

## Information document 2: Sharing information regarding agenda items for the 2023 HCCH Special Commission on the Practical Operation of the 1980 Child Abduction Convention and 1996 Child Protection Convention (submitted 2 October 2023)

Child Identity Protection (CHIP) supports the multiple documents prepared for this Special Commission (SC) and congratulates the work of the HCCH's Permanent Bureau (PB) in the drafting of high quality material, welcoming the inclusion of identity rights. This information document is to highlight key identity issues that are relevant to the multiple preliminary (PD), information (ID) and working (WD) documents prepared by the PB, given that CHIP fully appreciates that the discussions will be led by Contracting States.

Right to identity includes birth registration, name, nationality and family relations (Arts. 7-8 Convention on the Rights of the Child (UNCRC)) as well as issues that are connected to their habitual residence such as family, friends, community, school, ethnic, religious, cultural and linguistic background (c.f. Art. 20(3) UNCRC).

### Key identity considerations relevant to the 1980 Child Abduction Convention based on Agenda discussions:

#### III. Addressing delays under the 1980 Convention

- Prompt returns for children who have been wrongfully removed or retained abroad prevents the undue modification of their identity, particularly linked to his or her place of habitual residence. (PD No. 1)
- The obligation to expeditiously return the child in the 1980 Child Abduction Convention is fully aligned with State obligations under Art.8(2) of the Convention on the Rights of the Child (UNCRC), which notes that 'where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to *re-establishing speedily* his or her identity'. The latter applies to all States, including those not party to the 1980 Convention (PD No. 1).
- CHIP shares concerns that, on average, it takes 30 weeks (more than the six weeks envisioned by the Convention) to resolve cases, which particularly for (very) young children can result in significant changes to their identity and family relations (PD No. 12, c.f. Para. 33). As such, CHIP fully supports all mechanisms that facilitate prompt return under the 1980 Convention (e.g. procedures, bench-books, guidelines, protocols), mediation, direct judicial communications, as being characteristics of States with shortest resolution periods (PD No. 7, PD No. 12, c.f. 400-412).
- CHIP fully supports the proposed SC recommendations, suggesting that further awareness raising on the harm to children and families by avoidable delays be included, related to identity issues (PD No. 12, c.f. Para. 47(b)).
- The above points apply unless the exceptions are invoked.

#### IV. Relationship with other international instruments – 1989 UN Convention on the Rights of the Child

- CHIP supports the proposed recommendations in WD No. 1 where return proceedings should prioritise efforts to promptly bring the child back to his or her habitual residence. By restoring the status *quo ante*, these efforts contribute to the child's identity connected to such a place. The proceedings should equally factor in how the child can maintain personal relations with both parents, siblings and extended family, to the extent possible. This is important as discontinued contact with either parent can cause the child to lose part of his or her identity.<sup>i</sup> CHIP agrees that exceptions should be applied restrictively and recommends that in such cases, identity considerations be included in any best interest assessment.
- CHIP fully supports the recommendations in WD No. 2 noting that 'the objectives of the 1980 Child Abduction Convention – prevention and immediate return – seek to protect the best interests of the child'. CHIP recognises the unique opportunity for the HCCH and the Committee on the Rights of the Child (CRC) to jointly work in this field. The CRC has as a special role to play when examining States Parties about their efforts to reduce the average time it takes to resolve child abduction matters, as contributing

to the immediate return and speedy re-establishment of the child's identity (Arts. 8(2) and 35 of the UNCRC).

#### **V. Central Authorities under the 1980 Convention – Duties and cooperation**

- CHIP fully supports the recommendation in WD No. 3 that 'strongly encourages Contracting States that provide for legal aid and representation in the context of return proceedings to do the same in the context of proceedings for access / contact'. The importance of maintaining contact with both parents and, by consequence, respective extended families facilitates the preservation of family identity in compliance Articles 8 and 9(3) of the UNCRC. CHIP notes that this recommendation could be facilitated in practice with the training of Central Authorities and relevant professionals on the right to identity and how it provides an additional contribution to the objectives of the Convention.

#### **VI. Direct judicial communications (JDC)**

- CHIP welcomes the various information documents prepared to facilitate direct judicial communications, which contribute to the implementation of both Conventions. CHIP notes that an important principle of JDC in the 2013 Guidelines within domestic courts, is the 'initiation of and participation in internal training seminars for judges and legal professionals as well as writing articles for publication is also part of this role'.<sup>ii</sup> CHIP encourages that training includes the right to identity and remains available to provide such support if considered helpful.<sup>iii</sup>

#### **VII. Exceptions to the return of the child and protective measures upon return**

- CHIP broadly supports the recommendations in WDs Nos. 4, 5 and 7, noting the complexities and conflicting interests in these situations. CHIP welcomes the additional clarification that 'domestic violence to a parent can, in a particular case, constitute grave risk of harm to the child' (WD No. 5). The proposed wording of 'placing the child in an intolerable situation' as being an indicator of an exceptional circumstances that may create a grave risk for the return is helpful.
- CHIP is of the view that WD No. 6, submitted by Australia, presents a promising practice of minimum information that every Central Authority should make publicly available regarding an Article 13.b exception to return or otherwise, particularly on the existence of protective measures.
- CHIP respectfully contends that an assessment of 'intolerable situation' should factor in both short- and long-term considerations. This is because 'placing the child in an intolerable situation' may occur in situations where there may be a loss of family identity with a parent, sibling, extended family and other factors related to this right, which may only be quantifiable at a later stage. In terms of immediate considerations, this should include the participation of the child according to his or her maturity, where he or she can explain issues of importance.

#### **VIII. Processing of return applications under the 1980 Convention and enforcement of return orders**

- In terms of tools developed to ascertain whether a removal or retention is wrongful under the 1980 Convention (PD No. 14), it would be helpful to include other factual elements related to the child's habitual residence beyond school and medical connections, such as factors that reflect ties to the ethnic, religious, cultural and linguistic identity of the child (Section XI of the Recommended Model Form).
- To facilitate cooperation between States, CHIP agrees with the suggestion to have additional information about Article 15 procedures in the country profiles (PD No. 14, Para 31). In order to limit the use of Article 15 to truly exceptional cases, CHIP believes that Section 9 on custody in the 2023 Country Profiles is helpful. In this section, it may also be useful to have information about 'parental responsibility' and the link with custody orders, given how parental responsibility may be informally shared with the wider family and community and may be indicators of habitual residence.

#### **IX. Rights of custody, access / contact under the 1980 Convention**

- CHIP supports the proposals which complies with State obligations under Article 9(3) of the UNCRC ‘States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests’ text that could strengthen PD No. 15. This provision contributes to the child’s right to have his or her ‘family relations’ identity preserved (Art. 8(1) of UNCRC). It should also be understood to include siblings and wider family.

#### **X. Tools to assist with the implementation of the 1980 Convention**

- CHIP fully supports the approval of the Revised Request for Return Recommend Model Form and new Request for Access Recommended Model Form, especially as they now fully include the minimum elements of the child’s legal identity as defined by the UN’s Economic and Social Council (ECOSOC) (PD No. 10) and Revised Country Profile (PD No. 18)
- In terms of habitual residence, identity information linked to the child’s upbringing and living arrangements (school, sports and leisure activities, etc.) and child’s ethnic, religious, cultural and linguistic background are important considerations (PD No. 10, Section VI on Annex 1)
- In terms of documents attached to the form, those that contribute to proving the child’s habitual residence and habitual living arrangements are important (PD No. 10, Section XI on Annex 1)

#### **XI. Mediation as relevant to the 1980 (Art. 7(c)) and 1996 (Art. 31(b)) Conventions**

- While there are no points for discussion on the agenda, CHIP recommends that there be training of mediators on importance of contact with both parents, siblings and other relatives in mediation services in addition to the cross-cultural elements that should already be included.

#### **XII. International family relocation as relevant to the 1980 and 1996 Conventions (see Agenda Item XXII)**

- CHIP supports further work on this issue noting that the importance of respecting all children’s rights in the UNCRC in relocation decisions, notably the need to preserve the child’s identity and ensure continuity in upbringing, ethnic, religious, cultural and linguistic background (Art. 20(3) of the UNCRC).

#### **Key identity considerations relevant to 1996 Child Protection Convention based on Agenda discussions:**

#### **XIII. Evaluating and taking stock of the 1996 Convention**

- Despite the identification of potential domestic challenges for the 1996 Child Protection Convention’s implementation (e.g. legislation, coordination, individual cases, timeframes, etc.), CHIP welcomes the interest of States and their recognition of the importance of the 1996 Child Protection Convention in two situations potentially affecting children’s identity: (a) cross-border guardianship, custody and care arrangements; and (b) children affected by migration, in particular those who are unaccompanied (PDs No. 2, 6-A and 6-B).

#### **XIV. Scope of application**

- In addition to past Conclusions and Recommendations (PD No. 1) that remain relevant, CHIP welcomes the proposed recommendations in WD No. 11, noting that ‘cooperation should not be limited to situations of urgency’ as often cross-border child protection measures may be part of long-term efforts to find sustainable solutions for the child.
- CHIP would welcome the consideration of the child’s identity and family relations in protection measures falling under the scope of the 1996 Child Protection Convention in the Conclusions and Recommendations resulting from the 2023 Special Commission, in particular in the identification of ‘the whereabouts of a child’ (Art. 31.c); ‘the situation of the child (Art. 32.a); in the consideration of placements and in the report on the child (Art. 33); and in relation to ‘information relevant to the protection of the child’ (Art. 34).

## **XV. Jurisdiction issues**

- The definition of 'habitual residence' is part of a child's identity as it is linked to the child's potential feeling of belonging, family relations, linguistic and cultural identity, integration in society (school and activities), etc. and should be taken into account in all cases before domestic courts (WD No. 13). Potential changes to habitual residence including potential risks (Arts. 5(2) and 36) can also affect a child's identity because of the information available about the child in the process when selecting the placement, such as the child's family relations (PD No. 6-A).
- CHIP welcomes the recommendation in WD No. 13 that 'the SC further noted that this process should be conducted diligently and without delay', as this would contribute to the prompt restoration of a child's identity, including family relations, as enshrined in Art. 8.2 of the UNCRC.
- The key opportunity 'to exchange information, including such information as may be relevant for the purposes of Article 5(2)' may contribute to the preservation/restoration of a child's identity (WD No. 13).
- In cases of urgency (Art. 11), all elements of a child's identity, including their family relations, legal identity, potential changes or falsification of elements of the identity, should be taken into account and help assess 'whether the child in question is likely to suffer irreparable harm or if their interests will be compromised if protection is not pursued immediately' (WD No. 14, PD No. 6-A). These considerations are equally applicable to unaccompanied, separated and refugee children.
- In terms of direct judicial communications, CHIP welcomes that the commonly accepted procedural safeguards include that 'a record is to be kept of communications and it is to be made available to the parties' (WD No. 15). This contributes to the child's right to identity, as information on actions and decisions about their care and family relations is duly preserved and access to it is promoted. In addition, it welcomes that these principles are applicable to judicial and administrative authorities.

## **XVI. Applicable law**

- Where both Conventions are applicable, the determination of parental responsibility and custody rights must not omit the preservation of any records about family relations including any changes (WD No. 16). When parental responsibility or custody rights are attributed or extinct (Art. 16), it is important that the child may have access to their history, background and origins including through decision-making bodies. The child's family identity should be included in the report on the child's situation under both, the 1980 Convention and the 1996 Convention.

## **XVII. Recognition and enforcement of measures of protection**

- Article 23 is a key provision of the 1996 Convention which may be simplified through the resort to a certificate that would include relevant identity elements (WD No. 17). The proposed suggestion that the context of the measure be explained would facilitate its enforcement, as the definition/grounds of measures may vary between Contracting States, which may entail implications for the child's family relations when enforced (WD No. 19).
- In this regard, a number of conditions have been set for the refusal of recognition of such measures. In recognition matters, all of the elements of a child's identity, including their family relations, should be recorded in the report about the child's situation and taken into account. The parties' participation in the process, in particular that of the child, is fundamental to be able to understand their family relations, which is important in the determination or adaptation of measures of care for the child (PD No. 1).

## **XVIII. Cooperation and general provisions under the 1996 Convention**

- In relation to the implementation of Article 30 of the 1996 Convention on the obligation of cooperation between Central Authorities, CHIP wishes to reiterate points raised above on the need to cooperate to record any elements of a child's identity in the report to be drafted about the child's situation and in the determination, recognition and potential adaptation of measures. This includes information about the child's legal identity, family relations, protection measures, etc. as well as any changes to the latter.

### **XIX. Placement or provision of care of the child in another Contracting State under the 1996 Convention Articles 3(e) and 33**

- Care arrangements (Art. 3), including in the context of migration, should consider the child's identity and any family element should be taken into account. Any decision and action relating to the child's care should be duly recorded and preserved, including changes to the child's family relations in the other Contracting State as well as information on the decision-making process between both States (Art. 33). These elements of a child's identity should be considered in the 'report on the child together with the reasons for the proposed placement or provision of care' (Art. 33) (PD No. 1, in particular Item 155).
- When considering the placement or provision of care in another Contracting State, the child's cultural and linguistic identity should be promoted in the recognition, implementation or adaptation of the care measure.

### **XX. Unaccompanied and separated children and the application of the 1996 Convention**

- All provisions and care measures determined in relation to unaccompanied and separated children under the 1996 Convention must take into account the child's full identity, including family relations and care arrangements (*see above*) (PD No. 6-A). This is also applicable to children in humanitarian crises.<sup>iv</sup>
- When recording relevant elements for the child's situation report, this should prioritise information and efforts made for the tracing of the child's family and for their potential reunification in determining the most appropriate care and best interests (see UN Guidelines on the Alternative Care of Children).
- With regards to the identity of unaccompanied and separated children, the obstacles to the recognition and portability of their identity (including identity documents, care decisions, family relations, etc.) should be addressed. Efforts undertaken to record and preserve the latter and to prevent any undue modification or falsification of elements of their identity should also be noted.
- When determining care arrangements for unaccompanied and separated children, the risks of violations of their identity, including through trafficking, sale, and those resulting from the situation of migration, such as potential stateless, must be given due consideration. Any changes to an unaccompanied or separated child's identity must be duly recorded, preserved and given access to (PD No. 6-A).

### **XXI. Tools to assist with the implementation of the 1996 Convention**

- PD No. 11 includes extensive information about the child's identity, including legal identity, family relations, care arrangements, siblings, etc.
- The report on the situation of the child under the 1996 Convention (Arts. 32 and 33 must address elements of the child's identity, including legal identity, family relations, care arrangements, siblings, etc. These elements should be systematically addressed and included in communications and reports between Contracting States and States should address the minimum content of the report in the questionnaire (PD No. 9).

### **XXII. Benefits and use of the 1996 Convention in relation to the 1980 Convention**

- Both Conventions consider the child's best interests and rights at the heart of proceedings.
- Both Conventions relate to the child's family relations and intend to address situations in which children's family identity is potentially at risk in measures affecting rights of custody, parental responsibility, contact and access, protection measures – all having been addressed under other sections above.
- It is fundamental that administrative and judicial authorities continue to strengthen their capacity to consider all these issues from a children's rights perspective, including by addressing children's identity rights in all stages of the procedures established by both Conventions.

### **XXIII. The International Hague Network of Judges (IHNJ)**

- CHIP would welcome the opportunity to incorporate children’s rights to identity under the 1980 and 1996 Conventions into potential regional and national trainings of judges.<sup>v</sup>

#### **XXIV. Central Authorities (CAs) designated under the 1980 and 1996 Conventions**

- CHIP suggests that, in addition to cooperating among each other in relation to the 1980 and 1996 Conventions, the appointed CAs cooperate on ‘other matters’ (WD No. 20), *e.g.* complementing all relevant information about a child’s legal and family identity, identity documents, family relations, child protection and care history and proceedings, etc.

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<sup>i</sup> Borisova, B. (2022). *Policy Brief 3: Protecting the child's right to identity in parental child abduction cases*. Geneva, Switzerland: Child Identity Protection. Available at: <https://www.child-identity.org/images/files/CHIP-Policy-Brief-ChildAbduction.pdf>.

<sup>ii</sup> HCCH. Direct Judicial Communications. 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. Available at: <https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf>.

<sup>iii</sup> See, for example, the establishment of the Red Mexicana de Cooperación Judicial para la Protección de la Niñez (Mexico) at: <https://conatrib.org.mx/red-cooperacion-judicial-ninez/>.

<sup>iv</sup> In relation to the particular situation of children from Ukraine, see: Child Identity Protection (2022). Ukraine and other affected countries: protecting all rights of children, including their right to identity. Available at: <https://www.child-identity.org/en/resources/advocacy-and-policy/457-ukraine-and-other-affected-countries-protecting-all-rights-of-children-including-their-right-to-identity.html>.

<sup>v</sup> *Supra* iii.