

# *Kafalah*

Preliminary analysis of national and cross-border practices



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# Foreword

*Kafalah* is a child protection measure that is not widely understood or has been misunderstood, until recently, outside the circle of States whose legal system is based on or influenced by Sharia law. For these States, except for a minority that recognise adoption, *kafalah* is the solution of choice for children without a family environment or one that is at risk of breakdown. An important step to greater recognition of its designation as an alternative care measure for children deprived of their families was the specific reference to *kafalah* in the Convention on the Rights of the Child (CRC, 1989). This important milestone was followed by its inclusion as a measure that leads to the protection of the child, including his or her estate, in the Hague Child Protection Convention (1996 Hague Convention). This global recognition reflects the absence of systematic antagonism between the universality of rights and the distinctiveness of cultures.

The interest *kafalah* has raised is equal to the challenges it has faced in its alignment with the principles and provisions of the CRC and its reception by private international law in receiving States. The jurisprudence of the Committee on the Rights of the Child and those of national and international jurisdictions continue to present us with a plurality of situations where consideration of *kafalah* based solely on the abstract interpretation of the best interests of the child runs the risk of undermining this cardinal principle of the CRC.

The initiative of the International Reference Centre for the Rights of Children Deprived of the Family at the International Social Service (ISS/IRC) — an institution so useful that if it did not exist, it would have to be invented immediately — to dedicate a special study to *kafalah* meets a genuine need. The impetus of this study — modestly called ‘*Preliminary analysis of national and cross-border practices*’ — is based on ISS/IRC’s practical experience. Indeed, for some time now, the cases that have been brought to the attention of the ISS/IRC have shown the increasing challenges faced by families and children in relations between States whose systems are based on or inspired by Sharia law and other States. It became clear, for example, that mutual understanding of the characteristics of these legal systems and their interaction in cross-border situations is failing to keep up with the accelerated pace of these developments. As a result, there is a lack of understanding that can seriously affect children deprived of parental care.

One of the main goals of this study is to allow a better understanding of *kafalah*, its nature and the various characteristics “so it remains, when relied on, an alternative care option in a national and cross-border context”, as noted in the [Introduction](#). However, although the starting point of the study was the misconceptions around *kafalah* in Europe, North America, Australia and New Zealand, among others, and the cross-border issues created when these States care for *makfoul* children, it does not stop there. One of its original contributions is a significant and in-depth study of ten national *kafalah* systems.

Part I of the study sets the international scene of *kafalah*. It analyses the structures and function of the institution, comparing it to other protection measures such as adoption, presents the various forms it can take, and examines *kafalah*. But what is the origin and nature of this institution? Part I and Annex I aim to answer this question. Lastly, this first part concludes with observations on the various manifestations of *kafalah* and the Western view of it.

The reader who consults Part II on the implementation of *kafalah* in States whose legal systems are based on or inspired by Sharia law will learn about the vast scope of the social problems surrounding *kafalah* in these States, several of which have very large populations (for example Indonesia, Pakistan, Egypt, Iran) or must face large numbers of displaced or refugee families and children (for example Iraq, Lebanon). More generally, many are States that deal with poverty, lack of State structures based on children and families, stigmatisation of single mothers, child abandonment, child labour, etc. The analysis by country is innovative, detailed and indispensable for a solid understanding of *kafalah* and analogous institutions in each of these States. For a long time, it was left to the discretion of the “*kafilis*”, unreasonably called “adopters”, and was often intra-family, informal and even secret; it is more and more the subject of inconsistently strict procedures depending on the State. Currently, many efforts to regulate *kafalah* to better protect children’s rights have been noted. The technical note is valuable and useful; it summarises the positive trends and the challenges ISS/IRC has observed in the States being studied, while proposing issues to consider, besides the practical tools offered to national stakeholders, including a compelling case study.

In terms of number of children and families concerned, Part III addresses more specific problems. Nevertheless, the challenges of placing *makfoul* children in Western States can be particularly complex. The international community has tried to meet these challenges, by implementing a legal framework, including the above-noted 1996 Hague Convention. This multilateral treaty establishes a coordination, communication and cooperation system for the protection of children, among others, in relations between Western States and States whose legal systems are based on or inspired by Sharia law. However, of these, only Morocco is currently bound by this instrument. It is highly desirable for the other States to prioritise accession to/ratification of this Convention and, in the meantime, take inspiration from the principles of its consultation mechanism (art. 33) before placing a *makfoul* child in a Western State. Otherwise, the lack of coordination between these cross-border placements and migration rules could have harmful effects on the children.

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Moreover, this last Part of the study notes the crucial importance of identifying the key elements of the best interests of the child principle in a placement abroad, before even considering such a placement. To guide the professionals in the receiving States, the study proposes various approaches for each stage of this evaluation process. Clearly, the principle of the subsidiarity of cross-border placements versus national placements must also be respected by States of origin. The respect of this principle, or lack thereof, will determine how the entire process will continue, the related guarantees and, most of all, the child’s future; therefore, it is urgent to be aware of it. Part III concludes with two “points to consider”, which are action items to reinforce the safeguards in the current systems and to implement a procedure to manage individual cases.

Among the Annexes of the study, it is relevant to note the overview of the case law from the European Court of Human Rights and the United Nations Committee on the Rights of the Child (Annex II), the analysis of the relevance of the European directive on family reunification and on the right of citizens to reside in a European Union Member State as well as the case law of the Court of Justice of the European Union for *kafalah* cases (Annex III), and lastly, the proposals for strengthened cooperation and communication, including Model Bilateral Agreements to support cross-border *kafalah* placements. Such an agreement could complete the instrument for States already bound by the 1996 Hague Convention and for other States, form the basis for sufficient cooperation in cross-border *kafalah* matters (Annex IV).

We would like to congratulate the ISS/IRC for its initiative in this original and important study. We sincerely hope it will be widely distributed and become a tool that will allow for greater understanding of *kafalah* and especially that it will contribute to greater protection of children in States that know of *kafalah* and also when they are placed in *kafalah* in other States.

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**Disclaimer** This comparative study was carried out by an independent team. Consequently, opinions and proposals in the present study do not necessarily reflect the policies and views of the authorities of each State examined. It should also be recalled that the terminology relating to *kafalah* or other child protection measures used in each State will have to be assessed according to that State’s historical, social and legal context. Regardless of the chosen terminology, ISS/IRC has focused on the content of the concerned legal provisions.

This study cannot comprehensively address all of the different facets entailed in a national or cross-border *kafalah*. It focuses on *kafalah* as a family-type child protection measure. Consequently, the ISS/IRC recommends that further in-depth research be undertaken on the following topics: the interplay between legal systems and their impact on unaccompanied migrant or refugee children; informal care arrangements; the situation in other countries with legal systems based on or influenced by Sharia (Gulf States, Bhutan, etc.); the exact articulation between immigration law and child rights matters in *kafalah* or analogous child protection measure, etc.

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# Introduction

*Kafalah* is a child protection measure in countries whose legal systems are based on or influenced by Islamic law (Sharia, hereafter). Its effects vary greatly from one country to the next. In recent years, *kafalah* has garnered major attention and a growing interest from child protection professionals and other stakeholders in Western countries<sup>4</sup>. However, despite its international recognition (see Section I.1), *kafalah* raises numerous questions related to, among other things, lack of knowledge about its origins, its meaning and its implementation. Given the complexity that both surrounds this child protection measure and underpins its application, *kafalah* requires multidisciplinary approaches (sociological, legal, historical, ethnographic, immigration law perspective).

Following internal research conducted in 2008, ISS/IRC decided to undertake an in depth study of this topic, with the main objective of contributing to a better understanding of the nature and the various characteristics of *kafalah* so that, when it is used, it can continue to be a child protection measure in both domestic and cross-border contexts.

Based on international standards, including the Guidelines for the Alternative Care of Children (hereafter the Alternative Care Guidelines)<sup>5</sup>, like any child protection measure, *kafalah* must fit within an overall child protection system. A child protection system's first goal must be to avoid any unwarranted family separation through various support services for families as well as a robust "gatekeeping" mechanism (see Sections I.1.2. and II.1.). In cases where separation is unavoidable and is in the child's best interests, alternative care adapted to the child's individual situation and his or her needs must be considered in accordance with Article 20 of the Convention on the Rights of the Child (hereinafter CRC)<sup>6</sup>. In accordance with international standards, particular importance must be placed on the possibility of caring for the child in a family environment and to ensuring some continuity in the child's life (upbringing, education, culture, etc.).

Despite the wide variety of forms that *kafalah* can take, in the majority of countries, it offers a placement in a family-based environment, rather than in an institution, for children in a vulnerable situation. Often, it benefits children that have been abandoned because they were born out of wedlock and/or because of social stigma against single mothers. Sometimes, *kafalah* is seen as a temporary and flexible measure, which helps the child adapt to changes in his or her personal situation (reintegration into the family, maintaining family ties with the birth family, etc.). In some countries, *kafalah* provides the child with access to family allowance as well as to other social benefits without taking away the child's rights in respect of his or her biological family. Indeed, *kafalah* does not, as a matter of principle, sever the child's ties with his or her biological family permanently or irreversibly.

However, this study shows that, in many domestic and cross-border contexts, the needs and interests of the child are not always essential considerations when *kafalah* is being considered. Likewise, in 2017, an ISS/IRC mission in Morocco reiterated the importance of (re)placing at the core of considerations the fundamental need of children deprived of their families, or who are at risk of this, to grow

up in a family environment respectful of the laws and culture of the countries involved.

**In extending this mission and its 2008 internal comparative study, ISS/IRC thus decided to seek to enhance *kafalah* based on the following objectives:**

- *analyse and understand the legal and religious origins of kafalah (see Part I);*
- *explore kafalah and its legal, political and practical implications at the national level, in various countries with legal systems based on or influenced by Sharia States (see Part II);*
- *examine how this measure is currently incorporated into other contexts (for example, into civil-law and common-law countries) (see Part III); and*
- *identify persistent challenges and propose several possible solutions in order to strengthen domestic child protection systems and guarantee recognition and enforcement mechanisms of kafalah that are respectful of children's rights (Technical Notes; Part III; Annexes).*

## Understanding the origins of *kafalah* and its legal sources (see Part I)

Exclusive to countries whose legal systems are based on or influenced by Sharia, *kafalah* is enshrined in international reference texts on the rights of the child such as the CRC, the Alternative Care Guidelines and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter the 1996 Hague Convention)<sup>7</sup>. Part I of this study deals with the advent of this international recognition (see Section I.1), the place of *kafalah* in contemporary family law systems (see Section I.2) and the various possible forms of *kafalah* (see Section I.3).

## Analysing domestic systems of *kafalah* in States of origin (see Part II)

**Ten domestic systems** are examined in depth in Part II. In addition to these critical analyses, this study seeks to identify protection indicators in domestic systems that use *kafalah*. Particular attention is paid to the existence of specific monitoring and support procedures that could guarantee that the rights of the child are respected, such as assessing the profile of the child and the *kafil* candidates,

professional and independent matching, intervention by public authorities as well as the right to know and to access his or her origins. The study also identifies risk factors that could endanger the rights of the child, for example, when government support and preventative intervention for families at risk (single-parent families, single mothers, families raising children with disabilities, etc.) do not exist or are very limited, or when the existing system does not provide the essential guarantees noted above and therefore does not make it possible to assess the real needs of the child in question. Such a gap may lead to placements based primarily on the wishes of *kafil* candidates, to cases of child exploitation for socio-economic reasons, or to breakdowns.

### The recognition and enforcement of cross-border *kafalah* in receiving States (see Part III)

Just like any other family-based arrangement, *kafalah* may be considered as a cross-border placement when the child's habitual residence is different from that of the *kafil* candidates. It is also possible that domestic *kafalah* becomes cross-border in nature when it must be recognised in a third country, in particular, its legal effects. It is therefore in these two specific cases that the issue of recognition and enforcement of *kafalah* and of its effects into the legal system of another country is raised. In this context, this study examines the recognition and enforcement of *kafalah* in ten "receiving" States to identify the positive elements and gaps in terms of legal frameworks, implementation and internal and external cooperation.

According to international standards (see Section I.1.), any cross-border childcare option should be justified and considered only when the care of the child in his or her State of origin proves inadequate or impossible despite all efforts made. Thus, based on thorough assessments, a cross-border *kafalah* placement may be beneficial for some children who cannot be cared for suitably in their State of origin. For example, for children considered "difficult to place," such as children with disabilities, children with chronic medical conditions or older children, a cross-border *kafalah* placement may offer them the opportunity to benefit from a family environment. In addition, a cross-border placement may guarantee some cultural, religious and linguistic continuity to the child when the placement is with people who are from the same State or region as the child. Finally, the *kafalah* placement of a child may be with a member of his or her family living abroad. Such a placement may not only ensure continuity for the child but also be beneficial to him or her in terms of maintaining family ties in the State of origin. It is, however, essential that this type of cross-border intra-family placement complies with the standards established in international instruments such as the 1996 Hague Convention. To that end, reading ISS/IRC Comparative Working Paper 3: Spotlight on solutions on the topic of intra-family adoptions<sup>9</sup> is strongly encouraged.

This study also shows that the recognition and enforcement of *kafalah* placements in another legal system is extremely complex and involves various areas of law (civil law, family law, citizenship and immigration law, etc.). Few States of

origin provide rules applicable to cross-border *kafalah* arranged in their country. Many receiving States are concerned by the recognition and enforcement of *kafalah* and grapple with questions related to the applicable law, jurisdiction, recognition and enforcement of such a placement. The most complex factor is the divergence between legal, social and cultural systems of countries whose legal system is based on or influenced by Sharia, most of which prohibit adoption (*tabanni*), and those of civil-law and common-law countries for which *kafalah* remains unknown. Accordingly, practices in the States of origin and receiving States vary greatly, and it is still a concern that numerous cross-border *kafalah* placements are currently undertaken without the necessary safeguards (non-compliance with the double principle of subsidiarity, insufficient coordination among the various actors involved such as immigration services, courts, Central Authorities designated under the 1993 and the 1996 Hague Conventions, etc.) or with limited guarantees when *kafalah* is converted into another measure (for example, guardianship with little State monitoring). Given this variable treatment of and the obscurity surrounding the transposition of the effects of *kafalah* in numerous receiving States, a holistic approach centred on the rights of the child is difficult to adopt. The lack or insufficiency of regulations in effect may lead to adverse consequences for the child (inability to know and access his or her origins, unstable legal status, limited access to social services, obstacles to his or her rights and cultural and religious identity being respected, etc.) or even give rise to abuse and violations of children's rights<sup>9</sup>.

### Possible solutions that respect the rights of the child (see Technical Notes; Part III; Annexes)

Considering the long list of challenges related to *kafalah* both at the domestic and cross-border levels, it is asked whether or not there are solutions that would respect the rights of the child? When cross-border *kafalah* placements are undertaken, how do we strike the right balance between respecting the nature of *kafalah* itself as defined by the State of origin and ensuring that the rights of the child are fully realised in the receiving State without discriminating against other children from the same country? The study thus proposes various considerations and suggests possible solutions in order to guarantee the rights of the child in a *kafalah* placement. Among the elements indispensable to the resolution of current challenges, strengthening global child protection systems and *kafalah* procedures already in place appears essential, as does consolidating cooperation between actors and between countries at all stages of the domestic and cross-border placement procedure.

**With this publication, ISS/IRC hopes to contribute in ensuring, with its considerations and orientations, that the rights of children taken care of through *kafalah* are respected both domestically and across borders.**

# Methodology of the study

The study does not claim to provide an exhaustive analysis of *kafalah* throughout the world, but rather to provide an overview of this particular way of caring for children and its recognition and enforcement, based on the practices of some States of origin and receiving States.

The volume of information and the length of the analysis varies by country as a consequence of the wealth or scarcity of existing literature and the possibility of contact with domestic professionals able to cooperate with ISS/IRC on this project. Analyses of the various countries are based primarily on answers to a survey conducted by ISS/IRC in 2017, additional research conducted by ISS/IRC team between 2017 and 2019, and several exchanges and discussions held between 2018 and 2019 with various domestic and international experts as well as with Central Authorities designated under the 1993 and 1996 Hague Conventions, thus making it possible to complete and verify the information gathered and analysed.

Regarding the States of origin examined, the analyses are based on the following logic: each country's relevant legislation and policies are presented; a spotlight on the relevant component's that aim to preventing the separation of the child from his or her birth family environment; then, alternative care measures are reviewed before focusing on the various procedural steps of a *kafalah* placement. An

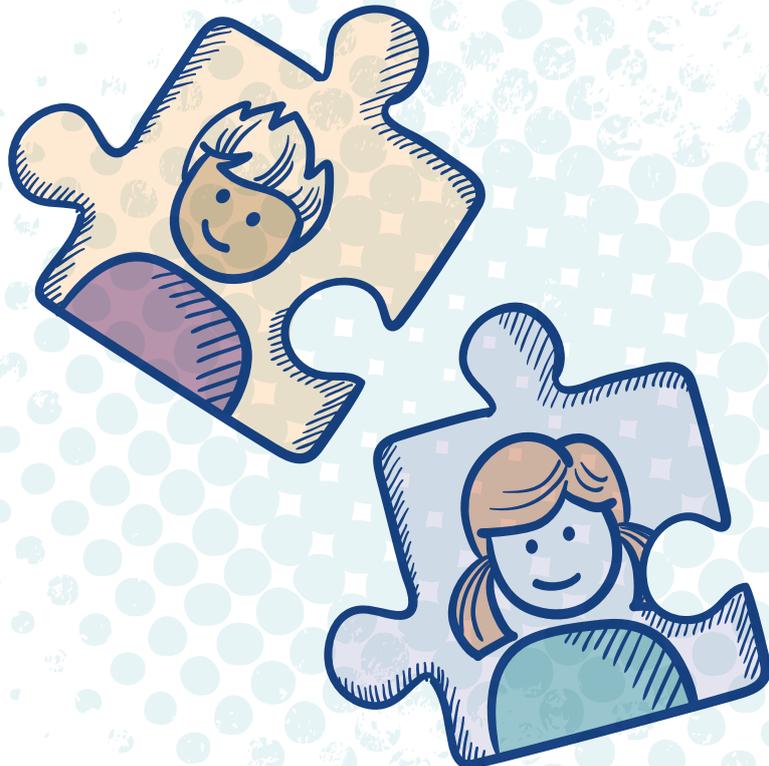
analysis of each country's strengths and challenges is finally shared. In addition, a [Technical Note on national \*kafalah\*](#) proposes a summary of the strengths and challenges commonly found in the States of origin and offers a few considerations and possible actions or solutions aimed at guaranteeing the current practices' compliance with international standards.

Presenting the approaches adopted by various receiving States makes it possible to paint a picture of current practices regarding the recognition and enforcement of *kafalah* in those countries and to analyse them in light of international and domestic law in order to offer some insights and possible solutions or tools (see [Technical Note: Cross-border \*kafalah\*](#) and [Annexes](#)). Many aspects are examined: the legal and political frameworks; authorities and other actors involved; model(s) for transposing the effects of *kafalah* into the domestic legal system; the child's legal status (type of visa, acquisition of nationality, access to social and family benefits, etc.); and applicable procedures where they exist.

# Limitations of the study

The study had to overcome some obstacles, in particular, related to the following:

- *impact of underlying socio-cultural and religious views present in most of the States of origin regarding the position of parents in society, the status of women, family status, unmarried relationships and children born out of wedlock, and abandoned children;*
- *difficulties in accessing or verifying data in some contexts because of a lack of statistics, documents or key resources or a lack of local contacts or, on the contrary, a multitude of actors involved;*
- *preliminary thinking in some States of origin on the topic of family-based care arrangements;*
- *informal nature of placements (often born out of customary law) making information difficult to access; and*
- *existence of diverging views and approaches within the same country (between the academic, political, administrative, religious, community and professional worlds; between approaches to rights of the child and immigration law) and between countries (differences and sometimes incompatibility between legal systems).*



# Glossary

**Abandonment** Concerns a process and a situation in which children are anonymously left in a 'public' place by persons unknown.

**Alternative Care** Protection the State is responsible to provide where the child's own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child or entrusts the child to a third person<sup>10</sup>.

**Children without parental care** "All children not in the overnight care of at least one of their parents, for whatever reason and under whatever circumstances<sup>11</sup>."

**Cross-border kafalah** This term covers two scenarios 1) placements that are established between two countries (i.e. a *kafalah* decision is made in a country but its effects shall be take place in a third country). 2) A domestic *kafalah* decision becomes international when its effects are recognised and enforced in a third country. In line with the terms used by the HCCH, the term "cross-border" was considered most appropriate as opposed to "transnational" or "international/intercountry".

**Formal care** "Situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care<sup>12</sup>."

**International Private Law (IPL)** Is a branch of law that is composed of the set of principles, customs or conventions which govern the legal relations established between persons governed by the laws of different States<sup>13</sup>.

**Private International Law (PIL)** Is a branch of law that mainly governs relations between States, the primary and principal subjects of this legal order, in particular in order to frame and regulate these international relations<sup>14</sup>.

**Informal care** "Any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends ('informal kinship care') or by others in their individual capacity. The arrangement is at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body<sup>15</sup>."

**Foster care** "Situations whereby children are placed by a competent authority for the purposes of alternative care in the domestic environment of a family, other than children's own family, that has been selected, qualified, approved and supervised for providing such care<sup>16</sup>."

**Guardianship** General term that covers different situations (depending on the legislation in question) but usually refers to a person/entity that is responsible to defend and protect a child.

**Kafalah**<sup>17</sup> Is generally defined as the commitment to voluntary care of a person (*kafil*) for the education and protection of an underage child as would a father do for his son (*makfoul*)<sup>18</sup>.

**Kafil** Caregiver of the child in need of alternative care.

**Kinship care** "Family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature<sup>19</sup>."

**Makfoul child** Child deprived of parental care for diverse reasons and placed in *kafalah*.

**Parental responsibility** "Includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child<sup>20</sup>". Each legislation determines the scope and the modalities of this parental responsibility.

**Receiving State** State in which the child is welcomed if the *kafalah* is of cross-border nature and/or the national *kafalah* decision has been recognised and enforced.

**Relinquishment** Refers to a process where a mother and/or father or others with or without parental authority decide not to raise their child and/or hand over the child to another 'carer', including the State.

**Sharia law or Islamic law country** These terms are frequently used as synonyms. To avoid any misrepresentation and to take into account the diversity of existing legal systems, this study will mainly refer to legal systems based on or influenced by Sharia (law).

**State of origin** Country where the child originates from (i.e. had his or her habitual residence).

**Residential care**<sup>21</sup> Care provided in any non-family-based group setting. Children are usually looked after in any public or private facility, staffed by salaried carers or volunteers working predetermined hours/shifts, and based on collective living arrangements, with a large capacity<sup>22</sup>.

**Recognition and enforcement of kafalah** To the knowledge of ISS/IRC, the only international definition available is provided by the HCCH and foresees the recognition "by operation of law" as per the 1996 Hague Convention. It "means that it is not necessary to commence proceedings for the measure to be recognised in the requested contracting State and for it to produce its effects there<sup>23</sup>."

As per the 1996 Hague Convention "if a measure of protection taken by one contracting State is not being respected in another contracting State, it may be necessary to commence enforcement proceedings in that latter contracting State.". The enforcement proceedings can be requested by any interested party in order for the "measure of protection be declared enforceable or registered for the purpose of enforcement in the requested contracting State according to the procedure provided for in the law of that State<sup>24</sup>."

**Tabanni** Adoption in Arabic.

# Abbreviations

**African Charter** The African Charter on the Rights and Welfare of the Child (1990)

**Alternative Care Guidelines** UN Guidelines for the Alternative Care of Children (2009)

**CRC** Convention on the Rights of the Child of 20 November 1989

**ECJ** European Court of Justice

**CFI** Court of First Instance

**CRPD** Convention on the Rights of Persons with Disabilities (2006)

**CPHRFF** Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

**CWD** Children with Disabilities

**ECtHR** European Court of Human Rights

**ECHR** European Convention on Human Rights

**HCHC** Hague Conference on Private International Law

**HB** Habitual Residence

**ISS** International Social Service

**ISS/IRC** International Social Service/International Reference Centre for the rights of children deprived of their family

**Special Commission** Special Commission on the Practical Operation of the 1993 Hague Convention or the 1996 Hague Convention

**1993 Hague Convention** Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

**1996 Hague Convention** 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

**UNICEF** United Nations Children's Fund

**PKP** Potential *kafil* parents





# I. Legal and religious sources of *kafalah*

When – despite efforts to support the family – a child cannot be cared for within their family, the State must take responsibility for that child and provide quality alternative care in line with the child’s individual needs. International standards clearly favour family-type placements, which include *kafalah* (as previously defined – see [Introduction](#)). The distinctive nature of *kafalah* lies in its origin, which is rooted in religious texts. Knowledge of *kafalah*’s cultural, legal and religious origins facilitates a better understanding of its nature and implementation, which vary according to the contexts concerned (see [Sections I.1.1. – 4. and II](#)). While *kafalah* is multi-faceted (see [Section I.3](#)), common characteristics and trends can be identified, as shown below (see [Section I.2](#)).

## 1. International recognition of *kafalah*

*Kafalah* is exclusive to countries subject to Sharia law. It has been incorporated into international reference texts on the rights of the child. This section provides a brief description of the process that took place during the negotiations leading to the international recognition of *kafalah* through various key instruments. These instruments include the Convention on the Rights of the Child, the recent associated Alternative Care Guidelines, the 2019 UN General Assembly Resolution, and the 1996 Hague Convention.

### 1.1 *Kafalah* and the Convention on the Rights of the Child of 20 November 1989

#### a) *Kafalah* in article 20

*Kafalah* is a legal concept recognised by the United Nations Convention on the Rights of the Child<sup>25</sup> (hereafter referred to as the CRC). Article 20 of the CRC<sup>26</sup> states that a child deprived of his or her family environment shall be entitled to special protection and specifies that each State shall ensure protection in accordance with its national laws. It adds that the child's ethnic, religious, cultural and linguistic background must be taken into account in decision making (see articles 8, 21 and 30 of the CRC). Alternative care could include the following: "foster placement, *kafalah* of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children".

Article 20 should be read in conjunction with articles 5 and 9. Article 20 focuses on children who cannot be cared for in their (nuclear and extended) family and who are therefore temporarily or permanently separated from their family for various reasons. The protection measures listed in article 20 clearly prioritise family-type options. In general, in response, States have opted for a non-exhaustive list that does not require them to take all the measures set out and defer to "their national laws" (article 20(1))<sup>27</sup>.

#### b) Negotiations regarding articles 20 and 21, and reservations<sup>28</sup>

During the negotiations regarding articles 20 and 21 of the CRC, several discussions took place. The scope of these discussions help to clarify the interests and concerns put forward by the different States parties, and to better understand the scope of the final text adopted by the General Assembly in 1989.

In the first part of the 1980s, the main discussions focused on the profiles of children and the types of situations that would or would not justify family separation. There were also many discussions on the types of measures that should or should not be included in article 20. There were discussions concerning guardianship, which were ultimately ruled out.

Only later during the 1987 negotiations, were cultural aspects addressed. This led to the inclusion of article 20(3), which accorded with existing international standards<sup>29</sup>. In addition, in the same year, the Moroccan delegation submitted a *note verbale* emphasising the need for the same social protection for children deprived of a family who did not benefit from the same inheritance rights as so-called "legitimate" children. During the second reading

(1988 – 1989), Egypt shared a proposal on behalf of the Drafting Group on Adoption and Family Issues<sup>30</sup> encouraging the recognition of all legal regimes, including *kafalah*. This proposal was based on the preamble of the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, which states that "under the principal legal systems of the world, various valuable alternative institutions exist, such as the *kafalah* of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents". This proposal was welcomed by other delegations, including Iraq, which has a similar measure entitled *El Dham* (see Section II.1.1.). This proposal was ultimately implemented in article 20(3).

When article 21 on adoption was drafted, it prompted reactions from countries subject to Sharia law, where adoption should be clearly distinguished from *kafalah*. For example, Bangladesh noted the difficulties that could arise for Sharia law jurisdictions with different concepts of child protection measures. Bangladesh drew attention to situations involving children adopted for reasons of proselytisation or trafficking by foreign agencies for conversion purposes<sup>31</sup>. A group of States subject to Sharia law<sup>32</sup> then submitted a proposal that identified the need for "family alternatives" to comply with national laws. In particular, the Libyan Arab Jamahiriya warned that article 21 could seriously inhibit countries subject to Sharia law from accepting the CRC. All these discussions led to the scope of application of article 21 being limited to countries that "recognize and/or permit the system of adoption".

It is not surprising that many countries subject to Sharia law made declarations and reservations regarding articles 20(3) and 21 because of the articles' incompatibility with the principles of Sharia law and the laws of the countries concerned<sup>33</sup>. These actions led to objections from other State parties<sup>34</sup>, although some reservations were deemed superfluous<sup>35</sup> by the Committee on the Rights of the Child<sup>36</sup>, and certain countries – such as Egypt<sup>37</sup> and Oman<sup>38</sup> – withdrew their reservations.

### 1.2 *Kafalah*, UN Guidelines on the Alternative Care of Children and UN General Assembly Resolution

In the early 2000s, implementation actions for article 20 of the CRC (see Section I.1.1) were further developed through the Guidelines for the Alternative Care of Children<sup>39</sup>. These Guidelines were ultimately welcomed by the United Nations General Assembly in November 2009. While non-binding, this instrument gives guidance to policy makers and professionals in the areas of prevention of family separation, and the provision of alternative care adapted to the needs of children. In these Guidelines, *kafalah* is mentioned several times alongside adoption as a "permanent"/"stable"/"definitive" (paragraphs 2(a), 123, 152 and 161) protection measure in cases where the child cannot be cared for by their family of origin.

## Part I Legal and religious sources of *kafalah*

ISS/IRC chose to base this study's approach on the two main fundamental principles set out in the Alternative Care Guidelines<sup>40</sup>:

- **The necessity principle<sup>41</sup>**, whereby States should have a legal framework and a national policy<sup>42</sup> that prioritises the prevention of family separation through a multidimensional approach (see Section II.1).
- **The suitability principle<sup>43</sup>**, whereby States must establish an alternative care system that meets minimum standards and the individual needs of the children concerned. When developing a variety of care options and choosing the most appropriate option, priority should be given to family, permanent, community, national, consensual and individualised solutions. In addition, to ensure proper placements based on the needs of the child concerned, the Guidelines propose several key elements. These elements include the assessment of the child's needs, interests and preparation; the assessment and preparation of the child's caregivers; and monitoring of the placement.

Another international text which applies to children placed in *kafalah*, like all children in alternative care, is the Resolution of the United Nations General Assembly on the Rights of the Child<sup>44</sup>, part of which concerns children in the world deprived of, or running the risk of being deprived of family. This resolution was adopted on 18 December 2019, and is a major advance and a precious tool whereby reforms can be reinforced on a global level concerning alternative care. It reflects the commitment on the part of the 193 States to respect numerous aspects such as: providing appropriate support to families; addressing the causes of the separation of children from their family environment (for example through inclusive policies and programmes which are adapted to reduce poverty; systems of social protection, etc.); recognising the negative effects on children of institutionalisation, and setting in motion the process of deinstitutionalisation through different forms of family or community care; ensuring that all decisions, initiatives and strategies concerning children deprived of parental care should be considered on a case by case basis with qualified professionals from a multidisciplinary team, culminating in a legal, administrative or other procedure, with legal guarantees which take into account the best interests of the child. From a general point of view, this resolution encourages States to reinforce their child protection system in order to avoid separations which are not in the best interests of the child, to supervise them regularly when necessary, and to accompany the children in their progress towards autonomy or their return to their family, once the causes for their withdrawal have been resolved. It calls on States to implement the Alternative Care Guidelines, the CRC and the CRPD concerning alternative care for children. This resolution, together with other initiatives, will provide guidance for the next Day of General Discussion of the Committee for the Rights of the Child, which covers alternative care and will take place in 2021<sup>45</sup>.

### 1.3 *Kafalah* and the 1996 Hague Convention

In line with article 21 of the CRC, the need to develop a complementary private international law instrument that can strengthen the applicable international legal framework had

been identified, particularly in view of child trafficking through intercountry adoption. While the 1993 Hague Convention<sup>46</sup> excludes *kafalah* from its scope of application through its article 2(2), which limits its applicability to measures that create a new filial relationship<sup>47</sup>, questions surrounding *kafalah* were nonetheless discussed during the Special Commission on the practical operation of the Convention in 2015. The Special Commission concluded that *kafalah* should be dealt with in the framework of the Special Commission on the practical operation of the 1996 Hague Convention and within the Malta process<sup>48</sup>.

In fact, it is notable that several countries with legal systems based on and influenced by Sharia participated in the preparatory work carried out for the 1993 Hague Convention<sup>49</sup>. During the negotiations concerning the preamble of the 1993 Hague Convention, the Egyptian delegation<sup>50</sup> argued – in the spirit of article 20 of the CRC – for the inclusion of other child protection measures such as *kafalah*, which “often provide for the same health, social and educational care for the child as that obtained through adoption”. Egypt emphasised that the inclusion of these measures “would permit the avoidance of trafficking and abuse, and to take appropriate care of children in countries where adoption is not recognized”. However, the proposal was not implemented due to a lack of support by other States that participated in the negotiations<sup>51</sup>.

These discussions during the drafting process of the 1993 Hague Convention contributed to the deliberations regarding the need for a new convention on the international protection of children<sup>52</sup>. Indeed, it was deemed necessary to review the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. Consequently, in 1995, the Special Commission in charge of preparing the new 1996 Hague Convention, launched a discussion and consequently supported the inclusion of the protection of children “by *kafalah* or an analogous institution” in articles 3 and 33. This inclusion is largely attributable to the Moroccan delegation, who provided a detailed note to the Special Commission<sup>53</sup>.

The 1996 Hague Convention covers a wide range of civil child protection measures and takes into account a broad variety of existing legal institutions and protection systems, including *kafalah*. It establishes international co-operation in the area of cross-border child protection through links between the legal systems in different religious and cultural traditions.

In addition, it sets out applicable rules on jurisdiction, applicable law, recognition, enforcement and co-operation in matters of parental responsibility<sup>54</sup> and cross-border child protection. In this respect, it establishes the designation of central and competent authorities and procedures to follow, in particular when the *kafalah* is of cross-border nature (see Section III.4).

The co-operation mechanism set out in articles 33 and 23(II) (f), provides several guarantees, which should be promoted to ensure that a placement is carried out in compliance with the two laws in question and the best interests of the child. However, the implementation of the Convention remains limited for various reasons, not only those related to the low number of ratifications of or accessions to the 1996 Hague Convention by countries with legal systems based on and influenced by Sharia (see Section III.4).

It should be noted that Morocco was one of the first countries to ratify the 1996 Hague Convention on 1 December 2002, and to date, remains one of the only contracting States with a legal system based on and influenced by Sharia<sup>55</sup>. Some countries still seem reluctant to comply with the rules and co-operation mechanisms set out in the Convention. However, efforts are being made at the international level to promote the ratification of this instrument through the Malta Process<sup>56</sup> that has been implemented by the HCCH, through regular references to this instrument by the Committee on the Rights of the Child, and through its inclusion in the preamble of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

#### 1.4 *Kafalah* and case law developments at the international and regional levels

Since *kafalah* was incorporated into the primary international instruments, it is not surprising that jurisprudence has been developed on the rights conferred on a child by *kafalah*, in particular by the domestic courts of several receiving States (see Part III). In addition, several key international and regional decisions deal with *kafalah* and the recognition and enforcement of its effects in another jurisdiction where it is not known. In-depth analyses of these decisions are proposed in Annex III. Indeed, the European Court of Human Rights (ECtHR) had been called upon twice to rule on the recognition and enforcement of a *kafalah* placement, by French authorities (*Haroudj v. France* in 2012) and Belgian authorities (*Chbihi Loudoudi and others v. Belgium* in 2014), respectively. On these occasions, the ECtHR had to implicitly rule on the issue of converting *kafalah* into an adoption. In both cases, the applicants cited violations of articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR). The ECtHR ultimately dismissed these violations in both judgments, finding that both countries' approaches to the treatment of *kafalah* in their domestic legal systems fell within the margin of appreciation available to them. More recently, two other international and regional bodies, the Committee on the Rights of the Child (*Y.B and N.S v. Belgium* dated September 2018) and the European Court of Justice (*SM v. Entry Clearance Officer, C-129/18* dated March 2019), rendered decisions regarding children placed in *kafalah* and their access to certain rights, including the right to stay in the receiving State.

The year 2021, marks the 12th anniversary of the Alternative Care Guidelines, and is a good time to bring *kafalah* to the forefront of the minds of States when making commitments for the full realisation of the rights of the child. In this sense, ISS/IRC advocates for the situation of the most vulnerable children, including *makfoul* children, to be more visible, in particular as part of the General Discussion Day of the Committee on the Rights of the Child in 2021.

**While the discussions held during the development of the various instruments discussed above highlight the differences between these two child protection measures, *kafalah* and adoption, and the positions of States concerned by *kafalah*, they also emphasise the need for a framework to ensure the protection of the children concerned – including those children placed in *kafalah*. So then, has the international legal framework managed to provide a suitable framework for these children?**

- *In the case of public international law, it appears that the various forms of kafalah have not been properly taken into account in the international law reference texts. While country analyses (see Part II) show that kafalah is mainly considered a “permanent” family-type solution for the child, as also addressed by the Alternative Care Guidelines (see paragraphs 2(a), 123, 152, 161), it may for instance take the form of emergency, temporary or informal placements in certain contexts. This finding seems to reflect a lack of advocacy in the negotiations regarding these legal instruments, whilst also clearly confirming the existence of concerns and a lack of comprehension regarding this measure and its many facets.*
- *Regarding private international law, the scope of the rules proposed by the 1996 Hague Convention remains limited, as noted above and demonstrated throughout the study (low ratification rates, complexity and lack of knowledge of its mechanisms, etc.). To contribute in addressing these shortcomings, ISS/IRC proposes, through this publication, legal, policy and practical guidance that could be adopted (see Parts II and III).*

What emerges from the negotiations analysed above is that the State parties were determined to differentiate *kafalah* from adoption as a separate child protection measure. This is a position which must be considered by the relevant authorities in a third country where adoption is a measure which leads to a change in parentage, when dealing with the recognition and enforcement of *kafalah* – a measure that does not result in a rupture of birth parentage (see Parts II and III). On the other hand, the law of the State of origin cannot be applied indefinitely, especially if the child remains in the receiving State for numerous years. The relevant authorities therefore need to find the right balance between the continuation of the effects of the law in the State of origin and the application of the law in the country of the child's habitual residence. Once the child is within the legal system of their country of residence, they, like any other child residing in the country, must be able to benefit from all the protections provided by the legal system.

## 2. *Kafalah* in legal systems based on and influenced by Sharia

The uniqueness of *kafalah* lies in its religious origins. For a comprehensive understanding of the different religious and legal sources of Sharia, it is therefore important to study the genesis of Sharia law and adopt a historical lens of its evolution (see Annex I). Generally, *kafalah* is viewed as a good deed by Muslims and takes different forms based on the law and customs of the individual State. It is considered a social norm that brings the benefactor closer to Allah.

From a more contemporary perspective, *kafalah* as a child protection measure is now enshrined in legal systems that are based on or influenced by Sharia law, especially relating to filiation, paternity, marriage and inheritance (see Section I.2.1).

**Practical advice:** In order to gain a good understanding of the legal position on this issue a person would be well advised to seek the help of a lawyer from the particular jurisdiction with a background in family law in that country.

### 2.1 Protecting children in need as moral duty of Muslims<sup>57</sup>

Protecting children in need is a moral duty prescribed by the Quran. Indeed, various verses in the Quran address the issue of “orphans” (generally covering all children deprived of parental care) and the duties and proper conduct of the believer towards those children<sup>58</sup>. According to these texts, “orphans” should not be mistreated or cheated, but be treated fairly, kindly and generously<sup>59</sup>. The holy book of Islam encourages the charitable upbringing of “orphans” and describes God as their ultimate caregiver<sup>60</sup>. According to Islamic tradition, the Prophet Muhammad, who had lost his father, asked believers to provide for “orphans”, irrespective of whether related to them or not<sup>61</sup>.

In Islamic jurisprudence, a foundling is considered a fellow Muslim and as such a holder of the same rights and bearer of the same duties as others<sup>62</sup>. The classical *fiqh* books<sup>63</sup> discuss extensively his or her rights as well as the duties and the proper conduct of the finder of such a child<sup>64</sup>. In these texts, the finder of an abandoned child has the individual duty to care for the baby if the child is at risk of dying or the person voluntarily took custody of the baby. Otherwise, taking care of a foundling is considered to be a communal responsibility and the non-fulfilment of this religious duty is a communal sin<sup>65</sup>.

### 2.2 Transformation into contemporary law<sup>66</sup>

*Kafalah*<sup>67</sup> etymologically means, “taking care”, “sponsoring someone”, and “responding on behalf of someone”. In classical Islamic law, *kafalah* is an institution of private nature with multiple faces. *Kafalah* as a moral and generous act, is still governed by custom in many countries whose legal system is based on or influenced by Sharia law. Originally, a charitable act of private nature, *kafalah* has been profoundly transformed by contemporary legislators<sup>68</sup>. Concerned by the fate of abandoned children, some of the latter took the initiative to regulate *kafalah*, in order to provide the practice with a clear legal framework aimed at ensuring the safety and well-being of the *makfoul* child. In doing so,

*kafalah* was legislatively subtracted from the private sphere to acquire a formal character and, consequently, produce legal effects. In these contemporary contexts, the constitution of *kafalah* is subject to the intervention of public authorities and its effects as well as termination are foreseen by law.

### 2.3 Family Law in relation to the filiation of a child<sup>69</sup>

As a concept, *kafalah* fits into the family law segment of Sharia, and all attendant laws and legislation dealing with family relations in Muslim countries. Therefore, it is important to understand the general tendencies as to the establishment of filiation, its connected rights and the consequences of the lack of filiation, portrayed as one of the main “characteristics” of a *kafalah*.

#### a) Establishment of Filiation: the importance of birth in wedlock

The importance of family and lineage runs like a golden thread through Islamic history and thought. From a linguistic point of view, lineage is established through father and mother; however, in the legal sphere lineage refers to the agnatic line of descent only, which is a result of the paternalistic structure of society<sup>70</sup>. The paternal tie defines and determines several seminal rights and duties in Islamic law<sup>71</sup>; in itself, it is a right that gives other rights<sup>72</sup>. The rights given by the paternal relationship include custody and guardianship, maintenance, rights of citizenship and name, and, importantly, inheritance.

In particular, the father must provide his offspring with clothing, food, shelter and education until they reach maturity (in case of a boy) or marry (in case of a girl). The term used in Islamic law for paternity in the sense of lineage is *nasab*<sup>73</sup>. In many cultures and up to this day, the relevance of a person's kin is shown by the use of patronyms (*ben, bint*, i.e., son, daughter of) which highlights the importance of the paternal tie. In order to have a proper *nasab*, certain preconditions must be fulfilled.

In Islamic law, proper filiation to the father is established by procreation under the further condition that the parents of the child were legally married at the time of conception of the child<sup>74</sup>. To the mother it is established by birth<sup>75</sup>. The requirement of marriage is linked to the criminalisation of extramarital sex, called *zinā*, which is one of the very few crimes against God for which a set punishment (*ḥadd*) is demanded by the Quran and the Sunna. In addition, the marriage requirement serves to maintain “genealogical clarity”. A well-known *fiqh* principle confirms the interconnectivity of marriage, procreation and *nasab* as well as a desire to uphold proper sexual mores in society. It says that “the child (belongs to) the conjugal bed” (*al-walad li-l-firāsh*<sup>76</sup>).

Legitimacy presupposes birth during a regular or irregular (but not void) marriage within specific pregnancy terms and with consummation having been possible. In order to avoid illegitimate birth, the Islamic jurists set minimum and maximum terms of gestation which are rather generous. In addition, parentage is often considered to be an indication of the existence of a marriage as the principle generally holds that the establishment of lineage establishes wedlock and not vice versa<sup>77</sup>.

## b) Other ways to establish filiation

Apart from marriage, parentage (and with it legitimacy) may also be established through acknowledgment by the father, the mother (*iqrār*<sup>76</sup>) (who is neither married nor in her *iddat*<sup>79</sup>) or the child. *Iqrār* requires that four basic conditions are met (which are varied slightly to fit the respective individual<sup>80</sup>). Finally, aside from marriage and *iqrār*, the Islamic religious legal texts acknowledge other means of establishing parentage to a child: *al-bayina* (evidence) and *al-qyāfa* (the comparing of physical characteristics<sup>81</sup>). The rules of *al-bayina* have been codified under some modern family laws such as Morocco, Tunisia and Algeria<sup>82</sup>.

## c) Forms of fictional parent-child relationships in classical Islamic law<sup>83</sup>

Further, some literature voices<sup>84</sup> are critical towards the commonly accepted adoption prohibition (see Section 1.2.4.) or do not consider the above-mentioned possibilities of establishing filiation as exceptions but rather as existing forms that allowed for the establishment of parentage based on the best interests of the child. Examples of such fictional forms are, among others: the acknowledgement of filiation (as described above), the so-called “milk kinship” or other legal fictions such as the “theory of the sleeping embryo” (*al-racīd* or *bou-margoud*<sup>85</sup>) or the figure of the “mistaken sexual intercourse” (*al-wat’ bi-shubha*<sup>86</sup>). These “pregnancy forms” do not exist anymore. As described by N. Yasseri, classical Islamic law would actually facilitate the creation of a parent-child relationship, irrespective of the genetics of involved parties<sup>87</sup>.

## d) Effects of Filiation

Only a child that is born legitimately can become a full member of society. In order to protect the child’s legitimate status, once the legal bond to the father is established, it is difficult to break it. As an example, a husband may only deny paternity under a valid marriage contract by claiming that his wife was unfaithful. If the father has not previously acknowledged his paternity or confirmed the acknowledgment of the mother or the child, he may start a judicial procedure called *li’an* by claiming under oath that his wife committed adultery and dispute his parentage while the wife denies these allegations. Under these circumstances, the judge will rule the separation of the spouses which amounts to an irrevocable dissolution of marriage and the illegitimacy of the child.

## e) Consequences of the lack of filiation

A person born outside of marriage is considered an “illegitimate child”. He or she will be deprived of the support that the father and his family owe legitimate children<sup>88</sup> and will take the mother’s name. This is considered a shame in societies where patriarchal lineage is highly valued, especially for boys who are expected to pass on lineage through their name.<sup>89</sup> Illegitimate children in many instances face a life on the fringes of society, as will their mothers.

Particularly unwed mothers who give birth will face harassment from family and community members. In extreme cases, unwed mothers may fear for their lives if family members perceive the illegitimate birth as a transgression against “family honour”. In addition, they may be tried and punished for adultery (*zinā*). Given the social stigma of illegitimacy, mothers often see no alternative other

than to abandon the baby in the hope of giving him or her a “better life” in a loving family, and sometimes also to protect their already existing family and their own life<sup>90</sup>. This context is usually omnipresent when it comes to *kafalah* placements and children without filiation or placed under *kafalah* are constantly reminded of their birth circumstances as a child born out of wedlock. It is however precisely the non-creation of a filiation bond that is often described as being the distinctive element between *kafalah* and adoption. It is therefore interesting to understand the perspective of States whose legal system is based on or influenced by Sharia.

## 2.4 Adoption from the perspective of legal systems based on or influenced by Sharia

The very essence of adoption is the creation of a stable legal and social filiation bond between the adoptee and his/her adoptive parent(s) and (in full adoption) the cessation of the biological bond with the family of origin. From a Western perspective, this is the main criterion for differentiating between adoption and *kafalah*. From the perspective of countries whose legal systems are based on or influenced by Sharia, despite the specificities of each country, reference is often made to a common approach to adoption — that is, its prohibition. It is therefore necessary to question the foundations of this prohibition (see Section 1.2.4.a) and to examine its scope: is it categorical, or can it be more nuanced (see Section 1.2.4.c)?

### Adoption [*tabanni*] practice in Pre-Islamic Arabia?

Various scholars in literature on Pre-Islamic times confirm the prevalence of adoption before the advent of Islam. However, as stated by N. Yassari based on E. Landau — Tasseron’s research — “a general formula as to the characteristics of the institution of *tabanni* [in those times] cannot be given with certainty”. The practice was **mostly related to adults** and generally took place in the **context of alliances building for the welfare of the clan and tribe**, without being framed as a measure aimed at a minor’s protection<sup>91</sup>.

## a) Common interpretation of Quranic Verses

According to Sharia (see previous Section), the adoption of children is not possible, and there is no legal institution that allows a person to acquire legal parentage of children that are not their own biological children. Sharia law therefore rejects filiation by adoption as well as the coexistence of natural and adoptive filiation as known in the legal systems based and influenced by Roman law<sup>92</sup>.

It is based on a common interpretation of the following Quranic verses of the Sura XXXIII that state:

- “(...)nor has He [God] made those whom you assert to be your sons your real sons; these are the words of your mouths; and Allah speaks the truth and He guides to the way. Assert their relationship to their fathers; this is more equitable with God; but if you do not know their fathers, then they are your brethren in faith and your friends; (Quran 33:4 – 5); and

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- (...) So when Zayd had performed that necessary formality (of divorce) from her, we gave her unto thee in marriage, so that (henceforth) there may be no sin for believers in respect of wives of their adopted sons, when the latter have performed the necessary formality (of release) from the (...)” (*Quran 33:37*).

The Quranic scholars agree that this revelation arises from one specific event in 5/627 CE: the marriage of *Zaynab bint Jahsh* to the Prophet Mohammed. *Zaynab* had been the wife of Mohammed’s adoptive son *Zayd*. Under Arab customary law at that time, this marriage was unacceptable and incestuous, since a man could not lawfully marry the former wives of his son and adoptive sons had the same legal position as natural sons. Thus, Mohammed’s marriage was much criticised. These Quranic passages legalised this marriage by asserting that adoption had no legal effects and that the wives of adoptive sons were not prohibited to marry<sup>95</sup>.

In fact, Islamic law prohibits any legal framework that: 1) permits the transfer of the name (ism) of one person to another person not related to him or her by blood; 2) establishes intestate inheritance rights not based on biological and legitimate descent; and 3) instigates marriage impediments between persons other than blood relatives and in-laws<sup>94</sup>. Consequently, considered an “alteration” of the natural order of society, adoption was declared *haram* (prohibited) in order to preserve the rights of the child and those of his biological parents.

However, the Quran attributes an important place to orphans and their protection. Thus, a Muslim person performs a noble act if he welcomes an orphan into his home and if he raises him/her, educates him/her and treats him/her as his own child. In this case, this person provides protection, food, education and love to a child, but without attributing it to himself. The child does not have access to the rights reserved by Sharia to natural children. Although Islam prohibits adoption as it is known in the West, it offers an orphaned child, an abandoned child, or a child in need, the possibility of being cared for by another family through *kafalah* (see Sections 1.2.1 and 1.2.3).

### b) Application of prohibition through national law

Muslim religious scholars regard these verses quoted above as an abolition of the institution of adoption which existed in pre-Islamic times (see box above). The ban on adoption still exists in the majority of Muslim countries whose family law is based on or influenced by Sharia law, although only few codes, such as those of Algeria (see Section II.2.), Morocco (see Section II.1.1.) and Kuwait, explicitly state that adoption is unlawful and null and void<sup>95</sup>. Even foundlings, whose parentage is unknown cannot be adopted, but only taken into care under guardianship or *kafalah*. In fact, the common reasoning behind the insistence on such adoption prohibition in these countries appears to be mainly motivated by the following factors: fear of incestuous relationships/marriages (the concerned child might end up marrying a former relative, especially if the family name is changed); the exclusivity of blood relationships; and the importance of cultural and religious heritage and the protection of natural heirs. In other countries however, the law is merely silent in relation to adoption, rather than being expressly prohibitive<sup>96</sup>.

### c) A more nuanced perspective on the prohibition of adoption

The general rule of adoption prohibition does not seem to be absolute, and may need to be nuanced in certain contexts. Indeed, some countries accept adoptions but limit them to certain persons, notably non-Muslims. For example, in countries where different sets of laws exist for different religious beliefs, Christian families may adopt children. This is especially the case in some Asian and African countries where Muslim and Christian populations coexist and are subject to different regimes, including judicial systems based on the different Personal Status laws that apply<sup>97</sup>. For example, in Tunisia, adoption was legalised in 1958 alongside *kafalah* (see Section II.1.2.)<sup>98</sup>. Indonesia (see Section II.2.) and Malaysia (see Section II.1.2.) have also developed adoption systems. Additionally, as previously mentioned, despite adoption being “generally” prohibited in a number of countries with Sharia inspired family legislation, there are instances in which the rule of exclusive filiation by blood is tempered under certain conditions, to permit the establishment of legal filiation, namely through the acknowledgment of paternity (see section above).

These exceptions prove the area of filiation in Sharia law can be nuanced, even though in some contexts it remains quite strict. In ISS/IRC’s view, each case should be examined thoroughly, on a case-by-case basis and each child should be dealt with as an individual. Adoption is not allowed in the great majority of Sharia law countries and this should be respected by potential receiving States. In those few States where adoption is possible, this is only when the child and prospective adoptive parents are not Muslims (see Section II.1.2). One practical challenge is proving (or not) the religious affiliation of a child, especially very young and abandoned children. In practice there is seemingly a prevailing pragmatic view that the child should simply benefit from any child protection measure, including adoption abroad.

However, ISS/IRC believes that there are risks with such an approach, especially in terms of long term consequences for the child. If the religion for abandoned children is systematically deemed unknown or not Muslim – despite being in a Sharia law country – this could open the floodgates in terms of applying child protection measures, such as adoption inappropriately. In these situations, given that the countries in questions are generally not parties to the 1993 Hague Convention, it’s safeguards are not in place such as the principle of subsidiarity, matching and prevention of illicit practices. In addition, in terms of access to origins, a child who is adopted from a Sharia law country where adoption is not recognised, will likely face additional hurdles in having this right respected. ISS/IRC recommends that, unless there is evidence to the contrary, the presumption should be that the child be assigned the dominant religion of the country or the specific region. In every case, receiving States should only allow adoptions from countries where they are convinced that the principles of the 1993 Hague Convention have nonetheless been upheld in cooperation with and with the approval of the authorities in the State of origin.

### 3. Various forms of *kafalah*

Whilst common tendencies can be observed in terms of filiation in Sharia law countries in which a *kafalah* measure is usually enshrined, the details of how *kafalah* operates in practice, especially the different modalities and procedures, largely depend on the law of the respective States (see Part II). Common features are the *kafil's* religion (usually he or she must be a Muslim) and his or her mental, financial and personal suitability for this role as well as the child's status as "abandoned".

*Kafalah* is generally defined as "the commitment to voluntarily care for a person (*kafil*) for the education and protection of an underage child as would a father do for his son (*makfoul*)<sup>99</sup>".

Traditionally, *kafalah* can take several forms. Sometimes, it is limited to financial support, a form of sponsorship of a child whose parents are unable to provide care and who has been placed in an institution (for example, in Egypt or Lebanon). Sometimes, it also involves the child's integration into the *kafil* family's home.

In addition, *kafalah* may vary in terms of timeframe. It may constitute a "permanent" placement, but it may also sometimes constitute a temporary or emergency solution for any child in need of short-term care, including migrant or refugee children (for example, in Syria<sup>100</sup>).

The following sections distinguish between three different categories:

#### 3.1 Formal versus informal *kafalah*

Like any child protection measure, *kafalah* can take the form of an informal or formal placement. The provisions of the Alternative Care Guidelines apply to both forms of placement.

A **formal *kafalah*** is subject to a formal process with the involvement of public authorities and is a formal care placement described as, "all care provided in a family environment which has been ordered by a competent administrative body or judicial authority, and all care provided in a residential environment, including in private facilities, whether or not as a result of administrative or judicial measures<sup>101</sup>".

An **informal *kafalah***, on the other hand, falls under the radar of the public competent authorities and constitutes an informal care placement, according to the Alternative Care Guidelines, defined as "any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body<sup>102</sup>".

In many contexts, the issue of abandoned children is a sensitive issue that can often lead to private placements or arrangements to "hide" the situation. These care placements are therefore difficult to quantify and escape any regulation or monitoring. This type of care may come in various forms

(e.g. care by the extended family; registration of the *kafil* parents as "natural" parents of the child when he or she has been born to other parents, etc.). It would seem that these informal placements often take place following a family decision; the child can be entrusted to female members of the maternal and then paternal family (grandmother, aunt, etc.). Through a tacit agreement, this type of placement can also take place — temporarily or permanently — with persons outside the family, such as a nanny (against remuneration), a couple who are unable to have biological children or a woman married according to applicable law, wishing to have a child. In some contexts, women in the villages have been known to find solutions or even families for children deprived of their family<sup>103</sup>.

#### 3.2 Judicial versus notarial *kafalah* (sometimes known as "*kafalah adoulaire*")

Another distinction can be made between the process leading to the placement decision, and its validation.

A notarial *kafalah* takes place when a private contract or arrangement is established between the biological parent(s) and the *kafil* parent(s), and then validated through a notarial deed drafted by an accredited professional. By virtue of this notarial deed, the arrangement provides individual conditions and its legal value varies depending on the legal system in place. Several practices may exist: for example, it may involve placement with a family member or relative, but it may also involve placement with people who are initially unknown to the child. Given the secrecy often surrounding this type of placement, there is little data on how and under what circumstances initial contacts are established between the biological parent(s) and the *kafil* parent(s) and in what form the consent of the biological parent(s) has been obtained. A *kafalah adoulaire* could pose difficulties in terms of removing the child from the State of origin, as most civil and common law countries require judicial decisions (see Part III). It seems in the past that the use of notarial *kafalah* has led to abuses and illegal practices. What is generally problematic is the private nature of such placements, which often leaves the choice of the child to the *kafil* family, without professional intervention. Consequently, the possibility of future breakdowns is much greater. Moreover, children involved in these placements can be subjected to risks of abuse and violations of their rights (e.g. biological mother being paid to give up her child, falsification of birth certificates, use of some girls as domestic help, so-called "little maids"). Given the secrecy that often surrounds this type of placement, there is little data available. Nevertheless, there is a need for better support for these unsupervised situations. As the Alternative Care Guidelines point out (§§ 76 – 77), these families who informally take in children should have access to support services.

A **judicial *kafalah*** is granted following a legal procedure that establishes the relationship between the *kafil* and *makfoul*. This type of *kafalah* is generally viewed as providing more safeguards in overseeing the placement and ensuring that it can meet the child's best interests.

## Part I Legal and religious sources of *kafalah*

### 3.3 Intrafamily versus extrafamily *kafalah*

Another important distinction is often made, particularly from the point of view of receiving States, regarding the acceptance of placement at the international level (right of access to another territory and residence permit) between intra and extra family placements. In situations involving intrafamilial *kafalah*, a child is cared for by a member of their (nuclear or extended) family, whereas in extrafamily *kafalah*, a child is placed with a person or people outside of their family.

In other situations, a large family may even transfer the care of a child to a close relative without descendants:

*"[This is] the custom of intrafamily child donation. A woman who has multiple pregnancies generously gives one of her children to a close relative who is infertile. This specific case of informal transfer, which is more in the order of fosterage than adoption, because the child's objective identity remains unchanged, leads to relationships with multiple parents (the exercise of kinship roles involves several people). The child who is known and who is of the same blood belongs to the extended and hierarchical 'large family' <sup>104</sup>."*

## 4. *Kafalah* from a Western perspective

*Kafalah* is unknown in civil and common law systems. Therefore, difficulties arise when a Western country is asked to recognise and enforce a *kafalah* placement. The professionals in these legal systems must consider how to

recognise and enforce the measure in their domestic legal systems, while preserving the nature of the measure imposed and safeguarding the rights of the child concerned.

It is not surprising that *kafalah* is often put in the same category as simple adoption, guardianship or foster care. Western thought, influenced by its own vision of adoption, generally defines *kafalah* according to the following characteristics:

- *the non-severance of biological filiation ties and the preservation of the child's civil status;*
- *the legal timeframe of the kafalah placement when the child reaches the age of majority;*
- *the non-granting of inheritance rights; and*
- *the possibility for revocation.*

**However, can a child protection measure truly be limited to this list of characteristics? Is it not too simplistic to put a protection measure in the same category as other measures that also come in different forms and that have a variety of effects around the world?**

The analysis of legislation and its implementation in various countries subject to Sharia law show that these factors do not characterise all *kafalah* placements. For example, only under certain (strict) conditions, the establishment of a new filiation is allowed (see the above Section). Additionally, it is not correct to refer to a systematic non-granting of inheritance rights, as many countries have introduced provisions to ensure the transfer of part of the *kafil* family's assets to the *makfoul* child. A *tanzil*<sup>105</sup> may assert the possibility of a testamentary gratification, enabling the child to be placed in the position of first-degree heir, without influencing the issue of filiation and exceeding a certain threshold<sup>106</sup>.

The preservation of the child's civil status, which is often considered discriminatory for the child, is frequently contested by *kafil* families and child protection officials. In practice, solutions are often found on a case-by-case basis, especially since *makfoul* children are frequently children without a known filiation.

This study aims to show the wide-ranging facets of *kafalah* or of an analogous institutions/practices that sometimes uses different terminology. From a Western perspective, it is necessary to understand that *kafalah* is a multi-faceted protection measure and that it is specific to each context. If *kafalah* is of a cross-border nature, it is difficult to put it in the same category as other child protection measures. This can pose difficulties for receiving States when they must decide on the recognition and enforcement of the effects of a *kafalah* in their domestic law. The study reveals that there is no uniform approach throughout the different receiving States analysed (see Part III), but that cross-border *kafalah* is currently a sensitive topic that requires concrete measures to ensure child protection in line with international standards (see Technical Note: Cross-border *kafalah*).

# References

## Introduction

- 1 See detailed [biographies](#).
- 2 Idem 1.
- 3 Voir définitions de l'article 20(3) de la Convention relative aux droits de l'enfant et para. 29 c.iii UN General Assembly (2009), *Guidelines for the Alternative Care of Children*, A/RES/64/142A/RES/64/142.
- 4 See, for example, the Fourth Meeting of the Special Commission of June 2015 on the Practical Operation of the 1993 Hague Convention, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6161&dtid=57>, and the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention of October 2017, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>
- 5 United Nations' General Assembly, Resolution 64/142. Available at <https://www.alternativecareguidelines.org/Portals/46/Moving-forward/Moving-Forward-implementing-the-guidelines-for-web1.pdf>
- 6 See the English text of the Convention available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- 7 English version of the Convention available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>
- 8 Available in English, French and Spanish at: [https://www.iss-ssi.org/images/Publications\\_ISS/ENG/IntrafamilyIntercountryAdoptions\\_ANG.pdf](https://www.iss-ssi.org/images/Publications_ISS/ENG/IntrafamilyIntercountryAdoptions_ANG.pdf)
- 9 See also the Annual Report of the Special Rapporteur on the sale and sexual exploitation of children, who noted in her 2017 annual report (para. 49) that some situations related to kafala may result in illegal practices especially where there is a legal loophole. "The conversion of a *kafalah* guardianship arrangement into a domestic adoption, once the child has been brought back to the receiving State, has also been used to circumvent intercountry adoption procedures under the 1993 Hague Convention." Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/440/24/PDF/G1644024.pdf?OpenElement>
- 10 Alternative Care Guidelines, para. 5.
- 11 Alternative Care Guidelines, para. 29a.
- 12 Alternative Care Guidelines, para. 29b) ii).
- 13 See <https://www.dictionnaire-juridique.com/definition/droit-international-prive.php>
- 14 See <https://univ-droit.fr/unjf-cours/10574-droit-international-publicles-relations-entre-etats>
- 15 Alternative Care Guidelines, para. 29.b.i.
- 16 Alternative Care Guidelines, Para. 29c) ii).
- 17 This study does not address *kafalah* in the sense of a sponsorship system for labor migration as practiced in several countries in the Middle East.
- 18 See for example, art. 123 of the *Code de la Famille algérien* [Algerian Family Code], law no. 84-11 of 9 June 1984, <https://www.alternativecareguidelines.org/Portals/46/Moving-forward/Moving-Forward-implementing-the-guidelines-for-web1.pdf>
- 19 Alternative Care Guidelines, para. 29c) i).
- 20 1996 Hague Convention, art. 1 (2).
- 21 Alternative Care Guidelines, para. 29c)iv).
- 22 See NGO Working Group on Children Without Parental Care (2013). *Identifying Basic Characteristics of Formal Alternative Care Settings For Children: A Discussion Paper*. Available in English at: <https://resourcecentre.savethechildren.net/library/identifying-basic-characteristics-formal-alternative-care-settings-children-discussion-paper>
- 23 See 10.1-3., HCCH (2014). *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*. Available in English at: <https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf>
- 24 See 10.22 et 10.23, HCCH (2014). *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*.

## I. Legal and religious sources of kafalah

- 25 Available in English at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>
- 26 "A child deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State" (art. 20 CRC).
- 27 See G. van Buren (1995), *The International Law on the Rights of the Child*.
- 28 See Office of the United Nations High Commissioner for Human Rights. (2007) *Legislative history on the Convention on the Rights of the Child* (Vol 2). Geneva, Switzerland. <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf>
- 29 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally of 1986 (<https://www.refworld.org/docid/5290a1cf4.html>) and the International Covenant on Economic, Social and Cultural Rights of 1966 (<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>).
- 30 Composed of representatives of Argentina, Australia, Brazil, China, France, Italy, the Netherlands, Pakistan, Sweden, the Soviet Union, the United Kingdom, Northern Ireland and Portugal.
- 31 See p. 545, Office of the United Nations High Commissioner for Human Rights. (2007) *Legislative history on the Convention on the Rights of the Child* (Vol 2). Geneva, Switzerland. <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf>: "Article 11(2) should be modified to protect orphans and other children who are adopted for reasons of proselytization. This kind of adoption has – in the past – created very serious problems and abuses in Bangladesh and other developing countries. The draft convention should safeguard against trafficking by foreign agencies for purposes of conversions, etc."
- 32 Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan Arab Jamahiriya, Morocco, Oman, Pakistan and Tunisia.
- 33 CRC, Reservations, Declarations, and Objections relating to the Convention on the Rights of the Child, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsgno=IV-11&chapter=4&lang=en#EndDec>; see also Hodgkin R., Newell, P. *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF (2002). Different types of declarations and reservations can be identified: *General declarations and reservations: Afghanistan, Saudi Arabia, Iran, the Republic of Djibouti, the Islamic Republic of Mauritania, Syria and Qatar expressed or reserved the right to express reservations on all provisions of the Convention that may be incompatible with or contrary to the laws of Islamic Sharia. Reservations concerning article 21 of the CRC regarding adoption as stipulated by the governments of Bangladesh, Brunei Darussalam, United Arab Emirates, Indonesia (application in line with its Constitution), Kuwait and the Maldives. Reservations concerning articles 20 and 21 of the CRC: Jordan and Somalia.*
- 34 For example, the Danish and Dutch Governments raised objections to the reservations of Djibouti, Iran, Pakistan and the Syrian Arab Republic.
- 35 "Article 20(3) of the Convention expressly recognises *kafalah* of Islamic law as alternative care, and article 21 expressly refers to those States that "recognize and/or permit" the system of adoption".
- 36 Committee on the Rights of the Child, *Concluding observation of the Committee on the Rights of the Child*. Jordan, CRC/C/JOR&CO/4-5, 7 July 2014.
- 37 On 31 July 2003, the Government of Egypt informed the Secretary-General that it had decided to withdraw its reservation made upon signature and confirmed upon ratification in respect of articles 20 and 21 of the Convention. The reservation read as follows.
- 38 On 9 December 2014, the Secretary-General was notified of the Government of Oman's decision to withdraw the reservations to articles 7, 9, 21 and 30 made upon accession.
- 39 Alternative Care Guidelines available at <https://www.sos-childrensvillages.org/getmedia/4972cb2e-62e1-4ae8-a0bc-b0e27fe3ea97/101203-UN-Guidelines-en-WEB.pdf>

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- 40 See Cantwell, N., Davidson, J., Elsley, S., Milligan, I., Quinn, N. (2012). *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*. United Kingdom: Centre for Excellence for Looked After Children in Scotland. <https://www.alternativecareguidelines.org/Portals/46/Moving-forward/Moving-Forward-implementing-the-guidelines-for-web1.pdf>
- 41 See pp. 22 et seq., Cantwell, N., Davidson, J., Elsley, S., Milligan, I., Quinn, N. (2012). *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*.
- 42 See Alternative Care Guidelines, paras. 32-52.
- 43 See pp. 22 et seq., Cantwell, N., Davidson, J., Elsley, S., Milligan, I., Quinn, N. (2012). *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*.
- 44 The text of the Resolution is available in Arabic, Chinese, English, French, Russian and Spanish at: <https://undocs.org/en/A/RES/74/133>
- 45 For further information, see: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx>
- 46 Text of the Convention available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>
- 47 Article 2.2: "The Convention covers only adoptions which create a permanent parent-child relationship".
- 48 See Point 30, Conclusions and Recommendations adopted by the Special Commission of 2015: "The SC recommended that kafala, as a child protection measure, be discussed at the next SC on the practical operation of the 1996 Hague Convention. The SC recommended that consideration be given to the inclusion of the subject on the agenda for the fourth "Malta Judicial Conference on Cross-Frontier Family Law Issues" (part of the "Malta Process")".
- 49 Report of the Special Commission on the Implementation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, <https://www.hcch.net/en/publications-and-studies/details4/?pid=933&dtid=2>
- 50 Working Document No 124, see Parra-Aranguren M. G. (1993). Explanatory Report of the 1993 Hague Convention, para. 42. Available in English at: <https://assets.hcch.net/docs/787bd479-a60e-44e4-91a8-d76d43990e63.pdf>
- 51 Parra-Aranguren M. G. (1993). *Explanatory Report of the 1993 Hague Convention*, para 314.
- 52 Text of the Convention, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>  
See also, preamble of the Convention: "Noting that the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors is in need of revision".
- 53 Working Document No 10, see Lagarde, P. (1998). *Explanatory Report on the 1996 Hague Child Protection Convention*, Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2943&dtid=3>
- 54 Term covering access and contact, custody or visitation rights.
- 55 Central Authorities of the contracting States designated under the 1996 Hague Convention, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>
- 56 For more information see <https://www.hcch.net/en/news-archiv/details/?vareview=349>
- 57 The following section contains extracts from the article Büchler A., Schneider Kayasseh, E. (2018). *Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates*, Electronic Journal of Islamic and Middle Eastern Law, Volume 6, pp. 31 – 55.
- 58 See e.g. Sayed, M. (2014). *The Kafalah of Islamic Law – How to Approach it in the West*, in: Maunsbach, U. et al. (eds.), *Essays in Honour of Michael Bogdan*, Lund 2013, pp. 507 – 520, at 512.
- 59 Al-Azhary Sonbol A. (1995). *Adoption in Islamic Society: A Historical Survey*. Dans Warnock Fernea E. (ed.). *Children in the Muslim Middle East*, Austin, 45 – 67, p. 55 – An example is Quran (4:36): "[...] And do good – To parents, kinsfolk, orphans, those in need [...]". See also e.g. Quran (4:127); (93:9); (107:1 – 3).
- 60 See Quran (93:6).
- 61 Mattson, I. 2003 – 2007. *Adoption and Fostering*, in: Suad, J. (ed.), *Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics*, Leiden, at 1; Al-Azhary Sonbol A. (1995). *Adoption in Islamic Society: A Historical Survey*. In Warnock Fernea Elizabeth (ed.) (2013). *Children in the Muslim Middle East*, Austin, 45 – 67, pp. 53 et seq.; Sayed M. (2014). *The Kafalah of Islamic Law – How to Approach it in the West*. In: Maunsbach Ulf et al. (eds.). *Essays in Honour of Michael Bogdan*, Lund, 507 – 520, p. 513; Thomason L.M. (2008). *On the Steps of the Mosque: The Legal Rights of Non-Marital Children in Egypt*. *Hastings Women's Law Journal* Vol. 19, 121 – 148, p. 139.
- 62 This position is based on the notion that it is piety that characterises a Muslim and not her or his lineage (*nasab*) or wealth (*hasab*). See Bargach, J. (2002). *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Lanham, at 11, 62; See e.g. Clarke, M. (2009). *Islam and New Kinship*, New York, at 77. See also Quran (6:164): "Each soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another."
- 63 Jurisprudential interpretations.
- 64 See Bargach, J. (2002). *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Lanham, at 61; Al-Azhary Sonbol, A. (1995). *Adoption in Islamic Society: A Historical Survey*, in: Warnock Fernea, E. (ed.), *Children in the Muslim Middle East*, Austin, pp. 45 – 67, at 52, 57, referring to the original definition of *luqta* as "that which is picked up"
- 65 Cf. Pollack, D. et al. (2004). *Classical Religious Perspectives of Adoption Law*, *Notre Dame Law Review*, Vol. 79, pp. 101-158, Nasir Jamal J. (2009). *The Status of Women under Islamic Law and Modern Islamic Legislation*. 3e edition, Leiden/Boston, p. 178 et ss ; Bargach J. (2002). *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*. Lanham, at 61.
- 66 This section is based on information provided in Al-Dabbagh, H. (2017). *La réception de la kafalah dans l'ordre juridique québécois : vers un renversement du paradigme conflictuel?*, *Revue générale de droit*, Volume 47, number 1, pp. 165-226.
- 67 Also known as *Kafalah* or *Kefala*.
- 68 In Algeria, Morocco, Tunisia, Libya, Egypt and Iraq for instance.
- 69 The following section (points a, b, d, e) contains extracts from the article Büchler A. and Schneider Kayasseh, E. (2018). *Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates*, *Electronic Journal of Islamic and Middle Eastern Law*, Volume 6, pp. 31-55.
- 70 See e.g. Shabana, A. (2014). *The Islamic Law of Paternity between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis*, *Journal of Islamic Studies*, Vol. 25, pp. 1-32, at 1, 3.
- 71 Welchman, L. (2007). *Women and Muslim Family Laws in Arab States*, Amsterdam, at 143.
- 72 See e.g. Morgan, C. (2009). *Islam and New Kinship*, New York, at 96.
- 73 Referring to a male genealogical line, *nasab* has been described as "the most fundamental organising principle of Arab society". See Rosenthal, F., Nasab, in: Bearman, P., et al. (eds.) (1997 – 2009). *Encyclopaedia of Islam*, 13 Vol., Leiden, at 967.
- 74 Nasir Jamal J. (2009). *The Islamic Law of Personal Status*. 3e édition, Leiden, at 81; Shabana A. (2014). *The Islamic Law of Paternity between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis*. *Journal of Islamic Studies*, Vol. 25, 1-32, at 1; Bargach J. (2002). *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*. Lanham, at 56.
- 75 Nasir, J. (2009). *The Status of Women under Islamic Law and Modern Islamic Legislation*. 3rd edition, Leiden/Boston, pp. 146, 154; Az-Zubair Kabir Banu, M. (2007). *Who is a Parent? Parenthood in Islamic Ethics*. *Journal of Medical Ethics*, Vol. 33, 605 – 609, pp. 606 et seq.; Kreuzberger, K. (2008-2009). *Single Mothers and Children Born out of Wedlock in the Kingdom of Morocco*, *Yearbook of Islamic and Middle Eastern Law*, Vol. 14, 49 – 82, at 62. This principle derives from the Quran (58:2) which states: "[...] none can be their mothers except those who gave them birth [...]". See e.g. Art. 146 *Moudawana* which states that filiation to the mother has the same effects irrespective of legitimate or illegitimate birth.
- 76 Cf. Pearl, D./Menski, W. (1998). *Muslim Family Law*. London, pp. 399 et seq. ; Pollack, D. et al. (2004). *Classical Religious Perspectives of Adoption Law*, *Notre Dame Law Review*. Vol. 79, 101-158; ; Shabana, A. (2014). *The Islamic Law of Paternity between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis*. *Journal of Islamic Studies*, Vol. 25, 1-32, at 6 ; Eich, T. (2012). *Constructing Kinship in Sunni Islamic Legal Texts*. In: Tremayne Soraya/Inhorn M. C. (eds.), *Islam and Assisted Reproductive Technologies*. New York/Oxford, 27-52, at 37 ; Welchman, L. (2007). *Women and Muslim Family Laws in Arab States*. Amsterdam, at 142 ; Az-Zubair Kabir Banu, M. (2007). *Who is a Parent? Parenthood in Islamic Ethics*. *Journal of Medical Ethics*, Vol. 33, 605-609, at 606 ; Morgan C. (2009). *Islam and New Kinship*. New York, p. 47. Pour une perspective historique sur le principe de *firāsh*, voir Landau-Tasserou, E. (2003). *Adoption, Acknowledgment of Paternity and False Genealogical Claims in Arabian and Islamic Societies*. *Bulletin of the School of Oriental and African Studies*, Vol. 66 , 169-192, pp. 176 et seq.

- 77 Welchman, L. (2007). *Women and Muslim Family Laws in Arab States*. Amsterdam, at 144 ; see also Khan Arif, A./Khan Tauqir, M. (2009). *Family Law in Islam*. In: *Encyclopedia of Islamic Law*, Vol. 5, New Delhi, at 207. See Büchler A./Schneider Kayasseh, E. (2014). *Medically Assisted Reproduction in Egypt, Iran, Saudi Arabia and the United Arab Emirates*, European Journal of Law Reform, Issue 2, 430 – 464, pp. 432 et seq.
- 78 It must be pointed out, however, that not all schools consider the acknowledgment of a woman valid: See Bargach, J. (2002). *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*. Lanham, at 60; Khan Arif, A. et Khan Tauqir, M. (2009). *Family Law in Islam*. In: *Encyclopedia of Islamic Law*, Vol. 5, New Delhi, p. 210. See also, Esposito, J. (2001). *Women in Muslim Family Law*. Syracuse/ New York, at 27.
- 79 Waiting Period following the death of the spouse or the divorce during which the woman cannot remarry.
- 80 1) the child must be of unknown parentage; 2) there must be a certain age difference between father and child so that parentage is plausible (See Pearl, D. and Menski, W. (1998). *Muslim Family Law*, London, pp. 399 f.: real paternity must be possible, meaning that the acknowledger must have reached the minimum age of puberty and the minimum period of gestation must have passed by); 3) the father must indicate that the child is legitimate and not the offspring of *zina*; 4) if the child is of age, he or she must agree to the acknowledgement. If the mother is married or in her waiting period, her acknowledgement shall only establish the paternity of the husband if this individual confirms the acknowledgment (Concerning the whole, Nasir, J. (2009). *The Status of Women under Islamic Law and Modern Islamic Legislation*. 3rd edition, Leiden/Boston, at 176 ; see Khan Arif, A. et Khan Tauqir, M. (2009). *Family Law in Islam*. In: *Encyclopedia of Islamic Law*, Vol. 5, New Delhi, p. 214. See also Esposito, J. (2001). *Women in Muslim Family Law*. Syracuse/New York, at 27 ; Nasir J. (2009). *The Status of Women under Islamic Law and Modern Islamic Legislation*. 3rd edition, Leiden/Boston, at 150 ff. ; Khan Arif, A. et Khan Tauqir, M. (2009)., *Family Law in Islam*, in: *Encyclopedia of Islamic Law*, Vol. 5, New Delhi, at 210 et seq. see also Landau-Tasserion, E. (2003). *Adoption, Acknowledgment of Paternity and False Genealogical Claims in Arabian and Islamic Societies*. *Bulletin of the School of Oriental and African Studies*, Vol. 66, 169 – 192, at 176.
- 81 In detail see Shabana, A. (2014). *The Islamic Law of Paternity between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis*. *Journal of Islamic Studies*, Vol. 25, 1 – 32, at 8 et seq. – Some schools also accept “drawing of lots” (al-qur’ah) as a valid means to establish paternity if one is unable to determine the paternity of a child by other means: Sujimon, M. S. (2002). *The Treatment of the Foundling (al-Laqrī) According to the Hanafīs, Islamic Law and Society*, Vol. 9 , pp. 358 – 385, at 378.
- 82 See Nasir, J. (2009). *The Status of Women under Islamic Law and Modern Islamic Legislation*. 3rd edition, Leiden/Boston, at 178; Bargach, J. (2002). *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*. Lanham, at 60.
- 83 This section is based on a different source, namely Yasseri, N. (2015). *Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law*, *The American Journal of Comparative Law*, Vol. 63, pp. 927 – 962.
- 84 See Landau-Tasserion, E. (2003). *Adoption, Acknowledgment of Paternity and False Genealogical Claims in Arabian and Islamic Societies*.
- 85 It needs to be noted that these “pregnancy forms” do not exist anymore; See also Muslim Women’s shura Council, American Society for Muslim Advancement (2011). *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child: the Digest*, Muslim Women’s shura Council, American Society for Muslim Advancement; Bargach, J. (2002). *Orphans of Islam, Family Abandonment and Secret Adoption in Morocco*. Lanham, MD: Rowman and Littlefield.
- 86 According to this legal fiction the female gestation period can range from six months to seven years. This way, a child could still be considered a legitimate child of the husband (in case of death of the latter or divorce for instance).
- 87 Children born from parents who erroneously thought that they were married were considered legitimate children.
- 88 Nasir Jamal, J. (2009). *The Status of Women under Islamic Law and Modern Islamic Legislation*. 3rd edition, Leiden/Boston, pp. 119, 172; see also Pearl, D. & Menski, W. (1998). *Muslim Family Law*. London, at 400 ; Al-Azhary Sonbol, A. (1995). *Adoption in Islamic Society: A Historical Survey*. Dans : Warnock Fernea Elizabeth (ed.). *Children in the Muslim Middle East*. Austin, 45 – 67, at 50 ; Khan Arif, A. et Khan Tauqir, M. (2009). *Family Law in Islam*. Dans : *Encyclopedia of Islamic Law*, Vol. 5, New Delhi, at 205 ; Welchmann, L. (2007). *Women and Muslim Family Laws in Arab States*. Amsterdam, p. 142 ; verse (24:6 – 9) of the Quran. Nasir, J. (2009). *The Status of Women under Islamic Law and Modern Islamic Legislation*. 3rd edition, Leiden/Boston, pp. 148, at 172, points out that father and child would remain un-marriageable to each other.
- 89 Fortier C. (2010). *Le droit musulman en pratique : genre, filiation et bioéthique*, *Droit et Cultures*, Vol. 59, pp. 1 – 19, at 9; Barraud, É. (2011). *L’adoption au prisme du genre : l’exemple du Maghreb*, *CLIO*, Vol. 2, pp. 153 – 165, at 160.
- 90 On the situation of women who have children out of wedlock see, e.g., Bargach, J. (2002). *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*. Lanham, at 133 ; Abdul-Hamid, Y. (2011). *Child Rights Situation Analysis Middle East and North Africa*. Report commissioned by Save the Children Sweden, Bureau régional pour le Moyen Orient et l’Afrique du Nord. 2e édition, Beirut, pp. 77, 110. Voir aussi Fisher, B. (2015). *Why Non-Marital Children in the MENA Region Face a Risk of Statelessness*. *Harvard Human Rights Journal Online*, 1 – 8, p. 5 et ss. It must be highlighted that the profiles of mothers who decide to give up their new-born vary highly. Also, there are myriad reasons why mothers decide to take this step.
- 91 Yassari N. (2015). *Adding By Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law*.
- 92 This subsection a) was drafted by Prof. Emer. Ruud Peters from the University of Amsterdam. Landry, A. and Breton, G. La démarche pré-adoption : *L’adoption et l’Islam*, 17 juillet 2003 <http://www.quebecadoption.net/adoption/preadopt/islam.html>
- 93 For the details and interpretations of this episode, see Watt, W.M. (1956). *Muhammad at Medina*. Oxford, pp. 329-332 and Rodinson, M. (1971). *Mohammed*. (Tr. From the French). Harmondsworth. pp. 204 – 208; Al-Azhary Sonbol, A. (1995). *Adoption in Islamic society: A historical survey.* In *Children in the Muslim Middle East*, edited by Warnock Fernea, E., Austin: University of Texas Press. pp. 45 – 67.
- 94 See Kutty, F., *Islamic «Adoptions»: Kafalah*, Raadah, Istilhac and the Best Interests of the Child, in: Ballard, R. L. et al. (eds.), *The Intercountry Adopting Debate* (2015).
- 95 Nasir, J. J. (1990). *The Islamic law of personal status*. 2nd edition, London etc.: Graham & Trotman, pp. 106.
- 96 Nasir, J. J. (2009). *The Islamic Law of Personal Status*, 3rd edition, Leiden, at 81.
- 97 E.g. in Lebanon. For Indonesia, see Lewenton, U., Indonesien, in: Bergmann Alexander et al., *Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht*, Loseblattsammlung, Ordner VII, 6. Auflage, Frankfurt a.M./Berlin 1983 ff. (Stand 2018), at 43ff.
- 98 Act 1958/27 on Public Guardianship, Unofficial Tutorship and Adoption, 4 March 1958.
- 99 Translation from French, see Code de la Famille algérien [Algerian family code], law no. 84 – 11 of 9 June 1984, art. 123, <https://www.refworld.org/docid/5e55403b4.html>
- 100 This would appear to be the appointment of a guardian in accordance with international humanitarian law, which may be called ‘kafil’ in some situations, but remains different from the kafalah that is the subject of this study.
- 101 Alternative Care Guidelines, para. 29(b)(ii).
- 102 Alternative Care Guidelines, para. 29(b)(i).
- 103 ISS/IRC (2017). *Final Evaluation mission report Morocco* (non-published).
- 104 Citation translated from French. Barraud, É. (2008). *Adoption et kafala dans l’espace migratoire franco-maghébin*, IV L’Année du Maghreb 459 at para. 8.
- 105 [Translation from French] “Tanzil is the act of putting a person in the same category as an heir when the person does not have the status of an heir” (see Book V, Code de la Famille marocain [Moroccan family code], art. 315).
- 106 In Algeria, for example, a maximum of one third of the inheritance in order not to affect the legal heirs (see art. 123 of the Code de la Famille algérien [Algerian family code], law no. 84 – 11 of 9 June 1984, <https://www.refworld.org/docid/5e55403b4.html>)



## II. Implementation of *kafalah* in legal systems based on or influenced by Sharia

Despite the wide variety of forms of *kafalah* (see [Section I.3](#)), ISS/IRC chose to focus on *kafalah* that takes the form of a family-based placement as defined by the Alternative Care Guidelines (see [Section I.1.2](#) and [II.1.1](#)). Thus, these forms of *kafalah* are examined regardless of the terminology used in the different contexts. In many situations, *kafalah* remains the only family-based option available. However, some countries have mixed systems that recognise not only *kafalah* but also placements in a foster family or adoption (see [Section II.1.2](#)).

In some countries, other categories of *kafalah* or of analogous measures exist; these are measures that establish child-parent relationships or forms of sponsorship for children living in institutions (see [Section II.1.3](#)).

## Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

In Part II, the following countries, whose legal systems are based on or influenced by Sharia are examined in detail based on available information: Egypt, Djibouti, Jordan, Lebanon, Malaysia, Morocco, Iran, Iraq, Pakistan, Sudan and Tunisia. Other countries were not able to be studied to the same extent due to a lack of local contacts able to verify and confirm the information collected, or because of inadequate feedback from these contacts. This is the case of Afghanistan, Algeria, Saudi Arabia and Indonesia, countries regarding which only short analyses are provided. Further information remains available with ISS/IRC.

Given the great diversity of systems, a strict comparison between these countries is not possible. However, the analysis of each country follows the same logic and

assesses certain key criteria and steps required by international standards in this field (see Sections I.1., II.1.1 and II.1.2). Other elements that are essential but very undeveloped or even non-existent in many countries are not be dealt with, including: data collection and preservation systems supporting searches for children's origins; regulation of procedural costs; existence of preventative measures or management of *kafalah* placement breakdown situations; or complaint mechanisms available to children in cases of violations of their rights. These elements remain important and should be developed and/or strengthened in the relevant countries (see Technical Note: National *kafalah*).

### 1. *Kafalah* – an integral part of the child protection and alternative care system

In general, the alternative care system should be a component of a country's overall child protection system (that otherwise includes protection against violence, juvenile justice, support for vulnerable families, etc.). In order to meet the needs of the children concerned, this system must be based on well-defined legal and political foundations, which translate into concrete and effective action.

Family breakdown and separation are often the result of a multitude of factors specific to each situation.

The Alternative Care Guidelines clearly state that, since the family is *"the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members"*<sup>107</sup>.

A legal framework and a domestic policy<sup>108</sup> should therefore be based on **three fundamental levels of prevention**<sup>109</sup>.

- *The first level aims to guarantee access to basic services, and the second, to provide specialised services to vulnerable families. This requires support and services that deal with problems related to material poverty, to a lack of access to basic services including social security, health and education, housing and employment, and to generalised discrimination and marginalisation based on ethnicity, gender, disability and status at birth.*
- *In addition, concrete actions should be taken to prevent situations and conditions that could lead to considering or requiring a placement in alternative protection, whether *kafalah* or some other form. To that end, a **solid mechanism preventing admission to alternative care** ("gatekeeping") must exist<sup>110</sup>. As prescribed by the Alternative Care Guidelines as well as CRC obligations<sup>111</sup>, such a mechanism involves, among other things, ensuring a rigorous decision-making process based on a detailed assessment of each child's individual needs, situation and wishes<sup>112</sup>. The existence of a real need to formally place a child in alternative care must be verified. It is at this stage that it is suitable to seek solutions that would be in the best interests of the child whilst, as far as possible, preventing any unwarranted placement, thus keeping the child in his or her family environment.*

Preventing unwarranted family separation is therefore essential to complying with the principle of necessity (see also Section I.1.2), which is one of the pillars of the Alternative Care Guidelines, based on which formal placements in alternative care must require evidence of a real danger of harm rather than being a knee-jerk reaction to struggling families.

If risk factors for family separation are not recognised and dealt with, many children will be placed in alternative care needlessly. This approach is based not only on the spirit of the CRC but also on numerous specific provisions of the CRC, such as health care (Article 24), education (Article 28), support for parents in fulfilling their roles (Article 18), conditions for separating the child from his or her parents (Article 9), right to social security (Article 25) and protection against discrimination (Article 2<sup>113</sup>).

#### 1.1. *Kafalah* as a family-type child protection measure

In accordance with international standards (CRC, Alternative Care Guidelines), *kafalah* must be viewed as one child protection measure within a comprehensive child protection system. Such a holistic approach is followed for each of the countries examined below.

Issues related to child protection and alternative care must be dealt with through a comprehensive, holistic approach. They should have the benefit of solid legal and political bases, adequate resources, and effective programs and services aimed at avoiding any unwarranted family separation. In this way, children should be able to benefit from continuity of care and from adequate coordination of care. Based on international standards, care options must preferably be family-based. Both domestic and cross-border *kafala* placements can be part of the range of alternative care measures provided by a child protection system.

### Procedural steps essential for a *kafalah* placement that respects the rights of the child

When family separation becomes inevitable, the alternative care system must provide for a range of options that are chosen according to the child's individual needs, circumstances and wishes. This is the suitability principle<sup>114</sup>, another pillar of the Alternative Care Guidelines. This principle dictates that the most suitable forms of care must be provided under conditions that "promote the child's full and harmonious development." All efforts should be made to reintegrate the child into his or her original family<sup>115</sup> or, if that is not possible, to find other suitable long-term solutions<sup>116</sup>. Thus, priority must be given to family-based solutions such as care by extended family, foster care<sup>117</sup> or a *kafalah* placement. The principle also seeks to put an end to the use of inadequate placements, such as large institutions or detention centres. To that end, institutional placements should be considered only as a last resort and should be able to take into account the protections enumerated at paragraphs 123 – 136 of the Alternative Care Guidelines. For any family-type formal care placement, the following steps should be ensured:

#### Determining the suitability of a *kafalah* – individualised approach<sup>118</sup>

In order to guarantee the suitability of a placement in *kafalah* based on the principle of the best interests of the child, the *kafalah* procedure should provide for several steps which are systematically carried out by competent professionals. Placement decisions should be made through a thorough process (systematic judicial and administrative procedures with assessments undertaken by qualified professionals)<sup>119</sup> and clear goals (permanency of care)<sup>120</sup>. For a given child, the declaration of the suitability of *kafalah* must first be based on a thorough study of the child's social and medical situation, capacities (physical and psychological) to benefit from placement in *kafalah* and status (medical-psycho-social evaluation)<sup>121</sup>.

#### Consent and involvement of all parties<sup>122</sup>

Consent must be freely provided and be the result of a genuine and conscious choice by the child, the child's parents of origin or the child's legal guardian, in light of viable alternatives offered to them.

#### Evaluation of *kafil* candidates' suitability to care<sup>123</sup>

It should be noted that there is no right to a child. At the same time, children have the right to grow up in a family environment, in an atmosphere of happiness, love and understanding (CRC Preamble). Thus, the evaluation of the candidates' suitability must be guided by the best interests of the child and the existence of well-defined criteria for the selection of a potential family for the child, as well as a thorough psychosocial assessment of that family. The agreement is then the assessment of the reception and care capacities of the candidate families. The parents' capacity is not reduced to merely a legal, economic or religious notion. It must take into consideration ethical, psychological, social and medical elements.

#### Matching<sup>124</sup>

Matching is a key step in the sense that this choice (if subsequently confirmed by a legal declaration) will forever transform the life of the child and the family. Thus, it must be made by a professional, interdisciplinary and independent team who can assess whether or not the profile of the candidates corresponds best to the specific needs of the child.

#### Final placement decision and continuous preparation of the placement

The finalisation of a placement procedure can take several forms and be decided by different administrative or judicial entities. The preparation of and support for the child<sup>125</sup> and the family<sup>126</sup> before and during the placement is an essential step in a successful placement that is beneficial to the child's harmonious development. Such preparation undertaken by trained and specialised professionals, as well as training for *kafil* parents in their new caregiver role, will ensure that the child's integration into his or her family is as smooth as possible.

#### Supervision/follow-up and post-*kafalah* support<sup>127</sup>

The supervision of the placement as well as support and follow-up must be ensured for each placement by a specific entity/authority composed of professionals from various fields and by offering specialised services. Supervision of the *kafalah* system must take the form of an effective complaint mechanism, and the costs involved in the procedure must also be controlled. In addition, regular follow-up must be ensured, and there must also be interventions aimed at complex situations such as *kafalah* breakdowns or support during a search for the child's origins<sup>128</sup>.

## EGYPT

## GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE

## Legal and policy framework

**International framework:** CRC was ratified in 1990 by the country; OPSC was signed on 22 April 2002 and ratified on 13 September 2002<sup>129</sup>.

Egypt is not a party to any Hague Convention, but has (save for 2016) been a regular participant in the Hague Conference's Malta Process (see Section I.1.3.).

**The Egyptian Child Law (1996, amended 2008)** seeks to ensure the protection of all children. It covers issues such as health, juvenile justice. Importantly, this law provides for support to families and the alternative care of children (both residential care and alternative families – as discussed below). Accompanying this law are the **By-Laws to the Child Law**, which provide context to the law particularly with regards to the functioning of alternative families.

Parenting obligations, and matters of custody and guardianship in Egypt flow from Egypt's **Personal Status Laws** (which cover such matters as: marriage, divorce, child custody and succession). Although different religions across Egypt may benefit from personal status laws which accord with their respective communities, matters relating to, inter alia, child custody, are governed by the personal status law for Muslims<sup>130</sup>. Meaning that this is the uniform law for child custody issues.

Under these **Personal Status Laws**, and in accordance with Islamic Legal Doctrine, there is a distinction between legal guardianship (*wilāya*) and child custody (*hadāna*) based on a gendered division—the father as guardian and provider and the mother as the caregiver (or holder of 'custody'). Whilst custody refers to the physical care and control of a child, guardianship refers to the right to generally supervise the child's upbringing and make decisions for the child. Currently, should parents separate, the mother has custody until the child is 15. The Personal Status laws provide for relatives to take care of children should their parents be unable to do so. For example, if a father is stripped of his parental status, guardianship automatically passes to the paternal grandfather, unless the father specifically nominates another guardian. Likewise, if a mother loses custody of a child for whatever reason, it will pass to a female family member in the following order: maternal grandmother, maternal sister, paternal grandmother or paternal sister<sup>131</sup>.

## Competent authorities

Ministry of Social Solidarity (MOSS): has overarching responsibility for providing support to families, and for the provision of alternative care (website: <http://www.moss.gov.eg>)

National Council for Childhood and Motherhood: key support body, runs the main child helpline for families seeking advice, or for risk of harm reports (website: <http://www.nccm-egypt.org>)

## Children's rights situation

The population amounts to 99,413,317. As at 2016, approximately 37% of the population (33.4 million) were aged between 0 and 17 years of age<sup>132</sup>.

Egypt is a largely Muslim nation (90% Muslim and 10% Christian – predominately Coptic Orthodox).

Main risk issues for children include poverty and youth unemployment<sup>133</sup>. The country's large and rapidly increasing population complicates government efforts to alleviate poverty, and as such poverty is a significant risk factor for children. 2013 figures indicated that 28.8% of children were reported to be living in extreme monetary poverty. Additionally, the large population places a strain on the government's capacity to provide services for children (such as education and health)<sup>134</sup>. Physical violence and Female Genital Mutilation ('FGM') are two other notable major risk issues for Egyptian children<sup>135</sup>.

Health services may also be limited for some children. In their 2011 Concluding Observations, the Committee on the Rights of the Child noted a disparity in the provision of health care between children in rural and urban Egypt. Major concerns noted by the Committee included the limited access to health services by street children, and the increasing malnutrition rate. In 2016, UNICEF noted malnutrition continued to be a concern<sup>136</sup>.

UNICEF nonetheless reports that in recent years some progress has been noted in some areas. FGM is reportedly declining, and in 2016, UNICEF noted that Egypt has made significant progress in both reducing child mortality and expanding access to basic education (including closing the gap between boys' and girls' enrolment)<sup>137</sup>.

Egypt is positioned along the North-Eastern Migratory Route, and is such in a key migration position. Main countries of origin for refugees and asylum seekers in Egypt are Syria and Sudan, with other countries of origin including Eritrea, Ethiopia, South Sudan, Yemen and to a lesser extent Chad. As of December 2018, there were 4,126 unaccompanied and separated children registered with UNHCR Egypt<sup>138</sup>.

## FAMILY SUPPORT & PREVENTION OF SEPARATION

### Access to services (1st and 2nd levels of prevention)

Each governorate in Egypt (27 in total) has a General Committee for Child Protection ('CPC'), which is chaired by the Governor and made up of the directors of the Health, Security, Social Affairs, and Education directorates and relevant CSO's<sup>139</sup>. CPC's operate under the auspices of NCCM, and are responsible for the general formulation of child protection policies and their implementation.

Regarding targeted support to families, Child Protection Committees (CPC's), under the auspices of the NCCM provide frontline child protection services – having a mandate to monitor children at risk and to provide preventative measures. Additionally, family guidance and advice offices managed by CSO's (under the auspices of the MOSS) are tasked with investigating family problems and proffering solutions<sup>140</sup>.

Despite the existence of these services, there is reportedly a real lack of preventative and responsive child protection services aggravating the poor conditions for children in Egypt – this is compounded by a lack of resources and a lack of trained social workers<sup>141</sup>.

### Gatekeeping (3rd level of prevention)

A major cause of children coming into alternative care in Egypt is because they are abandoned at birth, or relinquished. Nonetheless, the total number of children brought into alternative care does not exceed 2,000 per year (as at 2013), with more than half of them in the Cairo governorate alone<sup>142</sup>.

It is noted that should a child be born out of wedlock, their parents are not required to care for them, and whilst the law provides that a single woman may register her child out of wedlock (and in the absence of the father), it is reported that in practice women have difficulty doing this<sup>143</sup>.

Should a child be placed in alternative care because they are abandoned, the birth family do not lose their parental rights and obligations and may seek the return of the child at any time. As it is believed that the birth family is the best option for caring for a child, there is no severing of the biological relationship when a child is removed or separated from their family. However, this viewpoint is not accompanied by any apparent actions to support reintegration of children with their biological family, and there is no apparent assessment should this be sought (merely a court approval subsequent to any DNA test).

## ALTERNATIVE CARE OPTIONS

Forms of alternative care foreseen in the Egyptian law are residential care or alternative families (discussed in greater detail in the next section). There is a distinction in Egyptian law and practice between children who have been abandoned, and those who have been neglected or abused by their family. Although ideally the latter should fall under some kind of State intervention, these children are in practice likely to be placed with kin, or a residential placement as decided by the relevant family member with responsibility (under Personal Status Laws). For abandoned children, formal government supervised processes oversee placements in alternative family or residential care<sup>144</sup>.

### Kinship care

The default position is that a child should live with their birth family (as per the Personal Status Laws). Should a parent lose their custody or guardianship rights, these obligations will automatically pass to a relative.

There is no apparent assessment of the capacity of extended family members to take on this care, nor any formal monitoring and support. Kinship care as a form of alternative care for children unable to live with their parents is not foreseen under Egyptian law. Should any kinship care occur outside of the auspices of Egypt's Personal Status Laws, it is wholly voluntary and not regulated by any law<sup>145</sup>.

### Residential care

In 2016, UNICEF statistics indicated that a total of 12,015 children were living in 548 institutions<sup>146</sup>. There are three different types of residential care:

**Childhood and Motherhood Care Centre ('CMCs')**<sup>147</sup>: CMC's provide care for children who are abandoned, up to the age of 2 years (although in practice sometimes children may stay beyond this age<sup>148</sup>). The centres provide clothing, food, and medical care. Once the child reaches 3 months of age, they are eligible for a placement in a foster family. However, should they not be placed before the age of 2, they will be moved into a Social Care Institution (see below)<sup>149</sup>. As of 2016, UNICEF statistics indicate that there were 2418 children living in 75 CMCs (an average of 32 children per CMC – it is unknown if this average is an accurate reflection of how many children live in each CMC).

**Shelter Nurseries**<sup>150</sup>: These placements provide care for children between the ages of 2 years, when they must leave any CMC, and the age of 6 years, where they are eligible for a placement in a Social Care Institution.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

EGYPT

**Residential care (continued)**

**Social Care Institutions**<sup>151</sup>: Social care institutions provide care for children between the ages of 6 and 18 years who are deprived of family care because: they are orphans; their family has broken down; or the family is unable to care for the child. Young people over the age of 18, may be able to remain in the social care institution if they are enrolled in higher education, until the time of their graduation, or until marriage for girls<sup>152</sup>. As of 2016, UNICEF statistics indicated that there were 9,597 children living in 473 institutions (an average of 20 per facility)<sup>153</sup>.

It is noted that steps have been taken by MOSS over recent years to enable monitoring and quality assurance in residential care homes, and to commence a move towards deinstitutionalisation. Since 2014 no care homes that propose to house more than 50 children can be approved (pursuant to a Ministerial Decree), and it is reported that (as at the time of drafting this report) MOSS will not approve any further homes as the existing homes have capacity<sup>154</sup>. In 2015, National Standards for Residential Care were endorsed by MOSS<sup>155</sup>, and in late 2018 an announcement was made by the Minister of Social Solidarity that the number of residential care centres are decreasing, in line with a target of closing all such placements by 2025<sup>156</sup>.

**ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE**

There are a number of positive features of the present Egyptian system such as a comprehensive framework in the law, which provides for the supervision and monitoring of placements, and sets out measures that should act to preserve information on the child’s origins. Further, it is commendable that Egypt is taking steps towards moving away from a reliance on residential care, yet a serious lack of human and financial resources undermines the effectiveness of this child protection framework.

The Egyptian system presents with both gaps in gatekeeping, and shortcomings in the actual provision of alternative care placements.

The gaps in gatekeeping can be divided into two issues: 1) support for families in need; and 2) a gap in addressing the root causes of child abandonments. Considering the first issue, despite the existence of a framework to provide assistance to families in need, it is not apparent that this theoretical framework actually transforms into practical assistance. This is very likely due to the cultural (and legislated) position that families are primarily responsible for their children, and the reliance seemingly placed on intra-familial problem-solving responses. On the second issue, very little information seems to be available on any concerted efforts from MOSS or the government at large to prevent child abandonments, and support parents to care for their children.

There is seemingly little attention placed on a) working with pregnant women on any plan to abandon the child and attempting to find alternatives; or on b) public awareness raising of the issue, attempts to reduce stigma, or to address the root cause of abandonment. Secondly, upon a child being abandoned it is unclear how intensive and thorough the police investigation is.

**ALTERNATIVE FAMILIES (‘LONG TERM FOSTER FAMILIES’)**

It is noted that this alternative family system is frequently referred to as *kafalah* in research documents and by some professionals<sup>157</sup>. However it is not explicitly referred to as *kafalah* in the legislation, and in Egypt the term *kafalah* more often refers to the provision of financial support (i.e. donating to residential care institutions)<sup>158</sup>.

**Competent authorities**

MOSS is responsible for Alternative Family Placements. The responsible department within MOSS is the **Family And Childhood Department (FCD)**<sup>159</sup>. In each governorate, a Foster Care Committee (FCC) has general oversight of matters relating to the child and of the work of the FCD. The FCC is made up of the Director of the Social Solidarity Department, the Director of the FCD, a foster care specialist from MOSS, and representatives from: health, education, security (juvenile care), and a relevant CSO<sup>160</sup>.

**Principle of subsidiarity**

Largely, (as a matter of practice, not law) children who benefit from the foster system are abandoned children. When a child is found abandoned, efforts are made to locate the child’s birth family. Details may be published in the media and extensive police investigations carried out<sup>161</sup>.

**Eligible children**

A child older than 3 months of age, who: is a foundling; is abandoned; has left their family and whose family cannot be located; or who cannot be supported by their family based on a social research assessment<sup>162</sup>, are able to benefit from Egypt’s foster system.

Upon an abandoned child being found, they will be placed in a Childhood and Motherhood Care Centre up for two years, where they may be selected for foster care. If they are not placed within the two years, they will be moved to a different residential care home, but will remain eligible for a foster placement<sup>163</sup>.

In practice it is likely that only very young babies and those children who have been abandoned will benefit from this system. This is due to both a desire to take on the care of a younger child, and uncertainty surrounding how to deal with a birth family returning and seeking care of the child<sup>164</sup>.

<p><b>Potential alternative parent</b></p>	<p><b>Potential foster parents are eligible if:</b></p> <ul style="list-style-type: none"> <li>• They are Egyptian and of the same religion of the child;</li> <li>• They meet personal qualifications of good conduct; are ethically and socially mature; have been married for at least three (3) years; and are between the ages of 25 and 60.</li> <li>• Meet social, psychological and health standards; and demonstrate an understanding of the needs of the child, and a commitment to provide for the child the same as any other family member;</li> <li>• Reside in a place where there is access to educational, health, athletic, and religious facilities; and</li> <li>• Have an income level sufficient to meet the needs of the child, as well as time and other resources.</li> </ul> <p>Single women over the age of 30 (widowed, divorced or never married) may foster a child, if approved by the FCC<sup>165</sup>.</p> <p>Proposed foster carers must be willing to:</p> <ul style="list-style-type: none"> <li>• Accept FCD oversight (visits, meetings, etc.);</li> <li>• Not communicate about the child, or hand the child to, the birth parents (if known) without the involvement of the FCD;</li> <li>• Work with the FCD to develop a care plan for the child, inclusive of any return to the birth family;</li> <li>• Commit to maintain the genealogy of the child<sup>166</sup>.</li> </ul>
<p><b>Evaluation of candidates</b></p>	<p>Foster Families apply to the FCD, who then assess them for eligibility – carrying out background checks, home visits and parenting capacity assessments.</p> <p>The assessment considers the families, social, cultural, financial and ethical status; their motivation; and their physical environment.</p> <p>The legal framework does not outline what documentary evidence needs to be provided to assess prospective alternative families. This has led to discrepancies across the country regarding required documentation. For example, while some families are asked to provide a lease of at least 3 years, others are required to show a 5-year period.</p> <p>This uncertainty has also led to requirements being imposed that are not in the legislation. For example, prospective foster parents are asked to prove that they cannot have children – which is not an eligibility requirement.<sup>167</sup></p> <p>As of October 2019, the Supreme Committee is working to develop more comprehensive criteria<sup>168</sup>.</p>
<p><b>Consents</b></p>	<p>There are no consents required from the parents, the child, or the prospective carers.</p>
<p><b>Procedure</b></p>	<p>If approved by the FCD, the file is referred to the Foster Care Committee (FCC) for further scrutiny. A formal approval is issued by the FCC, and the proposed foster parents are notified. An appeal may be made by unsuccessful applicants to the Supreme Court<sup>169</sup>. There are no formal matching procedures. However, it is understood that as of October 2019, the MOSS and the Supreme Committee in charge of alternative families were evaluating possible new and more comprehensive selection criteria, and a matching and follow-up system<sup>170</sup>. After a family is approved to care for a child, they will receive a letter from MOSS, which they may take to a residential care institution and choose a child. Once the decision for the placement is taken, the FCD social workers are responsible for preparing the child and the family for transition, and addressing any issues adapting.</p>
<p><b>Legal effects</b></p>	<p><b>Patronymic Rights:</b> an orphaned child, or a child born to unidentified parents may carry the surname of their foster father. This can be documented in the child's file, but it in no way leads to any effects akin to adoption. Accordingly, no legal entitlements flow from a placement and the situation may be reversed at any time should the child's biological parents seek their return<sup>171</sup>.</p> <p><b>Parental Responsibility:</b> Legal guardianship technically remains with MOSS, requiring foster parents to seek help/approval in administrative issues for the child, such as acquiring a passport and enrolling the child in school<sup>172</sup>. The proposed foster parents are required to sign a welfare contract with the FCD, agreeing to share responsibility for the child with them. They are required to notify the FCD of any changes to their personal circumstances, living situation, or any changes pertinent to the child such as commencing work, change of school or the child's death<sup>173</sup>.</p>

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

EGYPT

<p><b>Legal effects (continued)</b></p>	<p><b>Social and Inheritance Rights:</b> Alternative parents are not able to open a bank account for their child(ren), and if they did do so nonetheless the child(ren) could not access it until they turn 18 years of age. If the foster parents allocate an inheritance to the child, their biological children could successfully object to this, as the system does not allow an automatic inheritance. Lastly, issues could arise should one or both of the foster parents die, with the biological children empowered to dismiss the ‘fostered’ child from the home upon the parent’s death<sup>174</sup>. A girl child could also face instability in her placement should her foster mother die. In such circumstances, as there is a belief in a high risk of sexual abuse should the child live with her foster father (given there is no blood relation), it is sometimes the practice of MOSS to seek to transfer the child out of the family as soon as possible. If no alternative female carer is found, the child will be transferred to a residential placement<sup>175</sup>.</p>
<p><b>Follow-up and post-placement</b></p>	<p>After the placement decision, foster parents should be visited by FCD social work practitioners on a monthly basis to ensure safe and stable conditions for the child, and a periodic report should be submitted to the FCC every 6 months. Foster parents may also be able to benefit from group support<sup>176</sup>.</p> <p>However, such procedures are not always carried out. A 2014 study found that an almost complete lack of budget for operating costs meant there were very limited physical resources (computers, desks, etc), limited use of telephone lines to make calls to family and little to no money to fund field visits<sup>177</sup>. When follow up visits do occur, the foster families are reportedly reluctant for them to occur and the child is often not been made aware that they are not a biological child, as families are concerned about matters of stigma and friends or neighbours discovering this ‘secret’<sup>178</sup>.</p>
<p><b>Revocation</b></p>	<p>The foster placement can be revoked at any time by the biological parents coming forward and seeking to claim their child<sup>179</sup>. It is unclear what, if any, assessment is completed on the biological parents/child in preparation for any return of the child to their biological parents/family, save a DNA test. The foster parents may seek to terminate or discontinue the placement at any time<sup>180</sup>, and the FCD can end the placement, and transfer the child to another foster family or into a welfare institution if:</p> <ul style="list-style-type: none"> <li>• One of the foster parents dies;</li> <li>• There is a change in the economic / welfare status of the family;</li> <li>• The child is exposed to acts of neglect or perverted behaviour which cannot be addressed;</li> <li>• The family does not collaborate with, or respond to, the guidance of the assigned social worker;</li> <li>• The family is seen to have an adverse effect on the behaviour, or physical or psychological safety of the child; or</li> <li>• It is established that the foster family embraces disgraceful or outrageous behaviours<sup>181</sup>.</li> </ul>
<p><b>Identity &amp; access to origins</b></p>	<p>When an abandoned child is born, the Egyptian Personal Affairs Law no. 11 of 1965 provides that the child should have a birth certificate which records:</p> <ul style="list-style-type: none"> <li>• The date of birth (the day the baby was found);</li> <li>• The place of birth (location where the baby was found);</li> <li>• Age (estimated by a paediatrician);</li> <li>• Gender;</li> <li>• Name and address of the individual who found the baby; and</li> <li>• The name given to the baby by the police department.</li> </ul> <p>In addition, a special file should be kept which includes: a photograph; birth certificate; full description of the baby (inclusive of marking, fingerprints); what the baby was wearing when found; any objects found with the baby; the baby’s emotional and physical condition when found (hot/cold, crying, asleep, etc); and appearance (i.e. dirty, clean)<sup>182</sup>. Records are kept by the government for the purpose of facilitating any search by the child for their biological family; and carers have a duty to keep children up to date with developments in their birth family<sup>183</sup>.</p>

**Cross-border placement**

Foster parents are prohibited from travelling with the child outside of Egypt without MOSS' permission, a provision which, *inter alia*, seeks to prevent a child who has been fostered from being taken abroad, and subsequently sought to be adopted under the national system of a third country<sup>184</sup>.

A 2016 UK case demonstrates the Egyptian government's opposition to any child 'fostered' under this system being taken out of Egypt, in the context of an application for a child to be adopted in England by the woman who had fostered her in Egypt, with her (then) Egyptian husband. MOSS intervened in the proceedings and objected to the application on the basis that adoption was not permissible under Egyptian law<sup>185</sup>. In this case, MOSS submitted to the court that the child would not be able to maintain both British and Egyptian citizenship as the British citizenship would be acquired through an adoption – which is contrary to Egyptian law – and as such is contrary to public policy and unconstitutional<sup>186</sup>. It can be extrapolated that a similar position would apply for other children in similar circumstances.

Despite this, it does appear that some – although very few – children are removed from Egypt following their fostering under this system and are then adopted abroad. For example, the US Department of State indicates that between 1999 and 2017 a total of 24 adoptions occurred. In the last 5 years, one adoption has occurred in each of 2013, 2014 and 2017, with two in 2016<sup>187</sup>. These may relate to cases of couples being granted permission to leave the country (either permanently or temporarily) and then subsequently seeking a domestic adoption abroad, despite this being impermissible under Egyptian law. In cases where families have gone abroad with their children, the embassy in the destination country is responsible for conducting the statutory follow-up visits. However, MOSS complains that in most cases, this does not occur<sup>188</sup>.

There is also a risk (which equally applies domestically) that a child may be found, or claimed by a couple who then do not report the child in the normal manner, and seek to claim that child as their own – predominantly in circumstances where the couple are desperate for a child. The nature of Egypt's laws means that any man can give an oath (without proof) before a judge of the paternity of a child and a birth certificate will be issued in the man and his wife's name. Although, by the very nature of this practice there is no statistics on its prevalence, it is a practice complained about by MOSS social workers, including because it creates a risk that the child will then be taken out of the country<sup>189</sup>.

**Statistics**

It is not clear how many domestic 'alternative placements' occur. See above (under 'Cross-Border Placement') for information on international placements.

**ISS/IRC ANALYSIS: ALTERNATIVE FAMILIES**

The alternative family system suffers a number of shortcomings, and likely fails to meet the children's' best interests. Upon abandonment the child is initially placed in an institution, and must stay there for their first 3 months of life. This is contrary to the UN Guidelines on Alternative Care for children, which provides that children under 3 years should be in a family placement and any placement in residential care should be for a limited and pre-determined time. Once a child is placed in a foster home, although ostensibly to all involved a permanent placement, this could fall apart at any time should the child's biological parents seek their return. This hybrid system which straddles between a temporary and permanent placement, robs the child of a level of permanency and certainty. The practice of families keeping the child in the dark about their fostering is likely to be even more confusing to a child who is faced with (theoretically) monthly visits from a social worker. There is seemingly little attempt on behalf of the government to seek to address the root cause of this, through either raising awareness of any potential detriment to foster children, or attempting to dispel the stigma attached to being a foster child.

The lack of human and financial resources manifests in a number of different problems. The lack of manpower results both in delays in foster families being assessed (and consequently children being placed); and in the statutory follow up potentially not occurring. Long delays in processing foster parent applications, no doubt contributes to the suspected practice of couples claiming a found child as their own, and thereby circumventing the assessment process, and the adoption ban. Lastly, training is needed for social welfare workers. It is concerning that there is a lack of uniformity in the criteria and documentary evidence required from proposed foster parents, and that some workers rely on criteria which is not in the legislation and appears wholly value based (such as proof of infertility).

**ADOPTION PROHIBITION**

Adoption is not legally permitted in Egypt, and it is explicit within Egyptian legislation that the placements discussed in the preceding section are not to be considered adoption<sup>190</sup>. Whilst the US Department of State on their website indicates that adoption may be possible, it is not clear under which law this adoption is possible, and in fact it may be that the website is referring to the 'alternative families' discussed in this article<sup>191</sup> given that it refers to 'fostering' in the text, and notes that the laws regarding adoption are 'unclear and may vary'. It is additionally noted that as recently as 2009, 2009 three American/Egyptian Christian couples were prosecuted for seeking to adopt<sup>192</sup>. ISS is informed that placements akin to adoption may be made through Catholic or Christian Institutions, or persons may commit fraud to have a child registered as their own, rather than as a *makfoul* child. However, none of these actions are supported by law and are likely against international laws<sup>193</sup>. Accordingly, it is ISS/IRC' view that adoption is not possible under Egyptian law, even for non-Muslim children or prospective adoptive parents.

## THE ISLAMIC REPUBLIC OF IRAN

### GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE

#### Legal and policy framework

The Iranian parliament ratified the CRC on 13 July 1994. Upon ratification, Iran entered the following reservation – “The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect<sup>194</sup>.”

Iran has not ratified the 1993 or 1996 Hague Conventions.

Civil Code (1928)<sup>195</sup>.

The Act on Protection of Children and Adolescents Without Caregiver (*bi sarparasf*) or without Effective Caregiver (*bad-sarparasf*) (2013) (“CPA (2013)”) <sup>196</sup> is the most recent legislation in Iran directly addressing guardianship and regulates the placement of children who are without a caregiver in a new family setting<sup>197</sup>.

Supplemental legislation addresses the issue of children without parental care, and acknowledge that such children will need extra care and legal protection. This includes the Act on the Protection of the Family (“FPA 2013”).

Supported by UNICEF technical assistance, State Welfare Organisation (SWO) national protocols are being developed (Dec 2019) to provide comprehensive care and support to children in nurseries, residential centres and family based foster care. The protocols aim to establish national minimum standards for children in alternative care<sup>198</sup>.

#### Competent authorities

Ministry of Cooperative, Labour and Social Welfare (MoCLSW).

State Welfare Organization (SWO): the SWO is responsible for protecting “*children deprived of parental care (...) in residential institutes which are considered to provide for standard life requirements and facilities until the children are ready for independent living*”<sup>199</sup>. Affairs related to the custody of abandoned children and adolescents are handled by the SWO.

Ministry of Justice.

In January 2010, the **National Body on the Convention on the Right of the Child** was established under the Ministry of Justice, and is responsible for monitoring and coordinating the implementation of children’s rights.

The competent court for investigating matters related to the care of abandoned children and adolescents is the court located at the applicant’s domicile.

#### Children’s rights situation

The following challenges are present regarding the rights of children in the country: Non-systematic birth registration; forced marriage and child marriage; difficult access to education; uncertain access to basic services for child refugees; poverty due to difficult economic situation (as a result of economic sanctions and pressure on the country)<sup>200</sup>.

##### Particularly Vulnerable Children in Iran:

- **Ethnic Minority Children in Iran:** The Statistical Centre of Iran reported that approximately 40% of the population of total children in Iran (24 million in 2011) was of Azerbaijani Turkish descent and considered an ethnic minority.
- **Refugees and Migrant Children in Iran:** In 2016, thousands of Afghan refugee children were in Iran, many of whom were born in the country but could not obtain Iranian citizenship. However, Afghan refugee children have access to basic services such as education and health care.
- **In 2017, UNICEF Iran continued its work around the needs and rights of Afghan refugee children.** Iran hosts one of the longest protracted refugee situations in the world. As of 2017 there were approximately 800,000 school-age Afghan children and adolescents (documented and undocumented) in Iran.

**Children's rights situation (continued)**

- **General considerations regarding custody and care for children: *Hizanat* (custody)** a word of Arabic origin, generally means to maintain, supervise and take custody and care of someone. In its legal context, *hizanat* requires parents and other legal custodians to take care of the material and spiritual needs of a child, it is similar to the concept of custody in Western law. In Western law, however, custody generally includes not only control and protection of the physical and psychological affairs of a child but also control and protection of a child's assets and administration of the child's financial affairs. In Iranian law the protection of a child's assets and properties is dealt with under the concept of *wilayat* and the protection of the child as an individual is addressed in the separate institution of *hizanat*. When a father and mother live together, the responsibility of *hizanat* is imposed upon both of them. Under Iranian law *Hizanat* of a child is regarded as both a right and a duty of the parents. The responsibility of *hizanat* includes feeding, clothing, and nursing a child, protecting the child's physical and mental health, and familiarising the child with the customs and rules of Iranian society<sup>201</sup>. Also relevant is the concept of *Ghayem* (guardian). This is a person appointed by court to take care of a child or a mentally incapacitated person, including managing his/her financial affairs. A father is able to appoint a *Ghayem* for his children.
- In case of divorce, the parent who is not living with the child has the right to visit his/her child. (See Article 1174, Iranian Civil Code). This provision shall contribute to maintaining child's contact with both parents.

**FAMILY SUPPORT & PREVENTION OF SEPARATION****Access to services (1st and 2nd levels of prevention)****Health access<sup>202</sup>**

In 1979, a Primary Health Care network was established. In rural areas, each village or group of villages contains a Health House, staffed by trained "Behvarz" or community health workers – in total, more than 17,000, or one for every 1,200 inhabitants.

More than 85% of the population in rural and deprived regions have access to primary health care services. In 2017, the infant mortality rate was 13 per 1,000 live births; the under-five mortality rate was 15 per 1,000 live births<sup>203</sup>; and the maternal mortality rate was 16 per 100,000 live births<sup>204</sup>.

Immunisation coverage for children and pregnant women is very extensive. Over 95% of Iran's rural and urban population has access to safe drinking water (routine coverage – 2016); and more than 80% of the population has access to sanitary facilities.

UNICEF Iran supports the Ministry of Health and Medical Education (MOHME) and other relevant partners to enhance and promote the health and social well-being of children, adolescents, and youth including targeting the prevention of risky behaviours and substance use disorders.

**Access to education**

Since the 2011 significant reforms have been made to the Iranian Formal National Education system, guided by the Fundamental Reform Document of Education in Islamic Republic of Iran<sup>205</sup>.

As of 2015, the SWO pays education allowances to the children of the families under its protection scheme to encourage them to continue their education.

**Access to social services**

As of 2015, 24,602 children were living in Iran without an effective caregiver<sup>206</sup>.

The Plan for Honouring Orphans (2015) works to protect and support children without guardians or financial supports. If an individual wishes to volunteer financial support to provide for these children, the individual makes contact with the SWO's officers and registers to care for a child financially.

The Imam Khomeini Relief Foundation identifies and assesses the needs of children who are without guardians or coming from underprivileged families and provides them with necessary services, including monthly financial allowances, and covering the costs of their education, medical treatments and clinical services.

The SWO has focused on strengthening support to the families of street children and children affected by child labour, through financial assistance, such as providing credit loans to such families, including where the child is older than 15 years and seeking a job. The SWO and the State Technical and Vocational Trainings Organization also offers free training courses on professional skills for these children, where they are above 15 years of age and seeking employment.

<b>Gatekeeping (3rd level of prevention)</b>	<p><b>Competent Authority:</b></p> <p>The Civil Code of the Islamic Republic of Iran states that if natural guardian of a child fails to administer the affairs of his ward owing to absence or imprisonment or any other reason, and he has not appointed anyone else to represent him, the court will appoint provisionally an administrator on the proposal of the Public Prosecutor for taking charge of the assets and other affairs of the ward (article 1187, Civil Code). Where the carelessness or immorality (i.e. drug, alcohol, or gambling additions; ethical corruption or prostitution; mental disease, child abuse and or exploitation; repeated assault or excessive battery) of a father or mother under whose custody the child resides, endangers the physical safety or ethical wellbeing of the child, the court may take any appropriate decision on the custody of the child on the request of the child's relatives or guardian or public prosecutor (article 1173, Civil Code).</p> <p>The relevant governmental and judicial authorities when deciding upon cases of children separated from their parents should first seek placement in the child's wider family and if none are competent, then alternatives should be sought for placement of the child.</p>
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## ALTERNATIVE CARE OPTIONS

<b>Informal care</b>	<p>The closest relatives available usually care for the child in an informal, spontaneous, and unregulated basis, with no legal responsibilities on the caregivers.</p> <p>Concerningly, Iranian legislation does not explicitly address or provide for these informal guardianship arrangements. This lack of established mechanism(s) for regulation of such practices, or for supporting informal guardians, may pose a risk to the child's safety or well-being.</p>
<b>Foster care</b>	<p>Affairs related to the custody of abandoned children and adolescents are with the SWO. Generally, parental responsibilities for children in foster care are shared between the State and the foster parents. Fostering is recognised and permitted under Islam (unlike adoption) as an alternative care form that is distinct from <i>kafalah</i>.</p> <p>The CPA (2013), specifically Articles 1, 14, 15, 23, 26, and 31, stipulate that the best interests of the child is the primary consideration for legal authorities when determining a fostering decision. As of 2015, the care of approximately 1,091 children was given to volunteer foster families. The current issue pertaining to these provisions relate to the protection and coverage of this law to non-Iranian children living in Iran. The CPA is unclear as it merely refers to "custody," and does not differentiate between <i>kafalah</i> and foster care. The law also does not explicitly state the procedures for matching nor the competent authority that is responsible for the matching procedure in the context of foster care.</p>
<b>Residential care</b>	<p>The SWO reported that as of 2015, 9,633 children were being kept in 575 boarding centres, 500 of which were governmental and 75 are non-governmental.</p>

## SARPARASTI

<b>General considerations</b>	<p>The Iranian legal system does not use the term <i>kafil</i> or <i>kafalah</i> in relation to the care and protection of children.</p> <p>Instead, the term "<i>sarparasti</i>" is used to denote the alternative care option for children deprived of a family environment in Iran, in a manner that does not violate verses 4 and 5 of the Quran.</p> <p>The term "adoption" is not used by the Iranian legal system and as based on Iranian law, some parental rights cannot be permanently transferred to the alternative family, such as the severing of natural family ties or the transference of inheritance.</p>
<b>Competent authorities</b>	<p>Affairs related to the custody of abandoned children and adolescents are with the SWO. The competent court to investigate the affairs related to the care and keeping of abandoned children and adolescents is the court located within the applicant's domicile. The court determining <i>sarparasti</i> must submit a copy of its judgment to the SWO who is obliged to supervise those in the period of the placement<sup>207</sup>.</p>

<b>Principle of subsidiarity</b>	Iran's national legislation does not specifically address the principle of subsidiarity, which includes necessity and suitability assessments for children deprived of parental care.
<b>Eligible children</b>	<p><b>Abandoned children and adolescents who:</b></p> <ul style="list-style-type: none"> <li>a) have no way to know their father, mother, or paternal grandfather;</li> <li>b) do not have a living father, mother, paternal grandfather, or appointed executor of the will by their natural guardian;</li> <li>c) whose guardianship has been delegated to the SWO by the order of competent authorities and no father, mother, paternal grandfather, or appointed executor of the will by their natural guardian has sought contact with them for 2 years; or</li> <li>d) whose father, mother, paternal grandfather, or appointed executor of the will by their natural guardian is not competent to get custody as per recognition of the competent court, even by appointing a trustee or supervisor.</li> </ul> <p>All children and adolescents under 16 years whose lack of growth or need for supervision is recognised by the court<sup>208</sup>.</p>
<b>Potential <i>sarparast</i><sup>209</sup></b>	<p>All Iranian nationals living in Iran can be granted <i>sarparasti</i> of a child(ren) or adolescent(s) by observing the provisions in the law (as below), and upon the judgment of a competent court. Additionally, Iranian nationals living abroad may also submit their application for taking <i>sarparasti</i> of a child to the SWO through either Iranian embassies or Iran offices of interests in their respective countries of residence.</p> <p><b>Person may submit applications to the SWO if they:</b></p> <ul style="list-style-type: none"> <li>a) a couple who have been married for 5 years and do not have any child born of the marriage, provided at least one of them is over 30 years old;</li> <li>b) a couple who have children provided that at least one of them is over 30 years old; and</li> <li>c) Single women (women without husband or divorcees) if they are at least 30 years old. However, if a forensic organisation finds that a couple are unable to naturally have a child, applicants will be exempted from the 5-year period stipulated in a).</li> </ul> <p><b>Priority of applications:</b></p> <ul style="list-style-type: none"> <li>• Married couples with no child, then unmarried women and girls with no child, and then couples with children. Applicants less than 50 years old have priority over like applicants over that age.</li> <li>• Applicants cannot supervise more than 2 children or adolescents unless they are members of the same family.</li> <li>• Second-degree and third-degree relatives meeting the qualifications may demand custody and, if they meet the qualifications, may be granted <i>sarparasti</i> of the child.</li> </ul>
<b>Evaluation of the potential <i>Sarparast</i><sup>210</sup></b>	<p><b><i>Sarparast</i> applicants should:</b></p> <ul style="list-style-type: none"> <li>a) be determined to do necessary duties and quit forbidden/illegal activities;</li> <li>b) lack effective criminal convictions and observe the Islamic Penal Code;</li> <li>c) have financial ability;</li> <li>d) have capacity;</li> <li>e) have the necessary physical and mental health and practical ability to maintain and train children and adolescents under their care;</li> <li>f) not be addicted to drugs, psychotropic substances and/or alcohol;</li> <li>g) have moral competence;</li> <li>h) not suffer from any contagious diseases or severe illnesses; and</li> <li>i) believe in one of the religions stipulated in the constitution of the Republic of Iran.</li> </ul>
<b>Consents</b>	The CPA (2013) does not explicitly mention the necessity of the child's consent in any form of alternative care proceedings. Concerning custody or divorce and in administrative decisions, when the child's view is only heard through the father or paternal grandfather or another appointed guardian and not from the child directly.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<b>Procedure<sup>211</sup></b>	Applications are submitted to the SWO, who is then required to submit it to the competent court no less than 2 months after the expert's announcement. The court considers the provisions of the law and the SWO's opinion and issues a 6-month trial <i>sarparasti</i> order to the prosecutor, applicant, and SWO.
<b>Decision<sup>212</sup></b>	After the trial period the court will consider the SWO's views and may issue a <i>sarparasti</i> order to the prosecutor, applicant, and SWO. Additionally, an order is subject to the applicant transferring the ownership of some of his or her property or income to the concerned child or adolescent. However, if the court determines the granting of <i>sarparasti</i> without the implementation of this provision is in the best interests of the child, the order will be issued. The order is valid even after the death of the guardian until a new guardian has been appointed. The guardians are obliged to have life insurance in favour of the child in care.
<b>Legal effects<sup>213</sup></b>	<p>Administration of property in possession of the minor under <i>sarparasti</i> is handed over if the child does not have a natural guardian or if the child's natural guardian has not specified any person to administer the child's property and the competent judicial authority has made a decision about the <i>sarparasti</i> of the child.</p> <p>The <i>sarparast</i> duties toward the child or adolescent in terms of maintenance, education, and alimony, are the same as parenting duties towards the children.</p> <p>The issuance of a custodial order does not result in the cessation of any lawful pension paid to or received by the child.</p> <p>In the event of the death of a <i>sarparast</i> who is subject to a retirement pension fund, the child under guardianship is deemed to be the deceased's survivor and will be benefit from the retirement allowance until a new <i>sarparast</i> is appointed.</p> <p>In the event that one <i>sarparast</i> dies, or the couple separates or divorces the court may assign the <i>sarparasti</i> to the care of one of the couple or a third party.</p> <p>Any <i>sarparast</i> shall benefit from the benefits of child support, and/or leave to care for a child under the age of 3 (maternity leave).</p> <p>Following the issuance of a definite order, the order's contents will be notified by the court to the civil registry organisation and the welfare office. The civil registration organisation must provide a new birth certificate with the name of the <i>sarparast</i> or the <i>sarparast</i> couple's family name and the content of the <i>sarparasti</i> order as well as the name of the true parents (if known).</p>
<b>Follow-up and post-<i>sarparasti</i></b>	Pursuant to Article 33 of the CPA, the SWO is obliged to monitor the status of a child placed in the care of a new family.
<b>Revocation</b>	<p><b><u>Sarparasti may be revoked by court order in 3 instances:</u></b></p> <ul style="list-style-type: none"> <li>i) at the request of the sole caregiver or caregivers (<i>sarparast</i>) when the misbehaviour of the child is not tolerable for the caregiver(s);</li> <li>ii) by a contractual agreement between the <i>sarparast</i> and the child once the child reaches the age of majority; and</li> <li>iii) whenever either parent or paternal grandfather (<i>wasi</i>) reclaim the child<sup>214</sup>.</li> </ul>
<b>Costs</b>	The CPA does not explicitly stipulate costs of the transfer of guardianship, including court costs nor who is responsible for the payment of court costs. Ideally, in order to avoid illicit practices, the legislation/policy in place should cover cost issues, including their transparency and supervision.
<b><i>Sarparasti</i> breakdowns</b>	Given the priority under law that rights of custody should lie with the mother, if the father, mother, paternal grandfather, or their appointed executor of the will by their natural guardian come to reclaim the child, the court may issue an order to return the child if this person has the necessary qualifications and does not present with any corruption that may threaten the child. Such claims can occur by appointing a trustee or other legal representative. The court takes into account the opinion of the SWO in any decision in this regard, and will preserve the order should the necessary requirements not be met <sup>215</sup> .

<b>Identity and access to origins</b>	Article 22 of the CPA addresses the legality of the child's identity and states that the civil registration organisation is required to provide a new birth certificate for the child or adolescent with the name of the <i>sarparast</i> or <i>sarparast's</i> family name as well as the name of the biological parents, if known. The civil registration organisation is required to maintain records of the identity and true relation of the child in his/her identification case. Upon reaching the age of 18, the child under <i>sarparasti</i> can apply for the issuance of a new birth certificate with the name of their actual parents, if known <sup>216</sup> .
<b>Cross-border <i>sarparasti</i></b>	The national law of the Islamic Republic of Iran does not recognise intercountry adoption or cross-border <i>kafalah</i> . Only Iranian nationals, whether residing in Iran or abroad, may apply for <i>sarparasti</i> of a child.  Iranians residing overseas may submit custody applications to the SWO through Iranian embassies or the Interests Sections of the Islamic Republic of Iran. The embassies are required to cooperate with the SWO, who is then obliged to process the applicant's request by order of the competent court <sup>217</sup> .
<b>Statistics</b>	The US Department of State reported "adoptions" from Iran to US by year as shown by the following numbers (2018: 1; 2017: 1; 2016: 2; 2015: 4; 2014: 2; 2013: 3) <sup>218</sup> .

**ISS/IRC ANALYSIS: *SARPARASTI***

Due to the Central Juvenile Welfare Office's initiative in 2004 to widen the scope of the CPA (1975), in 2013 the law was amended to its current status. In contrast to it the CPA (1975) which only referred to children without a *sarparast*, the CPA (2013) promulgates two new purposes. First, it proposes to renew the existing rules on the permanent family-type placement of children without a *sarparast*. Second, it promotes the temporary placement of children in foster families when their biological families are unable to care for them properly. An Executive Regulation for the Implementation of the CPA was adopted in 2015 in order to address ambiguities contained in the previously amended CPA (2013). This signifies a positive step towards protecting the rights of Iranian children deprived of parental care. Other positive elements: the seemingly permanent nature of *sarparasti* given the revocation possibilities after the child is an adult via an agreement between the child who became adult and his or her *sarparast*; and the preservation of data related to the child's origins.

However, certain elements and steps of the procedure should be clarified, notably that the law is silent on the evaluation of the child's needs and the attribution of the *sarparast* based on socio-medical-legal assessments. In addition, the legal effects of *sarparasti* (attribution of custody, guardianship, legal representation, etc.) remain somewhat unclear.

**IRAQ****GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE****Legal and policy framework**

CRC ratified in 1994.

**The Iraqi Law on Personal Status of 1959** (*Personal Status Code*) applies to all Muslim Iraqis. However, it is noted that art. 41 of the new Iraqi Constitution of 2005 proclaims the freedom of Iraqis to observe the legal provisions of their confession or rite in matters of personal status. Additionally, a draft law designed for the Shiite community – the *Ja'fari* Personal Status Code (March 2014 – not yet approved by the Parliament or the Government) allows marriage for girls from the age of nine, restores matrimonial guardianship, a duty of obedience on a wife, and favours fathers in custody arrangements<sup>219</sup>.

**The custody** of children is covered by art. 57 of the Personal Status Code. There is no distinction between boys and girls. Until the child is 10 years old, the mother has priority; between 10 and 15 the custody devolves to the father unless it is given to the mother for the child's best interest; between 15 and 18 the child may choose his/her custodian-mother, father, or a relative. Mothers have a preferential right concerning custody during the marriage and after its dissolution, unless it would be detrimental to the child. Where priority is given to the mother, but it is determined that it would not be in the child's best interests to grant her custody, the father is assessed and only if he is found to be unsuitable, will a third person chosen by the Court. In the absence of a third person, the child will be placed in a children's home run by the State. The remarriage of the divorced mother no longer means the loss of the custody.

<b>Legal and policy framework (continued)</b>	<p><b>The Juvenile Welfare Act No. 76 (1983)</b>, covers issues, <i>inter alia</i>, on the placement of a child in the care of persons under '<i>damm</i>' (see below for more details).</p> <p><b>The National Child Protection Policy</b> (approved by the Iraqi Government but not yet by the Kurdistan Region Government) and <b>Child Rights Laws</b> (this law is still a draft, UNICEF and MOLSA are still working on it). The National Child Protection Policy was finalised in December 2017. It was developed with UN input, and it focusses on preventing recruitment and use and ensuring the release of children<sup>220</sup>. UNICEF provide financial and technical support to the Kurdistan Region Government for the National Child Protection Policy.</p> <p><b>Draft Law on Children's Rights</b><sup>221</sup>.</p> <p>In 2013, the Ministry of Labour and Social Affairs (MOLSA) submitted to the Consultative Committee of the State a <b>draft law on the Protection on Children</b><sup>222</sup>.</p>
<b>Competent authorities</b>	Ministry of Labour and Social Affairs (MOLSA): <a href="http://www.molsa.gov.iq/">http://www.molsa.gov.iq/</a>
<b>Conflict situation impacting children's rights</b>	<p>The population amounts to 34,769,000: 15,752,000 children under 18, and 4,909,000 children under 5. In 2014, there was an estimated 4.5 million orphaned or abandoned children, noting that as not all orphans are registered as such this number may not be accurate<sup>223</sup>.</p> <p>In 2017, UNICEF estimated that more than 1 million people were newly displaced. As a result, the number of children separated from caregivers increased. Nonetheless, between October and December 2017, the internally displaced population in Iraq decreased from 3.2 million to 2.6 million individuals, with rates of return increasing as security improve – in the same period, the 'returnee' population increased from 2.2 million to 3.2 million<sup>224</sup>. As of August 2019, over 1.55 million Iraqis and December 2018, over 900,000 children remained internally displaced.</p> <p>In 2017 the Syrian refugee population was approximately 246,000, of which 43 per cent were children under 18 years old<sup>225</sup>.</p> <p>UNICEF reports that due to insecurity and a lack of appropriate services and partners in affected areas, certain grave child rights violations remain significantly under reported, particularly the recruitment and use of children by armed forces and group, and sexual violence. Notably, the Islamic State of Iraq and the Levant (ISIL) and affiliated organisations reportedly recruit and use children, kill and maim children, and have been known to attack schools and hospitals in Iraq<sup>226</sup>.</p> <p>The legal minimum age of work in Iraq is 15 years but enforcement the relevant law and other labour standards which would protect children are extremely weak or non-existent. According to the latest data from UNICEF's MICS 6 (2018), 7.3% of children 5 – 14 were engaged in child labour and 5.9% were involved in the worst forms of child labour.</p> <p>The legal minimum age for marriage is 18 years or 15 with the permission of the parent and approval of a judge. According to MICS 6, 27.9% of women 20 – 24 were married before 18 years and 7.9% of the same group were married before 15 years.</p>

## FAMILY SUPPORT & PREVENTION OF SEPARATION

<b>Access to services (1st and 2nd levels of prevention)</b>	<p><b>Targeted support to migrant or refugee families and children:</b></p> <ul style="list-style-type: none"> <li>• Child protection services such as legal assistance, family tracing and reunification, were accessed by 10,967 internally displaced and refugee children.</li> <li>• UNICEF Iraq built 646 community-based structures where 4,709 adults were trained on child protection topics in 2018.</li> <li>• Psychological support was given to 180,331 internally displaced refugee children.</li> </ul>
<b>Gatekeeping (3rd level of prevention)</b>	The Juvenile Care Act refers to prevention. However, no prevention programs or actions have been able to be identified.

## ALTERNATIVE CARE OPTIONS

<b>General considerations</b>	<p>The Iraqi law provides for two forms of alternative care: residential care and <i>damm</i>. The latter's literal meaning can be translated to: "accretion" or "attachment".</p> <p>In English, the term "<i>damm</i>" is commonly translated into 'foster care', as was the case in documentation provided to the CRC Committee for its periodic report on the implementation of the CRC in Iraq<sup>227</sup>.</p>
<b>Foster care</b>	<p>According to estimates provided by Iraq in its reply to the CRC Committee, there were 23 children in foster care in 2011, 15 in 2012 and 15 in 2013<sup>228</sup>. It is unclear whether these number relate to <i>damm</i> placements (as described below), or some other form of Foster care .</p> <p>It is understood that these numbers might indeed concern foster care placements. Foster care is very new in Iraq and was piloted in a small scale project with UNICEF support in the Kurdistan Region of Iraq<sup>229</sup>. However, foster care is not a measure which exists in the rest of the country, and it is understood that most children without parental care stay in "orphanages", State homes, or home for the homeless.</p>
<b>Residential care</b>	<p>As of 2013, it was reported (in an independent report) that there were 5 million Iraqi orphans, and 4.5 million in 2014 (according to official government statistics). About 500,000 of these children are said to live on the streets without family, or specialised institutions to care for them. According to the Sponsor Iraqi Children Foundation, it is understood that approximately 1 in 6 Iraqi children under the age of 18 is an orphan. Many orphans beg on the streets or sell water to help poor widowed mothers or siblings, and are very vulnerable to arrest for begging as well as to recruitment or abuse by criminals, extremists and human traffickers<sup>230</sup>.</p> <p>According to the UNAMI Human Rights office and OHCHR in Baghdad, in the Kurdistan Region (KRG), MoLSA accommodates children who have lost their families in government run orphanages. Additionally, children whose families are incapable of providing adequate care for them for economic or social reasons and placed in foster homes, with regular allowances paid by MoLSA (if they cannot be reunited with their families). According to MoLSA, the number of children hosted in orphanages in the three governorates of the KRG, as recorded at the end of 2012, was of 198 (117 boys and 81 girls). For that same period, the number of children reunited with their families or placed in foster homes (foster families) was of 292 boys and 312 girls<sup>231</sup>.</p> <p>State homes care for infants, youngsters and juveniles suffering deprivation, family break-up, or loss of one or both parents. State homes are divided into three categories on the basis of age group:</p> <p><b>State homes for infants:</b> concerned with the welfare of orphans from birth to the age of five;</p> <p><b>State homes for youngsters:</b> concerned with the welfare of orphans between the ages of 6 and 12;</p> <p><b>Home for the Homeless:</b> under the authority of the Baghdad Governorate (previously called "State homes for juveniles" and under MoLSA): concerned with the welfare of juveniles between the ages of 12 and 18; these institutions are separated into homes for boys and those for girls (except for infant homes, which are mixed). A home for boys is called <i>Dar al-baraim</i> ["house of buds"] and one for girls is called <i>Dar al-zuhour</i> ["house of blossoms"]. According to a local contact, boys can stay in these homes until they reach the age of 18 and for girls until they reach the age of 22.</p>
<b><u>DAMM</u></b> <sup>232</sup>	
<b>Applicable law</b>	Regulated by articles 39 – 46 of the Juvenile Welfare Act of 1983.
<b>Competent authorities</b>	<b>Juvenile Courts:</b> According to the Juvenile Welfare Act of 1983 (arts. 3(5) and 43 (a)), the Court can grant all rights and duties of parental care to the child's carers.
<b>Eligible children</b>	<p>According to article 39 of the Juvenile Welfare Act<sup>233</sup> "young children" are eligible for <i>damm</i>. The term "young child" is defined as a child being aged 9 years or below (see article 3).</p> <p>Article 39 mentions also a child being orphaned of both parents and not of just one parent.</p> <p>Further, article 45 states that orphanhood, Iraqi nationality and Muslim faith are presumed for children who have been found or abandoned and whose care is assumed by the State, until contrary proof is brought forward. For this category of children, article 44 further declares Juvenile Courts as competent authorities by referring to the Personal Status Code.</p>

<b>Eligibility criteria for potential parents</b> <sup>234</sup>	<p>If they wish to care for a young orphan or child of unknown parentage, a married Iraqi couple may submit a joint application to the Juvenile Court.</p> <p>Both candidates must be psychologically capable to care for and raise a child.</p> <p>Both candidates must demonstrate good behaviour.</p> <p>Both candidates should be free of any infectious or communicable diseases.</p> <p>Both candidates should have the necessary financial capacity to care for a child.</p> <p>Both candidates must be of good faith (presumed), and should not seek to divert a <i>damm</i> placement from its intended purpose by prioritising their interests over those of the child.</p>
<b>Evaluation of candidates</b>	<p>According to a 2008 research that looked at care options in Iraqi legislations published in 2008<sup>235</sup>: The candidates' good behaviour is evaluated based on an assessment undertaken by the Personality Study Office (attached to the Civil Court) or their employer or co-workers or various other testimonies. A medical certificate must be drawn up by an official doctor, attesting that the candidates meet the necessary health requirements, and their financial capacity is assessed by the juvenile court through the consideration of the candidate's the sources of income and any other relevant documentation.</p> <p>According to a local contact, the <i>damm</i> decision is at the discretion of the judge of the Court of Cassation, taking into consideration the report the court received from the Personality Study Office.</p>
<b>Consents</b>	<p>The law does not specify any details.</p>
<b>Procedure</b>	<p>An application is made to the Juvenile Court by the married couple.</p> <p>The Juvenile Court is empowered to approve the application, on a provisional basis, for a trial period of six months. This may be extended for a further six months, during which time the court shall send a social worker to the home at least once a month to verify their desire to foster and care for the child. A detailed report in this regard shall be submitted to the Juvenile Court.</p>
<b>Probatory period &amp; decision</b>	<p>According to article 40, the trial period of 6 months, may be extended for a further six months, during which time the court shall send a social worker to the home at least once a month to verify their desire to foster and care for the child. A detailed report in this regard shall be submitted to the Juvenile Court.</p> <p>In the event that the court determines a failure or misconduct on behalf of the caregivers has occurred during the probationary period, or finds that the child's interests will not be respected should they remain with the candidates, the court may choose to place the child in a State institution (article 41).</p> <p>A <i>damm</i> decision will be pronounced should the court find that the interests of the child are preserved by caregivers (article 42).</p> <p>Article 46 of the Juvenile Welfare Act of 1983 stipulates that the Juvenile Court must send a copy of its ruling on <i>damm</i>, or on recognition of parentage, to the General Directorate of Nationality and Civil Status for entry in the records</p>
<b>Legal effects</b>	<p><b>Parental responsibility:</b> The parents have full parental authority according to the Juvenile Welfare Act of 1983, including personal care, educational rights, choice of schooling and the right to migrate with the child abroad.</p> <p><b>Maintenance obligation:</b> Article 43 of the Juvenile Welfare Act of 1983 stipulates the following: 1. To maintain a girl until she marries or enters employment and to maintain a boy until he reaches the stage where his peers are earning their living, unless he is a student or unable to earn a living due to physical defect or mental infirmity, in which case he shall continue to be maintained until the he obtains at least a preparatory certificate or reaches the age at which he is able to obtain it, or until he becomes capable of earning; 2. To bequeath the child a legacy equivalent to the lowest share inherited by any other heir but not exceeding one third of the inheritance; this is an obligation which must be honoured.</p> <p><b>Inheritance rights:</b> Articles 41, 42 and 43 of the Act set forth the conditions for the care of children and protection of their interests. Under the terms of article 43, paragraph 2, of the Act, in the event of the death of one or both parents, the child must be bequeathed a legacy equivalent to the lowest share inherited by any other heir but not exceeding one third of the inheritance. This obligation must be honoured and cannot be circumvented.</p> <p>An <b>acknowledgment of filiation</b> seems to be possible under the Iraqi Law on Personal Status of 1959. It is understood that the combination of the legal effects of the <i>damm</i> and the acknowledgment of filiation gives the child the status of a legitimate child<sup>236</sup>.</p>

**Cross-border  
damm**

There is no information on cross-border placements from Iraq. However, despite referring to an information sheet which asks that Adoption of Children from Countries in which Islamic Shari'a Law is observed, the US Central Adoption authority<sup>237</sup> provides concrete advice on how to proceed in order to adopt a child from Iraq: ***"Please consult a local attorney or adoption agency familiar with laws and regulations regarding intercountry adoption in Iraq. The Government of Iraq, through its Ministry of Labor and Social Affairs (MOLSA), may accord guardianship of an Iraqi child of the Islamic faith to a member of the child's extended family or a family friend, provided that the guardian is an Iraqi national of the Islamic faith and the child will be cared for in Iraq. A family cannot obtain guardianship over an Iraqi child who is not of the Islamic faith, regardless of the religious faith of the family. Foreign citizens cannot be guardians. Questions regarding eligibility for guardianship may be directed to MOLSA." "US citizens interested in adopting children from Iraq should contact the adoption authority of Iraq to inquire about applicable laws and procedures. US citizen prospective adoptive parents living in Iraq who would like to adopt a child from the United States or from a third country should also contact Iraq's adoption authority."***

A 2015 judgment of the first court in Stuttgart, considered the question of **recognising a *damm* decision abroad**<sup>238</sup>, and recognised the possibility of an intercountry adoption following this Iraqi decision. The German Court held that the effects of Iraqi *damm* were equivalent to at least a "strong" adoption (equivalent to full adoption under German law). In its decision, the Court highlighted that the Iraqi authority had been aware that the child was to be brought permanently to Germany. The applicants for the recognition of the *damm* were Iraqi national spouses, resident in Germany, and had complied with all the requirements set out by the Iraqi law.

**ISS/IRC ANALYSIS: DAMM**

In 2015<sup>39</sup>, the CRC Committee shared its general concerns that negatively affect children, such as polygamy and repudiation, negative gender stereotypes persist concerning the tasks and roles of women and girls, including discrimination in obtaining official documents and accessing government aid and the fact that mothers are considered as the "physical" but not the legal custodian of their children and women are granted custody only until the child is 10 years of age, with rare exceptions.

Therefore the Committee urged *"to ensure that all provisions that discriminate against women (...) are repealed without delay; (...), to ensure that mothers and fathers share the legal responsibility for their children equally (...); to eliminate all forms of discrimination against single women, including widows and divorced women, and provide them and their children with increased protection. The Committee further urges the State party to provide female heads of household with sufficient financial support, and ensure their access to health care and social security."*

Considering the number of vulnerable children in Iraq, the country's efforts to prevent the placement of children in institutions by providing support structures to vulnerable families is to be encouraged.

*Damm* seems terminate once the boys start working and the girls get married. Considering the high number of children working and the very young age of marriage for girls<sup>240</sup>, one can assume that concerned children are at high risk of being without any protection at a very young age.

In its 2015 Concluding Observations, the CRC Committee had particularly stressed concern *"about the large number of children who have lost their families during the many years of conflict, and about the lack of measures and strategies to provide these children with protection and alternative care, in particular foster care."* Therefore, the Committee recommend that Iraq, *"strengthen its alternative care programme, particularly foster care, and ensure that adequate human, technical and financial resources are allocated to alternative care centres and relevant child protection services, in order to facilitate the rehabilitation and social reintegration of children in their care to the greatest extent possible."*

In the long-term, it is considered that the legal and policy framework would need to equally address the following elements: data collection and preservation mechanisms of children placed in *damm*; follow-up and post-*damm* issues; sanctions and complaint mechanisms in case of rights violations; the issue of costs and intermediaries involved in *damm*; and questions related to the children's identity and access to origins.

**ADOPTION PROHIBITION**

Under the laws of Iraq, adoption of Iraqi children is not permitted. As seen above, some academics and courts argue that the institution of *damm* combined with the acknowledgment of filiation likely leads to the same effects as an adoption.

JORDAN<sup>241</sup>**GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE****Legal and policy framework<sup>242</sup>**

**Royal endorsement, political prioritisation, cultural and religious values giving momentum to the CRC:** As a member of the Arab League, Jordan was active in regional initiatives focusing on education and social policies for children; signature of the Charter of the Rights of the Arab Child at its enactment in 1984.

**Ratification of CRC in 1991** as main driving force for prioritisation of care and welfare of children as a national duty. **Significant shift in the underlying philosophy** of initiatives and legislations – from needs-based to rights-based culture.

**Adoption of legislations compliant with CRC:** e.g. legal extension of maximum age of the child from 10 to 18 years, amendments in several areas (penal, juvenile, personal status and nationality laws, laws about disability, child protection, health and culture). Attempts to further close gaps in legislation are ongoing.

Endorsement of **Law 50/2006 formally adopting the CRC.**

**2004 Draft of Jordanian Child Rights Bill (CRB)** is enforced as temporary Law<sup>243</sup>. The revision for permanent adoption is currently in process as of publication of report.

**Juvenile Law No. 32 adopted in 2014** focused largely on establishing a restorative justice that is child friendly and in compliance with the CRC.

**Competent authorities**

**Creation of specialised organisations:** The National Council for Family Affairs (NCFA) is a semi-governmental organisation that was created by a Royal Decree, the Family Protection Directorate (FPD) is the Public Security unit that specialises in child protection and domestic violence, and the Child Safety Program (CSP) at the Jordan River Foundation (a leading NGO). The Ministry of Social Development (MoSD) is the leading governmental agency that is responsible for child welfare and juvenile justice systems.

**FAMILY SUPPORT & PREVENTION OF SEPARATION<sup>244</sup>****Access to services (1st and 2nd levels of prevention)**

Children are unlikely to enter into care due to poverty alone. Families, divorced and widowed women in financial difficulties can receive some financial support from the government provided they meet qualifying criteria (such as no source of income). This is in addition to health services. Some non-governmental organisations provide psychosocial support, financial support and food parcels, in addition to educational support.

Families with identified risk factors are referred to the FPD for follow-up. The FPD coordinates with MoSD and other partner non-governmental organisations for psychosocial support.

**Gatekeeping (3rd level of prevention)**

Children with established abuse are removed from families and placed in residential care facilities. Those aged 12 and under are placed in a governmental residential care facility. The children and their families receive psychosocial support from JRF (non-governmental organisation) where there are plans for family reunification and it is safe to do so. Other residential care facilities provide psychosocial services. All plans for reunification are coordinated with the FPD and the Juvenile Court.

## ALTERNATIVE CARE OPTIONS

### General considerations

According to the 2014 Juvenile Law<sup>245</sup>, there are **five groups of children legally considered in need of care and protection**<sup>246</sup>: children in need of protection (abuse, neglect, domestic violence); abandoned children; children with known mothers but unknown fathers; children whose fathers refuse to admit paternity; and orphaned children<sup>247</sup>. **The three forms of alternative care in Jordan are foster care, *Ihtidan* and residential care**<sup>248</sup>.

### Informal care

Informal care tends to be limited to the care of children by their extended families. As opposed to children enrolled in the *Ihtidan* programme whose families are unknown, children in informal care come from known families where one or both parents are deceased or due to dysfunctional family dynamics. Orphaned children are largely cared for informally by extended family.

### Foster care<sup>249</sup>

Since its establishment in 2011, a total of 250 children have been enrolled in the foster-care program and 1,168 children have been placed with families in the *Ihtidan* program (established in 1967) (MoSD, 2020)<sup>250</sup>. Up to 2011, the only form of family-based care was the *Ihtidan* program.

### Residential care

**Predominant response to children in need of care:** Children are typically placed in one of the 32 residential care homes that serve children to age 18. This care option takes place in a context where the professionalisation of social work (including the provision of psychosocial support) is very much at a nascent stage.

**Statistics:** Estimations of placed children are around 800 to 1,200. According to the Ministry of Social Development (MoSD)<sup>251</sup>, 821 children were in residential care in the last quarter of 2016. The largest group (42.8% or 352 children) were categorised as “father unknown”; 39.5% (325 children) had been admitted due to child protection concerns and broken homes; 14.49% (119 children) are orphans; and 3.04% (25 children) had been abandoned (MoSD, 2017).

**Supervision:** The MoSD is responsible for licensing. Of the 32 homes, 5 are government-run and remaining facilities are run by non-governmental organisations (NGOs). Together with the Juvenile Court, MoSD is responsible for monitoring.

**Challenges<sup>252</sup>:** The professionalisation of social work (including the provision of psychosocial support for children and families) is at a nascent stage; successive placements due to age and gender segregation; lack of adequate psychosocial services, care plans, education or vocational support despite high government, NGO and home staff investment in care facilities.

**Efforts to improve the care system are ongoing:** Capacity-building and initiatives to develop standards of minimum care; increasing awareness of the struggles of care leavers<sup>253</sup>; limited opportunities for a family-based care model.

## IHTIDAN<sup>254</sup>

### General considerations

*Ihtidan* is the term used in Jordan for a family-type care option. *Ihtidan* is the program that is often referred to as *kafalah* in literature regarding forms of alternative care in the Muslim and Arab world. *Ihtidan* is meant to be a permanent option for children, unlike foster care that may be either a short or long-term solution. The term ‘*Ihtidan*’ in Arabic translates to ‘to care for’.

For the Muslim community<sup>255</sup>, the *Ihtidan* programme – in principle – stems from Islamic teachings but it is not regulated by Sharia Law per se – however its guidelines are created so as not to contradict Sharia law. It is regulated by the Juvenile Court and not the Sharia Court.

Both foster care and *Ihtidan* rely on Article 37 a.3 of the new Juvenile Law of 2014 to place a child. Article 37 does not specify which program should be selected, allowing the child’s legally-required **government-licensed social worker** to nominate the placing of any child considered in need of care and protection “*in the care of a family or person deemed suitable for providing the necessary care*”. The actual nomination of the most suitable programme depends on the eligibility criteria of children and families in the guidelines for each of the two programmes.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<b>Competent authorities</b>	<p>The administrative and judicial authorities with a direct role in implementing <i>Ihtidan</i>:</p> <p><b>MoSD</b> is the main governmental body that is responsible for child welfare, including the administration and monitoring of both the <i>Ihtidan</i> and foster care programmes as well as outsourcing psychosocial services for foster families.</p> <p><b>Civil Status Bureau</b> (for birth certificates and the selection of second and third names).</p> <p><b>Judicial Council</b> (to formalise placement via order). Procedures are carried out through departments of these governmental bodies, for example residential care facility housing of infants eligible for <i>Ihtidan</i> is a MoSD institution. Other involved MoSD institutions include the local directorates in the governorates of the prospective <i>Ihtidan</i> parents place of residence, who process applications.</p>
<b>Eligible children<sup>256</sup></b>	<p>Abandoned children and children with unknown fathers. Due to its eligibility criteria, only a minority of children in need of care and protection could be placed with families. Children are declared abandoned based on the circumstances with which they were found, and without any evidence of identifying birth parents in the first six months of finding them. Both abandoned children and children with unknown fathers are assumed to be Muslim since the country is presumed Muslim according to its constitution<sup>257</sup>.</p>
<b>Prospective <i>Ihtidan</i> parents</b>	<p>The <i>Ihtidan</i> guidelines require:</p> <p>Applicants must be a couple and must have been married for a minimum of 5 years;</p> <p>Both must be Muslim, or have proof of having converted to Islam a minimum of three years ago, and have a good relationship;</p> <p>The couple must be infertile;</p> <p>The wife should not be less than 30 and no more than 50 years old, while the husband must be no less than 35 and no more than 55;</p> <p>The applicants must live in the same household;</p> <p>The applicants must have a minimum monthly income of 500 Jordanian dinars;</p> <p>The minimum age of the child intended for <i>Ihtidan</i> is five years old for <i>Ihtidan</i> mothers who are older than 45 and husbands who are older than 50;</p> <p>The applicants must have a clean legal record;</p> <p>The applicants must have the physical and emotional ability to provide the child with comprehensive care (developmental, physical, emotional, economic and social), and must sign a pledge promising that they will do so;</p> <p>The applicants must adhere to appropriate Islamic jurisprudence with regard to the children in their care<sup>258</sup>.</p>
<b>Evaluation potential <i>Ihtidan</i> parents</b>	<p>If the eligibility criteria is met, a home visit is conducted to assess the applicant parents' suitability. Once this part of the process is complete, the application file is reviewed by the <b><i>Ihtidan</i> Committee</b>. Membership of this Committee is decided by the MoSD and includes representatives from the relevant MoSD directorates, including the Child and Family Directorate and the Legal Directorate, and any other professional whose presence is deemed necessary. These professionals could include mental health professionals and other experts from the field.</p>
<b>Consents</b>	<p>There is no consent for birth parents or children enrolled in the <i>Ihtidan</i> programme. The children are generally infants when enrolled and their parents are unknown. However, should birth parents come forward, they have the right to request family reunification.</p>
<b>Procedure</b>	<p><b>1) Application:</b> the procedure leading to the placement order before the Juvenile Court entails a number of steps, beginning with the couple's application to the local MoSD directorate in their habitual residence. Representatives of the Child and Family Unit in the relevant MoSD directorate review the application, primarily to ensure that the couple meets the eligibility criteria.</p> <p><b>2) Home visit</b> (see evaluation above)</p> <p><b>3) Matching</b> is typically decided based on preferences of families applying for <i>Ihtidan</i>. Factors considered include the gender, age and ethnicity of the child.</p>

<b>Decision</b>	Once a child and a couple have been matched <sup>259</sup> , a court date is set. A Juvenile Judge reviews the file and has a final say on the government social worker's recommendation that the child is placed with the family via the <i>Ihtidan</i> option. Unless the judge identifies an unfavourable issue, they tend to grant the application
<b>Legal effects</b>	<p><i>Ihtidan</i> is intended to be a permanent care option. Care through <i>Ihtidan</i> is legally limited to placement only rather than acknowledged guardianship. <i>Ihtidan</i> can have several effects.</p> <p><b>No inheritance rights:</b> Sharia limits automatic testamentary disposition to birth children and spouses. However, Sharia law allows children as third-party individuals to receive donations and assets from their <i>Ihtidan</i> parents.</p> <p><b>No patronymic rights:</b> Sharia law does not allow <i>Ihtidan</i> parents to give their surname to the child, nor are they allowed to add the child to their family book<sup>260</sup>. <i>Ihtidan</i> children have their own family book, and are given a family name by the Civil Status Bureau (adding only the <i>Ihtidan</i> parents' first names to the child's birth certificates and relevant formal identification documents). To avoid stigma due to having different family names, families requested that the grandfathers' names are added to the child's identification documents<sup>261</sup>.</p> <p><b>Limited social rights:</b> Not being included in the <i>Ihtidan</i> family book prevents the child accessing essential basic rights such as being enrolled on the <i>Ihtidan</i> father's health insurance scheme and receiving social security benefits (automatic right of the birth children). <i>Ihtidan</i> parents struggle to apply normal parental rights and practices with their <i>Ihtidan</i> children, such as opening and managing a bank account, and must often contend with complex travel regulations. The charge for transferring assets to <i>Ihtidan</i> children, 9% of the asset value, is too high for most families<sup>262</sup>. Additionally, the decision to reclaim assets transferred to <i>Ihtidan</i> children is irreversible.</p> <p><b>In their call for improved rights and regulations, <i>Ihtidan</i> parents expressed respect for Sharia law. However, they also shared their grievances as a result of the stigma that they and their children face<sup>263</sup>.</b></p>
<b>Follow-up and post-<i>Ihtidan</i></b>	Judges are usually inclined to approve the recommendation with a request for the renewal of the placement order after one year, subject to follow-up reports by a designated government social worker. Timing of the placement's renewal can vary depending on the judge's opinion (ranging from 5 to fifteen years). According to the <i>Ihtidan</i> Guidelines the government social workers is required to conduct a minimum of one visit annually.
<b>Revocation</b>	Revoking approval of families and removal of children in the <i>Ihtidan</i> programme takes place if the child is deemed to be in unfit circumstances, or is found to be abused. Placements may be revoked also if children's parents come forward.
<b>Sanctions</b>	Legal sanctions are imposed if the child is found to be abused, based on the penal code.
<b>Costs</b>	Procedures for both <i>Ihtidan</i> and also foster care are free of charge for families. However, costs to run the foster care programme are incurred by MoSD as they outsource psychosocial support from a partner NGO.
<b>Breakdowns</b>	Breakdowns can occur if the child is abused, or if the family is no longer able to care for a child. The latter has been reported to occur when disabilities or health challenges are identified post- <i>Ihtidan</i> that are beyond the capacities of the families. This has also been reported to occur when some children became teenagers and families are unable to cope with psychosocial challenges.
<b>Identity and access to origins</b>	Families are required to help children understand that they are not a birth family. Based on internal policies and practice, once children are adults, they have the right to review their personal files. Guidelines were developed by the NCF and MoSD to help <i>Ihtidan</i> parents inform children about their background <sup>264</sup> .
<b>Cross-border <i>Ihtidan</i></b>	According to the <i>Ihtidan</i> Guidelines, cross-border <i>Ihtidan</i> placements are allowed. However, the MoSD halted the practice in 2013. Previously, the same assessment procedure was conducted via the Jordanian embassies in the applicants country of habitual residence. The Juvenile Court received the file and formalised the placement, while the MoSD supported the <i>Ihtidan</i> family with additional procedures required by their country of residence.

<b>Cross-border <i>Ihtidan</i> (continued)</b>	<p>Children were followed up via the relevant embassy, and the families travelled to Jordan with the child to renew the placement court order.</p> <p>Cross-border <i>Ihtidan</i> was halted as a result of the lack of mechanisms to legally bind families to remain in contact with MoSD and the Jordanian Embassy in their country of habitual residence. As a result, the ability to follow up on <i>Ihtidan</i> children abroad was not ensured as Jordan is not a signatory of international conventions, such as the 1996 Hague Convention, which would ensure sufficient safeguards.</p>
<b>Principle of subsidiarity</b>	<p>There is no reference as to the subsidiary nature of a cross-border <i>Ihtidan</i> placement.</p>

### ISS/IRC ANALYSIS: FOSTER CARE & *IHTIDAN*

The government is to be commended for its achievements in its deinstitutionalisation strategy, for instance, strengthening family-based care options in terms of applicable procedures and regulatory frameworks.

**In addition, certain positive elements can be identified for family-based care options in Jordan:**

#### Regarding foster care:

- Allowance for single women to foster children;
- Obligation for foster parents to cooperate with the child's birth family;
- Priority given to the extended family of the child, provided they meet the eligibility criteria;
- Ongoing advocacy efforts following evidence-based studies on the cost-investment and efficiency of foster care in Jordan (not yet published) towards the increased financial support by the MoSD to foster care families.

#### Regarding *Ihtidan*:

- Suitability assessments of *Ihtidan* parents via home studies;
- Required follow-up by the Juvenile Court;
- Legal obligation for parents to inform children about their background;
- Suspension of cross-border *Ihtidan* as a result of lacking legal possibilities to bind families to remain in contact, with MoSD and the Jordanian embassy in their country of habitual residence.

**However, important aspects need still to be tackled in the Jordanian system:**

**Prevention:** Enhanced efforts are needed to tackle the root causes of relinquishment and separation. There is a specific need for the development of mechanisms to prevent risks of victimising unwed pregnant women in the name of 'honour', as well as preventing the separation of children and birth mothers where possible and safe. It is imperative to develop mechanisms to hold biological fathers responsible for their children. Currently paternity can only be legally established with the father's consent.

**Concerning children placed in the *Ihtidan* program,** the many short and long-term developmental and psychosocial disadvantages to children cannot be underestimated, especially in light of prevailing challenges of the alternative care system (e.g. nascent professionalisation of social work; lack of specialised skills and minimum care standards; social stigma that perpetuates the children's marginalisation as embodiments of immorality, labelling them "children of sin" and "foundlings").

#### Procedural challenges to be addressed:

- The *Ihtidan* guidelines limit eligible parents to Muslim couples only<sup>265</sup>. Christian minorities are excluded from enrolling in the program. Jordan should reconsider its policy that automatically designates children of unknown parentage as Muslim<sup>266</sup>, and it should certainly eliminate the article in the *Ihtidan* Guidelines that states that not only should both *Ihtidan* parents be Muslim, but also that they should be Muslim for a minimum of three years (Article 4.2)<sup>267</sup>.
- **Absence of psychosocial evaluation**, including assessment of their knowledge about child development, parenting skills, coping with potential difficulties, the quality of wider family support. The evaluation should not be limited to the presence of eligibility criteria.
- **Lack of preparation** of *Ihtidan* parents and children to ensure adequate transition of the child into the family and more successful placements. These should be based on existing practices and focus on developing attachment and healthy coping mechanisms for new parents.
- **Inadequate matching process:** the matching is based on the families' wishes rather than the child's needs and interests. Approved applicants can visit the governmental care home and meet eligible children.
- The child's **ambiguous legal status** can be a major challenge for both the child and the family. The *Ihtidan* program requires a bespoke legal and regulatory framework that protects and promotes the children's rights, for instance by adding the child to the parents' family book and/or adding his or her *Ihtidan* grandfathers' names to the child's own family book.
- Policies must be deliberately developed to reduce the **gap between *Ihtidan* children and birth children**, including access to health insurance and social security benefits, and special measures for gifting and transferring assets.
- **Extra support** should be available to *Ihtidan* parents who are willing to care for children with disabilities, rather than allowing the automatic return of the child should a disability be found.

**ISS/IRC ANALYSIS: FOSTER CARE & *IHTIDAN* (CONTINUED)**

- Lack of **monitoring and follow-up** based on periodic psychosocial and developmental assessment of children as well as assessment of parental needs and experiences. The results should inform individual care plans and inform the development of evidence-based policies.
- **Need for more advocacy** for mixed race and darker children (particularly with the religious communities) and further support mechanisms to encourage families to select and/or maintain placements for children with identified physical and psychosocial difficulties.
- While the *Ihtidan* Guidelines require parents to **inform children about their background**, professional support is needed for concerned children and parents, with the process of age-appropriate disclosure of *Ihtidan*. Special support measures delivered by mental health professionals should be provided<sup>268</sup>.

**Concerning cross-border *Ihtidan* placements**, Jordan should consider allowing such placements for children who have no chance of being placed in national *Ihtidan* placements due to their dark skin, mixed race, disfigurement, disability, etc. The possibility to reinstall care placements abroad with Jordanian expatriates' or foreign citizen could provide opportunities to grow up in a family environment for children who cannot benefit from *Ihtidan* in Jordan. However, the country would need to foresee a framework providing adequate safeguards in terms of the principle of subsidiarity, evaluations, follow-ups and monitoring. In this regard, it is of due importance that Jordan considers ratifying the 1996 Hague Convention which foresees procedural guarantees for such cross-border placement.

**KINGDOM OF MOROCCO****GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE****Legal and policy framework**

**International and regional framework:** CRC ratified in 1990; Optional Protocol to the CRC on the Sale of Children (2000) signed on 22 April 2002 and ratified on 13 September 2002<sup>269</sup>; contracting State to the 1996 Hague Convention<sup>270</sup>.

**New constitution** adopted in 2011.

***Mudawana*** [Family Code] in effect since 2004.

**Law no. 15-01** concerning the placement in care of abandoned children (hereinafter "Law no. 15 – 01").

**2013 Charter of the Judiciary System Reform:** Establishment of an independent body, the High Council of the Judicial Power<sup>271</sup> (early 2017), and introduction of amendments to family law.

**2013 Integrated Public Policy for Child Protection (PPIPEM)** and the **2016 Action Plan** for implementation in 2015 – 2020 (complete overhaul of the child welfare system via five strategic objectives<sup>272</sup> in order to address certain structural causes of the separation of children from their families<sup>273</sup>).

**Provision on parental responsibility:** Childcare is the joint responsibility of the father and mother as long as a marital relationship exists (article 164 of the Family Code).

**Competent authorities and other parties**

Issues related to family and child welfare, as well as disabilities, are primarily the responsibility of the **Ministry of Family, Solidarity, Equality and Social Development (MFSEDS)**.

For issues related to child abandonment, the **Ministry of Justice (MJ)** and the President of the Prosecutor General's Office are the authorities who have jurisdiction and who can intervene at several levels, especially during: the placement of children (at the request of the crown prosecutor); decision making; *kafala*<sup>274</sup> regulation; and monitoring of *makfoul* children. The Moroccan judiciary has been independent since late 2017.

Two ministries are responsible for housing facilities for children who may later be placed in the *kafala* system: **The Ministry of Youth and Sport (MJS)**, and **MFSEDS** (via its "local provider" the *Entraide Nationale*). The MJS is primarily involved in retrieving children in emergency situations during the first phase of abandonment (first aid, vaccinations, etc.), and introducing alternative childcare, especially through its partnerships with the organisations that address child abandonment.

**The Ministry of Habous and Islamic Affairs (MdHai)**.

**The Ministry of the Interior**, through its programme *Initiative nationale de développement humain* (INDH), is responsible for addressing the structural causes of family separation, such as insecurity and extreme vulnerability of certain population groups. It provides financial support mainly to institutions housing children without families.

### Competent authorities and other parties (continued)

The *Sûreté nationale* [National Police] is mainly involved leading up to the placement (discovery, orientation and placement of children), as are the Civil Protection and Royal Gendarmerie for children found abandoned in the street.

**Judicial authorities:** The judiciary has been independent in Morocco since late 2017. The High Council of the Judiciary oversees the implementation of safeguards for the judiciary, including independence, appointment, promotion, retirement, and discipline. A number of professionals from the judicial sector are involved in alternative care, particularly *kafala* placements: **The Crown prosecutor**, who has custody of children until they are declared abandoned and is responsible for ruling on abandonment and investigating the situation of abandoned children; **The guardianship judge**, to whom *kafil* candidates must submit their application, and who is responsible for issuing the *kafala* order and following up on the *kafala* placement; and the **juvenile court judge**, who has jurisdiction over children in conflict with the law (criminal component), including children placed in child protection centres, *makfoul* children and child victims. A number of years ago, **family cells or family affairs divisions** (sometimes called ‘Sections de justice de la famille en charge du contentieux familial’) composed of several guardianship judges and social workers were established in courts of first instance (CFI) to address the civil component of family law, including *kafala* procedures.

**Civil society** plays a major role in terms of prevention and support for single mothers, but especially child welfare as a whole. For example, five associations came together to form the **Collectif Kafala** to speak with a single voice on institutionalised children and, above all, to seek to improve conditions for children in the *kafala* system. The *Collectif* advocates for the amendment of Law no. 15 – 01 to create a better framework for *kafala* placements (assessment, preparation, supervision and follow-up) provide greater rights for *makfoul* children (e.g. ability to obtain inheritance rights, mandatory and systematic registration in the civil registry). It was suggested that a specialised national institute be created, wherein psychologists and social workers would provide pre-and post-placement support and educate *kafil* parents and teachers on problems related to child abandonment, among other topics.

In addition, to implement the recommendations issued by the Committee on the Rights of the Child in 2014, civil society members are working to establish a **children’s rights platform** that would combine the various efforts and actions of NGOs and give civil society a stronger voice. There is also a collective that advocates for the development of an institutional mechanism (including a legal framework) for placing **children in foster families**.

### Children’s rights situation

In 2019, the number of children in Morocco was of 11.2 million<sup>275</sup>. Based on Morocco’s international commitments and to strengthen institutional responses to children’s rights in Morocco, the country has invested heavily in reforming the family and children’s domain over the past decades.

Jointly led by UNICEF, the Ministry of Justice and the President of the Prosecutor General’s Office with financial support from the EU, the project “*Himaya, for a justice system that meets children’s needs and respects their rights*”<sup>276</sup> is attempting to reform several components of family law and is carrying out many activities in this regard. Following this first project, the project *Hijra wa Himaya – “Promotion of the rights of migrant children in Morocco”* (2018 – 2021) aims to strengthen responses to the phenomenon of children concerned by migration in Morocco.

*The Observatoire National des Droits de l’Enfant (ONDE) [National Observatory on the rights of the child] has established a hotline to report cases of child abuse. See <http://www.droitsdelenfant.ma/fr/actions/allo-enfance> (in French).*

In the area of children, the country is faced problems related to socio-economic and gender inequalities<sup>277</sup>, child labor (69,000 in 2014 excluding domestic work, 162,000 perform hazardous work in 2017)<sup>278</sup>, child marriage<sup>279</sup> (9% of all marriages in 2017 and 2018 are underage marriages; nearly 85% of applications for marriages before the age of 18 are accepted by judges) and sexual and physical violence<sup>280</sup>.

The number of children “in difficult circumstances” was 117,646 in 2017. These children can find themselves affected by a variety of situations that can be cumulative: children without civil status, children in street situations, abandoned children, children who are victims of physical, sexual or psychological violence, forced child labour, children who are victims of sexual exploitation, forced marriage or children in conflict with the law. Few figures are available for each category. During data collection in the frame of the 2019 UNICEF SitAn, the situation of children who are orphaned, abandoned by their families, or placed in institutions was identified by children as a major problem<sup>281</sup>.

Very high **newborn abandonment** rate: Around 24 abandonments per day or 8,760 per year, according to 2010 figures of the *Institut National de Solidarité avec les Femmes en détresse (INSAF)*<sup>282</sup>. Abandoned children are most often **born out of wedlock**. It is estimated that up to 30,000 births take place out of wedlock every year<sup>283</sup>. Due to the continued **criminalisation of sexual relations outside of marriage** (article 490 of the Penal Code)<sup>284</sup> and the resulting societal stigmatisation, the often single mothers are forced to hide the natural filiation of their children. In addition, Moroccan law does not oblige fathers to acknowledge children born out of wedlock, even if a conclusive DNA test has been carried out, in contrast with the Convention on the Rights of the Child (CRC), which promotes the sharing of responsibility between parents. Another factor that frequently pushes families/biological mothers to abandon their children and entrust them to a third party or an institution is the **socio economic precarity** these mothers face. However, without **centralised data and a State supervision system**, it is difficult to track these vulnerable children and ensure their protection, raising the risk that they fall victim to various forms of exploitation.

## FAMILY SUPPORT & PREVENTION OF SEPARATION

### Access to services (1st and 2nd levels of prevention)

*“Improvements benefiting children were made to the services provided by the National Social Security Fund (CNSS), including: raising the age-limit for payment of orphans’ allowance from 12 to 16 years; increasing the scale of allowances paid by the CNSS and generally implementing an increase in the amount of family allowances for (...) local communities and public institutions<sup>285</sup>”.*

**Specific government funding**, such as the *Tayssir* program for rural education, which provides a monthly allowance of MAD 140 (approximately EUR 13) per child. Other services (providing transportation to school, canteens, binders, etc.) have been launched since 2008; in 2016, 800,000 children benefited from this funding<sup>286</sup>.

Law no. 41 – 10 establishing the conditions and procedures for receiving benefits from the Family Mutual Assistance Fund<sup>287</sup> authorises the provision of the **Fund’s** benefits to underprivileged divorced mothers and their children who are entitled to child support following the dissolution of a marriage.

**The Social Cohesion Fund**, which provides targeted benefits to children and adults with disabilities with a view to facilitating their social integration (*Entraide Nationale*). The Fund also provides an allowance to widows for each of their children in school.

**Child protection units (CPUs)** in a number of cities (12 in 2017): Social workers and other professionals whose objective is to provide information to families at risk of separation and refer them to public services and other appropriate services (*Entraide Nationale*).

The association sector (e.g. INSAF, *Association Solidarité Féminine*, *Association Widad*) is very advanced in terms of alternative care for children, providing services for **single mothers and their children** to prevent family separation. These activities, though successful, may not remain viable due to a lack of State support.

### Gatekeeping (3rd level of prevention)

#### Challenging environment for family reintegration

- Little effort is currently made to reintegrate children into their nuclear or extended families. According to the PPIPEM, family integration is beset by many difficulties due to the lack of programs to support and guide parents. The 2015 – 2020 Action Plan does not contain concrete measures. However, a support program for positive parenting was launched from 2017 to 2019 by MFSEDS with support from UNICEF Morocco.
- While 148,163 children had been placed in Social Welfare Institutions (EPS), the vast majority had at least one living parent. Limited effort is made to reintegrate children, usually because the biological mother’s identity is unknown or due to the lack of support for single mothers.
- Some positive results have been obtained by associations working closely with biological families that provide parenting support through reintegration and professional orientation activities. In addition, SOS Children’s Villages in Casablanca and Marrakesh have developed family reintegration programs (although displaying a low success rate at 5.5% per year).

#### Mechanism to prevent placement in alternative care

- Lack of robust procedures for admission to various institutions (lack of resources and capacity to perform assessments and determine sustainable options). In certain cities, such procedures are very underdeveloped, if present at all<sup>288</sup>.
- A child can enter the system (bypassing legal and administrative procedures) through the revocation of parental authority, or an abandonment ruling (formal placement).
- Abandonment ruling procedure (formal procedure): Article 1 of law no. 15 – 01 divides the procedure into the following steps:

*Judicial inquiry by the crown prosecutor conducted to ensure that the parents cannot be found<sup>289</sup>. Searching for and reintegrating families is often not prioritised due to a feeling of powerlessness to deal with socio-economic problems. Institutionalisation is thus often considered to be in the best interests of children born to single mothers.*

*Temporary placement during the inquiry until an abandonment ruling is handed down and displayed in offices in the local communities for a period of three months<sup>290</sup> during which the child is taken into the custody of the Crown prosecutor.*

## ALTERNATIVE CARE OPTIONS

Informal care  
notarial *kafala*  
“*kafala adoulaire*”

## There are two scenarios:

- Following a family decision, the child can be entrusted to female members of the mother’s family, or, if necessary, the father’s family (grandmother, aunt, etc.). This type of placement can also take place through a **tacit agreement** – on a temporary or permanent basis – with individuals not related to the family, such as: a nanny (in exchange for compensation); a couple unable to have biological children; or a woman with a “regular” marital status who wishes to have a child. There are women in villages that are known for finding solutions, and sometimes families, for abandoned children. Competent authorities are not involved in these arrangements.
- A placement can also take place through a **notarial decision** (that sets individual conditions and has no effect on the legal status of the child). This is known as **notarial *kafala*** or “*kafala adoulaire*”. There is currently no consensus regarding the existence, functioning or scale of this practice. Certain professionals deny its existence, while others openly speak of how well it works, especially as compared to judicial *kafala*, the procedures of which are often considered slow and rigid. It should be noted that article 24 of law no. 15 – 01 concerning the placement of abandoned children stipulates that judicial authorisation is required to for a *kafil* to leave Moroccan territory with a *makfoul* child. Challenges can be faced in the receiving State as well, with the majority of European countries requiring a judicial decision authorising the removal of the child from Moroccan territory.

*Information provided during the ISS/IRC Mission in Morocco in 2017.*

## Foster care

Given the lack of specific regulations, the definition of a foster family is currently based on the provisions of article 471 of the Code of Criminal Procedure, which refers to a trustworthy third party than can take care of the child.

The **Collectif Familles d’Accueil**, a grouping of several organisations, advocates for the formalisation of foster families and the implementation of a regulatory framework<sup>291</sup>.

In 2012, a draft regulatory framework was developed in collaboration with three judges and submitted to the MJ and MFSEDS. One of the principal objectives of this bill was to create a formal status for foster families and to promote the concept at the national level<sup>292</sup>.

There were encouraging early signs<sup>293</sup> regarding the launch of a foster family mechanism in the 2015 – 2020 Action Plan, which provided for the implementation of a system for the selection, preparation, education and monitoring of foster families<sup>294</sup>. The *Fondation Amane* of Taroudant, with the support of UNICEF, launched a foster family placement pilot program in 2017, including the 3rd level of prevention, as part of a *Himaya* project chaired by the MJ and the Prosecutor General’s Office<sup>295</sup>.

A pilot program to place children in foster families was implemented by the Moroccan Association of SOS Children’s Villages<sup>296</sup>. In Casablanca, the *Bayti* Association found foster families for children living on the street and those in contact with the law.

## Residential care

According to Entraide Nationale, 10,028 children (7,064 boys and 2,964 girls) were placed in institutions and 103,563 children in the 888 schooling support protection centers supported by Entraide Nationale. In addition, 1,027 boys and 332 girls under the age of 6 were placed in children’s homes attached to hospitals (20% of them were presenting a form of disability)<sup>297</sup>.

Despite the lack of disaggregated, reliable data, the number of institutions points to a growing number of child placements (46,000 in 2006 and nearly 150,000 in 2015<sup>298</sup>), likely explained by insufficient basic services and the poor socio-economic situation of many families.

Institutionalisation remains the **most common outcome** for children without families. Those who decide on placements and parents themselves believe that institutionalisation is beneficial to the child and that it offers more opportunity in the familial, social and professional spheres. This view may seem counterintuitive given the persistent stigmatisation of institutionalised children, who are commonly known as “*Ouladkharya*” or “orphanage children”.

**Legal framework:** Law no. 14 – 05 regarding conditions for opening and managing social welfare institutions<sup>299</sup> and law no. 15 – 01<sup>300</sup>.

Different types of institutions<sup>301</sup>: Social Welfare Institutions (EPS); Child Welfare Centres (CPE) (also known as *centres de sauvegarde*, or protection centres); or children’s homes. Some of these institutions fall under the purview of the Ministry of Youth and Sport (MJS)<sup>302</sup>, and others are overseen by MFSEDS through the regional offices of *Entraide Nationale*<sup>303</sup>.

**Residential care (continued)**

There are questions surrounding the co-operation and coordination between the various ministries. There are also challenges arising from the lack of centralisation, harmonisation and supervision of procedures. Each centre appears to have its own model, including for matching children with *kafil* families, which can range from letting parents choose and immediately leave with a child, to mandating a week of gradual relationship building.

There are many institutions that operate without any oversight or accreditation<sup>304</sup>. Other challenges identified by the Committee in 2013<sup>305</sup> include insufficient hygienic and sanitary facilities, the ratio of staff to children, and a lack of qualifications on the behalf of staff to provide quality individual care<sup>306</sup>.

**Preparation for leaving the institution and independent living** is not systematically addressed. However, *Dar Assadaka* in Tangier<sup>307</sup>, The Moroccan League for the Protection of Children (LMPE) in Taroudant, SOS Villages, and the *Bayti* Association<sup>308</sup> all provide services in this regard, focussing on children's eventual coming of age by emphasising their education and professional training.

**Children with disabilities**

Article 54 of the Family Code holds that disabled children are entitled to special care.

A 2009 – 2010 report from the *Ligue Marocaine de Protection de l'Enfance* (LMPE) and UNICEF indicated that children with disabilities have little chance of growing up in a family environment, as disabilities are a strong barrier to being placed in the *kafala* system.

ISS/IRC has observed with great concern that failed *kafala* placements and the return of children to institutions by *kafil* families often resulted from the discovery that the child had a disability.

According to a 2013 UNICEF report on the current situation in institutions for children with disabilities<sup>309</sup>, problems include insufficient medical care due to a lack of human and material resources, and psychological and physical violence from supervisors or teachers.

In the wake of the growing number of abandoned children with disabilities, there are encouraging ongoing initiatives ongoing, such as the work of the Centre *Lalla Hasnaâ* for children over three years old with physical or mental disabilities (capacity for 75 children), the institution Al Hanan in *Tétouan*, and the association Al.BI Maroc).

**ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE**

The **many legal and policy reforms** are encouraging and should be continued. There is a newfound awareness of the situation of children without families on the political scene thanks to the 2015 – 2020 Action Plan. Domestic and cross-border *kafala* placements should be considered among various care options.

However, it remains difficult to implement these reforms. An in-country ISS/IRC mission in 2017 revealed **three major shortcomings of the system**: the lack of co-operation and coordination between sectors; the lack of databases that would allow, for example, the tracking of children who have been, or may be, placed, due to their vulnerability; and the lack of training for professionals working in the child protection system. In addition, in light of the apparent absence of an integrated child protection system and the need for a coordinating entity that would centralise and supervise the various services and interventions, distributing clear roles and responsibilities is difficult and overlapping mandates are likely.

Given the growing number of institutionalised children, **preventative measures and support for vulnerable families** should be strengthened to help prevent family separation and address its root causes, including poverty and the persistent stigmatisation of single mothers and their children. This stigmatisation can be remedied by repealing article 490 of the Penal Code, which criminalises all relations out of wedlock. An important first step was made through a 2018 decision recognising the paternity of a child born outside of marriage and awarding compensation to the mother<sup>310</sup>. Unfortunately, a local contact confirmed that this decision was subsequently overturned by the appeal court. In addition to strengthening the skills and capacity of the CPUs, it is important that the following measures are taken: 1) effectively launch the territorial child protection mechanisms, a cornerstone of the 2015 – 2020 PPIPEM; and 2) raise public awareness of the services that the CPUs offer. Given the low rate of family reunification, a law or policy should designate an entity or competent authority to effectively implement the above measures, which should be an integral part of the child protection system. In addition, the establishment of a registry for children placed in care or who risk separation would facilitate reintegration in the event the original family changes their mind or the child has been abducted or unlawfully detained. **Adequate funding must therefore be allocated** to these reintegration programs to promote the return of children to their families.

**Alternative care other than *kafala* has little regulation**, which often means that **disparate practices** are found throughout the country, to the detriment of children's safety. Alternatives to institutionalisation should be considered (grants for children from poor families, social assistance to prevent children from dropping out of school, allowances for children with physical disabilities, etc.).

**Informal family care** (informal/notarial *kafala*) is not quantifiable or subject to any form of regulation or control, and therefore may put children at risk of abuse and rights violations. This problem stems from the private nature of these placements: *kafil* families select children without professional intervention, leading to a higher risk of breakdowns.

The country should assess the benefits of foster families. If it decides to continue its efforts to institutionalise the foster care programs, it should implement a legislative/regulatory framework and a system to select, prepare, educate and follow up with foster carers, as provided for in the 2015 – 2020 Action Plan (effective implementation was expected in 2018). This type of care arrangement could have a clear value for certain children on a temporary (respite care) or emergency basis.

**ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE (CONTINUED)**

For **institutional care**, a number of essential recommendations made by UNICEF in 2013<sup>311</sup> remain relevant today and should be implemented, including: encouraging the process of de-institutionalisation of large-scale institutions; and during the transitional period, improving staff ; improving staff qualifications; allowing care plans to be determined for children with their input; ensuring placements are monitored by a multidisciplinary committee; and introducing a complaint mechanism for cases of violence, abuse, etc. It is encouraging that the new law 65 – 15, which is being developed to replace Law 14 – 05, addresses some of the above shortcomings. According to UNICEF Morocco, the new law is in compliance with the Alternative Care Guidelines.

For **children with special needs**, in addition to the current practice of providing care in specialised institutions, ISS/IRC encourages the assessment of foster family placements. When there is no other non-institutional option available, there are structures that take on the responsibility of caring for these children and adults. Despite this show of goodwill, ISS/IRC wishes to emphasise the necessity of promoting the right of these children to live in the community.

**KAFALA****General considerations**

In Morocco, the term “*kafalah*” is commonly used without (h). In 2017, ISS/IRC undertook an evaluation mission on *kafala* in Morocco. Some of the information provided in the following sections have been gathered during this mission<sup>312</sup>. According to the UNICEF SitAn (2019), 8,890 children were placed in *kafala* between 2014 and 2017 according to the Ministry of Justice.

**Applicable law**

**Regulated by law no. 15 – 01 concerning the placement of abandoned children** (hereafter law No. 15 – 01).

Article 2 of the law defines the practice as “*the commitment to take responsibility for the welfare, education and care of an abandoned child, just as a father would do for his child*”<sup>313</sup>.”

In 2016 – 2017, the country launched an assessment of the *kafala* system to evaluate the implementation of the 2001 law and provide an improved social and judicial framework for the practice. To address a number of legal shortcomings, the 2015 – 2020 Action Plan provides for the introduction of a formal system to select, prepare, educate and follow up with *kafil* families.

**Competent authorities and other parties**

**Central Authority** (designated pursuant to The Hague Convention of 1996): The Ministry of Justice of Morocco.

See <http://www.justice.gov.ma> (in Arabic).

**Other competent authorities:** Family Cells or Family Affairs Divisions established within CFIs (composed of representatives of the Public Ministry, guardianship judges, social workers), responsible for family litigations (including *kafala* procedures); the crown prosecutor (abandonment ruling and investigation into the child’s situation); guardianship judges (application, *kafala* order, placement follow-up); juvenile judges (responsible for child victims and those in conflict with the law); Moroccan Consulates (follow-up on *kafala*-adoptions by those living abroad).

**Civil society:** *Collectif Kafala* (CKM) – focusses on institutionalised children and improving conditions for children placed in the *kafala* system; advocates for an amendment to law no. 15 – 01 to provide a better framework (assessment, preparation, supervision and follow-up) and more rights for the *makfoul* child (e.g. the opportunity to give the child the family name to strengthen the familial bond, mandatory registry of the child in the civil registry); proposes the establishment of a national centre where psychologists and social workers would provide pre-and post-placement support and educational and outreach services for *kafil* parents and teachers (issues linked to child abandonment, solutions to the multiple *kafala* breakdowns).

**Eligible children<sup>314</sup>**

A child of either sex under the age of 18 in one of the following situations, is considered to be abandoned (article 1): “*born to unknown parents or to an unknown father and a known mother who voluntarily abandoned the child; orphaned or have parents who are incapable of providing support or have no legal livelihood; parents who engage in misconduct and who neglect their responsibility to protect and guide the child to the right path, such as when parents are stripped of legal custody or when, in light of the death or incapacity of one of the parents, the other is found to be wayward and neglects their aforementioned responsibility to the child*”<sup>315</sup>.”

The abandonment procedure for children found abandoned or entrusted with others can only be initiated after three months have passed. The abandonment procedure ends when a definitive abandonment ruling is issued by the Court of First Instance on the request of the Crown prosecutor. After the declaration, the abandonment ruling is instanced to the guardianship judge, who transfers it to the *kafala* system (articles 4 to 6 of law no. 15 – 01).

<p><b>Eligible children<sup>314</sup> (continued)</b></p>	<p>During this period, a court social worker placed in the Family Justice Division will write an assessment report on the child's situation.</p> <p>ISS/IRC encourages the country to work on the basis of the legal mechanism that should be further developed in terms of medical-psychological-social assessment.</p> <p><b>Regarding the profile of children placed abroad</b>, many stakeholders encourage the placement of Moroccan children abroad in light of foreign couples' open-mindedness toward older children or those with disabilities. It seems that even very young children (0 – 9 months) could be placed abroad as part of <i>kafala</i> arrangements. This observation is confirmed by the US' Central Authority for adoption, which notes that in 2010 – 2015, the vast majority of adoption visas issued for Morocco were for children aged two years old or younger (181 out of 224).</p>
<p><b>Potential kafil parents (PKPs)<sup>316</sup></b></p>	<p>Adopting children ruled abandoned through <i>kafala</i> is restricted to the following groups and organisations<sup>317</sup>: "1. <b>A Muslim married couple that meets the following conditions:</b> a) have reached the legal age of majority, be <b>morally and socially capable of adopting the child through kafala</b> and possess the material means to meet the child's needs; b) have not, together or separately, been convicted of a moral or child-related offence; c) are not afflicted with a contagious illness or one that would prevent them from assuming their responsibility; d) are not the target of litigation from the child they wish to adopt through <i>kafala</i> or their parents or the subject of a family dispute that could harm the interests of the child. 2. <b>A Muslim woman who meets the four conditions set out in paragraph 1 of this article.</b> 3. <b>Public child welfare institutions and public, recognised social organisations and associations that possess the material means, the resources and the human skills necessary to ensure children's welfare, provide them with an adequate education and raise them according to Islam<sup>318</sup>.</b>"</p> <p>Having children is not a barrier for couples who wish to adopt abandoned children through <i>kafala</i>, as long as all of their children can equally benefit from the family's means.</p>
<p><b>Assessment of PKPs<sup>319</sup></b></p>	<p>The guardianship judge gathers information and data on the circumstances in which the <i>kafala</i> care of the child would be performed. This is done through a special investigation carried out by a <b>board of investigation or inquiry</b> composed of representatives of different entities in order to determine if the <i>kafil</i> candidates meet the eligibility criteria<sup>320</sup>. These assessments are carried out as a matter of principle for each placement.</p> <p><b>Limitations:</b> The number and content of the assessment varies by region; and meetings do not specifically address the parenting capacity of the potential <i>kafil</i> parents.</p> <p>Without a thorough and interdisciplinary assessment (including social-psychological aspects), there is little guarantee that the family chosen for a given child will be appropriate. The lack of a uniform procedure leads to a risk of "forum shopping", i.e. choosing the most favourable court and the least strict region.</p> <p>Most courts and hospitals/childcare institutions have <b>waiting lists</b> for applicants. In practice, selections are made in the order applications were submitted. Such an arbitrary approach does not put children's rights first, and cannot be considered an adequate assessment. However, these lists do present an opportunity to identify applicants in other regions for children awaiting placement (regional matching) and should be used before any cross-border placement is considered. In addition, the waiting period should be used to prepare these candidates.</p>
<p><b>Consent<sup>321</sup></b></p>	<p><b>Child's consent:</b> The <i>kafala</i> of a child over 12 years of age is subject to their personal consent heard by the competent court. An exception is made for <i>kafala</i> applicants that are public facilities for child welfare and recognised, public social agencies, organisations and associations.</p> <p><b>Consent of the child's biological parents or legal guardian:</b> Law no. 15 – 01 does not require the consent of children's biological parents or legal guardian for <i>kafala</i> placements. The lack of a legal obligation in this regard suggests that working with the biological mother is discouraged, which can in turn encourage unjustified <i>kafala</i> placements. Given the frequent uncertainty surrounding the biological mother, the status of <i>kafil</i> is rather unstable. (The law allows biological parents to withdraw their children from <i>kafala</i> placements, even several years after the fact and without any expression of interest from the child.) It is necessary to enhance collaboration with the biological mother and respond to attempts to revoke the <i>kafala</i> placement with a thorough and professional case-by-case assessment.</p>

<p><b>Procedure</b><sup>322</sup></p>	<p>An application is presented to the guardianship judge where the child resides with information on the child as well as documents confirming that the individual meets the conditions to care for the child and a copy of the child's birth certificate.</p> <p><b>Abandonment ruling:</b> Once the special investigation detailed above has been carried out and demonstrates that all the conditions set out in the law have been met, the guardianship judge will deliver an order permitting the <i>kafala</i> placement of the abandoned child by the individual or party who submitted the application. This order is delivered by the Court of First Instance of the judge that made the <i>kafala</i> order, within 15 days of their doing so.</p> <p><b>Features specific to cross-border <i>kafala</i>:</b> With the authorisation of the guardianship judge and provided it is in the interest of the parties, the individual applying to care for the child through <i>kafala</i> can exit the territory of the Kingdom of Morocco to live abroad on a permanent basis. Once the judge's authorisation has been obtained, a copy is sent to the consular service of Morocco located in the individual's place of residence. This is done to ensure that the child's situation can be monitored and that the individual carries out the obligations set out in article 22 above. The consular service may use any monitoring method it deems adequate and will inform the guardianship judge of any failure to meet the obligations.</p> <p><b>Matching</b><sup>323</sup>: The individual must present the child's birth certificate to the guardianship judge, who is responsible for this essential step. However, the law says nothing about the specific considerations for such a decision. In the event of multiple <i>kafala</i> applications for a single abandoned child, priority is given to married couples without children or those who can offer the best conditions. According to professionals, to address abuse of the system, applicants that show up directly at the hospital, orphanage or institution are redirected to the court to submit their application. Once this application has been accepted, in some regions the Crown prosecutor will provide a <b>provisional authorisation</b> to applicants allowing them to go to a centre and select a child according to their own criteria. A number of the centres will make sure that the applicants are not the ones who directly make the selection, with some having developed internal guidelines on the topic (including advice and suggestions from the director of the centre or the social worker), while others are clear that the applicants may select the child. Still others will select two to three families to meet the child in question. The meetings are observed and the child can give their opinion on the choice of applicants. While it is encouraging that the child's input would be sought out, these candidates need to be assessed and escorted while meeting children, and the final decision for matching should be made by professionals.</p> <p><b>Preparation:</b> There is currently no legislation in Morocco requiring that children or <i>kafil</i> applicants prepare for the placement itself or for post-placement life.</p>
<p><b>Decision</b><sup>324</sup></p>	<p>Judicial decision made by guardianship judge in the form of an order<sup>325</sup>.</p> <p>Within a month of the authorisation, cancellation or renewal of a <i>kafala</i> placement, the guardianship judge will send a copy of the order to the civil registrar with whom the birth certificate of the <i>makfoul</i> child is registered.</p> <p>An order authorising, cancelling or renewing a <i>kafala</i> must be indicated in the margin of the abandoned child's birth certificate in accordance with the provisions governing the civil registry.</p> <p>However, in accordance with the law governing the civil registry, the <i>kafala</i> must not be indicated on birth certificate copies sent to the <i>kafil</i> or the <i>makfoul</i>.</p>
<p><b>Legal effects</b><sup>326</sup></p>	<p><i>Kafala</i> placements do not confer an <b>entitlement to parentage or succession rights and have no patronymic effects</b>.</p> <p>It is unclear whether the <i>kafil</i> parent obtains <b>parental responsibility</b> for the <i>makfoul</i> child (legal custody) or whether this arrangement is considered a <i>de facto</i> custody. Article 17, paragraph 2 refers to "dative guardianship" for the <i>kafil</i>, and article 22 refers to custody without specifying the type. Given that article 27 provides for the possibility of visitation rights in the event of the divorce of <i>kafil</i> parents and that article 22 refers to the <i>kafil</i> parents' civil responsibility for the <i>makfoul</i> child, it would seem likely that <i>kafil</i> parents are granted custody rights from the outset. It seems that <i>kafala</i> conferred parental authority upon <i>kafil</i> parents but that legal custody rights remained with the judge. However, as long as this is not made explicit in the law, <i>kafil</i> families will be subject to administrative and practical complications in their daily lives (Judge's agreement is necessary for any significant decision affecting the <i>makfoul</i> child's life, e.g. travel). This represents a clear disadvantage faced by <i>kafil</i> families as opposed to other families.</p> <p><b>Social rights:</b> The <i>kafil</i> will receive allowances and social welfare provided by the State, public and private institutions and local communities and their groupings. During the in-country mission of ISS/ IRC in 2017, the concerned families expressed a number of difficulties, including <i>makfoul</i> children not receiving medical coverage in certain situations, not being covered when their <i>kafil</i> parents retire, and not being registered in the civil registry.</p>

<p><b>Post-placement supervision and follow-up</b><sup>327</sup></p>	<p>Moroccan law protects the child by supporting the <i>kafil</i> and providing for supervision by the guardianship judge; an investigation performed by a social worker may be requested. There is a clear requirement for supervision, but the law <b>does not specify the modalities</b>.</p> <p>Regarding follow-up, <b>disparate practices</b> are observed throughout the country. Whereas in certain regions, an annual follow-up is carried out, other professionals admit that they have neither the means nor the capacity to undertake any follow up monitoring (there are 200 guardianship judges and a small number of social workers for the entire territory.) For example, in 2017 in the Court of First Instance of Rabat, 45 follow-up requests were sent to <i>kafil</i> families but only 7 were fulfilled.</p> <p><b>Features specific to cross-border kafala:</b> If the individual performing the <i>kafala</i> resides outside of Morocco on a permanent basis, once authorisation from the guardianship judge has been obtained, the new place of residence must be communicated to the consular service of Morocco so that the child's situation and the individual's performance of their obligations can be monitored. The consular service will send the guardianship judge reports of the child's situation and can recommend any action it deems appropriate, including revocation of the <i>kafala</i>. Moroccan authorities have shared their concerns regarding the difficulty of following up on cross-border placements. For example, after sending 11 follow-up requests abroad, the Court of First Instance of Rabat obtained only 2 reports.</p>
<p><b>Revocation/termination/cancellation</b><sup>328</sup></p>	<p><i>Kafala</i> placements can be terminated for one of the following reasons: Firstly, when the child in <i>kafala</i> care reaches the legal age of majority, although this does not apply to an unmarried girl or to a child with disabilities or who is incapable of meeting their own needs (e.g. accident, unemployment). Or secondly in the event of: the death of the child in <i>kafala</i> care; the death of both <i>kafil</i> parents, or of the woman providing <i>kafala</i> care; the incapacity of both <i>kafil</i> parents; the incapacity of the woman providing <i>kafala</i> care; the dissolution of the institution, agency, organisation or association providing <i>kafala</i> care; or the cancellation of <i>kafala</i> rights by judicial order in the event that the <i>kafil</i> breaches their obligations or withdraws from the arrangement, or if it would be in the best interests of the child.</p> <p>If the <i>kafala</i> is terminated, a "<i>dative guardian</i>" is designated by the guardianship judge. However, one or both of the child's parents can regain custody of the child by judicial decision once the grounds for abandonment are no longer valid. The court will hear a child who has reached the age of discretion. If the child refuses to rejoin one or both of his parents, the court will consider the child's interests when making its decision.</p>
<p><b>Sanctions</b><sup>329</sup></p>	<p>The guardianship judge can, upon reviewing submitted reports, order the cancellation of the <i>kafala</i> and take appropriate measures in the interests of the child. This order is subject to appeal.</p> <p>The provisions of the Penal Code penalising parents who commit offences against children apply to the individual providing <i>kafala</i> care to a child. Likewise, the provisions of the Penal Code penalising children who commit offences against their parents apply to the child under <i>kafala</i> care and their caregivers.</p> <p>Any individual who purposefully neglects to help a newborn, to provide the care that their condition requires, or to inform the police, the gendarmerie or the local authorities in the location the newborn was found, is subject to penalties under the Penal Code.</p> <p>However, the country does not currently have a complaint mechanism accessible to <i>makfoul</i> children.</p>
<p><b>Costs</b><sup>330</sup></p>	<p>There are several existing fee structures for the judicial procedures, which also vary depending on the crown prosecutor's assessment of the applicant's situation. Besides a one-time judicial tax, the <i>kafala</i> application is free of charge, with 90% of costs covered by the Moroccan government.</p> <p><b>Cross-border kafala:</b> According to the website of the US Central Authority, donations to institutions are common and can reach sums ranging from 500 USD to "several thousand dollars". This is confirmed by a number of adoption agencies' websites, which openly describe donations ranging from 12,000 USD.</p> <p>See <a href="https://babymaghrib.wordpress.com/la-creche-de-tanger/how-to-start-the-adoption-process/">https://babymaghrib.wordpress.com/la-creche-de-tanger/how-to-start-the-adoption-process/</a></p> <p>It seems that the competent authorities in Morocco are not aware of these unjustifiably high amounts allegedly paid by foreign <i>kafil</i> applicants. Given the negligible administrative costs for this procedure in Morocco, ISS/IRC is perplexed by the involvement of such large amounts of money, as described on the websites of foreign agencies.</p>
<p><b>Difficulties with the kafala</b></p>	<p>As an example of the revocable nature of this child protection measure, it is possible for the <i>kafil</i> parent to withdraw from the arrangement. According to many Moroccan professionals, there have been many cases of <i>kafala</i> breakdowns. There is no quantifiable data or special procedures. It is encouraging that certain courts, such as the Court of First Instance of Rabat, wish to monitor these situations.</p> <p>Given the impact that being abandoned a second time can have on a child, it is imperative to establish a legal and psychosocial framework for these situations. It is thus all the more important for the current system to ensure that the assessment of applicants and children, matching by professionals, the preparation/education of <i>kafil</i> parents and children and follow-up are all performed.</p>

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<p><b>Identity and access to origins</b></p>	<p>The law provides no information on search for origins. Presently, there is a certain level of secrecy surrounding <i>kafala</i> placements. For example, the placement must not be mentioned on the copies of the birth certificate sent to the <i>kafil</i> parents or to the child in question (as per the law on the civil registry). It seems that a large number of professionals and <i>kafil</i> families were open to telling the child about their backgrounds and origins, in fact some professionals even encourage <i>kafil</i> parents to be transparent with children as early as possible (the age of four is often mentioned).</p>
<p><b>Cross-border kafala</b></p>	<p>In September 2012, Circular No.40/S2 of the Ministry of Justice, addressed to the attorneys general for the appeals courts and CFI prosecutors, sparked a fierce debate among the general public. The Circular indicated that verifying the required conditions for <i>kafil</i> parents was problematic in the following cases: <i>"kafala applicants (...) of foreign nationality who do not reside in Morocco. In this case, it becomes difficult to verify, in accordance with the aforementioned provisions, these applicants' information and data, upon which the juvenile judge's decision to grant or deny the kafala is based(...). Given that the law, as expressed through the provisions on kafala, is essentially intended to protect the best interests of Morocco's children, in order to protect these interests in light of the above, and in keeping with the spirit and philosophy of the kafala system for abandoned children, kafala must be granted only to applicants who reside on national territory on a permanent basis"</i><sup>331</sup>.</p> <p>The Government of Morocco appears to be promoting the granting of <i>kafala</i> placements to applicants residing on Moroccan territory on a permanent basis. Despite this official discouragement of granting <i>kafala</i> placements to foreign applicants who do not reside in Morocco, couples with such a profile are still granted placements in certain Moroccan regions and cities subject to the discretion of the guardianship judge (see statistics section below). According to ISS/IRC sources, Moroccan children have been placed in Belgium, France, Spain and the United States.</p>
<p><b>Subsidiarity principle</b></p>	<p>The double subsidiarity principle does not seem to be known to Moroccan stakeholders. These stakeholders must therefore be made aware of how this principle benefits the child.</p>
<p><b>Agencies and intermediaries</b></p>	<p>Officially, there are no "accredited adoption agencies" that provide services in Morocco. However, based on certain accounts and the existence of multiple websites promoting "adoptions" in Morocco, there seem to be intermediaries, including lawyers, who are in direct contact with foreign <i>kafil</i> applicants and help them establish a relationship with children's residential care institutions<sup>332</sup>. ISS/IRC wishes to emphasise the importance of regulating the involvement of intermediary individuals or structures and the potential associated costs. Such non-regulated approaches could lead to the sale and trafficking of children.</p>
<p><b>Statistics</b></p>	<p><b>National statistics on placements:</b> Around 2,000 children are placed in the <i>kafala</i> system following a court decision (MJ estimates). However, disaggregated, qualitative data on a national level is not available. Number of annual placements by court: 40 to 100 in Agadir; around 100 in Rabat and in Salé. Number of placements by the CFI of Marrakesh 162 in 2014<sup>333</sup>, 215 in 2015<sup>334</sup>, 167 (abandoned children<sup>335</sup>) and 8 (non-abandoned children) in 2016<sup>336</sup>. From January to late April 2017, the CFI in Rabat recorded 96 <i>kafala</i> cases underway, of which 82 were finalised<sup>337</sup>. It is encouraging to note that the statistics from Rabat also include follow-ups and failed <i>kafala</i> adoptions. This should serve as an example. Statistics on <b>cross-border placements</b> with families residing abroad (AICAN website<sup>338</sup> in table):</p> <p>It should be noted that these figures do not include all countries that appear to receive cross-border placements. The figures mainly (and for 2013, exclusively) cover placements in the United States and Canada. According to the US Central Adoption Authority, data on the number of placements of Moroccan children in the United States is available for 2014 (43), 2015 (22) and 2016 (20). As far as ISS/IRC is aware, data on placements in other countries is not available. France, for example, does not refer to Morocco on the subject of adoption. The data on the AICAN website, seems to indicate that Circular No.40/S2 (see above under 'Cross Border <i>Kafala</i>) has been applied to placements in Belgium, Spain and Switzerland. Regarding Spain, HCCH statistics indicate 6 adoptions in 2005 and 20 in 2006, with no more having taken place since 2007. HCCH also shows that placements in Germany took place in 2010, 2011 and 2013.</p> <p>In light of these disparate figures, it would be useful to establish a centralised database with nationwide, disaggregated data that includes international placements. It is encouraging to note that the CFI in Rabat has started to record statistics on these placements under the category "application for long-term exit from Moroccan territory".</p>

Country	2013	2012	2011	2010	2009	2008	2007	2006
Germany	–	–	7	9	5	2	12	12
Belgium	–	21	21	19	22	6	–	–
Canada	8	5	–	–	–	–	–	–
Spain	–	–	–	–	–	–	–	20
United States	24	57	46	32	20	12	–	–
Switzerland	–	18	30	33	16	–	–	–
<b>Total</b>	<b>32</b>	<b>102</b>	<b>108</b>	<b>96</b>	<b>69</b>	<b>23</b>	<b>13</b>	<b>32</b>

### ISS/IRC ANALYSIS: *KAFALA*

ISS/IRC would like to commend Morocco for the progress made on *kafala* and encourages the country to build on this progress to develop the wider child protection system. Several aspects of the Moroccan *kafala* system should be enhanced (see also the CRC Committee's 2014 Concluding observations)<sup>359</sup>.

#### Legal shortcomings

The legal effects of a *kafala* order (granting parental responsibility or not) should be clarified.

The law does not prioritise placements within the extended family. Such a provision could help avoid completely separating the child from their biological family and allow a relationship to continue.

There is no legislation requiring the consent of the child's biological parent(s) or legal guardian.

Mandatory psychological assessments for *kafil* applicants, and the establishment of programs to prepare these applicants and children could be considered in future legal reforms.

Given the disparate practices found throughout the country and the fact that, in principle, the choice of child rests with the *kafil* applicants, ISS/IRC encourage the development of national and institutional guidelines on matching children with applicants, that should include a Central Authority/competent authority to supervise the process.

#### Practical shortcomings

Although the law provides for placement follow-up, conducting effective follow-up has proven to be difficult. In light of the current situation, ISS/IRC encourages Morocco to better equip responsible judges and social workers or delegate the responsibility to another entity, such as CPUs, provided that they are given training.

Given the continued stigmatisation of *makfoul* children (known as "children of sin"), it is necessary to raise awareness among the public to create a shift in mentality.

The majority of children placed in *kafala* are girls and under six years old.

The system should consider solutions to better prevent and manage the many cases of failed placements and respect the children's right to know their origins.

#### Cross-border *kafala*

Often, domestic legal practices/options are taken advantage of by *kafil*(s) in 'receiving States', to allow this arrangement to be converted to an adoption, despite the adoption prohibition by Morocco. Such a conversion can take place instantaneously or after the child has lived in the receiving State for several years. Some of these practices do not, however, meet international adoption standards.

Morocco should establish a practical and legal framework to protect children's best interests, in accordance with its own legislation as well as its international commitments such as the CRC and the Alternative Care Guidelines.

Given the disparate nature of procedures, ISS/IRC wishes to underline that it is important for Morocco to adopt a consistent approach to managing cross-border placements, by way of a law or a national policy. The country is encouraged to fully comply with the standards and procedures set out in the 1996 Hague Convention (articles 33 and 23(2) address the initial mechanisms for consultation and approval) and to not perform placements without sufficient safeguards in place.

It may be beneficial for Morocco to consider bilateral agreements with concerned receiving States to clarify a framework for collaboration on a practical and legal level (conditions, etc.). This is particularly important given the considerable amounts of money involved in some cross-border placements.

ISS/IRC strongly encourages better monitoring of the financial aspects of cross-border *kafala* and the activities of intermediaries, which could include the staff of foreign organisations in Morocco.

## PAKISTAN

## GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE

## Legal and policy framework

**International framework:** CRC signed on 20 September 1990 and ratified on 12 November 1990; OPSC signed on 5 July 2011, and ratified on 26 September 2001<sup>340</sup>.

Pakistan has not ratified the 1993 nor the 1996 Hague Convention.

Islam is the State religion, the legal system is based on English Common Law with provisions to accommodate Pakistan's status as an Islamic State<sup>341</sup>.

Pakistan's child protection system is influenced by the traditional values held by the different cultures and values that prevail in the provinces, as such legislation varies throughout the country<sup>342</sup>.

**Domestic laws:** Pakistan is divided into four federated provinces, each with its own specificities and laws. For the legal framework applicable to children (national and federated laws) see:

- **Guardian and Wards Act of 1890**<sup>343</sup>, which governs the rights and interests of children in Pakistan and provides for guardianship (which appears to be the local form of family type care);
- Islamabad Capital Territory Child Protection Act, 2018<sup>344</sup>;
- The *Khyber Pakhtunkhwa* Child Protection and Welfare Act, 2010<sup>345</sup>;
- West Pakistan Muslim Personal Law (Shariat) Act, 1962<sup>346</sup>;
- West Pakistan Family Courts Rules, 1965<sup>347</sup>; and
- The *Sindh* Child Protection Authority Act, 2011<sup>348</sup>.

## Competent authorities

**The National Commission for Child Welfare and Development**, the **Children Complaints Offices** (offices in charge of receiving complaints from children) and other stakeholders regularly evaluate the existing care policies for the different care institutions. All concerned government departments receive detailed reviews of the alternative care institutions on a monthly, quarterly, bi-annual and annual basis<sup>349</sup>.

**Family courts are competent for all questions related to the guardianship of children.**

## Children's rights situation

In 2016, Pakistan's population was estimated at nearly 200 million inhabitants, of which nearly 80 million were under the age of 18<sup>350</sup>.

Currently, some of the serious issues affecting the protection of children and adolescents in the country are: low rate of birth registration — births of only one-third (34%) of children under five are registered; high levels of violence against children; relatively high prevalence of child marriage — albeit declining; and ongoing socio-economic disparities<sup>351</sup>. Further, there are reports of child trafficking in the country<sup>352</sup>, and the situation of children on the move also needs to be adequately addressed.

Of note, the Edhi Foundation has established 'baby boxes' in order to respond to the problem of child abandonment. Indeed, "*Jhoolas*" (baby cradles) are installed where unwanted infants can be left<sup>353</sup>. This facility is often subject to debates, as some of the children's rights do not appear to be fully respected, in particular the right to know his or her origins (Art. 7, CRC), and the mothers, who chose to abandon their child in such a box cannot be subsequently supported. Unfortunately, there are no statistics on the number of abandoned/relinquished children, and children subsequently placed in alternative care arrangements.

## FAMILY SUPPORT & PREVENTION OF SEPARATION

### Access to services (1st and 2nd levels of prevention)

According to the information provided by the Government in its 2014 Fifth Periodic Report to the Committee on the Rights of the Child<sup>354</sup>, “Pakistan considers that the best care and protection for children is possible by parents within the family institution. **Therefore, all laws and judicial practices discourage any actions that lead to breakup of families and deprivation of children from the parental protection and care.** Across the country, the government department with the help of [civil society organisations] and United Nations agencies have conducted orientation/training sessions for the staff members working at the various institutions that rescue, protect, rehabilitate and reunify children with their families.”

According to a local contact, the social workforce usually needs to complete a specific period of training and/or internship in a well-recognised institution, and specifically about alternative care.

At the regional level, for example in *Khyber Pakhtunkhwa* 2011, the provincial government established Child Protection Units in various districts, and according to the report, “in each fiscal year, each [Child Protection Unit] has been allocated Rs. 50,000 funds for supporting needy children and their families. Through these units 3,400 children and their families have been provided financial and socio-psycho support”.

Similarly, “[I]n Punjab, [Child Protection and Welfare Bureaus] have been established in seven cities. The CPWB (...) during 2008 – 2011, rehabilitated 10,250 destitute and neglected children’s families, addressed socio economic needs of families and built capacity of the most vulnerable families and persons with disabilities<sup>355</sup>”.

### Gatekeeping (3rd level of prevention)

**The profile of children separated from their parents and in alternative care** includes orphans, Afghan refugees, children born out of wedlock, children with special needs, and from a different perspective, and children placed in Quranic schools<sup>356</sup>.

In 2014, a new policy to address the registration of parentless or abandoned children was introduced. It provides that, “under the new policy, the head of an orphanage where such a child lives is eligible to become that child’s legal guardian by providing an affidavit. This replaces the old practice of going to the relevant court to seek guardianship certificates for each such child”. In addition, “under the new policy, it is mandatory that the orphanage in question is registered with **NADRA [National Database & Registration Authority]**, a complete record of all children previously residing there is available and all documents of the relevant authority of the orphanage are in order. (...) For each new registration, it would be mandatory for the orphanage to report each new birth to NADRA and pre-empting any future claims of parenthood, DNA tests should be conducted by the orphanage if possible. The chairman had also decided to issue identity cards to such orphans free-of-cost<sup>357</sup>”. Additionally, “the Supreme Court of Pakistan in a human rights case has directed NADRA authorities to register such children with unspecified parents’ names to avoid shame in the society”. The registration of children in need of care has also been included in section 25 of the Islamabad Capital Territory Child Protection Act of 2018.

According to the Islamabad Capital Territory Child Protection Act of 2018, a care and placement plan is established by a Child Protection Officer based on in-depth assessments of the child’s needs and his or her situation. This professional can be considered as the gatekeeper given that the latter is also in charge of initiating legal procedures for placement according to the Guardianship and Wards Act of 1980<sup>358</sup>.

## ALTERNATIVE CARE OPTIONS

### Informal care

Informal care appears to be widespread in Pakistan, although statistics are not available.

### Residential care

Through different laws, care institutions are established for children at risk, or children in need of care and protection. These laws provide procedures to ensure quality standards, periodic review of placement and respect for the views of the children in the care institutions.

The *Pakistan Bait-ul-Mal* operates 28 institutions called *Pakistan Sweet Homes* for orphans aged between 4 and 6 years old. It caters to the needs of 1,300 orphan children in these homes<sup>359</sup>. “All alternative care institutions are established in accordance with laws, rules and regulations, and are regularly monitored by the relevant departments and [civil society organisations]. Monitoring teams highlight issues of governance and quality of facilities for redressal. The [National Commission for Child Welfare and Development], the [Children Complaints Offices] and other stakeholders evaluate the existing care policies for the care institutions on a regular basis. All concerned government departments receive detailed reviews of the alternative care institutions on a monthly, quarterly, bi-annual and annual basis<sup>360</sup>”.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<b>Residential care (continued)</b>	<p>According to UNICEF Pakistan's 2018 Annual Report, "in Punjab, UNICEF supported establishment of a cell in the Social Welfare Department to map organisations that provide alternative/institutional care for girls and boys and review licensing processes. These efforts will inform policymaking in 2019<sup>361</sup>".</p> <p>The Islamabad Capital Territory Child Protection Act of 2018 also includes provisions for young people leaving care<sup>362</sup>.</p>
<b>Kafalah</b>	<p>According to the <i>Khyber Pakhtunkhwa</i> Child Protection and Welfare Act, there is also a form of sponsorship for children placed in institutions which is called "<i>kafalat</i>" and refers to financial support intended for the institution in which the child is under protection and aims to cover the child's costs of living, maintenance and education.</p>

**ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE**

Despite the fact that there is quite limited information about the alternative care provided to children in Pakistan, ISS/IRC welcomes that the country aims to provide protection and support to families and to prevent family separation – at national and regional levels in law, but also through programmes and services. It also welcomed that both child protection authorities and proceedings appear to have been strengthened in recent years, as this is a key aspect of gatekeeping.

However, as stated by the Committee on the Rights of the Child in its Concluding Observations to Pakistan in 2016, there is concern "about the insufficiency of the assistance provided to families with children living in poverty and the absence of psychosocial support and guidance for families in need, which lead to the abandonment and institutionalisation of children."

In addition, when separation does occur, no information is available as to the efforts to reintegrate children into their family and community environments.

Based on the Guidelines for the Alternative Care of Children, it therefore recommended that the country should "strengthen its efforts to provide financial assistance to families living in poverty and psychological and social support and guidance to help them fulfil their parental responsibilities, in order to prevent the abandonment and institutionalisation of children".

The Committee's specific mention of the particular form of residential care known as madrasas, is interesting to note. *Madrasas* are religious institutions, and shelters, which appear to be "sometimes registered with the national or provincial governments, but are not provided with any benchmarks for quality of care or monitored by the State."

Further, the Committee was "concerned that such institutions lack appropriate medical, psychological and educational facilities, and have no complaint mechanisms to ensure that children's rights are not violated". It therefore also recommended that the State party "establish a clear regulation on alternative care for children, including provisions for quality care standards, a periodic review of placements and the right of the child to be heard at all stages of the procedure; provide training for staff in care settings, provide children with accessible channels for reporting ill-treatment, including through complaints mechanisms, and implement measures to monitor and remedy the ill-treatment of children; and ensure that adequate human, technical and financial resources are allocated to alternative care centres and relevant child protection services, as well as medical, psychological and educational services, in order to facilitate to the greatest extent possible the rehabilitation and social reintegration of children resident therein<sup>363</sup>".

Lastly, the Committee also expressed concern at the lack of foster care, which is indeed absent from reports and materials about alternative care in the country. However, it could be considered that Pakistan is giving priority to its culturally-accepted form of family care, i.e. guardianship or kinship care – usually set up informally, rather than foster care as known elsewhere.

**GUARDIANSHIP**

<b>Applicable laws</b>	<p>The <b>Guardian and Wards Act of 1890</b> governs the rights and interests of children in Pakistan and provides for <b>guardianship</b>, which appears to be the local form of family-based care. This legislation can facilitate foreign nationals, or nationals residing outside of Pakistan 'adopting'.</p>
<b>Competent authorities</b>	<p>Guardianship proceedings are handled by the Family Courts<sup>364</sup>.</p>
<b>Eligible children<sup>365</sup></b>	<p>Children abandoned at an Islamic orphanage are deemed Muslim unless there is evidence to the contrary.</p> <p>If the child is old enough to form an intelligent preference, then such preference should also be considered.</p>

<b>Potential guardian</b> <sup>366</sup>	<p>While appointing a guardian, the character, the capacity, and the fitness of the individual should be taken into consideration. While appointing a guardian, the court must also have regard to the proposed guardian's nearness to the child.</p> <p>Only Muslim families may be appointed as guardians of a Muslim child, and only Christian families may be appointed as guardians of a Christian child.</p>
<b>Evaluation of potential guardian</b>	<p>Foreign families, seeking guardianship of Pakistani children, must apply in Court for a guardianship certificate.</p> <p>The following documents must be <b>provided in the case of foreign applicants or applicants residing abroad: a medical report</b> (intercountry adoption form) to be completed by a reputable doctor; and <b>a report written by candidates</b> containing the following information: name of child; the child's date of birth; the place of birth; the name and address of the terminating parent; <b>and a statement detailing</b> (a) when the adopting parents arrived in Pakistan, (b) when the baby was given to them; and, (c) information given by the parents about the baby's circumstances.</p> <p><i>NB: For cross-border guardianship placements, there is an evident confusion, particularly on the difference between guardianship and intercountry adoption.</i></p>
<b>Procedure</b> <sup>367</sup>	<p><b>Submission of application:</b> The application for guardianship is made in accordance with the <i>Guardian and Wards Act 1890</i> at the Court having jurisdiction in the place where the child ordinarily resides, and is concerned with the specific child.</p> <p><b>Court procedure:</b> Any person, including a relative or friend, interested in becoming a guardian must apply to the Court to be appointed as a guardian. During the court proceedings, the Court exercises parental jurisdiction over the child. The Court is also empowered to give temporary custody, and order protection of the person and property of the child during the case.</p> <p><b>Matching</b> (Identification of child): Once the applicants have identified a child through a licensed institution (Pakistani law requires that an orphanage be licensed under the relevant local laws), the institution provides them with a letter describing the identity and social history of the child. The 1890 Act clarifies that when appointing a guardian, the court must take into account the well-being of the minor. This includes factors such as: the child's age, sex, religion, character; the capacity of the proposed guardian and his/her proximity to the child; the wishes, if any, of the deceased parents; any existing or previous relationship of the proposed guardian with the minor or his/her property; and if the child is old enough to form a view, then that preference should also be considered. It is reported that in practice birth parents often giving up their parental rights in favour of other people by signing a deed / agreement that needs to be confirmed in court. There is no case-referral system in place to professionally match a child and a family.</p> <p>Upon receiving the <b>abandonment declaration/certificate</b>, prospective guardians must apply for guardianship of the child to obtain legal custody. The applicants, or their attorney in Pakistan, can file an application for guardianship in a Family Court with this letter.</p>
<b>Decision</b>	<p><b>Judicial decision</b></p> <p><b>Registration:</b> After obtaining the guardianship decree from the Court, the adoptive parents must obtain a 'B' form, (also called CRC — Child Registration Certificate) from the offices of National Database and Registration Authority (NADRA) and have a National Identity Card (NIC) number issued for the child. Once they have received the 'B' form with the NIC number, the guardians can apply for a Pakistani passport for the child. Parents, who reside overseas, can apply for a National Identity Card for Overseas Pakistanis (NICOP) for their child.</p>
<b>Legal effects</b> <sup>368</sup>	<p><b>Attribution of legal custody:</b> A guardian is responsible to ensure that the minor is supported, fed, housed, clothed, and educated in a manner suitable to his or her position in life, and to the fortune which he or she is likely to enjoy upon attaining the age of majority.</p> <p>The guardian appointed by the court is <b>entitled to such allowance as the court thinks fit</b> for the minor's care, and for the effort that he or she goes through while undertaking their duties towards the child. The allowance could be paid out of the property of the ward.</p>
<b>Follow-up and post-placement</b> <sup>369</sup>	<p>The guardianship ceases once the child turns 18.</p> <p>The age of majority, and consequent follow up, can be extended until child attains 21 years of age (in accordance with the 1890 Act and the 1975 Majority Act (No. IX)).</p> <p>For cross-border guardianship placements (often converted into adoptions in the receiving State), the Family Law Court may ask the guardians/'adoptive parents' to return the child to Pakistan upon request.</p>

<p><b>Revocation/cessation</b><sup>370</sup></p>	<p>A court, on the application of any interested person or on its own motion, may remove a guardian it has appointed or declared or a guardian appointed by will, for the following reasons (amongst others):</p> <ul style="list-style-type: none"> <li>• Abuse of trust;</li> <li>• Continued failure to perform the duties of his trust; Incapacity to perform the duties of his trust;</li> <li>• Ill-treatment, or neglect to take proper care of the ward;</li> <li>• Wilful disregard of any of the GWA's provisions or of any of the court orders;</li> <li>• Conviction of an offense implying a defect of character;</li> <li>• Having an interest that is adverse to the faithful performance of his duties;</li> <li>• Ceasing to reside within the local limits of the court's jurisdiction; and</li> <li>• Bankruptcy or insolvency in the case of a guardian of property.</li> </ul> <p>A guardian may also apply to the court to discharge him or her from the responsibility of being a guardian.</p> <p>A person also ceases to be a guardian in the case of his or her death, removal, or discharge; upon the ward ceasing to be a minor; upon the female ward's marriage (when her husband is not unfit to be her guardian); or upon the court itself assuming guardianship of the minor.</p>
<p><b>Sanctions</b><sup>371</sup></p>	<p>A guardian appointed by the court and with the court's permission cannot <b>remove</b> the ward from the limits of the court's jurisdiction. The permission could be special or general and could be specified in the court order. Illegal removal of a ward from the court's jurisdiction is punishable with a fine not exceeding Rs 1,000 or a jail term extending to six months.</p>
<p><b>Cross-border guardianship</b><sup>372</sup></p>	<p>Pakistani Courts are able to grant the custody of children to <b>foreign nationals</b> by appointing them as guardians for the sake of their welfare. The Guardian and Wards Act 1890 has no provision about a ban regarding the adoption of Pakistani children in other countries, where an adoption law exists. In this context, a Pakistani court has the authority to allow the guardian to take the child abroad.</p> <p>If the Family Court grants the guardianship, it will issue a record of the proceedings, a guardianship order and a guardianship certificate. The certificate must state that guardianship has been <b>granted for the purposes of immigration to, and adoption in, the receiving State</b>.</p> <p><b>Conversion of the guardianship order into adoption in the receiving State:</b> The guardian may formalise an adoption on the basis of the documents issued by a Pakistani civil judge, in the court of another country where there is legislation providing for adoption.</p> <p>The US Department of State does not list any adoption agencies in Pakistan. However, there are <b>agencies specialised in guardianship-adoption proceedings</b>, such as New Star <i>Kafala</i><sup>373</sup>, which stated that, in 2017, it had completed 7 adoptions in Pakistan (with one orphanage) and has 22 further applicants in process. As stated by the Government itself in its latest periodic report to the Committee on the Rights of the Child, when addressing <i>kafalah</i>: "various organisations have facilitated the adoption of children in orphanages such as Edhi Foundation, Anjuman Kashana-e-Itfal-o-Naunehal, SOS Children's Village of Pakistan, Ansar Burney Trust, Hope and Didar Karim. All adoptions of children at orphanages take place through proper legal and judicial procedures."</p> <p>2013 Research notes that, "the issue of adoption of Pakistan children born out of wedlock by foreigners (adoptive parents) was initially taken up by the <b>Supreme Appellate Court of Gilgit</b><sup>374</sup> <b>Baltistan (Pakistan)</b>. It was brought to the notice of honourable court that a large number of children having no claim by any parents are being moved out of the country by the foreigners after getting their custody from the Guardian Court through the facilitation of one local N.G.O, CEENA Health and Welfare services. The Supreme Appellate court heard the case, the writer was appointed as Amicus curiae to give his opinion on the issue in the light of Sharia. The Court concluded the case by <b>issuing strict guidelines to be followed by 'foreign adoptive parents'</b>. The court, inter-alia, required foreign adoptive parents to maintain the child as their natural child in accordance with Muslim faith and not handover the custody of the child to any other person without the permission of the concerned authorities<sup>375</sup>."</p> <p>In July 2013, <b>Canada imposed a moratorium on 'adoptions' from Pakistan</b><sup>376</sup>, citing a conflict with Islamic law over adoption and guardianship: "The provinces and territories will no longer accept applications for adoption placements from Pakistan, effective July 2, 2013. (...) Pakistani law allows for guardianship of children, but does not recognise our concept of adoption. Proceeding with further such placements would violate Canada's obligations under The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption."</p>

**Subsidiarity principle<sup>377</sup>**

No legal provision explicitly mentions the subsidiarity of a potential cross-border measures.

**Statistics<sup>378</sup>**

It appears that there are currently no official statistics on the number of domestic or intercountry guardianship placements.

The Edhi Foundation states that it annually places over 250 babies or children for “adoption”. To date, over 23,320 babies and children have been provided to childless couples and families.

“Adoptions” from Pakistan to the USA: 35 in 2018, 30 in 2017, 29 in 2016, 30 in 2015.

Until Canada’s moratorium on adoptions from Pakistan, it had been the receiving State of 129 children between 2005 and 2013.

**ISS/IRC ANALYSIS: GUARDIANSHIP**

Whilst it is clear that Pakistani and Sharia Law do not provide for the adoption of children in Pakistan, it is, however, apparently possible for foreigners to apply to become a guardian in accordance with Pakistani legislation, and then request the adoption of the child in their country of residence.

It is considered that Pakistan must further strengthen the procedure leading to the declaration of guardianship, and then potentially an adoption abroad. This procedure should be part of an official policy, and be undertaken by appropriately trained and supervised public authorities.

In addition, some key elements of the procedure should be developed or strengthened to ensure that children’s rights and those of the biological families are fully respected in line with international principles and standards. This would include:

- Ensuring the child is truly eligible for a guardianship order;
- Assessing and preparing the potential guardians to assume the guardianship and potential adoption of the child;
- Having matching undertaken by a professional and multidisciplinary team – rather than the personal selection of a child by the applicants;
- Ensuring that intercountry guardianship placements/adoptions fully respect the principle of subsidiarity;
- Undertaking follow-up in the receiving State in order to ensure the child’s legal status, family situation, and thereby protection; and
- Supervising the intermediaries involved and the costs linked to these procedures.

**Unfortunately, Pakistan’s guardianship system is somewhat unclear and dysfunctional, does not fully safeguard the child’s interests and rights. ISS/IRC calls upon receiving States, and prospective adopters, to be very cautious when planning to undertake a guardianship and potential adoption procedure from Pakistan.**

**ADOPTION PROHIBITION**

The legal system of Pakistan does not have a recognised procedure or statutory provision on child adoption; yet it is not explicitly prohibited (see also sections above).

On the other hand, Pakistani Law and Islamic Sharia Law, upon which Pakistan’s Family Law is largely based, does not allow for adoptions of Pakistani children in Pakistan.

**SUDAN****GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE****Legal and policy framework**

**International framework:** CRC (signed on 24 July 1990 and ratified on 3 August 1990); Optional Protocol to the CRC (adhered on 2 November 2004);

Non-contracting State of the African Charter, nor the 1993 and the 1996 Hague Conventions;

**Child Act, 2010<sup>379</sup>**; and

The 2011 **National Policy on the Welfare and Protection of Children Deprived of Parental Care (The ‘National Policy’)**<sup>380</sup>.

<p><b>Competent authorities</b></p>	<p>As of 2016, Sudan is divided into 18 States called (<i>Wilayah</i>), these are further divided into 158 localities<sup>381</sup>.</p> <p>The National Policy, adopted by the National Council for Child Welfare (NCCW), describes the obligations and responsibilities of stakeholders, specifically the Ministry of Social Welfare, Women and Children, the NCCW, the State councils, the Ministry of Health, the Ministry of General Education, the Family and Child Protection Units (FCPU), the State ministries of social affairs, the regions and civil society organisations<sup>382</sup>, as well as the Ministry of Welfare and Social Security.</p> <p>According to UNICEF<sup>383</sup>, the Ministry of Welfare and Social Security is in charge of promoting the care of children within their families, and is the main entity in charge of children and their harmonious development. Intervention actions include: prevention of separation; reintegration; training; institutional care; and advocacy and legislative support to foster families. Additionally, the National Council for Child Protection holds an important coordination role regarding childhood policies and laws.</p>
<p><b>Children's rights situation<sup>384</sup></b></p>	<p>Due to many years of conflict, thousands of children are internally displaced or are refugees. Birth registration and female genital mutilation are significant child protection concerns.</p> <p>Violence against children is a concern with 64% of children in Sudan aged 1 – 14 years experiencing psychosocial aggression or physical punishment. Improvements in school enrolment have been made over the past two decades, community child protection committees have been established, and family tracing and reintegration, including a system of <i>kafalah</i> for abandoned children, have been supported and expanded over the past several years, with support from UNICEF.</p>

**FAMILY SUPPORT & PREVENTION OF SEPARATION**

<p><b>Access to services (1st and 2nd levels of prevention)</b></p>	<p>With the support of UNICEF, the country is currently building a comprehensive and integrated social protection system that is based on life-course approach and seeks to address the specific needs of families and children through social protection referral mechanisms<sup>385</sup>. In a recent report, UNICEF provides an analysis on current social policies, including information on support to vulnerable families and children, and the challenges encountered as well as the lessons learnt<sup>386</sup>.</p> <p><b>Support for single mothers:</b> A study carried out in 2003 estimated that 1,600 babies, mostly newborn, are abandoned in Khartoum every year. Approximately half of these children die before they can be rescued. Thanks, mainly, to the work of civil society actors' assistance is now in place in Khartoum State, providing services for pregnant women and single mothers who otherwise might abandon their babies because of stigma or risk an honour killing. Preventing discrimination requires raising societal awareness regarding the innocence of children born to single mothers and of the mothers, themselves<sup>387</sup>.</p> <p>Since April 2018, the EU funds a project aimed at the "<i>development of a safe environment for single mothers, pregnant women and women who give birth outside wedlock and their children</i>". It aims to train and empower child protection professionals to respond to the needs of vulnerable women, set up new prevention and quality alternative care services, and reduce the stigma and discrimination towards single mothers, pregnant women and women who give birth outside wedlock<sup>388</sup>.</p>
<p><b>Gatekeeping (3rd level of prevention)<sup>389</sup></b></p>	<p>Probation officers, social workers and FCPU work to prevent the separation of children from their mothers and to protect children from death or abandonment. When a child is abandoned, steps must be taken to reunite the child with their family, under the care of their parents, where possible, or their extended family.</p> <p>Before a decision is made to reunite a child with their family or prevent separation, the ability of the parents or family to care for and protect the child must be assessed. The decision must be made by an appropriate body. The separation prevention and reunification process must include religious and psychological support for the family, as well as direct assistance, both technical and in-kind, to help the family regain its footing and keep the child.</p>

## ALTERNATIVE CARE OPTIONS

<p><b>Applicable law</b></p>	<p>Under section 25 of the Child Act, 2010, substitute care must be provided to children who suffer from difficult family circumstances that hinder their upbringing or their restitution to their natural families, in accordance with the following options:</p> <ul style="list-style-type: none"> <li>• relatives of the mother or father (<b>care by family members</b>);</li> <li>• <b>maintenance families</b>, in accordance with Sharia law (<b>emergency alternative family/permanent alternative family</b>);</li> <li>• <b>adoption</b> in accordance with the Non-Muslims Personal Status Act; and</li> <li>• care homes (<b>residential care institutions</b>).</li> </ul> <p>Upon selecting substitute care, due consideration must be given to the continuity of child instruction, in accordance with the child's religious, ethnic, cultural and linguistic background and beliefs<sup>390</sup>.</p>
<p><b>Extended family/kinship care</b></p>	<p>Despite being foreseen by the Child Act, 2010, ISS/IRC was unable to gather information on this alternative care option.</p> <p>According to a 2002 study, Sudanese society believes strongly in family-based care, as bolstered by the Child Act, 2010.</p>
<p><b>Emergency foster family/alternative family</b></p>	<p>The Child Act, 2010, defines "maintenance family" as a substitute or sponsor family assigned with the provision of spiritual, social, psychological and health care of the child, whose circumstances prevented their upbringing in their natural family (section 4).</p> <p>An <b>emergency foster family/alternative family</b> provides temporary shelter to a child until reunification measures are taken or a permanent alternative family is found; the child is to remain with the emergency alternative family for the shortest period possible, while the search for a permanent alternative family continues. Selected families must meet specific conditions and requirements<sup>391</sup>.</p> <p>During the child's stay with the emergency family, probation officers make weekly visits to monitor the child's physical, psychological and social condition<sup>392</sup>.</p> <p>During the child's stay with the emergency family, probation officers make weekly visits to monitor the child's physical, psychological and social condition.</p> <p>In addition, the State provides the emergency alternative family with a reasonable monthly allowance. In fact, each emergency alternative family is paid a regular sum each month, and health insurance is provided for all children in the family. School fees are paid for by the State<sup>393</sup>.</p>
<p><b>Residential care</b></p>	<p>Institutional care is governed by section 26 of the Child Act, 2010, and by the National Policy, which provides for institutional care as a temporary measure. According to the National Policy, <i>"the purpose of consistent institutional care is to pave the way for the integration of children deprived of parental care within sponsor families, so the children can lead natural lives in dignity"</i><sup>394</sup>.</p> <p>The National Policy also states that <i>"the Maygoma Care Home is the most significant care home. Established in 1961, the Maygoma Care Home takes in abandoned children from one day old to four years of age, from every region of the country. The home operates in conjunction with two other care homes, the Child Protection Centre for boys and the Future Centre for girls, which take in children between four and 21 years of age. Smaller homes are located in some States including Gezira, Red Sea and White Nile"</i> (p.8). In addition, Hope and Homes for Children (HHC) Sudan explains that the Maygoma Care Home (...) <i>"was designed to take care of a maximum of 80 babies and generally had a population of about 40 at any one time."</i></p> <p>When the National Policy was being developed, the Islamic Fiqh Council issued an opinion clearly recommending that <i>"the State directly oversee the care homes, which are not to be led by foreign organisations. The State has a duty to care for and protect these children as subjects of the State"</i><sup>395</sup>.</p>

### ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE

It is worth noting that current legislation and the National Policy clearly stipulate that institutional care be used as a transitional measure of last resort and that family-based solutions be given priority. It is positive that, in response, the government, along with civil society – Hopes and Homes for Children in particular – has deployed significant efforts to develop and strengthen family-based care solutions, both temporary and permanent.

As detailed further, emergency and permanent foster families have emerged over the past decade as a meaningful option for children deprived of parental care. This promising practice, which takes into account Sudan’s cultural and religious context, establishes a system whereby children are placed in families, either temporarily or permanently.

This is a positive step, and it is important that the government allocate the necessary human and financial resources to strengthen the system, equipped with an appropriate legal and policy framework, so that it can be established countrywide in accordance with local cultural, religious and social conditions.

### THE PERMANENT ALTERNATIVE FAMILIES (‘KAFALAH’)/MAINTENANCE FAMILIES

#### General considerations

The National Policy stipulates that “*authorities give priority to the sponsorship of abandoned children by foster families*”, in accordance with the four above-mentioned pillars: abandonment awareness; prevention of family separation and promotion of reunification; permanent family care; and temporary/emergency family care<sup>398</sup><sup>399</sup>. As HHC Sudan explains, “*the existence of cooperation and dialogue between different actors, including the Government, religious authorities and civil society, has resulted in the principle of kafalah being applied in a progressive way.*”

*“With support from UNICEF, the Government established an Alternative Family Care Task Force in 2002 whose members were the Khartoum State Ministry of Social Affairs, the Khartoum Council for Child Welfare, Médecins Sans Frontières(MSF) and Hope and Homes for Children (HHC). The Task Force commissioned a study group to conduct field research (...). The most significant finding was the conformity of Sudanese culture with the family-based care for children. Of particular significance was the Sudanese familiarity with Kafalaas a permanent family-based solution akin to adoption and the high rate of success it had across all economic groups<sup>400</sup>.”*

**Paradigm shift regarding the fate, rights and social status of children abandoned at birth and children whose parents are unknown** took place following a *fatwa* was issued in February 2006 by the Islamic Scholars Council, the highest religious body in Sudan. It established that orphans were entitled to full support and compassion from the community, and that the State had a legal obligation to provide financial and material support for these children. The *fatwa* stated that pregnancy alone was not proof of adultery, and that children born out of wedlock should not be punished for any apparent failings of their parents. According to HHC, the *fatwa* effectively decriminalised unmarried mothers, and removed the ‘criminal’ stigma attached to children born out of wedlock. Consequently, it prevented the forced separation of mother and child – a common practice when an unmarried mother was presented to the courts or police for judgement<sup>401</sup>.

To care for abandoned children and place them in permanent alternative families, UNICEF worked with the Government of Sudan to implement the *kafalah* system, helping to secure homes for more than 3,000 abandoned children.

*Placement in permanent foster families, under the kafalah principle, is permitted nationally (as per a well-established procedure) and internationally through diplomatic means.*

#### Competent authorities<sup>402</sup>

**National placement:** Formal procedures vary from State to State. In Khartoum, the transfer of a child to a permanent alternative family must be approved by both the **Director General of the Ministry of Social Welfare** and by the **Office of the Attorney General for Minors at the Ministry of Justice**. In other States, the transfer is validated by the **Director General of the Ministry of Social Affairs** and by a Judge of the Juvenile Court.

**Cross-border placement:** These placements seem to be possible under the National Policy, Appendix 3 of which stipulates that custody procedures by mothers residing outside Sudan be undertaken at the **Sudanese embassy** in their country of residence and that the necessary steps be taken to ensure the child’s protection by the receiving State when the husband is a foreigner.

#### Subsidiarity principle

Each child’s situation is scrutinised and every effort is made to, first, find the child’s family and, where possible, reunite the child with their family, taking into account the child’s best interests.

In every case, the decision to place a child in a permanent alternative family is approved at a very high level, keeping in mind the potential impact on the child’s rights with respect to identity and contact with the biological family.

<b>Eligible children</b> <sup>403</sup>	<p>The permanent alternative family system applies only to children whose parents have died.</p> <p>However, since February 2006, the <i>fatwa</i> established that the principle of <i>kafalah</i> could be extended to children who had been abandoned at birth and whose birth parents could not be found. This provision gave children in Sudan access to family-based care and, most importantly, long-term family care.</p> <p>Where the abandoned child is found constitutes evidence of the child's religion, and any child lost in an Islamic city is considered a Muslim.</p>
<b>Potential alternative families</b> <sup>404</sup>	<p>Appendix 3 of the National Policy on the Welfare and Protection of Children Deprived of Parental Care sets out the requirements for permanent foster families:</p> <ul style="list-style-type: none"> <li>• fitness;</li> <li>• the family's home must be located within the borders of the region or State in which the abandoned child was found;</li> <li>• the application must be submitted in the <i>kafil</i> mother's name;</li> <li>• the applicant must be a Sudanese woman; in the case of a foreign woman, the application must be submitted in the husband's name with the wife's consent;</li> <li>• an unmarried man is not permitted to apply for guardianship;</li> <li>• the <i>kafil</i> mother must be between the ages of 28 and 55;</li> <li>• the consent of the legal guardian (who must appear in person before the relevant bodies to provide verbal consent); in the absence of a legal guardian, public guardianship is an option available to authorities;</li> <li>• the <i>kafil</i> mother's home should provide a suitable environment for child care;</li> <li>• the applicant must be free of any illness that could hinder child care;</li> <li>• the applicant must demonstrate good behaviour;</li> <li>• the applicant's youngest child must be at least 24 months old;</li> <li>• the family must agree to monitoring by the relevant bodies; and</li> <li>• the <i>kafil</i> mother must personally sponsor the child and may not entrust the child's sponsorship to another person.</li> </ul> <p>The following documents must be submitted: the legal guardian's written consent, certified by the proper authorities; the identity documents of the legal guardian and the applicant (<i>kafil</i> mother); the marriage contract, proof of divorce or death certificate of the husband if applicable; a certificate of medical fitness; the birth certificate or certificate of estimated age; a recent certificate of residence issued by the appropriate authorities in the area of residence; a recent certificate of good behaviour issued by the appropriate authorities in the area of residence; and a criminal record check.</p>
<b>Evaluation of applicants</b> <sup>405</sup>	<p>The eligibility of the applicants is <b>evaluated by means of a visit or investigation to ascertain key data</b> including their social situation, health and financial position. According to HHC Sudan, <i>"when a family makes enquiries to become an Emergency Alternative Family or a Permanent Alternative Family, a rigorous process is in place to select applicants [for a detailed description, consult ISS/IRC]. The child's best interests are at the forefront of this process and several meetings/visits take place with family before any child is placed. (...) Families also undergo training during which they will learn best practice in caring for children as well as the trauma the baby may have experienced and its possible impact of this."</i></p>
<b>Procedure</b> <sup>406</sup>	<p><b>Completion of the application form</b>, which contains initial information about the applicant.</p> <p><b>Review of the applicant's documents</b> and creation of a special file for the family.</p> <p><b>Evaluation of the candidates and Oversight.</b></p>
<b>Legal effects</b> <sup>407</sup>	<p><b>Responsibility of the family:</b> A permanent alternative family is financially responsible for the child and takes responsibility for most of the day-to-day decisions affecting them. The State retains responsibility for monitoring the placement and intervening in case of breakdown.</p> <p><b>Parentage:</b> Owing to the importance of blood relationships in Islamic teaching and society, biological ties cannot be severed by way of a legal process as would be the case in adoption. Accordingly, a Muslim is therefore prohibited from passing on their lineage to a child that is not theirs. In Sudan, however, placement in a permanent alternative family is considered a permanent arrangement where the child continues to be part of the family after they turn 18.</p> <p><b>Name:</b> As the National Policy indicates, a Muslim is not allowed to give their name to a child who is not legally theirs.</p>

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<p><b>Legal effects<sup>407</sup> (continued)</b></p>	<p><b>Inheritance:</b> The grounds for inheritance are clearly defined in Islam; an abandoned child does not have the right to inherit because there is no legal basis requiring such a thing. According to HHC Sudan, “children cared for through the <i>kafalah</i> system do not have an automatic right to inheritance, which, under Islamic teaching, is determined using a strict calculation for the division of an estate among blood relatives. However, Islamic teaching provides that an individual can make a will and designate one or more persons of their choice as the beneficiary, or beneficiaries, of up to 30% of their estate. HHC has trained social workers to counsel permanent alternative families to make a will, naming the adoptive child as beneficiary of up to the maximum of 30% of the estate.”</p>
<p><b>Follow-up and post-placement<sup>408</sup></b></p>	<p>The State retains the responsibility for monitoring the placement and intervening in case of breakdown. Once a child is placed in an emergency alternative family or a permanent alternative family, safeguarding the child’s welfare is of primary concern.</p> <p>Regular visits take place, often unannounced, to verify that the child is being cared for appropriately and to assess the family for further support if needed.</p> <p>In the case of permanent alternative families, visits take place weekly and then monthly. They are subsequently reduced to every three months and then every six months.</p> <p>Finally, visits will take place every 12 months until the child reaches the age of 18.</p>
<p><b>Revocation</b></p>	<p>A provision allows for the reunification of a child who has been placed in a permanent alternative family with their mother provided that she is found, that she come forward to reclaim the child and that reunification is in the child’s best interests<sup>409</sup>.</p>
<p><b>Kafalah breakdowns</b></p>	<p>In the event that the union between the child and the <i>kafil</i> mother or extended family breaks down, the mother and the family must contribute to finding a better solution for the child, with the support of psychiatrists, to ascertain what the child really needs<sup>410</sup>.</p>
<p><b>Identity and access to origins</b></p>	<p>International standards emphasise the importance of preserving the child’s identity and knowledge of their birth family and history, a principle that is mirrored under the Sudan <i>kafalah</i> system. Permanent alternative families therefore provide a progressive approach to a long-term stable solution for children<sup>411</sup>.</p>
<p><b>Statistics</b></p>	<p>According to the 2015 UNICEF annual report, through the alternative care program of the Ministry of Social Welfare, 791 children (514 boys and 277 girls) were placed in alternative family care/<i>kafalah</i><sup>412</sup>. UNICEF Sudan worked with the government to implement the <i>kafalah</i> system, indicating that it had secured homes for 5,033 abandoned children<sup>413</sup>.</p>

**ISS/IRC ANALYSIS: PERMANENT ALTERNATIVE FAMILIES (‘KAFALAH’)**

The permanent alternative family mechanism is a significant step forward in securing family-based care for children separated from their families, while taking into account Sudan’s legal, cultural and religious context.

The effective collaboration between different stakeholders, including religious entities and civil society, has led to a changed social attitude towards children born out of wedlock and their respective rights.

The country has established a strengthened, recognised and widespread system of family-based care offering a procedural framework. Some aspects of the process, however, need to be developed further to ensure sufficient safeguards for children in placements, including: requiring informed consent, especially in the case of a *kafalah* placement abroad (as per Appendix 3 of the National Policy); post-placement monitoring to ensure the child’s continued well-being; and the involvement of a multidisciplinary team before, during and after the *kafalah* process, including when undertaken in another country.

This is particularly important in cases where it is possible to implement permanent alternative family care solutions beyond the borders of the country, that is, when a Sudanese child is placed in a family that lives abroad, as mentioned in Appendix 3 of the National Policy.

The 1996 Hague Convention and the mechanism for cooperation and communication it provides may facilitate oversight of such placements abroad, while ensuring respect for the rights of the child.

**ADOPTION PROHIBITION EXCEPT FOR NON-MUSLIM CHILDREN**

Adoption is **prohibited in Islam**, whether the child’s heritage is known or not. Muslims are not permitted to pass their lineage to a child that is not theirs. It seems, however, that **adoption is permitted for non-Muslim children in Sudan**, under the Child Act, 2010, which provides for adoption in accordance with the Non-Muslims Personal Status Act.

## 1.2. *Kafalah* in mixed systems

The coexistence of different confessions – whether it is in a country of Muslim majority<sup>414</sup> or in a country without a State (constitutional) religion – has led to the cohabitation of diverse civil status and personal status regimes. In such contexts, adoption systems and practices have emerged, especially as a response for non-Muslim children in need of care. Countries such as Djibouti, Lebanon and Malaysia are examples of systems which are more adoption-focused. Yet, some countries – such as Tunisia – have developed dual *kafalah* and adoption systems. In other countries, other family-type measures co-exist, for example, in South Sudan<sup>415</sup> – guardianship and foster care as well as adoption; or in Somaliland<sup>416</sup>.

## REPUBLIC OF DJIBOUTI

### GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE

#### Legal and policy framework

**International and regional framework:** CRC ratified on 6 December 1990; OPSC ratified on 27 April 2011<sup>417</sup>; African Charter signed in 1992.

**Domestic laws:**

There is no general law related to child rights in Djibouti<sup>418</sup>;

2018 – 2022 National Policy for Social Protection;

National Plan of Actions for Children in Djibouti (PASNED);

2015 National programme of solidarity with families (PNSF);

*Loi n°003/AN/18/8ème L Portant Code Civi* <sup>419</sup>(12 April 2018) [**New Civil Code**] and *Loi N° 54/AN/19/8ème L portant modification de l'article 435 de la Loi n°003/AN/18/8ème L du 12 avril 2018 portant Code Civi*<sup>420</sup> (4 July 2019) [**Amendments to new Civil Code**];

*Loi n°158/AN/12/6ème L portant statut du centre DARYEL*<sup>421</sup> (28 March 2012) [Status of the DARYEL Centre];

*Loi n°152/AN/02/4ème L portant Code de la Famille*<sup>422</sup> (31 January 2002) [Family Code] and *Loi n°56/AN/14/7ème L modifiant et complétant les titres 6 et 7 de la Loi n°152/AN/02/4ème L portant Code de la Famille*<sup>423</sup> (30 September 2014) [Amendments to the Family Code].

NB: The laws in Djibouti are codified, but a specific characteristic of the system lies in the coexistence of Islamic Law, Customary Law and Civil Law inherited from the French Code Napoléon, in particular in Family Law matters and family-type protection measures.

#### Competent authorities

Ministry of Women and Family;

National Council for Children (CNE): responsible for the implementation of the National Plan of Actions for Children in Djibouti (PASNED) since 2012;

Office of the Republic's Public Prosecutor: Placement order/Declaration of abandonment;

Ministry of the Interior: Social assessment of the applicants;

Personal Status Judge: Administrative placement decision (*'adoption-protection'*) (see below);

Civil Chamber of the Court of First Instance: Simple and full adoption (see below).

#### Children's rights situation<sup>424</sup>

The Republic of Djibouti had approximately 888,000 inhabitants in 2012, of which over 344,000 were children under the age of 18 years. The majority of the population are Muslim.

According to UNICEF in Djibouti, 10% of all children in the country are not registered at birth and have no birth certificate. An issue that affects girls and women is female genital mutilation, which affects 78% of women.

The recent influx of migrants and refugees due to the events in the region and the impact of climate change have also had an impact on the life of children in the country<sup>425</sup>.

Djibouti is one of the few countries having achieved the Millennium Development Goal relating to access to drinkable water.

The Republic of Djibouti ratified the UNCRC in 1990 and since the early 2000's, has been actively engaged in poverty reduction efforts. This is reflected in its National Poverty Reduction Strategy and the subsequent 2004 – 2006 Poverty Alleviation Strategy, the National Initiative for Social Development 2008 – 2011, and the most recent National Social Protection Strategy 2013 – 2017 which describes the establishment of social safety net services for vulnerable groups<sup>426</sup>.

There is a new cooperation programme between the Government of Djibouti and UNICEF for 2018–2022, which focuses, in particular, on the most disadvantaged and vulnerable children and communities. Amongst others, this programme intends to ensure that vulnerable children and adolescents have access to integrated child and social protection services<sup>427</sup>.

## FAMILY SUPPORT & PREVENTION OF SEPARATION

<p><b>Access to services (1st and 2nd levels of prevention)</b></p>	<p><b>Appropriate assistance to parents</b> by strengthening education related to parenthood, and by disseminating (in national media (radio, TV) programmes/debates) information for the adoption of good practices within the family, with the support of civil society.</p> <p><b>Inclusive access to health:</b> According to the government, through its Social Health Assistance Program (PASS), health benefits are provided for vulnerable households (without income) and their children (arts. 20 and 21). The entire population thus benefits from basic medical coverage.</p> <p>In 2018, the State developed the <b>National Policy for Social Protection 2018 – 2022</b>, with the main objective to cover the needs of the most vulnerable groups of the Djiboutian population. This policy is strongly based on the 'basis of social protection' as promoted by technical and financial partners.</p> <p><b>National Social Protection Strategy 2018 – 22:</b> The Djibouti government's <i>Secrétariat d'État aux Affaires Sociales</i> (SEAS) is committed to strengthening the social service workforce and engaging professionally trained social workers to deliver these social safety net services to the population through <i>Guichets Sociaux</i> (social service offices). Since early 2018, 11 <i>Guichets Sociaux</i> have been established in Djibouti to deliver cash transfers, and referrals to other social support services<sup>429</sup>.</p>
<p><b>Gatekeeping (3rd level of prevention)</b></p>	<p><b>National programme of solidarity with families</b> (PNSF) in 2015, financial assistance was provided to the most vulnerable homes to ensure food security, as was support measures for the health and education of children between the ages of 0 and 16, and for pregnant and breast-feeding women<sup>430</sup>.</p> <p><b>Article 89 of the 2018 Civil Code foresees a detailed procedure</b> in case of the discovery of an abandoned child, or of children placed under guardianship of the Child Welfare Services, and children without any known birth certificate or children born under secrecy (obligation to transfer the child to an accredited child care centre; declaration of the child welfare services; protocol at the Civil Status Registry, etc.).</p>

## ALTERNATIVE CARE OPTIONS

<p><b>Kinship care</b></p>	<p>The care of children vulnerable to HIV/AIDS remains complex (15% of the total number of orphans in the country, estimated at 33,000), save that offered within their family environment. However, since the socioeconomic crisis of the 1990s, family solidarity has become eroded and the community often remains powerless in this situation<sup>431</sup>.</p>
<p><b>Guardianship</b></p>	<p><b>Guardianship is governed by articles 85 and following, of the Family Code, according to which the following persons can be a guardian of a foundling or a child abandoned by his or her parents:</b> The legal representative of the national public or private institution which takes in the child; and the Commissioner of the Republic with territorial jurisdiction in all other cases. When the child is taken care of by a private natural or legal person, a contract is drafted before a notary between the guardian and the parent of the ward (or one of the above bodies), or at least, the territorially responsible Commissioner of the Republic or his representative, if the parent is unknown or deceased<sup>432</sup>. According to articles 88 and 89, <i>"the guardian exercises, with respect to the ward, the rights recognised by this code to the holder of custody and assumes the same obligations. He is, moreover, civilly responsible for the acts of the ward, under the same conditions as the father and the mother. (...) Anyone who, following the authorisation from the judge, takes care of a foundling who does not have property, is required to provide him or her with food until the age of majority unless he is continuing his or her studies."</i></p>
<p><b>Residential care</b></p>	<p><b>The centre/nursery DARYEL:</b> This association, recognised as being of public use, has been granted the mission of public care and placement service for abandoned children. Its operation and duties are prescribed by law<sup>433</sup>. The centre only welcomes children between the ages of 0 and three years. Any placed child who reaches the age of four years and who cannot return to his or her family or be placed under guardianship, will be transferred to a Child Protection Centre or any other home accredited by the State. It welcomes children born from unknown parents or a known mother, who has willingly abandoned the child; or whose parents have a dissolute or perverted lifestyle, with bad behaviour, or have been deprived of parental responsibility (Art. 12 of the Law). Children welcomed and placed in the centre are State wards.</p> <p><b>The Centre de Protection de l'Enfant:</b> The oldest institution in the country, cares for young school-age girls. The Centre has been strengthened with the creation of a nursery for abandoned newborn children.</p>

**Residential care  
(continued)**

The **Centre *Al-Rahma***: Cares for orphaned boys and provides accommodation, food and education in general, professional and technical fields. This charity has also established itself at regional level to help local populations.

**SOS Children's Villages International**: Established in the country since 2014, seeks to offer family life to orphaned siblings and to ensure an affective and educational relationship with a SOS mother, until they become autonomous. Under the leadership of the Ministry of Women and Family, the NGO has built and equipped Djibouti's first village for orphaned and vulnerable children in Tadjourah. The children's village is made up of 10 independent houses, each of them caring for seven to eight orphaned children. They are supported by a trained and experienced team, such as the SOS mother (substitute mother) and SOS aunts<sup>434</sup>.

**Procedure**: Provisional care or admission to a centre is notified to the Public Prosecutor within 48 hours. The latter issues a placement order at the DARYEL Centre. The provisional admission is undertaken upon a request by the following authorities: the heads of health centres or maternity wards; the Major of the *Gendarmerie*; the Director of the National Police; or any person or authority, which may confirm the child's abandonment (Art. 13 of the Law). From the date of the child's placement by one of the entities mentioned in Article 13, the Director submits a request to the Public Prosecutor for the declaration of abandonment, and for the DARYEL Centre to be recognised as the child's guardian until he or she is placed with a family (Art. 17)<sup>435</sup>.

**ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE**

ISS/IRC shares its concern at *"the high numbers of vulnerable and orphaned children that need special attention from the State party to ensure upbringing in their families and communities of origin or, as a last resort, in alternative care centres"*;

and stresses the need to strengthen the provision of support to families with children and the strengthening of the capacities of its alternative care facilities in such a way as to maintain a family-type of environment;

as well as the need to ensure that an appropriate monitoring mechanism is in place to monitor alternative care facilities and foster care/guardianship programmes.

**'ADOPTION-PROTECTION'****Applicable laws**

**According to *Loi n°152/AN/02/4ème L portant Code de la Famille (Family Code)*, adoption is prohibited in Djibouti; except for the provisions of title seven of the Family Code (Art. 80).**

However, *Loi n°56/AN/14/7ème L modifiant et complétant les titres 6 et 7 de la Loi n°152/AN/02/4ème L portant Code de la Famille (Amendment to the Family Code of 30 September 2014)* has reformed the Djiboutian Family Code, and creates two types of child care placements, known as **'adoption-protection'**, one being notarial, the other judicial (via the Personal Status Court), depending on whether the child has an established parentage or not.

As per ISS/IRC's interpretation, this type of adoption resembles a *kafalah* placement in Islamic Law but does not respond to the legal criteria of an intercountry adoption in Western countries (i.e. the creation of a parentage relationship)<sup>437</sup>.

Thus, as described by the government in its Third to Fifth Periodic Reports to the Committee on the Rights of the Child of 2019, 'the revised text of titles 6 and 7 of the Family Code specify the exceptions to the adoption prohibition (art. 80). The provisions on (...) *adoption-protection* (...) have been drafted so as to give a central place to the rights and interests of the child, while also respecting the rights of the family of origin and the adoptive family'. As per this last periodic report, since 2018, the country is undertaking reforms in the field of *adoption-protection* in order to tackle legal obstacles and to establish a national reference framework. As per local contacts, the Family Code is currently being reviewed, possibly leading to further amendments.

**Competent authorities**

The provisions of the Family Code constitute the common law framework on family issues (marriage, divorce, parentage, inheritance, etc.) and are under the jurisdiction of the Personal Status Court<sup>438</sup>.

**Principle of subsidiarity**

*Loi n°56/AN/14/7ème L* of 30 September 2014 (arts. 88 and 89) gives priority to adoptions by Djiboutian families<sup>439</sup>.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<p><b>Eligible children</b></p>	<p>Both children with known and unknown parentage seem to be eligible for an ‘<i>adoption-protection</i>’.</p> <p>By way of notarial process: The adoption-protection agreement is submitted to a notary when the child has known parentage. This is adoption-protection via a notary.</p> <p>By way of judicial process: For children of unknown parentage, the adoption-protection is declared by the Personal Status Judge. This is adoption-protection via the court.</p>
<p><b>Eligible candidates<sup>440</sup></b></p>	<p>The person or couple, who wishes to adopt must comply with the following requirements:</p> <ul style="list-style-type: none"> <li>• have Djiboutian nationality;</li> <li>• be of Muslim faith;</li> <li>• be married;</li> <li>• be over the age of 30 years;</li> <li>• have sufficient resources to respond to the child’s needs; and</li> <li>• have a good reputation.</li> </ul> <p>The file for the request of an <i>adoption-protection</i> must include the following documents:</p> <ul style="list-style-type: none"> <li>• a hand-written request by the applying person or couple; a certificate of nationality; proof of marriage; the child’s birth certificate;</li> <li>• the provisional placement order issued by the Office of the Public Prosecutor;</li> <li>• a copy of the criminal records issued maximum three months before the application;</li> <li>• a certificate of good life and morals issued by the competent authorities;</li> <li>• a declaration of income and property and/or an employment certificate; and</li> <li>• a medical certificate based on a consultation and a follow-up consultation.</li> </ul>
<p><b>Evaluation of candidates<sup>441</sup></b></p>	<p><b>Social assessment of the applicants:</b> When the adoption-protection measure is requested at the DARYEL Centre, the Centre’s Direction will transfer a copy of all the placement requests to the Ministry of the Interior, which will call upon the competent authorities to move forward with the proceedings.</p> <p>The public authorities issue a social assessment report, which includes an opinion on the couple’s suitability.</p> <p>Should these authorities issue a negative opinion, the Direction of the DARYEL Centre will be in charge of informing the couple and ensuring that no elements of the opinion are shared.</p> <p>A negative opinion may be appealed before an administrative Judge.</p>
<p><b>Consents</b></p>	<p>When the child reaches the age of discernment, the Judge must take into account his or her opinion<sup>442</sup>.</p>
<p><b>Procedure<sup>443</sup></b></p>	<p><b>There are two procedures as mentioned above.</b></p> <p><b>Notarial process:</b> The <i>adoption-protection</i> application file must contain the documents mentioned above. The judge can request any other document likely to complete the application file. When the request is submitted in relation to a child placed at the care and family placement centre, a copy is submitted to the Management of the DARYEL Centre (e.g. Director); the documents are the same, and the management may request additional documents, which may complete the request.</p> <p><b>Judicial process:</b> The Management of the DARYEL Centre (e.g. Director) (if in charge of the file) submits a request for the placement to the Personal Status Judge, on behalf of the applicants having already obtained a positive opinion from the various authorities.</p>
<p><b>Decision</b></p>	<p>The Personal Status Judge issues a declaration within a month following the initial request for the placement.</p>

<b>Legal effects</b>	<p><b>Attribution of parental responsibility:</b> Once the family placement has been granted, the DARYEL Centre delegates the parental responsibility to the carers, which must behave like true parents. In cases of refusal, the applicants may call upon the Personal Status Chamber of the Supreme Court within a reasonable period, in accordance with the applicable procedure in their jurisdiction. In cases of definitive refusal, the Management (e.g. Director) Direction submits a new request for the applicants on the waiting list, in accordance with all the above-mentioned procedures.</p> <p><b>Custody of the child:</b> The rights resulting from <i>hadana</i> (Arabic term for custody) and the guardianship are exercised by the ‘adopter(s)’ in the same conditions as in relation to a legitimate child. Further, they are, in civil law, responsible for the actions of the ward, as would be the father and mother.</p> <p><b>Maintenance obligation:</b> Anyone who, following the Judge’s authorisation, cares for a child who has been found and has no possessions, must provide him or her with maintenance until the age of adulthood, except if he or she pursues his or her studies<sup>444</sup>.</p>
<b>Follow-up and post-placement</b>	<p>Any child, who has been admitted and cared for at the Care and Family Placement Centre may be placed under guardianship in accordance with the legal provisions and regulations in force and provided for in the Djiboutian Family Code (see below). The placement service of the DARYEL Centre is in charge of the follow-up and monitoring of those children, who have been placed with a family or under guardianship<sup>445</sup>.</p>
<b>Revocation</b>	<p>The <i>adoption-protection</i> and the guardianship certificate may be revoked by the Court upon a request by one of the parties at any time, and by the Judge and taking into account the best interests of the child or on serious grounds. The revocation of the <i>adoption-protection</i> is subject to the same conditions as the loss of parental responsibility<sup>446</sup>.</p>

### ISS/IRC ANALYSIS: ‘ADOPTION-PROTECTION’

Even though the procedure for a ‘*adoption-protection*’ placement decision – similar to *kafalah*, in the ISS/IRC’s view – is detailed in the laws in force, it would be useful to regulate in more details some aspects of this procedure, in particular when it is not applied for via the DARYEL Centre.

The *adoption-protection* system allows children deprived of their family of origin to be cared for by another family, thereby offering them personalised care, but it is necessary to ensure that this decision is always in the child’s best interests through the following key safeguards: thorough assessment of the child’s specific needs; obtaining the birth parents’ consent (if known); a comprehensive procedure to assess the applicants (socio-legal and psychological elements); a matching process based on the child’s needs and interests, rather than on the interests of the applicants; follow-up and supervision; sanctions in case of abuse or illicit practices; data collection and preservation systems for children in adoption-protection; search for origins; etc.

The reform undertaken in the country in Family Law matters has allowed for essential safeguards for those adoption procedures (simple and full adoptions) undertaken in accordance with the Djiboutian Civil Code (see below), the procedure provided for ‘*adoption-protection*’ in the reform of the Family Code should be reviewed in order to ensure at least similar protections. It is hoped that the current review of the Family Code will address these elements in the interests of the children placed in care. Consequently, the Committee on the Rights of the Child has requested the Djiboutian government in its 2020 List of Issues to provide further information on the application of the revised Family Code. .

### SIMPLE AND FULL ADOPTION<sup>447</sup>

**Applicable laws:** Loi N° 152/AN/02/4ème L (Family Code) prohibits adoption in Djibouti (Art. 80). However, it is worth highlighting that a **new Civil Code was adopted** in 2018 which includes key provisions relating to adoption. **Even though the Civil Code applies to any person on Djiboutian territory and of any religion (Art. 11 of the Civil Code), the application of the provisions relating to adoption remains complex and supplementary to those of the Family Code.**

**Competent authority:** Civil Chamber of the Court of First Instance (as the provisions of the Family Code constitute the common law framework on family issues (marriage, divorce, parentage, inheritance, etc.) and are under the jurisdiction of the Personal Status Court; the provisions of the Civil Code relating to family matters are under the competence of the Civil Chamber of the Court of First Instance)<sup>448</sup>.

**Adoptability of the Child:** The following children may be adopted: a) Children, whose **father and mother or the Family Council have duly consented** to the adoption; b) Children, **who have legally been entrusted to an association**, which has submitted a periodic declaration for at least five years at the time of the consent, and whose statutory object includes the protection or assistance to children and which actively works in this field. This association must also be recognised by the Ministry of Justice; or c) Children, who have been **declared abandoned** (a child under the care of a person, a private body or an association, whose parents have clearly not shown an interest in him or her for a year prior to the submission of the request for the declaration of abandonment, may be declared abandoned by the Civil Chamber of the Court of First Instance).

**SIMPLE AND FULL ADOPTION<sup>447</sup> (CONTINUED)**

**Different legal effects:** For a simple adoption (revocable on serious justifiable grounds), the adoptee remains in his or her family of origin and maintains his or her rights, in particular those relating to inheritance. Any marriage prohibitions are applicable between the adoptee and his or her family of origin. The adopter is the only person vested with parental responsibility in relation to the adoptee. Any parental responsibility rights are exercised by the adopter(s) in the same conditions as in relation to a legitimate child. The parental relationship resulting from the adoption is extended to the adoptee's legitimate children. The adoptee must provide maintenance to the adopter should the latter be in need and, vice versa, the adopter must provide maintenance to the adoptee. The obligation to provide maintenance continues to exist between the adoptee and his or her birth parents. However, the parents are only obliged to provide maintenance to the child if he or she cannot get it from the adopter. The adoptee and his or her legitimate offspring have, within the adopter's family, the same inheritance rights as a legitimate child, without gaining the status of compulsory heir in relation to the adopter's ascendants. Regarding a full adoption (**irrevocable**), the adoption grants the child a parentage that replaces his or her parentage of origin: the adoptee ceases to belong to his or her biological family, except for the prohibitions provided for in relation to marriage.

**For intercountry adoptions (ICA)**, it should be noted that some ICA seem to have taken place, including prior to the approval of the new provisions relating to adoption. Indeed, in 2007, the Government, in its report to the Committee on the Rights of the Child, explained that *"in practice, intercountry adoptions concern children with no known filiation, orphans or children legally declared to have been abandoned. Adoption is the subject of a legal decision based on legal texts that predate independence (Order of 23 December 1958 and Act of 11 July 1966), and priority is given, depending on the case, to adoptive legitimation or full adoption. The judge of the Djibouti lower court is at the centre of the process that regulates adoption, which is not authorised by him or her until after a strict procedure aimed at guaranteeing the interests of the child from the time of the decision declaring the child to have been abandoned and the child's placement in an orphanage requesting an award of adoption on behalf of an adopting family until the child leaves the orphanage"*.

**ISS/IRC ANALYSIS: SIMPLE AND FULL ADOPTION**

Even though adoption – in its Western legal meaning – is prohibited in accordance with the provisions of the Family Code in force in Djibouti, it appears that following the reform of the Civil Code, the resort to adoption has been strengthened and that some intercountry adoptions may have proceeded in practice. In 2008, the Committee on the Rights of the Child expressed its concern in relation to this issue following the discussions with the government, given that *"inter-country adoptions impact children, especially non-Djiboutian children, who are given over to the care of private institutions that send them out of the country to be adopted without ensuring that inter-country adoptions procedures are respected"*.

In this context, it is essential that the reforms that are currently underway on child protection measures and Family Law matters comply with international principles and standards in this regard, in particular the Convention on the Rights of the Child and the 1993 Hague Convention. This would allow intercountry adoption procedures to offer children (Djiboutian and other nationals on the territory), but also their biological families and foreign applicants, all the necessary safeguards to ensure their protection, their rights and prevent the potential sale of children.

**LEBANON****GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE****Legal and policy framework**

**International framework:** CRC was signed in 1990 and ratified in 1991; OPSC was signed 2011, and ratified in 2004<sup>449</sup>.

Lebanon is **not a party to any Hague Convention**<sup>450</sup>.

**Domestic laws:** Law on the Protection of Juveniles in Conflict with the Law or at Risk (Law No. 422 of 2002); Standard Operating Procedures for the Protection of Juveniles in Lebanon (Operational Toolkit)<sup>451</sup>; Lebanese Religious Personal Status Laws.

Lebanon has a secular constitution (that does not foresee any State religion) based on the coexistence of 19 religions and confessions. The Lebanese Religious Personal Status Laws for each denomination govern family affairs, and in general parents have responsibility for providing care for their children.

**Competent authorities**

Ministry of Social Affairs (MOISA) is responsible for providing support services to families<sup>452</sup> and for oversight of care providers<sup>453</sup>.

Ministry of Justice (MoJ).

Stakeholders of civil society such as NGOs.

Judiciary: juvenile judges (civil courts); religious courts should not play a role in decision making regarding child protection cases<sup>454</sup>.

**Children's rights situation**

In July 2018, the country's population was estimated to be just over 6.1 million, with approximately 1.4 million persons aged less than 14 years<sup>455</sup>.

At the same time, Lebanon hosts a large refugee population, with an estimated 1 million refugees living in Lebanon as of December 2018 (majority Syrian, but also a large Palestinian population)<sup>456</sup>. It is reported that the influx of Syrian refugees has increased social tensions, and has made it harder for basic needs to be met and the rights of children to be fulfilled<sup>457</sup>.

Approximately just under half a million children live below the poverty line, with poverty affecting Syrian and Palestinian refugees at a higher rate than the general population.

Violence, child marriage and child labour are reported to be amongst the worst violations of child's rights in Lebanon. Violent discipline at home is reportedly widespread among Lebanese families (57%) and within the ranks of Syrian refugees (65%). Girls are reported to be at risk of early marriage, often as result of attempts to reduce a family's economic burden. Whilst this is reported to be a risk across the board, in Syrian refugee communities it was reported that 27% of girls were married as of 2017<sup>458</sup>.

**Main reasons leading to the child's separation from his or her parents:** poverty is a main driver of separation, and it is reported that MOSA will not fund a child's placement in a residential care shelter, unless the family is poor<sup>459</sup>. A lack of access to quality education is another main driver, with residential care shelters providing education which is perceived to be of better quality than that available in public schools. Children with disabilities ('CWD'), are also likely to be placed into residential care centres in response to a lack of access to necessary services<sup>460</sup>; divorce and separation (either because single parents have difficulties coping, or because new spouses may reject a child brought into the marriage); and stigma around unmarried mothers may drive some to leave their babies in hospitals or residential care centres<sup>461</sup>.

**FAMILY SUPPORT & PREVENTION OF SEPARATION****Access to services (1st and 2nd levels of prevention)**

The Ministry of Social Affairs ('MOSA') has responsibility for providing support services to families, such as outreach and awareness programs and parental skill education<sup>462</sup>.

NGO's may also fulfil this role with, for example, Save the Children provides psychosocial support and parenting programs for parents and caregivers and poverty relief<sup>463</sup>; the NGO *Himaya* provides support services, including awareness sessions for caregivers, professionals, and children aimed at preventing violence in the home across all settings as well as psychosocial support services for children and parents<sup>464</sup>.

As of 2017 the Committee of the Rights of the Child remained concerned that financial and material poverty was contributing to the separation of children from their parents from their care, and that support for families needed to be increased<sup>465</sup>.

That same year, it was separately identified that largely the bulk of government expenditure on child protection goes towards 'social welfare' residential care shelters (see further below under 'Residential Care'), with some 70% of MOSA's budget going towards funding shelters (predominantly run by NGO's)<sup>466</sup>.

In 2017, Standard Operating Procedures for Protecting Juveniles in Lebanon ('the SOPs') have been introduced, which provide a pathway for supporting families that are at risk. However, in reality it is reported that resources for supporting families continue to be largely funnelled into residential care, which is used as a response to issues of poverty or a lack of access to education<sup>467</sup>.

There are some programs in place which act to support children at risk, and prevent their removal. This includes the case management work of some NGO's who have decided to stop making referrals to residential care and to devote efforts to case work with families (i.e. *Himaya and Imam Sdar Foundation*); and a government program designed at reducing poverty (the National Poverty Targeting Programme – NPTP). This latter initiative however is reported to have narrow criteria and is not explicitly aimed at limiting the numbers of children in residential care<sup>468</sup>.

**Gatekeeping (3rd level of prevention)**

**There are two mechanisms for the separation of children from their parent's care – voluntarily or by means of a formal court order.**

1) For children voluntarily relinquished into care, MOSA holds responsibility: children must be accepted into child welfare shelters with the parents' consent, following either a social workers investigation, an NGO referral, or at the direct request of the parents<sup>469</sup>.

2) For those children removed by court order, the Ministry of Justice (MOJ) has responsibility for the child themselves, and MOSA has responsibility for oversight of the care provider<sup>470</sup>.

**Gatekeeping  
(3rd level of  
prevention)  
(continued)**

**Court ordered removal:** it will likely first follow a risk of harm report made to the Department of Protection of Juveniles at MOSA, to NGOs that are specialised in child protection, to UPEL (*L'Union pour la Protection de l'Enfance en Liban* – a large national NGO which is mandated to case manage child protection and juvenile justice cases), or directly to the Juvenile Judge, and the case is then investigated<sup>471</sup>. The SOPs provide a pathway for social workers to consider when making a decision, based on assessment, on whether to pursue a judicial pathway or to continue case management with the family. Should the social worker determine that judicial intervention is needed, they make recommendations to the juvenile judge regarding the different measures that could be taken in the best interest of the child, based on the information they have collected. These recommendations could be for removal into alternative care, or could include a request for formally ordered support for the parents/carers rather than removal. The SOPs also provide a pathway for the judge to consider when making a decision on removing the child, and also different measures which could be taken – including ordering that support be provided to the parents/carers, rather than removing the child<sup>472</sup>.

**Family reintegration** (modalities provided by the SOPs): For both children under a judicial order, and those under an agreement with MOSA, the situation should be reviewed every three months – either by a report to the court by the assigned social worker if the child is within a host family, or by a report from the organisation where the child is living if the child is in residential care<sup>473</sup>. Nonetheless, a 2017 report found children remain in alternative care for unnecessarily long periods of time as there is limited checking of whether or not the situation for either the child or the family has changed. Children under a judicial order, may receive more intense case management aimed at reintegration, but reportedly the level of support varies greatly<sup>474</sup>. There are some services in place aimed at supporting reintegration, but this seemingly will be dependent on the residential care service provider themselves. For example, SOS children's Villages<sup>475</sup> only take children into care for short periods, and work intensively with families to support reintegration; and some other agencies provide reintegration support – however the level of support will depend on the capacity of the social worker and that of the alternative care provider<sup>476</sup>. Additionally, there are also no specific formal services or plans for re-integration from residential care facilities<sup>477</sup>.

**ALTERNATIVE CARE OPTIONS****Kinship care**

Informal or kinship care usually occurs without the involvement of courts or social workers, although Judges may decide to formally place children with kin through a child protection order – which implicitly comes with a regular court review.

**It is, however, unclear how often this happens**, and UNICEF data indicates that kinship care is not widely used<sup>478</sup>.

Barriers to the wider use of kinship care include: a lack of time to carry out proper assessments; lack of experience of caseworkers; lack of community awareness; lack of human resources; no mechanisms in place to provide proper support to carers (including financial support); difficulties in allocating legal guardianship to the kinship carer(s) – namely, difficulty in accessing/understanding complicated procedures; and cultural barriers, with some communities reluctant to have girls placed in households with a large number of boys<sup>479</sup>.

**Foster care**

There is no formally established foster care system in Lebanon<sup>480</sup>.

Over 2019 the NGO *Himaya* – in conjunction with Save the Children and UNICEF, was piloting a program aimed at establishing family based care<sup>481</sup>.

It is understood that judges and General Prosecutors may place abandoned babies with a family who intends to adopt them whilst the adoption proceedings are pending – however, this could not be considered foster care per se.

A number of barriers exist to establishing a foster care system in Lebanon, including: a lack of resources to identify, assess and monitor foster families; cultural barriers, such as a reluctance to take in a stranger child in the face of a strong sense of family bonds, and a need for older girls having to cover up in front of unrelated men; and a lack of detailed policy guidance<sup>482</sup>.

**Residential care**

It is reported that once a decision has been reached to place a child into alternative care for their protection, social workers have difficulty finding placements, and often they are selected based on vacancies, rather than on the needs of the child. At the same time, this lack of placements means that children risk remaining in unsafe home environments<sup>483</sup>.

There are reportedly no small group homes operating in Lebanon<sup>484</sup>.

**Residential care (continued)**

'Social Welfare' residential care centres provide the bulk of alternative care placements in Lebanon, and MOSA is primarily responsible for these placements – which are run by NGO's but partially or fully funded by MOSA stipends. These facilities house children aged 5 – 18 years from disadvantaged homes, and who have been placed in residential care due to poverty and a lack of access to quality education. Most children in these centres go home at the weekends and over holidays, and many facilities close over the summer. These facilities may also provide day care, schooling, meals and after school care for older children. However, government policy dictates that all children aged under 14 years must sleep at the facilities. As of 2016, there were 24,106 children funded by MOSA in 201 social welfare facilities<sup>485</sup>.

There are 15 facilities ('protective placements'), run by NGO's who have contracts with MOSA, that specialise in supporting children placed into care by judicial order – although sometimes these children may be placed in a social welfare facility. It is not clear the numbers of children in residential care under a judicial order. However, it is understood that only a fraction of the children in such placements are there for protection reasons.

In addition to the centres described above, a number of NGO facilities not funded by MOSA provide residential care. These centres are registered with the government, but are not subject to regulation. Accordingly, the numbers of children in these placements are unclear, and the 24,000 figure is likely an underestimate of the real number of children in residential care in Lebanon<sup>486</sup>.

**Children with disabilities:** are quite likely to be placed in residential care. It is reported that these children are usually cared for in segregated homes, separately from other children. In 2017 the Committee on the Rights of the Child noted concern regarding the high rate of institutionalisation of CWD and also of instances of abuse and violence (including sexual violence) by residential care service providers<sup>487</sup>.

**Children on the move:** MOSA does not fund social welfare placements for refugee children, and so these children cannot access these placements<sup>488</sup>.

**ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE**

The Lebanese child protection system is characterised by an **over reliance on residential care, and a lack of early gatekeeping mechanisms** aimed to prevent entry into care. The heavy reliance on residential placements as a means of relieving poverty and meeting educational needs has resulted in a significantly overstretched system. The majority of social welfare funding is funnelled into these services, leaving a huge gap in capacity to both alleviate poverty, and to provide early intervention support services to families. It also means that large numbers of children are unnecessarily placed in institutional care – in direct opposition to the principles outlined in the UN Guidelines for the Alternative Care of Children.

**Services and support for children at risk is limited** – likely resulting in those children who do need the support of social welfare services, not receiving such support. Additionally, there is limited oversight of the placements themselves, and some facilities have no oversight at all. Promisingly, it is understood that MOSA has developed some guidelines on child safeguarding in institutions together with a code of conduct<sup>489</sup>. However, the ISS/IRC considers that it is essential that such codes and guidelines be enforced in all institutions and not just those which are MOSA funded.

ISS/IRC considers that steps should be taken to increase poverty support and educational support across the board so that residential care facilities are no longer relied upon to relieve concerns regarding poverty and education. This would allow for the proper channelling of funds into supporting children at risk, and providing essential gatekeeping and prevention services. It is promising that organisations such as Himaya are piloting foster care programs and devote efforts to family support rather than making referrals to residential care. Such initiatives should be commended and supported as a means of changing the current alternative care response in Lebanon.

**KAFALAH****General considerations**

Whilst in many Islamic countries, *kafalah* is used as a means to allow a child to live with another family, in Lebanon *kafalah* refers to the financial sponsorship of children residing in residential care centres<sup>490</sup>.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

**ADOPTION**

For further information on the adoption system, see ISS/IRC country situation for Lebanon<sup>491</sup>.

Under Sharia law adoption is prohibited. However, the Lebanese Constitution provides that, ‘any population, irrespective of which rite it follows, is respected in its personal status and their religious interests’<sup>492</sup>. The issue of adoption falls within ‘personal status laws’ and accordingly comes under the legal and jurisdictional competence of religious communities. **Therefore, adoption is: a) available only to members of the relevant religious communities; b) is not subject to a single civil law; and c) is governed by the various religious laws.**

The following laws include provisions relating to adoption:

- The Code of the Catholic communities (to which most adopted children belong to) (Arts 98 – 118);
- The Code of the Greek-Orthodox community (Art. 93);
- The Code of the Armenian-Orthodox community (Arts. 137 – 148);
- The Code of the Syriac-Orthodox community (Arts. 72 – 74); and
- The Code of the Evangelical community (Arts. 65 – 70).

These laws represent what is understood to be the position of the main religious bodies. However, Lebanon recognises 19 religious confessions, and the above are the five codes which contain adoption provisions<sup>493</sup>.

**MALAYSIA**

**GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE**

**Legal and policy framework**

**International framework:** CRC was accessed on 17 February 1995; OPSC was acceded to on 12 April 2012<sup>494</sup>.  
 Malaysia is not party to the 1993 nor the 1996 Hague Conventions.  
 2001 Child Act (at 1 January 2006) and the Amendment of 2016<sup>495</sup>.  
 Adoption Act 1952<sup>496</sup>, and Registration of Adoptions Act 1952<sup>497</sup>.  
 Child (Places and Safety) Regulations 2007.  
 Child (Fit and Proper Person) Regulations 2009.

**Competent authorities**

Ministry of Women, Family and Community Development (MWFC).  
 Department of Social Welfare (called JKM) under de MWFC.  
 Several administrative units including Children’s Division which ensures the protection of children in homes and institutions (places of safety and shelters), and also plays a general developmental role (education, activities, events, etc). This administration is decentralised across States and has several offices.

**Children’s rights situation**

The population amounts to 31,809,660 inhabitants (estimations in 2018)<sup>498</sup>. In 2014, there were over 15 million children<sup>499</sup>. As explained by UNICEF, Malaysia is considered as one of the most culturally diverse nations, with its multi-ethnic and multicultural population, including Malays, Chinese and Indians and more than 200 indigenous ethnic groups<sup>500</sup>.  
 Challenges relating to the protection of children remain, such as poverty, an increase in violence against children, a lack of time for parents to care and raise their children, and migration (which has had an impact on birth registration), amongst others<sup>501</sup>.  
**Child abandonment seems to be a widespread problem**<sup>502</sup>, and numbers may be increasing year after year<sup>503</sup>. The official notification mechanisms apparently provide an under-estimation of their number, likely because some provinces are wooded areas and it is impossible to know how many children are abandoned in some rural areas. In addition, official statistics report abandonment cases in the wider category of maltreatment. In this context, a ‘baby hatch’ has been established by the organisation OrphanCARE, which operates 24/7<sup>504</sup>. This, however, has also raised debates regarding the responses needed to address child abandonment. Baby hatches are also provided by KPJ Hospitals.

## FAMILY SUPPORT & PREVENTION OF SEPARATION

### Access to services (1st and 2nd levels of prevention)

The **National Policy on Children** was approved in 2009 emphasising a better coordination among stakeholders in the child protection system, their shared responsibility as well as the consolidation of support services to children and families<sup>505</sup>.

A **Technical Committee chaired by MWFC** has been established in order to coordinate and monitor the implementation of the Plan of Action.

It appears that Malaysian legislation and practice is mainly reactive; i.e. parents are punished when they have neglected their obligations with regards to their children. **With regards to parental awareness-raising, initiatives by government agencies and local NGOs are provided but remain insufficient.** On this issue, parents affected by a case of abuse may be asked to attend workshops on this subject. Those parents, who fail to meet the conditions set by the Court, may also be penalised.

Financial assistance services by the Department of Social Welfare are provided to target groups in order to ensure their continuity of survival (monthly assistances basis, lump sum assistance and two types of social assistance programs<sup>506</sup>).

There are also community-based services for families, including public housing, parenting classes, subsidised community childcare centres and Children Activity Centres with child protection teams<sup>507</sup>.

### Gatekeeping (3rd level of prevention)

In accordance with the 2001 *Child Act* (amended in 2016), in some situations, the child is considered in need of protection and may be withdrawn from the care of his or her parents by a 'Protector', Assistant Protector, or a police officer (Section 18), who is responsible for the child and must present him or her to a judge within 24 hours (Section 19). The above-mentioned situations include those, in which the child has been abused physically or psychologically, neglected, abandoned or sexually abused (Section 17). UNICEF notes that "nearly 5,000 children were reported to be in need of protection from abuse in 2016 alone, according to the Welfare Department, the cause or factors behind the abuse is heart-breaking<sup>508</sup>".

The *Child Act* also provides for the appointment of a social welfare officer as the Registrar General of Children in need of protection, as well as public officers as Registrars of Children in need of protection (Section 9). The latter are responsible for managing a registry, which includes the details of all (confirmed or alleged) cases of children in need of protection as well as details of persons convicted of any offence in which a child is a victim (Section 119). Nonetheless, recent (2018) research has noted that, "the shortage of professional social workers who can effectively manage abuse and child neglect cases is a serious problem<sup>509</sup>".

## ALTERNATIVE CARE OPTIONS

### Diversity of care options

Once the child has been separated from his or her parents, and is considered to be in need of protection, the Court takes his or her best interests as the main element of its decision (Section 30), and selects one of the following options:

Placement of the child with a **fit and proper person for a specified period**;

Placement of the child **under the supervision of a Protector or some other person appointed for a specific period**;

Placement in a **'place of safety' for a period of three years** from the date of the order or until he or she reaches the age of 18 years (whichever is shorter): applicable to children in need of protection;

Placement in a **'shelter'**: applicable to child victims of trafficking or exploitation through prostitution;

Placement in the **care, custody and control of a foster parent for a period of two years or until he attains the age of eighteen years** (whichever is the shorter). Until this is possible, the child is to remain in a 'place of safety' — this is applicable only to children, who have been abandoned, or whose parents cannot be located, or if he or she has no parents, no guardian.

It is worth noting that the *Child Act* 2001 (and its amendment in 2016), in accordance with Sections 30(1) and 40(1), emphasises family-based care as a priority (to a family member, to a fit and proper person, to foster parents, to a centre and, as a last resort, a placement in institution). "In case if the child has no parent or guardian, the child will be placed in the care, custody and control of a foster parent or fit and proper person that is found to be suitable by the Director General for a period of two years or until the children reaching the age of eighteen years<sup>510</sup>". In addition, an amendment to the measure may be requested.

### Informal care, care by a fit and proper person or foster care

The *Child Act* also includes provisions on **informal placements and their supervision**, including the obligation to notify of such a placement to the Protector within a week. The latter must then undertake the necessary research about the child's situation, and determine whether the child should be placed or may return to his or her family<sup>511</sup>.

The *Child Act* allows the child's placement with a fit and proper person, which may be the child's parent, family member, or a person with whom the child has no biological relationship. Criticisms have been raised as to the lack of safeguards for foster care, in particular the absence of operational procedures, comprehensive assessments of the applicants, the lack of monitoring, amongst other issues. The case of a child having died has increased these concerns<sup>512</sup>.

The 2009 *Child (Fit and Proper Person) Regulations* offer some guidelines for the implementation of foster care measures: the Court will determine whether a person is fit and proper, if the placement is in the child's best interests, whether it does not put the person at financial risk, and if there is no conflict relating to the child's guardianship. The fit and proper persons must meet the children's needs and provide them with protection and affection. Local child protection teams may offer material and financial assistance to the fit and proper person, and the Protectors are responsible for the monitoring and supervision of these foster placements. During the placement, the child's parents will be in contact with the fit and proper person regarding the child's development and wellbeing<sup>513</sup>.

Model Guidelines For *Foster Care* (Placement Panel) were approved in 2015 as well as Child (Family Based Care) Regulations in 2017 for social workers and other professionals as guidance in implementing family-based care.

Notably, given the protection needs of **unaccompanied migrant children, who only rarely have access to family-type care**, it appears that informal foster placements occur. These placements are not notified to the Department of Social Welfare. Efforts have been undertaken by the Malaysian government to formalise foster care placements in the country, and a handbook has been published to expand this option for migrant children<sup>514</sup>.

The *Rumah Tunas Harapan* is a structure for caring for orphans, and neglected or destitute children. These are couples, who wish to care for children in their homes (limited to 10 children per home), and who are subject to JKM's control (validation of their application, including the control of the couple's financial situation). They also benefit from an allowance of maximum RM 1,000/month.

### Residential care

In Malaysia, there are 613 registered residential care facilities across the country, and approximately 28'267 children placed in these institutions<sup>515</sup>. It has been observed that one of the greatest obstacles to reform of the alternative care system is the availability of, and efficient use of, financial resources<sup>516</sup>.

The *Child Act* allows for the placement of children in 'places of safety' and 'shelters', which are State-governed. Places of Safety are government-owned institutions, namely Children's Homes, gazetted under the *Child Act* 2001 and its regulations -there is no need for licensing.

The 2007 *Child (Places of Safety) Regulations* provide some quality standards, but include no information on these institutions' licensing and registration procedure. These regulations also address the obligations of staff on administrative issues; files on the children's general wellbeing, hygiene, education; the operation of advisory committees on discipline; and the intervention of peer committees to respond to conflicts, etc. Children may visit their families for maximum 30 days and also receive visits, except if this is not considered to be appropriate.

The supervision of places of safety is incumbent on JKM's Director General, as well as the Board of Visitors, and the inspection visits undertaken by the Director General must occur at least four times a year, and twice by the Board of Visitors, either announced or not. A report is prepared following each visit, and JKM must be informed of any flaws or recommendations. The Board of Visitors is also responsible for the staff training at these care facilities<sup>517</sup>.

In accordance with the 2007 *Child (Places of Safety) Regulations*, each institution must have a review committee, which should review each child's progress every four months, and recommend to the authorities the measures that need to be implemented in order for the child to leave<sup>518</sup>.

It is noted that Malaysia does not promote the institutionalisation of the care of children without parental care. Indeed, **homes and small-group homes are common**. There are also private homes, sponsored by the government and associations (including the Muslim Association of Malaysia). However, according to the organisation OrphanCARE, there are still some 64,000 children in institutions for a number of reasons. This organisation supports the child protection authorities in the reform of the care system and in the **deinstitutionalisation process**, either through reintegration efforts, access to health and other services, community services, and also through adoption<sup>519</sup>.

**Kafalah**

It remains unclear to what extent *kafalah* is practiced in the country.

The government's report to the Committee on the Rights of the Child in 2007 stated:

*"Kafalah is not adoption and creates no effect of 'parent-child' relationship. The child remains the obligation of the biological parent who remains as the legal guardian. Kafalah does not make any child to become a family member of the custodian or appointed guardian (kafil). The child retains his natural parent's name, not affiliated to the foster father or mother and he is still able to inherit from his biological father or mother. An allowance of RM250.00 per month is allocated by the Department of Social Welfare for each child placed under this scheme. Thus far, 121 cases have been recorded by the Department<sup>520</sup>".*

Thus, it appears that *kafalah* – a placement measure therefore applicable to Muslim children in accordance with Sharia Law – is different from de facto adoption, which is also applicable to Muslim children and is therefore supplementary. The circumstances of each measure remain unclear but the child's integration into the family appears to be much more limited in the first option than in the second measure<sup>521</sup>.

**ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE**

The ISS/IRC welcomes the fact that the *Child Act* 2001 prioritises family-based care and establishes institutional care as the last resort. However, the legislation has gaps in relation to the priority that should first be given to the prevention of separation. The *Child Act* focuses on reactive/punitive measures in response to situations of neglect/abandonment/maltreatment, rather than on preventive measures and parental support. It includes sanctions aimed at parents, who have failed in their obligations, but does not put emphasis on the promotion of the family environment and awareness-raising. Moreover, when the Court determines the placement of a child in need of protection, it does not take into account his or her option, which violates the principle of participation of the child and the concept of child-friendly justice.

As for the above-mentioned care options available to children in need of protection, the *Child Act* does provide for priority to be given to family-based care when considering the criteria and priorities, and in determining the form of care and the selection of options.

Despite Section 55 and Section 62 of the *Child Act* 2001, there is, however, little information about post-placement follow-up measures, which would review the child's situation and could promote family reunification – such as in cases of changes in circumstances.

With regards to informal care, it would be most welcome if standards of notification, support and supervision would be adopted to ensure the protection of those children placed informally, either in their extended family, with next-of-kin, or in private homes. With regards to some facilities, in particular private homes, there is a trend towards their establishment in urban areas.

Already in 2007, the Committee on the Rights of the Child mentioned this situation, and noted that *"in Malaysia a relatively small number of children live in residential care. It welcomes the cottage system children's homes and the guidelines on 'Management of Child Related Care Centres' and in particular the involvement of children in developing these guidelines. Nevertheless, the Committee regrets the absence of a comprehensive evaluation of the alternative-care system. It notes with concern that the quality of children's homes maintained by NGOs is often unknown<sup>522</sup>".*

**COEXISTENCE OF TWO ADOPTION REGIMES****Applicable laws**

Malaysia's cultural diversity is reflected in the Malaysian legal system, which is a combination of Islamic Law, British Common Law system, customary and case-law. This diversity of sources is all the more obvious in the **differences in treatment between Muslim children and non-Muslim children**. This difference results in **different legal frameworks** on adoption between the two categories.

Adoption is fully admissible in both categories, but has considerable differences as, whilst the non-Muslim child may be adopted by complying with a developed procedure, the Muslim child is subject to less procedural standards and supervision.

Adoption in Malaysia is subject to two main instruments: **the 1952 Adoption Act, which is solely applicable to non-Muslim children**; and **the 1952 Registration of Adoption Act, which includes provisions on the care of Muslim children subject to a different framework as well as to non-Muslim children**. It is also worth mentioning that, geographically, another difference occurs in the Federation of Malaysia with regards to adoption legislation. The 1952 *Adoption Act* is only in force in Peninsular Malaysia (the following discussion focuses solely on the legislation in force in Peninsular Malaysia)<sup>523</sup>.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

	REGIME APPLICABLE TO NON-MUSLIM CHILDREN	REGIME APPLICABLE TO MUSLIM CHILDREN (DE FACTO ADOPTION)
<b>Competent authorities</b>	Department of Social Welfare (JKM), under the Ministry of Women, Family and Community Development <sup>524</sup> .	National Registrar ( <i>Ibu Pejabat Jabatan Pendaftaran Negara</i> ) <sup>525</sup> .
<b>Simple/full adoption</b>	Full adoption <sup>526</sup>	The adoption of Muslim children is a <b>simple adoption</b> , insofar as it excludes the transmission of the surname and does not provide for inheritance rights. It is not revocable <sup>527</sup> .
<b>Eligible children</b>	The child must have spent three consecutive months under the care and control of the potential adoptive parents <sup>528</sup> . According to the US Central Authority, for <b>intercountry adoption</b> : <ul style="list-style-type: none"> <li>• The child may be adopted up to the age of 18 years.</li> <li>• In practice, groups of siblings are often adopted together (no legal provision).</li> </ul>	The child must: <ul style="list-style-type: none"> <li>• be under the age of 18 years;</li> <li>• have been placed with the applicants for at least two years; and</li> <li>• be either a citizen of the country, or not<sup>529</sup>.</li> </ul>
<b>Potential adoptive parents</b>	<b>Criteria relating to potential adoptive parents:</b> <ul style="list-style-type: none"> <li>• At least one of them must be at least 25 years old and must be at least 21 years older than the child they wish to adopt. The Court may contravene this rule in particular circumstances (should the applicant be a relative of the child, the age limit is set at 21 years old and the age difference is not applicable).</li> <li>• When the adopter is a single man, he cannot request the adoption of a girl, unless the Court considers that special circumstances justify such an exceptional decision.</li> <li>• The potential adoptive parents must notify, at least three months prior to the order, a member of the Department of Social Welfare of their intention to request an adoption.</li> <li>• There is <b>no requirement on income</b>.</li> <li>• Evidence of marriage must be submitted amongst the required documents for the adoption. A single potential adoptive parent may also request an adoption but must comply with some restrictions (see below).</li> <li>• According to the US Central Authority, the Court may, in some cases, appoint a guardian ad litem, whose role is to assess the background and circumstances of the potential adopters' life, in order to determine whether they are suitable to care for the child.</li> <li>• <b>An adoption order cannot be decided in relation to an applicant, who does not habitually reside in Malaysia</b> (which means living and working in Malaysia). Furthermore, he or she must remain in Malaysia during the adoption proceedings (i.e. between three months and one year). Thus, a period of over one year must be foreseen, as residence must be ascertained prior to the proceedings.</li> <li>• Even though the <i>Adoption Act</i> does not include specific provisions on intercountry adoptions, it is clear that an adoption may only take place for adopters, who habitually reside in Malaysia<sup>530</sup>.</li> </ul>	<b>Criteria relating to the potential adoptive parents:</b> <ul style="list-style-type: none"> <li>• At least one of the potential adoptive parents must <b>be over the age of 25 years</b> and be <b>at least 18 years older than the adoptee</b> (if the applicant is the brother, sister, uncle or aunt of the child, the age limit is of 21 years and the age difference is not applicable).</li> <li>• A foreign couple will have to <b>reside, in accordance with the two-year de facto adoption criterion, on the territory for two years</b> before being able to request the registration of the child<sup>531</sup>.</li> </ul>

<p><b>Consents</b></p>	<p><b>Consent of the biological parents/guardian:</b> prior to the adoption of a child, the Court has an obligation to obtain the <b>consent of his or her parents or guardian, except if:</b></p> <ul style="list-style-type: none"> <li>• The parent or guardian has abandoned, neglected or abused the child;</li> <li>• The person, whose consent is required, has disappeared or is unable to express his or her consent or unfairly refuses to consent.</li> </ul> <p>Furthermore, when an application is pending before the Court, the parent or guardian, who has previously expressed his or her consent to the adoption request, cannot withdraw the child from the applicant, except with the Court's permission – the Court will take into account the child's wellbeing in granting this permission.</p> <p><b>Consent of the spouse:</b> when the request is submitted by one of the potential adopters, the consent of the other must be obtained, except if:</p> <ul style="list-style-type: none"> <li>• The second spouse has disappeared or is unable to express his or her consent; or</li> <li>• When the spouses are separated and this separation appears to be permanent.</li> </ul> <p><b>Consent of the authorities:</b> The applicant must have obtained the consent of the authorities of his or her country of origin to adopt. The Court must ensure that all necessary consents have been obtained and that their authors are aware of the effects of the adoption. The decision must meet the child's wellbeing<sup>532</sup>.</p>	<p>When a <i>de facto</i> adoption takes place, except if the potential adoptive parent is a man and the adoptee a girl, the consent of the guardian or of the biological parents is not necessary. If the conditions are met and it would meet the child's wellbeing, an adoption order will be declared<sup>533</sup>.</p>
<p><b>Procedure</b></p>	<p>An application must be submitted in duplicate to the Court and with the required documents. The duplicate requirement is not applicable to the written consents. To adopt a child, the applicants must always be assisted by a local lawyer throughout the procedure. Subsequently, a guardian is appointed within months and proceeds to some inquiries prior to the Court's issuance of the adoption order.</p> <p><b>List of documents required from foreign potential adopters:</b></p> <ul style="list-style-type: none"> <li>• A valid passport;</li> <li>• The potential child's birth certificate;</li> <li>• A statutory declaration of the biological parents' consents;</li> <li>• Their marriage certificate if they are married;</li> <li>• A letter from the Department of Social Welfare stating the intention to adopt.</li> </ul>	<p>This is (self-)registration of a <i>de facto</i> adoption, and is not a judicial decision. The applicants are not obliged to resort to the services of a local lawyer. They may comply with the proceedings without such assistance.</p> <p><b>List of required documents:</b></p> <ul style="list-style-type: none"> <li>• A statutory declaration of the biological parents submitted to the National Registrar;</li> <li>• Evidence that the child has been placed with them for two years<sup>536</sup>.</li> </ul> <p>At the time of the request for registration of the child, if the child is under the age of 18 years and has never been married; if he or she is under the guardianship, care and education of the person or spouses, who introduce him or her as their child as a <i>de facto</i> adoptee; if the child has been continuously under the care of the interested persons for a period of over two years, the Registrar General may, on the basis of the request, register the adoption if:</p> <ul style="list-style-type: none"> <li>• the interested persons submit to the Registrar General verbally or in writing evidence of a <i>de facto</i> adoption;</li> <li>• the parents, or one of them, or if both are deceased or none of them are in Peninsular Malaysia the child's guardian, must appear before the Registrar to express their consent to the adoption. Should the Registrar consider the circumstances to be equitable and fair, it may decide on the request by taking into account the consents and the child's wellbeing; and</li> <li>• the fees have been paid<sup>537</sup>.</li> </ul>

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<p><b>Procedure (continued)</b></p>	<p><b>Matching</b><sup>534</sup>: Successful applicants can only choose the age and gender of children, not their physical appearance (DSW, 2016). There is a formal process of matching.</p> <p>According to the US Central Authority, the potential adoptive parents must proceed, privately, through friends or relatives in Malaysia, or via the Department of Social Welfare, in order to be put in touch with a potential child.</p> <p><b>Interim order</b><sup>535</sup>: The Court may postpone its decision and issue an interim order (which is different from the adoption order), granting guardianship of the child to the potential adoptive parents for a period from six months to two years. This is considered as a probationary period, during which the Court sets the conditions (education and supervision of the child's wellbeing) that it considers relevant. When it determines the probationary period, the Court takes into account any period the child may have spent with the applicant(s) and resulting from a <i>de facto</i> adoption or any other reason. An interim order cannot be issued in situations, in which an adoption order would be considered illegal. In <b>terms of consents</b>, the probationary period requires the same conditions as an adoption order. However, the Court may decide otherwise.</p>	<p><b>Matching</b>: according to the US Central Authority, the potential adoptive parents proceed privately or via friends or relatives in Malaysia, or via the Department of Social Welfare, in order to get in touch with a potential child. ISS/IRC notes that this is not compatible with recommended international principles and standards.</p>
<p><b>Decision</b></p>	<p><b>Judicial decision</b>: The act whereby the Court grants an adoption is an adoption order. Except if the applicant has previously submitted a request to the Court, or if the court demands his or her presence, he or she is not required to be present to submit the request.</p> <p><b>Competent judicial authority</b>: According to the <i>Adoption Act</i>, the competent court is the High Court. In exceptional circumstances, the potential adoptive parents may opt to proceed via any Sessions Court; however, the judge of the Sessions Courts may refuse the request and forward it to the High Court. The judge of the Sessions Court may raise a question of law, a procedural question or a case-law issue before the High Court, who must respond.</p> <p><b>Appeal</b>: Should the High Court or the Sessions Court decline the adoption request, an appeal is possible before the High Court or the Federal Court. This is valid for the interim adoption order. Likewise, an appeal of the adoption decision is possible before the Federal Court<sup>536</sup>.</p>	<p>This is a (self-) registration of a <i>de facto</i> adoption, and is not a judicial decision.</p> <p>The Registrar registers the adoption by recording the specific characteristics on the register.</p>

MALAYSIA <b>Legal effects</b>	<p><b>Full adoption:</b> All rights and obligations of the parent or guardian shall be extinguished. All such rights and obligations shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock. The adopted child shall stand to the adoptive parents in the same relation as a child would have stood to a lawful father and mother, respectively.</p> <p><b>Surname:</b> The name or surname that the child acquires following the adoption replaces the original on the order.</p> <p><b>Inheritance:</b> In terms of inheritance, the legal provisions apply similarly to a child born in the adoptive parents' lawful wedlock. Any instrument <i>inter vivos</i> in respect of any movable or immovable property must be interpreted, if established after the adoption date, as considering the adopted child in equal conditions to a biological child<sup>539</sup>.</p>	The adoption provided for under the Registration of Adoptions Act excludes inheritance rights for the child. It also excludes the transmission of the surname. Only an adoption certificate – rather than a birth certificate – will be issued <sup>540</sup> .
<b>Follow-up and post-placement</b>	<p><b>In case of a probationary period</b> (see above), conditions relating to its supervision may be imposed on the guardian <i>ad litem</i> or the Director General of Social Welfare, except if the latter has already been appointed guardian <i>ad litem</i>. During the probationary period, the guardian <i>ad litem</i> may, at any time, request that the Court issue an order withdrawing the child from the negative environment he or she is in. Within two months of the expiry of the probationary period, the potential adoptive parents may request the Court to declare the adoption. Otherwise, there does not seem to be other relevant provisions in the Adoption Act.</p>	N/A
<b>Sanctions</b>	<p>The Court must ensure that no party (biological parents, guardian, potential adoptive parents) has acted on the basis of an economic gain. Publicity of the potential adoptive parents' wish to adopt a child or the 'availability' of a child or any similar behaviour may result in a six-month prison sentence and/or a fine of RM 250<sup>541</sup>.</p>	N/A
<b>Costs</b>	<p><b>Reimbursement of various expenses:</b> At the issuance of the interim order to the final decision, the Court may state those costs that it considers fair. This may relate, in particular, to the expenses imposed on the guardian <i>ad litem</i> or any other actor or any other expenses considered to be relevant.</p> <p><b>Costs of professional assistance:</b> According to the US Central Authority, the adoption costs are very limited and vary from region to region. However, it is necessary to resort to the services of a local lawyer and his or her fees vary between RM 2,000 (USD 570) and RM 10,000 (USD 2,850). Public and private service providers, as well as NGOs, are not allowed to make a profit from domestic or intercountry adoption<sup>542</sup>.</p>	N/A

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<p><b>Identity &amp; access to origins</b></p>	<p>The Registrar General manages a register of ‘adopted children’, which includes adoptions orders. The name or surname of the child following the adoption replaces the original one on the order. When a child is adopted twice, the order shall contain a direction to the Registrar General to cause the previous entry in the Adopted Children Register to be marked with the word ‘readopted<sup>543</sup>’.</p>	<p>N/A</p>
<p><b>Principle of subsidiarity</b></p>	<p>Malaysia has not ratified the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993 Hague Convention). In this regard, it is worth mentioning that in terms of intercountry adoption Malaysia has adopted quite a restrictive approach, insofar as it requires that applicants are habitually resident on the State’s territory, which considerably limits the opportunities to access this option. Given the restrictions imposed on the conditions set for persons residing abroad, it appears that domestic adoption is a priority.</p>	<p>N/A</p>
<p><b>Statistics</b></p>	<p>Based on the 2016 adoption statistics, the number of successful adoption applications under the Adoption Act 1952 is 824. As the National Registration Department has no data on parents living abroad, the number of intercountry adoptions cannot be determined. However, the USA have been the receiving country of two Malaysian children in 2017. The average in this country over the past 10 years has been two children per year. Concerns have been expressed and challenges have been mentioned at the fact that intercountry adoptions from Malaysia are undertaken, despite the fact that it is not a Contracting State to the 1993 Hague Convention<sup>544</sup>.</p>	<p>Based on the 2016 adoption statistics, the number of successful adoption applications under the National Registration Department was 560<sup>545</sup>.</p>

**ISS/IRC ANALYSIS: ADOPTION**

According to a local contact, it appears that Malaysia lacks a modern, comprehensive legal framework to properly regulate adoption practices throughout the country.

Indeed, it is worth mentioning that several stages of the adoption procedure remain without any clear provision, such as the child’s adoptability and opinion, the matching process, the assessment of the potential adoptive parents, the post-adoption follow-up, etc. – whether for non-Muslim or Muslim children. It is important that all potentially adoptable children have access to the same rights, and that these are ensured in accordance with international principles and standards, in particular considering that the procedure is particularly complex due to the residency criterion. Thus, it is necessary to strengthen the legal, institutional and practical frameworks, in order to support these adoption procedures and to prevent any risks of fraud or abuse.

Further, the two-year residency criterion in Malaysia for foreign couples is extremely restrictive. Indeed, it is very difficult, in practical terms, for the couple to move for two years (or perhaps more) to the Malaysian territory. This is reflected in the limited number of intercountry adoptions from Malaysia.

The differences in the implementation of the legislation between Muslim and non-Muslim children is somehow problematic, and remains confusing on some aspects, including potential similarities between de facto adoption, foster care and potential *kafalah*. Additionally, a Muslim child does not benefit from a formal adoption and from the usual advantages and safeguards of an adoption, which could result in a certain discrimination.

On the latter, already in 2007, the Committee on the Rights of the child shared its concern: *“The Committee acknowledges that the State party has a traditional form of adoption of non-Muslim children as well as an Islamic form of foster care of Muslim children. As regards the adoption of non-Muslim children, the Committee is concerned at the absence of a national uniform adoption law in Malaysia and at the different procedures for adoption between States in Malaysia. Concern is also expressed at the prevalence of informal adoptions, which are neither registered nor monitored<sup>546</sup>”*.

## TUNISIA

## GENERAL SITUATION OF CHILDREN DEPRIVED OF PARENTAL CARE

## Legal and policy framework

**International and regional framework:** Convention on the Rights of the Child (1989): February 26, 1990 (signature); January 30, 1992 (ratification)<sup>547</sup>; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000): April 22, 2002 (signature) and September 13, 2002 (ratification); Not a party to the 1993 and 1996 Hague Conventions, nor the African Charter on the Rights and Welfare of the Child (1990) (signed June 16, 1995, but not ratified).

**National framework:**

- Organic law no. 2016 – 61 dated August 3, 2016, preventing and combatting trafficking in persons (French and Arabic only)<sup>548</sup>.
- Constitution of the Tunisian Republic, 2014 (Article 47)<sup>549</sup>.
- Law no. 2003 – 51 dated July 7, 2003, which amends law no. 98 – 75 dated October 28, 1998, on naming children who are abandoned or whose parentage is unknown<sup>550</sup> (French only).
- *Code de la protection de l'enfant* [Child Protection Code] dated November 9, 1995 (French only)<sup>551</sup>.
- Law no. 67 – 47 dated November 21, 1967 on family placement (French only)<sup>552</sup>.
- *Code de la Nationalité Tunisienne* [Tunisian Nationality Law], promulgated by decree and substantially amending the Tunisian nationality law ratified by law no. 63 – 7 dated April 22, 1963 (French only)<sup>553</sup>.
- Law no. 58 – 27 dated March 4, 1958 on public guardianship, unofficial guardianship (*kafala*) and adoption, some articles of which were amended by law no. 5 – 69 dated 19 June 1959 (French only)<sup>554</sup>.
- *Code du statut personnel* [Personal Status Code] promulgated by decree on August 13, 1956 (French only)<sup>555</sup>.

**Following** independence in 1956, Tunisia implemented a family planning policy that enabled the country to control demographic growth and fertility. Tunisia has significantly improved its human development indicators and its people's economic and social well-being, and is considered a leader in child protection<sup>556</sup>.

**Politique publique intégrée de protection de l'enfance** (PPIPE) [Integrated Public Policy for the Protection of Children] and **Action Plan (2016 – 2020)**: The policy's five strategic focal points target prevention: "By 2025 (...) all children will benefit from social and legal protection in a cohesive, integrated and coordinated system that provides access to quality services, personalised support and better social integration."

**Strategy to Strengthen Families and Alternative Care:** launched in 2018 as part of the PPIPE, the goal of the strategy (hereafter, June 2018 Strategy) is deinstitutionalisation<sup>557</sup>. Other strategies include the **2017 – 21 Early Childhood Development Strategy** (in partnership with UNICEF and the World Bank) and a **Family Development Plan** to support families in difficulty.

Taken together, the severe economic and budgetary crisis affecting the country since 2011 and increasingly scarce resources for child and family protection, jeopardise these advances and deserve political decision-makers' full attention. According to the 2015 household budget, consumption and standard of living survey by Tunisia's national institute of statistics (INS) (Arabic only), one in five children lived below the poverty line for the survey year<sup>558</sup>.

## Competent authorities

Two ministries oversee the two main organisations responsible for institutional placement of children without family support: the **Ministère des affaires sociales** (MAS) [Ministry of social affairs] for the *Institut national de protection de l'enfant* (INPE) [National Institute of child protection] and children's social protection centres, including the *Essanad* centre for children with disabilities without family support and nurseries for abandoned infants affiliated with the INPE; and the **Ministère de la femme, de la famille, de l'enfance et des séniors** (MAFF) [Ministry for women, children, the family and seniors] for Tunisia's integrated child and youth centres (CIJE) and SOS Children's Villages affiliated with the ministry.

The *Institut National de Protection de l'Enfance* is a public administrative body under the authority of the ministry of social affairs. Its missions are as follows:

- care for children who are abandoned, who lack family support or who are in danger, mainly those born out of wedlock and under six years of age; and
- reuniting children in care with their biological families or placing them with foster families.

**Competent authorities (continued)**

**Commission de l'adoption, la kafalah et du placement familial** [Adoption, *kafalah* and family placement commission]. The commission was created in the 1990s. It is part of the INPE. A December 4, 2014, MAS circular enabled the commission to achieve consensus regarding evaluation criteria for candidate families. The commission is authorised to do the following: (1) examine candidate families' applications for adoption, *kafala* or family placement according to defined eligibility criteria; (2) follow up with *kafalah* children (*makfoul*), children in short- or long-term family placements, and certain problematic cases; and (3) coordinate with family judges and child protection delegates for children in need of urgent intervention.

**Social defence units** (local level): located within regional social promotion departments, social defence units are on the front lines of child protection. They are responsible for initial assessments of children's vulnerability within their families and for alerting appropriate services, such as social workers or child protection delegates<sup>559</sup>.

**Délégué à la protection de l'enfance** (DPE) [child protection delegate]<sup>560</sup>: according to the 2017 statistical bulletin on DPE activities<sup>561</sup>, the DPE has the authority to engage in preventive intervention in any difficult situation constituting a threat to a child's health or physical or moral integrity within the meaning of article 20 of the child protection code<sup>562</sup>. The DPE coordinates the social organisations and services involved. It determines the appropriate course of action for the child based on the severity of the situation and recommends protective measures.

**Observatoire pour la Protection des Droits de l'Enfant** [observatory for the protection of children's rights]: established in 2002 by decree. Reports to the ministry for women, children, the family and seniors<sup>563</sup>.

**Judicial authorities: Family judge and juvenile judge.**

**FAMILY SUPPORT & PREVENTION OF SEPARATION****Access to services (1st and 2nd levels of prevention)**

The family policy established a social safety and benefits system, and key social assistance programs were developed<sup>565</sup>. According to the MAS<sup>566</sup>, the Programme national d'aide aux familles nécessiteuses (PNAFN) [national assistance program for families in need] and the *Programme national d'accès aux soins à tarifs réduits au sein des structures publiques de santé* [national program for access to reduced-rate care at public health care facilities] were set up to support vulnerable populations. Through the MAS, the government committed to creating a universal child grant in the 10 poorest delegations<sup>567</sup>.

In addition to its *Centres de Défense et d'Intégration sociale*<sup>568</sup> [social integration and prevention centres], Tunisia has launched various family support initiatives as part of its deinstitutionalisation policy. For example, the *Complexes de l'enfance* for children aged 6 to 18 from disadvantaged families welcome children during the day and provide education, food, clothing and support. The PNAFN also offers support to single mothers, and the MAFF has taken steps to strengthen their skills.

In addition, according to the national DPE website<sup>569</sup>, the Tunisian government has created the following:

- integrated centres for protection and reintegration with an emphasis on early identification of delinquency, guidance and socio-educational support for individuals and families with social adaptation difficulties;
- child protection institutions with partial boarding or supervision in family placement for over 5,000 abandoned children who receive the educational and social services they need; and
- a child support and alimony fund.

According to the June 2018 strategy, there is still a need for a child-centred family policy and child-centred social protection. A comprehensive vision would help to coordinate social protection programs with the child and family policy<sup>570</sup>. Proposed solutions include the following:

- ensure access to basic services for the most vulnerable families;
- develop local community services;
- tackle the stigmatisation and exclusion of certain populations, such as single mothers and their children and children with disabilities and their families;
- improve social services workers' ability to address current realities, such as dropouts, violence and neglect. Corporal punishment is still legally tolerated and sanctioned socially and culturally, but taboos seem to be changing<sup>571</sup>.

**Gatekeeping  
(3rd level of  
prevention)**

In 2012, the MAFF introduced a family reintegration program for children placed in integrated child and youth centres (CIJEs) because of poverty.

Among other things, the MAS provides social services to biological families in the form of counselling, guidance and social support, especially in cases where children are returned to their families. Families also receive a long-term monthly payment<sup>573</sup>.

Of the 252 children admitted to the INPE in 2017, 82 were reunited with their families. These data are from the INPE's 2018 strategy. The numbers have gone up slightly, whereas the reintegration rate for children placed in *Unités de vie associatives* (UVA) [group homes] remains unchanged.

Former beneficiaries of CIJEs may be at risk because there is no systematic follow-up that considers the reasons for which they were initially placed in care<sup>574</sup>.

**ALTERNATIVE CARE OPTIONS** <sup>575</sup>**Applicable laws**

The purpose of the *Code de la Protection de l'Enfant* (Child Protection Code) is two-fold: first, it contains measures to protect children at risk (children in difficult situations such as those described below); second, it contains specific measures to protect juvenile delinquents.

**Care options for children separated from their families:** Section 96 of the *Code de Protection de l'Enfant* (CPE) recognises several different types of alternative care: foster care, institutional care, guardianship, *kafalah* and adoption. *The Code du statut personnel* recognises the independence of these alternative care measures as specified in the text of specific laws (1956 adoption and *kafala* law, 1967 foster care law).

**Monitoring, placement review and maintenance of contact with biological family:** Section 57 of the CPE states that the family judge is responsible for monitoring children placed in care with the help of the DPE and services provided by specialised social organisations. Section 63 of the CPE states that the family judge may review a placement at the request of a guardian or person responsible for the child or of the child himself or herself if he or she is competent. The judge has two weeks following receipt of the request to review measures taken in the child's case. Judgments and decisions upon review are not subject to appeal. Section 11 of the CPE states that children separated from one or both parents have the right to remain in regular contact and to maintain a personal relationship with both parents (and other family members) unless the court decides that it is not in the child's best interest.

**Informal care**

According to a local contact, given the cultural importance of family solidarity, the most common care arrangement for children without family support is an informal placement within the extended family. No statistics about such placements are available.

**Family placement  
or foster family**<sup>576</sup>

**Legal foundations and characteristics of this interim measure:** Family placement, as set out in section 2 of law no. 67 – 47 dated November 21, 1967, occurs when a family (not biologically related to the child) agrees to provide care and education on a temporary basis for one or more children lacking family support until their legal and social status can be regularised. The goal is to provide children with a substitute family environment that supports their healthy and balanced development. The family receives material assistance from the State as well as multidisciplinary support in exchange for raising, educating and taking care of the child for the agreed-upon period, at the end of which the placement may (...) be converted into unofficial guardianship (*kafalah*) or adoption pursuant to the law dated March 4, 1958.

**Duration:** This solution is based on a short-term provisional contract in effect until the child's legal status can be regularised. Such placements can last between one day and two years for provisional placement and may last longer in certain cases involving long-term placement (for children with disabilities). According to a local contact, the goal is to keep the placement as short as possible and find a permanent, stable home for the child as quickly as possible.

**Conditions:**<sup>577</sup> Placement may be arranged by order of the family judge, at the request of the DPE, by requisition from the *Ministère de l'Intérieur et du Développement Local* [ministry of the interior and local development], or at the mother's request. According to a local contact, the CPE dictates these conditions. There is currently some inconsistency with law no. 67 – 47 dated November 21, 1967, concerning family placement. An attempt has been made in connection with the deinstitutionalisation policy to develop standards for foster families that reconcile the two texts.

### Family placement or foster family<sup>576</sup> (continued)

#### **Family selection and evaluation, matching, preparing the child:**

- Several different services are involved in family placement with the INPE: the sociolegal branch and the medical branch jointly evaluate the potential foster family's application via the intervention of a multi-disciplinary team. In addition, the medical branch psychologist matches the child with the foster family, and the social worker monitors the family and the child at their home. A regular follow-up is being ensured by a multi-disciplinary team until the child's leaves the care setting.
- These placements are for children placed at the INPE, but there is currently an initiative for children in two *Unités de vie associatives* (UVA) [Group homes] (*Mahdia and Sousse*). In these specific cases, the regional INPE team works with the home and handles matching, preparing the child to leave the UVA, and validating the placement order just as it does for children placed within the INPE. Follow-up is the same as well, and is ensured by the social worker and the psychologist who selects the families.
- Once a placement with a foster family is decided, the head of the medical branch notifies the UVA doctor, the technical services psychologist notifies the caregivers, and the UVA psychologist prepares the child.
- In addition to providing required official documents, the candidate family must meet the selection criteria set out in a MAS circular, and informed by a series of guides<sup>578</sup>.

**Follow-up and support:** Officials follow up with the foster family to ensure the child is being appropriately cared for. The foster family receives financial assistance: 100 dinars for a short-term placement and 200 dinars for a long-term placement of a child with a disability. Compensation for long-term placements is 200 dinars or 350 dinars for a child with a disability.

**Statistics:** The INPE maintains a central database of foster families. According to the June 2018 strategy, 49 families are available for short-term placements and 79 for long-term placements. Nearly all of them are in greater Tunis. In 2016, 91% of the families were in greater Tunis and only 11 were in the other seven governorates.

### Institutional care<sup>579</sup>

#### **State residential care settings**

INPE: State-run care setting for children from 0 to 6 years of age. Abandoned children and those found in public places are systematically placed under public guardianship and placed with the INPE. In 2017, 252 children became wards of the INPE<sup>580</sup>.

CIJE: Placement for children from 6 to 18 years of age who are **in school**, who do not have physical or intellectual disabilities, but who are experiencing social difficulties due to temporary or permanent parental absence. In 2017, 418 children were placed in CIJEs<sup>581</sup>.

The *Centre de Protection sociale des Enfants de Tunis* [children's social protection centre] houses children over the age of 6 who are experiencing major family difficulties and do not have a disability (96 children placed in 2017<sup>582</sup>) and the Centre Essanad houses abandoned children over the age of 6 who have a disability (56 children placed in 2017<sup>583</sup>).

Three *centres d'encadrement et d'orientation sociale* (CEOS) [guidance and referral centres], created by the MAS and located in Tunis, Sousse and Sfax, for homeless individuals, including children who are typically with their families. CEOS provide basic protection, medical assistance and psychological care. In 2016, CEOS' cared for 385 children (including 57 infants) with a ratio of 14 staff to 100 children<sup>584</sup>.

#### **Affiliated residential care institutions**

SOS Children's Villages took in 440 children in 2017<sup>585</sup>.

Regional affiliated nurseries for children between 1 day and 2 years of age (Amen enfance Tunisie network and other NGOs)<sup>586</sup>.

UVA: 205 children placed in 2017<sup>587</sup>.

**Statistics:** In total, 1,467 children were placed in institutions in 2017 (2,500 in 2011). From 2010 to 2017, there was a significant decrease in the number of temporary and permanent infant placements with the INPE because UVAs increased their capacity, which enabled more seamless movement through the system.

**Aging out of a formal care setting:** CIJEs would likely benefit from developing a new approach guided by principles of progressive independence and remote support for youths, especially those completely lacking in family support. The same is true of SOS Children's Villages and the *Centre de protection sociale des enfants*<sup>588</sup>.

**Deinstitutionalisation:** The MAFF introduced a deinstitutionalisation program in 2012 to reintegrate children into their families with the help of modest financial support. This small-scale initiative would benefit from evaluation. Several other initiatives were introduced, such as the creation of foster families in 2002 and the transformation of large institutions into group homes offering a family-like environment for 8 to 10 children.

## ISS/IRC ANALYSIS: CHILD PROTECTION & ALTERNATIVE CARE

**Concerning the child protection system:** According to ISS/IRC's observations during its 2014 evaluation mission<sup>589</sup>, having two ministries involved in child placement results in a disjointed approach and excessive administration. Policies governing responsibility for children in care are incoherent and do not allow for a comprehensive understanding of family and social issues. The June 2018 strategy emphasises that a leadership mechanism must be implemented to support a vision focused on supporting and strengthening children's and families' skills and ensuring effective coordination among institutions and ministries. In response to the vision articulated by the 1998 – 99 inter-ministerial commission for the review of cases of children born out of wedlock and placed in institutions, the ministry of social affairs drafted a reference document about formalising the status of children born out of wedlock.

**Regarding family support:** Children and families are important in the country's policies. Despite ongoing challenges, Tunisia's child protection system includes a range of measures to protect children deprived of family and to support families. As evidenced by the aforementioned programs, much is being done to support families and prevent separation. When children are separated from their families, authorities strive for family reunification, but this is still difficult in practice. In addition, efforts to promote measures such as foster care placements encounter geographic limitations. This analysis points to the need for all countries to harmonise their practices, for better coordination among all the actors and for a clear vision for the importance of protecting the natural family environment. This vision must guide the deinstitutionalisation process already under way. Authorities must continue to strengthen preventive measures such as parenting support and tackling socioeconomic difficulties and ongoing discrimination.

**With regard to foster care:** As the statistics show, family placement is still very centralised. Elsewhere in the country, the system remains rudimentary. When they were created in 2003, there were 300 of them, but there are significantly fewer now. UNICEF points to several reasons for this, including insufficient compensation to cover the children's needs<sup>590</sup>. Compounding issues are the lack of communication and follow-up mechanisms. Several strategies (family placement promotion (2008) and deinstitutionalisation) focus on communication, community mobilisation and local support. A national network of foster families should be created to increase the number of families, train them and provide coverage that meets placement needs as indicated by factors such as the number of births out of wedlock<sup>591</sup>.

**Concerning residential care:** As observed by ISS in 2014, **living conditions for children in institutions** are often lacking in terms of interaction with, and individual attention paid to, children, high staff turnover, poor communication and coordination between institutional staff and biological families, and so on. Staff do not systematically develop individualised plans for the children. A recent study by *Santé Sud*, UNICEF and *Amen Enfance* showed that children placed in INPE and UVA formal care settings may demonstrate serious cognitive and psychosocial developmental difficulties compared to other children of the same age (0 to 3) placed with foster families. This is all the more concerning given that children tend to remain in these situations for extended periods of time<sup>592</sup>. The INPE helped reopen the conversation about regularising the sociolegal situation of children in care and encouraged the creation of new family-style units for children with special needs. More attention should also be paid to working with youths who leave formal care settings to support their progressive autonomy and social integration. Facilities such as the nurseries are moving toward **deinstitutionalisation** by setting up programs for mothers, especially single mothers, but more thorough planning is needed on the part of ministries responsible for formal care settings, which should collaborate with front-line professionals. Although the number of children placed in formal care has decreased, as noted above, the 2018 strategy makes it clear that the goal of deinstitutionalisation should be not only to reduce the number of children in formal care, but also to implement a sound strategy to support and strengthen families.

## UNOFFICIAL GUARDIANSHIP ('KAFALAH')

### General considerations<sup>593</sup>

Unofficial guardianship or *kafalah* or is covered in **section II of law no. 58 – 27 dated March 4, 1958, on public guardianship, unofficial guardianship and adoption.**

The child's family protection is ensured by two different institutions in Islamic law: custody and guardianship. The rules governing these institutions indicate that Tunisian law oscillates between fidelity to Islamic law and adherence to fundamental rights.

In the traditional model based on Islamic law, custody is exercised primarily by the mother for the protection of young children; guardianship is exercised primarily by the father and lasts until the child reaches the age of majority.

From birth, the child is placed under the regime of paternal guardianship. Under the *Code du statut personnel*, in the event of the father's death or absence, guardianship is transferred to the mother. In the event of the mother's death or incapacity, guardianship is transferred to a designated testamentary guardian. A judge may designate a judicial guardian only in the event of the death or incapacity of both parents and only if the father had not designated a testamentary guardian.

### Competent authorities

This is a notarised contract between the unofficial guardian and the child's father and mother, or just one parent if the other is unknown or deceased, or the public guardian or its representative if both parents are unknown or deceased. The certificate of unofficial guardianship is certified by a regional judge (article 4, section II). See the "Competent authorities" section above.

Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

<b>Subsidiarity principle</b>	According to a local contact, Tunisian nationals are priority candidates.
<b>Eligible children</b>	<p>The child is a minor (article 3, section II).</p> <p>According to a local contact, because of institutional practices, it is preferable for abandoned children to have a patronymic family name because the <i>kafil</i> family will not give the child their family name. This is to avoid giving the child a fictional name.</p> <p>As stated, an adopted child or <i>makfoul</i> is born out of wedlock, and the name of the child's father is usually unknown. In some cases, the biological father acknowledges paternity (spontaneously or following DNA analysis).</p>
<b>Potential guardians</b>	Contract in which a person of legal age with full civil capacity or an assistance agency takes a minor child into care and ensures the child's material needs are met (article 3, section II).
<b>Evaluation of potential guardians</b>	According to information provided by the INPE <sup>594</sup> , the adoption, <i>kafala</i> and foster family placement commission meets bi-weekly. It is responsible for approving or rejecting candidate families. The selection criteria are the same as for prospective adoptive families and are set out in an MAS circular. Social workers use social investigation and psychological interview guides to evaluate families.
<b>Consent</b>	Information unavailable.
<b>Procedure</b>	According to information provided by the INPE, a family that is a candidate for <i>kafalah</i> may apply for the adoption or <i>kafalah</i> of more than one child <sup>595</sup> . Such placements involve regional MAS representatives or the local social worker as well as the judge responsible for approving the final decision.
<b>Decision</b>	As noted, this is a notarised contract approved by the regional judge (article 4, section II).
<b>Legal effects</b>	The unofficial guardian has certain rights and obligations with respect to the ward as set out in the <i>Code du statut personnel</i> beginning at article 54, which include obligations to feed, maintain and educate the child. The guardian bears civil responsibility for the ward's actions, just as fathers and mothers do (article 5, section II). A child placed in care retains all the rights of his or her parentage, including surname and inheritance rights (article 6, section II). A <i>makfoul</i> does not bear the <i>kafil</i> family's surname and therefore cannot inherit their property. A <i>kafalah</i> contract ends when the child comes of age (article 7, section II).
<b>Follow-up and post-placement</b>	According to a local contact, children in <i>kafalah</i> arrangements through the INPE remain wards of the State. Each placement is reviewed at least twice a year or more often depending on the child's situation. The <i>kafil</i> family maintains contact with the INPE for administrative processes such as exit authorisations, passport applications and so on.
<b>Revocation</b>	A <i>kafalah</i> contract may be revoked at any time by a lower court at the request of the unofficial guardian, the child's parents or the ministry if it is in the child's best interest (article 7, section II).
<b>Sanctions</b>	No specific texts, but the general child protection regime applies.
<b>Costs</b>	Information unavailable.

<b>Breakdowns</b>	During its 2014 mission, ISS/IRC interviewed DPEs, who indicated that <i>kafalah</i> is sometimes misused to facilitate the domestic exploitation of children. A local contact also noted several major concerns: management of crises the child experiences because of stigmatisation, identity issues and the child's experience. In 2016, two children refused to remain with their adoptive/ <i>kafil</i> family and there were 36 cases of reported violations of the rights of <i>makfouls</i> <sup>596</sup> .
<b>Cross-border guardianship</b>	The embassy's or consulate's social attaché handles international <i>kafala</i> (and adoption) applications from interested families.
<b>Statistics</b>	In 2017, 252 children were taken into care by the INPE, 110 were adopted, 60 were placed in <i>kafalah</i> arrangements, and 82 were reunited with their families.

### ISS/IRC ANALYSIS: UNOFFICIAL GUARDIANSHIP ('KAFALAH')

With respect to the proper application of the double subsidiarity principle, Tunisia's efforts to prevent the separation of a child from its family and to promote reunification should be underscored. Nevertheless, as mentioned, significant challenges remain. According to a local contact, the second level of the subsidiarity principle appears to be respected in that Tunisian candidates seem to take priority.

According to information from the INPE, there is a framework governing the *kafalah* procedure. Candidates must submit an application package just as prospective adoptive or foster families do. Regional MAS representatives or local social workers are involved along with the judge responsible for approving the final decision.

Selection and psychosocial evaluation of candidates is carried out by the adoption, *kafalah* and foster family placement commission, which is responsible for making decisions about candidate family applications. The selection criteria are virtually the same as for prospective adoptive families and are set out in a MAS circular. Although it is understood that tools are available to help the professionals who carry out these evaluations, information is lacking regarding whether *kafils* undergo any kind of preparation at any point in the process.

With respect to evaluating the child, only the child's age is mentioned. According to the data provided, most of the *makfouls* are children born out of wedlock.

Precise information about how candidates are chosen for potential *makfouls*, has not been able to be obtained.

As noted above, follow-up consists of two visits per year by INPE representatives, with whom more regular contact is maintained for administrative matters or when difficulties arise. Considering the information being shared, follow-up could be enhanced. *Makfouls* appear to face major difficulties, and reports of violations of the rights of children in *kafala* placements emphasize the need for greater supervision.

It is important to note that *kafalah* ends at 18 years of age. There appears to be a lack of support for the young adult after the relationship ends. Furthermore, the fact that the *kafalah* contract can be revoked at any time puts the child in a vulnerable position. Although it is clear that temporary and permanent alternatives that provide a family environment should take priority, it is important to ensure that each of the alternatives respects the child's rights in the long term.

### ADOPTION<sup>597</sup>

<b>Co-existence <i>kafalah</i>-adoption</b>	Tunisia is the only country in the Maghreb that recognises adoption. The law of March 4, 1958, amended by the law of June 19, 1959, incorporated the notion of filiation by adoption into Tunisian law even though it is clearly not permitted under Islamic law. The practice existed before then but was not regulated. With respect to international adoption, Tunisia has not ratified the 1993 Hague Convention, but it has concluded bilateral agreements on the subject with Belgium and Canada <sup>598</sup> . Adoption differs from <i>kafalah</i> in that, by law, adoption must be formalised by a ruling of a regional judge in the presence of the adoptive parent, that person's spouse and, if possible, the father and mother of the adopted child or the representative of the government authority responsible for the public guardianship of the child or the unofficial guardian.
<b>Subsidiarity principle</b>	Article 10 of the law of 1958 authorises the adoption of a foreign child by a Tunisian candidate. The law is silent on the subject of placing a Tunisian child in a foreign country, however in practice, jurisprudence appears to have authorised this type of placement of Tunisian children. Following controversy about the placement of Tunisian

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<b>Eligible children</b>	<p>The adoptee must be a minor child, Tunisian or otherwise, of either sex. The child must be an orphan or declared legally abandoned. Children who are candidates for <i>kafalah</i> or adoption are generally born out of wedlock and abandoned and have become wards of the State.</p> <p>In practice, family judges no longer appear to support adoption, even within the same family. In general, the extended family assumes responsibility for the child. The child may, for his or her protection, be placed in the care of a guardian designated by the family judge. This is another legal form of <i>kafalah</i> that is not under the auspices of a public guardian.</p>
<b>Eligibility criteria potential adoptive parents</b>	<p>The adoptive parent must be of legal age, male or female, married, with full legal capacity. Single, divorced or widowed individuals and unmarried couples may not adopt except with specific judicial approval. The adoptive parent must be of good moral character and physical and mental health and must be capable of meeting the adopted child's needs.</p> <p>Adoptive parents must be over the age of 20 and at least 15 years older than the adopted child except in cases where the adoptee is the child of the adoptive parent's spouse.</p> <p>Although the law of 1958 does not mention religious confession, the procedure requires candidates to be Muslim.</p> <p>As such, non-Muslim foreigners or Tunisians cannot apply to adopt<sup>599</sup>.</p>
<b>Procedure</b>	<p>Adoptions require the involvement of a judge and competent authorities, i.e., regional MAS representatives or the local social worker.</p>
<b>Legal decision</b>	<p>The regional judge verifies that all the legal requirements have been met and meets with the parties to ascertain consent, then issues the adoption certificate. The judge's decision is final.</p>
<b>Effects of adoption</b>	<p>Adoption creates a filial bond between the child and the adoptive family. The adoptee has the same rights and obligations as a biological child. The law does not state whether the relationship between the child and its biological family is severed. Adoption is irrevocable.</p>
<b>Post-adoption follow-up</b>	<p>Given their unusual backgrounds, adoptees and <i>makfouls</i> may face the kind of social stigma that makes their and their family's situation even more difficult, so professionals in the field emphasise the importance of working closely with the child and the family and of communicating in a way that meets their needs.</p>
<b>Adoption breakdowns</b>	<p>In 2016, 20 cases of violations of adopted children's rights were reported<sup>600</sup>.</p>
<b>Inter-country adoption</b>	<p>The embassy's or consulate's social attaché handles applications from interested families.</p>
<b>Preventing and combating human trafficking</b>	<p>Article 2 of law no. 2016 – 61 preventing and combatting trafficking in persons addresses the adoption of children for the purpose of exploitation of any kind.</p>

**ISS/IRC ANALYSIS: ADOPTION**

**Articulation between adoption and *kafalah*:**

The inclusion of adoption in the 1958 law makes Tunisia the only country whose legal system is based on or influenced by Sharia that offers adoption as an alternative to Tunisian children who have not been taken into care at the local level while maintaining *kafalah* in the legislation. This leaves the door open to Muslim candidates who wish to become guardians for children while honouring their religious principles. According to a local contact, despite the rapid decrease in adoption rates in recent years, adoption remains the preferred placement type among stakeholders in the decision-making process (adoptive families, family judges, DPEs and the INPE). The increasing popularity of *kafalah*, which many consider more in line with religious precepts, indicates a sociocultural paradigm shift in how Tunisians view adoption.

### 1.3. *Kafalah* as a form of sponsorship

As demonstrated in a number of the country analyses (e.g. Egypt, Lebanon and Pakistan above), *kafalah* can also take the form of a sponsorship. That is, a regular or one-time support of an institutionalised child aimed at meeting that child's needs and covering the costs associated with the child's care, his or her education and the maintenance of his or her continued institutionalisation (food, hygiene products, contribution to institutional staff wages, etc.). In some countries, such as Egypt and Pakistan, forms of financial support for institutionalised children co-exist with family-type care options (such as guardianship or foster care).

**Such financial support can take many forms and can:**

- Include payment in cash or in kind through donations from local or foreign sponsors;
- Be tied to a particular child or family;
- Be intended for a particular institution; or
- Be provided through an intermediary agency or otherwise.

Despite the manner in which it is provided, the purpose is still the same – to help secure the child's livelihood and guarantee that he or she receives quality care and access to quality services. There are a number of international guidelines<sup>601</sup> which focus on the essential aspects of this type of *kafalah*, such as the identification of sponsored

children, contact between the sponsor and the sponsored children, the benefits for both parties, the monitoring of the sponsorship and the registration of agencies.

However, this type of support is not risk-free<sup>602</sup>. First, in the absence of the aforementioned guarantees and regulations, the sponsorship may be detrimental to children. Further, dependence on donations from abroad could, in the long term, prevent the State in question from fulfilling its obligation according to international standards and from implementing a quality protection and alternative care system. International standards dictate that the State has primary responsibility for meeting children's needs, preferably by supporting families in providing care to their children, even when existing structures are limited. Arguably a reliance on support from abroad means that care for children will be subject to uncertainties and fluctuations in such support from abroad. In addition, it has been demonstrated in other child protection contexts<sup>603</sup> that some types of support are likely to have unintended consequences, exposing children to risks, and can become push factors, forcing children into the child protection system as a "source of assigned support." This risk is all the greater when authorities and/or institutions expect to obtain such support. Lastly, it should be noted that this type of support in no way replaces the benefits of family-type or -based care, as promoted by international standards.

## 2. Brief overview of *kafalah* and alternative care in other countries

A number of other countries not profiled above have various types of family-based care arrangements (*kafala*, guardianship, etc.), which are broadly outlined below.

### Afghanistan

In Afghanistan, the Child Protection Department is responsible (among other matters) for the care of children in alternative care. As neither *kafalah* nor foster care is provided for by the child protection system, the use of institutions<sup>604</sup> is still significant<sup>605</sup>. However, guardianship became possible in 2014. Afghanistan's 2019 Law on Protection of Child Rights (LPDE)<sup>606</sup> defines guardianship as "safekeeping, educating, nurturing, and providing material and spiritual needs of an orphan and child without a guardian<sup>607</sup>".

Aside from the options listed in the 2014 Afghan Child Care Law (LGE) and the LPDE, a child is considered to be without a guardian if that child's parents are deceased, absent or addicted to drugs or if that child's existing guardian is declared unfit. The guardian must be at least 30 years of age, be of the Muslim faith and have the resources necessary to educate the child<sup>608</sup>. A guardianship application must be filed with the competent family court, identifying the child if the guardian knows his or her identity. If all the conditions are met, the court will issue a wasiqa (guardianship decree). The obligations between the guardian and the child are the same as the legal and religious rights and obligations parents have towards their children<sup>609</sup>. The guardian must protect the best interests of the child<sup>610</sup>, and must enable the child to receive an

education or technical and vocational training<sup>611</sup>. There is no cost to become a guardian, and such guardianship cannot be subsidised<sup>612</sup>. The guardian must provide an annual follow-up report, including if they leave to live abroad (in such a case, the report must be submitted to the Afghan consulate)<sup>613</sup>. Except in cases involving early termination, the guardianship ends when the child turns 18 years of age, unless the court orders an extension based on one of the causes of incapacity<sup>614</sup>. Importantly, it is noted that the court may order a guardianship trial period of up to six months.

**Positive points regarding guardianship procedures in Afghanistan:**

- The creation of guardianship as family-based care;
- The possibility of allowing a six-month guardianship trial period so that the situation can be re-assessed;
- Annual follow-up monitoring the child's progress and the appropriateness of the arrangement; and
- The possibility, in limited cases, of extending the guardianship beyond the child's 18th birthday.

**Areas requiring improvement:**

- No statistics on the number of children placed under guardianship;
- No measure to support young adults once guardianship ends;
- No extensive assessment or preparation of the future guardian in relation to the child's specific needs;

## Part II Implementation of *kafalah* in legal systems based on or influenced by Sharia

- Placement follow-up that does not appear to involve independent professionals; and
- An obligation on the Ministry of Labour and Social Affairs to establish institutions (Article 44 §1 LPDE). This provision is contrary to international standards, which encourage family-type and -based care when that is in the best interests of the child. Ideally, institutionalisation should be a last resort and used for a defined period only.

### Algeria

In Algeria, *kafala*<sup>615</sup> exists in conjunction with foster care (remunerated foster care families)<sup>616</sup> and institutional care, and is primarily regulated by articles 116 through 125 of Chapter VII of the Family Code<sup>617</sup>. The Ministry of National Solidarity, Family and the Status of Women is the competent authority for matters relating to children. However, other government entities that play a crucial role in *kafala* placements are the Department of Social Action and Solidarity (DASS) located in the various wilayas (local administrative entities), family courts in the applicant's place of residence and the Vital Statistics and Nationality Department of the Ministry of Justice (for name changes) at the national level. As for legal effects, all parental obligations related to childcare, custody and protection are transferred to the *kafil* parent (Article 116). Under normal circumstances, care of a child is provided by their mother (*hadana*), whereas protection, guardianship and the administrative aspects of parental responsibility are assigned to their father.

#### Three positive points about *kafala* procedures in Algeria are identified:

- *Kafil* candidates' legal and psychosocial capacity appears to be assessed extensively and systematically by the local DASS;
- A compulsory legal procedure exists to avoid placements in direct *kafala* or in notarial *kafala*. Notarial *kafala* (a form of *kafala* practiced for children whose parents were known but were in a difficult social situation) was abolished through compulsory procedures due to illicit practices having occurred (see Article 492 of the Code of Civil and Administrative Procedure); and
- There is a solid basis of intersectoral and interdisciplinary cooperation between administrative and judicial entities and civil society organisations.

Based on the available information, **areas requiring strengthening in Algerian procedures relate mainly to** the need to strengthen the legal, political and practical system in terms of prevention and support measures for vulnerable families, and on the importance of strengthening procedures surrounding placement matching, preparation and monitoring.

With respect to placement in **cross-border *kafala***, an Algerian child can be placed with an Algerian national living abroad or with a foreigner of the Muslim faith. Algeria cooperates with France<sup>618</sup>, Belgium, Canada, the United States<sup>619</sup> and Switzerland. In 2015, 167 children were placed in cross-border *kafala*. The eligibility conditions for *kafil*

parents are the same as for national *kafala*, but there may be additional requirements, particularly regarding minimum wages<sup>620</sup>. Diplomatic channels are used to exchange necessary documents and check eligibility criteria. However, practices appear to vary for placement in cross-border *kafala* according to the different wilayas. Accordingly, the Algerian *kafala* judgment authorises the child to leave Algeria.

### Indonesia

Indonesia<sup>621</sup> is a democratic country and has the largest Muslim population worldwide<sup>622</sup>. The Indonesian child protection system foresees different care options for children in need of parental care, all regulated by law and under the responsibility of the Ministry of Social Affairs: guardianship, kinship care, foster care, adoption and residential care. In all cases, the religion of the child should be taken into account when deciding where to place the child. If the religion of the child remains unknown, the child's religion should follow the majority religion in the area where he or she is found.

The Indonesian legal framework uses “**childcare**” as a term encompassing the different care options for children deprived of parental care. It “*is intended to provide the basic services and fulfil the basic needs required by every child in the form of affection, attachment, security, welfare and civil rights and to provide certainty that every child receives appropriate care*”<sup>623</sup>. A child will be referred to “childcare” should their birth parents be unable to provide for their necessary needs whether physically, mentally, spiritually and socially<sup>624</sup>. Child care can be provided outside of a social welfare institution (by a blood relative<sup>625</sup> in a direct line or in a collateral line; or by a foster parent<sup>626</sup>) or in a social welfare institution, the latter being a measure of last resort and temporary in nature, until permanent care is arranged<sup>627</sup>. Foster care is a temporary arrangement for a maximum period of one year, with the aim being to reunify the child with his or her biological family. If such reunification fails, “*the childcare arrangement may be extended until permanent care is found*”<sup>628</sup>. Foster parents are prepared, accredited and designated according to requirements set out by the law<sup>629</sup>. Different types of support are provided to foster parents (i.e. family strengthening, counselling and business skills training)<sup>630</sup>.

**Guardianship:** As detailed in the 2011 National Standard of Care for Child Welfare Institutions, “*Care of a child through guardianship is temporary in nature, whereby the child's custody is legally transferred to someone appointed by the court in accordance with relevant articles of the Law No.23 of 2002 on Child Protection*”<sup>631</sup> and the Regulation No.29 of 2019 on Requirements and Procedures for Appointment of Guardians<sup>632</sup>. Where parents are no longer available, missing, or are unable to take care of their child, rearing responsibilities can be assigned to a child's family member, a relative, or another legal entity<sup>633</sup>. Guardianship shall end, *inter alia*, when the child is 18, or at the death of the child or of the guardian<sup>634</sup>.

Adoption is recognised and permitted in Indonesia and monitored by the Directorate of Child Social Service Development of the Ministry of Social Affairs of the Republic of Indonesia<sup>635</sup>.

**Adoption from Indonesia should respect the following principles (among others)<sup>636</sup>:**

- *Child adoption should only be conducted in accordance with the child's best interest, the local customs and prevailing laws and regulations;*
- *Child adoption should not cut off the blood relationship between the adopted child and his or her biological parents;*
- *Child adoption by foreign nationals should be seen as a measure of last resort.*
- *The country has not ratified the 1993 Hague Convention. Intercountry adoption is only permitted under strict circumstances (minimum residency obligation of 2 years; candidates need to have the same religion as the child<sup>637</sup>; etc.)<sup>638</sup>;*
- *The adoptive parents should explain to the child his or her origins that respects his or her evolving capacity.*

**Positive points as to child protection options in Indonesia:**

- *The variety of options available for children in need of care, which largely align with international standards, among others the Guidelines for the Alternative Care of Children;*
- *The continuity of the child's cultural identity including religion in the different care placements;*
- *The importance given to origins in case of the child's adoptions.*

**Points requiring further strengthening:**

- *The ratification of the 1993 Hague Convention should be encouraged as it would enhance the protection of children's rights in intercountry adoption procedures;*
- *Ensuring that residential care placements are used as a last resort, as required under a number of international standards, including the Guidelines for the Alternative Care of Children.*

**Saudi Arabia**

In Saudi Arabia, the competent authority responsible for children deprived of family is the Ministry of Social Affairs<sup>639</sup>. Within this Ministry, a General Administration for the Protection of Orphans has been established and is responsible for the protection of children — including the service which looks after families and the service in charge of placement in an institution. Additionally, the Ministry of Justice plans to reform the legal system, so as to standardise and improve responses to family matters (abandonment, guardianship, filiation)<sup>640</sup>.

The care of children deprived of family is governed by the 2014 Child Protection Act<sup>641</sup> as well as the Protection from Abuse Act and its regulations. Questions relating to children in need of alternative care and placed under State guardianship are provided for in article 7 of Part II of the 2014 Child Protection Act (including issues related to negligence, dangers to the child's well-being, etc.)<sup>642</sup>. Family-type care can be either temporary (via the "benevolent family" program) or permanent (via the care measure *kafalah*)<sup>643</sup>. In the absence of a family-type measure or, in the event that this proves to be deficient, the child is placed

in a specialised institution (State or private; homes for children aged 0 to six; socio — educational facilities for children from six years old; model schools for boys from 12 years old). According to the country's 2015 periodic report to the Committee on the Rights of the Child, *kafalah* is an alternative solution that is only resorted to in cases where the nuclear or extended family cannot take care of the child<sup>644</sup>. It is characterised by comprehensive care by the *kafil* family<sup>645</sup>.

**Positive points regarding child protection options in Saudi Arabia:**

- *The creation of family courts enabling more streamlined resolutions for various problems that may affect children.*
- *The procedures in place provide for certain key guarantees, such as the assessment of *kafil* candidates (who must be deemed suitable from an educational, psychological and social point of view), and monitoring of the placement. However, the CRC Committee recommended that the State party strengthen elements in its placement system (eligibility criteria, matching focused on the child's needs, monitoring modalities)<sup>646</sup>.*
- *The allocation of important financial aid from which *kafil* parents may benefit (equivalent to 500 euros/month). These subsidies can be received until the professional integration and/or the independence of the child/young adult<sup>647</sup>.*
- *A fatwa (legal interpretation on a religious matter) issued by the Permanent Committee on Scientific Research and the issuance of fatwa No. 21145 of 22/10/1420 AH [1] have made it incumbent on the *kafil* to inform the *makfoul* child of his or her origins (leaving the decision of the exact moment to the *kafil* parents).*

**Areas requiring improvement:**

- *An adverse environment for children born out of wedlock due to condemnation of relationships out of wedlock, and, consequently, of single mothers<sup>648</sup>.*
- *As noted by the Committee on the Rights of the Child in its 2016 Concluding Observations of, significant gaps persist in terms of regulating institutional care<sup>649</sup>. A matter that is all the more worrying given that in 2015, the government planned the creation of new institutional structures<sup>650</sup>.*
- *A practical obstacle concerning the continuity of care for a male *makfoul* child exists due to a prohibition on (visual) contact between two persons of the opposite sex in the absence of a filiation bond. This prohibition applies within the *kafalah* framework. Indeed, the contact between the *kafil* mother and her *makfoul* child discontinues after the age of puberty (indeterminate but tends to be around 15 years old).*
- *The wide discretion and interpretation of the judicial power of the judiciary, and a lack of separation of legislative and judicial powers, were also raised by the Committee in 2016 as factors that could impede the realisation of children's rights<sup>651</sup>.*

# Technical note: National family type *kafalah*



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## Technical note: National family type *kafalah*

The individual country studies lead to the general observation that child rights are a prominent consideration in the States of origins. However, a child-centred approach – based on the child’s rights and needs and in compliance with international standards – is far from being achieved in many of the contexts examined. For example, a number of the child protection systems examined are often characterised by a lack of formal procedures, adequate human and financial resources, family law provisions influenced by a lack of equal rights, and stigma that prevails over extra-marital relationships and, as a result, children born out of wedlock.

This section presents an overview of positive trends observed in the countries examined and the challenges faced by States of origin. Further, several avenues for reflection, including promising practices and tools, are shared with the aim of equipping the different national stakeholders and strengthening comprehensive child protection systems.

## Positive trends despite persistent challenges

### 1. Increasingly visible positive trends

The study shows that promising trends can be observed nationally.

#### Introduction of reforms to strengthen alternative care

Numerous States of origin have undertaken, or are currently implementing, reforms to strengthen their legal system and/or alternative care practices; or are intending to introduce monitoring to guarantee that the rights of the children concerned are respected.

Some of these reforms are as follows:

- A number of countries have begun developing or strengthening various family-based care options, such as *kafalah*, or other measures (including foster care)<sup>652</sup>. For example, some contexts require diversification in the application of a family-based care option to meet children's various needs (emergency or short- or long-term placement)<sup>653</sup>. Tunisia, Djibouti, Lebanon and Indonesia are examples of countries that provide a range of possible alternative care options depending on the individual situation of each child. One country that has revised its legal framework (dating back from the 1970s) after seeing the increased need for care of children is the Republic of Iran.
- Tradition and customs based on Muslim faith provide fertile ground, and may be an opportunity to be seized and channelled in the development of alternative care options, as opposed to institutional care.
- In the Philippines, at the time of publication, a draft law is being developed, proposing the introduction of a dual adoption-*kafalah* system to introduce a formal family-based care option for children of Muslim faith.
- Algeria and Morocco have introduced compulsory legal procedures for the supervision of any placement in *kafalah*, thereby seeking to avoid informal or notarial *kafalah*.
- Countries such as Morocco and Tunisia have introduced deinstitutionalisation strategies.
- In Syria, a draft law provides for a broader application of *kafalah* as a child protection measure for groups of children without a family, and in particular those in vulnerable situations such as unaccompanied migrant children.

#### An increasingly strong voice of children and young people in care, and of civil society

- Some countries, such as Tunisia and Morocco, have coalitions or networks of national NGOs that carry out important advocacy actions to strengthen legal and procedural frameworks, but especially to contribute to a paradigm shift to guarantee that the *makfoul* child has the fundamental rights recognised by the CRC.

- Initial trends in strengthening the voice of young people in care can be seen. In Jordan and Pakistan, leaving care is an emerging topic (see section below).
- The importance of the child's identity and origin is also increasingly apparent in some contexts (e.g., Iran).

#### Introduction of protection against illicit practices and introduction of restrictions on cross-border placements until guarantees are in place at the national and cross-border levels

- In Jordan, cross-border placements were suspended in 2013 as a result of difficulties in following up on children placed with families who were living abroad. ISS/IRC commends Jordan for putting this ban in place. However, it is recommended that during this suspension, the country continue efforts to put in place more safeguards for national and cross-border procedures.
- In Morocco, a circular from the Ministry of Justice to prosecutors issued in 2012 limited placements under the *kafalah* umbrella to candidates residing in Morocco in order to avoid cross-border *kafalah* placements which were circumventing applicable international rules.

### 2. Persistent challenges for children deprived of a family in their own country

The following challenges were identified in the country analyses or were raised by the Committee on the Rights of the Child in the context of the periodic review:

#### Cross-cutting challenges related to the child protection system

- **Insufficient collection, analysis and preservation of statistical data:**

  - Especially in relation to vulnerable families and children, children separated or at risk of being separated from their families, and children in care, etc<sup>654</sup>.
  - A lack of information collection mechanisms or databases can have long-term impacts and hinder the right to access to origins.
- **Lack of cooperation and coordination among actors in the child protection system**<sup>655</sup>.
- **Professional qualifications still needs to be strengthened** in many contexts, especially through: allocating adequate technical and financial resources to the child protection system<sup>656</sup>; providing continuous training to professionals<sup>657</sup>; establishing key professions (such as social workers, psychologist, child psychologist, etc.) that do not exist or are not very widespread or even recognised<sup>658</sup>.
- **Lack of a system of complaints and sanctions for violations of children's rights**<sup>659</sup>.

## Technical note: National family type *kafalah*

- **Prevalence of various forms of discrimination:** Many States parties have been called upon to abolish/eliminate/fight against: gender-based discrimination in laws, policies and practices against women and girls, considering their negative impact on the children concerned<sup>660</sup>; persistent discriminatory practices in relation to marriage, divorce, polygamy, inheritance<sup>661</sup>, nationality, guardianship and custody rights<sup>662</sup>; the stigmatisation of children born out of wedlock<sup>663</sup>; limited access to profiles of children who may not be able to fully enjoy their rights, such as children with disabilities, migrant children and children from other ethnic minorities<sup>664</sup>.
- **Unequal rights in matters of parental responsibility:** The Committee has encouraged numerous countries to ensure: equal rights in the upbringing of children in matters of custody and guardianship<sup>665</sup>;
- access for all children to civil rights (nationality, etc.). In many countries, these rights were still exclusively linked to the establishment of paternity<sup>666</sup>.

### Challenges related to the legal/policy framework

- The Committee encouraged States parties to ratify or accede to the 1996 Hague Convention<sup>667</sup>.
- The Committee has consistently recommended the implementation of policies consistent with the Alternative Care Guidelines<sup>668</sup>.

### Challenges in preventing the child's separation from his or her family

- **Preventive efforts and support services for families without any distinction:** A frequent recommendation of the Committee concerned the need to provide support to families without distinction as to race, ethnic or national origin, to children of single-parent families and to unmarried women<sup>669</sup>.
- **Financial and material poverty** as a decisive factor in family separation<sup>670</sup>.
- **Gaps in family reintegration programs:** Working closely with birth families is not widespread in many contexts.

### Challenges related to the alternative care system

- **Private nature of placements:** Often these arrangements are not quantifiable, and are not subject to regulation and control. Informal *kafalah* or *kafalah* by *adoul* (notary) fall into this category and raises serious concerns related to the fact that choice of the child is made directly by the *kafil* family, without any professional intervention, and therefore there is no support in case of difficulties – which could lead to a breakdown of the placement. In addition, the legal framework is often not conducive to the registration of the placement decision, a fact that does not encourage or support the formalisation/regularisation of the placement in question<sup>671</sup>.

- **Lack of family or community type placements** in the systems in place when separation is unavoidable<sup>672</sup>.
- **Excessive use of institutions and lack of monitoring:** In some countries, this is the only measure made available, and affects an extremely high number of children in some contexts<sup>673</sup>. In addition, monitoring and the implementation of legal provisions related to children placed in private or religious institutions<sup>674</sup> remain challenging.
- **Need to consolidated *kafalah* provisions due to legal gaps and/or inadequate implementation:**
  - Some countries have a limited legal framework that remains silent on the implementation of certain key steps such as obtaining consent from birth parents<sup>675</sup>, matching by a competent and independent body<sup>676</sup>, and preparation of the child and the applicants.
  - Other aspects that are rarely foreseen by the law are the regulation of costs related to the placement (administrative or judicial)<sup>677</sup>, the prevention and responses to placement breakdowns<sup>678</sup>, the provision of leaving care<sup>679</sup> or the right to know and access one's origins<sup>680</sup>.
  - In addition, certain key safeguards such as the assessment of the child<sup>681</sup> and of the applicants<sup>682</sup>, a regular review of the placement<sup>683</sup> and adequate monitoring of the quality of the placement<sup>684</sup>, are often not implemented in practice.

### Challenges with placements in cross-border *kafalah* or other cross-border placements

- **Differing practices:** while some countries do not appear to have cross-border placements<sup>685</sup>, others authorise cross-border placements on a case-by-case basis<sup>686</sup>, or even authorise intercountry adoptions in addition to *kafalah*<sup>687</sup>. When recognising a cross-border placement in a receiving State, it is important to take into account these distinct approaches, whilst also respecting the laws and traditions of the other country in question.
- **Lack of monitoring:** As demonstrated in most of the countries examined, supervision of cross-border placements is not provided for by the legislation in force. The State of origin is often limited to providing authorisation to travel or exit from its own territory.
- The law in most of the countries examined also makes no mention of the principle of subsidiarity, that is, the priority given to national solutions (see Section III.2).
- The differing practices in the State of origin, combined with the varied treatment of this type of placement in the receiving State, **too often leads to a lack of oversight and supervision of intermediaries and the costs involved**, thus potentially endangering the children concerned.

See also [Technical Note: Cross-border \*kafalah\*](#).

## Theoretical reflection and potential avenues to guarantee the protection of children deprived of family in their own country

To meet the challenges mentioned above and reinforce current responses to problems in the short, medium and long term, ISS/IRC proposes **three key actions**, illustrated with numerous promising practices. These practices have been identified in the countries examined in [Part II](#), or have been inspired by the other areas, such as foster care and/or adoption.

### 1. Reinforce comprehensive child protection systems (in the short and medium term)

The following cross-cutting elements should be an integral part of the child protection systems in which *kafalah* placement takes place:

*Intersectoral and interdisciplinary cooperation and coordination for a harmonised and effective care system based on standardised, harmonised procedures and reference mechanisms between the different services and actors.*

#### **Sudan: Paradigm change regarding the fate and rights of children born out of wedlock**

The introduction of a family-type alternative care system with numerous safeguards for the child concerned was made possible in Sudan thanks to the following key factors: 1. Government commitment to and ownership of the new child protection system. 2. Broad based support with key stakeholders, such as Task Force (composed of expert organisations), Imams, Community/Civil Society, Midwives, Police, Prosecutors, Media. 3. The support of significant influential individuals to champion the new child protection system. 4. Ongoing awareness-raising through the media and community leadership structures.

<https://bettercarenetwork.org/sites/default/files/Looking%20Back%20Looking%20Forward%20Report%20HHC257.pdf>

*Allocation of adequate financial resources for child protection.*

#### **Childnomics Initiative<sup>688</sup>**

ISS/IRC would like to encourage governments to join the Childnomics initiative or other multi-agency projects, which contribute to understanding the long-term social and economic return of investing in children. The tool includes economic modelling that considers the cost of the different services and approaches to supporting children and families in vulnerable situations. Using existing longitudinal data, the study will explore expected outcomes for children, families and society. The budget should be allocated to State support for families and the development of a national social assistance program.



*Ensuring basic and ongoing training for professionals working in the child protection system (consolidate status of professionals such as social workers and/or psychologists, etc.).*

#### **Friends of the Family training – Para-social workers, Rwanda**

With the support of UNICEF, 30,000 para-social workers have been trained in several communities with the aim of educating families about the well-being of their children and linking families to providers of basic services such as health and education.

<https://www.unicef.org/rwanda/media/1641/file/TMM%20Summary%20Evaluation%20Phase%20I.pdf>

#### **Massive Open Online Course (MOOC): 'Getting Care Right for All Children: Implementing the UN Guidelines for the Alternative Care of Children'**

This free six-week course, developed by an international inter-agency group that has worked on several initiatives, is aimed at professionals from various fields and seeks to deepen the application of the UN Guidelines and the principles for policy and practice that have been agreed upon globally, to help towards finding solutions for children deprived of families.

<http://www.alternativecaremooc.com/index.php/en/>



***Equipping professions working in alternative care***

**Mapping the present state of workers/professional social workers in several countries through a regional study undertaken in 2019:** a workforce who is well planned, qualified and supported is essential to protect vulnerable groups, and children in particular, from abuse, negligence, exploitation and violence. Without a strong social service workforce, endowed with resources at the heart of the organisation of social protection and wellbeing, the essential services cannot reach the children, families and other vulnerable populations. The objective of the study of the social services workforce in several countries in the Middle East and North Africa (Djibouti, Iran, Jordan, Lebanon, Morocco, Palestine, Sudan and Tunisia) was to create and analyse key data, to guide and assist strategies in the countries so as to reinforce the role of the professionals. The study was conceived to reveal the unique characteristics of the workforce in each country, to identify the challenges or common tendencies, and to suggest proven plans of action to help countries when they develop their own national strategies. See: UNICEF, Global Service Workforce Alliance and Maestral International (2019). Strengthening Social Service Delivery through Workforce Development in the Middle East and North Africa Region.

<http://www.alternativecaremooc.com/index.php/en/>



**Use of a skills reference framework for the training of actors in social work – developed by the Global Social Service Workforce Alliance:** in the context of this alliance, certain members have expressed the desire to improve understanding and support for workers at the community level. A group has been established to deal with the question of “para-professionals”, and has agreed on a set of guiding principles. It is necessary to have a clear, common definition of the required qualifications, knowledge and behaviour, to ensure the correct preparation of workers and services of quality for children and families. The group has therefore decided to prepare a skills reference framework in order to define the functions and skills of these “para-professionals”. This framework could be used when setting up programmes and defining responsibilities, or to provide information on the training and supervision of workers.

<http://www.socialserviceworkforce.org>

***Establishment of a data collection and preservation system for disaggregated data and documents, in accordance with data protection laws in place, or to be put in place (e.g. database for children at risk of family separation; children separated from their families; future opportunities for search for origins, etc.).***

**Use of PRIMERO:** Open source software platform fed by different stakeholders for the purpose of establishing a database (<https://www.primero.org/>). This tool facilitates the input of data relating to an individual file and allows the collection and evaluation of disaggregated data on a national scale.

**Tracking Progress Initiative: an initiative to monitor progress on the implementation of the Alternative Care Guidelines**

The “Tracking Progress Tool,” an inter-agency initiative supported by the Oak Foundation, is an interactive, strengths-based diagnostic and learning tool to help governments and NGOs determine the extent to which a State or region has effectively implemented the Guidelines, and the priorities for change still ahead. A web-based version of the tool will be available so that teams can work on completing it over time, saving the data as they go along. As the principal duty-bearers with regard to children’s rights and the monitoring of alternative care resources, government officials should be part of any “Tracking Progress” team, though it is likely that a team will draw on resources and assistance from across sectors, including civil society. The report produced from this process will also assist national actors in providing comprehensive information when their country reports under treaty body mechanisms, including the Committee on the Rights of the Child.

<https://bettercarenetwork.org/library/social-welfare-systems/data-and-monitoring-tools/tracking-progress-initiative-monitoring-the-guidelines%e2%80%99-implementation>



## 2. Contribute to a change in the approach/attitudes of professionals working with children deprived of family: focus on prevention (in the medium/long term)

One of the major weaknesses in the systems studied is the lack of preventive professional intervention, and this is almost systematic (see Part II and challenges above). In order to effectively implement the CRC and the Alternative Care Guidelines, prevention actions must be reinforced in many contexts with the objective of ensuring that the children who are within a system of alternative care are really in need of placement (see principle of necessity and the three levels of prevention in Section II.1). Given the prevalence of informal *kafalah* placements, it is also essential that the families concerned by these unsupervised situations should have access to the available support services, in order to guarantee the protection of the child concerned and to avoid illicit practices.

A case study will be presented on the following pages so that you can reflect on your own attitude and approach.

**Promising practices have been observed in certain countries covered by the study, or in other contexts/fields:**

### **Ensuring access to basic services for all and specific services for vulnerable families/children.**

#### **Facilitating access to basic services through new technologies**

A smartphone application could make basic services offered by various entities (different ministries, etc.) more accessible. Such an application would also make use of different formats, including icons/images, to ensure accessibility for all, even those who are illiterate.



### **Developing “safety net” measures for single mothers to prevent permanent separations<sup>689</sup>.**

**Work with single mothers to prevent definitive separation:** In Morocco for example several associations exist (Association *Solidarité Féminine*, *Widad* Association or 100% Mothers) which work towards social inclusion and citizenship for single mothers and their children, and combat all forms of violence towards women and children. These associations provide support for single mothers by offering them a welcome centre and the possibility to follow professional training.

<https://centpourcentmamans.com/>; <https://www.facebook.com/Association-WIDAD-pour-la-femme-et-lenfant-528652953909689/>

**Prevention and response to the abandonment of children in the children's hospital in Angkor, Cambodia:** A unit of social workers managed by the Angkor Children's Hospital in Cambodia provides support to families so that they can care for their children. In a video, an experienced social worker talks about the work undertaken with families to identify and solve the underlying problems, to relate to and communicate with families, and to find the risk factors which could lead to the child being abandoned. Furthermore, ideas are exchanged concerning the search for family members, when the child has already been abandoned, including the identification of solutions and key sources of information. *Friends International* collaborates with this hospital to provide a wide range of services to foster families, and in particular abandoned babies, and works closely with biological mothers when the child is placed provisionally with foster families, who have been evaluated and prepared.

<https://bettercarenetwork.org/sites/default/files/2019-08/AHC%20Discussion%20Guide%20-%20Preventing%20and%20Responding%20to%20Child%20Abandonment%20at%20Hospitals.pdf>

<http://friends-international.org/blog/index.php/foster-care-project-siem-reap-baby-vs-story>

**Support to single mothers in South Korea:** The 2012 Special Adoption Act has introduced a series of provisions relating to strengthened policies and mechanisms of support to families in order to prevent abandonment and family separation. Before, a significant number of shelters and counselling services for the mothers in difficulties were functioning as adoption agencies. Adoption agencies can no longer establish or manage centres for single mothers (*mihonmo sisul*) under Article 20 (4) of the Single Parent Family Support Act. Some of these maternity homes for single mothers have been closed whereas others have been transformed into social welfare services for mothers and children (*mojawon*), which should act to preserve the family unity rather than tending towards the separation of the child and his/her mother. According to the numbers of 2015, 58 centres for single mothers provide services such as housing support, birthing support, medical support, and childcare support. In order to reduce the stigmatisation of single mothers, an amendment concerning especially article 15 of the Law on the Registration (...) of Family Relationships was examined and approved by the Government in April 2016. Further information can be requested at ISS/IRC. Other promising practices in terms of prevention of family separation and support can be found at the **Better Care Network website under ‘Learning videos’**. See for instance the work done in Uganda by the Child's i Foundation.

Technical note: National family type *kafalah***Promote family reintegration through temporary or ad hoc support programs.****Cambodia: family reintegration as a political objective**

The government of Cambodia is committed to improve its child protection and alternative care system. Following a mapping exercise, the Cambodian government had set itself the objective of reintegrating 30% of children into their families in five provinces within three to five years. CSOs are providing examples and frameworks, although a nationwide approach is lacking. Civil society organisations provide examples and frameworks, despite the lack of a national approach. The successful work of prioritising intra-family care (*Children in Families and M'Loap Tapang*) could be replicated in other contexts. Further, increasing the participation of the child is an essential part of reintegration. The future work of the Family Care First program to establish a family conferencing system is a promising initiative and could be a means of fostering the participation of all concerned. Likewise, comprehensive training of child welfare staff is needed to improve practices – especially on how best to assess the needs and views of each child.

For further information, see ISS/IRC Country situation, last updated in December 2019, and Dambach M. (2019). Principle Of Subsidiarity, ISS/IRC Comparative Working Paper 1: Spotlight on solutions: [https://www.iss-ssi.org/images/Publications\\_ISS/ENG/PRINCIPLE\\_SUBSIDIARITY\\_ANG.pdf](https://www.iss-ssi.org/images/Publications_ISS/ENG/PRINCIPLE_SUBSIDIARITY_ANG.pdf)

**ISS Project 'A better future is possible' in Viet Nam**

Since 2013, ISS has been coordinating this project aimed at promoting family life and adequate alternative care options for disabled children deprived of their family. This project is implemented in various partner countries: Burkina Faso, Cambodia, Haiti and Viet Nam. In Viet Nam, the project is being implemented since 2014 thanks to the collaboration with MOLISA (Ministry of Labour – Invalids and Social Affairs), UNICEF, Embassy of France in Vietnam, Dora Foundation and the technical partner SPOON. A team of 12 Vietnamese Master trainers have been trained on social work activities as well as improved daily care, nutrition and feeding practices. They will disseminate these training packages in 14 residential care institutions caring for children with disabilities in 2020. ISS and SPOON have also worked with MOLISA to prepare the reintegration component of the project which aims to work with 3 pilot provinces on family reunification for children with disabilities. This component focused on Family Reintegration for CWD in residential care has been launched in 2018 and is based on the work of two "Reintegration Teams" from public social work centres have been created in 2 provinces, selected by the Child Protection Authorities (MOLISA). These trained teams will pilot this specific program. Six Residential care Institutions across Vietnam will benefit from training on monitoring over the next 2 years.

<https://www.iss-ssi.org/index.php/en/what-we-do-en/cwd-en>

**CPIMS+ (part of Primero software platform):** The Child Protection Information Management System, CPIMS for short, was initially developed in 2005 by International Rescue Committee, *So they can* and UNICEF and "consists of a database and accompanying tools such as template paper forms, data protection checklists and information sharing protocols". As a holistic tool, its updated version CPIMS+ is now the primary case management tool for child protection emergency situations. It offers online and offline family tracing and reunification possibilities (e.g. offline data matching). It has not yet been used for family tracing and reunification, but is currently in service in Jordan, Kenya, Nepal and Sierra Leone. At the moment, however, data matching between emergency situations and across borders is currently not possible.

<http://samuelhall.org/coming-together-family-tracing-reunification/>

**The recourse to family mediation:** A website dedicated to family mediation has been developed and can not only help prevent unnecessary family separation, but also promote and prepare the family reintegration of a child temporarily separated from his family. The website [www.ifm-mfi.org](http://www.ifm-mfi.org) offers information and resources to families and professionals around the world. Its content reflects the knowledge and skills acquired by established international family mediation structures and specialised professionals. It also provides a practical guide which presents international family mediation and its articulation with the law, and also offers a directory for the use of parents and professionals on legal authorities and psycho-social services in several countries around the world.



**Capacity building and awareness raising initiatives to address certain forms of discrimination and disseminate messages such as “finding a family for a child and not a child for a family”.**

**Lebanon: Standard Operating Procedures and their gatekeeping role (see Section I.1.2).**

The Standard Operating Procedures were issued in 2017 to protect children in Lebanon and foresee mechanisms to support families exposed to risks. The SOPs provide a pathway for social workers to consider when making a decision, based on assessment, on whether to pursue a judicial pathway or to continue case management with the family. Should the social worker determine that judicial intervention is needed, they make recommendations to the juvenile judge regarding the different measures that could be taken in the best interest of the child. The SOPs also provide a pathway for the judge to consider when making a decision on removing the child, and also different measures which could be taken – including ordering that support be provided to the parents/carers, rather than removing the child.



**The 2020 Day of General Discussion (DGD) on alternative care, postponed to 2021:** The objective of the Day is to promote a deeper understanding of the provisions and implications of the CRC, and will be an opportunity to reflect on the present state of alternative care in order to understand its complexity, and identify and discuss certain areas of concern, in particular the unjustified separation of children from their families. This event will certainly be the occasion to pinpoint new promising practices in various parts of the world.

<https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2020.aspx>



### 3. Ensuring minimum procedural guarantees for family-type *kafalah* (in the short and medium terms)

It is necessary to ensure a common foundation of minimum guarantees based on the CRC and the Alternative Care Guidelines (suitability principle) by qualified, trained professionals, in view of the risks prevalent in numerous systems of children's rights (see [Part II](#)).

**In the short and medium terms, the following key stages should be reinforced:**

**Determining the suitability of kafalah for a given child based on psycho-social, medical and legal assessments (individualised approach)**

**ISS international tools for evaluating the child's needs from the moment he or she enters the institution to the development of a life project**

In the context of its project 'A better future is possible' ISS has developed tools for professionals and children, including a handbook for professionals and a life book. These are practical tools, such as simple grids for observing the child and guidance on preparing the child for his or her new environment. These tools have been developed with the aim of:

- helping professionals caring for children with disabilities in institutions to better understand and take into consideration the specific needs of children with disabilities in order to improve daily care;
- promoting and encouraging a systematic evaluation of children with disabilities in institutional care;
- elaborating a permanent family file project for every child, whatever his or her health is;
- encouraging and accompanying competent authorities to develop alternatives to institutional care for children with disabilities; and
- ensuring the continued existence of the plan through local partners' identification, training and follow-up.

<https://www.iss-ssi.org/index.php/en/what-we-do-en/cwd-en>



## Technical note: National family type *kafalah*

### *Introduce the obligation to adequately prepare the child by using available tools such as a life book*

#### Life journal to ensure continuity in the life of the *makfoul* child

As recommended by para. 100 of the Alternative Care Guidelines, a collection of important information to keep a record of the child's history, such as his or her origins, development, life in the institution and childhood memories. This notebook is also an innovative tool for professionals.

**There are many preparation tools for a child placed in alternative care or adoption. These could be adapted to other measures such as *kafalah*.**

- **Preparing the "adoptable" child, South Africa:** Child professionals develop an individualised placement plan for each child (life project). Following this decision, the child is adequately prepared according to his or her age. Plans are developed for children over the age of 3. Before the match, the child's emotional state is evaluated and the child is shown photos of the adoptive family and their new environment.
- See also other countries such as *Chile* or the *Philippines*, articles published in *ISS/IRC Monthly reviews*, N° 181 of May 2014 and N°193 of July/August 2015.



### *Obtaining required consents (if applicable): Ensuring the free and informed consent of the child, biological parents, legal guardian or other extended family members*

**Different practices in the field of adoption exist which could inspire other forms of alternative care, such as placement in *kafalah*:**

- **Haiti: equip professionals for work with biological families:** The social workers from the competent adoption authority have been trained in their crucial role when accompanying and alerting biological families, so that biological parents are made aware of the legal and psychosocial consequences of full adoption (little known culturally in Haiti but common in the receiving countries), and also that consent is free and informed. Although this practice is specific to adoption, it could apply to *kafalah* in order for biological parents to be alerted to the consequences of cross-frontier placement of their child, and the subsequent treatment in another country, including the later adoption of the child, the objective being to respect the rights of the child concerned. See: Video (2015): *Adoption, the choice of nations*, [https://boutique.arte.tv/detail/adoption\\_choix\\_nations](https://boutique.arte.tv/detail/adoption_choix_nations)
- **Lithuania: collection of the consent of the child for adoption:** Based on the legal requirement that any child over the age of 10 must consent to the adoption, child specialists and psychologists collect the consent using tools adapted to the age of the child concerned (drawings, pictures, etc.). The child must give his opinion several times: before the matching with a given family, after the first meeting with the family, and during the hearing before the Tribunal. See Jeannin, C. (Ed.) (2017). *Towards a greater capacity: Learning from intercountry adoption breakdowns*. Geneva, Switzerland, International Social Service, p. 134.

### *Professional evaluation and preparation of *kafil* candidates*

**Egypt, Morocco and Tunisia:** The evaluation of the PKP is obligatory and various criteria are prescribed by law in these countries. Although challenges exist for the systematic implementation of these criteria, they are a good starting point and source of inspiration for other countries. The established criteria should ideally cover not only the financial and material resources of the PKP but also, and in particular, their psychological and social capacity to care for the child. Furthermore, these legal provisions should be accompanied by concrete assistance and tools in order to put in place a complete, systematic procedure for evaluation and selection. See: Egypt, Morocco in [Section II.1.1.](#) and Tunisia in [Section II.1.2.](#)

**Numerous tools used in the field of foster families and adoption could be options for work with *kafil* candidates, in order to help them develop and strengthen their *kafalah* or care project:**

- **Guide for the development of programmes for foster families in Mexico – RELAF and UNICEF:** This tool proposes three stages for the evaluation and preparation of foster parents: awareness campaign and appeal for candidates, evaluation and selection, training and preparation. It gives concrete steps and principles to be respected for the implementation of these key stages, and also underlines the risks involved if any one of these stages is missing.

RELAF (2018). *Manual Para La Implementación Acogimiento Familiar Para Niños, Niñas y Adolescentes en México*. Available in Spanish at: [https://www.relaf.org/biblioteca/MANUAL\\_MEXICO.pdf](https://www.relaf.org/biblioteca/MANUAL_MEXICO.pdf)

### Professional evaluation and preparation of kafil candidates (continued)

- **ISS Project 'A better future is possible' in Burkina Faso and Cambodia:** In Burkina Faso (project implemented since 2014), specialised foster care program for children with disabilities is in preparation with a dedicated Foster care Team and support services for biological and foster families. In 2019, most activities were focused on strategic planning and training of the Foster care team. In Cambodia, in 2019, activities have focused on the Development of Children with Disabilities specific Community-Based-Rehabilitation (CBR) Approach – which aims to prevent to the abandonment of CWD, strengthen CBR and respite services for families and caregivers of CWD. There are small-group home pilot projects for CWD such as the Damnok Toek's Neak Loeung, for which ISS provides a regular technical support to improve the development and functions of their Small Group Homes. The ISS CWD Manual is being updated to incorporate the information from the USAID publication 'Family Care for CWD: Practical Guidance for Frontline Workers in Low and Middle Income Countries', this tool will be a practical guide specific to the issues and context in Cambodia.

<https://www.iss-ssi.org/Index.php/en/what-we-do-en/cwd-en>

- **"Parenting Plan," an interactive tool, New Zealand:** The country has developed an interactive tool, the "Parenting Plan," through which candidates are asked to consider the unique needs of the adopted child that they have imagined in their minds and then from the child's perspective. This "Parenting Plan" will be reviewed and rewritten by the prospective adoptive parents once the matching proposal is received. This will allow them to determine for themselves whether the child's profile fits what they had imagined and how, in concrete terms, they will be able to meet the child's needs: support from their own social network (extended family, friends, community), from professionals (paediatricians, occupational therapists, speech therapists, etc.) and from specialists.

Jeannin, C. (Ed.) (2018). Towards a greater capacity: Learning from intercountry adoption breakdowns.

Geneva: Switzerland. International Social Service. [https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/ICA\\_Breakdowns\\_ENG.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/ICA_Breakdowns_ENG.pdf)

- **ISS Guide for adoption candidates as an example for the development of a preparation tool for national and cross-border kafalah placements:** Designed for future adoptive parents, this guide could be a valuable checklist that highlights the risks that may arise during the kafalah process. Although it may deter some candidates, it is preferable that an intense reflection is carried out to validate the kafalah project. Important questions must be asked: what criteria govern consent or matching decision? What are the financial risks? With its concise answers and reliable criteria, this guide will provide candidates with solid support throughout their adoption process.

[https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/SSI\\_brochurePDF\\_A4\\_ENG\\_.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/SSI_brochurePDF_A4_ENG_.pdf)

### Matching based on the child's needs

#### Existence of multidisciplinary matching boards in other countries

- **Algeria:** Kafala commissions within the Department of Social Action and Solidarity (DASS) at the wilaya level: wali, DASS officials and often psychologists/social workers from the children's institution.
- **Burkina Faso (in the adoption field):** Multidisciplinary composition of a technical matching committee (e.g. social workers, psychologist, representatives of the Ministry and the institution, doctor, etc.

Video (2015): Adoption, le choix des nations, [https://boutique.arte.tv/detail/adoption\\_choix\\_nations](https://boutique.arte.tv/detail/adoption_choix_nations)

### Placement decision by a competent authority

In several countries covered by the study, such as **Algeria, Jordan, Lebanon, Morocco** and **Tunisia**, the placement in *kafalah*, or other forms of care, is the result of a decision by a competent authority, either legal or administrative, which is an important safeguard for the child concerned.

### Follow-up and post-placement support

In several countries covered by the study, such as **Egypt** and **Morocco**, a follow-up during a certain period after the placement is obligatory by law. Although challenges exist for the implementation of these legal provisions, the follow-up and post-placement support is essential to guarantee the rights of the child concerned, and prevent and even respond to possible difficulties or placement breakdown.

**In the medium term, the following aspects should be developed/reinforced:**

*Establishment of a system for access to origins which includes raising awareness among kafil parents during their preparation, conservation of files, adequate accompaniment of the makfoul and other persons concerned, etc.*

**Where adoption is concerned**, several countries such as **Chile** and **Guatemala**, have established various systems for the collection and conservation of data, and accompaniment with a view to accessing this data during the search for origins undertaken by persons adopted or placed in care.

See the sub-programme developed by SENAME in Chile (Servicio Nacional de Menores): <https://www.sename.cl/web/index.php/programa-busqueda-de-origenes/>

In Guatemala, see Programa De Adopciones: Lineamientos Técnicos Equipo Multidisciplinario Del Consejo Nacional De Adopciones, 2015, IX.2.2.4. Búsqueda De Orígenes. Available in Spanish at: [http://www.cna.gob.gt/Documentos/InformacionPublica/Lineamientos\\_Tecnicos.pdf](http://www.cna.gob.gt/Documentos/InformacionPublica/Lineamientos_Tecnicos.pdf)

**The later life letter, a tool for collecting information on the life of the child:** This tool takes the form of a letter written by the social worker who first introduces him or herself to the child or the young adult by addressing him or her by the name he or she had at the time, and explains to him or her what his or her role in the adoption process was. The letter must also include all the details about the birth and the events that led to the child's adoption, which may help him or her shape his or her own identity and dispel his or her doubts. Information on the pregnancy, birth, and the child's home before the adoption are very valuable for this purpose. Details regarding the child's culture, religion and ethnicity may also be included, enabling the child to clear up any grey areas. Further, it is common for the child to know his or her biological mother's story, but not that of his or her father. This letter is therefore an opportunity to include any information available about the father, for example, from the point of view of the mother. Finally, the guide to writing the letter addresses many sensitive and specific issues, such as abuse, rape and incest, and explains how to adequately describe these circumstances.

See ISS/IRC Monthly Review No. 172 of May 2013, page 5.

Other *promising practices, particularly in response to illicit practices*, can be found in: ISS (2016) *Responding to Illegal Adoptions: A Professional Handbook*. Available in English at: [https://www.iss-ssi.org/images/Publications\\_ISS/ENG/Illegal\\_Adoption\\_ISS\\_Professional\\_Handbook.pdf](https://www.iss-ssi.org/images/Publications_ISS/ENG/Illegal_Adoption_ISS_Professional_Handbook.pdf)

*An efficient mechanism for the supervision of the actors, and the costs involved (registration, authorisation/ accreditation, fixed and justified transport costs, a complaints mechanism available to children in the case of violation of their rights; etc.), through for example the establishment of independent bodies to ensure the respect of human rights and in particular the rights of the child, as in Morocco (see Section II.1.1.).*

*Development of responses to unexpected situations and placement breakdowns, through the implementation of preventive strategies (for example, proposing support and accompaniment services when problems arise), and concrete responses to these cases.*

*Preparation, planning and implementation of a policy for deinstitutionalisation. Due to the present tendency to have recourse to the institutionalisation of children deprived of family, as a first and often only option, and to the creation of new institutional structures, strategies for deinstitutionalisation should be encouraged in the Maghreb and the Middle East.*

**Regional campaign for the deinstitutionalisation of children aged 0 – 3 years**

Since 2011, UNICEF, together with the European Parliament and several governments in Central and Eastern Europe, has been working to prevent the placement of young children (between 0 and 3 years old), focusing on policies to support families and prevent abandonment.

[https://www.mellowparenting.org/wp-content/uploads/2016/04/UNICEF\\_Compndium\\_of\\_promising\\_practices\\_Web.pdf](https://www.mellowparenting.org/wp-content/uploads/2016/04/UNICEF_Compndium_of_promising_practices_Web.pdf)



*Reinforcement of the quality of institutional care, according to international standards (promotion of structures consisting of small groups, systems of accreditation and regular supervision, the ratio of staff-children in placement, staff training, specialised staff for certain children with specific needs, etc.).*

**The Quality4Children standards for the placement of children outside the family environment in Europe**

In the European context, the international organisations FICE, IFCO and SOS Children's Villages, have, based on their own experiences, identified a considerable need to develop standards of quality in the field of care for children in placement. While Europe is mainly concerned with economic development, pan-European initiatives must also respond to social challenges. With this objective, a project in Europe was launched in March 2004 to guarantee and improve the opportunities for development of children and young adults placed outside the family environment. This project resulted in the 18 standards of "Quality4Children", which cover the four stages of the placement procedure: the decision, admission into placement, care during placement, and departure from placement.

[https://www.sos-childrensvillages.org/getmedia/1b7397b9-ce47-41e0-8329-3c01a5496c6f/Q4C\\_colour.pdf](https://www.sos-childrensvillages.org/getmedia/1b7397b9-ce47-41e0-8329-3c01a5496c6f/Q4C_colour.pdf)



In order to understand the options available and the issues faced by professionals in the field, ISS/IRC proposes the following case study. For each stage of the case, three different approaches are suggested to the professional. The approaches are all distinct and are not interconnected from one stage to another. At the end of each approach, there are self-reflection questions that you should consider.



## Case Study: Preventing unjustified family separation

You work at a public welfare agency for vulnerable, low-income persons. One day, you are approached by a young mother who comes to see you with her baby who is a few weeks old. She explains to you that she is alone, unmarried, and that despite her efforts over the last few weeks to get by on her own, she cannot keep the child. She has no family support because, upon learning of her pregnancy, her family rejected her. Indeed, in your country, relationships and births outside marriage remain highly stigmatised, and will affect the mother and child throughout their lives. **What would be your approach to help this young mother and her child?**

APPROACH A	APPROACH B	APPROACH C
<p><i>After a discussion with the young mother and from your own perspective on the general situation of single mothers in your country, you inform her about the very limited support available for women in her situation. You therefore encourage her instead to initiate a process of renouncing her parental rights and placing her child in a residential setting. The possible placement of the child with another family will then be decided by the competent authorities. You inform her of the consequences of such a decision, and explain the procedure to follow if she should opt for such a process, which you feel best suits the well-being of her child. You suggest that a social worker from your team accompany her in this process of placing her child in care.</i></p>	<p><i>Despite the plight of many women in the same situation and your desire to contribute to a change in society's treatment of these women, you cannot intervene in such cases due to a lack of human and financial resources. For example, you cannot offer her help in terms of employment and housing or individualised psycho-social support and follow-up. However, you tell her about structures that offer help to single mothers in your capital city. The young mother would have to travel to receive support.</i></p>	<p><i>You take the time necessary to understand the exact situation of this young mother and her child in order to understand their immediate needs. At the same time, you inform her about the different legal options available to her (<i>kafalah</i>, institutionalisation, etc.), as well as the consequences this will have for her and her child. In order not to rush the decision, you suggest that the young woman take some time to analyse the information received and think about her next steps. You also tell her about a support organisation and emergency accommodations for women in her situation. You offer to accompany her to this facility, an offer that the young mother gladly accepts. Finally, you designate a social worker who will be responsible for the follow up of this young woman and her child.</i></p>

### What are the questions to ask yourself as a professional?

- *Is the socio-cultural stigmatisation of single mothers an obstacle to keeping the child with the mother or extended family?*
- *Are you sufficiently informed about the assistance (financial, employment, psycho-social support) available for single mothers in your country, including the assistance offered by civil society?*
- *Do you have sufficient human resources to provide quality follow up for single mothers and their children?*
- *Does your country have local structures that informs biological parents of the different options available to them and refers them to the corresponding facilities and services?*
- *Is your advice guided by your own perception of the situation, or by the reality for these women?*

A few weeks after the first meeting, the young mother comes back to you. She explains that your advice and the support offered by the structures to which you referred her had helped her overcome the initial difficulties. However, she continues to have concerns because her child is often sick, which causes her problems with her employer. The young mother is worried about her child's well-being because she does not think she will be able to take care of her child in the long term. During the interview, she tells you that she is reconnecting with part of her family. **You initiate a discussion with your team about how to approach this situation. Opinions differ within your team. Which of the following thoughts would be yours?**

APPROACH D	APPROACH E	APPROACH F
<p><i>You take the time to discuss how the situation of the young mother and her child has changed since you last met. The young woman tells you that she has been able to get a job and that she does not receive any State support despite her child's state of health. Her salary is not high, and she fears losing her job because of her repeated absences. She also has difficulties in accessing affordable and appropriate medical care for her child. You talk to her about different medical facilities and the possibilities of applying for State benefits, with which you also offer to help her. You also discuss potential support she could receive from family members. You stress all the efforts she is deploying to ensure the well-being of her child and the continuity of the child's care. You assure her that your service will be available to support her in her choices, whatever her decision is.</i></p>	<p><i>Faced with the lack of alternatives for single mothers in your country, you explain that there are two choices: either to initiate a procedure to place the child in kafalah with a family in your country, or to place the child in kafalah with a family abroad. In the first case, she can potentially revoke the placement, which seems less likely for a cross-border placement. You share your view that the child will have a better chance of harmonious development abroad, given the higher financial means of the families and the more favourable socio-cultural contexts. You tell her about other cases that you have been able to refer to the second option, and the benefits for the children involved. You give her information on the procedure to follow and share contact details of the relevant entities (administration, court or other).</i></p>	<p><i>You re-emphasise the need to make informed and thoughtful decisions. You suggest that the child be placed in a small facility that provides care that you consider to be of good quality. During this placement, the young woman could stabilise her life professionally and with her family and then take her child back with her. You mention the importance of keeping in touch with the child and visiting regularly if she should choose this option. This placement will be reassessed periodically until family reintegration is possible.</i></p>

### What are the questions to ask yourself as a professional?

- *Is it better for the child to ensure his or her material comfort with another family, particularly one living abroad, rather than staying with his or her mother?*
- *Do you have good relations with other sectors (health, employment, etc.) to refer the person in need to the appropriate services?*
- *Are temporary or ad hoc care options assessed regularly?*
- *Do you have the means to conduct home studies of extended family members to support this mother and possibly consider having her extended family take in the child?*
- *What do you think are the criteria for certifying that institutional care is of good quality?*

Technical note: National family type *kafalah*

As the discussion progresses, the young mother tells you that a woman from her neighbourhood approached her to tell her about a wealthy couple who are unable to have children. This couple that has a strong desire to have a child and would be willing to raise the child as their own and pay a significant amount of money to help the young woman overcome her current precarious situation. The woman in the neighbourhood would be willing to facilitate contact between the young mother and this couple. She is seeking your advice because she is very concerned about the well-being of her child and believes that this family will be able to offer her child a better future. **What would you advise her?**

APPROACH G	APPROACH H	APPROACH I
<p><i>You are not against such a step and give some advice to the young mother so that she can, for example, better evaluate the motivations of this couple and consider a possible role in the life of her child. You encourage her to meet this family and to go through the official channels to formalise this placement if she chooses to opt for it.</i></p>	<p><i>You try to discourage such an agreement, and warn the young mother of the dangers involved in such a private arrangement. You also try to make her aware of the issue of payment in exchange for the transfer of her child, and the psychological and legal consequences that such a move could cause to her child the day he/she learns that his/her parents paid his/her biological mother a sum of money to obtain him/her. You remind her of the importance of the child growing up with his/her birth mother and you think together about other support strategies that could be put in place. For example, the money that this couple would be willing to offer her to help her overcome her precarious situation could be the way for her to keep her child with her.</i></p>	<p><i>You take the time to explain to her the importance of the legal procedures for the placement of children in kafalah with another family, which contain important guarantees to respect her child's rights.</i></p> <p><i>These procedures ensure that the option chosen will best serve the specific needs and interests of the child. There are many assessed and qualified families waiting for a child, both nationally and internationally.</i></p>

**What are the questions to ask yourself as a professional?**

- *Are informal placements common in your country, and do you consider them to put children at risk?*
- *Are the potential consequences (violation of the child's rights, or even sale or trafficking) of this type of private arrangement known to the population?*
- *Are there criminal sanctions in your country for transferring children in exchange for money (sale of children)?*
- *Would it be possible for you to have more information about this woman and this couple in order to inform the judicial authorities or the police so that an investigation can be carried out?*

The young mother feels increasingly overwhelmed by the care of her child, now almost nine months old. Despite the support received by the women's aid organisation, she eventually lost her job and is currently without a fixed income. Based on the young mother's accounts of her child's recurrent illnesses, you call in a paediatrician to assess the child's health. The medical assessment finds that the child has heart and lung failure that may require multiple surgeries and lifelong treatment. Following this diagnosis, the mother makes the decision to give up her child because she will not have the resources to provide adequate care. During your investigations to find extended family members, the mother mentions one of her aunts who lives abroad with her husband. The aunt has no children and wishes to help her young niece by taking care of her child and ensuring that he or she receives good medical care. She turns to you because she does not know how to do this and would like to make sure she chooses the best option for her child. **Which of the following approaches would you consider?**

APPROACH J	APPROACH K	APPROACH L
<p><i>You research medical facilities and foundations, including foreign ones, which provide free or subsidised interventions for people in vulnerable situations, and you find out about the conditions for medical and social care. In the meantime, you try to identify an institution specialising in paediatric medical care that could take care of the child temporarily to allow the mother to stabilise her situation.</i></p>	<p><i>In your opinion, the option of intra-familial placement could be considered, provided that such a placement is supervised and based on thorough psychosocial assessments of the child, the aunt and her husband. Factors to be taken into account are the health system in the receiving State and the ability of the aunt and her husband to meet the significant medical expenses.</i></p>	<p><i>You realise that the care of the child is becoming complicated for the mother, and that this may become more difficult in the long run. You doubt the possibility of the intra-familial option. You then steer her towards a national kafalah process. If she chooses this option, you explain that she will have to give up some of her parental rights, but that she can revoke this placement in the future, if she so wishes.</i></p>

### What are the questions to ask yourself as a professional?

- Are there any possibilities of retraction for biological parents to seek an end to a kafalah placement in the future, should they have originally consented to it?
- Do you have reliable partners to carry out home studies abroad?
- Do you have contacts for identifying reliable organisations involved in the medical care of the child?



## References

## References

II. Implementation of *kafalah* in legal systems based on or influenced by Sharia

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- 108 See Alternative Care Guidelines, paras. 32 – 52.
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- 110 CRC, art. 9 ; Alternative Care Guidelines, paras. 2(a), 3, 14 – 15, 49 – 52, 60, 123, 166 – 167.
- 111 CRC, art. 20.
- 112 CRC, art. 9; Alternative Care Guidelines, paras. 2(a), 3, 14 – 15, 49 – 52, 60, 123, 161, 166 – 167.
- 113 CRC, arts. 3, 7 – 9, 11, 18, 24 and 26 – 29, 18, 23; Alternative Care Guidelines, paras. 32 – 52
- 114 Alternative Care Guidelines, paras. 53 – 75.
- 115 CRC, arts. 9, 10, 25; Alternative Care Guidelines, paras. 11, 49 – 52, 71, 155 – 156, 162 – 167.
- 116 Alternative Care Guidelines, paras. 2(a-b), 60.
- 117 Alternative Care Guidelines, paras. 118 – 122. Foster care is defined by the Guidelines as “situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care” (Alternative Care Guidelines, para. 29(c)(ii)).
- 118 Alternative Care Guidelines, paras. 57 – 68.
- 119 Alternative Care Guidelines, paras. 57– 68.
- 120 Alternative Care Guidelines, para. 63.
- 121 Alternative Care Guidelines, paras. 62 – 63. 122 CRC, art. 12, ; Alternative Care Guidelines, paras. 7, 62 – 63.
- 123 Alternative Care Guidelines, para. 71; “Consent”: Evaluation of the reception and care capacities of candidate families.
- 124 See ISS/IRC (2015). *Manifesto for ethical intercountry adoption*, p. 21. Available at: [https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/ISS\\_Manifesto\\_ANG.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/ISS_Manifesto_ANG.pdf)
- 125 Alternative Care Guidelines, para. 68,
- 126 Alternative Care Guidelines, paras. 65 and 71.
- 127 Alternative Care Guidelines, paras. 128 – 130 and 151 – 156.
- 128 CRC, art. 8.
- Egypt**
- 129 Ratification/accession table, see: <https://indicators.ohchr.org/>
- 130 Moussa, J. (2017). Egypt, in Yassari, N., Möller, L. & Gallala-Arndt, I. (Ed’s.) *Parental Care and the Best Interests of the Child in Muslim Countries*. Asser Press, p.4.
- 131 Moussa, J. (2017). Egypt, pp. 7, 8, 11. It is noted that Egypt has been criticised by the CRC Committee regarding the practice of determining a child’s custody via age, rather than through a determination of the child’s best interests. Under Egyptian law, it is considered that the child’s best interests are synonymous with remaining in the mother’s (or other female family member’s) care for as long as possible (See, Committee on the Rights of the Child (2011). *Concluding Observations: Egypt*, p. 36). It is further notes that at the time of drafting this report, these laws were under review; See also, Immigration and Refugee Board, Canada. (2004). *Response to Information Requests*, available at: <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/EGY42578.E.pdf>
- 132 CIA World Factbook, *Egypt*, available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html>; UNICEF (2017). *Children in Egypt 2016: A Statistical Digest* (‘Children in Egypt’), p. 9, available at: <https://www.unicef.org/egypt/reports/children-egypt>
- 133 UNICEF (2017). *Children in Egypt*, p. 9.
- 134 UNICEF (2017). *Children in Egypt*, p. 9.
- 135 UNICEF (2017). *Children in Egypt*, pp. 9, 10; See also, UNICEF, *Violence Against Children in Egypt* (2015); and *In the Matter of Z (A child)* [2016] EWHC 2963 (Fam), p. 131.
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- 137 UNICEF (2017). *Children in Egypt*, pp. 9, 10.
- 138 CIA World Factbook, *Egypt*; UNHCR. (2018). *Fact Sheet: Egypt*, available at, <https://reporting.unhcr.org/sites/default/files/UNHCR%20Egypt%20Fact%20Sheet%20-%20December%202018.pdf>
- 139 The Child Law, art. 97.
- 140 State Party Report to the CRC Committee (2010), paras. 123 – 30.
- 141 UNICEF: Egypt, *Child Protection*, available at: <https://www.unicef.org/egypt/child-protection>; See also, UNICEF (2016). *Position Paper to Guide UNICEF Egypt Support for Alternative Care*, p. 8 (hereafter UNICEF (2016). *Position Paper*).
- 142 Face for Children in Need, *Evaluation* (2014) p. 1.
- 143 Moussa, J. (2017). *Egypt*, p. 16; The Child Law, art. 15; By-Laws to the Child Law, art. 23; Information provided by in country source.
- 144 Megahead, H.A. (2017). Non-Kinship Family Foster Care in Egypt, *Adoption and Fostering*, Vol. 41(4), p. 395.
- 145 Megahead, H.A. (2017). Non-Kinship Family Foster Care in Egypt, *Adoption and Fostering*, Vol. 41(4), p. 395.
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- 151 It should be noted, that in parallel there are some Social Care Institutions that are run by the Department of Social Defence, that cater largely to children in conflict with the law. The below discussion relates to those institutions which are run by the Department of Family and Childhood, and operate as an alternative care placement.
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- 153 UNICEF (2017). *Children in Egypt 2016: A Statistical Digest*, p. 206.
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- 158 UNICEF (2016). *Position Paper*, p. 1.
- 159 By-Laws to the Child Law, art. 88.
- 160 By-Laws to the Child Law, art. 88, 93, 94.
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- 170 Information provided by an in-country source.
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- 173 Megahead, H.A. (2017). Non-Kinship Family Foster Care in Egypt, *Adoption and Fostering*, Vol. 41(4), p. 395; By-Laws to the Child Law, art. 90, 91; UNICEF (2016). *Position Paper*, p. 2.
- 174 Face for Children in Need. (2014). *Evaluation*, pp. 2, 3, 10, 11.
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- 176 Megahead, H.A. (2017). Non-Kinship Family Foster Care in Egypt, *Adoption and Fostering*, Vol. 41(4), p. 396.
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- 179 Megahead, H.A. (2017). Non-Kinship Family Foster Care in Egypt, *Adoption and Fostering*, Vol. 41(4), p. 394.
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- 181 By-Laws to the Child Law, art. 100.
- 182 Megahead, H.A. (2008) Family Foster Care for Abandoned Children in Egypt, *The Journal of Sociology and Social Welfare*, vol. 35, no. 2, p. 31; See also, the Child Law art. 5, pp. 20-22; By-Laws to the Child Law, art. 100 (10).
- 183 Megahead, H.A. (2017) Non-Kinship Family Foster Care in Egypt, *Adoption and Fostering*, Vol. 41(4), p. 397.
- 184 By-Laws to the Child Law, art. 91.
- 185 *In the Matter of Z (A child)* [2016] EWHC 2963 (Fam).
- 186 *In the Matter of Z (A child)* [2016] EWHC 2963 (Fam), p. 111.
- 187 See, [https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt\\_ref/adoption-statistics.html](https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics.html)
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- 190 By-Laws to the Child Law, art. 92.
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- 198 See UNICEF (2018). Annual report, [https://www.unicef.org/about/annualreport/files/Iran\\_2018\\_COAR.pdf](https://www.unicef.org/about/annualreport/files/Iran_2018_COAR.pdf)
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- 202 See <https://www.unicef.org/iran/en>
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- Iraq**
- 219 Yassari N., Möller L-M., Gallala-Armdt I. (Eds.) (2017). *Parental care and the best interests of the child in Muslim countries*, <https://www.springer.com/gp/book/9789462651739>; UNICEF Iraq (2011), MENA gender equality profile, <https://www.unicef.org/gender/files/Iraq-Gender-Equality-Profile-2011.pdf>
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- 228 Reply to the list of issues (2014), CRC/C/IRQ/Q/2-4/Add1, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=IRQ&Lang=EN)
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- 240 It is indeed important to note that even though the minimum age of marriage for both sexes is 18, according to the 2006 Multiple Indicator Cluster Survey (MICS), 17% of young Iraqi women aged 20 – 24 were married before the age of 18. Among young women residing in urban areas, 16 % were married before 18, and in rural areas 19% were married. Currently 975,000 girls in Iraq got married before the age of 15. Numerous are boys working at a young age. See: UNICEF Iraq (2011). MENA Gender equality profile, <https://www.unicef.org/gender/files/Iraq-Gender-Equality-Profile-2011.pdf>
- ### Jordan
- 241 This factsheet has been co-drafted by Rawan Ibrahim and ISS/IRC team.
- 242 See in particular UNICEF (2017). *Situation analysis of children in Jordan*, <https://www.unicef.org/jordan/media/506/file>
- 243 The law is meant to unify protective legislation and national efforts to prioritise the benefits afforded to children in all economic, social and developmental programs.
- 244 Based on information provided by Rawan Ibrahim.
- 245 Article 37 of the 2014 Juvenile Law allows government-licensed social workers to nominate the most suitable of three placement options for the child in question: remaining with their family, who sign a pledge entailing specific agreements with the court; moving to a care home; or placement with a suitable person or a suitable family. All the options may also include monitoring by the court via government-licensed social workers.
- 246 Several articles on the Situation of Children or Youth Deprived of parental care in Jordan are accessible at: <http://haqqi.info/en/haqqi/search-engine?s=Youth+deprived+of+family+ties>
- 247 While the majority of orphans stay with their living parent and/or extended family, admission to alternative care due to orphanhood in these cases is usually due to the combination of losing one or both parents and other dysfunctional family dynamics.
- 248 While residential care remains the predominant form of alternative care, shifts in policy and practice to move to community-based care for children have taken place, such as foster care.
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- 252 See for instance, Gearing R. et al. (2013). *Prevalence of Mental Health and Behavioral Problems Among Adolescents in Institutional Care in Jordan*, <https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201200093>
- 253 An extension to remain in care may be granted in special circumstances such as having special needs or continuing education.
- 254 Up to 2011, the only form of family-based care was the *Ihtidan* program. *Ihtidan* is the program that is often referred to as *Kafalah* in literature concerning forms of alternative care in the Muslim and Arab world. *Ihtidan* is meant to be a permanent option for children, unlike foster care that may be either a short or long-term solution. The term '*Ihtidan*' in Arabic translates to 'to care for'. Due to its eligibility criteria (limited to abandoned infants), only a minority of children in need of care and protection could be placed with families while the majority remained in residential facilities. The *Ihtidan* program is currently implemented in all Jordanian governorates.
- 255 Children from the Christian community that are in need of alternative care are placed in Church-based residential facilities. They are also eligible to be enrolled in the foster care programme provided a 'Christian' family comes forward. However, this requires outreach within the Christian community which has not taken place in any serious measures.
- 256 Prior to 2011, eligibility criteria for children on the *Ihtidan* program included those who were abandoned and those with unknown fathers. After multiple placement breakdowns in the *Ihtidan* program, the decision was made to include children with unknown fathers in the foster care program because unlike the *Ihtidan* program that is intended to be a permanent option, the time frame of placements in the foster care program depends on the child's best interest. This decision allows biological families to amend paternity challenges while the child is living with a family that is more prepared to cooperate with biological parents and MoSD, as per the conditions of the foster care program.
- 257 See article 2 of the Constitution, [http://www.kinghussein.gov.jo/const\\_ch1-3.html](http://www.kinghussein.gov.jo/const_ch1-3.html)
- 258 Ministry of Social Development (2013). *Ihtidan Guidelines*, only available in Arabic at: <http://www.mosd.gov.jo/UI/Arabic/ShowContent.aspx?ContentId=112>
- 259 Approved applicants visit the governmental care home and meet eligible children (mostly infants).
- 260 A family book is a formal document issued to couples by the Civil Status Bureau within 90 days of marriage. It is a form of nuclear family ID in which all members (spouses and children) are registered. Children remain in the book until they are married and then must create their own. The family book is used for many formal procedures including as proof of kinship and for inheritance.
- 261 The practice of giving children of unknown parents' family names that are different from the usual surnames whether on the *Ihtidan* program or not, is problematic in itself (Ibrahim, 2016; Farahat, 2013). In the patrilineal and patriarchal system in Jordan, the name of any individual consists of four parts: the given name followed by the father's name, the paternal grandfather's name, and then the paternal family name. As Farahat (2013) points out, family names in Arabic have suffixes or prefixes meaning 'house of' or 'tribe of'. Family names are rarely in the form of first names as are those given to children without lawful lineage, whose distinguishable names were found to place the young people at a disadvantage (Farahat, p.17) as it increases their difference from the rest of society and the risk of stigmatisation (Ibrahim, 2016; 2011).
- 262 In fact, this charge is a tax, as transferring assets to non-kin is considered a sale because *Ihtidan* children are not considered to legally be part of the family.
- 263 National Council for Family Affairs (2017).
- 264 Ministry of Social Development, Guidelines for *Ihtidan* parents <http://www.mosd.gov.jo/UI/Arabic/ShowContent.aspx?ContentId=112> (In Arabic only)
- 265 Article 19 of the Civil Status Law states that any child of unknown parents must follow the religion of the Kingdom (Islam).
- 266 The Civil Status law allows for lineage to be affiliated to mothers. Many of the mothers of children born out of wedlock are known, and some are from the Christian community. If the father is unknown, it is therefore the child's right to remain within his/ her community.
- 267 Sharia law permits Muslim men to marry Christian women without forcing them to convert, and should these women willingly choose to convert, Sharia law does not require them to wait for three years before bearing children. Thus, not only is the premise for these articles unfounded, but rather they contradict Sharia law, and are discriminatory.
- 268 In Jordan psychosocial and mental health support for both adults and children is currently very limited.
- ### Kingdom of Morocco
- 269 Status of ratifications/accessions, see: <https://indicators.ohchr.org/>
- 270 See <https://www.hcch.net/fr/instruments/conventions/status-table/?cid=70>
- 271 See Charter of the Judiciary System Reform, July 2013. The Council is intended to supervise and ensure the training of judges.
- 272 "1. Strengthening and improving the legal framework for child welfare;  
2. Implementing integrated territorial child welfare units;  
3. Standardisation of child welfare structures, services and practices;  
4. Social norms that protect children; and  
5. Implementing reliable and standardised information systems to perform regular and effective follow-up and supervision."

- 273 To prevent abandonment, pregnant women and girls or children born outside of marriage should receive support in a prompt manner, in the form of housing, psychosocial assistance, healthcare and outreach programs (OS 4, No. 6).
- 274 In Morocco, the term *kafala* is used without 'h'.
- 275 UNICEF, *Rapport de Synthèse, Situation des enfants au Maroc*, 2019, p. 9.
- 276 Partnership between the European Union, UNICEF Morocco and the Ministry of Justice and Liberties.
- 277 In 2015, 4.4% of children lived in absolute poverty (7.2% in rural areas). More than 39.7% of children in Morocco were in multidimensional poverty (deprivation of at least two dimensions of well-being among housing, water, sanitation, nutrition, health, health coverage, education, and information. Source: UNICEF (2019), *Rapport de Synthèse, Situation des enfants au Maroc*, p. 10.
- 278 See <http://www.droitsdelenfant.ma/fr/actions/allo-enfance>
- 279 43,508 applications registered for 35,152 marriages entered into in 2013 and 30,230 marriages entered into in 2015 with an increasing number of applications for exemptions. Source: INSAF (2014), *Mariage précoce au Maroc, négation des droits de l'enfant*, [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MAR/INT\\_CRC\\_NGO\\_MAR\\_17891\\_F.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MAR/INT_CRC_NGO_MAR_17891_F.pdf)
- 280 See UNICEF (2019). *Situation Des Enfants Au Maroc. Analyse selon l'approche Équité*. Available at : [https://www.ondh.ma/sites/default/files/documents/sitan\\_2019\\_-\\_rapport\\_global-vf.pdf](https://www.ondh.ma/sites/default/files/documents/sitan_2019_-_rapport_global-vf.pdf)
- 281 UNICEF (2019). *Situation Des Enfants Au Maroc. Analyse selon l'approche Équité*. Available at : [https://www.ondh.ma/sites/default/files/documents/sitan\\_2019\\_-\\_rapport\\_global-vf.pdf](https://www.ondh.ma/sites/default/files/documents/sitan_2019_-_rapport_global-vf.pdf)
- 282 INSAF. (2010). *Le Maroc des mères célibataires – Étude diagnostique 2010 – Chiffres clés*. [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MAR/INT\\_CRC\\_NGO\\_MAR\\_17892\\_F.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MAR/INT_CRC_NGO_MAR_17892_F.pdf) ; According to data collected by UNICEF in 2010, nearly 50% of children abandoned at birth were placed in the kafala system (especially girls), 8% were reunited with their original families, 8% had died and 37% remained institutionalised the following year.
- 283 See <http://merescelibatairesmaghreb.santesud.org/fr/edite.php> (In French).
- 284 According to a number of civil society organisations, judges had been more lenient on this topic.
- 285 Periodic report to the Committee on the rights of the child (2013), CRC/C/MAR/3-4, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MAR&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MAR&Lang=EN)
- 286 See <http://fr.le360.ma/economie/programme-tayssir-800000-beneficiaires-en-2016-71847> (In French).
- 287 *Dahir No. 1 – 10 – 191 of 7 Muharram, 1432 enacting law no. 41 – 10*, see: <http://www.cabinetavocatelhafi.com/pdf/Dahi%20%20fixant%20les%20conditions%20pour%20beneficier%20des%20prestations%20du%20fonds%20d%20entraide%20familiale.pdf>
- 288 Information provided by UNICEF Morocco.
- 289 Law no. 15 – 01, arts. 4 – 8.
- 290 Law no. 15 – 01, arts. 4, 6 and 8.
- 291 For example: the Bayti Associations, SOS Children's Villages, Bayt El Hikma and the Moroccan League for the Protection of Children. See <https://www.leconomiste.com/article/901791-protection-de-l-enfance-urgence-d-un-dispositif-famille-d-accueil-2012> (In French).
- 292 *Les familles d'accueil pour une meilleure réhabilitation des enfants en difficulté* (February 19, 2016), <http://laviéco.com/news/maroc/societe/les-familles-daccueil-pour-une-meilleure-rehabilitation-des-enfants-en-difficulte.html> (In French).
- 293 First pilot project with 22 children from 2008 to 2012, see: [https://lematin.ma/journal/2012/Seminaire\\_Un-plaidoyer-pour-le-Dispositif-famille-d-accueil/175584.html](https://lematin.ma/journal/2012/Seminaire_Un-plaidoyer-pour-le-Dispositif-famille-d-accueil/175584.html) (In French); see also <http://laviéco.com/news/maroc/societe/les-familles-daccueil-pour-une-meilleure-rehabilitation-des-enfants-en-difficulte.html> (In French).
- 294 See <http://www.sos-maroc.org/docs/JournalSOS/JournalSOS24-juin16.pdf>
- 295 Information shared by UNICEF Morocco.
- 296 For example: Bayti in Casablanca, SOS Children's Villages in Casablanca and Marrakesh. See also <http://www.sos-maroc.org/lancement-du-collectif-marocain-de-placement-en-familles-daccueil/>
- 297 UNICEF (2019). *Situation Des Enfants Au Maroc. Analyse selon l'approche Équité*. Disponible sur : [https://www.ondh.ma/sites/default/files/documents/sitan\\_2019\\_-\\_rapport\\_global-vf.pdf](https://www.ondh.ma/sites/default/files/documents/sitan_2019_-_rapport_global-vf.pdf)
- 298 According to UNICEF Morocco, the exact figure is 117,000. It should be noted that this figure includes 103,000 children living in boarding school-type EPSS. There are therefore 14,000 children "placed" in institutions in Morocco.
- 299 The reforms contained in the 2016 Action Plan should also include a substantial improvement of the basic and continued training of child welfare professionals through the introduction of work methods and techniques. To improve the status of these professionals, a reference framework for social work professions and a legal status for social workers are expected to be adopted.
- 300 Although the law sets out the conditions for *kafala* first and foremost, it also sets out the conditions for temporary placements and the obligations of the persons or institutions taking care of the child.
- 301 See Entraide Nationale and UNICEF (2013). *Analyse causale du phénomène du placement des enfants dans les institutions résidentielles* and Entraide Nationale and UNICEF (2013) *Institutions de placement résidentiel au Maroc et conditions de vie des enfants placés*.
- 302 EPSS or children's homes: Welfare or protection centres intended for children in conflict with the law, but which can, in the absence of emergency or transit centres lodge children living on the street and even child victims or the very young.
- 303 Child Welfare Centres (CPE) (also known as protection centres).
- 304 See: Entraide Nationale and UNICEF (2013). *Analyse causale du phénomène du placement des enfants dans les institutions résidentielles* ; and Entraide Nationale and UNICEF (2013). *Institutions de placement résidentiel au Maroc et conditions de vie des enfants placés*.
- 305 Periodic report to the Committee on the rights of the child (2013), CRC/C/MAR/3-4, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MAR&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MAR&Lang=EN)
- 306 Alternative Care Guidelines, para. 126.
- 307 Young adults are given a grant of MAD 10,000 (to find a job and accommodations) and lunch and supper are provided free of charge. Former teachers visit regularly.
- 308 See [https://www.huffingtonpost.fr/2017/05/31/najat-maalla-mjid-lapediatre-marocaine-qui-arrache-les-enfant\\_a\\_22118761/](https://www.huffingtonpost.fr/2017/05/31/najat-maalla-mjid-lapediatre-marocaine-qui-arrache-les-enfant_a_22118761/) (In French).
- 309 See Entraide Nationale and UNICEF (2013). *Institutions de placement résidentiel au Maroc et conditions de vie des enfants placés*.
- 310 See [http://telquel.ma/2017/02/22/justice-reconnait-paternite-dune-enfant-nee-mariage\\_1536509](http://telquel.ma/2017/02/22/justice-reconnait-paternite-dune-enfant-nee-mariage_1536509)
- 311 See Entraide Nationale and UNICEF (2013). *Institutions de placement résidentiel au Maroc et conditions de vie des enfants placés* ; Entraide Nationale and UNICEF (2013). *Analyse causale du phénomène du placement des enfants dans les institutions résidentielles*.
- 312 Upon a request from Morocco's Ministry of Justice, a group of ISS' experts together with UNICEF Morocco, undertook an assessment mission in the Kingdom of Morocco. This mission enabled the ISS team to meet over 100 key actors (governmental, civil society, families and children) involved in child protection and to talk with them, specifically, about *kafala*. The aim of the mission was to draw an analysis of the situation of 15 years of implementation of the legal framework relating to the care of abandoned children through *kafala*, in Morocco and elsewhere, and to identify the achievements and the remaining challenges in practice.
- 313 Translation from French.
- 314 Law no. 15 – 01, art. 1; Association de Parents Adoptifs d'Enfants Recueillis en Kafalah, *Guide Pratique* : <http://www.apaerk.fr/procedures-maroc.php>; see [https://travel.state.gov/content/travel/en/intercountry-adoption/adopt\\_ref/adoption-statistics-esri.html#wcmmode=disabled](https://travel.state.gov/content/travel/en/intercountry-adoption/adopt_ref/adoption-statistics-esri.html#wcmmode=disabled)
- 315 Translation from French.
- 316 Articles 9 to 11 of law no. 15 – 01; Circular No. 40 S/2 relating to abandoned children; [https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/AdoptionsNoticesPDFs2019/2012AdoptionArchive/Morocco\\_Notice\\_Ministry%20of%20Justice%20Provides%20Prosecutors%20New%20Instructions%20on%20Kafala%20Guardianship%20Decreases\\_November%2005%2C%202012.pdf](https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/AdoptionsNoticesPDFs2019/2012AdoptionArchive/Morocco_Notice_Ministry%20of%20Justice%20Provides%20Prosecutors%20New%20Instructions%20on%20Kafala%20Guardianship%20Decreases_November%2005%2C%202012.pdf)
- 317 Law no. 15 – 01, arts. 9 . 11; Circular No. 40 S/2 relating to abandoned children; see also, [https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/AdoptionsNoticesPDFs2019/2012AdoptionArchive/Morocco\\_Notice\\_Ministry%20of%20Justice%20Provides%20Prosecutors%20New%20Instructions%20on%20Kafala%20Guardianship%20Decreases\\_November%2005%2C%202012.pdf](https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/AdoptionsNoticesPDFs2019/2012AdoptionArchive/Morocco_Notice_Ministry%20of%20Justice%20Provides%20Prosecutors%20New%20Instructions%20on%20Kafala%20Guardianship%20Decreases_November%2005%2C%202012.pdf)

## References

- 318 Translation from French.
- 319 Law no. 15 – 01, arts. 10 and 16.
- 320 [Translation from French] “A representative of the Public Prosecutor’s Office; a representative of the government authority responsible for *habous* and Islamic affairs; a representative of the local authority; a representative of the government authority responsible for children. Board members are selected according to terms and conditions established by regulation.”
- 321 Law no. 15 – 01, arts. 12 and 29.
- 322 Law no. 15 – 01, arts. 14 – 18.
- 323 Law no. 15 – 01, arts. 8 – 9; 15 – 16.
- 324 Law no. 15 – 01, art. 21; Law no. 37 – 99 on the civil registry, art. 16 (last para).
- 325 Law no. 15 – 01, arts. 14 and 17.
- 326 Law no. 15 – 01, arts. 2, 22 - 25 and 28 – 29.
- 327 Law no. 15 – 01, arts. 19 and 24.
- 328 Law no. 15 – 01, art. 25.
- 329 Law no. 15 – 01, art. 19, 30 – 31 ; Criminal Code, arts. 30 – 31.
- 330 Interview with several Moroccan judges conducted on December 21, 2016 in the frame of the evaluation mission of ISS/IRC; United States’ Central Authority for adoption: <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Morocco.html>
- 331 Translation from French.
- 332 Belgian AAB *Crois e des chemins*: <http://www.croiseedeschemins.be/>; United States’ Central Authority: <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Morocco.html>; Websites of American AAAs such as Hopscotch Adoptions: <http://www.hopscotchadoptions.org/pages/morocco.html>
- 333 153 abandoned children and 9 non-abandoned children.
- 334 205 abandoned children and 10 non-abandoned children.
- 335 159 abandoned children and 8 non-abandoned children.
- 336 Interview during the mission ISS/IRC with Marrakesh CFI on May 4, 2017. 135 *kafala* placements in 2015 (130 abandoned children, 3 non-abandoned children) and 212 in 2013 (115 abandoned children, 9 non-abandoned children).
- 337 Of these cases, 38 resulted in the approval of the *kafala* adoption of an abandoned child and 27 resulted in denials. 4 applications concerned authorisation for tourist travel and 7 concerned long-term residence permits.
- 338 For several years, this website does not provide statistics anymore.
- 339 Committee on the Rights of the Child, *Concluding observations*, CRC/C/MAR/CO/3-4, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRC%2fC%2fMAR%2fCO%2f3-4&Lang=fr](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRC%2fC%2fMAR%2fCO%2f3-4&Lang=fr)
- Pakistan**
- 340 Ratification/accession table, see: <https://indicators.ohchr.org/>
- 341 See, <https://www.unicef.org/pakistan/>
- 342 Pulla, V., Gul Tarar I, M. and Alii, A. (2018). Child Protection System and Challenges in Pakistan. In: *Space and Culture, India 2018*, 5:3. Available at: <https://bettercarenetwork.org/library/social-welfare-systems/child-care-and-protection-policies/child-protection-system-and-challenges-in-pakistan>
- 343 Available in English at: <http://jillani.org/LAW OF GUARDIANSHIP IN PAKISTAN.doc>
- 344 Available in English at: [http://www.na.gov.pk/uploads/documents/1528263176\\_639.pdf](http://www.na.gov.pk/uploads/documents/1528263176_639.pdf)
- 345 Available in English at: [http://kp.gov.pk/uploads/2016/02/2.\\_Child\\_Protection\\_and\\_Welfare\\_Act,\\_2010\\_.pdf](http://kp.gov.pk/uploads/2016/02/2._Child_Protection_and_Welfare_Act,_2010_.pdf)
- 346 Available in English at: [http://kpcodex.kp.gov.pk/uploads/The\\_West\\_Pakistan\\_Muslim\\_Personal\\_Law.pdf](http://kpcodex.kp.gov.pk/uploads/The_West_Pakistan_Muslim_Personal_Law.pdf)
- 347 Available in English at: <http://www.pja.gov.pk/system/files/Family%20R.pdf>
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- 352 See, UNICEF Pakistan, Child Protection, <https://www.unicef.org/pakistan/child-protection-0>
- 353 Edhi Foundation, <https://edhi.org/children-services/#1503394908390-1569fc7b-5b51>
- 354 Fifth Periodic Report to the Committee on the Rights of the Child: Pakistan, CRC/C/PAK/5, 4 May 2015.
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- 358 Islamabad Capital Territory Child Protection Act of 2018, actions 10 and following.
- 359 For further information, see: <http://www.pbm.gov.pk>
- 360 Fifth Periodic Report to the Committee on the Rights of the Child: Pakistan, CRC/C/PAK/5, 4 May 2015.
- 361 UNICEF Pakistan. (year). *Country Office Annual Report 2018*. Available at: [https://www.unicef.org/about/annualreport/files/Pakistan\\_2018\\_COAR.pdf](https://www.unicef.org/about/annualreport/files/Pakistan_2018_COAR.pdf)
- 362 Islamabad Capital Territory Child Protection Act of 2018, section 19.
- 363 Committee on the Rights of the Child. Concluding observations: Pakistan, CRC/C/PAK/CO/5 (2016). Available at: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=PAK&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=PAK&Lang=EN)
- 364 However, according to a local contact, civil courts would be more appropriate to hear guardianship cases. Indeed, family courts seem to address guardianship cases if they are considered a family case, but the Family Court Act 1964 has limited scope, which is limited to matters which are arising out of the *Nikahnama* (marriage contract). Thus, family courts should have no jurisdiction to hear and decide adoption cases. Furthermore, civil courts would be more appropriate, as the adoption deed assigns all rights, privileges and responsibilities that are attached to the parental relationship, thus covering custody and guardianship automatically. However, “adoptive parents” still have the option of having the guardianship assigned by the family court under the Guardian and Wards Act 1890.
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- 369 Information provided by the website of the US Department of State.
- 370 See 1980 Guardians and Wards Act, under ‘Cessation of Guardianship’.
- 371 See 1980 Guardians and Wards Act, under ‘Effects of Being Appointed a Guardian’.
- 372 US Department of State ; DAWN, *Pakistan no barring inter-country guardianship of children*, 27 August 2013, <https://www.dawn.com/news/1038528/pakistan-not-barring-inter-country-guardianship-of-children>
- 373 See: <https://www.newstarkafala.org/annual-report/>
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- 375 DAWN (2013). *Pakistan no barring inter-country guardianship of children*, <https://www.dawn.com/news/1038528/pakistan-not-barring-inter-country-guardianship-of-children>
- 376 Government of Canada, <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/adoptions-pakistan.html>
- 377 1980 Guardians and Wards Act; Information provided by the website of the US Department of State.
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## Sudan

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- 380 National Policy on the Welfare and Protection of Children Deprived of Parental Care sets out four pillars of the Sudanese strategy:
1. awareness-raising to prevent child abandonment and illegal pregnancy;
  2. prevention of separation and, where separation occurs, prioritisation of reunification;
  3. permanent alternative families; and
  4. emergency alternative families (Source: Hope and Homes for Children Sudan; Hope and Homes for Children Sudan; The National Policy is available on request).
- 381 See UNICEF (2019). *Multi-Country Review of the State of the social service workforce in the Middle East and North Africa Region*. Available in English at: <https://www.unicef.org/mena/sites/unicef.org/mena/files/2019-10/MENA-SSW-Review-2019.pdf>
- 382 National Policy on the Welfare and Protection of Children Deprived of Parental Care.
- 383 See UNICEF, Child Notice Sudan, <https://www.unicef.nl/files/unicef-child-notice-soedan-en.pdf>
- 384 See UNICEF (2019). *Multi-Country Review of the State of the social service workforce in the Middle East and North Africa Region*. Available in English at: <https://www.unicef.org/mena/sites/unicef.org/mena/files/2019-10/MENA-SSW-Review-2019.pdf>
- 385 See UNICEF Sudan (2019). *Social Policy*. Available in English at: <https://www.unicef.org/sudan/sites/unicef.org.sudan/files/2020-03/UNICEF%20Sudan%20-%20Social%20Policy%20Report%20-%202019.pdf>
- 386 UNICEF Soudan, Annual report of 2019, <https://www.unicef.org/sudan/sites/unicef.org.sudan/files/2020-03/UNICEF%20Sudan%20-%20Social%20Policy%20Report%20-%202019.pdf>; National Policy on Welfare and Protection of Children Deprived of Parental Care.
- 387 UNICEF Sudan's Child Protection Programme, [https://www.unicef.org/infobycountry/files/Unicef\\_Sudan\\_CHILD\\_PROTECTION\\_PROGRAMME\\_FINAL\\_\(032016\).pdf](https://www.unicef.org/infobycountry/files/Unicef_Sudan_CHILD_PROTECTION_PROGRAMME_FINAL_(032016).pdf)
- 388 See <https://www.hopeandhomes.org/news-article/eu-funds-protect-babies-sudan/>
- 389 National Policy on Welfare and Protection of Children Deprived of Parental Care.
- 390 Child Act, 2010, section 25.
- 391 National Policy on the Welfare and Protection of Children Deprived of Parental Care. UNICEF Child Notice Sudan, <https://www.unicef.nl/files/unicef-child-notice-soedan-en.pdf>
- 392 National Policy on the Welfare and Protection of Children Deprived of Parental Care.
- 393 National Policy on the Welfare and Protection of Children Deprived of Parental Care.
- 394 National Policy on the Welfare and Protection of Children Deprived of Parental Care.
- 395 National Policy on the Welfare and Protection of Children Deprived of Parental Care; UNICEF Child Notice Sudan <https://www.unicef.nl/files/unicef-child-notice-soedan-en.pdf>
- 396 Terminology referred to by Hopes and Homes for Children, main organisation that helped the country to implement the family-type care system.
- 397 Terminology used in the 2010 Child Act.
- 398 See National Policy on the Welfare and Protection of Children Deprived of Parental Care, pp. 8 and 9.
- 399 National Policy on the Welfare and Protection of Children Deprived of Parental Care.
- 400 Hope and Homes for Children Sudan, *Looking Back, Looking Forward*. Celebrating 10 years of transforming Sudan's Child Protection System. An innovative model of alternatives to institutional care in Khartoum. Available at: <https://bettercarenetwork.org/sites/default/files/Looking%20Back%20Looking%20Forward%20Report%20HHC257.pdf>
- 401 Hope and Homes for Children Sudan, *Looking Back, Looking Forward*.
- 402 National Policy on the Welfare and Protection of Children Deprived of Parental Care; HHC Sudan, *Looking Back, Looking Forward*.
- 403 HHC Sudan, *Looking Back, Looking Forward*; National Policy on the Welfare and Protection of Children Deprived of Parental Care.
- 404 National Policy on the Welfare and Protection of Children Deprived of Parental Care.
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## Republic of Djibouti

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### Lebanon

### Malaysia

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  - Known and ongoing failure to provide education and protection
  - Habitual ill treatment of the child
  - Sexual exploitation of the child, boy or girl
  - Exploitation of the child in organised crime
  - Economic exploitation of the child and exposure of the child to begging
  - Inability of parents or guardians to ensure the protection and education of the child In 2017, known and ongoing failure to provide education and protection (28.1%) and inability of parents or guardians to ensure the protection and education of the child (26.6%) were the most common reasons why DPEs were alerted to difficult situations.
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- 597 The adoption procedure described in this section is based on information available from MAS at <http://www.inpe.tn/fr/faq.php> (French only); and from Mission de l'adoption internationale (MAI), at <https://www.diplomatie.gouv.fr/fr/adopter-a-l-etranger/les-conditions-de-l-adoption-internationale/les-fiches-pays-de-l-adoption-internationale/fiches-pays-adoption/article/adopter-en-tunisie> (French only).
- 598 Tunisian periodic report to the Committee on the Rights of the Child available in English at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTUN%2f4-6&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTUN%2f4-6&Lang=en)

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- 601 See for example, *Guidelines and procedures for Child Sponsorship Programmes* <https://bettercarenetwork.org/sites/default/files/Guidelines%20and%20Procedures%20for%20Child%20Sponsorship%20Programmes.pdf>; <https://www.sos-childrevillages.org/getmedia/2b1246f6-871d-4444-9556-f8cc212196c6/Handbook-for-sponsors.pdf>; [https://www.wvi.org/sites/default/files/Child\\_Sponsorship\\_Monitoring\\_toolkit\\_0.pdf](https://www.wvi.org/sites/default/files/Child_Sponsorship_Monitoring_toolkit_0.pdf); [https://www.wvi.org/sites/default/files/ENGLISH\\_Community%20reps%20Toolkit\\_0.pdf](https://www.wvi.org/sites/default/files/ENGLISH_Community%20reps%20Toolkit_0.pdf)
- 602 See for example, ISS/IRC (2019). *Is intercountry adoption the way to 'rescue orphans' from institutions?*, editorial Monthly review No. 230, March-April 2019. Available in English at: [https://www.iss-ssi.org/images/editorial-monthly-review/Editorials\\_fra/2019/Edito\\_230Mars-Avril\\_2019.pdf](https://www.iss-ssi.org/images/editorial-monthly-review/Editorials_fra/2019/Edito_230Mars-Avril_2019.pdf)
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- ### Afghanistan
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- 605 UNICEF (2018). *Child Notice Afghanistan*, p. 65. Available at: [https://www.unicef.nl/files/Child%20Notice\\_Afghanistan%20EN%20\(2018\)%20FINAL.pdf](https://www.unicef.nl/files/Child%20Notice_Afghanistan%20EN%20(2018)%20FINAL.pdf)
- 606 Available in English at: <https://www.unicef.org/afghanistan/media/3936/file/Law%20on%20Protection%20of%20Child%20Rights.pdf>
- 607 LPDE, art. 3 (3).
- 608 LGE, art. 5.
- 609 LPDE, art. 69(1), and LGE, art. 7.
- 610 LPDE, art. 69 (2).
- 611 LPDE, art. 69 (3).
- 612 LGE, art. 22.
- 613 LGE, art. 17.
- 614 LGE, arts. 19-21.
- ### Algeria
- 615 The term *kafala* is mainly used without 'h' in Algeria.
- 616 See *Arrêts Interministériels de 1988*, amended in 2001.
- 617 Additional requirements are detailed in the *Note Réf. 196/DGSN/2004* of the Ministry of Labour and National Solidarity towards the DASS of each Wilaya and in Code of Civil and Administrative Procedure of 2008.
- 618 A bilateral agreement of 1968 foresees a specific procedure for Algerian children placed under *kafalah* with Algerian nationals. The agreement is not applicable to French Nationals.
- 619 See, <http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/algeria.html>
- 620 Minimum wage after taxes of 1.200 €/month as indicated by the Algerian Embassy in Switzerland, see: [http://www.consulat-algerie.ch/index.php?option=com\\_content&view=article&id=59&Itemid=157](http://www.consulat-algerie.ch/index.php?option=com_content&view=article&id=59&Itemid=157); <http://www.ambassade-algerie.ch/affaires-consulaires/08/kafala.html>
- ### Indonesia
- 621 Information on Indonesia is based on the work provided by Debby Nazty Pratiwi, S.H. and research undertaken by ISS/IRC.
- 622 See, <https://www.quora.com/Why-does-Indonesia-have-the-highest-Muslim-population-despite-the-fact-that-most-Islamic-countries-are-in-West-Asia>, last accessed 16 July 2018.
- 623 Regulation No.44 of 2017 on Childcare, art. 2.
- 624 Child Protection Law No.23/2002, art. 37 (1); See also, Government Regulation No. 44 years of 2017 regarding Implementation of Child Care, Article 3 (4).
- 625 Regulation No.44 of 2017 on Childcare, Part Two.
- 626 Regulation No.44 of 2017 on Childcare, Part Three.
- 627 Regulation No.44 of 2017 on Childcare, art. 35 (1). However, placement in residential care seems to be widely referred to. According to a Save the Children Report in 2017, 500 000 children were living in 8000 institutions in Indonesia. See BERPIHAK PADA ANAK – Yayasan Sayangi Tunas Cilik – Partner of Save the Children (2017). *Annual Report 2017 Indonesia*. Available at: <https://www.stc.or.id/sci-id/files/66/66e49d62-89d4-408c-a21-1cdf2cbd60c8.pdf>
- 628 Regulation No.44 of 2017 on Childcare, art. 13.
- 629 Regulation No.44 of 2017 on Childcare, arts. 18 and following.
- 630 Regulation No.44 Of 2017 on Childcare, arts. 40 b and 42.
- 631 Decree of the Minister of Social Affairs of the Republic of Indonesia, No.30/HUK/2011, *National Standard of Care for Child Welfare Institutions*, p. 51.
- 632 See especially the requirements of Government Regulation No.29 of 2019 on Requirements and Procedures for Appointment of Guardians, arts. 4 and following.
- 633 Government Regulation No.29 of 2019 on Requirements and Procedures for Appointment of Guardians, art. 3.
- 634 Government Regulation No.29 of 2019 on Requirements and Procedures for Appointment of Guardians, arts. 16 – 17.
- 635 See American Central Adoption Authority, Country information Indonesia, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Indonesia.html> (last accessed on 5 May 2020).
- 636 Child Protection Law No.23/2002, Arts 39-40; See also, Handar Subhandi Bakhtiar (2017). *Legal Arrangements Regarding the Adoption of Children in Indonesia*. Available at [https://www.researchgate.net/publication/313470266\\_Legal\\_Arrangements\\_Regarding\\_the\\_Adoption\\_of\\_Children\\_in\\_Indonesia](https://www.researchgate.net/publication/313470266_Legal_Arrangements_Regarding_the_Adoption_of_Children_in_Indonesia); and its Implementing Regulations, Government Regulation No. 54 of 2007.
- 637 The Indonesian government stipulates that an adoptive child must be of the same religion as the adoptive parents. In the case of a child of unknown origin, it is believed that the Indonesian government will make a determination that the child's religion will be deemed to be the same as the religious majority in the neighbourhood or community where the child was discovered (See: <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Indonesia.html>).
- 638 See, Swiss Central Adoption Authority <https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/herkunftslaender/Indonesien.html>; see also, American Central Adoption Authority, *Country information Indonesia*, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Indonesia.html>
- ### Saudi Arabia
- 639 Supports and supervises the private care centres for children; promotes awareness of the rights of children; implementation of general policies for the protection of orphans and children in a similar situation (see 2015 State Report, para. 117).
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- 643 2015 Third and fourth periodic reports, para. 131 – a.
- 644 2015 Third and fourth periodic reports, para. 131.
- 645 2015 Third and fourth periodic reports, para. 131– a.
- 646 Committee on the Rights of the Child (2016). *Concluding Observations*, para. 33.
- 647 See, <http://yatem.co/showArticle.php?id=13>
- 648 Committee on the Rights of the Child. (2016). *Concluding Observations*, para. 33.
- 649 Committee on the Rights of the Child. (2016). *Concluding Observations*.
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- 651 Committee on the Rights of the Child. (2016). *Concluding Observations*, para. 43.

## References

### Technical note: National family type *kafalah*

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- 653 See for example Morocco.
- 654 E.g. Iraq. See also Committee on the Rights of the Child, *Concluding Observations* to for instance: Bahrain (2019), Qatar (2017), Syria (2019).
- 655 All the countries examined in Part II.
- 656 Committee on the Rights of the Child, *Concluding Observations* to for instance: Bahrain (2019), Brunei Darussalam (2016), Oman (2016).
- 657 E.g. Morocco. See also Committee on the Rights of the Child, *Concluding Observations* to for instance: Lebanon (2017), Pakistan (2016).
- 658 E.g. Morocco.
- 659 E.g. Egypt, Iraq, Iran, Pakistan, Sudan. See also Committee on the Rights of the Child, *Concluding Observations* to for instance: Oman (2016), Pakistan (2016), Qatar (2017), Saudi Arabia (2016).
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- 661 Committee on the Rights of the Child, *Concluding Observations* to, for instance: Iran (2016).
- 662 Committee on the Rights of the Child, *Concluding Observations* to, for instance: Saudi Arabia (2016).
- 663 E.g. Algeria, Morocco, Tunisia, etc.
- 664 Committee on the Rights of the Child, *Concluding Observations* to, for instance: Qatar (2017).
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- 670 Committee on the Rights of the Child, *Concluding Observations* to, for instance: Lebanon (2017), Pakistan (2016).
- 671 E.g. Egypt. 672 All the countries examined in Part II. See also Committee on the Rights of the Child, *Concluding Observations* to, for instance: Bahrain (2019), Brunei Darussalam (2016), Lebanon (2017), Oman (2016), Qatar (2017), Saudi Arabia (2016).
- 673 All the countries examined in Part II. See also Committee on the Rights of the Child, *Concluding Observations* to, for instance: Brunei Darussalam (2016), Oman (2016), Qatar (2017), Pakistan (2016), Saudi Arabia (2016).
- 674 See also Committee on the Rights of the Child, *Concluding Observations* to, for instance: Bahrain (2019), Pakistan (2016).
- 675 E.g. Pakistan, Sudan.
- 676 E.g. Pakistan.
- 677 E.g. Egypt, Pakistan, Iraq, Sudan.
- 678 E.g. Egypt, Iraq, Pakistan.
- 679 E.g. Morocco. See also Committee on the Rights of the Child, *Concluding Observations* to, for instance: Oman (2016).
- 680 E.g. Iraq, Pakistan.
- 681 E.g. Pakistan. See also Committee on the Rights of the Child, *Concluding Observations* to, for instance: Bahrain (2019), Oman (2016), Pakistan (2016), Qatar (2017).
- 682 E.g. Pakistan, Sudan.
- 683 E.g. Lebanon; See also Committee on the Rights of the Child, *Concluding Observations* to, for instance: Brunei Darussalam (2016), Oman (2016), Qatar (2017).
- 684 E.g. Iraq, Lebanon, Malaysia, Pakistan (follow-up is optional); See also Committee on the Rights of the Child, *Concluding Observations* to, for instance: Qatar (2017), Oman (2016), Saudi Arabia (2016).
- 685 E.g. Egypt, Iran, Mauritania.
- 686 E.g. Algeria, Morocco, Pakistan.
- 687 E.g. Indonesia, Malaysia, Tunisia.
- 688 See, [www.terredeshommes.org/wp-content/uploads/2013/06/20130315\\_the\\_links\\_between\\_child\\_protection\\_and\\_good\\_governance.pdf](http://www.terredeshommes.org/wp-content/uploads/2013/06/20130315_the_links_between_child_protection_and_good_governance.pdf); [www.unicef.org/protection/files/Kenya\\_CP\\_system\\_case\\_study.pdf](http://www.unicef.org/protection/files/Kenya_CP_system_case_study.pdf); [www.unicef.org/protection/files/Ghana\\_CP\\_system\\_case\\_study.pdf](http://www.unicef.org/protection/files/Ghana_CP_system_case_study.pdf)
- 689 § 51(b) of the *Concluding Observations* of the Committee on the Rights of the Child to Morocco, 2014.





### III. Recognition and enforcement of *kafalah* or any other analogous institution in receiving States

Like any other family-based arrangement, *kafalah* may be considered a cross-border placement when the child's habitual residence differs from that of the *kafil* parents. National *kafalah* can also become cross-border in nature when the placement and its effects are sought to be recognised in a third country (see scenarios). Therefore, it is mainly in these two particular scenarios that the question of the recognition and execution of *kafalah* arises in the legal system of another country.

According to international standards (see Part I), any cross-border care option should be motivated by considerations of the best interests of the child (see Section III.1) and contemplated only when the care of a child in his or her domestic context has been determined to be inadequate or impossible (Section III.2). Aside from assessing the merits of the cross-border placement of a child on a case-by-case basis, which ISS/IRC suggests examining through a continuation of the case study (see Technical Note: National *kafalah*), questions should be asked about the legal rules applicable to these cross-border placements (see Sections III.3 and III.4). The specifics of the recognition and enforcement of *kafalah* in 11 countries is presented in country analyses (see Section III.5). These aim to allow critical reflection on how *kafalah* is recognised and enforced in the countries examined<sup>690</sup>. On this basis, a number of possible solutions are proposed in a Technical Note: Cross-border *kafalah*.

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## Recognition and enforcement of cross-border *kafalah*

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### ISS/IRC proposes three scenarios for cross-border *kafalah*:

#### Scenario No. 1: Recognition of a national *kafalah* in a third country

A competent authority of the receiving State is tasked with recognising the effects of a national *kafalah* granted by a competent authority from a State whose legal system is based on or influenced by Sharia (see Part II). Such situations may arise following a change in the child's and the *kafil* parent's habitual residence<sup>691</sup> for migration purposes.



#### Scenario No. 2: Establishment of a *kafalah* between two countries

*Kafalah* that involves two competent authorities: the competent authority of the State of habitual residence of the *kafils* (receiving State) and that of the State of habitual residence of the child (State of origin). The competent authority of the State of origin will have to contemplate the granted *kafalah* taking effect in a third country. In such case, the *kafalah* decision should result from good co-operation between the two countries, including through rules of private international law (jurisdiction, applicable law, recognition and enforcement).

ISS/IRC has noticed that many *kafalah* placements are decided on a national level without any consideration for the habitual residence of *kafil* candidates in a third country. The competent authorities in the child's State of origin base their decision on factors linking the *kafil*(s) to the State of origin such as their nationality, heritage, etc. As such, rules that apply to cross-border placements have the potential to be circumvented.



#### Scenario No. 3: *Kafalah* "taking effect" as a result of a private arrangement

As noted in country analyses (see Part II), *kafalah* placements often seem to elude the public sphere and be of private nature (see Technical Note: National *kafalah*). The *kafalah* arrangement in these situations result in an agreement or a unilateral act or testament that attributes parental responsibility for a child to one person or a member of the family. There is a distinction to be made between intrafamilial cases with pre-existing family relationships and extrafamilial cases.

In many contexts, private attribution of parental responsibility is unregulated, which can cause problems in a cross-border situation, namely when the person to whom parental responsibility is attributed is not in the same country as the child. In those cases, the 1996 Hague Convention (if applicable) provides the possibility of having the *kafalah* take effect under relevant law like a contract (see Article 16 (2) of the 1996 Hague Convention). Although such a situation would be covered by the 1996 Hague Convention, it is essential that public law principles (CRC, UN Alternative Care Guidelines) are also respected. Accordingly, this scenario will be addressed only briefly. Some of these extrafamilial cases raise important questions. How was the child able to be identified? Was it a question of looking for a child for a family and not the other way around? Such a situation comes with the same set of problems as private adoptions, which the international community is strictly against because of the elevated risk of child rights violations.



## 1. Considerations related to the Best Interests of the Child in cross-border *kafalah* placements

### Best interests of the child in international standards

Article 3(1) of the CRC states that “*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*” The child’s best interests must be considered but not as the overriding rule as argued by some. While the best interests principle is frequently referred to in Convention’s provisions, in only one matter is the best interests of the child to be the paramount consideration, and that is in adoption cases (article 21 of the CRC)<sup>692</sup>. With specific regard to the issue of children being deprived of their family, the best interests principle is scattered throughout the Guidelines for the Alternative Care of Children, highlighting its due importance. As emphasised by Nigel Cantwell, the best interests of the child are relevant not only to decisions on individual children, but also more generally to laws, policies and procedures affecting children as a group<sup>693</sup>.

Deliberately kept undefined to allow for its flexible application on a case-by-case basis, practice shows, however, that how the term is interpreted and is applied has not always been the best for each child – particularly in alternative care matters<sup>694</sup>. This is one reason why, in 2013, the CRC Committee issued the General Comment No. 14 on *the right of the child to have his or her best interests taken as a primary consideration*<sup>695</sup> in order to provide guidance on how to ensure the accurate use of this principle. For the CRC Committee the best interests of the child shall be considered as a threefold concept: a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.

More concretely, the determination of a child’s best interests should include the assessment of a wide variety of personal, family, social, legal and other elements. Such in-depth assessments and the balancing task of different individual needs and circumstances requires extensive skills and tools for social workers and psychologists, and in ensuring each child’s participation in this process<sup>696</sup>.

### Best Interests of the child in cross-border *kafalah* placements

When it comes to a cross-border *kafalah* placement, the best interests’ principle seems to be commonly invoked by professionals in both the State of origin and the receiving State as a justification to place the child with a family abroad – whether the family is related or not to the child. As in other similar contexts (e.g. intercountry adoptions), material considerations and better educational and professional prospects appear to dominate the best interests’ determination process in practice. However, without the necessary multidisciplinary, individualised and independent assessment, should these considerations automatically conclude that a cross-border *kafalah* placement corresponds to the child’s best needs? (see [Principle of Subsidiarity](#)).

Any dogmatic position to these above-mentioned questions could seriously endanger the implementation of the child’s best interests’ and subsequently of his or her rights. Such assumptions can indeed lead to extremely harmful and even illicit practices. Regrettably, it can be observed that some of the current cross-border *kafalah* practices seem to serve the interests of adults and third parties (e.g. intermediaries) rather than centring on considerations around the child’s best interests’. In this regard, important lessons should be learnt from the intercountry adoption field and the long-term and multi-layered consequences of illicit practices.



## Case Study: The crucial questions to ask oneself as a professional in a receiving State

In order for professionals in the receiving State to identify the key elements in the assessment of the best interests of the child in a cross-border placement, ISS/IRC proposes to pursue the case initiated in the [Technical Note: National \*kafalah\*](#). For each stage of the case, three different approaches are proposed to the professional. The approaches are all distinct and are not interconnected from one stage to another. At the end of each approach, there are self-reflection questions that you should consider.

You work in a child protection service in a receiving State, and you receive the file of a child aged almost 10 months directly from the *kafil* applicants and with the knowledge of the competent authority in a State of origin. The child's file contains a cross-border *kafalah* judgment to which the birth mother has consented, and contains very little information about the child, his or her history and the efforts undertaken to find a solution to place the child within his or her country. The child is temporarily placed in an institution in the State of origin.

**What are the key questions to ask in such a case in order to ensure that the cross-border placement is in the best interests of the child and to consider whether or not the foreign judgment should be recognised and enforced?**

1) You are wondering about the procedure to be followed to understand this cross-border placement (see also [Technical Note: Cross-border \*kafalah\*](#)) and whether or not the State of origin has ratified the 1996 Hague Convention. Your country has ratified the 1996 Hague Convention. **What approach would you take?**

APPROACH A	APPROACH B	APPROACH C
<p><i>The State of origin has ratified the 1996 Hague Convention, but this cross-border placement does not fully follow the procedure set out in that Convention. An application for a cross-border placement should have reached you from the Central Authority of that State of origin before any decision was taken by a court (in accordance with Article 33 of the Convention, see Sections I.1. and III.4.). You alert your Central Authority designated under the 1996 Hague Convention and provide your views on the failure to comply.</i></p>	<p><i>The State of origin has ratified the 1996 Hague Convention. You contact your Central Authority designated under the 1996 Hague Convention, and they tell you that they have been consulted under Article 33. Therefore, you study the submitted file in detail.</i></p>	<p><i>You note that the State of origin has not ratified the 1996 Hague Convention. You contact your Central Authority and try to facilitate contact with the competent authorities in the State of origin to understand their involvement in this case.</i></p>

**What are the questions to ask yourself as a professional?**

- *In these types of situations, do you always contact either the Central Authority designated under the 1996 Hague Convention in your country, or the competent authority if your country has not ratified the 1996 Hague Convention?*
- *In the face of individual steps initiated directly by potential candidates for *kafalah*, what means do you have to prevent an infringement of children's rights and international standards?*

2) The child's file tells you that the child was born out of wedlock, and the father is unknown. You are aware of systematic discriminatory practices against children born out of wedlock in that State of origin. Other reasons for placement in *kafalah* across the border to your country include poverty and the widespread belief that the child will have a better future abroad.

APPROACH D	APPROACH E	APPROACH F
<p><i>Most of the cases of children placed in kafalah with residents of your country that you receive from that State of origin correspond to this profile of children. Often, they are even anonymously abandoned children and any search for the biological family seems unrealistic. After a simple verification of the information available in the file, you do not see why children born out of wedlock should not be eligible for cross-border kafalah placements. You agree that the cross-border placement can take place and be recognised and enforced in your country.</i></p>	<p><i>The reality for single mothers and births out of wedlock is a real problem that should be solved by changing the attitudes of actors and public opinion in the State of origin, which is not your responsibility. However, you limit this type of cross-border placement to children for whom there is sufficient evidence that real efforts have been made to find solutions in the child's State of origin. Thus, you contact the authorities in the State of origin to obtain more information about the child, the measures taken in the State of origin, and the consents obtained.</i></p>	<p><i>On the basis of these facts, you refuse to accept this type of placement from the State of origin in question. Your country considers that poverty should not be the main reason for cross-border placement. However, in order to address this poverty and the systematic discrimination suffered by single mothers in this country, your country supports local organisations that provide assistance to families involved.</i></p>

#### What are the questions to ask yourself as a professional?

- Do you carry out all your procedures in close co-operation with the Central Authority designated under the 1996 Hague Convention in your country?
- What steps do you take if you encounter difficulties in, or fail to, obtain information about the child and his or her family history that is essential for making a decision on the cross-border placement?
- In the face of trends in discrimination, poverty and corruption in some countries, how far does your discretion go in placements mainly motivated by these causes?
- Do you personally think that the best option for the child is to live in the receiving State despite the family separation or the severance of ties with the State of origin that this entails?

3) In addition, the child's file indicates that he or she has lived with his or her mother since birth and suffers from heart and lung failure. The medical certificate attached to the file indicates that the child may require several surgeries and lifelong treatments. You are aware that certain profiles of children such as children with disabilities or chronic illnesses have great difficulty in benefitting from appropriate care in their country, and that their situation jeopardises their placement in family environments such as *kafalah* at the national level. **What approach would you take?**

APPROACH G	APPROACH H	APPROACH I
<p><i>You make no distinction on the basis of the child's profile, whether he or she has a disability, an illness or no special needs. As with any cross-border placement, you require that the child's file reflect the appropriateness of the placement on a case-by-case basis, based on thorough assessments.</i></p>	<p><i>You limit cross-border placements from the State of origin to "difficult" children, including children with disabilities or illnesses, and you are less demanding in terms of efforts to maintain the child in her or her family environment of origin or to find a placement in national kafalah.</i></p>	<p><i>As an alternative to cross-border placement, you take steps to identify a local or international organisation (e.g. Mercy Ships, or Chain of Hope) that could provide the child with the necessary medical treatment while indirectly supporting the child and his or her family, to avoid their separation.</i></p>

#### What are the questions to ask yourself as a professional?

- Should discriminatory practices against children with disabilities or illnesses be a determining factor in ruling out national care options and allowing a cross-border placement?
- What options are available to enable medical intervention and follow-up of the child, including within your receiving State, without the need for permanent cross-border placement?

## Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

4) As a result of your exchanges with colleagues in the State of origin, you understand that they consider that a permanent and stable environment, as well as a continuity of the child's ethnic, religious, cultural and linguistic identity (see Part I) will be better respected by placing the child in your country, particularly in view of the deficient child protection system in the State of origin. They point out that *kafil* candidates are nationals of the State of origin in question, are of Muslim faith and have greater financial resources. **What is your opinion?**

APPROACH J	APPROACH K	APPROACH L
<p>You do not share this view, nor do you believe that these elements should be decisive for cross-border placements. A balancing of interests should be carried out on a case-by-case basis. Cross-border placements are somewhat fuzzy, which could jeopardise the stability of the child (uncertain or temporary legal status which may lead to difficulties in everyday life, for example social security, schooling, etc.). Moreover, the child's removal from his or her habitual environment, learning a new language, etc. are all factors that will affect the child. Given these considerations, you believe that a national placement will often better meet international standards.</p>	<p>For you, this ethnic, religious, cultural and linguistic continuity will depend on the <i>kafil</i> candidates, and is to be assessed on a case-by-case basis. In particular, you consider that a certain stability is assured for the child when this cross-border placement is converted into adoption, as in your receiving State. In fact, it is a legally "more stable" care option that offers more safeguards to the child.</p>	<p>You share the opinion of your colleagues in the State of origin. For you, the material and financial stability offered to the child in your country by most families wishing to take care of a child is the most important consideration to be taken into account before any other consideration. Thus, you do not question their conclusion that this cross-border placement is in the best interests of the child.</p>

### What are the questions to ask yourself as a professional?

- Are evaluation mechanisms capable of guaranteeing that the decision is objective and complies with international standards (psycho-social assessments, multidisciplinary decision-making, supervision, etc.)?
- In your assessment(s) of the best interests of the child, to which established objective criteria do you refer?

5) While the law of the State of origin contains an explicit prohibition of adoption, you are informed that a court in your country is about to recognise the decision of cross-border *kafalah* by converting it into adoption. The judge in the State of origin seems to be aware of the conversion of *kafalah* into adoption. **Your opinion is sought by the court in your country.**

APPROACH M	APPROACH N	APPROACH O
<p>This is within the discretion of the judges in question, and the decision in the State of origin has the weight of <i>res judicata</i>. The receiving State is not in a position to go and challenge this decision. If it is in accordance with your own laws, the cross-border placement can take place without a thorough assessment of the merits of the decision in the State of origin. You give a favourable opinion on the conversion without carrying out any (additional) verification.</p>	<p>In accordance with the law of the State of origin, which does not permit adoption, you recommend against pursuing this conversion to adoption, to comply with the laws of the State of origin and your international obligations under the 1993 Hague Convention (see <a href="#">Section III.3.</a>), another international instrument that your country has ratified. Without these safeguards in place, the decision will be potentially harmful to the child.</p>	<p>Despite the prohibition of adoption by the law of the State of origin and the impossibility of applying the 1993 Hague Convention in the State of origin, you consider that steps have been taken to ensure that the adoption is in the best interests of the child (assessment, preparation of the child and <i>kafil</i> candidates, and follow-up on the placement). You therefore give a favourable opinion on the conversion.</p>

### What are the questions to ask yourself as a professional?

- Faced with such a decision, do you question the legal basis for the decision taken in the State of origin?
- Do you check with the relevant authorities involved to make sure that they understand how *kafalah* will be received in your country?
- Has your country established a bilateral agreement that sets certain conditions and clarifies the treatment of *kafalah* in your country?
- With a view to conversion to adoption, do you consider it essential that the safeguards provided in your country for adoption be respected?
- On the other hand, would you agree that a judge in your country should order a *kafalah* when it is not provided for or even when it is prohibited by the law of your country?

6) In spite of the non-compliance with the procedures of the 1996 Hague Convention and contrary to your opinion, cross-border *kafalah* is recognised in your receiving State. The child has been living with the *kafalah* parents in your country for five years now. Your opinion is again required after the *kafalah* parents have filed an application for adoption. **What do you think about this?**

APPROACH P	APPROACH Q	APPROACH R
<p><i>If the conditions for an adoption in your country are met, you see no reason to oppose the adoption of the child. You are in favour of the adoption since the law of your country now applies to the child and he or she should be able to benefit from all that it guarantees. Moreover, your law provides for alternatives to remedy the difficulty or even impossibility of obtaining the consent of the biological parents to the adoption of a child. Therefore, you carry out psycho-social assessments of the kafil parents and the child.</i></p>	<p><i>You object to the granting of an adoption in view of the fact that adoption is prohibited by the law of the child's State of origin. You consider that alternatives to adoption are possible in order to guarantee stability for the child (legal status, residence permit, etc.).</i></p>	<p><i>You object to the granting of an adoption on the basis that it is impossible to obtain the consent of the biological parents for the adoption. Apart from practical difficulties, it seems to you impossible to obtain informed consent in view of the prohibition on adoption in the State of origin. It is difficult for you to see how the competent administrative authorities in the State of origin would cooperate in such an endeavour. Moreover, an adoption would only be valid in your country but not in the child's State of origin.</i></p>

**Do you think it is important to:**

- *Guarantee the child under kafalah a stable status in the receiving State until the age of majority and beyond?*
- *Question the consequences of your decision, particularly in relation to the search for origins that the child or even the adult could undertake in his or her State of origin?*
- *Take into consideration the psycho-social impact for the child or adult of a decision such as adoption contrary to the laws and customs of the State of origin?*

Given their complexity, cross-border *kafalah* placements can be in a child's best interests, yet there is clearly no one fits all solution. Each placement should be based on thorough evaluations that take into account a variety of factors linked to the individual circumstances of the concerned child embedded in wider legal, social and political contexts. Thus, assessments to be undertaken should be based on objective criteria such as the Best Interests Criteria developed by UNHCR<sup>697</sup>.

## 2. Principle of subsidiarity in cross-border *kafalah* placements

### Principle of subsidiarity in international standards

The principle of subsidiarity is key when considering international placements, building on the principles of necessity and suitability required in national placements (see Section II.1). It is based on the premise that when any alternative care placement is being considered, “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background” (article 20(3) CRC). Arguably this continuity is most likely to occur successfully if the child is able to remain in his or her local context, in familiar surroundings. Ideally this occurs if the child is able to stay with extended family. It is therefore not surprising that the UN Guidelines for the Alternative Care of Children complement article 20(3) CRC, noting the important role played by the extended family as part of the spectrum of care options to be considered (as outlined in paragraphs 18 and 24).

In other words, when alternative care becomes a necessity for any child — despite all efforts to support the family of origin — there are priorities in care options to be considered. In principle due regard should be given to the extended family as it allows for continuity in child’s upbringing and background ideally in the child’s State of origin. If the extended family is not available, all efforts should be made to allow for such continuity in other familiar surroundings. Arguably this means prioritising a domestic alternative care placement, prior to considering any international alternative care placements, as there would likely be significant changes involved for the child in the latter (e.g. language, other social and cultural norms, different schooling, etc.).

Whilst this two-step consideration — known as the double principle of subsidiarity — is well recognised in the field of intercountry adoptions<sup>698</sup>, it is less familiar in other cross-border alternative care placements, including *kafalah*. Nonetheless, a lack of awareness of this principle, it does not derogate its applicability given it is clearly grounded in the CRC and the Alternative Care Guidelines.

### Principle of subsidiarity in cross-border *kafalah* placements

Based on international standards, prior to a *kafalah* placement being considered outside of the family for a child in need of alternative care, the extended family should be considered first. If the extended family is not available to care for the child, prior to considering a cross-border *kafalah* placement, in principle a domestic *kafalah* placement should be considered first.

In practice, most examined countries recognising *kafalah* placements do prioritise placements with extended family often in informal settings over non-family *kafalah* placements (first level of the principle of subsidiarity). However, ISS/IRC is regrettably not aware of any State of origin that has any legislation, policy or practice that upholds the second leg, prioritising domestic placements over cross-border placements. There is often a prevailing view that cross-border placements offer more material security to the child, whereas Alternative Care Guidelines note poverty alone should never be the sole reason for separation.

It should likewise be noted that as a “principle”, it does not override a best interest assessment/determination of the child’s individual situation (see Section III.1). There may be cases where the cross-border *kafalah* placement will have the priority over national solutions, such as intra-family placements where there are strong family ties. Each child’s case should be dealt with in a manner that identifies the most suitable solution given his or her particular circumstances.

**Given the importance of the double principle of subsidiarity as reflected in international standards, ISS/IRC recommends that it be reflected clearly in the laws, policies and practices of all countries. This means that efforts to explore placements with the extended family and nationally, should occur and be documented, prior to considering any cross-border placements. Such documentation also ensures that the child’s right to access information about his or her origins is supported.**

**Illustration: principle of subsidiarity**

One simple way to easily understand the hidden meaning behind the principle of subsidiarity is to imagine the following dialogue:

**The novice:** “But why is it so complicated to place a child with a family abroad when it seems that the world is overwhelmed with children in need?”

**The expert:** “It is important to firstly ask whether the children are in need of a cross-border placement, that is ensure that the possibility of relying upon alternative care measures in their country do not exist. To illustrate this, imagine you have two children and you die in a car accident? What would you want for your children?”

**The novice:** “It would be normal that they stayed with their mother”.

**The expert:** “Of course. And if the mother also died during the accident?”

**The novice:** “In that case, I would like the children to be placed in the care of our family: the grandparents, or uncles or aunts for example”.

**The expert:** “That’s right. And what if the family cannot look after the children, either because they do not exist or do not have sufficient resources?”

**The novice:** “In that case, I would like my children to grow up in their country, in a framework more or less familiar, where they can pursue their schooling in their mother tongue, etc.”

**The expert:** “And now you see, it is the same thing for all the parents in the world that a cross-border placement should only be considered after all the options that you elaborated upon before are not possible. That is the principle of subsidiarity”.

Source: Adaptations of the text developed by Aaron Greenberg, Regional Child Protection Specialist UNICEF see ISS/IRC Monthly Review 3-4/2009).

### 3. Considerations about the (non)-applicability of the 1993 Hague Convention to cross-border *kafalah* placements<sup>699</sup>

**This brief article has been issued by Laura Martinez Mora, Secretary at the Permanent Bureau of the Hague Conference on Private International Law.**

The 1993 Hague Convention only covers adoptions which create a permanent parent-child relationship (Art. 2(2)). However, during the negotiations of the 1993 Hague Convention the possibility of also applying the Convention “to various forms of childcare other than adoption, such as custody, foster placement and *kafalah*” was suggested by the delegate from Egypt (see Part II). Yet, finally this proposal could not be considered due to lack of support from other delegations<sup>700</sup>. The main reason for this was that these other forms of childcare, while they may perform certain social/psychological functions similar to adoption, they differ from it in respect of its essential legal structure.

To avoid any doubt, the Special Commission on the practical operation of the 1993 Hague Convention has clearly reiterated that *kafalah* does not fall within the scope of this Convention. At the 2000, 2005, 2010 and 2015 meetings, the Special Commission, when discussing how best to regulate the different types of cross-border placements falling outside the scope of the 1993 Hague Convention, referred to the 1996 Hague Convention as the instrument with the appropriate legal framework. In practical terms, this means that issues of Judicial Jurisdiction, applicable law, recognition and enforcement, and cross border cooperation regarding such placements, are regulated by the 1996 Hague Convention (see Section III.4), and not by the 1993 Hague Convention.

It should also be noted that the 1993 Hague Convention allows for a child to be moved to the receiving State and for the adoption to take place after his or her arrival there, either in the State of origin or in the receiving State<sup>701</sup>. The reason behind this is that at the time of the negotiations of the Convention, an important number of countries in Asia followed this model<sup>702</sup>. This system allows for a longer probationary period in the receiving State (as opposed to a probationary period in the State of origin, which is usually short), during which the prospective adoptive parents (PAPs) and the child live together, before the adoption is pronounced. Placement in view of an adoption may take the form of different types of measures<sup>703</sup>. One question that has arisen with regard to *kafalah* is whether this type of child protection measure can be considered as a “placement” of the child with the PAPs for the purposes of an adoption. This happens, for example, when an immediate conversion of a *kafalah* placement into an adoption is requested in the receiving State. However, one has to recall that:

## Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

### 1. According to the 1993 Hague Convention:

- an intercountry adoption falls within the scope of the Convention if a child has been, is being or is to be moved to the receiving State after his or her **adoption** in the State of origin, or for the **purposes of an adoption** in the receiving State or in the State of origin (Art. 2(1));
- the State of origin has to establish that the child is **adoptable** (Art. 4(a)) and that an intercountry adoption is in the best interests of the child (Art. 4(b));
- **consent** is given for an adoption (Art. 4(c)) and not for another measure;
- Central Authorities of both States have to **agree that the adoption may proceed** (Art. 17(c)); and
- any **conversion** from simple to full adoption (Art. 26) only covers adoptions and not any other type of child protection measures.

### 2. According to the 1996 Hague Convention:

- The decision to place a child under a *kafalah* arrangement in another contracting State may be made in the requesting State only, if, after consultation with

the Central Authority or other competent authority of the requested State, that Central Authority or competent authority has consented to the placement or provision of care by *kafalah* (Art. 33); and in that case,

- The *kafalah* placement or provision of care must be recognised as such by the receiving contracting State (Art. 23 and ff.)

Therefore, if both the 1996 and the 1993 Hague Conventions apply between the State of origin and the receiving State, or only the 1996 Hague Convention applies between these States, it is clear that the receiving State has a duty to recognise the *kafalah* as such. This recognition duty will in principle stand in the way of an immediate adoption of a child placed in that State under a *kafalah* arrangement (cf. ECtHR, 26 October 2012, 43631/09 Harroudj v France; see Annex II).

If only the 1993 Hague Convention applies, the safeguards and procedures listed under (1) must be observed. It follows that if a child has been placed under a *kafalah* arrangement in another contracting State, the 1993 Convention does not apply. It is a matter for the internal law of the receiving State whether, when, and under what conditions, the *kafalah* arrangement (if recognised under its PIL) may be followed up in that State by an adoption.

## 4. The 1996 Hague Convention on Child Protection: An international framework for cross-border *kafalah*?

In this interview, Hans van Loon, former Secretary-General of the Hague Conference on Private International Law, who actively participated in the drafting of the 1996 Hague Convention<sup>704</sup>, explains how this Convention applies to transnational *kafalah* placements, and why its (correct) application should be further promoted.

### Could you please explain how the Hague Conventions apply to cross-border *kafalah* arrangements?

A *kafalah* is not an 'adoption' and does not establish a 'permanent parent-child relationship' according to the 1993 Hague Convention (Art. 2). Therefore, the 1993 Hague Convention does not apply to 'cross-border *kafalah*'. The 1996 Hague Convention, by contrast, makes specific provision for 'the placement of child in a foster family or in institutional care or the provision of care by *kafalah* or an analogous institution' in its Articles 3.c) and 33<sup>705</sup>. In these articles, 'placement' and 'provision of care' refer to a **measure** of protection taken by a judicial or administrative **authority**.

With regards to such a measure to provide care by *kafalah*, a distinction must be made between the different scenarios mentioned on p. 127. While the 1996 Hague Convention applies to all, its article 33 only applies to the situation in which the 'cross-border *kafalah*' is intended from its inception to take place in another State party.

In addition to *kafalah* measures, *kafalah* may be arranged privately without the — formal, active — intervention of an authority. In those cases, however, Articles 3.c) and 33 do not apply, nor do those other provisions of the Convention

that relate to child protection **measures** taken by **authorities** only (Chapters II, III Art. 15, and IV). For those rules to apply, the private arrangement will have to be confirmed or approved by a measure taken by an authority.

Once an authority has provided care by *kafalah* (as well as in the case of private *kafalah* arrangements), other Hague Conventions may also apply. If the child is wrongfully removed from the *kafil*, or wrongfully retained after a visit, the 1980 Hague Child Abduction Convention may be applicable. Likewise, the 2007 Hague Child Support Convention, and its Protocol on Applicable Law, may apply.



### What protections may Article 33<sup>706</sup> of 1996 Hague Convention provide?

Article 33 aims to avoid situations where an authority in one State party (State of origin) provides a 'cross-border *kafalah*' in another State party (receiving State), without consultation with, and the consent of, the authorities of the receiving State. Without such consultation and consent, not only may the *kafalah* measure not be recognised in the receiving State (Art. 23(2)f)), but the child may also be exposed to other risks (e.g. incomplete assessment of the suitability of the *kafil(s)*), as well as the risk of not being permitted to enter and reside in the receiving State in the first place. Moreover, financial issues may arise regarding the costs of the unauthorised placement (to be paid by the State of origin or receiving State?).

### What do you think are the risks of engaging in private 'cross-border *kafalah*' arrangements?

As noted, where a 'cross-border *kafalah*' arrangement is made through an agreement between private parties, without the intervention of an authority, the rules of the Convention applying to 'measures', including Article 33, do not apply. Arguably, the same is true where the intervention of the authority is merely formal or passive, and the arrangement is essentially being made by the parties<sup>707</sup>. In such situations, the child is exposed to risks similar to those listed above.

### What risks are involved in cross-border *kafalah* placements decided by authorities of non-contracting States and enforced in a State party to the 1996 Hague Convention?

Again, in the relationship with a non-State party to the 1996 Hague Convention, a 'cross-border *kafalah*' that is to take place in a State party, will, in the absence of a procedure as provided for by Article 33, expose the child to the risks mentioned above.

### What if the procedure of Article 33 applies, but no consent is given to the intended 'cross-border *kafalah*'?

If the authorities of the other State Party, in which the provision of cross-border *kafalah* is envisaged, do not give their consent to that placement, the authorities of the State of origin should not proceed with, or stop, the contemplated *kafalah*. Otherwise, they act in breach of Article 33, and expose the child to all the aforementioned risks. It is important to note that the 1996 Hague Convention does not apply to 'decisions on the right of asylum and on immigration' (Art. 4j)). Therefore, the 1996 Hague Convention, per se, leaves the receiving State free to refuse to give its consent to a cross-border *kafalah* placement, based upon the laws on migration (including constitutional and human rights law) applicable in that country.

### What are the obligations of a State party to 1996 Hague Convention in terms of, for example, recognition and follow-up of the placement?

- **Recognition of a *kafalah* placement:** All contracting States to the 1996 Hague Convention are under an obligation to recognise a *kafalah* measure taken by the authorities of a contracting State, and to recognise it 'by operation of law' (Art. 23 (1)), i.e. without the need to resort to any proceeding to obtain such recognition. This obligation is subject, however, to the conditions of Article 23 (2), including the condition that, in the case of a 'cross-border *kafalah*', Article 33 has been complied with. An interested person, e.g. a *kafil*, in the receiving State may request an explicit decision to recognise the *kafalah* (Art. 24), or a declaration of enforceability or registration for that purpose, in that State (Art. 26).
- **Ensuring the child's access to the territory:** As noted, the 1996 Hague Convention does not apply to 'decisions on the right of asylum and on immigration' (Art. 4 j)). That means that the obligation of a State party to recognise the *kafalah* does not imply, per se, any obligation of that State to admit the child to its territory. Only where, in a 'cross-border *kafalah*' situation, the receiving State has given its consent to the placement of the child on its territory, that consent should, and will normally, imply a right of the child to enter and reside in that State under the conditions determined by that State. Whether, failing the receiving State's consent, a *makfoul* child may, nonetheless, enter or reside in a State party, is not determined by the 1996 Hague Convention, but by the laws on migration (including Constitutional and Human Rights Law) applicable in that State.
- **Effect of change of habitual residence:** Under the 1996 Hague Convention, the change of the *makfoul* child's habitual residence to the receiving State, including in the case of Article 33, will leave subsisting the *kafalah* measure determined in the State of origin in respect of the child (Art. 14). Nevertheless, the conditions for the exercise of the measure are governed by the law of the receiving State (Art. 15 (3)). As a result of the change of habitual residence<sup>708</sup>, the authorities of the receiving State acquire jurisdiction to take any measures of protection (Art. 5 (2)). In case of urgency, they may even take such a measure as soon as the child is present in the receiving State (Art. 11).
- **Steps following the placement:** Chapter V of the 1996 Hague Convention does not provide for a general follow-up obligation for the receiving State. However, the Central Authority of the receiving State must take all appropriate steps to provide the competent authorities of another contracting State, including the State of origin, assistance in discovering the whereabouts of the child (Art. 31 c)); may provide a report or request its authorities to take protective measures (Art. 32); may request information from the State of origin (Art. 34), or admit and consider information provided by the

## Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

*State of origin regarding a parent's access to the child (art. 35). In the event of non-recognition of a kafalah measure (art. 23 2)), it is for the authorities of the receiving State to arrange for appropriate measures of protection of the child, e.g. a provisional guardianship pending a permanent solution, which solution may be found either in the receiving State or in the State of origin*<sup>709</sup>.

### Under what circumstance can a *kafalah* be 'converted' into an adoption?

Adoption decisions are not covered by the 1996 Hague Convention (Art. 4 b)). The 1996 Hague Convention, therefore, does not determine the jurisdiction of the authorities of the receiving State to take a decision on adoption of the *makfoul* child. However, *kafalah* is, in many respects, the functional equivalent of (simple) adoption under the applicable law (not providing for adoption) of the State of origin. A country like Morocco, which is a party to the 1996 Hague Convention, does not provide for adoption resulting in the severance of the child's legal bonds with the biological family and his or her full integration into the adoptive family. However, Moroccan law offers *kafalah*, which has neither of these effects but does establish an obligation for the *kafil* to provide a child with protection, maintenance and education, as an alternative legal device to ensure that a child will grow up in the care of a family. Under the 1996 Hague Convention (Art. 23, see above), the other contracting States are under an obligation to recognise a measure of *kafalah*.

Therefore, an immediate 'conversion' of a *kafalah* into an adoption upon arrival of the child in the receiving State, before the child is fully integrated in that receiving State — as currently practiced between some countries (see Section III.5) — may raise questions from a human rights perspective, in respect of both the child's identity and the child's and family members' rights to respect for private and family life, notably under the European Convention on Human Rights<sup>710</sup>. One could imagine a situation, in which both States were also parties to the 1993 Hague Convention (e.g. assuming that Morocco were to join the 1993 Hague Convention). In such a situation, the Moroccan authorities might, with or without determining a *kafalah* measure, entrust the child to prospective adoptive parents habitually resident, for example in France or Belgium, in accordance with Article 17 of the 1993 Hague Convention, with a view to the child's adoption by a decision of the French or Belgian courts.

### What additional protections could be included in bilateral agreements (see Technical Note: [Cross-border kafalah; Annex IV](#))?

Bilateral agreements, supplementing the 1996 Hague Convention, may go beyond the provisions of the 1996 Hague Convention. They might, for example:

- exclude private *kafalah* cross-border arrangements, through a mandatory scope provision (an equivalent to Art. 2 of the 1993 Hague Convention is missing in the 1996 Hague Convention);

- provide more detailed requirements, such as ensuring that before considering a 'cross-border *kafalah*' measure, an effort is made to find a family for the child in the State of origin, that all persons concerned and the child have given their informed and free consent, that the prospective *kafil*s are eligible and suited for the *kafalah*, and the child will be authorised to enter and reside permanently in the receiving State (see Arts. 4 and 5 of the 1993 Hague Convention);
- include more extensive provisions on the role of Central Authorities, other public authorities and intermediaries, such as those of Chapter III of the 1993 Hague Convention;
- provide more elaborate procedural requirements (Arts. 14-20 of the 1993 Hague Convention); and
- add general provisions, such as Articles 29-35 of the 1993 Hague Convention.

Such bilateral agreements might also deal with any financial issues relating to the cross-border *kafalah* placement.

ISS/IRC encourages State parties to fully comply with the 1996 Hague Convention procedures. It further promotes the establishment of bilateral agreements, which could provide for additional safeguards in accordance with the legislations involved. ISS/IRC strongly encourages the involvement of competent authorities in cross-border *kafalah* arrangements, and the further ratification of the 1996 Hague Convention, in order to ensure that the child's rights are fully protected. In addition, for ISS/IRC, contracting States are to apply the cooperation mechanisms and spirit of the 1996 Hague Convention in relation to non-contracting States in order to ensure the minimum safeguards of the 1996 Hague Convention are complied with (see [Technical Note: Cross-border kafalah](#)).



## 5. Comprehensive analysis of the recognition and enforcement of *kafalah* in different receiving States

This section provides a dozen in-depth analyses with the aim to identify the existing recognition and enforcement mechanisms of a *kafalah* from a child rights perspective. It is important to note that the majority of the countries examined are all contracting States to the Convention on the Rights of the Child, and to the 1996 Hague Convention.

### RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN AUSTRALIA<sup>711</sup>

<p><b>General situation</b></p>	<p>General statistics on immigration in Australia are available at: <a href="https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3412.0Main%20Features32018-19?opendocument&amp;tabname=Summary&amp;prodno=3412.0&amp;issue=2018-19&amp;num=&amp;view=">https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/3412.0Main%20Features32018-19?opendocument&amp;tabname=Summary&amp;prodno=3412.0&amp;issue=2018-19&amp;num=&amp;view=</a></p> <p>As of June 30, 2016, Malaysia (152,900), Lebanon (93,700), Indonesia (79,000) were among the top 20 birth countries of Australian residents, indicating for significant numbers of migrants and potential cross-border situations.</p>
<p><b>Applicable laws &amp; policies</b></p>	<p><b>International framework:</b></p> <ul style="list-style-type: none"> <li>• Convention on the Rights of the Child (signed on 22 August 1990 and ratified on 17 December 1990)<sup>712</sup></li> <li>• The 1993 Hague Convention (ratified on 25 August 1998 and in force since 1 December 1998)<sup>713</sup></li> <li>• The 1996 Hague Convention (ratified on 29 April 2003 and in force since 1 August 2003)<sup>714</sup></li> </ul> <p><b>National framework:</b></p> <p><b>Applicable law can be found in the Migration Regulations 1994<sup>715</sup>, in particular:</b></p> <ul style="list-style-type: none"> <li>• Schedule 2 – Adoption (Subclass 102) visa</li> <li>• Schedule 2 – Orphan Relative (Subclass 117) visa</li> <li>• Regulation 1.04 – definition of ‘adoption’</li> <li>• Regulation 1.12 – definition of ‘member of the family unit’</li> </ul>
<p><b>Competent authorities</b></p>	<p><b>Central Authority/competent authorities:</b></p> <p>The Department of Home Affairs is responsible for considering the possibility for children to enter Australia under <i>kafalah</i> guardianship arrangements if they separately meet the requirements of a different permanent visa, such as the Orphan Relative visa.</p> <p>The Australia Central Adoption Authority does not have a role in ‘adoptions’ or intrafamilial placements from countries where Islamic law operates. This is because such arrangements do not meet the requirements for an adoption visa (full and permanent adoption under Australian law).</p>
<p><b>Recognition &amp; enforcement</b></p>	<p>It is likely that there have been cases of a child who is the subject of a <i>kafalah</i> arrangement being granted a visa other than an adoption visa – as a guardianship order. However, there is little visibility over any other temporary or permanent visas granted to these <i>kafalah</i> arrangements. This is because there is currently no report that can be run to establish the reasons for a person being included as a member of the family unit in a visa application.</p> <p>It should be noted that the Department of Home Affairs is not aware of any exceptional cases where a <i>kafalah</i> arrangement has been accepted for the purposes of an adoption visa. The legislative criteria for the Adoption visa is that the adoption must have afforded the adoptive parents full and permanent parental rights by the adoption, and is not flexible under migration law.</p>
<p><b>Procedural requirements</b></p>	<p><b>Orphan Relative visa:</b> depending on their circumstances, a child who is subject to a <i>kafalah</i> arrangement may be eligible to apply for an Orphan Relative visa. This visa is for a child who is unable to be cared for by their parents as they are both either missing, deceased or permanently incapacitated. This visa also requires the child to have a relative who is settled in Australia as an Australian citizen, permanent resident or an eligible New Zealand citizen<sup>716</sup>. If the person who has been afforded guardianship under the <i>kafalah</i> arrangement does not meet the requirement that they are the child’s Australian relative, then the child will be unable to meet the visa criteria.</p>

Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States**Procedural requirements (continued)**

**Member of the family unit of a visa applicant:** it may be possible for a child who has undergone a *kafalah* arrangement to be included in a permanent visa application for another type of visa as a member of the family unit of the person who has been awarded guardianship under the *kafalah* arrangement. This would require that the *kafalah* arrangement meets paragraph (2) of regulation 1.04's definition of 'adoption'. It is important to understand that if the *kafalah* arrangement does not meet paragraph (b), then the child cannot be considered as a member of the family unit, and their visa application may be refused.

**Temporary visa options:** a child who is subject to a *kafalah* arrangement may be eligible to apply for a temporary visa, such as a Visitor visa or a Student visa. However, the child would need to meet all criteria, including that they intend a genuine temporary visit to Australia. If the decision maker is not satisfied that the child is able to meet these criteria, including that they have incentive to return overseas, then the visa application may be refused.

**Adoption visa:** in order to be granted an Adoption visa, all children who have been adopted/are in the process of being adopted overseas must, amongst other things, meet the relevant criteria for the type of adoption they are claiming to have undertaken/are in the process of undertaking. An adoption that has occurred without an application being made through an Australian State or Territory Government Central Adoption Authority is considered to be an expatriate adoption under migration law, and this would be what a claimed *kafalah*, or customary adoption arrangement, would be assessed as. In order for the Department of Home Affairs to accept a *kafalah*/customary adoption arrangement for the purposes of an Adoption visa, the process needs to be akin to a formal adoption where the lawful ties are severed between the child and their biological parents, and the 'adoptive' parents are afforded full and permanent parental rights for the child. As most *kafalah*/customary adoption arrangements do not provide full and permanent parental rights to the adoptive parents, very few children, if any, children placed under a *kafalah*/customary adoption arrangement would be able to meet the requirements for an Adoption visa.

**Kinship placements where the child is not an orphan:** there are no permanent or temporary visas available for a child who is seeking to undertake a kinship care arrangement with a relative who is an Australian citizen, permanent resident or eligible New Zealand citizen. As mentioned above, a child who is seeking to come to Australia to live with a relative would need to consider their eligibility for an Orphan Relative visa.

**Follow-up and termination**

The conditions of the visa will apply independent of age. Upon the expiry of a visa, if a child is in the care of the State and Territory authorities, they will not be sent home if there are not appropriate arrangements in place for the child. If a child has a temporary visa and is still in the care of a family member, it is up to the family to ensure that the child either lodges a further application to stay in the country lawfully, or arranges for the child to return home. If they do not leave, or another visa is not applied for before the visas ceases, they will be unlawfully in Australia.

If a breakdown occurs and the child has a permanent visa, the child can remain in Australia permanently even if they are no longer being cared for by the family member. They have the right to remain in Australia permanently under the care of the Australian State and Territory authorities or other family members.

If the breakdown occurs and the child has a short-term visa, the child can remain in Australia for the duration of the visa and when it expires, will need to lodge an application for another visa. The Australian State and Territory authorities would care for the child and determine what the next steps would be. For example, apply for a permanent visa for the child, find alternative care arrangements, or arrange for the child to return to his or her State of origin.

**ISS/IRC ANALYSIS****The 'Australian approach' to *kafalah* holds various promising elements:**

ISS/IRC is encouraged to see the genuine efforts of the Department of Home Affairs to gather information about the child's background including the principle of subsidiarity. The Department is clear that poverty alone will not be accepted as reason for the declaration of a child as an orphan. The Department also has a clear policy of not dealing with placements from Islamic countries as adoptions unless there is permanent severance of ties and evidence that the State of origin is making an adoption decision. The Department requires evidence that the child has no parents capable of caring for them if they are considered to be an orphan. Evidence includes: a death certificate or other official document and evidence such as a medical report, showing why the child's parents are unable to care for them. The Department will not grant this visa if the child's parents are capable of caring for them but do not want to which includes a family living in poverty.

The Department will only grant this visa to a child younger than 18 years if either the child has the written consent of everyone who can legally decide where they live, OR, the laws of the child's home country allow them to leave their home country, OR, it is consistent with any Australian child order about the child. The Department might not grant this visa if it is not in the best interests of an applicant under 18. The Department attempts to gather information about the principle of subsidiarity in these cross-border placements to ensure that the wider family or national solutions have in principle been exhausted.

**ISS/IRC ANALYSIS (CONTINUED)**

**Challenges to be addressed:** It seems to us that *kafalah* is treated exclusively from an immigration law perspective. The ISS/ IRC encourages other child protection authorities, whether administrative or judicial, to work closely with immigration authorities to find adequate solutions to fulfil the rights of the child. In addition, it would be recommended to clarify the potential status of the child in Australia.

**RECOGNITION AND ENFORCEMENT OF KAFALAH IN BELGIUM****General situation**

On January 1, 2018, Belgium had 11,376,070<sup>717</sup> inhabitants, 11% of whom were foreigners<sup>718</sup>.

The vast majority of these foreigners (67%) are from European Union countries. Foreign nationals from Morocco represent 6% of the foreign population, while 1% are from other North African countries.

Individuals from West Asia, Sub-Saharan Africa and Europe outside of the European Union<sup>719</sup> represent 7%, 7% and 6% of the foreign population, respectively.

In 2018, 13,946 long-stay visas were granted for family reunion/reunification purposes as follows:

- 9,768 to Belgian or EU citizens
- 4,178 to foreign nationals

With regard to North African countries:

- **Morocco:** 573 applications for family reunification long-stay visas were granted to third-country nationals and 1,026 applications for family reunion/reunification long-stay visas were granted to Belgian or EU citizens.
- **Algeria:** 179 applications for family reunion/reunification long-stay visas were granted to foreign nationals.

As per the information provided by Belgium to the CRC Committee, 25 children were “adopted” from Morocco in Belgium on a *kafalah* basis in 2014 and 2015<sup>720</sup>. Statistics provided by the French-Community of Belgium (also called Wallonia-Brussels Federation)<sup>721</sup>.

**Statistics provided by the French-Community of Belgium (also called Wallonia-Brussels Federation)<sup>721</sup>.**

	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>
<b>Morocco</b>	6	22	19	21	21	14	15	10	13	9	11

**Applicable laws & policies****International and regional legal framework:**

- Convention on the Rights of the Child (signed on 26 January 1990, ratified on 16 December 1991)<sup>722</sup>
- The 1996 Hague Convention (ratified on 1 April 2003, in force since 1 September 2014)<sup>723</sup>
- The 1993 Hague Convention (ratified on 26 May 2005)
- European Convention on Human Rights (signed on 4 November 1950, ratified on 14 June 1955)<sup>724</sup>

**National legal framework:**

- Civil Code, specifically Article 361 – 5<sup>725</sup>
- Code of Private International Law, specifically Articles 22 and 25
- Act of December 15, 1980 on access to the territory, residence, settlement and removal of foreigners, specifically Article 9

**International jurisprudence: Committee on the Rights of the Child, *Y.B. and N.S. v. Belgium*, November 5, 2018 (CRC/C/79/D/12/2017)<sup>726</sup>:** this decision concerns the refusal of a humanitarian visa for a child cared for by a Belgian-Moroccan couple within a *kafalah* arrangement. The decision is analysed in Section I.1 and in Annex II. In response to the decision, Belgium implemented the following general measures to prevent future violations:

- (a) Visa requests for children taken in under *kafalah* will be examined expeditiously;
- (b) *Kafalah* arrangements will be assessed in light of the conditions established in the the 1996 Hague Convention;
- (c) Careful attention will be paid to living conditions in Belgium and the child’s situation in his or her State of origin, taking into account the best interests of the child;
- (d) The child will be heard taking into account his or her discernment capacity;
- (e) Due weight will be given to the family life that has developed between the child and his or her guardians;
- (f) A follow-up assessment of the child’s living conditions will be required, if relevant.

<p><b>Applicable laws &amp; policies (continued)</b></p>	<p>The State party adds that the CRC Committee views have been widely published on the website of the Immigration Office, including a summary in French and Dutch<sup>727</sup>.</p> <p><b>Regional jurisprudence: the European Court of Human Rights, <i>Chbihi Loudoudi and Others v. Belgium</i>, December 16, 2014 (no. 52265/10)</b><sup>728</sup>: “Relying on Article 8 (right to respect for private and family life), the applicants complained that the Belgian authorities had, to the detriment of the child’s best interests, refused to recognise the kafalah arrangement and to approve the adoption of their niece; they also complained about the uncertainty of her residence status. Under Article 14 (prohibition of discrimination) in conjunction with Article 8, they further alleged that they had been discriminated against on grounds of origin.” (Paras. 1 – 4). The Court’s decision on these issues is analysed in Annex II.</p> <p><b>National jurisprudence:</b></p> <p><b>Adoption leave:</b> “If the adopters have completed the adoption preparation course, been declared suitable and followed the legal procedures (Article 361 – 5 of the Civil Code) and decree procedures (article 35), the procedure that applies to a kafalah for adoption purposes meets the requirements of the previously cited Article 30b is, as it exists within the framework of an adoption. The parent concerned then has the right to adoption leave as soon as the child is in their care on the condition that the leave is taken within the two months following the child’s registration as member of the worker’s household, even if the parent-child relationship has not yet been established.”<sup>729</sup>”</p> <p><b>Adoption allowance:</b> In Belgium, the adoption allowance cannot be awarded for a <i>kafalah</i>. Indeed, “the lack of a parent-child relationship, the ‘reversible’ nature of a kafala[h](...) the significant guarantees surrounding adoption in Belgian law that kafala[h] does not provide, and the fact that other forms of assistance may be awarded in family placement arrangements other than adoption are all elements that lead to the conclusion that, in reserving the adoption allowance for cases of adoption only, the legislator applied objective, relevant and reasonably proportionate criteria”<sup>730</sup>.” This difference was not deemed to be discriminatory by the Constitutional Court of Belgium.</p> <p><b>Family allowance:</b> Children placed in <i>kafalah</i> and who are household members may be eligible for a family allowance<sup>731</sup>.</p>
<p><b>Competent authorities</b></p>	<p><b>Central Authority for the 1996 Hague Convention</b><sup>732</sup>: Service Public Fédéral Justice, Direction générale de la Législation et des Libertés et Droits fondamentaux Service de Coopération internationale civile</p> <p><b>Central Community Authorities designated under the 1993 Hague Convention</b><sup>733</sup>:</p> <ul style="list-style-type: none"> <li>• French Community: Ministère de la Communauté Française, Direction générale Aide à la Jeunesse</li> <li>• Flemish Community: Vlaams Centrum voor Adoptie (VCA) Kind en Gezin</li> <li>• German-Speaking Community: Ministerium der Deutschsprachigen Gemeinschaft Zentrale Behörde der Deutschsprachigen Gemeinschaft für Adoptionen</li> </ul> <p><b>Competent Authority other than the Central Authorities and Licensed Adoption Agencies:</b></p> <p>The <b>Family Court</b> is the competent authority for<sup>734</sup>:</p> <ul style="list-style-type: none"> <li>• The social inquiry report for the suitability assessment; and</li> <li>• The adoption judgment.</li> </ul>
<p><b>Recognition &amp; enforcement</b></p>	<p>In Belgium, a <i>kafalah</i> cannot be equated with an adoption given that a <i>kafalah</i> does not create a parent-child relationship<sup>735</sup>.</p> <p>Under Articles 22 of 25 the Belgian Code of Private International Law, a <i>kafala</i> decision may be recognised if it does not contravene one of the grounds for refusal in Article 25, for instance the incompatibility with the ordre public<sup>736</sup>. In Belgium, it is common practice to differentiate between <i>kafalah</i> by <i>adoul</i> (notary) and judicial <i>kafalah</i> (see Section 1.3.2.), the former being less easily recognised than the latter given its private nature.</p> <p>If recognised, the effects of a <i>kafalah</i> are similar to unofficial guardianship. According to the Belgian Civil Code, an unofficial guardian undertakes to: “maintain and raise the child, teach the child to be able to earn a living, manage the ward’s assets without having the right or power to use the minor’s income to pay for maintenance expenses, the exercise of custodial rights over the ward, so long as the child’s habitual residence is with said unofficial guardian”<sup>737</sup>.</p> <p>Following amendments to the Civil Code in December 2005 – after the country ratified the 1993 Hague Convention – it became possible for individuals seeking to care for a child through <i>kafalah</i> to adopt the child according to Belgian law<sup>738</sup>. This possibility is tied to certain conditions<sup>739</sup> explained in the following sections.</p>

<p><b>Status of the child</b></p>	<p><b>If the child is adopted:</b> “the recognition of the foreign adoption of the minor by the Federal Central Authority entails the automatic delivery of a Belgian passport (if the child becomes Belgian) to the child or a visa (if the child does not become Belgian), providing him or her with access to the Belgian territory”<sup>740</sup>.</p> <p><b>If the child enters Belgium outside of any adoption proceedings:</b></p> <p><b>Residence permit:</b> Once the person has been issued a temporary residence permit the Immigration Office examines their file every year to decide whether to extend their stay for another year. After five years, the temporary residence permit is converted into a permanent residence permit<sup>741</sup>.</p> <p><b>Nationality</b><sup>742</sup>: A foreign national legally residing in Belgium for five years may undertake the nationality declaration process. The person must be at least 18 years old, have their birth certificate (Belgian or foreign), hold an unlimited stay card, prove that they speak one of the three national languages (French, Dutch or German), prove their social and economic integration, and pay the €150 registration fee.</p>
<p><b>Procedure: Adoption</b><sup>743</sup></p>	<p><b>The adoption pronounced is a plenary adoption that cannot be revoked.</b></p> <p><b>The following procedures and conditions must be followed and met:</b></p> <p><b>Pre-procedural conditions:</b> prospective adopters must be considered candidates at the start of the process and meet all conditions required by Belgian law and the State of origin. In the case of Morocco, for example, they must be Muslim<sup>744</sup>. After taking the adoption preparation course and having been found fit by the family court, prospective adopters must contact a licensed adoption agency in the child’s State of origin<sup>745</sup>. The agency must work with institutions in the State of origin that have agreed to implement a cooperative strategy that is compatible with Belgian law. The agency develops the adoption project with the prospective adopters and sends the institution the prospective adopters’ file.</p> <p><b>Prohibition of prior contact:</b> prospective adopters may not have any prior contact with the people who have custody of the child or from whom consent is required. Once the child is proposed to them, the institution sends a child proposal to the licensed adoption agency. Contact can only occur once the proposal has been validated by the Community Central Authority.</p> <p><b>Supervision by the Community Central Authority:</b> the <i>kafalah</i>-adoption procedure must be supervised by the Community Central Authority or by a licensed adoption agency that has been authorised by the Community Central Authority to coordinate with the child’s State of origin. Once the child proposal is made at the licensed adoption agency, the Community Central Authority verifies the content of the child proposal, particularly with regard to the legal and psycho-social adoptability of the child. If it agrees with the proposal, it can then be shared with the prospective adopters. If the adopters agree to the match, the <i>kafalah</i> process is initiated in Morocco, under the supervision of the adoption agency and its on-site collaborators.</p> <p><b>Child profile:</b> “Only a child subject to an abandonment ruling and placed—in the custody of a State authority—in a nursery or an institution (or an orphan with no mother or father) can be adopted through this procedure. For all other situations, adoption is no longer an option”<sup>746</sup>.</p> <p><b>Visa with a view to adoption:</b> Once the Moroccan procedure is complete, all documents required by Belgian law are sent to and verified by the Community Central Authority, which then certifies that the procedure for issuing the child a visa for adoption purposes has been followed. When the child returns to Belgium, the adopters initiate an adoption procedure with the family court.</p> <p><b>Follow-up reports:</b> Belgium provides follow-up reports for competent authorities in the State of origin and, as with all adoptions, psycho-social support for adoptive families and assistance in case of search for origins.</p>
<p><b>Procedure: Regularisation on humanitarian grounds</b></p>	<p>“In some exceptional circumstances (e.g. the death of the parents), and on a case by case basis, Belgium sometimes uses its discretionary power for humanitarian reasons and issues a stay permit to a child placed in <i>kafala</i>[h]<sup>747</sup>.” If no legal criteria have been established, certain key elements may come into play: “evidence that ‘special bonds’ exist, namely, an undeniable financial and emotional dependence between the family members who remained in the State of origin and the person staying in Belgium. Proof of humanitarian grounds, or a precarious and isolated situation in the State of origin or of residence where there is no close relative that could care for the family member in question. The financial situation of the person staying in Belgium, which must be sufficient to allow them to care for the family members in question... the person must therefore be able to prove they have an income”<sup>748</sup>.</p>

Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

<p><b>Procedure:</b> <b>Regularisation on humanitarian grounds (continued)</b></p>	<p>For such an application, the Embassy may request the following documents: “a guardianship judgment for the child or a decision in which the child is placed in the custody of the person wishing to come to Belgium; Authorisation from the competent national authorities allowing the child to permanently leave their country (unless this is already explicitly stated in the guardianship judgment); An authenticated certification in which the biological parents or the person with parental authority or former guardianship gives their authorisation for the child to leave the country (unless this is already explicitly stated in the guardianship judgment) or an authenticated certificate declaring abandonment or the parents’ death certificate. These documents must be written in accordance with the local legislation; a verified copy of the child’s birth certificate; a care agreement (appendix 3bis) signed by the guardian and legalised by the commune, accompanied by proof of the guarantor’s solvency and a household composition document; a copy of the guardian’s identity document; a copy of the guardian’s certificate of good conduct and morals; proof that there are no other family members (up to the third degree) in the State of origin who can take care of the child (death certificates if applicable); proof that the child is already in the care of the guardian (proof of sending regular money to the child)<sup>749</sup>.”</p>
<p><b>Procedure:</b> <b>Family reunification</b></p>	<p>In certain cases, when adoption is not possible, family reunification may be an option. This possibility was the subject of a Court of Justice of the European Union (CJEU) judgment in March 2019<sup>750</sup> (see Annex III). In this case, the Court considered that on an administrative level, a <i>makfoul</i> child does not fall into the “direct descendants” category, as defined by the <a href="#">Directive on freedom of movement and residence</a><sup>751</sup>, but rather the “other family member” category (see paras. §§56 and following). According to CJEU, “[t]he words used in that provision are thus capable of covering the situation of a child who has been placed with citizens of the Union under a legal guardianship system such as Algerian <i>kafala</i> and in respect of whom those citizens assume responsibility for its care, education and protection, in accordance with an undertaking entered into on the basis of the law of the child’s State of origin.” (para. §59) The citizen must therefore demonstrate that the child was in their care prior to their arrival to Belgium<sup>752</sup>. During a family reunification process and following an assessment of various elements, including emotional bonds, degree of dependence, and age at which the child was placed, the child may or may not be issued entry and a stay permit<sup>753</sup>.</p>
<p><b>Follow-up and end of <i>kafalah</i>-adoption</b></p>	<p>Follow-up reports are requested by the competent authorities of the State of origin. Psychosocial support and assistance in tracing of origins seem to also exist<sup>754</sup>.</p>
<p><b>Follow-up and end of unofficial guardian/tutorship</b></p>	<p>The guardianship ends when the child reaches the age of majority or when s/he emancipates, but also in case of the guardian’s death.</p>

## ISS/IRC ANALYSIS

### The ‘Belgian approach’ to *kafalah* holds various promising elements:

Through this analysis, ISS/IRC seeks to showcase the specific framework put in place by Belgium<sup>755</sup>, for the reception of children taken care of via *kafalah*, including the adaptation of parts of its adoption legislation. Indeed, the implementation of various procedural guarantees from outset in the receiving State must be emphasised (e.g. evaluation of candidates, their preparation, monitoring of procedures, recourse to accredited adoption bodies specifically trained and qualified in this area, as well as post-placement follow-up). These key stages provide important safeguards for the child.

**Challenges to be addressed:** However, the following issues could be observed in the Belgian approach:

**The applicable legal/policy framework:** ISS/IRC is unclear about the ultimate purpose of the *kafalah*-adoption procedure as practiced in Belgium. Indeed, *de facto*, the current system allows for the declaration of intercountry adoption as defined in article 2 of the 1993 Hague Convention without resorting to this same Convention, given that none of the States of origin have ratified this instrument (since adoption is fundamentally contrary to their legal order). Yet, recourse to the 1996 Hague Convention should be promoted (see Section III.4), as cross-border placements fall within its scope. Resorting to this Convention may in particular be beneficial for cases of intra-family *kafalah* placements which are currently excluded in Belgian law.

Further, the articulation between the 1996 Hague Convention and immigration procedures remains unclear. For example, the visa granting procedure and the nature of the residence permit of the *makfoul* child remain to be clarified.

**ISS/IRC ANALYSIS (CONTINUED)**

**The implementation of the applicable laws/policies and cooperation:** From the State of origin's perspective, while it would be possible to raise the awareness of concerned judges' on the treatment of *kafalah* in countries that are not familiar with *kafalah*, such sensitisation efforts will, in practice, not reach all actors since it might be considered contrary to the country's official position. Therefore, caution is needed to avoid creating a parallel system and a non-homogeneous judicial practice for *kafalah* placements for the benefit of *kafil* candidates residing abroad. Some judges might be more favourable towards adoption, thus accepting the practice of the receiving State while others reject it categorically by strictly applying their law or the country's official position. Without a uniform approach in place, this reality combined with the demand of persons living abroad can lead to abuses such as "forum shopping", consisting in choosing the most favourable court as well as the least rigorous region, possibly harming concerned children.

As previously mentioned, the issue of recognition and enforcement of *kafalah* can also arise in proceedings related to family reunification and humanitarian regularisation. However, these procedures are largely dependent upon the discretionary power of the Belgian authorities. Recent international and European judicial analysis (see [Part I](#) and [Annex III](#)) has led to clarifications of Belgian practice, notably in response to the decision of the Committee on the Rights of the Child (see above). Finally, it is of due importance to continue to verify on a case-by-case basis whether the rules are respected and whether the guarantees laid down by international standards are not circumvented. From this perspective, a strong, transparent and law-abiding collaboration is essential.

**Solutions to better monitor cross-border *kafalah*:**

- Clarify the applicable procedures and their effects, for example since the *kafalah* is initially recognised through the mechanisms of the 1996 Hague Convention, does it require a second stage (decision or judgment) for the *kafalah* placement to be endorsed as a guardianship?
- Caring for a *makfoul* child internationally requires enhanced cooperation between the various States which goes beyond the guarantees already provided for by the 1996 Hague Convention. For ISS/IRC, this cooperation could, for example, be subject to bilateral agreements. These should deal in particular with the conditions and prerequisites necessary for the initiation of a cross-border *kafalah* procedure. These agreements could also help clarify the role of judicial authorities in the child's State of origin.
- Ensure that regularisation for humanitarian reasons continues to be done on a case-by-case basis, following a thorough verification of international and national rules. In other words, these procedures must be limited to certain cases and well-founded.
- Develop and implement follow-up for unofficial guardianships.

**RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN DENMARK<sup>756</sup>**

<b>General situation</b>	Immigration statistics are available on the official website, including data on family reunification, immigration for education purposes, immigration by family members, and others <sup>757</sup> .
<b>Applicable laws &amp; policies</b>	<p><b>International framework:</b></p> <ul style="list-style-type: none"> <li>• Convention on the Rights of the Child (signed on 26 January 1990 and in force since 10 July 1991)<sup>758</sup></li> <li>• The 1996 Hague Convention (ratified on 30 June 2011 and in force since 1 October 2011)<sup>759</sup></li> </ul> <p><b>National framework:</b></p> <ul style="list-style-type: none"> <li>• There are no domestic laws concerning cross-border <i>kafalah</i> placements.</li> <li>• If the Danish Family Agency were asked to evaluate a <i>kafalah</i> placement in order for it to be recognised as the applicants have custody/guardianship of the child, they would use international private law including the 1996 Hague Convention if applicable.</li> <li>• Danish adoption legislation such as Danish Adoption (Consolidation) Act does not apply (see below).</li> </ul>
<b>Competent authorities</b>	There is no Danish authority specifically in charge of recognition foster care established in a foreign country. The Danish Agency of Family Law is however in charge of custody or guardianship established abroad.
<b>Recognition &amp; enforcement</b>	<p><b>Guardianship or care by a family member</b> (see below in procedural requirements)</p> <p>A <i>kafalah</i> placement <b>cannot be automatically converted into an adoption</b> upon the child entering Denmark. After a certain lapse of time if a child enters through a guardianship placement and habitually resides in Denmark, there is a possibility that the guardians can make an application for a domestic adoption according to Danish laws (see below in procedural requirements)</p>

Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

<b>Status of the child</b>	<p><i>Kafalah</i> does not give the child a living basis or permanent residence in Denmark in accordance with the above. A <i>kafalah</i> arrangement by itself does not give the child a visa as it does not establish a legal relationship. However, if the conditions for a foreign custody have been met, the child may be granted a temporary visa to reside in Denmark which gives him or her access to education, health and social services.</p>
<b>Procedure requirements</b>	<p><b><u>Kafalah as a kinship care/guardianship placement</u></b></p> <p>Whilst there is no recorded information about <i>kafalah</i> placements as part of kinship placements/guardianship, in Denmark – such foreign placements can theoretically be recognised in Denmark under certain circumstances. It will involve an analysis of the decisions taken in the State of origin. If a person or a couple has been given custody or guardianship of a child in another country, this can be recognised in Denmark if certain conditions are met. One of the conditions has to be that it is similar to a Danish custody. Recognition of foreign custody of a child from another country does not imply that the child gets residence permit in Denmark.</p> <p>However, in principle Danish Authorities do not recognise social “placements” from other countries. There are of course have social placements in Denmark as in placements with foster parents of a child living in Denmark. If a child’s parents are not able to take proper care of the child, it can be placed in foster care. But a placement of a child in another country with a couple or a single person will not just be transformed into a Danish placement/foster care – not even if it is a kinship placement.</p> <p>The Central Adoption Authority is not involved in the evaluation but another Authority within the National Social Appeals Board. It is very important to understand though, that the recognition of a guardianship will not in any way mean, that the prospective parents have the same rights over the child, as if they are a biological parent. Among other things it will not assure that the child can reside permanently in Denmark.</p> <p><b><u>Kafalah cannot be converted into an adoption</u></b></p> <p>In Denmark, <i>kafalah</i> cannot be recognised as a legal adoption and it is not possible to convert a cross-border <i>kafalah</i> placement. Denmark can only recognise a foreign adoption in Denmark, if the adopter at the time of the application/adoption was domiciled in the country where the adoption has been carried out (if a national adoption) or the receiving State (if an intercountry adoption), and the adoption is valid, final and legally binding according to the laws of the country concerned. Furthermore, it requires that the adoption has legal effects corresponding to the legal effects of a Danish Adoption (cf. The Danish adoption (Consolidation) Act part 2). Finally, it requires that the adoption is not evidently incompatible with fundamental Danish legal principles.</p> <p>In practice, an application for recognition of an adoption carried out in a country outside Denmark will be considered individually and concrete on the basis of the conditions of which the adoption has been carried out. As <i>kafalah</i> is not a full adoption and the child is according to Danish rules not relinquished for adoption in accordance with the 1993 Hague Convention. Therefore, <i>kafalah</i> cannot be recognised according to Danish legal principles because it is evidently not compatible with fundamental Danish legal principles.</p> <p>In accordance with the above cross-border <i>kafalah</i> placement is not an option in Denmark. Therefore, all applicants that have asked for <i>kafalah</i> to be recognised as an adoption in Denmark has resulted in a refusal of recognition. As it is not a full and final adoption in the State of origin, it cannot be recognised as a full and final adoption according to Danish law.</p>
<b>Follow-up and termination</b>	<p><i>Kafalah</i> does not give the <i>makfoul</i> child, a living basis, visa or permanent residence to stay in Denmark. The duration of the visa will continue independent of age. It will be the Danish resident’s responsibility to ask for an extension of the temporary visa upon expiry. A <i>kafalah</i> placement does not get the child a visa or any other residence permit in Denmark. As the (Danish) applicants are not recognised as “parents” of the child, nothing happens when the child turns 18.</p>

## ISS/IRC ANALYSIS

### The ‘Danish’ approach to *kafalah* holds promising elements:

ISS/IRC welcomes the Danish approach that the *kafalah* arrangement is not recognised as an adoption.

### Challenges to be addressed:

The child has no legal status to remain in Denmark. Additionally, it does not seem that there are preparation services for the child and his/her guardians. There are no specific support services although the family will have access to existing general services. If Denmark accepts child protection measures pronounced in a country whose legal system is based on or influenced by Sharia, it must ensure that the procedures of the 1996 Hague Convention are respected, and disseminated to all potential *kafil* parents as well as professionals involved.

## RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN FRANCE<sup>760</sup>: *RECEUIL LÉGAL*<sup>761</sup>

### General situation

Because of the France's historical relations with Algeria and Morocco, most children placed in *recueil légal* in France come from those countries. ISS/IRC is not aware of any centralised collection of statistics on *recueil légal* in France. Indeed, the *kafils* are not required to present the *kafalah* decision, nor to obtain a French decision.

### Applicable laws & policies

#### International framework:

- Convention on the Rights of the Child (ratified by France on August 7, 1990)<sup>762</sup>.
- The 1996 Hague Convention (ratified by France on October 15, 2010, and in force since February 1, 2011)<sup>763</sup>, including Article 33 and provisions relating to recognition and enforcement (Article 23 f) particularly for Moroccan *kafalah*. Note that the 1996 Hague Convention has not been ratified by Algeria.

#### Bilateral agreements:

- Franco-Algerian Agreement on Enforcement of Judgments and Extradition, August 27, 1964.
- Franco-Moroccan Agreement on Mutual Judicial Assistance, Enforcement of Judgments and Extradition between France and Morocco, October 5, 1957.

#### National framework:

- **Article L221 – 3 du code de l'action sociale et des familles (Social Action and Families Code)** requiring that the child welfare service respond in a timely manner to requests for cooperation from a Central Authority under the 1996 Hague Convention.
- **Circular of October 22, 2014 on the legal effect of the provision of care system in France** establishing a "legal framework to give effect to the order granted abroad"<sup>764</sup>.
- **Article 21 – 12 of the Civil Code:** acquisition of French nationality.
- **Case law of the ECtHR, the Conseil d'État, Court of Cassation [CCass], Court of Appeal, first instance tribunals – replaced by judicial tribunals on 1 January 2020, in particular:**
  - Ccass, 10 May 1995 – evolution from a permissive jurisprudence<sup>765</sup> in the 90s towards the prohibition of the adoption of a child whose personal law prohibits adoption<sup>766</sup>;
  - ECtHR, 4 October 2012, *Harroudj c. France* req. n° 43631/09 (see Section I.4.; Annex II) ;
  - Paris Appeal Court, 15 February 2011 on the acquisition of French nationality and the adoptability of the child<sup>767</sup>;
  - Ccass Civ. 1st, 14 April 2010, n° 08 – 21.312 on the habitual residence of the child<sup>768</sup>;
  - Ccass Civ, 1st, 30 September 2003; Ccass Civ.,1st, 6 February 2011<sup>769</sup>;
  - Ccass Civ, 1st, 4 December 2013, n°12 – 26.161<sup>770</sup> on the required consents as well as the establishment of an "ad-hoc family council"; and
  - Conseil d'État, 22 February 2013, 330211 (*kafalah adoulaire*)<sup>771</sup>.

NB: Although there is no requirement for the *kafalah* to be of judicial nature, the effects of a notary *kafalah* (*kafalah adoulaire*) are not the same; the latter therefore cannot be equated to the transfer of parental authority or guardianship because these statutes imply judicial monitoring related to the respect for the child's best interests.

### Competent authorities

**Central Authority:** The *Bureau du droit de l'Union, du droit international privé et de l'entraide civile* (BDIP) of the Ministry of Justice, is designated as the Central Authority in France for the implementation of the 1996 Hague Convention between France and Morocco; it comes into play only for *kafalah* from Morocco for the purpose of granting approval as required by Article 33 of the 1996 Hague Convention.

#### Competent authorities:

- Child welfare services at the Departmental Council in the candidate's place of residence are to contact the BDIP (due to article 33 of the 1996 Hague Convention) who then may assess the candidates' ability to care for a child;
- The Directorate General for Social Cohesion (Ministry for Solidarity and Health) coordinates the social services standards at the legal level;
- The services of the Ministry for Europe and Foreign Affairs and the Ministry of the Interior share jurisdiction for the issuance of visas;
- French courts: although Moroccan and Algerian *kafalah* decisions are recognised by operation of law, it is possible, subject to compliance with certain conditions, to seek enforcement of a decision of "*recueil légal*" (exequatur) in order to confirm its effect in France or to request the delegation of parental authority; the French jurisdiction is covered by the child guardianship judge, who are responsible for deciding on guardianship and for constituting a Family council to consent to the adoption of the makfoul child if the child has become French (the adoption is impossible while the personal law of the child prohibits the adoption);

Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

<b>Competent authorities (continued)</b>	<ul style="list-style-type: none"> <li>• The <i>Bureau du Droit des personnes et de la famille</i> of the Ministry of Justice has a prescriptive jurisdiction (particularly in the drafting of circulars).</li> </ul>
<b>Recognition &amp; enforcement</b>	<p>According to the 2014 ministerial circular, foreign <i>kafalah</i> decisions institute a <i>recueil légal</i>, that is, a measure of protection that does not create parentage.</p> <p>This is a temporary measure which may be revoked.</p> <p>This measure is equivalent to a guardianship (for children who are orphaned or abandoned with or without established parental ties) or a partial<sup>772</sup> or total<sup>773</sup> delegation of parental authority (for children with established parentage and living parents).</p> <p>The <i>recueil légal</i> does not amount to a simple or full adoption as it does not create new parentage.</p> <p><b>In the longer term</b>, adoption is possible only where the minor was born and habitually resides in France (paragraph 2 of Article 370 – 3 of the Civil Code). If an application for nationality is submitted and is successful<sup>774</sup>, <b>an application for simple or full adoption</b> may be filed with the competent court. When there is no cross-border element, the prohibition in Article 370 – 3 is lifted, bringing the situation under the remit of French law. Consequently, the child becomes adoptable under the conditions of French law<sup>775</sup>, subject to a thorough review of the situation<sup>776</sup>. The consent of the biological parents is required under Article 348, paragraph 2 of the Civil Code, or of the family council<sup>777</sup> if the father and mother are dead, unable to express their intention or deprived of their rights of parental authority or when the child's parentage is not established. In certain cases, an ad hoc administrator may be designated to fully preserve the child's interests.</p>
<b>Status of the child</b>	<p>The <b>rights and obligations</b> toward the child arise from the effect given to the foreign <i>kafalah</i> decision.</p> <ul style="list-style-type: none"> <li>• If the <i>recueil légal</i> takes the form of a delegation of parental authority: Articles 371 and following of the Civil Code;</li> <li>• If the provision of care takes the form of a guardianship: Articles 390 and following of the Civil Code.</li> </ul> <p><b>Issuance of a visa:</b> it has long been considered that <i>kafalah</i> amounted to a simple transfer of parental authority which did not entail any particular access right for the child to French territory. However, the Conseil d'État has now declared that “<i>the best interests of the child are in principle to live with the person who, by virtue of a court decision which produces legal effects in France, is entitled to parental authority</i>” (CE, 9 Dec. 2009). The following two entities are responsible for visa requests for a child in <i>kafalah</i>: <i>Bureau du droit de l'Union, du droit international privé et de l'entraide civile</i> (Ministry of Justice) for <i>kafalah</i> cases from Morocco (<a href="mailto:entraide-civile-internationale@justice.gouv.fr">entraide-civile-internationale@justice.gouv.fr</a>) and in other cases, the <i>Office français de l'immigration et de l'intégration</i> (OFII). Requests in the latter case need to be submitted via a <a href="#">specific request form</a> for family reunification.</p> <p>(see <a href="https://www.diplomatie.gouv.fr/fr/adopter-a-l-etranger/faq-glossaire-textes-de-referance/foire-aux-questions/">https://www.diplomatie.gouv.fr/fr/adopter-a-l-etranger/faq-glossaire-textes-de-referance/foire-aux-questions/</a>)</p> <p><b>Nationality:</b> A child who, for at least three years (amended in 2016: from 5 to 3 years), has been given a home in France and brought up by a person of French nationality may claim French nationality. If the child's habitual residence is in France, a French judge then has jurisdiction and the child may then become adoptable, as explained above.</p>
<b>Procedure</b>	<p><b>Recognition of national <i>kafalah</i> in France:</b> the application shall be filed with the competent authorities of the State of origin, following the procedure provided by law in that State. Once <i>kafalah</i> is granted, it will be recognised and enforced in France as per the applicable provisions (existence of a bilateral convention or application of ordinary law).</p> <p><b>Cross-border <i>kafalah</i>:</b></p> <p><b>Non-contracting States:</b> Applications from non-contracting States of the 1996 Hague Convention shall be filed with the competent authorities of the State of origin, and absent any cooperation with French authorities, follow the procedure provided by law in that State. Once <i>kafalah</i> is granted, it will be recognised and enforced in France as per the applicable provisions (existence of a bilateral agreement or application of common law).</p> <p><b>Applications for judicial <i>kafalah</i> from contracting States (e.g. Morocco):</b> The French Central Authority receives an application for approval of judicial <i>kafalah</i> from the Moroccan Central Authority, in accordance with Article 33 of the Hague Convention; the French Central Authority ensures that the file is complete and applies to the departmental council of the place of residence of the person who made the <i>kafalah</i> application, for an assessment of that person's ability to care for a child. A home study for a <i>kafalah</i> is then requested from the departmental council (family composition, budget composition, housing, plan and motivation). On the basis of this report and the original criminal record extract that candidates are asked to provide, the French Central Authority indicates to the Moroccan Central Authority whether or not it approves the <i>recueil légal</i>.</p>

**Follow-up and end of provision care**

**Follow-up of *recueil légal*:** there is no judicial monitoring unless the French guardianship judge is seized, which is rare. The judge usually only intervenes once the child has French nationality in order to obtain consent to the adoption from the family council.

**End of *recueil légal*:** As soon as the child reaches the age of majority in France, the effects of *kafalah* terminate in France. If an adoption procedure is initiated once the child has become French, the adoption decision also effectively terminates the *kafalah*. A new decision by the State of origin could also terminate it.

**ISS/IRC ANALYSIS****The 'French approach' to *kafalah* holds various promising elements:**

The existence of a specific legal framework composed of bilateral agreements and a 2014 circular.

Implementation of the legal framework and the creation of a specific measure allows the child's daily needs to be responded to.

**Challenges to be addressed:****The applicable legal/ policy framework:**

The current legal framework does not seem to cover certain important aspects, such as the systematic evaluation and preparation of *kafil* candidates, as well as monitoring. According to the understanding of ISS/IRC, evaluation and preparation stages are required in 1996 Hague Convention cases, while in cases with non-contracting States, the verification of the above elements remains at the discretion of the competent jurisdiction in the State of origin and the French jurisdiction in case the recognition and enforcement of *kafalah* is requested by the competent judge. To address this shortcoming, some organisations offer preparation and information sessions for candidates (e.g. *kafala.fr*).

As for the visa granted to *makfoul* children, it falls within the competence of the Ministry of the Interior and it was not possible for ISS/IRC to obtain further information (nature, duration, access to basic services, social benefits and other basic services).

**Implementation of the legal/policy framework:**

The collection of statistical data by the Ministry of Justice on these types of placements or on the profiles of the children concerned seems difficult given that *kafalah* is not systematically the subject of a judicial decision. It may be that this data could be collected and centralised by the Ministry of the Interior competent for granting visas.

While it is possible to subsequently convert the *recueil légal* into adoption when the child has become French, this possibility can sometimes create practical difficulties related to obtaining the consent of the biological parents or the legal guardian (if identifiable) in the State of origin. For orphaned children there are less difficulties as the family council constituted by the guardianship judge can consent to their adoption.

**Cooperation/coordination:**

As per the French Central Authority, with the actors having clearly defined roles, there is no particular difficulty in their coordination. The only issue could relate to direct referrals to departmental councils by applicants in cases falling under the 1996 Hague Convention, which may give rise to assessments without going through or notifying the Central Authority. Yet, more and more departmental councils refer applicants to the Ministry of Justice, the 1996 Hague Convention procedure now being well known to their services.

**Solutions to envisage:**

Certain procedural steps, including suitability assessment, preparation of candidates and monitoring of the *recueil légal*, should be further strengthened. It is encouraging to note that a new information and support system for families who are candidates for the *recueil légal* has recently been set up in Greater metropole area Lyon<sup>778</sup>. Workshops on the safeguards provided to this profile of children are intended to raise awareness among candidates and the authorities involved.

In terms of stakeholder cooperation, ISS/IRC commends the efforts undertaken to improve the coordination and awareness raising of all involved regarding the existing procedures.

**RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN GERMANY<sup>779</sup>****General situation**

As per available information, *kafalah* placements in Germany under the 1996 Hague Convention are limited in numbers (with Morocco). Other *kafalah* placements concern children from Algeria and Tunisia. Despite the lack of statistical data, it is estimated that many of these placements are requested by relatives (aunts or uncles in the first or second degree). These requests are mostly dealt with through aliens/immigration law.

**Applicable laws & policies****International framework:**

- Convention on the rights of the child (ratified in 1992)<sup>780</sup> and the 1996 Hague Convention (ratified in 2011)<sup>781</sup>.

### Applicable laws & policies (continued)

#### International framework:

- Convention on the rights of the child (ratified in 1992)<sup>780</sup> and the 1996 Hague Convention (ratified in 2011)<sup>781</sup>.

#### Regional Framework:

- For cases within the EU, the regulation Brussels II a) is applicable.

#### National framework:

- There are no specific legal provision/procedure for the recognition of a *kafalah* pronounced in another country, yet several legal provisions can help legitimise a *kafalah* placement of a child and give access and residence rights according to strict conditions.
- **Sections 45 – 47** of Act to Implement Certain Legal Instruments in the Field of International Family Law (**International Family Law Procedure Act – IFLPA**)<sup>782</sup>. The consultation procedure described in these sections is in line with articles 33 of the 1996 Hague Convention and 56 of the Brussels II bis Regulation (see below) and gives clear indications on the competences and roles/responsibilities of the different German stakeholders involved. In 2016, Procedural standards were developed by a Working Group composed of the different regional child and youth services. **These were updated in May 2019**<sup>783</sup>.
- **Child Services Law, Sozialgesetzbuch (SGB VIII), Achtes Buch, Kinder- und Jugendhilfe, Section 44** (requirements for a foster care placement, e.g. approval of suitability).
- **Immigration law – Sections 7, 28 and following, Aufenthaltsgesetz (AufenthG)**<sup>784</sup>: In principle, a “privileged” family reunification is solely possible based on a parent-child relationship, which German authorities deny in case of a *kafalah*. In other cases, family reunification for “other dependants” (Section 28 (4) in conjunction with Section 36) with other family member such as grandparents, uncles/aunts rely upon strict conditions (e.g. lived relationship in the State of origin being equivalent to a family bond, case of hardship<sup>785</sup>). The exact legal basis will depend on the case and country in question.
  - For countries that do not recognise adoption but have ratified the 1996 Hague Convention, the legal basis for access and residence rights is **§ 7 (1.3) in conjunction with article 33 of the 1996 Hague Convention**.
  - For countries that do not recognise adoption and have not ratified the 1996 Hague Convention, the family reunification rules according to **§ 28 (4)**<sup>786</sup> or **§ 29 (4)**<sup>787</sup> in conjunction with **§ 36 (2)** may be applicable (for reunification with other family members).
  - For countries said to have a dual system<sup>788</sup> recognising adoption or a placement interpreted as a “weak” adoption in light of German law<sup>789</sup>, a cooperation among adoption authorities might be possible and the residence permit might be able to be based on adoption procedures. The initial *kafalah* decision considered equivalent to a “weak” adoption can subsequently be converted into a full adoption according to Section 3 (1) of the Act on the Effects of Adoption (*AdWirkG*). However, this approach has no consensus among the German contacts consulted for the present factsheet. In order for a cross-border placement to have the effects of an adoption as per the *AdWirkG*, Section 2 (2) of the 1993 Hague Convention needs to be complied with, which is usually not the case for a *kafalah* placement – even if it is called adoption in some countries – due to the lack of an established parentage and the lack of parentage modifications.
- **Case law:** Federal Administrative Court (*BVerwG* Urt. V. 10.3.2011 – 1 C 7/10 – VG Berlin; *BVerwGE* October 2010 – 1 C 16.09 OVG 3 B 8.07)<sup>790</sup> on the necessity to comply with the consultation procedure of the 1996 Hague Convention.

### Competent authorities

- **Central Authority (CA) designated under the 1996 Hague Convention:** *Bundesamt für Justiz – Zentrale Behörde für internationale Sorgerechtskonflikte* (Federal Office part of the Federal Ministry of Justice)<sup>791</sup> in charge of facilitating communication and referrals between Foreign and German competent authorities (article 6 IFLPA).
- **Regional Child and Youth Services** (*Landesjugendämter*) to provide consent on the placement via the consultation procedure (see below in procedure).
- **Immigration authorities** (*Ausländerbehörde*) have to consent equally to the envisaged placement while the final consent is to be granted by the *Landesjugendamt*.
- **The competent Family Court** needs to approve the consent given by the Regional Child and Youth Service in conjunction with the Immigration authorities.

**Recognition & enforcement**

According to the IFLPA, a cross-border *kafalah* is dealt with as a **cross-border placement**. As per a working document prepared by the working group composed of different regional child and youth authorities in 2016<sup>792</sup>, the German law considers *kafalah* placements as akin to a **long-term foster care placement combined with the guardianship of the child**.

In some cases, *kafalah* can also be comparable to kinship care (Section 33 SGB VIII *Kinder – und Jugendhilfe*) if there is a kinship relationship between the persons involved.

**Responsibility of the local Child and Youth Service to follow-up** on the child placed in care in Germany.

**Possibility of national adoption:** after two years of taking care of the child, there is a possibility for *kafil* parents to file a request for a national adoption to the German Court. In such cases, the Court will take into account the opinion of the local Child and Youth Services.

**Status of the child**

In principle, the child will have a temporary residence permit that can progressively be prolonged until it becomes permanent. Entitlements to social services, health insurance and other basic services appear to be ensured.

The German embassy in Morocco has developed a document<sup>793</sup> concerning the granting of a visa for a child placed under *kafalah* in Germany. The document contains a list of required documents to obtain a visa for Germany in accordance with article 7 of the *Aufenthaltsgesetz (AufenthG)*: “In order for a visa to be issued in accordance with the third sentence of paragraph 1 of Article 7 of the *Aliens Residence Act (AufenthG)*, it is necessary that the procedure laid down in Article 33 of the *Hague Convention*, in conjunction with articles 45 to 47 *IFPLA*, has been complied with (...). As *Central Authority*, the Moroccan Ministry of Justice establishes contact, with the competent German regional youth and child service (*Landesjugendamt*). The latter must approve the proposal, after receiving the approval of the competent Family court (art.45-47 *IFPLA*). Only then can the Moroccan court decide on *kafala* placement abroad.”

**Procedural requirements****A) Cross-border placement from a contracting State of the 1996 Hague Convention**

The consultation procedure in line with the 1996 Hague Convention is determined by Sections 45 – 47 of the Act to Implement Certain Legal Instruments in the Field of International Family Law (*IFLPA*). The exact process is detailed in a scheme (Annex 1) of the 2019 Procedural standards<sup>794</sup>. In addition, the *Bundesamt für Justiz* has issued on its website several factsheets (*Merkblätter*)<sup>795</sup> regarding the consultation processes to be respected for a cross-border placement towards Germany and from Germany towards other countries of the European Union. Apart from providing procedural country specifics, specific forms and practical information are provided.

The regional Child and Youth Services (*Landesjugendämter*) can provide counselling and support to potential *kafil* parents. Further, *kafil* candidates are encouraged, prior to any decision abroad, to contact the competent German authorities (*Landesjugendämter*). **At minimum, the *Landesjugendämter* are to be notified by the candidates of their *kafalah* project<sup>796</sup>.**

**1) A consultation request** needs to come from the competent authority (Court or CA) from the State of origin or the German CA, and be directed to the competent regional Child and Youth Service which is responsible for assessing the request and giving final approval to the placement after a positive answer from the immigration authorities. The consultation request shall include a report on the child and on the reasons behind the cross-border placement.

**2) Extent of the assessment of the consultation request as per Section 46 IFLPA:** Section 46 (1) “Consent to the request should as a rule be granted where: **1.** carrying out the intended placement in Germany is in the best interests of the child, in particular because he or she has a particular connection with the country; **2.** the foreign agency has submitted a report and, to the extent necessary, medical certificates or reports setting out the reasons for the intended placement; **3.** the child has been heard in the proceedings abroad, unless this appeared inappropriate on the ground of the child’s age or degree of maturity; **4.** the consent of the appropriate institution or foster family has been given and there are no reasons telling against such placement; **5.** any approval required by the law governing aliens has been given or promised; **6.** the issue of assumption of costs has been dealt with.”

The regional Child and Youth Service can request further information on the child’s social situation as well as on the child’s welfare and best interests. As noted, one of the pre-conditions for providing consent is the reception of an approval from the competent foreign authority, being a necessary pre-requirement for the later granting of the visa. This approval is non-binding as the relevant consulate/embassy has discretionary power for granting a visa. A preliminary consent is provided by the regional Child and Youth Service.

**3) Approval by the Family Court (Section 47 in conjunction with Sections 12 (2) and (3) IFLPA):** The consent given by the regional Child and Youth Service needs to be formally approved by a Family Court at the *Oberlandesgericht*.

<p><b>Procedure requirements (continued)</b></p>	<p><b>4) The decision provided by the regional Child and Youth Services</b> can be of different nature, e.g. simple approval of the intended placement; conditioned approval (the requirements of Section 46 need to be demonstrated) or refusal of the placement request. The decision is communicated to the requesting entity in the State of origin, the German CA, the local Child and Youth Services and the candidates themselves. The latter are informed of the need to comply with the requirements for a foster care placement according to Section 44 SGB VIII. For that purpose, the candidates' suitability is assessed by the Child and Youth Services, who will determine whether the conditions for a placement are met in the specific case (necessity of the cross-border placement as per the information shared by the State of origin; suitability of the caregivers). The result of this assessment should then be made available to the foreign competent authority/court. The candidates need also to prove that they are in possession of sufficient financial means, as well as health insurance.</p> <p><b>5) Kafalah placement pronounced by the competent Court/authority in the child's State of origin.</b></p> <p><b>6) Visa application</b> at the German Embassy in the given country (e.g. Morocco). In case of the German Embassy in Morocco, an information leaflet is shared with the required documents, including all the documents indicating the procedures followed in Morocco (report on the motivations and justifications behind the placement approved by the Moroccan court; <i>kafalah</i> decision pronounced after the approvals by the German stakeholders) as well as the procedures in Germany (proof of the approval regarding the <i>kafalah</i> placement provided by the regional Child and Youth services and confirmed by the Family Court, a travel health insurance for the child, etc.).</p> <p><b>B) Cross-border placement from non-contracting States</b></p> <p>Little practical information is available on proceedings in case of cross-border placements in case of non-contracting States. As per German contacts, while there is little information available, German authorities will equally ensure that the conditions for the cross-border placement are being respected. It is assumed that the German diplomatic mission would be first contacted with such a request, and might turn to the competent German Child and Youth Services to verify whether they have been previously involved in the placement request.</p>
<p><b>Follow-up and end of provision care</b></p>	<p>According to Section 33 SGB VIII, a long-term foster care placement is described as a permanent form of living. It is not clear whether the placement ends at the child's 18th birthday or whether the placement can prolong its effects beyond the age of 18.</p> <p>As shared by German contacts, there is little information available but in principle an adoption is being requested at some point, creating a parentage relationship that is solely recognised as per German law, not in the child's State of origin.</p>

## ISS/IRC ANALYSIS

### The 'German approach' to *kafalah* holds various promising elements:

**Mandatory procedures** in compliance with the 1996 Hague Convention.

**The inclusion of cost issues** as a pre-condition for granting approval for the envisaged *kafalah* placement.

**Sensitisation efforts** of potential *kafil* parents and of professionals:

- Publication of a warning on Website of the *Bundesamt für Justiz*<sup>97</sup> stressing the non-applicability of adoption provisions (March 2019).
- Information leaflet elaborated by the German embassy in Morocco (see above) on the required procedure in order to obtain a visa for Germany based on the compulsory consultation procedure.
- Country-specific Factsheets on how to apply the 1996 Hague Convention as well as the Brussels II bis Regulation for a cross-border placement towards Germany as well as other EU Member States.

**Challenges to be addressed:** The following challenges were able to be detected regarding the recognition and enforcement of *kafalah* in Germany.

#### **Legal and policy frameworks:**

**Inadequacy of immigration rules:** it is problematic that the families concerned (except for those from Morocco) have no possibility to legally constitute a family unit in Germany with a child placed under *kafalah*. This might lead to circumvention attempts. What poses particular challenge for the comprehensive application of the Convention is the fact that there is no legal basis for a right of residence for children placed under *kafalah* as opposed to children benefitting from intercountry adoption<sup>98</sup>. A solution would be to have a similar regulation also for cases of cross-border placement of children with a "foster family" so that the child would have a right to obtain a residence permit, at least in cases where the consultation procedure has been duly carried out.

Inherent to the nature of *kafalah*, it is not fully clear whether according to German law the placement ends at the child's 18th birthday or whether **the placement can prolong its effects beyond the age of 18**.

**ISS/IRC ANALYSIS (CONTINUED)****Practical implementation:**

**Non-compliance with the 1996 Hague Convention and national law provisions and existence of illicit practices and situations of “*faits accomplis*”:** various situations could present: **1)** Due to the fact that it is extremely difficult to obtain a residence permit for the children, they often are taken to Germany illegally, circumventing the residence law provisions. This situation is especially detrimental to the concerned children — the children may live in Germany illegally and, additionally, the placing entity in the State of origin cannot evaluate (or obtain an evaluation) whether the living-circumstances in Germany are suitable for the child and whether the placement in Germany is in the best interests of the child. **2)** Even if the child is not yet on German territory, the regional child and youth services are often informed about the *kafalah* placement once the decision has been made in the State of origin. As per the 2019 standards, it is extremely difficult to comply with the consultation procedure of article 33 of the 1996 Hague Convention *a posteriori* in order to “cure” situations contrary to the established standards. Such “curing” would indirectly entail a circumvention of established rules.

**Limping parentage and other disadvantages for the child:** Some of the regional child and youth services have the tendency to give their approval even *a posteriori* as they consider there would otherwise be serious disadvantages for the child. For instance, if his or her entry to Germany is refused, in the State of origin, the child is legally considered to be the child of the *kafil* parent, therefore making an admission in a residential care institution or a new placement with another *kafil* family impossible. However, in Germany, the child’s placement with the *kafil* is not legally effective. Such a “limping legal relationship” poses considerable problems with regard to the best interests’ of the child. Consequently, attempts are made to legitimate the placement retrospectively. In case a family bond has already developed, this is usually successful.

**Procedural hindrances and difficulties linked with a subsequent adoption:** The subsequent adoption of a child living as “foster child” in Germany might also lead to the creation of “limping parentage”, yet in some instances courts have legitimised adoptions based on considerations of best interests. Indeed, the respect of the domestic adoption procedure might present many difficulties. The declaration of consent from the birth parents cannot be submitted given the prohibition of adoption in many countries of origin. If the birth parents are still alive, according to German law, they would have to travel to Germany to give their consent. However, no visa is granted just for the purpose of a hearing. The fact that the child was probably declared to be an “abandoned” child in the State of origin before the *kafalah* was issued (which can be proved by means of a certificate of abandonment) does not help the fact that the German authorities require birth parents’ to be heard in person. Especially for unwed birth mothers who kept the birth of their child secret and therefore relinquished or abandoned the child for *kafalah*, such hearing obligation could have serious implications for them<sup>799</sup>.

**Discretionary power of diplomatic missions** to deliver a visa based on their own interpretation of legal provisions in the State of origin and in Germany. Consequently, intercountry adoption visas might in practice be delivered.

**Cooperation:** As per answers from German stakeholders, the cooperation with some of the States of origin is described as positive. Depending on how narrowly they interpret the prohibition of adoption, intercountry adoption procedures via “simple” adoptions might be possible. **ISS/IRC is concerned by this situation which in the light of “official prohibitions” as well as divergent “interpretations” by some actors within the State of origin, might lead to heterogeneous and illicit practices.**

**RECOGNITION AND ENFORCEMENT OF KAFALAH IN ITALY<sup>800</sup>****General situation**

Migrations from foreign countries are growing more and more, and persons from Pakistan, Nigeria and Morocco follow the Romanian and Albanese communities, which remain the most consistent in Italy. In addition, the communities from Egypt, Tunisia, Algeria and Bangladesh, are also significant<sup>801</sup>. Further, there seem to be increasing movements of people for “family reasons”<sup>802</sup>. Given the consistence of such communities and those increasing movements for family reasons, the application of *kafalah* should not be underestimated.

Interactions between Italian and Islamic law are nowadays unavoidable but remain challenging for legal experts and practitioners<sup>803</sup>. Migration is a gradually evolving phenomenon and can give birth to cultural and consequently legal conflicts<sup>804</sup>.

There is no official statistical data on children under *kafalah* either before the entry into force of the 1996 Hague Convention, nor after that date. It appears however that most issues relating to the recognition of *kafalah* in the Italian legal order firstly concerned minors entrusted to foreign citizens residing in Italy.

To fully understand the situation in Italy with regard to *kafalah*, it is important to distinguish the situation prior and post-ratification of the 1996 Hague Convention:

- **Pre-ratification until 2016:** Recognition of *kafalah* in the Italian legal system, was mainly based on needs of immigration law and freedom of movement within the EU. Other issues faced by national courts related to the declaration of adoption of the children under *kafalah*, as well as the need to appoint a guardian and the grant of parental leave. These were requested to recognise the effects of *kafalah* and to qualify them according to the **national categories of children’s protection measures** in order to decide whether it may constitute a precondition for the specific request,
- **Post-ratification after 2016:** Full recognition and enforcement of *kafalah* in Italy but challenges remain (see below).

<p><b>Applicable laws &amp; policies</b></p>	<p><b>International framework:</b></p> <ul style="list-style-type: none"> <li>• Convention on the rights of the child (ratified in 1991)<sup>805</sup> and the 1996 Hague Convention (ratified by Law 18 June 2015, n. 101 and in force since 2016)<sup>806</sup>.</li> </ul> <p><b>National framework:</b></p> <ul style="list-style-type: none"> <li>• <b>Full recognition of <i>kafalah</i> with challenges in practice:</b> Overall, the Italian legal framework does not provide clear rules on <i>kafalah</i>. However, the provisions of the 1996 Hague Convention, imply that <b><i>kafalah</i> must be fully recognised and enforced.</b> <ul style="list-style-type: none"> <li>– <b>1996 Hague Convention States:</b> Decisions pronounced in countries that have ratified the 1996 Hague Convention are fully recognised in Italy according to the Convention's provisions.</li> <li>– <b>Non-contracting States:</b> Application of Italian private international law rules (art. 42 of Law n. 218/1995 governs protection measures of children and (still) refers to the 1961 Hague Convention<sup>807</sup>.</li> </ul> </li> <li>• <b>Case law</b> should be distinguished between prior and after the entry into force of the 1996 Hague Convention (see, <i>Family reunification/Recognition &amp; enforcement/Status of the child</i> sections below). Italian case law has long filled a void in the domestic legal system due to the delay the country had in ratifying the 1996 Hague Convention. However, there is currently no case law available concerning <i>kafalah</i> placements undertaken under the 1996 Hague Convention. Despite the fact that decisions have been issued since the entry into force of the Convention (1 January 2016), those cases concerned circumstances that occurred before this date.</li> <li>• <b>Immigration law:</b> <ul style="list-style-type: none"> <li>– <b>Decreto legislativo 25 July 1998</b> (also called <i>Testo Unico sull'immigrazione</i>), addresses the possibility of family reunification (articles 28 and 29). Article 29 permits third country nationals, when they are Italian residents, to obtain family reunification with minor children, specifying that "<i>children adopted or fostered or subject to guardianship are all equally qualified as children</i>".</li> <li>– Prior to the ratification of the 1996 Hague Convention, a differentiation was made between situations where the child was entrusted through <i>kafalah</i> to: 1) foreign citizens who were Italian residents; and 2) Italian or European citizens. (see <i>Family reunification/Recognition &amp; enforcement/Status of the child</i> sections below).</li> <li>– <b>Decree of 6th February 2007, n. 30</b>, art.2, lett.b and art.3 which enacts and enforces the 2004/38/CE Directive.</li> </ul> </li> <li>• <b>Legge n° 218 del 1995 on private international law</b> for the recognition of decisions/acts from non-contracting States and the acquisition of nationality (arts. 41, 42, 64 ff.)</li> </ul>
<p><b>Competent authorities</b></p>	<ul style="list-style-type: none"> <li>• <b>Central Authority designated under the 1996 Hague Convention:</b> Presidency of the Council of Ministers, which to date has not been involved in any proceedings concerning children under <i>kafalah</i>, lacking official sources.</li> <li>• As per Italian case law, <b>public administration (Ministero dell'Interno), consulates or embassies</b> are involved when dealing with family reunification, as well as administrative or ordinary judges, whereas in other cases, depending on the specific matter, <b>national judges from ordinary or juvenile courts</b> are involved.</li> </ul> <p>NB: According to local contacts, it would be necessary to gather the experience of various juvenile courts in order to be able to provide a comprehensive overview of case-law practice.</p>
<p><b>Family reunification</b></p>	<p>In the last decades, the Italian case law has evolved in its interpretation of immigration provisions regarding family reunification and their applicability to situations such as <i>kafalah</i>. This evolution followed in particular a series of refusals of visa applications by the Ministry of Foreign Affairs for <i>makfoul</i> children in care of Italian citizens (see below). In this context, debates arose about the fact that these refusals could constitute a form of discrimination against Italian citizens (as opposed to the treatment granted to Italian residents of foreign nationality). The refusals had been prompted by the assumption that they were disguised intercountry adoptions aimed at circumventing the applicable rules. A landmark decision of the Italian Court of Cassation in 2013 determined the principles and criteria in this area (n. 21108 of 9 September 2013).</p> <p><b>From a restrictive interpretation towards a larger interpretation of the applicable family reunification rules (article 29 of Decreto legislativo 25 July 1998):</b></p> <p>It was in regard to family reunification cases of children entrusted to a foreign citizen (mainly from the above-mentioned communities residing in Italy) that the issue of the recognition of <i>kafalah</i> in the Italian legal order was raised for the first time<sup>808</sup>.</p>

## Family reunification (continued)

It is at this crucial stage that there were different interpretations of the provisions of *Testo Unico sull'immigrazione*. In fact, a restrictive interpretation of article 29 excludes the possibility of including *kafalah* in the notion of family reunion. On the other hand, looking at the rationale of the same article, the recognition of different kinds of relationship defined as para-parental could be certainly granted once it is proved that their effects are the same as other arrangements provided by the law and more generally by the whole Italian legal order<sup>809</sup>. Therefore, several courts of first instance have in fact stated that *kafalah* should be recognised on the grounds that the concept of adoption and custody cannot be solely considered in light of the internal law, but must be interpreted taking into account foreign institutions which produce similar effects<sup>810</sup>.

In 2008, the Italian *Corte di Cassazione*<sup>811</sup> applied an interpretation of the norms contained in the *Testo Unico sull'immigrazione* which was respectful of the constitutional principles, to avoid discriminatory effects. In particular, according to the Supreme Court, judges should balance the child's need of protection (which has been already considered superior<sup>812</sup>) with the exigence of a democratic defence of the State's borders<sup>813</sup>. In addition, an *a priori* exclusion of the arrangement's recognition in the context of family reunification would penalise minors coming from Islamic countries where *kafalah* is considered the most common means of custody for children. Finally, as a private international law problem, the Supreme Court preferred to classify *kafalah* as a hybrid institute, considering that there are many shared characters with custody but it usually lasts until the minor has reached adulthood<sup>814</sup>.

Case law seems to have overcome some initial reticence of the Public Administration (*Ministero dell'Interno*) giving reasonable certainty to professionals working in the field of family reunification<sup>815</sup>. These professionals can now rely on the fact that under this legal provision, cases of minors under *kafalah*<sup>816</sup>, or cases requiring assistance, whether moral or economic<sup>817</sup>, are included — as in both cases custody was given through a measure by the competent protection authority or at least has been subject to approval of that authority. This seems also in line with the prevalent doctrine<sup>818</sup>.

### Application of family reunification to Italian/European citizen residing in Italy:

In 2010, the Italian Court of Cassation addressed for the first time the request for family reunification submitted by an Italian citizen (of Moroccan origin)<sup>819</sup>. The Court denied the admissibility of *kafalah* as a ground for family reunification, based on a restrictive interpretation of the notion of “family member” under art. 2, 156et. B of Legislative Decree of 6th February 2007, n. 30, and instead, claimed the application of the national legislation on intercountry adoption. The relationship created by the *kafalah* institute would not amount to a family relationship that could be sufficient grounds to request a reunification as conceived at European level<sup>820</sup>. In its ruling n. 21108 of 2013, however, the Joint Division of the Italian *Corte di Cassazione* admitted the entrance in the national territory of a child entrusted under *kafalah* to an Italian citizen residing in Italy<sup>821</sup>. Before this decision, there was no clear precedent on the possibility to guarantee family reunification under articles 2 and 3 of the Legislative Decree of 6th February 2007, n.30<sup>822</sup>, which enacts and enforces the 2004/38/CE Directive<sup>823</sup> when the foreign minor is in custody of an Italian or European citizen that is not his or her parent.

Indeed, the Italian Supreme Court's Joint Division has expressed that “*The nihil obstat to the entry in Italy requested in the interest of a minor, non-EU citizen, in custody of an Italian citizen domiciled in Italy with a decision of kafalah placement pronounced by the foreign judge whenever the minor is in charge of or lives together in the State of origin with the Italian citizen or serious reasons of health impose that the minor should be personally assisted by the latter*”.

Subsequently, in 2015 the Court of Cassation<sup>824</sup> has linked the recognition of *kafalah* to the right to family reunification, including in cases of: minors in custody by virtue of a judicial decision from the competent authority in the minor's State of origin, and minors in custody as a consequence of an agreement between the caregiver and their parents only to the extent that such agreement has been approved by the competent authority for the protection of minors, whether judicial or administrative.

### Makfoul child as “descendent” of *kafil* parents according to EU law?

When instructing Member States on the correct application of 2004/38/CE Directive, the European Commission stated that minors in custody need to receive the same consideration as sons and daughters<sup>825</sup>.

Despite this, the *Sezioni unite* (Court of Cassation, United Sections) had a more restrictive approach and considers that a child placed under *kafalah* could not be considered a “descendant” within the meaning of the notion used in 2004/38/CE Directive. This is due to the notion implying a parental relationship, either biological or derived from a legitimising/full adoption (*adozione legittimante*). However, in 2017, the Court of Cassation affirmed that an agreement reached by the parties establishing *kafalah*, then approved by the competent authority of the State of origin of the minor, shall be fully recognised into the Italian legal order for the purposes of the family reunification according to the Legislative Decree n. 30/2007<sup>826</sup>. **What remains unclear, until now, is the rule of D.lgs. n.30 del 2007 that may ground family reunification of minors in custody by virtue of *kafalah*.**

### Family reunification (continued)

In its 16th September 2013 decision n. 21108, the *Sezioni unite* considered that, from the perspective of European law, minors in custody are considered as “other family members” for the purpose of art. 3.2 lett. a) of the 2004/38/CE Directive, that therefore allows reunification, if one of the following conditions is met: a) if the person is taken in charge or; b) if the person was a cohabitant in the State of origin (and also, probably, if the person was a cohabitant in the State of origin until the latter has come or come back to Italy) or even; c) in case serious health reasons impose the personal assistance of the person to be reunited. If duly followed, the suggestions of the *Sezioni unite* – independently of whether it is correct or not to consider minors taken care of under *kafalah* as “other family members” as opposed to considering them “sons and daughters” – may authorise the evaluation of the claims in order to distinguish between potentially abusive claims and situation of legitimate right of the primary caregiver of a minor.

In case of family reunification for relative placements, it seems difficult to deny a visa to the child when the conditions of art.3, c.2, 2004/38/CE Directive and D.lgs n.30 del 2007 are fulfilled<sup>627</sup>; in this case we would have a serious reason to consider a different approach, favoured by the European Commission, that consider the position of minors under a stable *kafalah* placement to that of sons and daughters. It would be important to consider whether the case of *SM (Algeria) (Appellant) v Entry Clearance Officer, UK Visa Section (Respondent) [2018] UKSC 9*, could potentially impact the above analysis (see Annex III).

### Recognition and enforcement

Apart from family reunification, the issue of *kafalah* is not restricted to visa and permits for children<sup>628</sup>, but should also deal with a foreign declaration that has to be transposed into the Italian legal order. Therefore, the challenge is to establish a regime guaranteeing a good balance between the respect of the minor’s national legislation and his or her best interests, evaluated *in casu*.

Prior to the 1996 Hague Convention, *kafalah* was likened to custody<sup>629</sup> or adoption depending on the competent judge, mostly in the frame of family reunification requests governed by immigration laws. For instance, the Supreme Court qualified *kafalah* as hybrid institute between custody and adoption<sup>630</sup>. This situation led to non-harmonised jurisprudence:

**Recourse to adoption provisions:** When requested to declare the adoption of a minor, national judges addressed the issue of the recognition of the effects of *kafalah* in the Italian legal order, as a condition for the declaration of the adoption. The analysis was concerned with the possibility of qualifying the *kafalah* regime like one of the national categories of protection of children, which includes the conditions to declare the adoption. According to some national courts, *kafalah* cannot be regarded as an adoption in peculiar cases (non-legitimising/simple) or a full adoption provided in Law 4th May 1983, n. 184, on the rights of the child to a family, because of the differences among the foreign and national institutes, and the risk of violating the State of origin’s legislation and creating limping situations<sup>631</sup>. Others considered the non-legitimising adoption the most suitable solution because such a qualification of *kafalah* was in compliance with the best interests of the child and allowed the continuity of the personal status<sup>632</sup>. The Court of Cassation indirectly affirmed the similarity of *kafalah* to the Italian adoption when stated that, in order to recognise the foreign judgment of *kafalah* of an abandoned minor, Law n. 184/1983 as recalled by art. 41 of Italian Law 31st May 1995, n. 218 on private international law, specifically dedicated to adoption, shall apply<sup>633</sup>.

**Recourse to custody rules:** In general, however, *kafalah* has been considered more similar to the regime of custody, as affirmed by the Joint Divisions of the Court of Cassation in 2013 cited above<sup>634</sup>. However, a jurisprudential reversal could be observed. Indeed, in 2018 the Tribunal of Mantova rejected a request, submitted by the child service office, for the **appointment of a guardian in favour of a minor**. The reasoning was that the legal guardianship was already entrusted to the Italian woman pursuant to the Algerian law as stated by the *kafalah* decision, which is fully enforceable in the Italian legal order pursuant to art. 65 ff. of Law n. 218/1995<sup>635</sup>.

As to the recognition of the foreign arrangement under the Italian private international law rules, the States concerned are not parties to the 1996 Hague Convention, and art. 42 of Law n. 218/1995 shall be applied because it governs protection measures of children (and not art. 41 on adoption decisions), which (still) refers to the 1961 Hague Convention<sup>636</sup>.

The comparison of *kafalah* to the custody regime was affirmed in relation to the **grant of the parental leave to the *kafil* mother**. In 2017 the Tribunal of Bergamo stated that the automatic recognition of the foreign judgment (pursuant to art. 65 of Law n. 218/1995 cited above), does not violate the national *ordre public* since *kafalah* was constituted on the basis of an agreement concluded before a notary and then approved by the judge, according to the foreign law in question. In light of the previous case law, the Tribunal confirmed the similarity between custody and *kafalah* that can thus be considered as a condition for the grant of the parental leave<sup>637</sup>.

**After the ratification of the 1996 Hague Convention: the ambiguity and parallelism with adoption seem to have stopped.**

**Status of the child**

The current Italian legal system allows the entry and legal permanence of a foreign child with their *kafil* parents without distinction on basis of the existence of family ties, precisely because the authorisation is based on the foreign placement decision – without that, it is necessary to refer to the de facto placement (*affidamento di fatto*). However, the possible effects of this recognition in the medium and long term (see above) remain to be understood. There are essentially three aspects concerning the longer-term effects:

1. The acquisition of family status;
2. The acquisition of “civitas” status; and
3. Legal permanence once the age of majority is reached (see below end of placement).

**Status “civitas”:** acquisition of Italian citizenship according to articles 64 and following of the *Legge n° 218 del 1995*. According to Italian laws<sup>638</sup>, it is possible to automatically attain Italian citizenship through adoption, but since *kafalah* is not exactly equivalent to adoption, it could be necessary for the *makfoul* child to spend some years in Italy to be a subsequently naturalised Italian. Nevertheless, it is considered that after the Italian ratification of the 1996 Hague Convention in June 2015<sup>639</sup>, a regime capable of adapting the Italian legal rules to those of the Convention seems all the more necessary. The Parliament confined itself to ratifying the Convention without adding rules in order to harmonise it with the national laws concerning minors. In addition to the above mentioned issues, given the fact that according to article 33 of the Convention communications between Central Authorities of the concerned countries are necessary<sup>640</sup>, the problem of the position of the Italian *Ministero dell’Interno* towards the institution of *kafalah* could be raised<sup>641</sup>. In fact, as underlined before, administrative authorities have always been suspicious in admitting *kafalah* into the Italian legal order. Finally, it must be considered that the competent authority has a duty of monitoring and must check the child’s integration in the extended family<sup>642</sup>. The necessity of implementing these rules in the Italian legal order remains an open matter.

**Acquisition of parentage with *kafil* parents:** The current Italian legal system does not cover this aspect, as provided for, for example, by the French Civil code. It currently allows two solutions for establishing parentage between the *kafil* parents and the *makfoul* child: one presumes the abandonment of the child; and the other uses the adoption rules in special cases, governed by article 44 letter d) of Law no. 184 of 1983.

**Procedure requirements**

Prior to the entry into force of the 1996 Hague Convention, the procedures applied were those of family reunification and the legal regime applicable to the case under the Italian legal order was determined by the competent judge (adoption or custody, see above). However, with the full recognition of *kafalah* in the Italian legal order through the ratification of the 1996 Hague Convention, new procedures still need to be established with the involvement of the 1996 Central Authority.

**Follow-up and end of provision care**

The Italian Supreme Court considered that *kafalah* presents many shared characters with custody, but, contrary to custody that usually is temporary, *kafalah* lasts until the minor has reached adulthood<sup>643</sup>. The 1996 Hague Convention was enforced however it lacked any provisions establishing the legal status of the child under *kafalah* living in Italy. Hence, the recognition of the effects of *kafalah* in the Italian legal order is still the main issue that needs to be addressed by the Italian legislator<sup>644</sup>. Nonetheless, whether or not the decision or agreement establishing *kafalah* is fully recognised in the Italian legal framework, the conditions provided therein should be respected.

According to local contacts in Italy, administrative case law has recently made significant progress (information shared in February 2020), allowing the issuance of independent residence permits to the child (not linked to the *kafil* parents nor the placement) as well as the granting of a residence permit for various reasons, including in the case of a “*de facto*” placement. It would therefore seem that there are no difficulties in this regard for a child placed in *kafalah*.

## ISS/IRC ANALYSIS

### The 'Italian approach' to *kafalah* holds various promising elements:

It is observed that Italian case law has undergone a **significant evolution in relation to *kafalah* placements**. A major change has been the ratification of the 1996 Hague Convention. However, its exact implementation remains unclear.

### Challenges to be addressed:

#### Legal and policy framework

**Lack of appropriate legal framework and practical implementation:** Given the extensive existence of case law in relation to *kafalah* issues, there seems to be a real need to address matters of uncertainty and remedy the lack of harmonisation around the reception of *kafalah* in the Italian legal framework and the subsequent respect for rights of concerned children and families. It is of importance to determine comprehensive provisions on the recognition of *kafalah* and the legal regime applicable in Italy to the children under *kafalah* and to the caregivers with national implementing rules. This needs to be done without necessarily preventing bilateral agreements from being concluded to enhance State cooperation in these particular situations. Strengthened inter-governmental cooperation through Central Authorities could help gather and share essential information on the condition of concerned children. The main issue is that Parliament has simply transposed the 1996 Hague Convention into Italian law without considering the need for harmonisation with pre-existing national rules, and there is no specific regulation on *kafalah*. Indeed, the case of children under *kafalah* seemed to be subject to new regulations (also with regard to the family reunification procedures) in connection with the ratification by Italy of the 1996 Hague Convention in 2015 (in force since 1 January 2016). However, the Italian legislator eventually abandoned initial intentions to reform the system and, in the end, ratified the 1996 Hague Convention without drafting any of the implementing rules concerning the procedures and the legal regime of the children under *kafalah* and the caregivers that were initially considered necessary<sup>845</sup>.

**Lack of clarification of procedural steps:** A specific normative framework should address this lack of clarity and should also include the issue of acquisition of nationality. **Heterogeneous case law could be harmonised** via the adoption of a national substantive instrument that would address the exact integration of the 1996 Hague Convention into the Italian legal system.

#### Practical implementation

Given the **absence of qualitative and quantitative data** (and sources) of the number of children already in Italy through *kafalah*, their profile and the duration of their stay in Italy, there is still a need for a **consolidated understanding of the phenomenon**.

Further, it is essential that the exact roles and involvement of the 1996 Central Authority is being determined. This will be crucial as the tendency of the jurisprudence away from *kafalah* placements considered from an immigration perspective rather than through a child protection lens needs to be supported with strong child protection actors and solid procedures in place. While previously the focus lied upon immigration laws, with an intent to balance these with child protection needs, ISS/IRC encourages the country to put in place the necessary implementing rules to comply with its international obligations.

## RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN NEW ZEALAND<sup>846</sup>

### General situation

It is noted that New Zealand has had no experience with *kafalah* which are not of an intra-family nature. In the latter cases, over the last ten years, there have been a handful from countries such as Afghanistan, Egypt, Ethiopia, Iraq that have been finalised in the New Zealand Family Court.

### Applicable laws & policies

#### International framework:

- Convention on the rights of the child (ratified by New Zealand in 1993) and the 1993 Hague Convention (acceded to by New Zealand in 1999). New Zealand is not party to the 1996 Hague Convention.

#### National framework:

- **New Zealand Immigration Instructions** (<http://immigrationcentre.co.nz/wp-content/uploads/2018/05/Amendment-Circular-2018-07.pdf>)
- **Adoption Act 1955**<sup>847</sup>: especially section 17 (*Effect of overseas adoption*)
- **Adoption (Intercountry) Act 1997**<sup>848</sup>. Section 11 outlines when a convention adoption should be recognised.

### Competent authorities

International placements from countries outside of New Zealand involve:

- The **Oranga Tamariki** – Ministry for Children [Central Adoption Authority] is responsible for all cases that fall within the mandate of the 1993 Hague Convention or
- The **Family Court** is responsible for all other cases, including intra family placements including adoptions that fall outside of the 1993 Hague Convention (i.e. non contracting State).
- **Immigration authorities** are involved in terms of the granting of visas based on the decision of the Central Adoption Authority and of the Family Court.

<b>Recognition and enforcement</b>	<i>Kafalah</i> cases would need to be dealt with as an adoption according to New Zealand law through the Family Court as falling outside the 1993 Hague Convention. An adoption order would either need to be pronounced in the child's country of habitual residence or it would need to be a placement for the purpose of an adoption in New Zealand. For such placements, it would need to comply with section 17 of the Adoption Act 1955.
<b>Status of the child</b>	No status and no rights to domestic student entitlement or free medical assistance or habitual residence entitlement <b>unless the child is entering for an adoption</b> which will entitle the child to the same rights as any New Zealand citizen child, or <b>the child has been adopted overseas</b> . The child would enter New Zealand with a visitor visa valid for six months.
<b>Procedure requirements</b>	<p>The first approach for families asking that a <i>kafalah</i> placement be recognised (relative <i>kafalah</i> placement) would be an application to Immigration New Zealand for the purposes of <b>entry and an immigration status</b> for a child. However, New Zealand immigration requirements are that for entry and access to New Zealand citizenship or a permanent resident immigration status a <b>child must have been born to or adopted</b> by a New Zealand citizen or or a person with permanent residence immigration status. Therefore, in practice, immigration authorities would refer to the Family Court.</p> <p><b>For candidates exploring a cross-border <i>kafalah</i> placement into New Zealand before any formal decision:</b> According to legislation candidates would need to be evaluated as to their eligibility and suitability to parent a child not born to them. Given that they are likely to be relatives an education and preparation programme would be offered but not mandatory to attend. Candidates could make a direct application to the New Zealand Family Court for an adoption order for the child under Adoption Act 1955. <i>Oranga Tamariki</i> – Ministry for Children would be required to report to the Court and make a recommendation as to the granting of an adoption order. <i>Oranga Tamariki</i> would, according to best practice, seek a <b>child study report</b> from the child's State of origin in order to provide the Court independent information about the child's circumstances, background and need for an intercountry adoption. The application of the subsidiarity principle would need to have been evidenced and the child's voice, views, and opinion would also need to be sought. The Court may grant an <b>interim adoption order</b> and the child might then enter New Zealand in order that the placement is monitored and supported, and a second report prepared for the Court about the placement outcome.</p> <p><b>For <i>kafalah</i> placements, after the fact (candidates have arranged the placement in the State of origin without the intervention of New Zealand authorities):</b> Immigration authorities would not grant a visa to enter. As stated earlier, visas can only be granted if there is an adoption order. Therefore, candidates would need make an application to the Family Court without having been evaluated nor prepared, equivalent to a private adoption (prohibited under international standards). The court has the possibility to "convert" a <i>kafalah</i> placement into an adoption order despite both child protection measures not being legally the same and without the safeguards of the 1993 Hague Convention being complied with.</p> <p><b>Family reunification:</b> Another way of entering New Zealand from countries with legal systems based on or influenced by Sharia, include those who initially entered as refugees and have since become citizens. New Zealand domestic adoption has a link with citizenship legislation and if an overseas adoption legislation meets the criteria within section 17 of the Adoption Act 1955, an adopted child, under the age of 14 years, can be granted New Zealand citizenship by descent. In practice there are very limited family reunification arrangements through immigration requirements but are available for refugees who need to reconnect with their families.</p>
<b>Follow-up and end of provision care</b>	At 18 years of age the young person is considered to be independent, but the Adoption Act 1955 continues to allow adoption until the person turns 20 years. Guardianship ceases when a young person turns 18 and is considered independent.

## ISS/IRC ANALYSIS

**The following challenges need to be highlighted in the current New Zealand response to cross-border *kafalah* placements:**

### *Legal framework:*

It seems that the Adoption Act 1955 is being used to contravene the safeguards of the 1993 Hague Convention and the procedures put in place by the Central Adoption Authority. The Adoption Act 1955 was introduced post war for the adoption of children born to them in another country. It is now arguably being used for the "adoption" of children from countries which does not recognise adoption (i.e. filiation ties being severed and lack of inheritance rights etc.) and where safeguards such as respect of principle of subsidiarity, necessary consents, appropriate matching etc. are lacking. The Adoption Act 1955 does not have the safeguards and practical procedures in place to ensure that international standards of "intercountry adoptions" are complied with.

**ISS/IRC ANALYSIS (CONTINUED)****Implementation of the legal framework:**

In practice, the reality is that the procedure applicable to cross-border *kafalah* placements for the purpose of adoption is not followed. This is because it is difficult to confirm the identity of these children and their background, especially as some of the countries that these children are habitually resident do not have the frameworks in place to provide such proofs. Despite such challenges the court is nevertheless granting adoption orders in the “best interests” of the child. This can occur without hearing the child’s or the biological family’s views. An additional difficulty is the fact that the court is granting “adoptions” from countries which do not recognise adoption or have the proper safeguards to ensure that these comply with international standards. Some countries outrightly prohibit adoption. Fit and proper applications are likely not being processed in the court as there is likely a lack of independent information and limited proofs about the principle of subsidiarity.

**Legal status/rights of the child:**

Children benefit from the effects of an adoption in the short term and can enter New Zealand. However, in the long run, without proper safeguards in place, lack of consents, proper background checks, dangers of private arrangements, there are high risks of the discovery of illicit practices, lack of access to origins, etc. which arguably would outweigh any immediate benefits for the child.

**Cooperation:**

There is no systematic approach that allows for cooperation between authorities, as is the case for adoptions carried out under the 1993 Hague Convention.

**RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN NORWAY<sup>849</sup>****General situation**

As *kafalah* may vary significantly from country to country, and Norway has no experience of *kafalah* placement requests under the 1996 Hague Convention, it is difficult to identify general issues that might arise and each placement should be assessed on a case-by-case basis. However, if the placement is not considered voluntary and the parents have had their parental rights withdrawn, the placement may not meet the requirements for cross-border placements set out in Norwegian law.

**Applicable laws & policies****International framework:**

- Convention on the rights of the child (ratified by Norway on 26 January 1990 and in force since 8 January 1991)<sup>850</sup> and 1996 Hague Convention (ratified on 30 April 2016 and in force since 1 July 2016)<sup>851</sup>.
- Norway only accepts cross-border placements to and from countries that are members to the 1996 Hague Convention. For the 1996 Hague Convention to be applicable, the measure in question must be taken by “an authority”, see in particular Article 1(1) (a). Therefore, a placement after an agreement between private parties will not fall within the scope of the 1996 Hague Convention. Each case must be assessed according to the demands in the Convention and domestic law.
- The 1993 Hague Convention is not applicable in *kafalah* cases, as it does not produce legal effects as outlined in Article 2 (2). Adoptions are not carried out from countries with Sharia law, where adoption is not permitted. There have been cases where Norwegian authorities have rejected applications for adoption in such countries even when the child is already in Norway.

**National framework:**

- Voluntary cross-border placement in a foster home in Norway is regulated in the Norwegian Child Welfare Act Section 4 – 4a<sup>852</sup>. The Act sets out additional requirements to those given in Article 33, that have to be fulfilled before the Child Welfare Service can consent to a placement. These include, amongst others, that the placement must be voluntary, meaning that the parents and children over the age of 12 must consent to the placement, and that the child must have a valid residence permit. Further, the child must be heard.

**Competent authorities**

All requests for the placement of a child in Norway, in accordance with Article 33 of the 1996 Hague Convention, must first be addressed to the Central Authority, which is the Norwegian Directorate for Children, Youth and Family Affairs, Department of International Services<sup>853</sup>.

The Central Authority will forward the request to the Child Welfare Service where the potential “foster home” is located. The local Child Welfare Service is the competent authority in Norway to consent to cross-border placements made by other State parties to the 1996 Hague Convention (cf. the Child Welfare Act Section 4 – 4a).

<b>Recognition and enforcement</b>	<p>According to Norwegian legislation, a <i>kafalah</i> is dealt with as a foster care placement.</p> <p>The only way a <i>kafalah</i> placement can be made in Norway in co-operation with Norwegian authorities is if it fulfils the requirements for a cross-border placement set out in Article 33 of the 1996 Hague Convention and Section 4-4a in the Child Welfare Act.</p>
<b>Status of the child</b>	<p>The child will need to have a Norwegian residence permit before the Child Welfare Service can consent to a placement in Norway. The Child Welfare Service can, if necessary, assist in applying for such a permit. It is up to the immigration authorities to assess whether a permit can be given in the specific case.</p> <p>It is important to note that a consent from the Child Welfare Service to the placement must be given before the child is physically placed in a "foster home" in Norway. If the child is physically placed in a home before a request for a cross-border placement is sent, the mandatory procedure in the 1996 Hague Convention (article 33) will not have been followed. It is a legal requirement that this procedure is followed for the Child Welfare Service to be able to consent to a placement (cf. the Child Welfare Act Section 4 – 4a).</p>
<b>Procedure requirements</b>	<ol style="list-style-type: none"> <li>1) The contracting State where the child is to be placed from must send a request to the Norwegian Central Authority stating the grounds for the placement, together with a report regarding the child (cf. Article 33 of the 1996 Hague Convention). The request must be for a specific home. Norwegian authorities will not assess different options for a "foster placement". However, a State may, in accordance with the 1996 Hague Convention, request Norwegian authorities to provide a report on a possible foster parent before a request for a placement is made. Such assessments before cross-border placements are only done upon requests. If the Child Welfare Service consents to a placement in Norway, the foster home will be prepared as any other foster home in Norway would.</li> <li>2) The Central Authority will forward the request to the local Child Welfare Service in question. It is up to the Child Welfare Service to assess whether the legal requirements for the placement are met, and to give their consent to the placement. Before such a consent can be given, the child must have gained a residence permit. The Child Welfare Service can apply for such a permit if necessary, as previously mentioned.</li> <li>3) An agreement regulating the supervision of the home, the follow-up of the child and the allocation of costs relating to the placement, must be in place between the Child Welfare Service and the authorities requesting the placement before the Child Welfare Service can consent to the placement (cf. the Child Welfare Act Section 4 – 4 a). 4) The Central Authority will assist in the communication between the Child Welfare Service and the requesting authorities.</li> </ol> <p><b>Other situations:</b></p> <p>In some instances where a cross-border placement in accordance with Article 33 is not possible, a transfer of jurisdiction in accordance with Article 8 and 9 of the 1996 Hague Convention might be a possible solution to secure a placement in Norway, if this is in the best interest of the child. This can only be done from Member States to the 1996 Hague Convention.</p> <p>A private placement could also be a possibility, where the person(s) wishing to care for the child in Norway gets the parental rights/care of the child/guardianship of the child transferred in accordance with the law in the state where the child has their habitual residence, and the child afterwards re-locate to Norway. The new guardians will be responsible for the re-location and for applying for a residence permit etc. for the child. It will be up to the authorities in the State where the child has their habitual residence to assess what will be in the child's best interest in such cases, and the Norwegian Child Welfare Service will only be involved if there is a concern relating to the care of the child after a re-location to Norway. It is noted that there are no safeguards in for private <i>kafalah</i> placements specifically. If there are any concerns about a child's care situation it will be a case for the Child Welfare Service. If the child has no residence permit it will be a case for the immigration service. It is important to note that if the child has no residence permit, they will have limited access to public services in Norway, such as public health care and education.</p>
<b>Follow-up and end of provision care</b>	<p>A placement under Article 33 in the 1996 Hague Convention can only be made if a residence permit is obtained. With such a permit the child will have access to all services in Norway as any other child residing there. What happens when the child turns 18 will depend on the kind of residence permit/visa that has been granted.</p> <p>The Child Welfare Service can, if the child agrees, uphold any measures taken before the age of 18, or take other measures for the protection of the child, until the age of 23. This means that a child can remain in a foster home after turning 18, or the child can receive other measures from the Child Welfare Service, such as economic support and guidance, until the age of 23.</p>

## ISS/IRC ANALYSIS

### The 'Norwegian approach' to *kafalah* holds various promising elements:

It is encouraging that Norway deals with any cross-border *kafalah* placement via the 1996 Hague Convention mechanism. Further, the exact implementation of the 1996 Hague Convention mechanisms in Norway are characterised by various promising elements, notably that the Norwegian authorities consider it crucial to have agreement and clarity on essential elements such as the regulation of costs as well as the follow-up on the cross-border placement prior to providing its consent to the decision in the State of origin. Likewise, it is promising that immigration questions need to be resolved prior to agreeing to the placement. Further, the possibility provided by Norwegian legislation to prolong follow-up protection and support measures up to the age of 23 constitutes an important safeguard for concerned children and families.

### Challenges to be addressed:

From the information provided by the Central Authority designated under the 1996 Hague Convention, the country has little practical experience in terms of cross-border *kafalah* cases. In addition, little information is available about what actually happens once the child is on Norwegian territory. ISS/IRC encourages the country to put in place more safeguards to ensure compliance with the 1996 Hague Convention procedure prior to any placement decision.

## RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN SPAIN

### General situation

**Current context:** Given the increase in members of the **Moroccan community residing** in Spain and the close relationship with Morocco due to the geographical proximity between both countries, it is important to describe legally a *kafalah* placement originating in that country in order to be incorporated – or not – into Spain's legal system. Thus, the following analysis will focus exclusively on Morocco's *kafalah* system.

**Predominant cases:** *Kafalah* placements constituted in Morocco by Moroccan nationals or Spanish citizens and their subsequent transposition into the Spanish system, given that, in the first case, the Moroccan nationals have – or subsequently establish – their residence in Spain, and, in the second case, Spaniards go back to Spain with the child. In the past, it was common practice for *kafalah* placements to be dealt with through the adoption system. It is noted that Spain has faced some illicit practices by residents or nationals, who have tried to evade the established legal procedures.

**Statistics:** To date, to the best of ISS/IRC's knowledge, there is no recorded centralised statistics at federal level in this field. However, there is significant case-law, which reflects the existence of Moroccan *kafalah* placements and the challenges these generate at the legal level, amongst others.

### Applicable laws & policies

#### International framework:

- The 1996 Hague Convention (in force in Spain since 1 November 2011); and
- Spanish-Moroccan Agreement of 30 May 1997, signed in Madrid, on various aspects of cooperation<sup>554</sup> (hereinafter, the 'Spanish-Moroccan Agreement').

**NB: The interrelation between both legal instruments appears to be problematic**, according to some experts. The terminology '*cosa juzgada*' (*res judicata*) (Arts. 22.1 and 23), referred to in the Spanish-Moroccan Agreement is not clear given that, by definition, acts in non-contentious proceedings, such as *kafalah* decisions, never have this effect. It may be helpful to undertake a comparative analysis of both instruments that could leave the resolution of these articulation difficulties in the hands of the *favor recognitionis*<sup>555</sup>. According to Professor Marchal Escalona from the University of Granada, this principle may be referred to in order to defend the 1996 Hague Convention, which provides for a system of specific recognition in the child's best interests.

#### Domestic legal framework:

- Civil Code: Art. 22.1 – 2 on the acquisition of nationality; Arts. 173, 173bis and 176 on care; and Arts. 222ff on guardianship;
- Law 54/2007, of 28 December, on Intercountry Adoption, as amended by Law 26/2015, of 28 July, which reforms the child and adolescent protection system (hereinafter, the 'LIA'): Arts. 19.4 and 34<sup>556</sup> on the legal effects, in Spain, of decisions on child protection measures, which do not create parentage, granted by foreign authorities (as is the case with a *kafalah* measure);
- Resolutions issued by the General-Directorate for Registers and Public Notaries (hereinafter, the 'RDGRN'), which determine the effects of a Moroccan *kafalah* decision in the Spanish legal system (e.g. Resolution-Circular RCL 2006, 1652 of 15 July 2006, which sets out that a *kafalah* constitutes a similar situation to care or fostering under Spanish Law)<sup>557</sup>. The RDGRN must be interpreted in the light of the LIA;

<b>Applicable laws &amp; policies (continued)</b>	<ul style="list-style-type: none"> <li>• Organic Law 1/1996, of 15 January, on the Legal Protection of Children (Arts. 20 – 21bis);</li> <li>• Order of the General-Directorate for Immigration of the Ministry of Labour and Social Affairs (DGI/SGRJ/06/2007);</li> <li>• Law on Non-Contentious Proceedings of 2015;</li> <li>• Royal Decree 240/2007 of 16 February; and</li> <li>• Regulations of the Autonomous Communities governing care proceedings in Spain's 17 Autonomous Communities.</li> </ul>
<b>Competent authorities</b>	<p>Ministry of Justice (Central Authority in accordance with the 1996 Hague Convention)</p> <p>Public Child Protection Entities of the Autonomous Communities</p> <p>Spanish Consulates in the countries of origin, which grant the relevant entry visa. In these cases, a family reunification visa is granted; the latter is currently under review as a result of the Judgement of the Court (Grand Chamber) of 26 March 2019 in the case C – 129/18 SM.</p>
<b>Recognition and enforcement</b>	<p>A domestic <i>kafalah</i> resolution, declared in a foreign country, will have to undergo a process of 'incidental recognition' in Spain. This involves verifying that proper procedural requirements were met when the <i>kafalah</i> was declared. If the foreign <i>kafalah</i>, was granted by way of non-contentious proceedings, in order to take effect in Spain, a Spanish authority will need to be engaged, for the <i>kafalah</i> to comply with incidental recognition, depending on the effect sought (functional qualification).</p> <p><b><u>There are different possibilities to recognise and enforce a <i>kafalah</i> placement through the child protection measures of the Spanish legal system:</u></b></p> <p><b>Permanent foster care</b>, (including for relative <i>kafalah</i> placements). there are differences between a Moroccan <i>kafalah</i> and foster care in Spain. This is because the socio-familial commitment of the <i>kafil</i> in relation to the <i>makfoul</i> is higher (the same as a father would assume in relation to his son) than the one assumed by a foster family under Spanish law. This lack of equivalence in some functions may hinder the recognition of a <i>kafalah</i> placement as foster care. However, in the best interests of the child, it is worth transforming it into a protection measure that is as similar to <i>kafalah</i> as possible in the Spanish legal framework.</p> <p><b>Guardianship:</b> A <i>kafalah</i> placement cannot be likened to guardianship, as in Spain guardianship will initially lie with the judge who grants the order, until such time as it is transferred to the <i>kafil</i> parents by the Spanish judge (provided this has been requested by the <i>kafil</i>).</p> <p>If the child subject to <i>kafalah</i> is not an orphan, the birth parents maintain their legal role, another factor contributing to the reasons why <i>kafalah</i> cannot be compared to guardianship under Spanish law. Whilst a socio-familial commitment results from a guardianship order in Spain, it is not as strong as that which results from a Moroccan <i>kafalah</i>. In Spain, the guardian may be exempted from his or her functions <i>motu proprio</i> (on their own motion) through an application to the judge (Art. 248 of the Civil Code). With regards to a <i>kafalah</i>, the judge may – on their own motion or upon a request by the Public Prosecutor – determine whether or not to terminate the guardian's functions, without taking into account the opinion of the <i>kafil</i><sup>650</sup>.</p> <p>Judicial intervention in a legal <i>kafalah</i> is very important from the perspective of Spanish Law, as the recognition of some of <i>kafalah</i>'s legal effects in Spain depends of whether it was declared based on the intervention of a public judicial or administrative authority (as required by Article 23 of the 1996 Hague Convention, to which both Spain and Morocco are contracting States)<sup>659</sup>.</p> <p>Whilst <i>kafalah</i> cannot be fully compared to guardianship under Spanish law, it is appropriate to determine the solution that best benefits the child, i.e. to transfer the functions resulting from a child protection measure.</p> <p><b>Subsequent conversion into adoption:</b> Article 19.4 of the LIA prohibits the transformation of a <i>kafalah</i> into an adoption, given that 'in the case of children, whose domestic law prohibits or does not provide for adoption, the constitution of an adoption will be denied, except when the child is in a situation of deprivation of parental care and under the guardianship of the Public Entity'. The latter situation is provided for under Article 18 of the LIA, given that an adoption may proceed when the child is habitually resident in Spain at the time of the constitution of the adoption or when he or she will relocate to Spain in order to establish his or her habitual residence in this country<sup>660</sup>. Even though the Central Authority is aware that there have been some cases where an adoption has occurred, it is considered that <i>kafalah</i> is a child protection measure that differs from an adoption. Having said that, the limitation included in Section 4 of Article 19 of the LIA is operational whenever the child retains his or her nationality of origin, and would no longer apply if he or she acquires Spanish nationality<sup>661</sup>.</p>

## Status of the child

**Access to rights:** The rights of children in care are recognised in *kafalah* placements, as established in Article 21 of Organic Law 1/1996 of 15 January on the Legal Protection of Children.

**Visa/Residence permit on Spanish territory: Determining the legal immigration status** of the foreign child cared for under *kafalah*, and the conditions under which his or her visa request and the corresponding residency permit will be subject to, is one of the decisive issues in relation to the entry and stay in Spain. **Several elements** will be taken into account:

- the involvement – or not – of the child’s biological parents in the granting of the *kafalah* measure in Morocco;
- the nationality or legal residence of the *kafil* in Spain; and
- the family relationship between the *kafil* and the child. The combination of this variety of elements results in **three potential cases**:

**1. Intrafamilial *kafalah* by a *kafil*, who is a national of the European Union, the European Economic Area or Switzerland:** The first case arises from a *kafalah* constituted by the *kafil*, of Spanish nationality, who is a relative of the *makfoul*. This case allows the Moroccan child to request a visa and residence in Spain in accordance with the application of free movement rules, provided that the *kafil* is a national of the European Union, of the European Economic Area or of Switzerland, based on Royal Decree 240/2007 of 16 February<sup>652</sup> (hereafter, the ‘RD 240/2007’).

In particular, one must comply with the concept of extended family of Article 2 of the RD 240/2007, which considers that members of the family are the main members related to the holder, irrespective of their nationality, (spouse, registered partner, relative in the ascending line, relative in the descending line), who are with or will reunite with him or her. The degree of kinship is not specified, nor is the consanguinity or affinity, which opens the definition to any type of bond, such as that of an aunt or sister of the child subject to *kafalah*. In accordance with this provision, what is important is the family bond that they have, irrespective of whether the *kafil* is or is not the foreign child’s legal representative. Once the bond has been evidenced, in order to obtain a European residence card one of the following two circumstances must also be proven<sup>653</sup>: 1. that, in the State of origin, the child is ‘under their care’, thereby demonstrating the existence of economic dependence or that they live together; 2. that, on serious health or disability grounds, it is strictly necessary for the citizen of the European Union to assume the personal care of the family member. Ultimately, the *kafalah* measure is one more piece of evidence to take into account for the Spanish Administration, as the determining element is the family bond between the *kafil* and the child subject to *kafalah* in the above-mentioned terms, together with any of the other requirements.

**2. Extrafamilial and judicial *kafalah* (in relation to an abandoned child):** This is a legal status comparable to guardianship and the *kafil* is considered to be the child’s ‘legal representative’. The Order of the General-Directorate for Immigration of 27 September 2007 (DGI/SGRJ/06/2007) determined that a *kafalah* measure, which has been granted under the authority of a foreign public administrative or judicial body with a view to the protection of the child’s interests (and not directly constituted by the child’s biological parents), whereby Spanish national or foreigner resident in the country is considered the legal representative, who has assumed responsibility for the child<sup>654</sup>. Thus, the child’s transfer to Spanish territory acquires a permanent character and the foreign *kafil*, who resides in Spain, will have to process the visa on grounds of residence for family reunification, provided for in Article 17 of Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration<sup>655</sup> (hereinafter, the LOE)<sup>656</sup>. The same solution is applicable if the *kafil* is a Spanish national or a citizen of the European Union, who resides in Spain, given that the legislation of the European Union does not automatically recognise the right to free movement of persons subject to guardianship or representation (Art. 2 of RD 240/2007)<sup>657</sup>.

**3. Informal/notarial *kafalah*:** This relates to those children, who have been relinquished voluntarily by their parents to the *kafil*<sup>658</sup> without any intervention by a competent authority. The Spanish legal system does not approve these decision-making acts of the parents on the transferring of parental responsibility, nor is it possible for parents to hand over legal representation to the *kafil* and to obtain a family reunification visa for the child subject to *kafalah*<sup>659</sup>. That said, this does not mean that there is a total lack of validity for this type of *kafalah*. The Spanish Administration itself appears to accept such arrangement in the framework of temporary child displacement programmes for schooling, medical treatment, and holidays, provided that the other legal conditions are complied with. Thus, the request for a visa for a *makfoul* child is acceptable when his or her stay is not incumbent on the person exercising parental responsibility, in accordance with Articles 187 and 188 of Royal Decree 557/2011. The *kafil*, who wishes to seek this kind of visa will have to make a personal request to the Delegation or Sub-delegation of the Government, seeking a mandatory report, that is positive. The child’s visa will require evidence of an explicit authorisation to leave Morocco, which will have to be undertaken by those persons exercising parental responsibility. Additionally, the *kafil* must express, in writing, his or her willingness to return the child to his or her State of origin. This intends to avoid *kafalah* placements of convenience, created to evade the comprehensive entry and residence controls in Spain, based on the legislation relating to immigration.

### Status of the child (continued)

#### Acquisition of Spanish nationality

**Two options** arise when considering the acquisition of nationality for the child cared for under *kafalah*:

- Article 20.1.a of the Civil Code provides, ‘whoever is or has been subject to the parental responsibility of a Spanish national has a **right to opt** for Spanish nationality’. This possibility is only effective if the child has been adopted by Spanish nationals. Yet the Moroccan legal system does not allow the transfer of parentage nor creation of filiation through adoption. In fact, Spain’s Article 19.4 of the LIA prohibits the adoption *ex novo* of the *makfoul* before the Spanish judicial authorities when the child’s domestic legislation provides for it.
- In any case, when adoption is not viable, a second possibility arises for Moroccan *makfoul* child to acquire Spanish nationality – waiting for one year of legal residence in Spain, as provided for in Article 22.2.c of the Spanish Civil Code: [For the granting of nationality through residence], *the period of residence of one year of the person having been legally subject to the guardianship (under the supervision of a guardian), custody or care (by a Spanish national or institution) for two consecutive years will be sufficient, even though he or she remains in this situation at the time of the request*. Thus, the child subject to a *kafalah* measure can acquire his or her Spanish nationality via the shortened period of residence of one year, provided the *kafil* is a Spanish national and acts as the child’s legal representative. If these requirements are not complied with, the minimum required period of legal and continuous residence in Spain is 10 years<sup>870</sup>.

### Procedure

**The following main situations must be distinguished in terms of applicable law to the various situations:**

**1)** The rules established by the 1996 Hague Convention will be applied if the *kafalah* measure has been declared by an authority that is a party to this Convention, or to a bilateral agreement, whichever is most favourable, such as the Spanish-Moroccan Agreement on judicial cooperation in civil, commercial and administrative matters of 30 May 1997.

**2)** Articles 11 and 12 of the Law on Non-Contentious Proceedings of 2015 will be applied if the *kafalah* measure has been constituted by a non-contracting State to the 1996 Hague Convention or any other international instrument on this matter.

**3)** In the case of **judicial *kafalah* decisions**<sup>871</sup>, it is noted that the Convention – or agreement-based system – whether multilateral or bilateral – will be applied, whereas in **notary-declared and subsequently formally-registered *kafalah* decisions**, the autonomous Spanish legal system – i.e. the LIA – will be applicable<sup>872</sup>.

#### **Procedure for the recognition of *kafalah* in Spain:**

**1) The requirements of Article 34 of the LIA must be complied with.** For example, a notary-declared or private *kafalah* measure is subject to the requirements of Article 34<sup>873</sup>.

**2) An ‘incidental’ recognition must take place.** The Moroccan document, which constitutes the *kafalah*, must meet the formal requirements of authenticity, comply with the legalisation or apostille process, and be translated officially into Spanish, in order to avoid any forgery of documents. In particular, it must be ascertained that the *kafalah* measure does not have ‘effects that are obviously contrary to Spain’s international public order’. For example, this would be the case should the agreement refer to children whose parents are alive, without any prior judicial declaration of abandonment, or when it appears that consents were obtained by means of a monetary payment, including situations of fraud in the framework of the legislation relating to immigration, as previously mentioned.

**Enforcement of *kafalah* as per Spanish law:** the procedure described below depends on the method of transposition of the *kafalah* measure into Spain’s legal system.

#### **Permanent foster care:**

- **Assessment of the prospective “*kafil*”:** The preparation of psychosocial reports on the *kafil*(s) is incumbent on the public child protection entities of the Autonomous Communities, and it will therefore be necessary to seek that one of them to specify the procedure. A psychosocial report will be prepared, rather than a certificate of suitability as it concerns a protection measure that is different to an adoption.
- **Monitoring of the measure:** Article 174 of the Civil Code is applicable and provides for the following: *‘It is incumbent on the Prosecutor to supervise the guardianship, custody or care of children (...). The Prosecutor will have to check, at least every six months, the child’s situation, and will request before the judge the protection measures it considers necessary. 3. The Public Prosecutor’s supervision will not exempt the public entity of its responsibility in relation to the child and of its obligation to notify the Public Prosecutor of any malfunction that it identifies’.*

Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

<b>Procedure (continued)</b>	<p><b>Guardianship:</b></p> <ul style="list-style-type: none"> <li>• There is evidence that, when the children have been in Spain for some time, the prospective “<i>kafil</i>” often request ordinary guardianship before a Spanish judge.</li> <li>• <b>Assessment of the prospective <i>kafil</i>:</b> Article 241 of the Spanish Civil Code sets out the following requirements for prospective <i>kafil</i>, who request ordinary guardianship before a Spanish judge: ‘Those persons, who fully enjoy their civil rights and who are not subject to any of the incapacities established in the following articles [Arts. 243 – 245], may be guardians’.</li> <li>• <b>Monitoring of the measure:</b> In compliance with Spanish law, Public Entities will only intervene in cases, in which there is a situation of risk or lack of protection.</li> </ul>
<b>Follow-up and end of provision care</b>	<p>If the carers have ordinary guardianship, when the child becomes an adult with the nationality of his or her State of origin, he or she will have to apply for the corresponding residence permit as well as Spanish nationality.</p>

### ISS/IRC ANALYSIS

#### The ‘Spanish approach’ to *kafalah* holds various promising elements:

**Legal framework:** *Kafalah* is a child protection measure that is a very different protection measure from those regulated in the Spanish legal framework. Thus, finding a balance between the respect for the foreign legal framework applicable to *kafalah* and the principles/standards of Spanish Law remains complex. It is true that, for the Moroccan legal order, the ‘interests of the child subject to *kafalah*’ include his or her education in the Muslim faith and that the protection measure does not generate parentage. Thus, the Spanish legal framework has addressed the recognition of *kafalah* in the latest reforms to the LIA, making it impossible to declare an adoption *ex novo* for children, when it is prohibited by their domestic law. According to the surveyed Spanish actors, the decision-making process of the involved authorities in the protection of the child subject to *kafalah* must be based on a dual conscience, which depends on the various legal frameworks and different cultures relating to the child placed under *kafalah* – giving priority to the child’s best interests<sup>874</sup>, whilst at the same time avoiding any type of discrimination against children from States whose legal system is based or influenced by Sharia.

**Cooperation:** In order to strengthen domestic and international cooperation, the Ministries of Justice, Health, Consumption and Social Welfare, Foreign Affairs, European Union and Cooperation and Labour, Migration and Social Security are working on the development of a protocol for the implementation of the 1996 Hague Convention in *kafalah*-related matters, in particular with regards to the application of Article 33 to *kafalah* placements constituted in Morocco.

#### Challenges to be addressed:

**When the guardian/legal representative is in the State of origin,** the decision-making process becomes more difficult with regards to the child in care (e.g. in cases of serious medical intervention).

**Need for harmonisation:** The asymmetrical treatment of Moroccan *kafalah* in Spain may jeopardise the child’s interests, as there is no harmonised, unique solution, which is applicable by all the Spanish authorities to proceed to its recognition and enforcement<sup>875</sup>. Thus, when the child has no biological parents as they are unknown, deceased or have been deprived of parental responsibility, the *kafil* holds the child’s legal representation, and may therefore opt for reunification. In the other cases, given that the relinquishment of parental responsibility is not accepted by the Spanish legal framework, it is only possible for the child subject to *kafalah* to remain in Spain temporarily. It is true that, if there are family bonds between the child subject to *kafalah* and the *kafil* of Spanish or other European Union nationality, they would be eligible to qualify for the requirements relating to the extended family, irrespective of whether the Moroccan *kafalah* measure is declared by a notary or a Court. These disaggregated replies offered by the legal framework complicate the migratory process of children subject to *kafalah* to the Spanish territory and their legal and social integration in a new receiving State.

**Need for clarification:** It is necessary to clarify whether the procedure outlined in the Royal Decree 557/2011, is still applicable in case of a child under an informal *kafalah* arrangement.

#### Solutions to better monitor cross-border *kafalah*:

Some form of response must be incorporated for the elimination of the above-mentioned asymmetry provided that it is respectful of the Convention-related rules in force in the Spanish legal system, which establish the theory of extension of effects in compliance with the best interests of the child subject to *kafalah*, and which tend to promote stability, legal security and the child’s integration in a suitable family environment.

Therefore, it is key to ensure that the psycho-social assessment of the child is systematically undertaken prior to any decision in the State of origin, and to guarantee the follow-up of the placed child on Spanish territory, independently of the recognition and enforcement option within the Spanish domestic legal system.

In order to promote cooperation at international level, it would be adequate to translate the relevant Spanish legislation, in particular Article 34 of the LIA, for it to be known by the Moroccan authorities, and to evidence that Spain is aware of the measure of *kafalah*, and that the child’s best interests will be protected by this measure. Additionally, article 19.4 of the LIA, should be translated so that it can be taken into consideration by the Moroccan legal decision-maker or that of any other country, which determines a *kafalah* measure.

## RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN SWITZERLAND<sup>876</sup>

### General situation

Only a handful of cross-border *kafalah* cases registered in the following cantons: Basel (1 case, without prior authorisation), Zurich (no cases), Bern (1 case)

Cross-border *kafalah* appears to be most prevalent in the cantons of Vaud and Geneva. The Canton of Geneva processes *kafalah* cases from Morocco. According to the information shared, Geneva does not keep statistics on child protection measures taken under foreign law. At the time of drafting, two contentious cases related to cross-border *kafalah* were pending before the Court of Justice of the Geneva Canton (see below). They deal with the formal requirements related to the age of the candidates. In August 2019, the Central Authority of Geneva designated under the 1996 Hague Convention shared the following figures from the Swiss Authorisation and Monitoring Service for Placements of Children (Service d'autorisation et de surveillance des lieux de placement hereafter 'SASLP').

#### In International/Intrafamily Foster care ('Accueil familial') (Morocco only)

Children on Canton of Geneva territory with a residence permit (after prior authorisation of the placement)	2
Awaiting receipt of a request via the Moroccan Central Authority	1
Appeal pending before the Court of Justice against the refusal decision refusing by the Central Authority of Geneva (3 children)	2
Awaiting international <i>kafalah</i> (under review)	1

### Applicable laws & policies

**International framework:** Convention on the Rights of the Child (ratified by Switzerland in 1997)<sup>877</sup> and the 1996 Hague Convention (ratified by Switzerland in 2009)<sup>878</sup>.

#### National framework – distinction between contracting States and non-contracting States:

- **Contracting States:** Article 33, 1996 Hague Convention;
- **Non-contracting States:** Swiss Federal Act on Private International Law of 1987<sup>879</sup> (LPIL – SR 291): jurisdiction for child protection measures and recognition of foreign decisions on child protection (Article 85 paragraph 3 and 4), recognition and enforcement of foreign decisions (Articles 25 and following);
- **Civil Code of 1907 (CC – SR 210):** Substantive law for the placement of a child (particularly Articles 300, 307 and 316: authorisation of caregivers/"foster parents" called '*parents nourriciers*' for a placement under the supervision of the child protection authority designated by cantonal law); and
- **Ordinance of 1977 on Child Placement (OPE)<sup>880</sup>,** specifically Article 6 and following on the placement of a child of foreign nationality.
  - Article 6:
  - "1. A child of foreign nationality who has until then lived abroad may be placed in Switzerland with foster parents who do not intend to adopt the child only if there is an important reason.
  - 2. Foster parents must provide a declaration from a legal representative with jurisdiction under the law of the child's State of origin indicating the reason for the child's placement in Switzerland....
  - 3. Foster parents must agree in writing to care for the child in Switzerland as if the child were their own, regardless of the development of the foster relationship, as well as to repay the public authority any costs of caring for that child that the authority has incurred on their behalf<sup>881</sup>."
- A study of the host conditions and expert opinion, if any (Art. 7); pre-placement authorisation for a specific child and issuance of an enforceable visa by the *Service cantonal des migrations* [cantonal migration service]; obligation to announce the arrival of the child and any change in the placement conditions (Art. 8); supervised visits at least once a year (Art. 9).
- **Immigration laws: LEI Directives of the SEM (Section 5.4.2, excerpts)<sup>882</sup>:**
  - "When the child's state of origin is a party to the 1996 Hague Convention on the Protection of Children, the procedure provided in Article 33 of the Convention must be complied with (...);
  - **Procedure for hosting the child:** The conditions of the OPE and Article 33 of the Convention must be met. - If the biological parents have a residence (B) or establishment (C) permit in Switzerland or if the child from abroad is placed in Switzerland by order of or through a federal authority, the *Ordonnance sur le placement d'enfants* provides facilitated conditions for placement with foster parents in Switzerland (Art. 6b OPE) (...);
  - **Regulation on the Conditions of the Child's Stay (Art. 33, OASA)<sup>883</sup>:** Issuance of a residence permit to the placed child who is not up for adoption if the conditions of hosting stipulated by the Swiss Civil Code have not been met. In principle, the authorisation procedure is the same as the procedure for admission to Switzerland for the purpose of adoption [i.e. the evaluation of the suitability of candidates for placement and evaluation of the child's case by the competent cantonal authority]. The conditions of the *Ordonnance sur le placement d'enfants* (OPE) and Article 33 of the Convention are integral to granting an entry permit or assurance of a residence permit. (...); and

### Applicable laws & policies (continued)

– *Issuance of a residence permit to the placed child is subject to SEM federal approval (Article 99 LEI; Article 5 f Ordonnance DFJP)... Cantonal migration authorities must ensure that the provisions on the entry of placed children (Art. 33 OASA) are not evaded through the granting of residence permits to students (Articles 23 and 24 OASA). The purpose of Article 33 OASA is to provide the child with a suitable family and social environment. The child may be able to continue his or her schooling in Switzerland as a consequence of successful placement.*"

- **Case Law:** In May 2020, the Court of Justice of the Canton of Geneva delivered two judgments<sup>884</sup> regarding two situations of cross-border *kafalah* between Morocco and Switzerland in which the proceedings of the 1996 Hague Convention had not been respected. In both cases, couples who were Swiss residents of Moroccan nationality<sup>885</sup> welcomed children through *kafalah* via national proceedings in Morocco, after having (solely) indicated their Moroccan nationality and addresses to the Moroccan authorities. Despite their habitual residence being in Switzerland and their knowledge of the requirements of Swiss and international law, binding for both countries, Switzerland and Morocco, the couples in question welcomed children under *kafalah* in Morocco<sup>886</sup>, and requested subsequently the SASLP, as Central Authority in adoption and placement matters in the Canton of Geneva, to grant the adoption of their *makfoul* children or, alternatively, to authorise the placement within the framework of a *kafalah*. In both cases, these requests which were refused by SASLP. The refusal was motivated by the failure to comply with the 1996 Hague Convention procedure, as well as the age conditions<sup>887</sup> required for an adoption and reception of children in Switzerland<sup>888</sup>. This refusal was then confirmed by the Court of Justice for the two situations in question. The Court noted in particular that: "(...) *it is not admissible, particularly with regard to the principle of good faith and equal treatment in relation to persons willing to respect the rules applicable in Switzerland, to let others ignore – what appears more to be to ignore knowingly – Swiss law for a certain period of time, the time to forge close emotional ties with the children, then allow them to invoke these same bonds – developed without regard to the requirements applicable in Switzerland and the instructions given by the competent Swiss authorities – in order to benefit from the exception granted by Swiss law. The requirements of Swiss law do not apply according to the goodwill of each individual, in particular in a field as sensitive as that of the care of children, but must be respected by all, the interests of the child taking precedence and not necessarily being confused with that of adults wishing to have children.*" In relation to the obligation of *kafil* candidates to inform themselves on the necessary steps, the Court decided that: "*in this case (...), in order to ensure that they could bring children of Moroccan origin to Switzerland and take care of them, it was incumbent on them to obtain information from Swiss authorities before taking any steps in Morocco and to ensure that these steps are undertaken in compliance with the conventional and legal requirements applicable in Switzerland. (...). In fact, the children reside in Morocco, irrespective of Swiss law or the respect for the procedure provided for in art. 33 [of the 1996 Hague Convention], despite the cross-border nature of the request made to the SASLP.*"

### Competent authorities

**In cases where the 1996 Hague Convention applies:** Federal central authority<sup>889</sup> (receipt of the application from foreign counterparts and transmission to the cantonal Central Authority; support for the cantonal Central Authority and other authorities involved); **cantonal central authorities**<sup>890</sup> (application processing, transmission to the competent cantonal authorities if necessary; coordination with migration authorities); **cantonal authorities responsible for child placement** (evaluation of the host environment and granting authorisation for placement); **cantonal immigration services** (examination of conditions for granting a residence permit); **Secrétariat d'État aux migrations (SEM)** (support and control of positive decisions). Under Article 24 of 1996 Hague Convention, the competent authority (competent court for the recognition of a foreign decision or the child protection authority as the case may be) may also receive a request for recognition and enforcement of a placement abroad.

**In cases where the 1996 Hague Convention does not apply:** Cantonal authorities responsible for placement of children, cantonal immigration authorities, the SEM if applicable, competent child protection authorities or authority responsible for the recognition of foreign decisions.

Note: The cantonal authorities responsible for the placement of children are defined by cantonal laws.

## Recognition and enforcement

### Interpretation provided by some Swiss authorities: immediate application of the Swiss law considered applicable law for the enforcement of the measure

Under Article 28 of the 1996 Hague Convention, "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."

**Practice varies widely among the different cantons.** According to Swiss stakeholders, three interpretations appear most prevalent for Convention and non-Convention cases (meaning cases outside the scope of application of the 1996 Hague Convention):

**1) Voluntary placement of the child with delegation of parental authority**, including the right to determine the child's place of residence and legal representation in everyday matters concerning the child, in accordance with Article 300, paragraph 1 of the Civil Code.

**2) Voluntary placement of the child, accompanied by a "curatelle de représentation" (type of guardianship with representation functions) of the child** in order to give the "foster parent" wider powers, akin to those of the person having parental authority in accordance with Art. 306 paragraph 2 of the Civil Code.

**In Geneva, for example, *kafalah* takes the form of a simple extrafamilial placement. By law (Art. 300 of the Civil Code), the foster parent (place of placement) has the power to represent the child in everyday matters but, in the absence of a legal representative who could effectively exercise parental authority, a deputy shall be appointed as representative (due to the parents being absent or prevented from acting within the meaning of Art. 306 paragraph 2 of the Civil Code).**

**3) Guardianship** if, from the act of *kafalah*, it can be inferred that the parents have completely renounced their parental responsibility for the child within the meaning of Article 327a of the Civil Code. According to the federal Central Authority designated by the 1996 Hague Convention, a *kafalah* placement can be converted into guardianship for easier day-to-day dealings with the authorities, among other things. The supervision of a guardianship is subject to Articles 327 a-c, and by analogy to Articles 390 and following. By analogy with Article 411 of the Civil Code, the guardian shall submit a report to the child protection authority "as often as necessary, but at least every two years."

**In Geneva, *kafalah* does not give rise to a guardianship order unless it is explicitly stated in the *kafalah* decision that the care of the child entails a total and irrevocable delegation of parental responsibility, i.e. the biological parent's incapacity to represent the child in the future, or if the decision likens the purpose of the delivery of the child to an adoption. Most often, however, because of ongoing contention between the roles of the biological and foster parents, guardianship is preferred.**

As soon as a guardianship arising from a *kafalah* (as in case of a "curatelle") is ordered by the cantonal authority, it is supervised in the same way as any other guardianship (Art. 410 and 411 of the Civil Code); a waiver of that oversight is possible under Art. 420 of the Civil Code, but in practice is not granted.

### **Possibility of granting an adoption:**

In certain cases, an adoption can be granted after the "foster parents" (*parents nourriciers*) have applied for adoption in accordance with Swiss law (child placed for at least one year, consent of the biological parents, etc.). According to the information shared by the Canton of Geneva, with respect to how consent to adoption is given by the biological parents in the State of origin of the child subject to *kafalah*, the Cantonal Central Authority in Geneva calls upon their local counterpart or Swiss diplomatic representation to obtain their written consent, ensuring that the provisions of Swiss law are explicitly stated. However, in the absence of consent, no adoption can be granted in Switzerland (unless the biological parent is deceased, unknown, has been of unknown whereabouts for some length of time, or permanently lacks capacity of judgment). The candidate must prove that they have performed all the requisite steps and research and gathered the necessary evidence to secure such consent. For adoptions, the prospective adoptive parents must be informed that the adoption will not be recognised in the child's State of origin.

**Lastly, note that if *kafalah* is followed by an application for adoption, the Cantonal Authority of Geneva also orders a guardianship by the analogous application of Article 17 of LF – 1993 Hague Convention (RS 211.221.31)<sup>691</sup>, considering that the *kafala* was entered into with a view to adoption subject to the limits of the national law under which it was ordered.**

## Status of the child

The child may receive a residence permit as per SEM directives (see above). The permit granted to children is the same as for family placements: either a study permit or a B permit.

According to the replies of the Swiss authorities consulted, children have, at the civil level, the conventional and constitutional rights derived from their status as minors (protection of their person and personality, human dignity, right to education, etc.), regardless of their residence permit in Switzerland or the authorisation of the supervisory authority.

Family reunification is subject to strict conditions and is only possible with children who are legally recognised (either biological or adopted).

Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

<p><b>Procedure</b></p>	<p><b><u>This part is mostly based on the experience in the Canton of Geneva. In Switzerland, practice differs widely from canton to canton.</u></b></p> <p><b>For cases related to the 1996 Hague Convention:</b> The application is received by the Central Authority, which forwards it to the cantonal central authority. The cantonal Central Authority then coordinates with the competent authorities in the canton to review the candidates and the proposed placement and confirms the child's immigration status. The report on the candidates and the review are then returned to the Central Authority of the State of origin.</p> <p><b>For cases with non-contracting States:</b> The foreign judge or the persons wishing to care for the child in Switzerland must address the Swiss authorities and should be redirected to the cantonal authority having responsibility for the placement permit, which will have to coordinate with the authority in charge of migration. The reverse may also be true (often immigration services are contacted first).</p> <p><b>Preparation of candidates</b> is provided for in cantonal law (Article 3a OPE): "<i>measures to provide foster parents (parents nourriciers) and specialists with basic and additional training and to advise them (...) <sup>892</sup></i>".</p> <p><b>Depending on how the measure is implemented in Swiss law, the obligations for supervising and monitoring the placement will differ. It would appear that in some cases (e.g. guardianship), supervision by the competent authorities remains limited.</b></p>
<p><b>Follow-up and end of provision care</b></p>	<p>When the child reaches 18 years of age, the age of majority, all measures shall be lifted; the child will no longer be under parental responsibility or any child protection measures that may have been ordered for them (Arts. 13 and 14 of the Civil Code).</p> <p>According to the information shared by SEM, the residence permit of a child placed in <i>kafalah</i> is, in principle, renewed after the child reaches the age of majority, provided that there are no grounds for revocation within the meaning of Article 62 of the LEI. The grounds for revocation include cases of serious or repeated violations of public safety and order in Switzerland or abroad, or dependence on social assistance.</p>

## ISS/IRC ANALYSIS

### **The 'Swiss approach' to *kafalah* holds various promising elements:**

An evaluation ("vetting") of candidates is required under applicable laws;

A nascent case law (see decisions of the Court of Justice above) that highlights the strict application of the 1996 Hague Convention;

Should immigration services give a positive response, the child's immigration status will be granted for a number of years and be relatively stable;

With respect to the incorporation of *kafala* in Swiss law, ad hoc accommodations are possible. *Kafalah* is not considered adoption as such but rather a placement with "foster parents" called '*parents nourriciers*' (a family-type placement outside the original family environment).

### **Certain challenges have yet to be addressed, especially in relation to:**

#### ***The applicable legal/ policy framework:***

It is essential that Switzerland take a clear position on these *kafalah* situations in accordance with its international commitments, and that position should be reflected in guidelines for implementing the OPE and 1996 Hague Convention.

**Potential unequal treatment:** Depending on how the Swiss authorities interpret *kafalah*, the biological parent and the *kafil* do not have the same rights, which can lead to unequal treatment; it is often difficult to obtain precise knowledge of foreign law and therefore the exact effect of the order granted abroad in accordance with Swiss law. In this respect, the Canton of Geneva recently rendered two decisions denying approval/authorisation for placement requests that had been submitted in connection with an adoption application. Age requirements for adoption had not been met (the husband was over 60 years old and wanted to take care of a 1-year-old child; under Swiss law, the maximum age difference is 45 years). One other case is currently being appealed before the Court of Justice. There should be a certain degree of harmonisation regarding the effect of a *kafalah* in Swiss law, for example, through a checklist for competent authorities/courts, while also allowing a certain amount of discretion for each case.

Other clarifications regarding **the recognition and enforcement of *kafalah*** are needed: 1) it is not clear when and under what conditions the effect of the order is governed by Swiss law. It would appear that immediate application of the law of the receiving State may be problematic (see [Technical Note: Cross-border \*kafalah\*](#)); and 2) it is uncertain whether the Swiss authorities have established eligibility criteria for children who could be placed in cross-border *kafala* arrangements (e.g. abandoned children/ children with no established parentage).

**Challenges regarding subsequent adoption:** Swiss law strictly requires the consent of the biological parent in a *posteriori* adoption proceeding. It is difficult to obtain or request this consent abroad, especially several years later. On the other hand, a *kafalah* by its very nature is not meant to be "converted" into an adoption – which is why it is important that there are strict conditions governing consent, given the differences between a *kafalah* and a full adoption (see [Part I](#)).

**ISS/IRC ANALYSIS (CONTINUED)****Implementation of the applicable legal/policy framework:**

As pointed out by the Central Authorities that were interviewed, the main challenge is **striking a balance** between compliance with the order while allowing it to be adapted in practice. More experience is still needed in this area, including in other aspects related to *kafalah* (inheritance rights, for example).

**Difficulties related to situations of *fait accompli*:** In practice, the Canton of Geneva has often been faced with a *fait accompli* by couples who have already welcomed a child in a *kafalah* in a State of origin, without informing the authorities that they reside abroad. Consequently, the exact handling of individual cases that do not comply with international and national standards still needs to be clarified (for example, in the case of an adoption without the required consent or *faits accomplis*). Case law in this respect will be established by the two cases before the Court of Justice. Those cases, however, relate to formal requirements for consideration and will not involve a ruling on the consent required, assessment of placement conditions or the best interests of the children concerned.

**Cooperation:**

The Central Authorities interviewed pointed out the **lack of clarity and proactivity** from the authorities in certain States of origin that do not make systematic use of the mechanisms of the 1996 Hague Convention.

According to the Swiss authorities interviewed, one major challenge is the **sometimes ambiguous behaviour** displayed by the State of origin with regard to this type of placement. The authorities of some States of origin, for example, allow cross-border *kafalah* placements with the knowledge that in the receiving State, the child may subsequently be adopted and the original parental ties severed.

**Faced with these challenges, some Swiss Central Authorities are focusing their efforts on developing the following solutions to provide a better framework for this type of cross-border placement, and ISS/IRC would like to encourage them to continue those efforts:**

**Development of tools for the professionals concerned:** The federal Central Authority is currently drafting a checklist to provide recommendations on such international placements (for both incoming and outgoing cases, including *kafalah* cases). Under the OPE, families wishing to care for a child through *kafalah* (even if members of the extended family) require placement authorisation.

**Increased knowledge of the 1996 Hague Convention procedure:** Cantonal authorities, such as Geneva's, are trying to raise the awareness of families wishing to care for a child through cross-border *kafalah*, in particular by pointing out:

- the importance of complying with the 1996 Hague Convention procedure (see [Section III.4](#));
- the requirement for candidates to inform and notify Swiss authorities of each step in the process (receipt of the child's case and compliance of the proposed placement with the placement authorisation);
- the importance of first having been assessed by the Swiss authorities;
- the obligation to cooperate with federal immigration authorities who are responsible for the final decision on the child's immigration status.

**Non-consideration:** The Canton of Geneva indicates that it no longer wishes to consider these applications for adoption following a *kafalah* placement in view of the difficulties encountered in obtaining informed consent from the biological parent in a country in which parentage is not established through adoption.

**Non-compliance with the 1996 Hague Convention:** In the event of non-compliance with the procedures of the 1996 Hague Convention or a potential endangerment of the child cared for in a *kafalah*, the Canton of Geneva shall file a report with the child protection authority so that protective measures can be taken.

**RECOGNITION AND ENFORCEMENT OF *KAFALAH* IN THE US<sup>893</sup>****General situation**

Statistics on Immigrant Orphans Adopted by US Citizens by Sex, Age, and Region and Country of Birth: Fiscal Year 2018<sup>894</sup>.

**Applicable laws & policies**

**International framework:** the 1993 Hague Convention (signed in 2010)<sup>895</sup>.

**National laws:**

**Immigration and Nationality Act Section 101(b)(1)(F) and (G);**

**The Intercountry Adoption Act of 2000 (IAA);**

**The Intercountry Universal Accreditation Act of 2012 (UAA).**

**Regulations of the US Code of Federal Regulations (CFR):**

- 8 CFR 204.1 et seq., and 8 CFR 204.300 et seq. govern the application and immigration petition process managed by the US Citizenship and Naturalization Service (USCIS); and
- 22 CFR Part 96 governs the accreditation of adoption service providers in intercountry adoption.

Part III Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

USA

<p><b>Applicable laws &amp; policies (continued)</b></p>	<p><b>Process Guidance for Consular Officers</b> abroad is found in the Foreign Affairs Manual (FAM) at 9 FAM 502.3.</p> <p>The <b>USCIS Adjudicators Field Manual</b> includes policy guidance on many elements related to intercountry adoption.</p>
<p><b>Competent authorities</b></p>	<p>The following US authorities may be involved in the case of a child who immigrates to the United States with a <b><i>kafalah</i> order that permits the child to emigrate and be adopted in the US:</b></p> <ul style="list-style-type: none"> <li>• Adoption service providers accredited or approved to provide services. The accrediting entity, designated by the US Department of State, is responsible for accrediting and approving adoption service providers.</li> <li>• The US immigration authorities, US Citizenship and Immigration Services evaluates US citizens' suitability and eligibility to adopt.</li> <li>• The Department of State is responsible for issuing visas and oversees the accrediting entity.</li> <li>• State child protection and welfare services authorities are responsible for licensing adoption service providers in each of the US States and Territories.</li> <li>• US Courts have jurisdiction over the adoption in cases where US citizens decide to complete the adoption in the United States in accordance with State law.</li> </ul>
<p><b>Recognition and enforcement</b></p>	<p>A cross-border <i>kafalah</i> placement seems often to be dealt with through intercountry adoption proceedings.</p>
<p><b>Status of the child</b></p>	<p>Children subject to a <i>kafalah</i> order granting custody to the <i>kafil</i> for the purpose of emigration and adoption in the United States, can immigrate to the US and <b>receive legal permanent residence. Upon completion of an adoption</b>, they automatically acquire US citizenship provided all requirements of Section 320 of the Immigration and Nationality Act have been satisfied before the child turns 18. Upon acquiring citizenship, these children enjoy all the benefits of citizenship, including issuance of a US passport.</p>
<p><b>Procedural requirements</b></p>	<p>The adoption process for <i>kafalah</i> cases that permits the child to emigrate and be adopted in the US, and that are completed in countries not a party to the 1993 Hague Convention, follow the US non-Convention process (also called the "I-600 process" or "orphan process") explained at <a href="https://www.uscis.gov/adoption/immigration-through-adoption/orphan-process">https://www.uscis.gov/adoption/immigration-through-adoption/orphan-process</a>.</p> <p><b>Information about the specific impact of Sharia Law on adoption linked to on the webpage<sup>896</sup>, above, is as follows: "Adoption of Children from Countries in which Islamic Shari'a Law is Observed. The Department of State receives many inquiries from US citizens who wish to adopt orphan children from countries in which Shari'a Law is observed. The implications and observance of Shari'a law varies from country to country. Generally, however, Islamic family law does not allow for adoption as it is understood in the United States. Accordingly, it may not be possible for US citizens to adopt a child who is orphaned overseas and to obtain an immigrant visa that will allow the child to live in the United States. However, some countries in which Shari'a law is observed do allow custody of children to emigrate to the United States through guardianship.</b></p> <p><i>The Immigration and Nationality Act does allow for the issuance of immigrant visas for orphans to be adopted in the United States. Prospective adoptive parents must first obtain legal guardianship or custody of the orphan for emigration and adoption in the United States, in accordance with the laws of the country in which the child resides. To show this standard has been met, the prospective adoptive parents must provide documentation to establish the child has been found eligible for emigration and adoption. This may take the form of a written consent from the Shari'a court or a competent authority, either included on the guardianship decree itself or as a separate document, or a provision of law from the country where the child resides indicating the guardianship decree implies permission for the child to emigrate and be adopted in another country.</i></p> <p><i>Again, the issuance of the immigrant visa in these cases depends on demonstrating that the underlying Shari'a law or the Islamic courts in the country in question actually allows for the child to be adopted overseas. To this point, in many cases, when the Form I-600 petition and the guardianship decree are submitted by the prospective adoptive parents, the consular officer reviewing the case may contact the Islamic court that issued the decree or work with the US Citizenship and Immigration Service of the Department of Homeland Security to ensure the guardianship decree meets all US immigration law requirements.</i></p>

### Procedural requirements (continued)

*Because of this, the Form I-600 processing time period for these cases may be longer than with other orphan visa cases. It is also important to note at the time the prospective adoptive parents submit the I-600 application and guardianship decree they will also have to show the consular officer they meet all pre-adoption requirements of the State in which they will be adopting the orphan once they return to the US (through documentary evidence, etc.).*

*For further information on this issue, please contact the Department of State's Office of Children's Issues at [Adoption@state.gov](mailto:Adoption@state.gov). Last Updated: October 30, 2018."*

## ISS/IRC ANALYSIS

### The 'US approach' to *kafalah* holds various promising elements:

ISS/IRC commends the US Department of State for its clear national position with regard to guardianship from Sharia law countries, and its awareness raising efforts destined to persons who wish to care for a child from Sharia Law countries on the prohibition of adoption and the different nature of child protection measures in such countries.

### Challenges to be addressed:

Yet, ISS/IRC would like to share the following concerns with regard to the US approach:

#### ***Legal and policy framework applicable and its practical implementation:***

First of all, the publicly described process can **create incentives for candidates** to initiate steps in the view of seeking required documentation to secure an adoption in the US. Indeed, despite the information purposes behind this notice, the webpage describes a step-by-step process on how to undertake "adoptions" in countries that either prohibit adoption or lack an adoption system/practice based on other traditional forms of child protection and care, which could foster illicit practices.

Further, as the approach leaves great **discretionary power to the judiciary**, it could lead to practices such as "forum shopping" (candidates seeking for the most beneficial jurisdiction) and sale of children due to a lack of supervision and control. It is also known that the general child protection systems can be weak in the States of origin, including the capacities of the judiciary to deal appropriately with such decisions, without any conflict of interests. This is most problematic when permissive courts take unilateral decisions against the country's legislation. The consequences for the rights of the child could be far-reaching, especially in terms of search for origins of the child.

Additionally, there seems to be a **confusion regarding the nature of the placement** and the attached proceedings. The process indeed appears to describe the recognition of a national guardianship measure through diplomatic channels by applying national adoption rules. Not only does it circumvent applicable intercountry rules from a US perspective, but it will be difficult (if not to say impossible) to verify the respect of the double principle of subsidiarity simply based on a written consent for adoption.

**Important safeguards** of a cross-border child protection measure **are omitted**, e.g. evaluation, preparation and follow-up of the placement.

#### ***Cooperation:***

Further, questions remain concerning the effectiveness of the possibility provided to the caseworker/consulate official to confirm the concerned stakeholders' awareness of the child's subsequent adoption in the US. The pathway through **diplomatic channels** also raises questions in relation to the diplomatic officials' qualifications and training in child protection matters.

In addition, this safeguard does not take into account that such awareness of the legal effects of adoption would need to be equally ensured concerning the birth family.

In sum, the US approach seems to be **based essentially on immigration issues** rather than child protection concerns.

### In the light of the above-raised concerns, ISS/IRC would like to encourage the US Department of State to address the following elements that are essential to safeguarding the rights of children in such processes:

- Develop clear guidelines regarding the assessment of foreign placements (e.g. guardianship and others) and on the elements that need to be evaluated (necessity and suitability of the placement; established relationship and continued contact between the child and the carer in case of a kinship placement; etc.).
- Establish clear processes regarding the nature of placement (relative vs. non-relative) via bilateral agreements for instance in order to avoid a case-by-case approach that might lead to arbitrary and illicit practices.
- It is essential that the US accedes/ratifies the 1996 Hague Convention in order to regulate cross-border *kafalah* placements through the recognition and cooperation mechanisms foreseen by the 1996 Hague Convention.

# Technical note: Cross-border *kafalah*



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## Technical note: Cross-border *kafalah*

As observed in the first part of this study (Part II), it would seem that improvements are still needed to ensure that *kafalah* as a child protection measure fully meets applicable national and international standards. In the absence of such safeguards at the national level (Technical Note: National *kafalah*), continuity of child protection becomes complicated in cross-border *kafalah* situations. In light of the diverse forms and effects of *kafalah*<sup>897</sup>, this study does not claim to propose one standard solution, but instead seeks to suggest possible solutions and encourage countries to share practical tools. It is, however, essential in ISS/IRC's view, that these solutions are based on the rules of public and private international law.

The examination of some receiving States in Section III.5 has indeed confirmed the heterogenous treatment of the recognition and enforcement of *kafalah*, despite the common legal framework that binds the great majority of these countries. This section provides a summary of positive trends as well as common challenges observed throughout the analysis of the recognition and enforcement of *kafalah* in receiving States. Subsequently, avenues for reflection are presented, and are accompanied by several practical tools aimed at equipping the various actors (see also Annex II – IV).

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## Positive trends in relation to cross-border *kafalah* in receiving States

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It is encouraging to see that some promising cross-border *kafalah* practices are emerging on the receiving States' side. These trends are particularly linked to:

### 1. Applicable legal and policy framework

- Domestic legislation providing for compliance with compulsory procedures under the 1996 Hague Convention (e.g. Germany, Norway, Italy) or the introduction of a specific legal framework (e.g. France, Spain, Belgium).
- Clear positions on the impossibility of treating a *kafalah* as an adoption (e.g. Australia)
- Requirement of the assessment of kafil candidates in accordance with certain laws of receiving States (e.g. Belgium, Switzerland).
- Established and emerging case law in some contexts which support the strict application of the 1996 Hague Convention (e.g. Italy, Switzerland).

### 2. The implementation of the legal and political framework

- Respect for the principle of subsidiarity through increased monitoring of children's files (e.g. Australia).

- Inclusion of cost issues as a prerequisite for approval of proposed *kafalah* placements (e.g. Germany, Norway).
- Awareness-raising efforts towards potential kafil parents and professionals regarding the applicable procedures (e.g. Germany, USA).
- Preparatory sessions for potential kafil parents (e.g. City of Lyon).
- Regulation of the monitoring of cross-border placements, including support for young adults (e.g. Belgium, Norway).
- The relatively stable legal status of the child (e.g. Switzerland).

### 3. Cooperation within the receiving State and between the receiving State and the State of origin

- In some contexts (e.g. Spain), a protocol is being developed to strengthen the coordination of all actors and implement the 1996 Hague Convention.
- Existence of bilateral agreements between certain receiving States and States of origin (e.g. France, Spain).

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## Challenges in respecting international standards in cross-border *kafalah*

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While doctrine and practice focus essentially on recognising and enforcing the legal effects of *kafalah* in a country where it does not exist, the challenges go beyond simply recognition and enforcement having an effect on countless other child protection aspects.

### 1. Challenges on the side of States of origin

Through its analysis, ISS/IRC identified the following challenges that States of origin face:

- **Absence of a clear internal approach:** most countries concerned do not have a clear internal approach to processing cross-border *kafalah* from a legal, political and practical standpoint.
- **Gaps in legislation applicable** to national *kafalah* and its implementation (see [Technical Note: National \*kafalah\*](#)).
- **Lack of internal co-operation** and challenging coordination between the authorities and services involved.
- **Non-compliance with the double principle of subsidiarity**<sup>998</sup>. In many countries, administrative or judicial authorities seemingly do not give sufficient consideration to the importance of this principle with regard to the child. Consequently, they do not apply it when considering the merit of a cross-border *kafalah*.
- **Difficulties related to verification of motivations.** The relevant authorities do not seem to conduct thorough reviews of the motivations of foreign candidates, whose intention is often to proceed with adopting the child in their country of habitual residence.

### 2. Challenges on the side of receiving States

- **Regulations inconsistent with *kafalah*.** Legislation in receiving States is often ill-suited to *kafalah* and its enforcement inconsistent with legislation in the State of origin. For example, some countries apply their own adoption legislation to cross-border *kafalah* while it is prohibited by law in the State of origin. Additionally, most receiving States do not have clear and detailed regulations on this matter, rendering management of these cases unpredictable, sometimes to the detriment of the child. In fact, these gaps can lead to practices such as "forum shopping" where often unassessed or unprepared candidates or intermediaries choose the region or authority that is considered most inclined to fulfil their request.
- **Lack of internal co-operation and challenging coordination** between immigration authorities (responsible for deciding on the child's entry into and stay in the country) and those responsible for child protection in the same country.
- **Absence of consideration for the nature of the measure.** As noted above, some countries automatically assimilate the *kafalah* to full adoption, a measure that establishes filiation, even if it is prohibited in the State of origin. Special attention must be paid to the approach taken by some countries that openly encourage their nationals to adopt children from Muslim countries, a trend that goes against the national law of the child's State of origin as well as international law.

## Technical note: Cross-border *kafalah*

### 3. International Challenges

- **Lack of clear political will:** A lack of consistency in the approach to this problem and in actions to harmonise practices may lead to the emergence of illicit practices such as circumventing established procedures (for example by inappropriately applying family reunification rules — see Annex III), choosing alternative pathways to adoption and thereby increasing the risk of breakdowns, and involving undue sums of money and intermediaries whose work methods may be described as unethical. In some situations where the child has already been living in the receiving State with the kafil family for some time, the authorities in the receiving States end up dealing with “*faits-accomplis*” that raise major challenges and illustrate the inadequacy of current responses.
- **Lack of data collection:** The study emphasises the absence of data collected on the number of children who benefit from a *kafalah* at the national and cross-border levels, the profile of children, and the type of placements in question. This makes it hard to determine the extent of these situations and identify real needs.
- **Insufficient international legal framework:** Other than Article 20 of the CRC and paragraphs 137 — 139 of the Alternative Care Guidelines, the 1996 Hague Convention is the primary international instrument applicable to cross-border *kafalah*. However, in spite of the benefits it offers, this statute faces some serious limitations.
- **Nature of the placement:** Two situations are covered by the 1996 Hague Convention<sup>899</sup>: *kafalah* approved by a competent authority, as provided for by Articles 3 and 1 of the 1996 Hague Convention; and *kafalah* resulting from a private arrangement provided for under Article 16 of the 1996 Hague Convention<sup>900</sup>. In both scenarios, the Convention allows for the full recognition of these placements in a third country. In the first case, full recognition must fall under Articles 33 and 23 II f), and in the second case, these arrangements “take effect” under Articles 16 and 17 of the 1996 Hague Convention.
  - **Applicability:** Limited by the low rate of ratification of the 1996 Hague Convention by States whose legal system is based on or influenced by Sharia. There is some confusion on how to use the applicable rules, which is further complicated when those rules are to be applied to a little-known measure.
  - **Implementation of Article 33** (and thereby Article 23 II f): Several States have raised concerns about implementing this article<sup>901</sup> due to the lack of experience applying it, the extremely long processing times, reports that are too brief and incomplete, and late consideration of applications for approval when the process is well under way, etc.
- **Recognition modalities and other important aspects** that remain vague such as the *makfoul* child’s access to a country, granting citizenship of the receiving State, access to social benefits, etc.
- **Lack of interstate cooperation:** Ensuring the implementation of the procedural steps of a cross-border placement is a shared responsibility. Not only does the State of origin have to meet its obligations and select and co-operate with receiving States that provide adequate safeguards, but the receiving State must ensure a framework even though *kafalah* is not a statutory measure in its own system of law. In that case, the receiving State must evaluate the candidates’ suitability to care for a child under *kafalah*, understand their motivations, provide preparation services, and supervise the fees and intermediaries involved in these placements. At this stage, no law or regulation in either States of origin or the receiving States is in full accordance with international standards. Many provisions in legal systems based on or influenced by Sharia are limited in scope and foresee only the permission to leave the country. These laws mostly remain silent on other important aspects, such as ensuring the rights of the child in the receiving State and preventing irregular practices. Some receiving States are certainly equipped with a framework on evaluation, candidate preparation and post-placement follow-up, but these practices are often viewed through the prism of adoption. Although such an approach provides safeguards for the care option through the involvement of a competent authority, the connection with adoption is not without its concerns (see above).

To ISS/IRC, there are risks involved in giving effect to such private arrangements under the 1996 Hague Convention due to the lack of safeguards regarding the merits of the initial decision (lack of evaluation of the *kafils* and the appropriate nature of the agreement with regard to the needs and interests of the child). Only when the agreement or act is approved by a competent authority or it is part of a court decision does the arrangement become a protection measure under Article 3, which is then subject to Article 23 on recognition and enforcement.

- **Other measures in common or civil law systems that are incompatible with kafalah.** The uniqueness of kafalah makes it very difficult to transpose its effects in the legal system of a receiving State with a civil or common law system. Significant differences can be observed between kafalah and measures that are generally available in receiving States, including:
  - **Full adoption:** This option goes against the foundation of kafalah, which rejects breaking the child's bond with his or her biological family and prohibits the establishment of a new filiation.
  - **Simple or open adoption:** Although under this option a child can, to some extent, maintain a connection with his or her family of origin depending on the context, it creates a new filiation between the child and the adoptive parents, and as far as adoption is concerned, remains a foreign concept under Sharia law.
  - **Guardianship:** This exists in many Sharia law countries in conjunction with kafalah. In principle, it does not grant parental responsibility like some forms of kafalah do.
  - **Foster Care:** Implementation of this measure varies greatly from one country to another (short- or long-term placement, remuneration and professionalism of foster parents, etc.), but in general the legal responsibility granted to foster parents is more limited than it is in kafalah cases.
  - **Kinship care:** This measure can be considered for intrafamilial kafalah only and provides a limited solution.
- **Placement in an institution such as a Quranic or boarding school:** Depending on the country in question, kafalah can be granted to an institution. In those cases, parental rights would have to be clarified and a competent authority must ensure follow-up by of the child's well-being.

A myriad of academic articles and approaches have addressed the issue, but it remains a sensitive topic and continues to cause debate without resulting in any tangible solutions. ISS/IRC does not claim to have the "miracle solution", but offers suggestions below.

"(...) kafala[h] is a very complex institution that presents a deeply rooted multifunctional nature and is resistant to any attempt at assimilation to any institutions within our legal systems. There is no one formula for kafala[h] (...), it is practically impossible to recognize this measure as an adoption, foster care, or guardianship. None of these institutions are versatile enough to respond to the different components of kafala[h]<sup>902</sup>".

Prof Diago Diago (2010), *La Kafala Islámica en España*, available in Spanish at: <https://e-revistas.uc3m.es/index.php/CDT/article/view/98/96>

- **Lack of follow-up.** Under the current systems, implementation of follow-up and support for the child in receiving States seems difficult and almost non-existent or limited (for example, when kafalah results in a guardianship). Furthermore, it remains very much unclear what happens when the child reaches the age of majority.

## Two major axes of reflection to preserve the continuity of protections for children across border

Each *kafalah* placement should be compliant with the minimum standards applicable to any child protection measure (see [Technical Note: National kafalah](#)). First (first level of subsidiarity), it needs to be ensured that the child protection measure respects the minimum standards in the CRC and the Alternative Care Guidelines. Next, the second level of the principle of subsidiarity must be respected.

In other words, a cross-border placement should be considered only after all efforts to find a national solution have been exhausted. Moreover, a cross-border *kafalah* placement raises questions of private international law related to competence, applicable law, the recognition and enforcement of the measure, and co-operation.

For ISS/IRC, it is important — from a child rights perspective — to adopt a joint approach between the principles of public international law and the rules of private international law. The objectives of such an approach should be clear: ensure the continuity of the familial situation (in cases where a decision has already been made), respect the rights conferred by the measure without distorting it, ensure the legal security of the child involved, and respect the child's basic rights (access to origins, etc.).

**In an attempt to address the aforementioned challenges, a number of considerations are proposed to:**

- *Strengthen safeguards in the current systems (see 1.); and*
- *Implement a process for individual case management (see 2.).*

### 1. Strengthen safeguards in the current *kafalah* systems

Through the following actions, ISS/IRC encourages countries involved in *kafalah* to adopt a clear approach, develop or adjust applicable standards, and enhance co-operation in order to prevent illicit practices such as "forum shopping" and situations of "*faits accomplis*".

## Technical note: Cross-border *kafalah*

### Adopt a clear position and clear standards on cross-border *kafalah* consisting of:

- Clarifying, and if necessary, adapting, applicable standards related to recognising a national or cross-border *kafalah* placement (article 33). In this regard, ISS/IRC commends countries that have clarified their legal framework and practice to better manage these cases.
- Encouraging receiving States and States of origin to monitor any cross-border placement, including private arrangements (i.e. made through an act/decision of confirmation or approbation);
- Promoting cooperation (exclusively) between contracting States of the 1996 Hague Convention (e.g. Norway, see Section III.5)<sup>903</sup>, or at least to apply the spirit and cooperation mechanisms of this instrument towards non-contracting States;
- Identifying the stakeholders involved and specifying their respective roles and responsibilities. This will allow:
  - Attribution of adequate resources to enhance the legal and practical aspects of child protection systems that incorporate *kafalah*. ISS/IRC would like to encourage countries that have made changes to develop systems that ensure the prevention of family separation and provide quality alternative care; and
  - Provision of training and awareness raising actions for the relevant stakeholders involved, and ensuring their supervision.

### Develop case management mechanisms and enhanced co-operation to address gaps

- A State of origin should be able to set conditions for choosing partners to work with by taking into account different key aspects, such as the duration of the residency permit for the child, guarantees that there will be monitoring of the placement, and access to origins. Receiving States should be able to apply their own criteria in accordance with their legal framework, while respecting the laws of the State of origin. Generally, for a successful collaboration, States of origin and receiving States should be aware and informed of the laws, policies and practices surrounding placement in each respective country. In order to facilitate informed decisions in the receiving States and States of origin, a handbook or country factsheets would be useful for sharing crucial information.
- The establishment of internal co-operation protocols is commendable (e.g. Spain and Switzerland).

### Promote the use of case management tools (see Annexes)

- **Direct judicial communication between judicial authorities in both countries (see Annex IV.3):** Recourse to the International Hague Network of Judges should be encouraged to facilitate direct communication between judicial authorities. Such communication is beneficial for both exchanging information on the individual situation of the child (gathering additional information, authenticating certain documents, etc.); and on the general situation of children without family in the countries involved, or the specific details of a

*kafalah*. Using their prerogative, judges should systematically proceed to evaluating the motivations of *kafil* candidates residing abroad.

- **Specifically, for the practical implementation of the process in Article 33, 23 II of the 1996 Hague Convention:** The involvement of the immigration authorities in both concerned countries should be sought before the placement decision is made (see Section III.4.). In this regard, ISS/IRC would like to reiterate paragraph 43 of the Conclusions and Recommendations of the 2017 Special Commission on the practical operation of the 1980 and 1996 Hague Conventions<sup>904</sup> which outline the mandatory procedure provided for in that article<sup>905</sup>.

Countries that have ratified or adhered to the 1996 Hague Convention should be made aware of the effective implementation of this process and continue to make efforts to promote the 1996 Hague Convention among other countries whose legal system is based on or influenced by Sharia. The Malta Process led by the HCCH<sup>906</sup> is devoted to bridging secular and Sharia law systems and improving understanding of the compatibility of human rights and international private law with Sharia law.

- **Adoption of bilateral agreements (see Annex IV.1)** that can set precise terms for processing a cross-border *kafalah* case, with a focus on procedural law aspects. The exact scope of such an agreement and its content (including aspects of substantive law) should be determined by the countries involved. However, negotiating such an agreement would allow the competent authorities of both countries to agree on the relevant conditions (for example: preserving a connection with the State of origin, respect for religion, educational needs, etc.). Private arrangements (article 16 of the 1996 Hague Convention) and the modalities for approving or confirming an informal *kafalah* arrangement could also be dealt with in such a bilateral agreement.

## 2. Implement a process for individual case management

Several steps have been identified by ISS/IRC for a receiving State to recognise and enforce a *kafalah* decided in a third country. For each, the competent authorities and the applicable law are mentioned.

### Recognition of the *kafalah* in question will differ dependant on the previously noted scenarios (see Part III) and the applicable law

- **Scenario No. 1 – Recognition of a national *kafalah* in a third country:** This should be based on the receiving State verifying the procedural steps that led to the decision (for example, evidence of the necessary consent, authentication of the required documents). It is not a matter of questioning the merit of the decision, but of collaborating with the countries that are able to guarantee the rights of the child through the decision in question (Technical Note: National *kafalah*).

- **Scenario No. 2 – Establishment of a kafalah between two countries:** The rules of Articles 33 and 23 II<sup>f</sup> apply if the countries involved are contracting States of the 1996 Hague Convention (recognition by operation of law/automatic). Otherwise, rules set by bilateral agreements concluded between the countries involved (if relevant), or rules of international private law set by the countries involved in matters of recognising foreign decisions apply.
- **Scenario 3 – Kafalah “taking effect” as a result of a private arrangement:** As previously noted (see [Part III](#)), this scenario raises serious concerns. As such, and given the lack of information on these situations, ISS/IRC will not suggest any procedural steps so as not to advise or promote particular steps in such cases.

It is, however, essential that authorities in both countries involved are notified of the child’s transfer as proposed by the Alternative Care Guidelines<sup>907</sup>. Competent authorities have to ensure, at minimum, that no money is involved in the transfer of the child (especially in extrafamilial cases) and that the family concerned has access to basic services (health, education, school, support in case of difficulties, etc.). Nonetheless, the question of transposing provisions of a private kafalah constituted in a Sharia law country will equally need to be addressed as in any cross-border kafalah placement (see Phase 4). This will automatically lead to questions around the proof of foreign law.

## Phase 1: Pre-placement Process

This phase includes the entire preliminary process for any decision, including a needs assessment, the preparation of the child and of the potential *kafil* parent(s), as well as the exchange of information on the envisaged placement.

<u>SCENARIOS</u>	<u>PROCESS</u>	<u>COMPETENT AUTHORITY</u>	<u>APPLICABLE NATIONAL LAW</u>
<b>Scenario N°1</b>	The pre-placement process falls exclusively under the purview of the authorities of the State of origin and in accordance with legislation in that country. It is incumbent on those authorities to ensure that minimum guarantees are met, including an assessment and adequate preparation of the child and of the candidates before the placement in question is approved or decided (see <a href="#">Technical Note: National kafalah</a> )	STATE OF ORIGIN	STATE OF ORIGIN
<b>Scenario N°2</b>	<p>The pre-placement process falls under shared jurisdiction between the State of origin and the receiving State.</p> <p><b>Contracting States of the 1996 Hague Convention:</b> Application of Article 33 must be used as a foundation for establishing close collaboration between the Central and competent authorities with a view to exchanging detailed information on the child and the <i>kafil</i> candidates (see above).</p> <p><b>Non-contracting States:</b> bilateral agreement or international private law rules that (in ISS/IRC’s view) should confer guarantees consistent with the 1996 Hague Convention. Concretely, this must / should result in:</p> <ul style="list-style-type: none"> <li>• The requirement enforced by authorities of the State of origin to present proof of the suitability assessment and preparation of <i>kafil</i> candidates carried out in the receiving State;</li> <li>• Training for diplomatic missions, particularly important given their significant role in non-contracting States;</li> <li>• The introduction of verifications of the actual habitual residence of <i>kafil</i> candidates (e.g. requests for salary slips, tax payments, etc.);</li> <li>• Determination of any costs of the placement and decision on the coverage of the costs involved (taking into account the types of support available in the two countries);</li> <li>• Establishment of a financial fund for unexpected circumstances (e.g. placement breakdowns, health concerns of the child, etc.).</li> </ul>	STATE OF ORIGIN + RECEIVING STATE	STATE OF ORIGIN + RECEIVING STATE

## Phase 2: *Kafalah* decision/constitution

This phase refers to the *kafalah* decision or constitution by a judicial or administrative authority in the State of origin.

<u>SCENARIOS</u>	<u>PROCESS</u>	<u>COMPETENT AUTHORITY</u>	<u>APPLICABLE NATIONAL LAW</u>
Scenario N°1	The placement decision falls exclusively under the purview of the authorities of the State of origin and in accordance with legislation in that country.	STATE OF ORIGIN	STATE OF ORIGIN
Scenario N°2	<p><b>Contracting States of the 1996 Hague Convention:</b> Article 33(2) applies: “The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child’s best interests.” As stated during the 2017 Special Commission, the involvement of a public authority is necessary to prevent any illicit practice<sup>908</sup>. The placement decision must be supported by evidence, reports and documents that not only identify every step taken (see <a href="#">Technical Note: National kafalah</a>), but ensure also the authority in question evaluated the cross-border nature of the placement. In addition, the provisions of the measure in the receiving State must be clear and approved by the authorities in both countries. In those cases, it may be possible that the <i>kafalah</i> decision provides clarity on the nature of the measure as recognised and enforced in the receiving State by specifying, for example, that it is a <i>kafalah</i> decision ‘with a view to (mentioning the relevant measure in the receiving State)’.</p> <p><b>Non-contracting States of the 1996 Hague Convention:</b> A bilateral agreement or private international law (PIL) rules that according to ISS/IRC should confer guarantees consistent with the 1996 Hague Convention. Concretely, this must/should result in:</p> <ul style="list-style-type: none"> <li>• Sensitisation of the competent authorities of the State of origin and the judiciary on the importance of indicating in the text of the decision the requirement for cross-border follow-up and the modalities of this monitoring;</li> <li>• Training for diplomatic missions, particularly important given their significant role in non-contracting States;</li> <li>• Determination of any costs of the placement and decision on the coverage of the costs involved (taking into account the types of support available in the two countries); and</li> <li>• Establishment of a financial fund for unexpected circumstances (e.g. placement breakdowns, health concerns of the child, etc.).</li> </ul>	STATE OF ORIGIN + RECEIVING STATE	STATE OF ORIGIN + RECEIVING STATE

## Phase 3: Transfer of child and immigration considerations

The child cannot be transferred unless all immigration matters and *kafalah* issues in the receiving State have been addressed (see Phase 4). This requirement is essential for preventing placements that do not meet international standards.

<u>SCENARIOS</u>	<u>PROCESS</u>	<u>COMPETENT AUTHORITY</u>	<u>APPLICABLE NATIONAL LAW</u>
Scenario N°1 + 2	<p>The physical transfer of the child and his/her immigration status depend on the immigration rules in force in each country. Through its study, ISS/IRC observed various immigration processes that can be used including:</p> <ul style="list-style-type: none"> <li>• <b>Family reunification:</b> these are usually very restrictive procedures and require a significant number of conditions to be met (see <a href="#">Annex III</a>).</li> </ul>	STATE OF ORIGIN + RECEIVING STATE	STATE OF ORIGIN + RECEIVING STATE

<p><b>Scenario N°1 + 2 (continued)</b></p>	<ul style="list-style-type: none"> <li>• Granting of a short and medium-term visa (for example temporary visa, visa for adoption purposes, visa on education or medical treatment grounds).</li> <li>• Granting of a long-term visa.</li> </ul> <p>Apart from the initial approval, other questions remain as to the renewal and its impact on the life of the child and the family involved, access to social and family benefits, etc. (see Annex II). The State of origin therefore has to take into consideration visa issues and the risks that certain types of visa or permits entail in the receiving State. Ideally, these aspects would also need be addressed in a bilateral agreement.</p> <p>Co-operation between the Central authorities, child protection authorities or services, and immigration services from the start of the process is key. Given the crucial role of these authorities, increasing awareness and potentially reviewing applicable immigration rules are to be encouraged. It is critical that the competent child protection authority take charge and lead the coordination efforts from a child's rights perspective, hence the importance of developing internal protocols.</p>	<p><b>STATE OF ORIGIN + RECEIVING STATE</b></p>	<p><b>STATE OF ORIGIN + RECEIVING STATE</b></p>
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For ISS/IRC, the legal certainty of the child is of paramount importance in choosing the method for entering the receiving State. The child's access to basic services (social, health and education, etc.) and his or her origins (e.g. data collection and storage) must be guaranteed. Knowing from the outset that the residency permit cannot be permanent and that the *kafalah* terminates in principle at the age of majority, it is up to the State of origin to choose to co-operate with the receiving States where the child will have the greatest protections and legal security.

### Phase 4: Implementation of the decision in the receiving State<sup>909</sup> and post-placement considerations

This phase deals with the child's arrival (short-term effects of the *kafalah* in the receiving State) and medium and long-term post-placement considerations (follow-up and support, changes in habitual residence and acquisition of citizenship).

<u>SCENARIOS</u>	<u>PROCESS</u>	<u>COMPETENT AUTHORITY</u>	<u>APPLICABLE NATIONAL LAW</u>
<b>Arrival of the child (short-term effects of <i>kafalah</i> in the receiving State)</b>			
<p><b>Scenario N°1 + 2 + 3</b></p>	<p>To proceed with the recognition and enforcement of <i>kafalah</i> in the receiving State, the effects of this measure in accordance with the law of the State of origin should be applied, as suggested by Article 15(2)<sup>910</sup> of the 1996 Hague Convention, and to view these effects from the perspective of the receiving State's legal system<sup>911</sup>.</p> <p>Currently, several possible approaches exist for recognising and enforcing the effects of the <i>kafalah</i> in the receiving State's legal system:</p> <ul style="list-style-type: none"> <li>• <b>Substitution or conversion</b> to a measure available the receiving State's legal system. The <i>kafalah</i> decision is then "converted" to a measure considered "similar" to <i>kafalah</i>. <b>Automatic assimilation or substitution should be dealt with extra caution. It is best to proceed on a case by case basis.</b></li> <li>• <b>Functional case-by-case equivalents</b><sup>912</sup> may be sought for each function or element of the <i>kafalah</i> concerned (scope of parental responsibility, roles and obligations of the <i>kafil(s)</i>, follow-up by a competent authority, etc.). <b>The <i>kafalah</i> might become "a hybrid measure" that would take into account the specificities and uniqueness of <i>kafalah</i>. No matter which approach is taken, the receiving State is responsible for the legal status of the child and his or her protection and wellbeing on arrival. This can be possible by creating provisions specific to <i>kafalah</i> to address not only the legalities, but psycho-social aspects as well.</b></li> </ul>	<p><b>STATE OF ORIGIN + RECEIVING STATE</b></p>	<p><b>STATE OF ORIGIN + RECEIVING STATE</b></p>

### Technical note: Cross-border *kafalah*

Follow up and support (medium and long-term post-placement considerations)			
Scenario N°1 + 2 + 3	<p>Follow-up should be systematic. Depending on the option chosen (existing measure or hybrid measure), follow-up and support procedures will differ according to the rules in place. In practice, follow-up is quite limited.</p> <p><b>ISS/IRC encourages all contracting States to apply the mechanisms of the 1996 Hague Convention for follow-up and exchange of information on the child and the placement. In addition, a specific provision on follow-up and support for the children and families concerned should be included in applicable standards and bilateral agreements.</b></p> <p><i>For scenario No. 3, follow-up and supervision will be different and should include mechanisms for providing the families and children with access to basic services.</i></p>	STATE OF ORIGIN + RECEIVING STATE	STATE OF ORIGIN + RECEIVING STATE
Change in habitual residence (HR) and acquisition of citizenship (medium and long-term post-placement considerations)			
Scenario N°1 + 2 + 3	<p>After a few years in the receiving State, the child should be fully subject to the national law of the receiving State, and the effects of the <i>kafalah</i> in the receiving State may be affected<sup>913</sup>.</p> <ul style="list-style-type: none"> <li>• <b>Change in HR<sup>914</sup>:</b> For contracting States, Article 15(3) of the 1996 Hague Convention<sup>915</sup> provides instruction on how to apply the law in case of a change in HR. Notably, the Special Commission made the following recommendation: “31. <i>More specifically, the Special Commission notes that in the case of a change of habitual residence of the child (Art. 5(2)), for example resulting from a long-term cross-border placement (Art. 33), the measures of protection established in the former State of habitual residence will subsist in the new State of habitual residence (Art. 14). The law of the new State of habitual residence will govern, from the time of the change, the conditions of application of the measure taken in the State of the former habitual residence (Art. 15(3)). If necessary, the competent authorities of the new State of habitual residence could adapt the measure taken in the former State of habitual residence or modify it in accordance with Article 5(2).</i>”. Nonetheless, the fact remains that each State applies the conditions set out under domestic law. ISS/IRC encourages countries to identify specific criteria for HR determination and follow the orientations of the HCCH in this area<sup>916</sup>.</li> <li>• <b>Child’s potential acquisition of citizenship of the receiving State</b> in accordance with the law of the receiving State. Acquiring new citizenship may result in <b>changes to the protection measure</b>. For a child who becomes a citizen of the receiving State, other measures deemed more “<i>beneficial or favourable</i>” to the child may be considered (e.g. in adoption, referred to as adoption <i>ex novo posterior</i>). However, as stipulated by Special Commission of 2017: “31. <i>The authorities of the new State of habitual residence may consult, if necessary, the authorities of the State of the former habitual residence when adapting or modifying such measures.</i>”</li> </ul> <p><b>Like the Special Commission, ISS/IRC encourages countries to strengthen their co-operation (see tools above and in Annexes) in this area, and for the receiving State to work closely with the authorities in the State of origin when considering a new measure for the child.</b></p>	STATE OF ORIGIN + RECEIVING STATE	STATE OF ORIGIN + RECEIVING STATE
A balance must be sought between the rights conferred on a child by the national <i>kafalah</i> and the child’s access to the same rights that every child in the receiving State enjoys.			

# References

## III. Recognition and enforcement of *kafalah* or any other analogous measure in receiving States

- 690 The list of receiving States examined is of course non-exhaustive. The choice of receiving States was motivated by the verification of the information collected by professionals in these countries, which allowed us to provide an overview of current practices.
- 691 See criteria proposed in HCCH (2017). *Note on Habitual Residence and Scope of the 1993 Hague Convention*. Available at: <https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf>
- 692 Cantwell N. (2014) *The Best Interests of the Child in Inter-country Adoption*, Innocenti Insight, Florence: UNICEF Office of Research, p. 16. Available at: <https://www.unicef-irc.org/publications/712-the-best-interests-of-the-child-in-intercountry-adoption.html>
- 693 Cantwell N. (2014) *The Best Interests of the Child in Inter-country Adoption*, Innocenti Insight, Florence: UNICEF Office of Research.
- 694 E.g. in various contexts the principle was for instance used as a justification to separate children from their birth parents and to subsequently forcibly adopt them; the principle was also used to justify the forced migration of children abroad (see in particular, N. Cantwell, *The Best Interests of the Child in Inter-country Adoption*, Innocenti Insight, Florence: UNICEF Office of Research. Available at: [https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document\\_web\\_re-supply.pdf](https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf)). See also, ISS, *Responding to Illegal Adoptions*, 2016. Available at: [https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/Illegal\\_Adoption\\_ISS\\_Professional\\_Handbook.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/Illegal_Adoption_ISS_Professional_Handbook.pdf).
- 695 UN Committee on the Rights of the Child (CRC) (2013). General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html>
- 696 See UNHCR (2019), *Guidelines on assessing and determining the best interests of the child*. Preliminary version. Accessible through: <https://www.refworld.org/pdfid/5c18d7254.pdf>
- 697 See UNHCR (2019). *Guidelines on Assessing and Determining the Best Interests of the Child*, Preliminary version, available in English at: <https://www.refworld.org/docid/5c18d7254.html>
- 698 Dambach M. (2019). *The principle of subsidiarity*. Spotlight on Solutions. Geneva, Switzerland. International Social Service. Available in English at: [https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/PRINCIPLE\\_SUBSIDIARITY\\_ANG.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/PRINCIPLE_SUBSIDIARITY_ANG.pdf)
- 699 This short section was drafted by Laura Martinez Mora, Secretary, at the Permanent Bureau of the Hague Conference on Private International Law.
- 700 Lagarde P. (1996). *Explanatory Report on the 1996 Hague Child Protection Convention*, para. 42; <https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf>
- 701 Lagarde P. (1996). *Explanatory Report on the 1996 Hague Child Protection Convention*, para. 74; <https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf>
- 702 Lagarde P. (1996). *Explanatory Report on the 1996 Hague Child Protection Convention*, para. 74; <https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf>
- 703 For example, in the Philippines, trial custody begins upon the physical transfer of the child to the care and custody of the PAPs who are to exercise substitute parental authority. The legal custody of the children remains with the Department of Social Welfare and Development until the completion of the legal adoption in the receiving State (see Hague Convention CH Country Profile, question 27).
- 704 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, see <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>
- 705 Article 33 stipulates: “1) *If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and if such placement or such provision of care is to take place in another contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.*”
- 706 It should be noted that Article 33 is the result of a proposal submitted by the Netherlands (Working Document no.59) which needed a “*procedure similar to that provided for by CLH-1993*” It is underlined in the Explanatory Report that the cooperation mechanisms and some of the general principles applied by the CLH-1993 can thus help to understand the operation of Article 33. The Explanatory Report also continues that Article 33 only provides general rule, the practical execution of which will depend on the contracting States.
- 707 Cf. ECtHR, case of Chbihi Loudoudi v. Belgium (16 March 2015, no. 52265/10), para. 96.
- 708 For further information, see HCCH (2018). *Note on Habitual Residence and the Scope of the 1993 Hague Convention*. Available in English at: <https://assets.hcch.net/docs/12255707-4d23-4f90-a819-5e759d0d7245.pdf>
- 709 Dutch Law of 16 February 2006 implementing the 1996 Hague Convention, art. 11 contains a specific provision to this effect. Available in English at: <http://wetten.overheid.nl/BWBR0019574/2017-09-01>
- 710 For example, the ECtHR case of Harroudj v. France (4 October 2012, Application No. 43631/09), respecting the *kafalah* placement during the period of “*integration of [makfoul] children of foreign origin without cutting them off immediately from the rules of their State of origin (...) show[s] respect for cultural pluralism*”.

## Australia

- 711 Document based on responses received by Family Migration Program Management Section, Department of Home Affairs and Department of Social Services, Australia.
- 712 See Status Table, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en)
- 713 See, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>
- 714 See, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>
- 715 <https://www.legislation.gov.au/Details/F2017C00582>
- 716 See, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/orphan-relative-117>

## Belgium

- This section is based on exchanges with the Belgian Central authorities under the 1993 Hague Convention and research conducted by ISS/IRC.
- 717 Myria, Belgian Federal Migration Centre. (2019). *La migration en chiffres et en droits 2019*, page 30. Available at: [https://www.myria.be/files/Myria\\_RAMIG-FR\\_2019-AS-gecomprimeerd.pdf](https://www.myria.be/files/Myria_RAMIG-FR_2019-AS-gecomprimeerd.pdf) (in French).
- 718 Meaning with a valid stay card or document.
- 719 Myria, Centre fédéral Migration. (2019). *La migration en chiffres et en droits 2019*, page 30. Available at: [https://www.myria.be/files/Myria\\_RAMIG-FR\\_2019-AS-gecomprimeerd.pdf](https://www.myria.be/files/Myria_RAMIG-FR_2019-AS-gecomprimeerd.pdf)
- 720 See, para. 4(4), <http://docstore.ohchr.org/SelfServices/>
- 721 Fédération Wallonie-Bruxelles – Nombre d’enfants confiés en adoption (encadrement par un OAA ou l’ACC). Disponible au lien suivant : <http://www.adoptions.be/>
- 722 See, <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=fr>
- 723 See, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>
- 724 [https://www.echr.coe.int/Documents/Convention\\_FRA.pdf](https://www.echr.coe.int/Documents/Convention_FRA.pdf)
- 725 Initially, the Belgian reform made no provisions for the adoption of children whose State of origin does not recognise adoption or placement in care for eventual adoption (namely Muslim countries). As soon as the new legislation came into force, a host of difficulties arose surrounding children placed in kafala – primarily from Morocco, a State of origin with a significant population in Belgium – being able to access Belgian territory. It is worth noting that well before the legal reform, Belgium, in practice, authorised the placement of children from countries that only have kafala arrangements. The former law provided for the notarial deed of adoption to be sanctioned by the youth court. The new law requires administrative recognition of the foreign adoption decision, which is impossible for kafala, as it is an institution that does not modify the parent-child relationship.

## References

- 726 This decision is available at the following link: <http://docstore.ohchr.org/SelfServices>
- 727 Text available at: [https://www.ohchr.org/Documents/HRBodies/CRC/CRC-C-82-1\(E\)advuned.pdf](https://www.ohchr.org/Documents/HRBodies/CRC/CRC-C-82-1(E)advuned.pdf)
- 728 See, [https://hudoc.echr.coe.int/eng#{"itemid":\["001-149111"\]}](https://hudoc.echr.coe.int/eng#{)
- 729 Translation from French; Labour Court, Liège, January 11, 2016 (2015AL/82). This decision is available at: [http://j.jure.juridat.just.fgov.be/pdfapp/download\\_blob?idpdf=F-20160111-5](http://j.jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20160111-5)
- 730 Translation from French; Labour Court, Liège (Judgment of September 22, 2014, 2011/AL/524).
- 731 *Quels sont, en Belgique, les effets d'une kafala au niveau social : allocations et prestations familiales ?* [www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain#h14-1-quels-sont-en-belgique-les-effets-d-une-kafala-au-niveau-civil](http://www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain#h14-1-quels-sont-en-belgique-les-effets-d-une-kafala-au-niveau-civil) (in French).
- 732 Contact information available at: <https://www.hcch.net/en/states/authorities/details3?aid=982>
- 733 Contact information available at: <https://www.hcch.net/en/states/authorities/details3?aid=670>
- 734 *Votre projet d'adoption s'oriente vers un pays d'origine qui ne connaît pas l'adoption ?* Available at: <http://www.adoptions.be> (in French).
- 735 Labour Court, Brussels (Judgment of September 14, 2005, D.N. c/C.39, RG n°40420), Cour du Travail de Mons (Judgment of September 3, 2009, R.G. 21.342).
- 736 "Une décision de kafala peut-elle être reconnue en Belgique?" [www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain](http://www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain) (in French).
- 737 Translation from French; Cf. Arts. 475bis and 475ter of the Civil Code; *Quels sont, en Belgique, les effets d'une kafala au niveau civil ?*, see [www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain#h14-1-quels-sont-en-belgique-les-effets-d-une-kafala-au-niveau-civil](http://www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain#h14-1-quels-sont-en-belgique-les-effets-d-une-kafala-au-niveau-civil) (in French).
- 738 According to the Belgian Central Authority, the desire of the legislator at the time was to ensure that children placed in *kafala* had the same protections children in an adoption procedure.
- 739 See, <http://www.adoptions.be> (in French).
- 740 See, <http://www.sdj.be/>
- 741 Myria, Belgian Federal Migration Centre. (2019). *La migration en chiffres et en droits 2019*, page 101. Available at: [https://www.myria.be/files/Myria\\_RAMIG-FR\\_2019-AS-gecomprimeerd.pdf](https://www.myria.be/files/Myria_RAMIG-FR_2019-AS-gecomprimeerd.pdf) (in French).
- 742 <http://www.adde.be/ressources/fiches-pratiques/nationalite/aquisition-de-la-nationalite-18-ans#h1-qu-est-ce-que-l-acquisition-de-la-nationalite-nbsp> (in French).
- 743 *Votre projet d'adoption s'oriente vers un pays d'origine qui ne connaît pas l'adoption ?* <http://www.adoptions.be> (in French).
- 744 Dahir n°1 \_ 02 \_ 172 du 1er rabii II 1423 (June 13, 2002) on the proclamation of law n°15-01 about the guardianship (*kafala*) of abandoned children, art. 9.
- 745 There are currently two licensed adoption agencies authorised to work in Morocco.
- 746 Translation from French; For example, in Morocco this applies to children born to unknown parents and placed in an institution. <http://www.adoptions.be>
- 747 Translation from French; *Quels sont, en Belgique, les effets d'une kafala au niveau administratif: regroupement familial ?*, see [www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain#h14-1-quels-sont-en-belgique-les-effets-d-une-kafala-au-niveau-civil](http://www.adde.be/ressources/fiches-pratiques/dip/la-kafala-en-droit-marocain#h14-1-quels-sont-en-belgique-les-effets-d-une-kafala-au-niveau-civil) (in French).
- 748 Myria. Focus: *Visa humanitaire*, [https://www.myria.be/files/FOCUS\\_visa\\_humanaire.pdf](https://www.myria.be/files/FOCUS_visa_humanaire.pdf) (in French).
- 749 Translation from French; <http://www.adde.be/ressources/fiches-pratiques/sejour/autorisation-de-sejour-provisoire> (in French).
- 750 Judgment *SM v Entry Clearance Officer, UK Visa Section*, 26 March 2019, C-129/2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0129>
- 751 Directive 2004/38/EC on the right of EU citizens and their families to move and reside freely within the EU (EU). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:I33152&from=FR>
- 752 Flamand, C. (2019). *L'enfant comme acteur du processus décisionnel migratoire, Cahiers de l'EDEM*. Disponible au lien suivant <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/comite-des-droits-de-l-enfant-27-septembre-2018-y-b-et-n-s-c-belgique-communication-n-12-2017.html> (in French).
- 753 Myria, Belgian Federal Migration Centre. (2019). *La migration en chiffres et en droits 2019*, page 69. Available at: [https://www.myria.be/files/Myria\\_RAMIG-FR\\_2019-AS-gecomprimeerd.pdf](https://www.myria.be/files/Myria_RAMIG-FR_2019-AS-gecomprimeerd.pdf) (in French).
- 754 "Votre projet d'adoption s'oriente vers un pays d'origine qui ne connaît pas l'adoption", see <http://www.adoptions.be>
- 755 Note that in Belgium, adoption is a matter of which certain aspects fall under the federal jurisdiction and some of the Communities. With regard to the latter, the French Community has been carrying out *kafalah*-adoptions for a few years while the Flemish Community, in 2018, was considering also initiating these *kafalah*-adoption procedures.

## Denmark

- 756 Document issued based on the responses received by *The Danish National Social Appeals Board* and the research undertaken by ISS/IRC Team.
- 757 See, <https://www.dst.dk/en/Statistik/emner/befolkning-og-valg/indvandrere-og-efterkommere>
- 758 See, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en)
- 759 See, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>

## France

- 760 This section is based on research conducted by ISS/IRC, an article drafted by Sonia Ben Mansour, Lawyer at the Parisian Bar, and exchanges with the French Central authorities under the 1993 and 1996 Hague Conventions.
- 761 In France the recognition and enforcement of *kafalah* is made possible through the provision of a specific legal institution called *recueil légal*, literally meaning legal reception. In English texts it usually translated by "provision of care".
- 762 See <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>
- 763 See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>
- 764 Translation from French.
- 765 In the 1990s, it was admitted that a child taken care of through *kafalah* could, under certain conditions, be adopted in France. In the so called "Fanthou" judgment by the Court of cassation on May 10, 1995 (Cass, Civ.1st, May 10, 1995, Fanthou, Bull. I. n° 198 p. 142, appeal n° 93 – 17.634), it was decided that two French spouses could proceed with the adoption of a child whose personal law did not know, or prohibit adoption, on condition that, regardless of the provisions of this law, the legal representative of the minor had provided his/her consent with full knowledge of the effects attached to French adoption law and, in particular, in the case of a full adoption, of the complete and irrevocable nature of the severance of the ties between the minor and his/her birth family or the supervisory authorities in his/her State of origin. This permissive jurisprudence was halted in with the entry into force of Law No. 2001 – 111 of February 6, 2001 relating to intercountry adoption. The reason being the need for France to respect its international commitments. On the basis of article 370 – 3 of the civil code, the Court of Cassation has repeatedly refused to determine the adoption of a child taken care of through *kafalah*, stating that the "recueil légal" could not be compared to a simple or full adoption.
- 766 Cass, Civ, 1st, 10 May 2006; Cass, Civ, 1st, 10 October 2006 n° 06-15.265 and 06 – 15.264; Civ., 1st, 9 July 2008 ; Ccass, Civ, 1st, 15 December 2010, n° G 09 – 10.439.
- 767 Paris Appeal Court, 15 February 2011, Pôle 3, Chamber 6, n° RG 10/12718; Appeal Court of Douai, Chamber 7, section 1, 05/04/2012, n° RG 11/02964.
- 768 Cass Civ., 1st, 14 April 2010, n° 08 – 21.312: A minor must establish his/her habitual residence in France for at least three years in order to apply for French nationality. Thus, it was judged that "if the concept of *recueil légal* does not imply that the child has severed all ties with his/her family of origin, it is necessary, in order to benefit from the provisions of former article 21-12 of the civil code, that the child is actually taken in and brought up in France, which is not sufficient to establish on its own an act of *kafalah*, and that it is not an episodic act, with residence alternately in France and in State of origin".
- 769 It was accepted by the Court of Cassation Civ., 1st, September 30, 2003 that the constitution of an ad hoc family council on French territory allows members of the family council to consent to the adoption in case the child has no known parentage.

- 770 The judgment of 4 December 2013 refused the consent to adoption given by a family council in a case where the biological mother of the child was known and retained her parental authority following a relinquishment decision on the basis that the conditions fixed in article 348-2 of the Civil Code were not met: *"the consent of the adoption can be given by the family council only when the father and mother of the child are deceased, unable to express their will or if they have not lost their parental authority rights or when the child's parentage is not established"*.
- 771 See: [https://blogavocat.fr/space/mc.rousseau/content/refus-de-visa-et-kafala-adoulaire\\_d609c9a8-7a1f-4828-8bf1-9b62003e65f4](https://blogavocat.fr/space/mc.rousseau/content/refus-de-visa-et-kafala-adoulaire_d609c9a8-7a1f-4828-8bf1-9b62003e65f4)
- 772 Paris Court of Appeal, Pole 1 – 1st Chamber, June 9, 2011, No. RG 10/18164; Court of Appeal of Paris, Pole 1 - Chamber 1, October 16, 2012, No. RG 11/23072.
- 773 Court of Appeal of Agen, 1st Chamber, February 3, 2011, No. RG 10/01541.
- 774 When nationality is not required or application for it is unsuccessful, the child retains his or her "initial" nationality and may continue to live with the *kafals*; a parental tie is not established unless there is an adoption.
- 775 Ministerial reply of August 21, 2008.
- 776 Cass Civ Avis, December 17, 2012, No. 12-00013: [Translation from French] *"the solution does not depend solely on the finding that French nationality has been acquired; it also involves the examination of a concrete situation falling within the remit of the trial judge."*
- 777 The family council shall be composed of a judge and at least 4 people who show an interest in the child (relatives of people caring for the child) and who can take action even from a distance if they reside in the State of origin.
- 778 See Article I in ISS/IRC Monthly Review N°236, October/November 2019.
- Germany**
- 779 The information provided in this section is based on different sources, including the responses provided by V. Schatz, former Jurist at Internationaler Sozialdienst (ISD) Germany, as well as the answers given by the German Central Authority for the 1993 Hague Convention and by the German Central Authority for the 1996 Hague Convention in the frame of a questionnaire in 2016 and in 2019.
- 780 See status of ratifications, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11&chapter=4&clang=en)
- 781 See Status Table Hague Convention CH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>
- 782 Available in English at: [http://www.gesetze-im-internet.de/englisch\\_intfamrvg/index.html](http://www.gesetze-im-internet.de/englisch_intfamrvg/index.html)
- 783 These Procedural standards foresee uniform rules regarding the conception of procedures and decision making processes in different cross-border situations and thus addressing the diversity of procedures applicable in each country. 2019 Version accessible in German at: [https://www.kvjs.de/fileadmin/dateien/jugend/Arbeitshilfen\\_Formulare\\_Rundschreiben\\_Newsletter\\_Tagungsunterlagen/Rundschreiben/Rundschreiben\\_2019/Verfahren\\_bei\\_grenzueberschreitenden\\_Unterbringungen\\_von\\_Kindern\\_und\\_Jugendlichen.pdf](https://www.kvjs.de/fileadmin/dateien/jugend/Arbeitshilfen_Formulare_Rundschreiben_Newsletter_Tagungsunterlagen/Rundschreiben/Rundschreiben_2019/Verfahren_bei_grenzueberschreitenden_Unterbringungen_von_Kindern_und_Jugendlichen.pdf)
- 784 The attribution of a permit based on hardship is only possible on precondition that the residence permit is *"necessary in order to avoid particular hardship"*. This, however, applies only if the refusal of granting the permit would be intolerable in the individual case, in view of the basic right to protection of the family (Article 6 Basic Law). This precondition is almost impossible to meet. The circumstances which cause hardship are of extreme unusual nature and shall call for the necessity to restore and maintain the family unit. The vital support needed by the child should only be possible in Germany. Any circumstances resulting from the general living-circumstances in the child's State of origin cannot be taken into consideration. Even if the child has no relatives in his or her State of origin who could support him or her, such situation does not constitute any "particular hardship". From the point of view of German authorities, in such situation, the child would have to be supported by persons outside the family (e.g. by employing a child minder) or by public or commercial benefits in the State of origin. The *kafil* parents living in Germany are advised to provide financial support to the relatives in the child's State of origin.
- 785 In order to join a German national.
- 786 In order to join a Foreign national.
- 787 Countries with different family law systems, depending on the religious context, or in federal republics with different family law systems in the individual federal states (e.g. Nigeria, with Sharia-based law and prohibition of adoption in the north, and federal law with provisions for adoption in the other states, which, however, has not been implemented by most of the northern states).
- 788 In German law, there are different forms of adoption. See ISS/IRC (2019). *Comparative table on full and simple adoptions*.
- 789 See also, VG Hamburg 13. Kammer, Urteil vom 04.03.2010, 13 K 2959/09.
- 790 See <https://www.hcch.net/en/states/authorities/details3/?aid=876>
- 791 See [http://www.bagljae.de/downloads/125\\_verfahrensstandards\\_2016.pdf](http://www.bagljae.de/downloads/125_verfahrensstandards_2016.pdf)
- 792 Document in French available on request at ISS/IRC.
- 793 See 2019 Procedural standards, Annex 1.
- 794 See, [https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Unterbringung/Unterbringung\\_node.html](https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Unterbringung/Unterbringung_node.html)
- 795 2019 Procedural standards, pp. 16 et seq.
- 796 Accessible in German at: [https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/BZAA/Fragen/FAQ\\_node.html](https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/BZAA/Fragen/FAQ_node.html); the website states the following: *"To be distinguished from an adoption is a kafala of Islamic law. The latter does not modify the filiation and kin relationships of the child, but a child is entrusted, while maintaining his or her biological origin, to other parents based on a transfer of parental responsibilities to care and education. Regarding the nature of the measure, kafala does not establish a permanent parent-child relationship, but is most likely to be compared with a long-term foster care placement combined with a guardianship. Therefore, the law and the procedure of adoption mediation (AdVermiG) are not applicable to them; kafala decisions can therefore not be recognised based on the Adoptionswirkungsgesetz."*
- 797 In the case of intercountry adoptions, Section 6 (1) no. 1 of the Act on the Implementation of the 1993 Hague Adoption Convention (AdÜBAG) provides that children in the process of adoption are allowed to join their prospective adoptive parents in Germany, just like biological children, if the adoption placement agency has approved of a proposal made by the Central Authority of the home country.
- 798 There have been cases where the German authorities, for that reason, allowed themselves to be convinced not to insist on a hearing.
- Italy**
- 800 This factsheet is based on initial information provided by Marco Paolo Morozzo della Rocca and Ilaria Pretelli, subsequently reviewed and complemented by ISS/IRC Team and Cinzia Peraro as well as responses provided by dott. Claudio Cottatellucci - Magistrato, Tribunale per i minorenni di Roma, e direttore della rivista Minorigiustizia.
- 801 According to 2019 ISTAT data, foreign people regularly residing in Italy by 1 January 2019 amount to 5,255,503 and represent 8,7% of all people living in Italy. The largest foreign community is from Romania (1,206,938, 23% of all foreigners present in Italy), followed by Albania (441,027, 8.4%) and Morocco (422,980, 8.0%), while foreigners from Egypt amount to 126,733, from Tunisia 95,071, from Algeria 19,661.
- 802 With regard to the entrances in 2017 for "family reasons", 5,801 were from Egypt, 16,127 from Morocco, 3,175 from Tunisia. However, these data concern all foreigners without distinction in terms of age (and I cannot find more recent data related to children). There is no database to check whether the "family reasons" also include "kafalah placements".
- 803 For general considerations on the interactions between the Italian and the Islamic legal order, cfr. Nisticò, M. (2013). *Kafalah Islamica e condizione del figlio minore*. La rilevanza della Kafalah nell'ordinamento italiano, Convegno annuale dell'Associazione "Gruppo di Pisa", Catania 7 – 8 giugno 2013, La famiglia davanti ai suoi giudici, pp. 1 – 3. Available at: [https://www.gruppodipisa.it/images/rivista/pdf/Michele\\_Nisticò\\_-\\_Kafala\\_islamica\\_e\\_condizione\\_del\\_figlio\\_minore.pdf](https://www.gruppodipisa.it/images/rivista/pdf/Michele_Nisticò_-_Kafala_islamica_e_condizione_del_figlio_minore.pdf)
- 804 Nisticò, M. (2013). *Kafalah Islamica e condizione del figlio minore* p. 2. Available at: <https://www.gruppodipisa.it/8-rivista/186-michele-nisticò-kafala-islamica-e-condizione-del-figlio-minore>
- 805 See status of ratifications [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-11&chapter=4&clang=fr](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11&chapter=4&clang=fr)
- 806 See Status Table Hague Convention CH <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>

## References

- 807 On this issue see Baruffi, M.C. (2016). *La circolazione degli status acquisiti all'estero e il loro riconoscimento*, in *Rivista dell'Associazione Italiana degli Avvocati per la Famiglia e i Minori AIAF*, pp. 63, 74 et seq.; Peraro C. (2015). *Il riconoscimento degli effetti della kafalah: una questione non ancora risolta*, in *Rivista di diritto internazionale privato e processuale*, n. 3, pp. 541 – 566, at pp. 558 et seq. Tribunal of Mantova, 10 May 2018.
- 808 For the considerations in this section see generally, Nisticò, M. (2013). *Kafalah Islamica e condizione del figlio minore*, pp. 16 – 19.
- 809 In this sense, Nisticò, M. (2013). *Kafalah Islamica e condizione del figlio minore*, pp. 17.
- 810 Cfr. Trib. Firenze 9 November 2006, in *Quad. dir. e pol. ecclesiastica*, 2007, p. 846; App. Torino 18 July 2007, in *Dir. famiglia*, 2008, 1, p. 143; Trib. Biella 26 April 2007, in *Dir. famiglia*, 2007, 4, p. 1810 note by J. LONG, *Il ricongiungimento familiare del minore affidato con kafalah*; App. Torino 30 May 2007, in *Dir. imm. e citt.*, 2008, 1, p. 181; Trib. min. Reggio Calabria 10 October, 2006, in *Famiglia e minori*, 2006, 2, p. 86.
- 811 Cfr. Cass. 20 marzo 2008, n. 7472, in *Famiglia e dir.*, 2008, p. 675, note by Gelli R., *La kafalah tra esigenze di tutela del minore e rischi di aggiramento della disciplina dell'immigrazione and in Famiglia, persone e successioni*, 2008, p. 891 note by Racheli, L., *La kafalah di diritto islamico è un presupposto per il ricongiungimento familiare*. The above-mentioned orientation was confirmed in Cass. 2 July 2008, n. 18174, and in Cass. 17 July 2008, n. 19734.
- 812 Cfr. Corte cost. 5 July 2003 n. 198, available at <https://www.cortecostituzionale.it/actionPronuncia.do>
- 813 As reported by Nisticò, M. (2013). *Kafalah Islamica e condizione del figlio minore*, p. 18.
- 814 Nisticò, M. (2013). *Kafalah Islamica e condizione del figlio minore*, p. 19.
- 815 Cfr. Randazzo, A., *La kafalah in Italia*. Available at: [https://www.avvocatidifamiglia.net/moduli/268\\_La%20kafalah%20in%20Italia.pdf](https://www.avvocatidifamiglia.net/moduli/268_La%20kafalah%20in%20Italia.pdf); as stated by the author the cases before the Italian Corte di Cassazione in 2008 where all legal actions promoted by the Public Administration (Ministero dell'Interno) against decrees pronounced by lower courts.
- 816 Cfr. Cass. civ., 20 March 2008, n.7472; Cass. civ., 2 July 2008, n.18174; Cass. civ., 17 July 2008, n. 19734; App. Perugia, 13 June 2013, in *Foro pad.*, 2014, 4, c. 496
- 817 Cfr. Trib. Varese, 23 July 2011, in *Dir. e politica eccles.*, 2012, 3, p. 748, declaring illegal the denial of a visa based on family reunification to a minor subject to the custody of his grandmother, who was legally resident in Italy and, as a consequence, had requested his entry in the country. Precedents in law and in the facts are: Trib. Genova, 12 settembre 2009 e App. Genova, 13 March 2010, available at "Immigrazione.it".
- 818 As Randazzo, A. reports in the article, *La kafalah in Italia*, p. 2, given the exceptional nature of the family reunification as intended in art. 29 of the Decreto legislativo 25 July 1998 no 286 and the fact that it is a mere negotiated settlement, the Islamic *kafala* Hague Convention can not be assimilated to other institutes which involve states authorities. In this sense, also Nisticò, M. (2013). *Kafalah Islamica e condizione del figlio minore*, pp. 17-18.
- 819 Court of Cassation, 1st March 2010, n. 4868, in *Famiglia e diritto*, 2010, p. 787.
- 820 See Peraro, C. (2015). *Il riconoscimento degli effetti della kafalah*, cit., p. 545; Lang, A. (2011). *Considerazioni su kafalah, ricongiungimento familiare e diritto dell'Unione europea*, in *Diritto, immigrazione e cittadinanza*, pp. 66 et seq.
- 821 Cfr. Cass. Sez. Un., 16 September 2013, n. 21108, in *Corriere giuridico*, 2013, 12, pp. 1497 et seq., note by Morozzo della Rocca, P., *Uscio aperto, con porte socchiuse, per l'affidamento del minore mediante kafalah al cittadino italiano o europeo*. The findings of the Italian Supreme Court are consistent with the interpretation of the Court of Justice adopted in the case C-129/18, nonetheless some unresolved issues can be still raised at national level: see Peraro C. (2019). *L'istituto della kafalah quale presupposto per il ricongiungimento familiare con il cittadino europeo: la sentenza della Corte di giustizia nel caso S.M. c. Entry Clearance Officer*, in *Rivista di diritto internazionale privato e processuale*, n. 2, pp. 320 – 348.
- 822 Here in after D. lgs. 30 of 2007.
- 823 Here in after the 2004/38/CE Directive.
- 824 Corte di cassazione, sez. I civile, sent. n. 1843 del 2 February 2015, in *Nuova giur. civ. comm.*, 2015, I, p.713 ss., con nota di Di Masi M., *La Cassazione apre alla kafalah negoziale per garantire in concreto il best interest of the child*.
- 825 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009)313 final of 2 July 2009; see Lang, A. (2013), *Le Sezioni Unite chiariscono quando la kafalah è presupposto per il ricongiungimento familiare del cittadino italiano*, in *Diritto immigrazione e cittadinanza*, 2013, 3, pp. 91 ff.; Peraro C. (2019). *L'istituto della kafalah*, p. 337 ff.
- 826 Court of Cassation, section I, 24 November 2017, n. 28154.
- 827 Article 3, c.2 of 2004/38/CE Directive, which was exactly transposed in art. 3, c. 2 of D. lgs. n. 30 of 2007 states: "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; (b) the partner with whom the Union citizen has a durable relationship, duly attested".
- 828 This is what Magno G. (2014) observes in *Ingresso in Italia del minore straniero affidato in kafalah a coniugi italiani: una questione da chiarire*, in *Dir.fam.pers.*, 1 p. 108.
- 829 Custody in the Italian legal order is governed by Law 4 May 1983, n. 184, as amended, especially by Law 476 of 31 December 1998, Law 149 of 28 March 2001 "Right of the child to have a family"; D.lgs. 154 of 28 December 2013; Law of 19 October 2015, n. 173 "Right to the affective continuity of foster children"; Law 47 of 7 April 2017 (on unaccompanied foreign minors).
- 830 Nisticò M. (2013). *Kafalah Islamica e condizione del figlio minore*, p. 19.
- 831 See Juvenile Court of Brescia, 23rd December 2013, n. 226, in *Rivista di diritto internazionale privato e processuale*, 2015, n. 3, p. 573 ff., commented by Peraro C. (2015). *Il riconoscimento degli effetti della kafalah*, p. 541; similar to Juvenile Court of Brescia, 12 March 2010, ivi, 2010, p. 760, that already deemed the declaration of adoption be in contrast with the nature and aims of *kafalah*.
- 832 See Juvenile Court of Trento, decree of 10 September 2002, in *Nuova giurisprudenza civile e commentata*, 2003, I, p. 149 ff., that granted this form of adoption; similar to Juvenile Court of Trento, 10 March 2002, Juvenile Court of Rome, 9 May 2011, n. 621. These judgments have been criticised: see Campiglio C., *Il diritto di famiglia islamico nella prassi italiana*, in *Rivista di diritto internazionale privato e processuale*, 2008, p. 46, 70; Morozzo della Rocca P. (2004) *Il limes dell'adozione internazionale e l'ingresso in Italia del minore non adottabile*, in *Studi urbanati*, n. 2, pp. 203 ff.
- 833 Court of Cassation, 23rd September 2011, n. 19450. However, it must be noted that whenever *kafalah* is deemed as an adoption, the correct legislation applicable to the case shall be art. 36, para. 2 of Law n. 184/1983 on the extra-conventional adoption since Islamic countries have not ratified the 1993 Hague Convention on international adoption. See Peraro C., *Il riconoscimento degli effetti della kafalah*, cit., p. 555 ff.
- 834 See also Court of Cassation, 26 March 2015, n. 6134 that also affirmed the application of art. 64 ff. of Law n. 218/1995 to the recognition of the foreign act.
- 835 Tribunal of Mantova, 10 May 2018; see Peraro C. (2019). *L'istituto della kafalah*, p. 334.
- 836 On this issue see Baruffi M.C (2016). *La circolazione degli status acquisiti all'estero e il loro riconoscimento*, in *Rivista dell'Associazione Italiana degli Avvocati per la Famiglia e i Minori AIAF*, pp. 63, 74 ff.; Peraro C. (2015). *Il riconoscimento degli effetti della kafalah*, p. 558 ff.
- 837 Tribunal of Bergamo (labour section) 20 January 2017. See Peraro C. (2019). *L'istituto della kafalah*, p. 333 f.
- 838 Cfr. art. 3 Law 5 February 1992, no. 91.

- 839 Actually, a section specifically concerning *kafalah* was added in the in the draft examined by the first chamber of the Italian Parliament on the 25th of June 2014. This amendment was aimed to give a juridical asset to the *kafalah* in the Italian legal order but has been deleted in the order of execution by the Italian Senate because it was considered too much ambiguous and deserving a deeper study by the legislator. For more details, cfr. *Ratifica ed esecuzione della Convenzione sulla competenza, la legge applicabile, il riconoscimento, l'esecuzione e la cooperazione in materia di responsabilità genitoriale e di misure di protezione dei minori, fatta all'Aja il 19 ottobre 1996*, available at <http://documenti.camera.it/leg17/dossier/pdf/ESO108B.pdf>
- 840 Cfr. Convention of 19 October 1996, art. 33.
- 841 This issue is raised in the article by Dato, E. (2016). *Kafalah, la convenzione è in vigore ma l'attuazione è un pasticcio*. Available at <http://www.vita.it/it/article/2016/02/16/kafalah-la-convenzione-e-in-vigore-ma-lattuazione-e-un-pasticcio/138326/>
- 842 Cfr. on this point R. Duca (2014). Family Reunification: the case of Muslim Migrant children in Europe, in *Athens Journal of Social Science*, p. 114.
- 843 Nisticò M. (2013). *Kafalah Islamica e condizione del figlio minore*, p. 19.
- 844 Peraro C. (2015). *Il riconoscimento degli effetti della kafalah*, pp. 557 ff.
- 845 Law 18 June 2015, n. 101.
- ### New Zealand
- 846 The information in this section is based on responses provided by Beth Nelson from the Central Authority designated under the 1993 Hague Convention, and member of ISS in New Zealand.
- 847 Accessible at: <http://www.legislation.govt.nz/act/public/1955/0093/latest/DLM292661.html>
- 848 Available at: <http://www.legislation.govt.nz/act/public/1997/0109/latest/DLM422494.html>
- ### Norway
- 849 The information provided in this section is based on exchanges with the Norwegian Directorate for Children, Youth and Family Affairs (*Budifn*).
- 850 See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&clang=en)
- 851 See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>
- 852 Available in English at <https://www.regjeringen.no/en/dokumenter/the-child-welfare-act/id448398/>
- 853 See <https://www.regjeringen.no/en/dep/bfd/organisation/Offices-and-agencies-associated-with-the-Ministry-of-Children-and-Equality/Norwegian-Directorate-for-Children-Youth/id418035/>
- ### Spain
- The information in this section is based on an article drafted by Dra. Carmen Ruiz Sutil from the University of Granada, research conducted by ISS/IRC and exchanges with the Dra. Pilar Diago Diago from the University of Zaragoza, and the Spanish Central Adoption Authority at federal level.
- 854 BOE núm. 151 of 25 June 1997.
- 855 Vid. Fernández Rozas, F. C., Sánchez Lorenzo, S. (2016). *Derecho Internacional Privado*. Pamplona, Thomson Aranzadi, pp. 206 and 400.
- 856 See, <https://www.boe.es/buscar/pdf/2007/BOE-A-2007-22438-consolidado.pdf>
- 857 It is also declared that said foreign institution "is a situation that can be recognised in Spain if it has been validly constituted by a foreign authority, as long as it does not violate Spanish international public order and if the documents in which it appears are duly legalised and translated into Spanish official language".
- 858 Ortiz Vidal, M<sup>a</sup>. D. (2016). *La Kafala Islámica: institución jurídica protegida en España por la prestación social de orfandad. Derecho e Islam*, pp. 277 – 278.
- 859 For Spain in BOE núm. 291, 2 December 2010. In Morocco it was published *Bulletin Officiel* núm. 1 Decembre 2002.
- 860 On the conflict caused by this provision between the Spanish and Moroccan authorities, see Diago, P. *Denial of constitution of kafala by foreigners who do not habitually reside in Morocco*. Circular núm. 40 S/2 Kingdom of Morocco, Millenium Dipr. <http://www.millenniumdipr.com/e-68-5-n%C2%BA-2-denegacion-de-constitucion-de-kafala-por-parte-de-extranjeros-que-no-residen-habitualmente-en-marruecos-circular-n%C2%BA-40-s-2-reino-de-marruecos> (consulted on 7 March 2017).
- 861 Conclusions of Opinion 3/2016 of the State General Attorney's Office on the impact of the reform of Law 54/2007 (December 28), on Intercountry Adoption, regarding the treatment of *kafalah*. On the use of *kafalah* by foreign families or residents abroad and the non-application of Moroccan regulations in Spain see Gómez Bengoechea, B., Berástegui Pedro-Viejo A., and Adroher Biosca S. (2015). Un estudio de caso sobre adoptabilidad: la kafala islámica, in AA.VV (coords.), *Se busca familia para un niño. Perspectivas psico-jurídicas sobre la adoptabilidad*, Dykinson. pp.121 – 175.
- 862 BOE núm. 51, 28/02/2007.
- 863 Concerning these two circumstances see in more detail Soto Moya, M. (2016). Droit à la vie de famille. Un parcours difficile depuis le Maroc. In *Revue Paix et Sécurité Internationales*, janvier – décembre 2016, num. 4, pp. 137 – 166, spec. pp. 147 and 148.
- 864 The jurisprudence follows the criteria set forth by the Instruction of September 27, 2007, admitting the granting of the visa for family reunification, when it had been constituted through a judicial or administrative procedure, provided that the previous declaration of abandonment had been mediated. This is reflected in the ruling of the National Court, Contentious-Administrative Chamber, February 2, 2011 (EDJ 2011/11156, Law database Lefebvre); Superior Court of Justice of Madrid, Contentious-Administrative Chamber, October 2, 2008 (EDJ 2008/257072 database Lefebvre Law); Superior Court of Justice of Madrid, Contentious-Administrative Chamber, of April 3, 2008 (EDJ 2008/84442, Law database Lefebvre). On the contrary, it understands that the visa does not proceed in cases of privately arranged *kafalah*, with the consent of the *makfoul's* biological parents before a notary, outside any judicial or administrative procedure [Judgment of the Supreme Court December 9, 2011 (RJ 2012/2630, aranzadi wetlaw database); Judgment of the Madrid Superior Court of Justice of July 10, 2008 (JUR 2008/315217, database of aranzadi wetlaw); Judgment of the Superior Court of Justice of the Basque Country of September 23, 2008 (JUR 2009/3819, aranzadi wetlaw database); Judgment of the Superior Court of Justice of Madrid of September 11, 2013 (JUR 2013/311461, aranzadi wetlaw database); Judgment of the Superior Court of Justice of Catalonia of November 21, 2012 (EDJ 2012/330041, Law database Lefebvre) or Judgment of the Superior Court of Justice of Catalonia of July 16, 2014 (JUR 2015/627, database of aranzadi wetlaw)].
- 865 BOE núm. 10, 12 January 2000.
- 866 Family reunification regulated by arts. 52 to 58 of the Aliens Regulation approved by Royal Decree 557/2011 (April 20), which approves the Regulation of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration (BOE No. 103, of April 20, 2011). In particular, the legal representatives of the minor must personally submit the application to the immigration office of the province in which the residence is to be established (art. 56.2 of this Royal Decree 557/2011), where compliance with the required requirements will be assessed. If the minors are in the State of origin, they must be cared for by other relatives or public officials while the procedure is being processed and once it is finished, if the resolution is favourable, the legal representative must request the corresponding visa for the entry to Spain before the consular office in the corresponding country.
- 867 When the legal representative is a Spanish citizen or a resident of the European Union, but the regime established in Royal Decree 240/2007 (February 16), on the entry, free movement and residence in Spain of citizens of the EU Member States and of Other Member States, minors who are under guardianship of a EU citizen are excluded from its application scope, there're according to additional provision twenty-one 1.c) of the Organic Law 4/2000 Regulation, introduced by final provision three two of Royal Decree 240/2007, the Immigration Law will apply. Consequently, as provided in art. 1 of the Aliens Act "the nationals of the EU Member States and those to whom the community regime applies will be governed by the rules that regulate it, this Law being applicable in those aspects that could be more favourable".
- 868 As stated in the Judgement of the Supreme Justice Court of Madrid, 11 September 2013 (EDJ 2013/183836, Law database Lefebvre). In particular, In particular, the first legal basis echoes the exact words of the applicant's father for the residence permit, since the latter declared that he had left his wife pregnant to give the child to his sister-in-law who resides in Spain.

## References

- 869 As reflected in the judgement Supreme Court, Third Chamber, Contentious-Administrative, 9 December 2011 (EDJ 2011/289775 Law database Lefebvre), in which the Court confirmed that if the child is under parental authority of his/her biological or adoptive parents, one or both being alive, and there is no judicial declaration of abandonment, the refusal of the visa on family reunification grounds is appropriate given that the *kafalah* is insufficient for these purposes. In addition, in the judgment of the Superior Court of Justice of Madrid, May 20, 2011 (EDJ 2011/155974, law database Lefebvre) the reunification visa requested by the *kafil* for his *makfoul* niece is denied, since she was not found abandoned but was living with her parents in Morocco. In the fourth law basis of the judgement, it is stated that "(...) everything turns out to be a true "set up" engineered by the *kafil*, with the passivity of the child's parents and the complicity of the Moroccan Court that disregarded the indispensable hearings in the Spanish legal system (...)".
- 870 As occurred in the Resolution of the General Directorate of Registries and Notaries of June 12, 2015 (EDD 2015/281605, Law database Lefebvre), in which the lack of legitimisation of the *kafil* was stressed given that they do not have the status of legal representatives of child taken care of through *kafalah* order to initiate the procedures for the acquisition of the Spanish nationality based on the residence of the child as per art. 22.2 c) of the Civil Code. If this pathway is not possible, the *makfoul* will have to reside in Spain for ten continuous years to acquire Spanish nationality.
- 871 See, Marchal Escalona, N. (2015). Problemas actuales de reconocimiento de la *kafala* marroquí ante autoridades españolas. In M. Moya Escudero (dir.). *Familia y Sucesiones en las relaciones hispano-marroquíes*, pp. 145 et seq.
- 872 For further explanations, see Ortiz Vidal, M<sup>o</sup>. D., *La kafala islámica: institución jurídica protegida en España*. In *Derecho e Islam*, pp. 265 and 266.
- 873 See Moreno Cordero, G. (2016). Determinación de los efectos que en el ámbito español despliega la *kafala* marroquí. Resolución (4<sup>o</sup>) 13 March 2015. In *Anuario español de Derecho internacional privado*, pp. 1285 – 1289.
- 874 Durán Ayago, A. (2004). El interés del menor en el conflicto de civilizaciones: elementos para su concreción en un contexto intercultural. In AA.VV., *El Derecho de familia ante el siglo XXI: Aspectos internacionales*, Madrid, Colex, pp. 295 – 318.
- 875 On the different responses see: Marchal Escalona, N. (2015). Problemas actuales de reconocimiento de *kafala* marroquí ante autoridades españolas. In Moya Escudero, M. (dir.), *Familia y Sucesiones en las relaciones hispano-marroquíes*, Valencia, Tirant Lo Blanch, pp. 141 – 176.
- ### Switzerland
- 876 This section was issued based on information provided by the Central Authorities under the 1993 and 1996 Hague Conventions at Federal and at cantonal levels as well as research conducted by ISS/IRC team.
- 877 See <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>
- 878 See <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>
- 879 In French at <https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html>
- 880 In French at <https://www.admin.ch/opc/fr/classified-compilation/19770243/index.html>
- 881 Translated from French.
- 882 In French at <https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/auslaender/weisungen-aug-f.pdf>
- 883 Article 33: *Residence permits may be granted to placed children if the conditions laid down in the Civil Code for the hosting of such children are met*. In French at <https://www.admin.ch/opc/fr/classified-compilation/20070993/index.html>
- 884 Decisions available in French at ISS/IRC on request.
- 885 Double nationals Swiss and Moroccans in one of the two situations.
- 886 In one of the two situations, the *makfoul* child lived with the sister of the *kafil* mother in Morocco. The latter and her spouse saw the children two or three times a year. In the other situation, the *kafil* mother said being obliged to stay (temporarily) in Morocco in order to take care of the child despite her husband living in Switzerland.
- 887 The Swiss law requires a maximum age difference of 45 years. There are exceptions to this rule (art. 5 al. 4 Ordinance on Adoption and art. 264 d al.2 Code civil) but they were considered non-applicable in the said cases. In both cases, one of the spouses were older than 60 and 80 respectively and the concerned *makfoul* children were very young.
- 888 According to the SASLP, the authority was confronted with a '*fait accompli*' situation that requested the adoption of the child arguing that this would be in the interest of the child, thus opening "pathways to abuses (...). In addition, the birth parents of the children had not given their consent neither to the *kafalah* decision nor to the adoption. Therefore, the condition of article 265a Civil Code was not complied with. The decision of the SASLP was founded on the legality principle and the principle of equality of treatments".
- 889 See <https://www.hcch.net/en/states/authorities/details3/?aid=831>
- 890 See <https://www.bj.admin.ch/bj/en/home/gesellschaft/kinderschutz/kantonsaufgaben.html>
- 891 Art. 17 (Special form of guardianship in the case of adoption before placement) of the *Loi fédérale relative à la Convention de La Haye sur l'adoption et aux mesures de protection de l'enfant en cas d'adoption internationale* [Federal Law relating to the Hague Convention on Adoption and Measures for the Protection of Children in the Case of International Adoption] (LF-CLH-1993):  
[Translation from French]: "1) When the child has been adopted before removal to Switzerland and the adoption is likely to be recognised, the child protection authority shall immediately appoint a deputy. 2) The deputy shall help the adoptive parents look after the child by providing advice and support. When adoption in the state of origin does not have the effect of severing the pre-existing filial relationship with the biological parents, the deputy shall help the adoptive parents apply for an adoption in accordance with Swiss law (Art. 27 HC). 3) The deputy shall draw up a report on the development of the adoption relationship for the child protection authority no later than one year after the deputy's appointment. 4) The deputyship ends by law no later than 18 months after communication of the child's arrival or, in the absence of communication, after the child's integration. The child protection measures provided by Art. 307 ff CCI are reserved."
- 892 Translation from French.
- ### USA
- 893 The information provided in this section was provided by the US Central Adoption Authority. The analysis of ISS/IRC does solely reflect the opinion of ISS/IRC.
- 894 Available at <https://www.dhs.gov/immigration-statistics/yearbook/2018/table12>
- 895 See Status Table HCCH <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>
- 896 See <https://travel.state.gov/content/travel/en/Inter-country-Adoption/Adoption-Process/how-to-adopt/adoption-of-children-from-countries-sharia-law.html>
- ### Technical note: Cross-border *kafalah*
- 897 The following parts are applicable to *kafalah* placements as a family-type placement, and therefore do not apply to *kafalah* situations where financial aid is provided to children in institutions, sponsorship situations for example (Lebanon, Egypt).
- 898 See ISS/IRC (2015). *Manifesto for Ethical Inter-country Adoption*, p. 12. Available at: [https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/ISS\\_Manifesto\\_ANG.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/ISS_Manifesto_ANG.pdf); Dambach M. (2018). *Principle of Subsidiarity: ISS/IRC comparative working paper 1: Spotlight on solutions*. Available at [https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/PRINCIPLE\\_SUBSDIARITY\\_ANG.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/PRINCIPLE_SUBSDIARITY_ANG.pdf)
- 899 See summary of the 1996 Convention based on the Explanatory Report by P. Lagarde (1996).
- 900 Assuming that *kafalah* is considered a type of attribution of parental responsibility, which may be the result of an agreement or a unilateral act, without the intervention of a judicial or administrative authority (see article 16 (2)).
- 901 Raised in questionnaires sent to countries in preparation of the Special Commission of 2017 concerning the practical operation of the 1996 Hague Convention. <https://www.hcch.net/en/publications-and-studies/details4/?pid=6550&dtid=33>
- 902 Translation from Spanish.
- 903 In the intercountry adoption field, Ireland has decided to cooperate solely with contracting States to the 1993 Hague Convention.

- 904 <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf>
- 905 "This consultation should occur well before taking a decision about the placement or provision of care, and it should be as comprehensive as possible (including among other things, a clear description of the measure of protection, status of the child, health (where appropriate) and family history, migration conditions of the child in the receiving State) in order to allow the respective authorities to take an informed decision in the best interests of the child. The decision on consent to the placement by the requested State should be provided as quickly as possible."
- 906 See <https://www.hcch.net/en/news-archiv/details/?varevent=349>
- 907 Alternative Care Guidelines, paras. 12, 27, 30(c), 56, 69, 76 – 79. Available at: <https://www.alternativecareguidelines.org/Portals/46/Moving-forward/Moving-Forward-implementing-the-guidelines-for-web1.pdf>
- 908 Conclusions and Recommendations adopted by the Seventh Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (10 – 17 October 2017), Point 32: "The Special Commission recalls that private agreements between parents on parental responsibility (i.e., parental agreements) do fall under the scope of the Convention through the application of the rules on applicable law, if consistent with Article 3 and not excluded by Article 4. Such parental agreements cannot be subject to the rules on recognition and enforcement, unless they have been confirmed or approved by a competent authority, or have been subject to an act of a similar nature by a competent authority with a view to giving such agreements force of law (see Art. 23, which provides for recognition by operation of law of measures taken by the authorities of a contracting State)". Available at <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf>
- 909 This is not exclusive to kafalah but generally poses problems when a protection measure does not exist in the legal framework of another country.
- 910 1996 Hague Convention, art. 15: "(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the contracting States shall apply their own law. (2) However, in so far as the protection of the person or the property of the child requires, they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection. Article 16 of the 1996 Hague Convention: A kafalah that results from an agreement between parties or a unilateral act (not confirmed or approved by a competent authority) or has the force of law in a foreign state under Article 16 (1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child. (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect".
- 911 See Paul Lagarde (1996). *Explanatory Report*. Available at: <https://assets.hcch.net/upload/expl34.pdf>
- 912 Prof Yasserli N. (2015) proposes the following three step approach:  
1. Traditional Islamic Jurisprudence (historical approach): concept and forms of "functional adoption equivalents";  
2. Examining contemporary state of legal institution among Islamic jurisdictions (Inter-Islamic comparison): understand role and operations; and 3. Transfer of findings based on purposes and effects of the respective regulations, regardless of label, including policy and legislative aims (Yasserli, N. (2015). *Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law*, The American Journal of Comparative Law, Vol. 63, pp. 927 – 962); see also paras. 84 and following, Prof Diago (2010). *La Kafalah islámica en España*, available in Spanish at <https://e-revistas.uc3m.es/index.php/CDT/article/view/98/96>
- 913 The application conditions may change, see Lagarde P. (1996). *Explanatory Report*, paras. 90 – 91. Available at: <https://assets.hcch.net/upload/expl34.pdf>
- 914 Concept of HR is a legal notion whose determination remains very complex in many areas (child abduction, international adoption, etc.).
- 915 1996 Hague Convention, art.15 (3): "If the child's habitual residence changes to another contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence"; 1996 Hague Convention, art. 16 (4) of for private kafalah: "If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence."
- 916 Some consistent criteria for determining the habitual residence of the parents or candidates under the 1993 Hague Convention:
- length of time the person has been living in the state;
  - intention concerning their residence;
  - profession;
  - personal and social ties to the States, including their degree of integration into the State; and
  - any other ties with the State in which they are living (business interests, real or personal property, etc.).
- Potential criteria for determining the habitual residence of the child:
- State in which the child is born;
  - State of habitual residence of the child's biological parents; and
  - Degree of integration and ties with significant persons.

# Annex I: Historical and contemporary considerations on Sharia Law

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## 1. Terminology

There are many terms associated with Sharia that one needs to be familiar with such as *sunna*, *hadith*, *umma*, *qadi*, *mufti*, *fatwa*, *usul al-fiqh*, *talaq*, *mahr*, *walaya*, *hadana* and others. It is important for anyone dealing with Muslim countries or persons originating from Muslim countries to be familiar with such terms.

Islamic law is not found in any one particular book or set of books, with the term Sharia being often conflated with its jurisprudential understanding (*fiqh*) in the form of Muslim schools of law (*madhahib*) within today's context.

Furthermore, despite Sharia failing to countenance many customary practices such as female genital mutilation, crimes of honour and forced marriage, these practices are frequently perceived to be part of Sharia. Many of these are pre-Islamic and have more to do with customary practice than with law.

### 1.1. Sharia Law

In its literal meaning, Sharia is defined as a pathway to a watering hole, a fitting metaphor for the arid desert environment in which the Quran, the holy book for all Muslims, was revealed in the year 610 CE through the Prophet Muhammad (*pbuh*). An all-encompassing word, Sharia covers the obligations a Muslim has to fulfil in life in order to attain salvation. While, Sharia often implies law, it is not law as understood in the Western sense of the word, as Sharia encompasses a Muslim's legal, social, political, theological, moral, ethical and even ritual obligations.

The word Sharia is only mentioned twice in the Quran with less than 10% of the over 6,000 verses of the Quran being strictly legal verses. Also, while the Quran enjoins certain behaviour, it does not prescribe worldly sanctions for its violation. Mostly, it mentions the consequences in the "hereafter". Human actions, thus, are categorised on a moral scale ranging from what is permitted (*halal*) to what is forbidden (*haram*), with actions in-between being those which are recommended, neutral or disapproved.

The term Sharia today is used generically to encompass the concept as it is used in the Quran. Its jurisprudential interpretation (known as *fiqh*), and Islamic law — which also includes different colonial-era laws that impacted upon

Muslim jurisprudential processes — are used interchangeably. Added to this in the modern context, are laws passed by Muslim-majority nation States, which draw upon this juridical heritage. Some countries source their law in Sharia, whereas others have provisions in their constitutions that submit legislation to the test of repugnance to the extent that it should not conflict with Islamic ethical principles. No Muslim country follows the Sharia in toto.

### 1.2. Islamic Law

Added to this, what is today referred to as "Islamic law" has many different components as well as many interpretative dimensions. There is no single, monolithic entity called Sharia which all Muslims follow globally. However, all Muslims follow the *Quran* and the *Sunna* as foundational texts, and recognise them as the primary sources of Sharia. From these texts, Sharia *fiqh* (jurisprudential understanding) emerges through human agency and interpretation by virtue of a process called *usul al-fiqh* (the roots of law). What is today referred to as "Islamic Law" is an amalgam of Quranic laws, developed historically by the political authorities in Muslim countries (known historically as *siyasa* and later on as *qanun* in the Ottoman empire). These laws were introduced by colonial powers over the centuries (mainly the British in India, the French in North Africa and the Dutch in Indonesia), and, in the 20th century, statutory laws passed by newly-independent Muslim nation States. It must also be noted that customary laws (known as *'urf*) form part of the corpus of Islamic law in countries such as Indonesia, Yemen, Morocco and Tanzania. What we today refer to as Islamic law, by and large applies to family relationships in Muslim countries, where in the 20th century, following the 1917 Ottoman Law of Family Rights, massive codification took place in the form of Family Law statutes.

## 2. Historical considerations

### 2.1. Advent of the Quran

With the advent of the Quran and the rapid expansion of Islam in the first century after the Revelation, Muslim communities of interpretation faced many challenges in knowing what God (known as Allah) intended for them. These ranged from questions regarding loot gained in war, to the inheritance rights of widows whose husbands had lost their lives in battle, and questions of moral rectitude and proper social behaviour. These questions also included the rights of non-Muslims living in territories that came under Muslim rule. Pre-Islamic norms, at times, came into conflict with Quranic rules, particularly on questions of inheritance, since the Quran, for the first time, gave women property rights which had been denied to them in tribal society. For interpretation and clarification, individuals and others resorted to the Prophet for guidance, and after his demise, to the early caliphs<sup>917</sup>.

### 2.2. Emergence of the main legal sources and schools of law

Very early on, Muslim scholars, referred to collectively as the *ulama*, devised principles (*usul al-fiqh*) through which they were able to source the law. Different approaches were taken depending on the context within which such discussions were taking place. Over a period of some two centuries, Muslim scholars, judges and legal thinkers devised a theory of law which identified the law as originating from four main sources: the Quran, the *Sunna* (sayings and actions of the Prophet Muhammad), *ijma'* (consensus of the scholars), and *qiyas* (analogical reasoning through which God's law became understood through human agency). In this process a range of functionaries were involved including a *mufti* who was a *jurisconsult* whose opinion, known as a *fatwa* (which was non-binding), contributed to keeping the law constant. Of these sources, the Quran and the *Sunna* were viewed as primary sources whereas consensus and analogy were seen as subsidiary. Given the diversity of approach, different schools assigned a different status to *ijma'* and *qiyas*. This human understanding was consolidated into *fiqh* (jurisprudential understanding) which different communities of interpretation (*madhahib*) have interwoven into their respective schools of law over three centuries.

Today, there are four Sunni schools of law, the *Hanafi*, the *Hanbali*, the *Maliki* and the *Shafi'i*; three *Shi'i* schools – the Ithna 'Ashari (Twelver), the *Zaydi* and the *Ismaili*; and mention should be made of the *Ibadi* School, which is neither *Shi'i* nor *Sunni*.

### 2.3. Sunni and Shi'i – the development of two major branches of Islam

All Muslims affirm the fundamental testimony of faith in Islam, the *shahada*, that there is no god but Allah, and that Muhammad is His messenger. After the Prophet's demise, the issue of his succession arose. Some felt that with his demise, the Revelation came to an end and each Muslim was at liberty to interpret the faith in accordance with their own understanding. These people became known as the Sunnis. A smaller segment of the community held that although with the Prophet's death the Revelation came to an end, the need for interpretation remained and that this function of interpretation was transferred to Ali, the fourth Caliph and the first *Imam* (spiritual leader). This leadership (*Imama*) was devolved to successors in direct lineal descent through him and his wife Fatima, the Prophet's daughter<sup>918</sup>. This group came to be known as the *Shi'a* – the other major branch of Islam.

*Shi'i* law differs from *Sunni* law primarily with regard to the role of the Imam vis-à-vis Sharia (as opposed to the role of the caliph or sultan vis-à-vis Sharia), the transmission of the Prophetic *hadith* (the reported sayings of the Prophet) through the legitimate Imam, and on how Sharia should be understood. There are also differences with regard to testamentary rules as well as the method of pronouncing divorce.

### 2.4. Further evolution of Sharia law due to increasing diversity in Islam

As Islam expanded, Sharia evolved and absorbed principles of law from other legal systems, so long as these were not incompatible with Islam's ethical principles as enunciated in the Quran. New laws were promulgated by the political authorities as new conditions emerged that required legal applications. Sharia, from the very inception of Islam, was not the only legal system used by Muslims, but co-existed with *siyasa*, or rules established by the political authority for proper governance. Also, Sharia law, as such, embraced local customs and principles, known as *'urf*, and integrated them into its system of administration. As time passed, countries with Muslim populations encountered other legal and political systems and, from the 15th century onwards, European colonialism also left its imprint on Sharia as traditionally practiced. In some cases, this gave rise to new strands of Islamic Law such as Anglo-Muhammadan Law in India and "Droit Musulman" in Algeria.

### 3. Sharia Law in contemporary times

#### 3.1. Islamic law and social purpose

Sharia embodies principles which allow Muslim jurists and others to ensure that the law is able to address the changing circumstances of Muslims as they confront new situations in life. These principles are known as *darura* (necessity) and *maslaha* (public interest), through which the invocation of the higher purposes of the law, known as *maqasid*, enables Sharia in the form of its *fiqh* to respond to the changing contexts in which Muslims find themselves. This is done in the name of justice and equity. These higher purposes include the protection of life, intellect, property, offspring and religion. While this notion has been part of Islamic juridical thinking for many centuries, historically, this dimension of the law has been eclipsed by more legalistic formulations. Modern Muslim thinking (through the works of jurists such as Ibn ‘Ashur (1879–1973) of Tunisia, Hashim Kamali (b. 1944) in Malaysia, Taher Jabir al-Alwani (1935 – 2016) in Egypt and others), re-embraces this principle with new thinking on the social purpose of law being reflected in some of the decisions of the courts of India, Pakistan and Bangladesh over the last 50 years. This approach has also been reflected in the discourses in seminars in various Muslim-majority countries such as Iran, Iraq and Egypt. Recent statutory enactments in Morocco and Indonesia, *inter alia*, are also indicative of this new thinking.

Contrary to popular perception, Sharia is not frozen in time, but through a dialogic process it can be repurposed to address new issues that Muslims face in the world today. A study of developments in family law and the Personal Law statutes in the Muslim world in the 20th century shows the massive changes that have taken place in this aspect of Sharia law<sup>919</sup>.

#### 3.2. Sharia Law as currently perceived by Muslims

According to I. Ahmad<sup>920</sup>, no Muslim country in the world today follows the Sharia in totality in its legal system. Some States refer to it, others incorporate parts of it, others ignore it and some, like Turkey, have abolished it. Regardless, most emphasise that their laws are Sharia-compliant. Some notions of Sharia-inspired law, as practiced in the world today, may appear to be at odds with so-called modern, enlightened principles. Such notions should be viewed in the context of the times in which they were promulgated and need to be reviewed in today’s contexts. This is done through the practice of *ijtihad* (exertion towards new thinking), which is a principle based on a number of verses in the Quran which call on the believer to use their mind in the understanding of their faith, as well as on the *sunna* of the Prophet and the teachings of Imam Ali, which encourage the use of the human mind in the understanding of the faith. Islamic law has an inbuilt capacity to call for new thinking and ongoing interpretation, and through greater dialogue and mutual respect and understanding, Islamic values and ethical underpinnings can enrich discourses and create new approaches to resolving problems afflicting human society as a whole<sup>921</sup>.

The example of the 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>922</sup> is a case in point where, from a situation where 91% of the Muslim countries were not parties to this Convention in 1980, today over 500 million people from a number of Muslim countries come under the process outlined by the Convention<sup>923</sup>. It must be highlighted that this major shift was occasioned by dialogue and mediation rather than through mutual demonisation, denigration or confrontation. This trend cannot however be observed in relation to the 1996 Hague Convention with less than 50 contracting States, among which solely Morocco has a *kafalah* system in place<sup>924</sup>.

Therefore, the dialogue about and promotion of this important text are of utmost importance in order to increase the number of Sharia law countries that could benefit from its provisions. In this regard, the Malta Process – launched in 2004 as a dialogue between senior judges and high ranking government officials from contracting States to the 1980 and 1996 Hague Conventions and non-contracting States with Sharia-based or Sharia-influenced legal systems – was a great facilitator. The Malta Process is aimed at improving State co-operation in order to assist with resolving difficult cross-border family law disputes in situations where the relevant international legal framework is not applicable. In particular, it seeks to improve child protection among the relevant States by ensuring that the child’s right to have continuing contact with both parents is supported (even though they might live in different States) and by combatting international child abduction. The process and its outcome showed that the Hague Convention principles fully accord with Sharia principles as understood by the various jurisprudential schools of Islam.

In the understanding of Sharia and its application in the modern world, certain principles must be kept in mind:

- *Sharia evolved in the context of real time for Muslim societies and historically was subject to the same vicissitudes as any other legal system;*
- *There is no monolithic entity called Sharia followed uniformly or in its entirety by 1.6 billion Muslims worldwide; and*
- *In its present form, Sharia reflects a codification that is uncoupled from its organic roots and processes, with some of its controversial expressions in certain contexts being due to a number of historical and socio-political reasons which are not espoused by the majority of Muslims globally.*

However, in Muslim-majority countries as well as in the diaspora, Sharia still constitutes an ethical frame of reference for how many Muslims conduct their daily lives and how they judge human behaviour. Thus, it plays an important though not exclusive role in their thinking. To this extent Sharia remains a work in progress as Muslim communities come to grips with the forces of the modern world which all communities are today grappling with.

## Conclusion

It would seem that, in most Muslim countries, Sharia operates at a much more organic level in society and consequently there is a much less developed hierarchy of religious authorities and legal sources than in the secular legal system, and that the problematic issue of legality, sanction and enforcement is inherent to the Islamic legal system, which can result in “advantages and disadvantages”. In terms of family law, Keshavjee goes on to say that, for example, very little is known about the positive changes to family law that have taken place in the Islamic world during the twentieth century. However, it can be observed that the courts in countries governed by Islamic law are increasingly playing a more active social role and are moving from a static, watertight and idealistic interpretation of the law, towards an interpretation that is more pragmatic and responsive to the new challenges presented by rapid changes under globalisation.

It will be interesting to see whether this trend will also be observed in solutions found for children deprived of their family and placed in alternative care. *Kafalah* could come under the rubric of *maqasid al-Sharia* where through the

notions of necessity (known as *darura*) and public interest (*maslahah*), both inherent to the Muslim juridical tradition, the stringency of *fiqh* rulings can be mitigated for the higher purposes of the law, which includes the protection of offspring and life. Given the fact that the primacy of the infant is paramount in Islamic law, more research needs to be conducted on why the original *fiqh* rulings took the shape they did, the higher purpose those rulings aimed to protect, and whether new scientific developments and global conditions today warrant a revisiting of the original *fiqh* formulations. Added to this would be an understanding of which Muslim countries have the *kafalah* system in place as well as which have abandoned it and for what reasons. A good understanding of the so-called Muslim position would be a starting point to bringing Muslim countries on board to reflect over the issue and to see how greater accord can be arrived at, as this is a global issue in today’s world where massive movements of population is the norm. A dialogue based on better understanding coupled with an intention to find creative solutions, he feels is within the original spirit of the Sharia.



# Annex II:

## International case-law relating to *kafalah*

This section provides an overview and analysis of three cases in which international jurisdictions have dealt with *kafalah*.

### 1. Rulings of the European Court of Human Rights (ECtHR)

The European Court of Human Rights (ECtHR) is an adjudicative body established by the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF)<sup>925</sup>. Its mission is to ensure that Member States comply with their obligations under the Convention and its additional protocols<sup>926</sup>, and it hears private petitions when all domestic remedies have been exhausted<sup>927</sup>. In two cases, one concerning France and the other concerning Belgium, the Court had to consider the conformity of the refusal to convert a *kafalah* into an adoption with Article 8 of the CPHRFF<sup>928</sup>. In both cases, the ECtHR ruled that there had been no violation of the Convention on the basis of the margin of appreciation left to the States parties.

#### 1.1. ECtHR, *Harroudj v. France*, October 4, 2012<sup>929</sup>

In this case, a girl was born in November 2003 in Algeria and became a ward of the Algerian State one month later. In January 2004, the Court of Boumerdes rendered a *kafalah* decision in respect of the child in favour of a French national. A few days later, the Court of Bordj Manaiel allowed the *kafil's* request to change the child's name for the purpose of familial consistency. Two years after the child's arrival in France, the *kafil* filed an application for full adoption before the French courts. In a judgment of March 21, 2007, the High Court of Lyon dismissed the application pursuant to Article 370 – 3 of the French Civil Code, which prohibits the adoption of a child where it is in turn prohibited by the child's personal status law. This judgment was upheld by the Court of Appeal of Lyon in a judgment handed down on October 23, 2007, which reiterated that the above-mentioned article is compliant with France's international obligations, and in particular with Article 4(a) of the 1993 Hague Convention, which provides that adoption may take place only if the child is adoptable. The Court of Appeal considered that, since Algerian national law prohibits adoption, the child could not be considered adoptable. Following the rejection of her appeal (Cass. Civ.1, February 25, 2009), the *kafil* mother, by application on August 10, 2009, referred the matter to the ECtHR, arguing that Article 370 – 3 of the French Civil Code is contrary to the right to respect for one's private and family life provided for in Article 8 of the European Convention.

The ECtHR rejected this application, holding that the impossibility of adopting the child taken in by *kafalah* did not constitute an interference with private and family life within the meaning of Article 8. In its reasoning, the Court discussed different international standards, particularly the Convention on the Rights of the Child, which recognises *kafalah* as a child protection measure, as well as the 1993 and 1996 Hague Conventions. According to the ECtHR, these international standards provide a margin of appreciation for States in implementing their international obligations<sup>930</sup>. Moreover, it found that *kafalah* concerning a child with no known parentage can, in France, produce the effects of guardianship (a child protection measure known to the French system) and accordingly there are existing legal means of remedying the obstacles presented by the applicant<sup>931</sup>. Finally, the Court noted that the prohibition in Article 370 – 3 of the French Civil Code allows the domestic court to it possible to consider the applicable law in the child's State of origin in its decision making, although this prohibition is not absolute – for example, the provision is not intended to apply to a child who is “born and resides habitually in France.” Further, a child in *kafalah* care can obtain French nationality within a reduced period of time<sup>932</sup>. However, through the law on nationality, the prohibitive status disappears since the new personal status law of the child, French law, does not prohibit adoption. As the French government and the Court pointed out, this possibility was already open to the applicant.

#### 1.2. ECtHR, *Chbihi Loudoudi and Others v. Belgium*, December 16, 2014<sup>933</sup>

In this case, the ECtHR confirmed its case law in *Harroudj v. France* by holding that the Belgian authorities' refusal to grant the adoption of a young girl in intra-family *kafalah* care did not constitute a violation of Article 8 of the European Convention. In this case, the applicants had always intended to adopt the minor, the applicants' niece, even before *kafalah* was granted in Morocco. In March 2011 they had in fact contacted the Belgian Immigration Office to obtain information on the steps to be taken to bring the child they wished to adopt to Belgium<sup>934</sup>. In September 2002, the biological parents gave their consent to the placement of the child in *kafalah* in the applicants' home,

and an agreement was drawn up by adouls (notaries). This *kafalah adoulaire* was subsequently approved by a judge responsible for notarial matters at the Meknes Court of First Instance. Two months later, the same judge authorised the child to leave the country and travel to Belgium. At the same time, in August 2003, a simple adoption deed was drawn up by a Belgian notary, and in September 2005, the Belgian consular authorities granted a short-stay visa for the adoption of a minor<sup>935</sup>. However, the Belgian courts seized by the *kafils* refused to approve the adoption. After the Belgian law reforming adoption came into force, the *kafils* filed a new application for adoption, which was again rejected both at first instance and on appeal. The Belgian courts first recalled that *kafalah* could not be equated to an adoption. They went on to state that the conditions of domestic law authorising the adoption of a child whose institution is not recognised under national law were not met, since the child had not been entrusted to the “adopters” by the “competent authority” of her State of origin but by her birth parents<sup>936</sup>. After an application for legal aid for an appeal was refused as there was no chance of succeeding on appeal, the *kafils* applied to the ECtHR on August 25, 2010, regarding a violation of Article 8, given the refusal to approve the adoption and the precariousness of the child’s residence status.

The Court considered that it was its role to question the application of national law by the Belgian authorities and therefore to assess whether, in the present case, the *kafalah* decision had been issued by a competent authority within the meaning of Article 361 – 5 of the Belgian Civil Code. However, it pointed out that the interests of the child form an integral part of the right to respect for private and family life and that it therefore needed to ascertain whether the Belgian authorities had taken the child’s best interests into account. It is interesting to note that in its determination of the best interests of the child, the Court considered Belgium’s international obligations and concluded that *“the refusal to grant the applicants’ application is partly out of concern for respecting the spirit and the objective of protecting the ‘best’ interests of the child which derive from the relevant international conventions in this area<sup>937</sup>”*. It expressly referred to the 1993 Hague Convention and the Convention on the Rights of the Child: *“The standards applied by the Belgian courts have their origin in a law that entered into force in 2005, which is intended to implement the objective set out in the Hague Convention of ensuring that intercountry adoptions take place in the ‘best’ interest of the child, namely to protect the child from any misuse of the adoption institution and thus to respect his or her private and family life. The Court of Appeal also expressly referred to Article 20 of the United Nations Convention on the Rights of the Child, which recognises kafalah under Islamic law as ‘alternative care’ in the same way as adoption, as well as Article 21, which obliges States that allow adoption to ensure that the ‘best’ interests of the child are the primary consideration<sup>938</sup>”*. Additionally, the Court noted that, contrary to the applicants’ arguments, this analysis of the best interests of the child was carried out *in concreto*, as regards both the relationship developed with the *kafil* parents and the existing relationship with the biological family, as well as the difficulties that would result

from placing the child in an “unstable” legal situation as a result of having different statuses in Morocco and Belgium.

### 1.3. ISS/IRC Analysis

For ISS/IRC, these judgments are of particular interest since the ECtHR takes into account the differences between *kafalah* and adoption and relies on the international obligations governing these two child protection measures to conclude that there was no violation of the provisions of the CPHRFF. These references are welcome as the two countries concerned, France (over time) and Belgium (under certain conditions), have allowed the adoption of a child following his or her placement in *kafalah*. It is therefore essential (in the view of ISS/IRC) to ensure that *kafalah* is not used as a means of circumventing the rules and safeguards governing domestic and intercountry adoption. In both cases, it appears that the *kafils* had, among other things, the possibility of having *kafalah* recognised in their receiving State by means of a guardianship measure with similar effects, and that no steps in this direction were taken by the *kafils*, who limited themselves to seeking to obtain an adoption<sup>939</sup>. This demonstrates the need to regulate *kafalah* at both national and international levels to ensure that they meet the double principle of subsidiarity and are always granted in the best interests of the child. For ISS/IRC, this assessment of the best interests of the child should be carried out before the measure is granted and presupposes coordination between States. Moreover, these judgments also highlight the difficulties of recognising and enforcing the effects of a *kafalah* in a State which does not have *kafalah*. In order to ensure respect for the best interests of the child, receiving States must ensure that children who are in a *kafalah* placement and are in their territory, are not discriminated against in relation to the rights enjoyed by children placed under this protection measure in the States of origin. Similarly, they must ensure that these children are not discriminated against in comparison with children in a situation considered to be analogous under their domestic legislation, i.e. children who are placed in a family-type placement without creating a parent-child relationship with the person responsible for their care. ISS/IRC welcomes the analysis *in concreto* of the best interests of the child carried out by the Court to conclude that there was no violation of Article 8 in either case.

## 2. Committee on the Rights of the Child – *Y.B. and N.S. v. Belgium*<sup>946</sup>

The Optional Protocol to the Convention on the Rights of the Child establishing a communications procedure (or third protocol)<sup>941</sup>, which came into force in April 2014, allows the Committee on the Rights of the Child to receive and consider individual complaints or communications from individuals in Member countries under certain conditions<sup>942</sup>. In the case of *Y.B. and N.S. v. Belgium*, a communication was submitted to the Committee on the Rights of the Child against the Belgian government concerning the refusal to grant a humanitarian visa to a child taken in under *kafalah* by a Belgian-Moroccan couple.

### 2.1. Background of the case

In this case, following numerous refusals by the Belgian authorities to issue a humanitarian visa to the child being taken into their care under a *kafalah* granted in Morocco, the authors of the communication brought the matter before the Committee on the Rights of the Child, alleging a violation of articles 2 (non-discrimination), 3 (best interests), 10 (family reunification), 12 (views of the child) and 20 (children deprived of their family) of the CRC. The little girl concerned by the communication was born on April 21, 2011, in Marrakesh, to an unknown father and was abandoned by her mother – facts which were established by a decision declaring her abandoned handed down by the Court of First Instance of Marrakesh on August 19, 2011. One month later, the same court appointed the authors (Y.B. of Belgian nationality and his wife, N.S., of Moroccan and Belgian nationality) as *kafil*s of the minor, following an investigation by the competent Moroccan authorities, which concluded that the authors had the material and social qualifications to take care of the child. One month later, the same court authorised the *kafil*s to travel abroad with their *makfoul*. Since the *kafalah* did not establish any filiation between the persons concerned, they were unable to apply for a family reunification visa. They therefore sought to obtain a humanitarian visa, an option provided for in Article 9 of the Belgian Act of December 15, 1980, *on the entry, temporary and permanent residence and removal of aliens*. This application was rejected by the Belgian authorities on the grounds that *kafalah* is not an adoption and does not confer any right of residence; that an application for a humanitarian visa cannot replace an application for adoption; that no application for recognition of the child protection measure had been submitted to the competent Belgian authorities; and that no evidence had been provided that the child was really in the care of the applicants or that they had sufficient means of subsistence<sup>943</sup>. However, this decision by the Belgian authorities was overturned by the Aliens Litigation Council due to the absence of an official justification for the refusal. A new refusal decision was then issued in 2016 for the following reasons, in addition to the above-mentioned ones: “the *kafalah* arrangement had been authorized with the authors using an official address in Morocco, even though their principal residence was in Belgium”; “the mother had abandoned the child but was still alive”; and “the authors failed to show that there were no other

members of the family, including third-degree relatives, who could take care for the child”<sup>944</sup>. At the same time, the *kafil*s submitted two applications for short-stay visitor visas, which were also rejected by the Belgian authorities because of serious doubts regarding the real purpose of the stay and the lack of return guarantees.

### 2.2. The Committee's decision

After analysing the arguments of the authors and the State party, the Committee concluded that the communication was admissible and found a violation by Belgium of Articles 3, 10 and 12 of the CRC.

For Article 3, the Committee recalled its general comment No. 12 and, for individual decisions, the need to assess the child's best interests in light of the particular child's specific circumstances<sup>945</sup>. It then criticised the State party for questioning, in general terms, the Moroccan proceedings without specifying in what way those proceedings did not ensure the necessary safeguards. In particular, while the Belgian government failed to consider the possibility of care by the extended family and thus the proper implementation of the first degree of subsidiarity, the Committee considered that, in the case of a child born of an unknown father and abandoned by her mother at birth, “the possibility that she could be taken care of by her biological family seems unlikely and is in any case not supported”<sup>946</sup>. It also referred to the *de facto* relationship between the child and the authors as an element to be taken into account with regard to the interests of the child.

The same analysis focusing on the *de facto* ties that were forged continued with regard to the violation of Article 10. The Committee considered that Article 10 does not, in general, oblige a State party to recognise the right to family reunification for children in *kafalah* arrangements. Nevertheless, it found that, in accordance with its General Comment No. 14, the term “family” must be interpreted broadly and take into account the *de facto* family ties and the time elapsed. Once again, the issue of the conditions for granting this *kafalah* and its conformity with the interests of the child at the time of its creation was not considered.

With regard to the consideration of the views of the child, the Committee recalled that Article 12 does not impose any age limit on the right of the child to express his or her views<sup>947</sup>.

As a result of the above-mentioned violations, the Committee considered that the Convention had been violated and asked Belgium to reconsider the visa application for the child. However, it did not consider it necessary to examine the violation of Article 2. Article 20 was also set aside by the Committee as being inadmissible given that the parties failed to substantiate their claims. As a result, although considered by Belgium in its arguments relating to the violation of the best interests of the child (Article 3), the debate on the necessity and suitability of establishing *kafalah* as an alternative care measure was excluded from the proceedings.

The CRC then called on Belgium to urgently reconsider the visa application and to take the necessary measures to prevent similar violations. In its follow-up submission, Belgium informed the Committee – which welcomed the submission – that the child’s visa application had been re-examined and that, after the child appeared before an oral hearing, a six-month humanitarian visa had been granted<sup>948</sup>. Belgium noted that future visa applications taken in under *kafalah* would be examined expeditiously; that a child capable of discernment would be heard; and that due weight would be given to family life.

### 2.3. ISS/IRC analysis

The debates around this case perfectly illustrate the challenges taken up by ISS/IRC in this study (see [Technical Note: Cross-border kafalah](#)) and the need to:

- *Strengthen national kafalah systems, taking into account international standards and the double principle of subsidiarity;*
- *Define cross-border kafalah and establish applicable rules;*
- *Raise awareness of the concept of habitual residence;*
- *Strengthen the functioning of the 1996 Hague Convention;*
- *Create effective mechanisms for cooperation and coordination between States;*
- *Establish immigration processes to allow the child’s entry and stay in the host country, for example by means of a specific visa;*
- *Provide mechanisms for the recognition of a kafalah in the receiving State.*

ISS/IRC notes that *kafalah* and adoption are two distinct child protection measures, as Belgium rightly pointed out in its observations<sup>949</sup>, expressly recognised by articles 20 and 21 of the CRC. In the determination of such measures, the best interests of the child must be a primary consideration. While ISS/IRC shares the Committee’s analysis on taking the child’s opinion into account and on

the need to assess the child’s best interests in concreto, it is of the view that the analysis should not only be carried out *a posteriori*, once the authority grants and authorises the protection measure, but well before any measure is granted, while taking long-term considerations for the child into account. Considering that the measure is in the best interests of the child by the mere fact that the decision has been rendered by a competent authority and that a family life has been formed, may expose children and families to risks of unlawful practices and lead to practices that circumvent the applicable procedures and standards, to the detriment of the primary person concerned: the child (see also Swiss case law, [Section III.5](#)). ISS/IRC recommendations on illegal adoptions<sup>950</sup> can be transposed to any child protection measure, including *kafalah*. Therefore, ISS/IRC is convinced that an analysis of the case in light of articles 3 and 20 of the CRC (combined) is essential in order to remedy this type of situation. In this case, Belgium questioned the merits of the *kafalah* decision, in particular the absence of sufficient evidence demonstrating the prior efforts undertaken to find the extended family, the absence of in-depth assessments of the needs and interests of the child concerned, the absence of prior contact between the residential care facility and the *kafils*, the absence of undue material gains, as well as the matching criteria. These procedural elements are essential and should be part of any alternative care placement, as set out in the [Guidelines for Alternative Care](#) (see [Sections I.1.2.](#) and [II.1](#)).



# Annex III: EU law instruments applicable to *kafalah*?

This article examines whether or not a child who has been placed under a person or persons care under *kafalah*, or their *kafil* parent are able to rely on either the Family Reunification or Citizen's Rights Directive(s) to access residence rights in an EU Member State.

The movements of children across borders requires administrative or judicial determinations regarding their residence rights in the destination country. In the EU, decisions regarding residence rights are central to obtaining a host of other rights (i.e. freedom to work, freedom of movement, health rights, eventual applications for citizenship), and consequently, these decisions are crucial for a child whose parents intend for them to live with them in the EU, including children under a *kafalah* arrangement.

This article considers how the EU law that underpins residence rights determinations is applied in cases of *kafalah*; and the capacity for such laws to be used when seeking to bring a child to an EU country subsequent to a *kafalah* decision in a third country. The two pertinent legal instruments which will be examined are: Directive 2003/86/EC of 22 September 2003 ('the **Family Reunification Directive**'); and Directive 2004/38/EC of 29 April 2004 ('the **Citizens' Rights Directive**'). Relevant European case law, which gives context to the Directives is also analysed.

## 1. The EU Directives

The **Family Reunification Directive** sets out common rules for the exercise of the right to family reunification by third country nationals residing lawfully in Member States. The **Citizens' Rights Directive** deals with the free movement of citizens within the European Economic Area. Each Directive provides that a third country national who is lawfully resident in a member State (either by way of asylum or immigration procedures – Family Reunification Directive; or by exercising their free movement / residence rights – Citizens' Rights Directive), may be joined in their country of residence by family members (variously defined). Explicitly, these provisions are intended to respect of the right to family life<sup>951</sup>. Whilst the two directives are similar in nature, they are two separate directives with no interplay between them. They are not reliant on one another, and apply in different situations to different categories of persons (the Family Reunification Directive to third country nationals, resident in the EU; and the Citizen's Rights Directive to Union Citizens who have exercised their freedom of movement to live in an EU State other than that of their nationality).

ISS/IRC has previously identified two possible cross-border *kafalah* scenarios (see Part III). That is: i) the recognition by a competent authority in a third country of a *kafalah* pronounced in a country regarding a child habitually resident in that country, in favour of *kafil* parents also habitually resident in that country, which later takes on a cross-border element as a result of the family seeking to move abroad; and ii) a *kafalah* which is established between two countries, the State of habitual residence of the *kafil(s)* (receiving State) and that of the State of habitual residence of the child (State of origin).

Considering the two Directives with these scenarios in mind, arguably the Family Reunification Directive is more likely to be relied on in the first case scenario, and the Citizens' Rights Directive is more likely to be relied on in the second case scenario.



### Family Reunification Directive

It should be noted that this Directive does not apply to *kafalah* cases where an EU national seeks to bring a child under *kafalah* to their home State. Such a decision concerning EU nationals and their families falls within the scope of national immigration laws. Therefore, in order to be able to apply for family reunification, both the sponsor and the family member must be third-country nationals<sup>952</sup>.

The table below briefly sets out: a) who is eligible to be a sponsor under the Family Reunification Directive, and who may be sponsored (**limited to who might fall under a *kafalah* arrangement** – i.e. not covering all possibilities, such as spouses or ascendants).

Eligible to Sponsor	Eligible to be Sponsored
<p><b>Art. 3(1) provides that the sponsor must be:</b></p> <ul style="list-style-type: none"> <li>• Legally resident in a MS;</li> <li>• Holds a residence permit, valid for at least one year (irrespective of title of permit); and</li> <li>• Have reasonable prospects of obtaining a right of permanent residence.</li> </ul> 	<ul style="list-style-type: none"> <li>• Minor children<sup>953</sup> of sponsor and their spouse (Art. 4(1)(b));</li> <li>• Minor children of the sponsor should the sponsor have custody for the children, and the child be dependent on them. If custody is shared, there must be consent from the other parent;</li> <li>• Minor children of a sponsored spouse should the sponsor have custody for the children, and the children be dependent on them.</li> </ul> 

### Citizens' Rights Directive

The Citizens' Rights Directive provides that any Union Citizen<sup>954</sup> and their 'family members' have the right of free movement and residence within the territory of the Member States (Art 1)<sup>955</sup>. Under this directive, 'family members' have an automatic right of residence in any Member State. The directive also provides that dependents and household members of the Union Citizen may be granted entry and residence, in accordance with the host Member State's national legislation.

Automatic Right of Residence	Right of Residence Dependent on National Decision
<p><b>Art. 2(2) provides that a family member is:</b></p> <ul style="list-style-type: none"> <li>• A spouse / registered partner;</li> <li>• A parent; or</li> <li>• A direct descendant (of the Citizen or their spouse/partner) under the age of 21 or who are dependent on the citizen or their spouse/partner.</li> </ul> 	<p><b>Art. 3(2) provides for entry and residence of:</b></p> <ul style="list-style-type: none"> <li>• Any other family members who are dependants or members of the household of the Union citizen with the primary right of residence;</li> <li>• Any other family member who due to where serious health concerns strictly require the personal care of the Union citizen;</li> <li>• A person in a durable relationship with the Union Citizen.</li> </ul> 

The question therefore is **whether or not a child under *kafalah* is a 'direct descendant' for the purpose of this directive and will obtain automatic residence right, or if the child would fall under the definition of 'any other family member' and be subject to a national determination process.**

## 2. Relevant Case Law

A March 2019 decision of the European Court of Justice (‘the ECJ’)<sup>956</sup>, considered exactly the question of whether or not a child under *kafalah* is a ‘direct descendant’ for the purpose of the Citizens Rights Directive. This case provides clarity on the extent to which *kafalah* may be relied on when a Union citizen is seeking to obtain rights of residence under this Directive for a ‘family member’. It is also possible to consider the implications of this ruling on the Family Reunification Directive. This case is considered below.

### SM v Entry Clearance Officer (Case C-129/18)

This case concerned an application by a married couple — both French nationals, one resident in the UK, and both of Algerian ethnicity. The couple married in the UK in 2001, and travelled to Algeria in 2009, where they were assessed as suitable to become *kafil*. Three months after her birth (and abandonment) in June 2010, the child ‘Susana’ was placed in their care under *kafalah*. The husband returned to the UK in 2011, whilst the wife remained in Algeria. In May 2012, Susana sought entry clearance into the UK as the adopted child of an EU national (a ‘family member’). After a number of appeals, the case was heard before the UK Supreme Court (‘the UKSC’) who, in February 2018<sup>957</sup>, referred the matter to the ECJ for a preliminary ruling. The UKSC found that Susana was eligible to enter and reside in the UK/EU as, “any other family member (...) dependants or members of the household of the household of the Union citizen” (art. 3(2)(a)). However, the court determined that it would be unnecessary and inappropriate to resort to this provision, should Susana have an automatic right as a ‘direct descendant’ of an EU citizen. **Accordingly, the UKSC asked the ECJ, *inter alia*, whether or not a child who is in the permanent legal guardianship of a Union citizen(s) under *kafalah* (or equivalent arrangement provided for in the State of origin) is a ‘direct descendant’ within the meaning of art. 2(2)(c) of the Citizens’ Rights Directive.**

The ECJ held that a child under *kafalah* is **not** a direct descendant for the purposes of the directive. Whilst art. 2(2)(c) (‘direct descendant’) includes adopted children — as a (valid) adoption creates a legal parent-child relationship — such a relationship is not found to arise in cases of *kafalah*. A *kafalah* arrangement is distinguishable as it does not create inheritance rights, nor is it final or irrevocable (the arrangement comes to an end when the child attains majority and/or can be revoked by the biological parents or guardian). Accordingly, the ECJ determined that a *kafil* child is not a ‘direct descendant’<sup>958</sup>, and cannot obtain automatic residence rights.

Nonetheless, the ECJ agreed with the UKSC that the child fell under the definition of ‘any other family member’ (art. 3(2)(a)), and that the words used in that provision covered a situation such as the Algerian *kafalah* — one where the Union citizens have, on the basis of law, assumed responsibility for the care, education, and protection of the child. The ECJ emphasised that the objective of the directive is to maintain the unity of the family in a broader sense by facilitating entry and residence for persons who maintain close and stable family ties with an EU citizen, and that Member States must make it possible for ‘family members in the broad sense’ to obtain a decision based on an extensive examination of their personal circumstances, and one which respects the right to respect for family life, and the need to protect the best interests of the child<sup>959</sup>.

Specifically regarding *kafalah* placements (or similar) it was found that in order to comply with the provisions of EU law<sup>960</sup>, the competent national authorities when exercising their discretion must, “make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all interests in play and, in particular, the best interests of the child<sup>961</sup>”. **Such an assessment must take into consideration factors such as the age of the child when the placement was made; whether the child has lived with the guardians; the closeness of the relationship and the degree of dependence; balanced with any risk that the child could be a victim of abuse exploitation or trafficking<sup>962</sup>.** If, after the assessment it is concluded that a ‘genuine family life’ exists, and the child is dependent on the Union citizen(s), EU Charter requirements regarding respect for family life and protecting the best interests of the child, in principle demand that such a child be granted a right of entry and residence pursuant to art. 3(2)(a) of the Citizens’ Rights Directive<sup>963</sup>.



Whilst this decision excludes the possibility that child under *kafalah* can be considered a 'direct descendant' with consequent automatic residence rights, it tends to indicate that such children will likely be eligible to enter and reside in an EU Member State – dependent on the outcome of any national assessment.

The decision provides some clarity regarding the approach to be taken for applications under the Citizens' Rights Directive, and while no like case law exists specifically on the issue of *kafalah* and the Family Reunification Directive, it is possible to consider the application of 'SM' case to this directive. The Family Reunification Directive states that 'minor children' may be sponsored, and includes children 'validly' adopted in its definition of minor children. Given that 'SM' explicitly found that *kafalah* is not akin to

adoption, it follows that *makfoul* children seeking entry to the EU under this directive would be unlikely to be considered 'minor children' for the purpose of the directive, and therefore would be unlikely to be able to rely on it for entry and residence.

On the other hand, it is arguable that this directive may still be an available pathway. The term 'minor children' is a separate term to 'direct descendant', and although the definition of 'minor child' includes 'adopted children' it does not explicitly exclude children in the care of/reliant on the sponsor for another reason. This factor, in conjunction with the requirement that decisions should be made with respect to the right to family life and should seek to uphold the best interests of the child, potentially leaves this pathway open.

### 3. Conclusion

The decision in the case SM, paves the way for persons taking the care of a child in a third country under a *kafalah* arrangement to have that child join them in an EU Member State – most definitely for an EU citizen, and arguably so for an eligible sponsor under the Family Reunification Directive.

By not declaring the *makfoul* to be a direct descendant, the ECJ has allowed the competent authorities in the Member States to undertake individualised assessments of the best interests of the child, to properly consider the degree of dependence and family relationship, and to assess any risk of trafficking or abuse. This is essential in ensuring that the best interests of the child are respected – both when considering the obligations under the EU charter, but also those that exist in other international instruments. Nonetheless, certain elements should be present to ensure that the best interests of the child are truly upheld. For example, any assessment should be carried out by professionals who have the capacity to appropriately assess any risks – i.e. not merely an immigration officer, but someone who is appropriately qualified to consider the risks to the child and the nature of the family relationship. At the same time, it is important in undertaking these assessments that there should be cooperation mechanisms in place between the EU State and the State of origin to allow for a full understanding of the child's background and the circumstances surrounding the *kafalah* decision.



# Annex IV:

## Tools to foster strengthened cross-border cooperation

In this section, two tools are presented aimed at strengthening cross-border cooperation between competent authorities, namely the establishment of a bilateral agreement (see [Sections IV.1.](#) and [IV. 2.](#)) and the recourse to direct judicial communication (see [Section IV.3](#)).

### 1. Checklist for the establishment of a bilateral agreement: how to ensure better protection of children placed abroad under a *kafalah* in (and beyond) the context of the 1996 Hague Convention

The document in Sections IV.1. and 2. were prepared by Hans van Loon, former Secretary General of the Hague Conference on Private International Law (HCCH).

#### 1.1 Background

1. In our age of increasing international mobility of persons and families, the provision of care by *kafalah* to children across international borders is not exceptional anymore. For example, it is quite common for a child living in say Morocco, to be placed under a *kafalah* in a family residing in a European country such as Belgium, France or Spain. While this may provide the child with appropriate family care – which is, in principle, preferable to permanent placement in an institution – **the child's legal protection, including his or her status under migration laws, and other rights may not be (fully) guaranteed.**

2. One important reason for this lack of full legal protection is that the institution of *kafalah* is not known in the laws of European countries, while, conversely, the institution of adoption is unknown by most countries whose legal systems are based on or influenced by Sharia. To some extent *kafalah* fulfils functions similar to adoption, notably by providing permanent family care to a child. But instead, *kafalah* does not lead to the termination of the family bonds with the child's (original) family nor to full legal integration into the *kafil* family.

3. For intercountry adoption of children, the international community has provided a comprehensive legal framework: the 1993 Hague Convention. This Convention establishes basic safeguards and procedures, and a system of cooperation between the States parties to the Convention.

No child may be placed in an adopting family in another State party unless:

*“a) competent authorities in the State of origin have determined that the child is adoptable, have given due consideration to possibilities for placement of the child within the country, and those whose consent is*

*required, including the child, have been counselled and duly informed, and have given their consent freely,*

*b) competent authorities of the receiving State have determined that the prospective adoptive parents are eligible and suited to adopt, and have been counselled, and that the child is or will be authorised to enter and reside permanently in that State, and*

*c) both States have agreed, following an exchange of reports and a matching procedure, that the adoption may proceed.”*

4. The 1993 Hague Convention applies to adoption only, not to provision of care by *kafalah*. While conceivably a State that does not provide for adoption in its internal laws may consider joining the 1993 Convention if that State allows the movement of children abroad for the purpose of adoption by families in other States – in particular where it allows such adoptions to occur systematically – so far no such State has acceded to the Convention.

5. In contrast to the 1993 Hague Convention, the **1996 Hague Convention, while excluding adoption from its scope, makes special provision for “the provision of care by *kafalah* or an analogous institution” (Art.3 (e)). Moreover, the 1996 Hague Convention includes a specific rule for the provision of care by *kafalah* across borders in its Art. 33.** According to this rule, if, for example, a competent authority in Morocco contemplates the provision of care by *kafalah*, and that provision of care is to take place in Belgium, it must first consult the competent authority in Belgium, transmit a reasoned **report** on the child to that authority, and may only decide to provide such care if the Belgian authority has given its consent. Obviously, this rule applies only when, as is the case in the example, **both States are parties to the 1996 Hague Convention.**

## 1.2 The issues at stake

6. While the procedure of Art. 33 is inspired by the 1993 Hague Convention, it captures only one of its features, not the full breadth and depth of its safeguards and procedures. Importantly, Art. 33 of the 1996 Hague Convention only provides: **“If an authority (...) contemplates (...), etc.”**. Art.33, therefore, **does not guarantee that any placement under a kafalah abroad may only be made following the consent by the State of origin**. Kafalah placements that are **privately** arranged with families abroad are not subject to the procedure of Art.33. Moreover, courts in Europe have also ruled that where an authority of the State of origin intervenes, but its decision lacks a constitutive character, the placement will be considered as privately arranged<sup>94</sup>.

7. In such cases, as well as where an authority in the State of origin did take a constitutive decision but without prior consent from the receiving State, which, is frequent, there is **no guarantee that the child may enter and permanently reside in the latter State**. Even if the child is admitted to that State’s territory, (s)he may not have a status, or an uncertain and fragile status, under migration laws. This may create serious issues for the child, and the receiving family, and ultimately affect their human rights.

8. In situations where Art.33 is applicable and its procedure has been respected, it may be assumed that the child may enter and reside permanently in the receiving State. Yet, there is no guarantee that other safeguards and procedures, which apply in the case of intercounty adoption (§3.), have been respected. Thus, there is **no certainty about counselling, informed consent, checks on the suitability of the care-taking family, or whether, prior to the kafalah decision, due consideration has been given to placement of the child within the State of origin, etc.**

## 1.3 Do States parties to the 1996 Convention share concerns about these issues? Are they willing to resolve them? If so, how?

9. The question is whether the issues identified in §§6 – 8, are perceived as such, and, if so, are considered serious enough by States involved to warrant action to address them. There can be little doubt that the issue of entrance and **permanent residence** of children in families in the receiving State has reached a level of international scrutiny that calls for action<sup>95</sup>. This suggests that States of origin and receiving States should urgently take steps to ensure that **all cross-border kafalah, including those that are privately made, are made subject to the procedure of Art. 33 of the 1996 Hague Convention, so that no child is left insecure under migration laws in the receiving State.**

10. This leads to the next series of questions, raised in §8 above. Even though the provision of kafalah care does not lead to the severance of legal ties with the birth family nor to full legal integration into the kafil family, informed and free consent by all concerned is essential to the cross-border kafalah placement or arrangement. Article 33 of the 1996 Hague Convention is quite ambiguous so when it is applicable and its procedure has been followed, it is unclear whether the requirement of consent has been met to its standards. Art. 33 also does not spell out that

*“each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family<sup>96</sup>”, nor that the authorities of the State of origin “have determined, after possibilities for placement of the child within [that] State have been given due consideration<sup>97</sup>” that provision of care by kafalah is in the child’s best interest. Nor does Art. 33 explicitly require that the authorities of the receiving State “have determined that the prospective [kafil] parents are eligible and suited to care for the child<sup>98</sup>” or “have been counselled as may be necessary<sup>99</sup>”.*

11. State parties to the 1996 Hague Convention may therefore wish to consider whether steps are taken to ensure that any cross-border kafalah implying the movement of the child from one State party to another is to be made subject to the procedure of Art. 33 of the 1996 Hague Convention (as argued in §9). As well as steps needed to ensure that these other safeguards (such as those mentioned in §10), coupled with adequate procedures, are guaranteed.

12. What **form** should such steps take? Not all States parties to the 1996 Hague Convention are faced with cross-border kafalah arrangements between them. A supplementary agreement to the Convention for kafalah arrangements or placements alone may, therefore, not be appropriate for their own context (this might be different if all cross-border placements of children in family or institutional care were considered, then all or most States parties to the Convention might have an interest in such an agreement).

Instead, States interested may prefer to deal with the issues bilaterally. Yet, it might be helpful if a model bilateral agreement were developed, to facilitate such bilateral agreements. Indeed, such a model might even lend itself to being used between States that are not both Parties to the 1996 Hague Convention<sup>97</sup>. The development of such a model, however, should await a response to the core questions raised above, and which are summarised in a checklist on the following pages.



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### 1.4 Checklist of key questions for the establishment of a bilateral agreement

#### a) Application of Art. 33 to any provision of care by *kafalah* between States parties

Do you agree that it should be ensured that:

1. Any cross-border provision of care by *kafalah* between State parties to the 1996 Hague Convention, **whether (considered to be) arranged privately or not, mandatorily follows** the procedure set out in Art. 33 of the Convention, and therefore requires the constitutive decision of an authority of the State of origin, a reasoned report on the child, and the prior consent of the receiving State (§9)?

The following questions (inspired by the provisions of the 1993 Hague Convention) assume that the procedure of Art. 33 is applicable:

#### b) Requirements for the provision of care by *kafalah* under Art.33

Do you agree that it should be ensured that:

2. As a matter of priority, appropriate measures are taken **to enable a child to remain in the care of his or her family of origin?** And, if this is not possible,

3. **Due consideration is given to placement of the child within his or her State of origin**, before deciding that the provision of care abroad is in the child's best interests?

4. The provision of care by *kafalah* in the receiving State takes place only if the **competent authorities of the State of origin** have determined that:

a) *the persons, institutions and authorities whose consent is necessary for the provision of care by kafalah, have been counselled and duly informed of the effects of their consent;*

b) *such persons, institutions and authorities have given their consent freely, in the required legal form, expressed or evidenced in writing;*

c) *the consents have not been induced by payment or compensation of any kind and have not been withdrawn;*

d) *the consent of the mother, where required, has been given only after the birth of the child; and, having regard to the age and degree of maturity of the child;*

e) *the child has been counselled and duly informed of the effects of the provision of care by kafalah and of his or her consent, where such consent is required;*

f) *consideration has been given to the child's wishes and opinions;*

g) *the child's consent, where such consent is required, has been given freely, in the required legal form, expressed or evidenced in writing, and*

h) *such consent has not been induced by payment or compensation of any kind?*

5. The provision of care by *kafalah* in the receiving State takes place only if the **competent authorities of the receiving State:**

a) *have determined that the persons who are to provide care through kafalah are eligible and suited to assume this responsibility;*

b) *have ensured that they have been counselled as may be necessary; and*

c) *have determined that the child is or will be authorised to enter and reside permanently in the receiving State.*

#### c) Private Intermediaries (if any should be limited according to the role of Central/ competent authorities in article 33)

Do you agree that where private bodies are involved in the provision of care by *kafalah* across borders it should be ensured that:

6. Such bodies:

a) *are duly accredited in their State;*

b) *are only accredited if they demonstrate competence to properly carry out the tasks that they have been entrusted with;*

c) *pursue only non-profit objectives, according to such conditions and within such limits as established by the competent authorities of the State of accreditation;*

d) *are directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of placement of children in foster care or institutional care or provision of care through kafalah or an analogous institution;*

e) *are subject to supervision by competent authorities of that State as to their composition, operation and financial situation, and*

f) *may act in the receiving State only if the competent authorities of both States have authorised them to do so.*

#### d) Procedures for the provision of care by *kafalah* under Art.33

Do you agree that it should be ensured that:

7. Persons or institutions that habitually reside in the State of origin, wishing to ensure the provision of care by *kafalah* in the receiving State for a child who habitually resides in the receiving State should **apply to the competent authority in that State?**

8. The Central Authority of the receiving State, based on professional evaluations including psycho-social-medical and legal considerations, must be satisfied that the **envisaged care providers are eligible and suited** to provide care to the child. Consequently, it must prepare a **report** including information about their identity, eligibility and suitability, background, family and medical history,

social environmental, reasons for taking care of the child, ability to assume the care responsibility, as well as the characteristics of the children for whom they could be qualified to care for?

9. If the competent authority of the State of origin considers that the placement or provision of care is in child's best interest, it should:

- a) prepare a **report** including information about his or her identity, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
- b) give due consideration to the child's upbringing and to his or her **ethnic, religious and cultural background**;
- c) ensure that all **consents** have been obtained in accordance with [§4. above];
- d) determine, on the basis of the reports relating to the child and the envisaged care providers, whether **the envisaged provision of care is in the best interests of the child**; and
- e) transmit to the Central Authority of the receiving State, its report on the child and proof that the necessary consents have been obtained and the reasons for its determination on the provision of care by kafalah?

10. Both States should:

- a) take all necessary steps to obtain **permission for the child to leave the State of origin** and to enter and reside permanently (or for the duration of the proposed provision of care) **in the receiving State**;
- b) ensure that this **transfer takes place in secure and appropriate circumstances** and, if possible, in the company of the prospective care givers;
- c) ensure that if the transfer of the child does not take place, the **reports** referred to in [§§ 9 and 10 above] are **sent back** to the authorities who forwarded them; and
- d) keep each other **informed** about the provision of care by kafalah?

11. Where it appears to the Central Authority of the receiving State that the continued provision of care by kafalah is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular:

- a) to **withdraw the child from the care of the care givers and to arrange temporary care**;
- b) to arrange without delay a new placement of the child with a view to **arrange alternative care**, in consultation with the competent authority of the State of origin;
- c) **as a last resort, to arrange the return of the child**, if his or her interests so require; and
- d) having regard to the age and degree of maturity of the child, ensure that the child is **consulted** and, where appropriate, his or her **consent** obtained in relation to measures taken under this provision.

## e) Other concerns

Do you agree that:

### **Preservation and access to, and use of information**

12. The competent authorities of both States should ensure that:

- a) **information** held by them concerning the child's origin, specifically information concerning the identity of his or her parents, as well as the medical history, is **preserved**;
- b) the child or his or her representative has **access to such information**, under appropriate guidance, in so far as is permitted by the law of that State, and
- c) without prejudice to a) and b), personal data gathered or transmitted under the Convention, especially data referred to in [§§ 8 and 9], shall be **used only for the purposes for which they were gathered or transmitted?**

### **Improper financial activities**

13. It should be ensured that:

- a) **no one shall derive improper financial or other gain** from an activity related to the provision of care by kafalah;
- b) only costs and expenses, including **reasonable professional fees** of persons involved in the provision of care by kafalah may be charged or paid; and
- c) the directors, administrators and employees of bodies involved in the provision of care by kafalah shall **not receive remuneration which is unreasonably high** in relation to services rendered?

### **Subsequent adoption in the receiving State**

14. It should be ensured that if, and when, under the law of the receiving State<sup>971</sup>, the adoption of the child by the caregivers is permitted, the authorities of that State may only take such decision if (in conformity with the requirements of Article 4, sub-paragraphs c) and d) of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993):

- a) the persons, institutions and authorities whose consent is necessary for adoption, have been **counselled** as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and their family of origin;

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b) such persons, institutions and authorities have given their **consent** freely, in the required legal form, and expressed or evidenced in writing;

c) the consents have **not been induced by payment or compensation** of any kind and have not been withdrawn;

d) the consent of the mother, where required, has been given only **after the birth** of the child; and, having regard to the age and degree of maturity of the child;

e) the child has been **counselled and duly informed** of the effects of the adoption and of his or her consent to the adoption, where such consent is required;

f) consideration has been given to the child's **wishes and opinions**;

g) the child's **consent** to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

h) such consent has **not been induced by payment or compensation** of any kind?

### General oversight

15. It should be ensured that if a competent authority finds that Art. 33 of the 1996 Convention or any [of the above requirements] may not be respected, it shall **immediately inform the Central Authority** of its State, and that this Central Authority is responsible for ensuring that appropriate measures are taken?

## 2. Model for the establishment of a bilateral agreement: regarding the cross-border placement of children in a foster family or institution, or their provision of care by *kafalah* or an analogous institution

### 2.1 Model for States that are both bound by the 1996 Hague Convention

The States signatory to the present Agreement:

Parties to the **Hague Convention of October 19, 1996, on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children** ("the Convention");

**Desiring** to strengthen the international protection of children under article 33 of the Convention; and

**Agree upon the following provisions:**

#### Chapter I – Scope of agreement

##### Article 1

1. The Agreement applies when a child habitually residing in one of the State parties to this Agreement ("State of origin") is to be transferred to another State party ("receiving State") for the purposes of placement in a foster family or institution, or provision of care by *kafalah* or analogous institution, in the receiving State.

2. The Agreement applies regardless of whether the placement or provision of care in the receiving State is being considered by an authority of the State of origin with jurisdiction under articles 5 to 10 of the Convention, or by a person or private institution in that State.

#### Chapter II – Requirements for placement or provision of care in the receiving State

##### Article 2

The placement or provision of care in the receiving State shall only take place if the competent authorities in the State of origin:

1. have noted, after duly reviewing the placement possibilities or provision of care for the child in the State of

origin, that the placement or provision of care in the receiving State meets the best interests of the child.

2. have ensured that:

a) the persons, institutions and authorities whose consent is necessary for the placement or provision of care have been counselled and duly informed of the effects of their consent;

b) such persons, institutions and authorities have given their consent freely in the required legal form and that this consent was given or noted in writing;

c) the consents have not been induced by payment or compensation of any kind and have not been withdrawn; and

d) consent of the mother, if required, was given after the birth of the child.

3. have ensured, having regard to the age and degree of maturity of the child, that:

a) he or she has been counselled and duly informed of the effects of the placement or provision of care and of his or her consent, if such consent is required;

b) the child's wishes and opinions have been taken into consideration;

c) the child's consent to the placement or provision of care, when such consent is required, has been given freely in the required legal form and was given or confirmed in writing; and

d) this consent was not induced by payment or compensation of any kind.

##### Article 3

The placement or provision of care in the receiving State shall only take place if the competent authorities in the receiving State:

1. have determined that the foster family, institution or

persons being considered for the provision of care are eligible and suited to take on this responsibility;

2. have ensured that they have been counselled as may be necessary; and

3. have determined that the child is or will be authorised to enter and reside permanently, or for the expected duration of the provision of care, in that State.

### Chapter III – Central authorities

#### Article 4

The designated Central Authorities pursuant to the Convention shall take, directly or through public authorities, all appropriate measures to prevent improper material gains in connection with a placement or a provision of care and prevent any practice that is contrary to the objectives of this Agreement.

#### Article 5

The Central Authorities shall take, directly or through public authorities or duly accredited bodies pursuant to article 6, all appropriate measures to:

1. collect, preserve and exchange information about the situation of the child and the prospective foster family or institution for the placement or the prospective persons for the provision of care, so far as is necessary for its completion;

2. facilitate, follow and expedite the proceedings for the placement or provision of care;

3. promote the development of counselling services for placements or provisions of care in their States;

4. provide each other with general evaluation reports about experiences with placements or provisions of care; and

5. reply, insofar as is allowed by the law of their State, to justified requests for information about a particular placement or provision of care presented by other Central Authorities or public authorities.

#### Article 6

1. By way of exception<sup>972</sup>, the State Parties to this Agreement may accredit a body to intervene and carry out cross-border placements of children in foster families or an institution, or their provision of care by *kafalah* or analogous institution. Accreditation shall only be granted to and maintained by bodies that demonstrate their competence to properly carry out the tasks conferred on them.

2. An accredited body shall:

a) pursue only non-profit objectives according to the conditions and within the limits set by the competent authorities of the State of accreditation;

b) be directed and managed by persons qualified by their ethical integrity and their training or experience to work in the field of international placement or provision of care of children; and

c) be subject to the supervision of the competent authorities of that State as to its composition, operation and financial situation.

3. An accredited body pursuant to the preceding paragraphs may intervene and carry out tasks only in the context of this Agreement and only in the State of accreditation.

#### Article 7

The State parties shall inform each other of the names and addresses of the accredited bodies and shall also inform the Permanent Bureau of the Hague Conference on Private International Law.

### Chapter IV – Procedural conditions in the placement or provision of care

#### Article 8

1. If the competent authority of the State of origin plans to place the child in a foster home or institution, or the child's provision of care by *kafalah* or analogous institution in the requested receiving State:

a) it establishes a report containing information on the child's identity, social environment, personal and family development, medical history and the family's medical history, as well as any particular needs the child may have;

b) it duly considers the child's conditions of education and ethnic, religious and cultural origin;

c) it ensures that the consents under article 2 have been obtained; and

d) it notes, based on the reports about the child and the intended foster family or institution for the placement, or the intended people for the provision of care, that the placement or provision of care is in the child's best interest.

2. It shall send the Central Authority or other competent authority of the requested receiving State its report on the child, proof that the required consents have been obtained and the reasons for its determination on the placement or provision of care.

#### Article 9

Any decision on the placement or provision of care may only be made in the State of origin if:

1. the Central Authority or other competent authority of that State has ensured that the intended foster family or institution, or intended persons for the provision of care have agreed;

2. the Central Authority or other competent authority of the requested receiving State has approved the placement or provision of care, considering the child's best interests; and

3. it has noted, in accordance with Article 3, that the intended foster family, institution or persons for the provision of care are eligible and suitable to take on this responsibility, and that the child is or will be authorised to enter and stay permanently, or for the intended duration of the placement or provision of care, in the receiving State.

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### Article 10

The Central Authorities of the two States shall take all useful measures for the child to be welcomed by *kafalah* or an analogous institution to receive authorisation to leave the State of origin and authorisation to enter and stay permanently. They shall do the same for the child who will be placed temporarily to receive the corresponding authorisations to leave, stay and return.

### Article 11

1. The child's travel to the receiving State shall only take place if the conditions in Article 10 have been met.

2. The Central Authorities of the two States shall ensure that the movement occurs safely and in the appropriate conditions and, if possible, in the company of the intended foster family, employees of the intended institution for the placement or intended persons for the provision of care.

### Article 12

If the placement is unexpectedly terminated in the receiving State, the States agree to conduct a procedure to determine the child's best interests in order to evaluate a new placement for the child.

## Chapter IV – General provisions

### Article 13

1. The competent authorities of Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

2. They shall ensure the child or the child's representatives have access to such information under appropriate guidance.

### Article 14

Notwithstanding Article 13, the personal data collected or shared in accordance with this Agreement cannot be used for purposes other than those for which they were collected or shared.

### Article 15

1. No one shall derive improper financial or other gain from an activity related to a cross-border placement or provision of care.

2. Only costs and expenses, including reasonable professional fees of persons involved in the placement or provision of care, may be charged or paid.

3. The directors, administrators and employees of bodies involved in the placement or provision of care shall not receive remuneration which is unreasonably high in relation to services rendered.

### Article 16

A competent authority that finds that any provision of the Agreement has not been respected or that there is a serious risk that it may not be respected shall immediately inform the Central Authority of its State. This Central Authority is responsible for ensuring that appropriate measures are taken.

### Article 17

The Competent Authorities of the State parties shall act rapidly in the placement or provision of care process.

## Final clauses

Signatures, ratifications, coming into force...

## 2.2 Model for States that are not both bound by the 1996 Hague Convention

The States signatory to the present Agreement:

**Desiring** to strengthen the international protection of children during their cross-border placement in a foster family or institution, or their provision of care by *kafalah* or analogous institution; and

**Agree upon the following provisions:**

## Chapter I – Scope of agreement

### Article 1

1. The Agreement applies when a child habitually residing in one of the State parties to this Agreement ("State of origin") is to be transferred to another State party ("receiving State") for the purposes of placement in a foster family or institution, or provision of care by *kafalah* or analogous institution, in the receiving State;

2. The Agreement applies regardless of whether the placement or provision of care in the receiving State is being considered by an authority of the State of origin, or by a person or private institution in that State.

## Chapter II – Requirements regarding the placement or provision of care in the receiving State

### Article 2

The placement or provision of care in the receiving State shall only take place if the competent authorities in the State of origin:

1. have noted, after duly reviewing the placement possibilities or provision of care for the child in the State of origin, that the placement or provision of care in the receiving State meets the best interests of the child.

2. have ensured that:

a) *the persons, institutions and authorities whose consent is necessary for the placement or provision of care have been counselled and duly informed of the effects of their consent;*

b) *such persons, institutions and authorities have given their consent freely in the required legal form and that this consent was given or noted in writing;*

c) *the consents have not been induced by payment or compensation of any kind and have not been withdrawn; and*

d) *consent of the mother, if required, was given after the birth of the child.*

3. have ensured, having regard to the age and degree of maturity of the child, that:

- a) he or she has been counselled and duly informed of the effects of the placement or provision of care and of his or her consent, if such consent is required;*
- b) the child's wishes and opinions have been taken into consideration;*
- c) the child's consent to the placement or provision of care, when such consent is required, has been given freely in the required legal form and was given or confirmed in writing; and*
- d) this consent was not induced by payment or compensation of any kind.*

#### **Article 3**

The placement or provision of care in the receiving State shall only take place if the competent authorities in the receiving State:

1. have determined that the foster family, institution or persons being considered for the provision of care are eligible and suited to take on this responsibility;
2. have ensured that they have been counselled as may be necessary; and
3. have determined that the child is or will be authorised to enter and reside permanently, or for the expected duration of the provision of care, in that State.

### **Chapter III – Central authorities**

#### **Article 4**

Each of the State parties to this Agreement designates a Central Authority responsible for meeting the obligations imposed on it by the Agreement.

#### **Article 5**

1. Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Agreement.
2. They shall take directly all appropriate measures to:
  - a) provide information as to the laws of their States concerning cross-border placement of children in a foster family or institution or their provision of care by kafalah or analogous institution, and other general information, such as statistics and standard forms; and*
  - b) keep one another informed about the operation of the Agreement and, as far as possible, eliminate any obstacles to its application.*

#### **Article 6**

The designated Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper material gains in connection with a placement or a provision of care and prevent any practice that is contrary to the objectives of this Agreement.

#### **Article 7**

The Central Authorities shall take, directly or through public authorities or duly accredited bodies pursuant to Article 8, all appropriate measures to:

1. collect, preserve and exchange information about the situation of the child and the prospective foster family or institution for the placement or the prospective persons for the provision of care, so far as is necessary for its completion;
2. facilitate, follow and expedite the proceedings for the placement or provision of care;
3. promote the development of counselling services for placements or provisions of care in their States;
4. provide each other with general evaluation reports about experiences with placements or provisions of care; and
5. reply, insofar as is allowed by the law of their State, to justified requests for information about a particular placement or provision of care presented by other Central Authorities or public authorities.

#### **Article 8**

1. By way of exception<sup>973</sup>, the State parties to this Agreement may accredit a body to intervene and carry out cross-border placements of children in foster families or an institution, or their provision of care by *kafalah* or analogous institution. Accreditation shall only be granted to and maintained by bodies that demonstrate their competence to properly carry out the tasks conferred on them.

2. An accredited body shall:

- a) pursue only non-profit objectives according to the conditions and within the limits set by the competent authorities of the State of accreditation;*
- b) be directed and managed by persons qualified by their ethical integrity and their training or experience to work in the field of international placement or provision of care of children; and*
- c) be subject to the supervision of the competent authorities of that State as to its composition, operation and financial situation.*

3. An accredited body pursuant to the preceding paragraphs may intervene and carry out tasks only in the context of this Agreement and only in the State of accreditation.

#### **Article 9**

The State parties shall inform each other of the names and addresses of the accredited bodies.

### **Chapter IV – Procedural conditions for the placement or provision of care**

#### **Article 10**

1. If the competent authority of the State of origin plans to place the child in a foster home or institution, or the child's provision of care by *kafalah* or analogous institution in the requested receiving State:
  - a) it establishes a report containing information on the child's identity, social environment, personal and*

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*family development, medical history and the family's medical history, as well as any particular needs the child may have;*

*b) it duly considers the child's conditions of education and ethnic, religious and cultural origin;*

*c) it ensures that the consents under article 2 have been obtained; and*

*(d) it notes, based on the reports about the child and the intended foster family or institution for the placement, or the intended people for the provision of care, that the placement or provision of care is in the child's best interest.*

2. It shall send the Central Authority or other competent authority of the requested receiving State its report on the child, proof that the required consents have been obtained and the reasons for its determination on the placement or provision of care.

### **Article 11**

Any decision on the placement or provision of care may only be made in the State of origin if:

1. the Central Authority or other competent authority of that State has ensured that the intended foster family or institution, or intended persons for the provision of care have agreed;

2. the Central Authority or other competent authority of the requested receiving State has approved the placement or provision of care, considering the child's best interests; and

3. it has noted, in accordance with Article 3, that the intended foster family, institution or persons for the provision of care are eligible and suitable to take on this responsibility, and that the child is or will be authorised to enter and stay permanently, or for the intended duration of the placement or provision of care, in the receiving State.

### **Article 12**

The Central Authorities of the two States shall take all useful measures for the child to be welcomed by *kafalah* or an analogous institution to receive authorisation to leave the State of origin and authorisation to enter and stay permanently. They shall do the same for the child who will be placed temporarily to receive the corresponding authorisations to leave, stay and return.

### **Article 13**

1. The child's travel to the Welcoming State shall only take place if the conditions in Article 10 have been met.

2. The Central Authorities of the two States shall ensure that the movement occurs safely and in the appropriate conditions and, if possible, in the company of the intended foster family, employees of the intended institution for the placement or intended persons for the provision of care.

### **Article 14**

If the placement is unexpectedly terminated in the receiving State, the States agree to conduct a procedure to determine the child's best interests in order to evaluate a new placement for the child.

## **Chapter IV – General provisions**

### **Article 15**

1. The competent authorities of Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

2. They shall ensure the child or the child's representatives have access to such information under appropriate guidance.

### **Article 16**

Notwithstanding Article 15, the personal data collected or shared in accordance with this Agreement cannot be used for purposes other than those for which they were collected or shared.

### **Article 17**

1. No one shall derive improper financial or other gain from an activity related to a cross-border placement or provision of care.

2. Only costs and expenses, including reasonable professional fees of persons involved in the placement or provision of care, may be charged or paid.

3. The directors, administrators and employees of bodies involved in the placement or provision of care shall not receive remuneration which is unreasonably high in relation to services rendered.

### **Article 18**

A competent authority that finds that any provision of the Agreement has not been respected or that there is a serious risk that it may not be respected shall immediately inform the Central Authority of its State. This Central Authority is responsible for ensuring that appropriate measures are taken.

### **Article 19**

The Competent Authorities of the State parties shall act rapidly in the placement or provision of care process.

## **Final clauses**

Signatures, ratifications, coming into force...

### 3. The Judges' Network to foster direct judicial communication in cross-border kafalah placements

In this article, Hon. Justice Victoria Bennett, appointed judge to the Family Court of Australia in Melbourne and designated Liaison Judge for Australia to the International Hague Network of Judges (IHNJ), and Monique MacRitchie, Legal Associate, provide a brief overview on the benefits of direct judicial communication and share the Australian experience on how direct judicial communication could be applied to cross-border kafalah placements.

Judicial communication is an important aspect in facilitating enforcement and recognition of orders in the cross-border transfer of child protection measures under the 1996 Hague Convention. In addition to the practical complexities that generally abound in international child disputes, cases can be complicated by child protection issues and domestic family law orders. It is axiomatic that the easy cross border family cases look after themselves. Courts, responsible authorities and lawyers are invariably engaged in helping the cross-border families beset with difficulties, vulnerabilities and, almost always, lack of resources. Direct judicial communication can be a useful means to understand and unravel these complex issues for the benefit of the child concerned.

The operation of both the 1980 and 1996 Hague Conventions, together or separately, can be facilitated by the International Hague Network of Judges (IHNJ). Of the 83 contracting States of the 1980 Hague Convention and the 52 contracting States of the 1996 Hague Convention, 86 have designated one or more Judges to the IHNJ, amounting to a total of 138 Judges (status as of March 2020)<sup>974</sup>. The Permanent Bureau of the Hague Conference also encourages countries which are not contracting states to nominate judges to the Network<sup>975</sup>.

In December 2016, the Honourable Sir Mathew Thorpe delivered a paper at the International Family Justice Conference at Bratislava. Amongst many important points, he said “[t]he last point I want is for me a particularly important one. I have seen in my professional life the emergence and the growth of what I call judicial activism, that is the responsibility of the judge to his society and to the international community, not just to make wise and fair decisions when sitting on the bench but to represent judicial thinking in a much wider context: to go to conferences, to speak for the jurisdiction, but also vitally important, in individual cases to aid the process of communication and collaboration which is so important to achieving good outcomes<sup>976</sup>”. It is a sound statement indeed.

#### Direct judicial communication as a means to enhance cooperation in cross border kafalah cases

The rules in relation to kafalah as a child protection measure are outlined in Article 33 of the 1996 Hague Convention. Kafalah brings a range of unique complexities for Civil law and Common law countries. First, to understand kafalah and its legal effects (see Part II). Second, including but not limited to, issues around immigration, inter-country adoption, and guardianship (see Part III).

Requests involving kafalah placements are not common in Australia. Research indicates that the Children's Court of Victoria has had no experience in these matters and nor has the Commonwealth Central Authority<sup>977</sup>. Australia does

not have any legislation that specifically addresses the measure. While the Central Authority fields many requests seeking assistance for the placement of children under special guardianship orders, or similar, with relatives in Australia we have no documented experience to bring specifically on kafalah. What we are able to share with you, however, is what I would do should such a situation present itself in my capacity as one of the Hague Network Judges for Australia.

We have many cases where children move between countries. Communication between judges in each jurisdiction is thought to provide certainty and enable procedures to be more streamlined. Article 15(3) of the 1996 Hague Convention provides that “if a child's habitual residence changes to another contracting State, the law of the other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence”. Similarly, parental responsibility is exercised in accordance with the law of the new State of habitual residence from the time the change of habitual residence occurs<sup>978</sup>.

If kafalah applies in the first State but does not exist under the law of the new State, the Explanatory Report of the 1996 Hague Convention encourages authorities to find a means to adapt the protection measure to a measure that is available under the laws of the changed State. As it is not possible to account for the diverse situations that may arise between the existence of the measure in one State and its manner of application in the new State, each case needs to be resolved on a case-by-case basis. In taking this **approach of adaptation**, new measures to be taken by the State of changed habitual residence are more likely to be practicable<sup>979</sup>. It is particularly important for special supports or safeguards directed to a child in the original State to transfer in a seamless way to the child in the new State.

Direct judicial communication is one means of introducing responsible authorities to one another across international borders. While the Network was initially conceived as a means of ensuring cooperation vis-à-vis the 1980 Hague Convention, it has been of increasing assistance with regard to the operation of the 1996 Hague Convention. In the guide, published by the Permanent Bureau, entitled, *Emerging Guidance regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, within the Context of the International Hague Network of Judges* (“the Guide”) it is stressed that direct judicial communication can facilitate a number of arrangements. The Guide provides a number of matters that may be the subject of direct judicial

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communication<sup>980</sup>, such as scheduling the case in the foreign jurisdiction<sup>981</sup>; establishing *whether protective measures are available for the child; ascertaining whether the foreign court can accept and enforce undertakings; confirming whether orders were made by the foreign court; verifying whether a transfer of jurisdiction is appropriate.*

Whilst the above may not be relevant to *kafalah* placements, the list demonstrates that direct judicial communication can be flexible. It can be as simple as a judge in Australia alerting the Central Authority in Australia that they have been contacted by a judge from a country whose legal system is based on and influenced by Sharia and advised of an incoming *kafalah* placement so that contact between the two executive arms of government in the two States can be expedited. Direct judicial communication could be used to explain how *kafalah* functions as well as to ensure that consultation occurs between responsible authorities. All of our direct judicial communication, in Australia, is conducted by email, published to the parties and tendered as evidence in the proceeding. The process is transparent. The process does not contravene any rule of law or procedure in Australia.

### Direct judicial communication in the implementation of a cross-border *kafalah*

The 1996 Hague Convention does not require contracting States to legislate to have *kafalah* available through their domestic laws. It is contemplated that contracting States will find ways to apply a measure of protection taken in one State in another State and to manage the uncertainty regarding the legal effects and function of a *kafalah* placement so that this child protection measure can be recognised in a third Civil law or Common law country vis-à-vis the 1996 Hague Convention. Australia is a country with a non-porous border. Accordingly, the initial consideration for any *kafalah* arrangement would likely be the immigration status of the child. Direct judicial communication does not play any role in securing immigration entitlements. However, if it is clear that a child can be lawfully brought to Australia then direct judicial communication would be able to be used to streamline the mandatory process required under Article 33 of the 1996 Hague Convention.

**Direct judicial communications could conceivably be useful in the context of seeking to understand the original measure better, and to find ways to adapt the measure to accommodate the laws and circumstances in the new State, both of which are going to be of direct benefit to the subject child. Therefore, in line with the efforts of the HCCH, ISS/IRC encourages countries to designate a liaison judge, especially in those countries where the 1996 Hague Convention has not (yet) been ratified, as it can act as important catalyst for cross-cultural and cross-judicial dialogue and harmonised actions in the best interests of children.**



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## Annex I

- 917 Who were later referred to as the *Khulafa Rashidun*, or the *Rightly-Guided Caliphs*.
- 918 For a detailed background to the concept of “supreme leadership”, see Madelung, W., ‘Imāma’, *Encyclopaedia of Islam*, Second Edition, Edited by: Bearman, P., Bianquis, T., Bosworth, C.E., van Donzel, E., Heinrichs, W.P. Consulted online on 11 August 2019. Available at [http://dx.doi.org/10.1163/1573-3912\\_islam\\_COM\\_0369](http://dx.doi.org/10.1163/1573-3912_islam_COM_0369)
- 919 Alami, D. S. and Hincliffe, D. (1998). *Islamic Marriage and Divorce Laws in the Arab World*, London.
- 920 Ahmad, I. (2002). ‘Communal Autonomy and the Application of Islamic Law’, Newsletter of the Institute for the Study of Islam in the Modern World, p. 32.
- 921 Abdulla , R. S. and Keshavjee, M. M. (2018). *Understanding Sharia: Islamic Law in a Globalised World*, see particularly chapter 13, pp. 225 – 260.
- 922 Keshavjee, M. (2014). Cross-Border Child Abduction Mediation in Cases Concerning Non-Hague Parental Child Convention Countries, in C. Paul and S. Kiesewetter, eds., *Cross-Border Family Mediation: International Parental Child Abduction, Custody and Access Cases*, pp. 95 – 114.
- 923 Abdulla , R. S. and Keshavjee, M. M. (2018). ‘Family Law to Finance’, in Amyn Sajoo, ed., *The Sharia: History, Ethics and Law* (London), pp. 119 – 134.
- 924 See HCCH table of Contracting Parties at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>

## Annex II

- 925 Convention for the Protection of Human Rights and Fundamental Freedoms, Title II, Articles 19 to 51.
- 926 Convention for the Protection of Human Rights and Fundamental Freedoms, Title II, Article 19.
- 927 Art. 35: “The Court may only deal with the matter after all domestic remedies have been exhausted (...)”.
- 928 Art. 8 (1) states: “Everyone has the right to respect for his private and family life, his home and his correspondence.” Article 8 (2) states, “ There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
- 929 Available at <https://hudoc.echr.coe.int/>
- 930 Spec. para. 47.
- 931 Drawing up a will for the estate, appointing a legal guardian in the event of death.
- 932 5 years at the time of the case, 3 years since 2016 (see *Civil Code*, art. 21 – 12)
- 933 ECtHR, Court (Second Section), Dec. 16, 2014, n° 52265/10. Available to download [here](#).
- 934 Spec para. 7.
- 935 Spec para. 9.
- 936 By way of derogation from Articles 361 – 3 and 361 – 4 of the Civil Code, Article 361 – 5, inserted into the Civil Code by the Law of December 6, 2005, amending certain provisions relating to adoption, allows a child to be moved from his or her State of origin which does not provide for adoption to Belgium with a view to adoption and to be adopted subject to certain conditions, including that the child is orphaned or has been abandoned and placed under the guardianship of the public authority (see Part III, Belgium).
- 937 Translated from French; Spec. para. 99.
- 938 Translated from French; Spec para. 98.
- 939 In the case of *Chbihi Loudoudi*, it is clear from the facts that the applicants never wished to obtain a *kafalah* but always an adoption. In *Harroudj*, the fact that the applicant promptly sought an adoption may suggest that this was also the case.

- 940 Available in several languages at: <https://juris.ohchr.org/Search/Details/2421>
- 941 See the text of the Protocol: <https://www.ohchr.org/en/professionalinterest/pages/opicccr.aspx>
- 942 See in particular art. 7 on the Admissibility of a communication.
- 943 Spec. para. 2.5.
- 944 Spec. para. 2.6.
- 945 Spec. para. 8.5.
- 946 Spec. para. 8.5.
- 947 Spec. para. 8.7.
- 948 See <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25102&LangID=E>
- 949 Spec. para. 4.2.
- 950 See Baglietto C., Cantwell N. and Dambach M. (2016). *Responding to Illegal Adoptions: A Professional Handbook*. Geneva, Switzerland: International Social Service.

## Annex III

- 951 Directive 2003/86/EC of 22 September 2003 (‘Family Reunification Directive’) at preamble (2); and Directive 2004/38/EC of 29 April 2004 (Citizens’ Rights Directive) at preamble (15).
- 952 European Commission (2019), ‘Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2003/86/EC on the Right to Family Reunification’, at p. 2: “For third-country nationals to be eligible as sponsors for family reunification they must legally reside in a Member State, have a residence permit valid for at least one year (irrespective of the title of residence) and have reasonable prospects of obtaining the right of permanent residence.”. In practice, the application of this mandatory provision varies greatly from Member State to Member State.
- 953 In all cases, the term ‘minor children’ extends to “children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State” (at art. 4(b) – (d)).
- 954 Defined as, “(...)any person having the nationality of a Member State”; Citizen’s Rights Directive, art. 2(1).
- 955 Citizens’ Rights Directive, art. 1.
- 956 The European Court of Justice operates as a final court of review within the EU. It is responsible for interpreting EU law, and ensuring its harmonisation among the Member States, and adjudicates on legal disputes between the governments of the Member States and the institutions of the EU. It may also, in certain circumstances, be referred to by individuals, companies or organisations wishing to bring an action against an EU institution when they believe that it has infringed their rights. Litigants may approach the ECJ on a question of EU law once all domestic remedies have been exhausted, or the courts of Member States themselves may seek a preliminary ruling on a question of EU law so that the domestic court can appropriately apply the law.
- 957 *SM (Algeria) (Appellant) v Entry Clearance Officer, UK Visa Section (Respondent)* [2018] UKSC 9.
- 958 At paras. 45 – 56.
- 959 See paras. 57 – 68.
- 960 Both the Directive and the Charter of Fundamental Rights of the European Union.
- 961 At para. 68.
- 962 See paras. 69, 70.
- 963 See paras. 71, 72.

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### Annex IV

- 964 See European Court of Human Rights, *Chbihi Loudoudi and Others v. Belgium*, 16 December 2014 (52265/10), para. 96: “Both the Brussels’ Court of First Instance and the Brussels’ Court of Appeal considered that neither the *kafalah adoulaire* nor the fact that it was approved by the judgment of the Court of First Instance of Meknès on 11 November 2003, made it possible to consider that the child had been entrusted to the adopters by the competent ‘authority’ of the child’s State of origin. It is not for the Court to question this interpretation of national law by domestic courts”.
- See also the *Conclusions and Recommendations of the Seventh Special Commission on the Operation of the practical operation of the 1980 and 1996 Conventions*, (2017), point 32: “The Special Commission recalls that private agreements between parents on parental responsibility (i.e., parental agreements) do fall under the scope of the Convention through the application of the rules on applicable law, if consistent with Article 3 and not excluded by Article 4 Such parental agreements cannot be subject to the rules on recognition and enforcement, unless they have been confirmed or approved by a competent authority, or have been subject to an act of a similar nature by a competent authority with a view to giving such agreements force of law (see Art. 23, which provides for recognition by operation of law of measures taken by the authorities of a contracting State)”. Available in English at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545>
- 965 Cf. the ruling by the UN Committee on the Rights of the Child, 5 November 2018, Y.B. and N.S. (on behalf of the child C.E. v. Belgium (communication 12/2017), CRC/C/79/D/12/2017.
- 966 The 1993 Hague Convention, preamble.
- 967 The 1993 Hague Convention, art. 4 b).
- 968 The 1993 Hague Convention, art. 5 a).
- 969 The 1993 Hague Convention, art. 5 b).
- 970 For example, to protect child *kafalah* arrangements from Algeria (not a State Party to the 1996 Convention), to the UK (Party to the 1996 Convention) or Canada (not yet a Party).
- 971 It should be remembered that, as the 2017 Special Commission (see fn. 1) recalled (§ 30.) “... paragraphs 90 to 91 of the *Explanatory Report of the 1996 Convention ... provide useful information for cases where a measure of protection falling under the scope of the Convention has been taken in one State which is unknown, or the conditions of application of which significantly differ, in a new State of habitual residence of a child, to the extent that the measure is denatured or at least weakened*”, and, (§ 31) “... in the case of a change of habitual residence of the child (Art. 5(2)), for example resulting from a long-term cross-border placement (Art. 33), the measures of protection established in the former State of habitual residence will subsist in the new State of habitual residence (Art. 14). The law of the new State of habitual residence will govern, from the time of the change, the conditions of application of the measure taken in the State of the former habitual residence (Art. 15(3)). If necessary, the competent authorities of the new State of habitual residence could adapt the measure taken in the former State of habitual residence or modify it in accordance with Article 5(2). The authorities of the new State of habitual residence may consult, if necessary, the authorities of the State of the former habitual residence when adapting or modifying such measures”.
- 972 If, by way of exception, a State party avails itself of the possibility to accredit a body to intervene and carry out tasks in the context of this Agreement according to article 6 such accreditation should **not** be granted by an authority with specific powers only in the field of inter-country adoption.
- 973 If, by way of exception, a State party avails itself of the possibility to accredit a body to intervene and carry out tasks in the context of this Agreement according to article 6 such accreditation should **not** be granted by an authority with specific powers only in the field of inter-country adoption.
- 974 See current list of Judges per country <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/i/hnj>
- 975 In the Asia-Pacific region, Singapore had a Network Judge for many years prior to its accession as a party; and Pakistan and The Philippines have designated judges to the Network.
- 976 Sir Mathew Ian Thorpe (Speech delivered at the International Family Justice Conference, Bratislava, 6 December 2016).
- 977 In Australia, the Commonwealth Central Authority is the designated central authority under the 1980 and the 1996 Conventions.
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- 979 Lagarde, P. (1996). *Explanatory Report on the 1996 Hague Child Protection Convention*, [91]. Available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=2943&dtid=3>
- 980 HCCH (2013) *Emerging Guidance regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications*, 12.
- 981 To make interim orders, e.g. support, measure of protection; or to ensure the availability of expedited hearings.

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# Biographies

## Professor Hind Ayoubi Idrissi

Professor Hind Ayoubi Idrissi holds a doctorate in human rights from the University of Grenoble in France and is a Member of the United Nations Committee on the Rights of the Child (2015 – 2018), re-elected in 2018 for a second term. She is Vice Dean at the University of Rabat in charge of Scientific Research and Cooperation at the Faculty of Legal, Economic and Social Sciences of Souissi and Member of the Superior Council of the Judiciary. Ms. Ayoubi Idrissi held the position of Director of International Relations at the Ministry of Human Rights in 2002. University professor of law, she is the author of several studies and research in the field of children's rights and women rights. She is also a founding member of the UNESCO chair "Women and their Rights" at the Faculty of Law in Rabat and of the Swiss International Association of Youth and Family Magistrates. Ms. Ayoubi is a consultant to several international organisations including the International Committee of the Red Cross, the Economic and Social Commission of Western Asia, UN Women, Terre des Hommes and the Mediterranean network for human rights.

## Hon Justice Victoria Bennett

The Hon. Justice Victoria Bennett was appointed to the Family Court of Australia, in Melbourne, in November 2005. She is the senior judge in the Melbourne Registry. Together with the Chief Justice of the Family Court of Australia, she is designated as a judge of the International Hague Judicial Network for Australia.

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Prof Dr Andrea Büchler is a Professor for Private and Comparative Law at the University of Zurich, Law Faculty, Director of the Centre for Islamic and Middle Eastern Legal Studies, Chair of the Advisory Commission on Biomedical Ethics.

## Nigel Cantwell

Nigel Cantwell is an Independent Consultant on child protection policies who has been working on issues related to the protection of children's rights in intercountry adoption for 30 years. He founded Defence for Children International (DCI) in 1979, served as coordinator of the group of non-governmental organisations that helped to shape the UNCRC, and participated on DCI's behalf in the drafting of the 1993 Hague Convention. He has been UNICEF's expert at all sessions of the Special Commission on the practical operation of the 1993 Hague Convention, responsible for reviewing the practical operation of that treaty, as well as in working groups to review specific problem areas. He was lead consultant for development of the 2009 UN Guidelines for the Alternative Care of Children. He has undertaken a dozen field assessments of adoption and alternative care systems for or in cooperation with UNICEF and ISS, in countries including Ghana, Guatemala, Romania and

Viet Nam. He was awarded an honorary doctorate by the University of Strathclyde in 2017 in recognition of his contribution to the promotion of the human rights of the child.

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Dr Rawan W. Ibrahim is an Assistant Professor at the German Jordanian University. Her specialisation lies in child protection and alternative care. She has been supporting the Jordanian government in developing the first foster care program in the region. Her research interests include preparation and post-care support of youth transitioning from substitute care to adulthood, implementation science and the development of community and evidence-based programs to divert children from institutionalised care.

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## Hans van Loon

Hans van Loon is an independent international consultant. He is a former Secretary General of the Hague Conference on Private International Law (HCCH) (1996 – 2013) and a member of the Institut de Droit International (since 2009), the Groupe européen de droit international privé (since 1991) and a honorary member of the Asociación Americana de Derecho Internacional Privado (2007). Having practiced law before the Supreme Court of the Netherlands, and acted before the European Court of Human Rights, he joined the Hague Conference in 1978, and assumed the role of Secretary General in 1996. He steered the Conference through a period of rapid expansion of its Membership (including the European Union, Member since 2007) and of States party to Hague Conventions, as well as the establishment of regional offices for Latin America and the Caribbean, and for the Asia-Pacific Region. During his time as Secretary General, the Conference also saw a fast growth of its legislative work and of its monitoring, support and assistance activities concerning the implementation and practical operation of Hague Conventions. Mr Van Loon has been involved in the development of over a dozen Hague Conventions, as well as the Revision of the Conference's Statute. He has lectured at universities and academic institutions worldwide and widely published on numerous topics of (private) international law, stressing the role of private international law in its social and its global context, and its links with human rights. He is a doctor *honoris causa* of Osnabrück University (2001).

## Biographies

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### **Laura Martinez-Mora**

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### **Cinzia Peraro**

Cinzia Peraro PhD is a post-doc researcher in European Union Law at the University of Verona. She collaborates with Prof Baruffi in the implementation of European projects and other scientific activities. She took part to various conferences as speaker and published articles on EU law and private international law, mainly on the protection of workers and family matters. She spent research periods at the University of Minho, the Max Planck Institute Luxembourg, The Hague Academy, where she attended the Summer Courses on private international law, and at the European Parliament as trainee at the Legal Affairs Committee. She is a member of the SIDI-ISIL and a lawyer.

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<sup>1</sup> See detailed [biographies](#).

<sup>2</sup> Idem 1.