

Children’s rights to identity and family relations, access to justice and effective remedies

June 2024

Child Identity Protection (CHIP)¹ welcomes the call for inputs to inform the draft General Comment on children’s rights to access to justice and effective remedies. In addition to the joint submission by the Working Group on Identity Rights,² this submission focuses on the restoration of children’s right to identity and family relations (Art. 8(2) CRC) as part of the right to access justice (Art. 39 CRC and SDG 16.3).

I. Child’s right to identity and birth registration

Birth registration – as the initial mechanism of creation of legal identity – is an individual right and is routinely pre-condition to accessing justice for all rights contraventions in the CRC. Birth registration should therefore be prioritised as without a legal identity, there can be no access to justice.³ The birth registration process is also the first opportunity to record all relevant information about the child’s origins including potential family relations.

II. Children’s right to identity and family relations

In addition to birth registration, name and nationality, as features of the right to identity, **the right to have family relations legally established or recognised is a stand-alone right.**⁴ The right to identity is closely linked to the achievement of other rights, *e.g.* keeping families together (Art. 9 CRC), facilitating contact with families (Art. 10 CRC), protecting the child (Art. 19 CRC) and promoting continuity in a child’s upbringing (Arts. 20 and 30 CRC). Without all the information relevant to forming a cohesive identity, children systematically face a range of legal, medical and psychosocial challenges.

Despite clear standards in the CRC and its importance, there are a number of ongoing practices that continue to perpetuate missing elements in the child’s family relations. This includes practices at birth (*e.g.* baby boxes, anonymous – rather than confidential – births, *naissances sous X*, anonymous donation in assisted reproductive technologies (ARTs)), modification of identities (*e.g.* in care, adoption or when born from surrogacy) or undue modification and falsification of children’s identities (*e.g.* child marriage, recruitment by armed groups, trafficking).

III. Restoration of identity through access to justice

Whenever there are rights contraventions, children should have access to justice. When it involves, identity violations, Art. 8(2) requires the “speedy re-establishment.” States should ensure that there is a broad interpretation and enforcement of these provisions, even if *prima facie*, this would only apply to unlawful domestic situations. Yet, there are arguments⁵ that it may be applicable in situations that were legal and accepted in the country at the time of deprivation of the child’s identity, but contrary to international standards.⁶ This interpretation argues that the evaluation of the “illegality” of the act be linked to international norms which are more objective in nature.

IV. Domestic legal proceedings for the restoration of identity

a) Access to personal records

One key element of the restoration of children's identity and family relations is access to personal records and their preservation in perpetuity. Without the latter, it becomes very complex for survivors to prove violations, initiate legal proceedings and obtain knowledge of their family origins. Even when other interests are considered in data protection rules, children should have access complete histories about their genealogy.⁷

In **Ireland**, when addressing the practices surrounding the Magdalene's institutions, forced labour and illegal adoptions,⁸ the Commission of Investigation was heavily criticised for refusing to provide survivors and adoptees with access to their personal data or archives⁹ and for destroying witness testimonies.¹⁰

German authorities provide a promising practice as they established a fund relating to care in residential children's homes in the West and another in relation to homes in the Former GDR and opened access to all records.¹¹ A similar fund was established in **Switzerland**, in a context of forced separation of thousands of children through compulsory social measures and placements up until 1981, which encompassed a Federal apology¹², compensation, counselling, access to archives; and academic research.¹³

b) Statutes of limitations

While prescriptions are helpful for ensuring that claims are resolved within a reasonable period of time, they may be unhelpful for identity issues, which often are often 'discovered' much later, often as adults. Whenever an identity is falsified or sold, burdens of proof for convictions are challenging to meet.¹⁴

In **the Netherlands**, a case determined that the Dutch State and an adoption organisation were considered to have acted unlawfully in an adoption from **Sri Lanka**. The decision was innovative insofar as the Court of Appeal determined that no limitation period could be invoked, according to standards of reasonableness and fairness.¹⁵

c) Independent claims

In other matters, children may have challenges in making claims on their own without adult intervention, for example for birth registration¹⁶ and in cases of child marriage. In the latter situation, parents may behind the forced marriage and/or law enforcement officials may "pose barriers to girls accessing justice, deferring to their own personal beliefs about marriage, rather than the intent of the law."¹⁷

d) Political will to address past actions

Without political will,¹⁸ restoration efforts are limited to *ad hoc* efforts and/or single strategic cases, as opposed to class actions and transitional justice.¹⁹

Several promising examples, however, demonstrate the will of authorities to initiate processes of recognition and memorialization when children's right to identity have been violated. This has been the case in **Switzerland**, as mentioned above; as well as in **Australia** where its 2013 National Apology for Forced Adoption represents an initiative of transitional justice;²⁰ and in **Canada** with its 2008 Indian Residential School Apology and compensation scheme.²¹ In **Argentina**, the State established the National Commission for the Right to Identity, a Specialised Unit for child appropriation, the National

Genetic Databank and a Network on the Right to Identity, to support search and reunion, which was complemented by a 2021 plan enabling victims of trafficking to find their biological roots.²²

V. Regional mechanisms as potential channels for restoration of children's identity

a) Inter-American Human Rights System

Several cases have proven ground-breaking in offering promising case-law and access to justice. In the case of *Fornerón and Daughter v Argentina* (2012),²³ the Inter-American Court of Human Rights (IACtHR) considered the impact of the separation of father and daughter and the lack of measures adopted by the State to ensure contact between them.

In *Ramírez Escobar v Guatemala* (2018),²⁴ the IACtHR declared Guatemala responsible for the arbitrary separation of the family and the violation of the right to personal integrity and to personal freedom and identity.²⁵ The IACtHR focused on the change of name, identity and separation from his culture, as a consequence of an adoption. It emphasised that identity included family relations as well as names establishing a bond with family members.

In a 2023 child abduction case, the IACtHR '*concluded that the lack of diligence and exceptional promptness required by the circumstances resulted in a rupture of paternal bonds. (...), the reconnection efforts were excessively delayed without providing significant advances or conditions to enable the improvement of the family relationship (...)*'.²⁶

b) European Human Rights System

At European level, the **jurisprudence of the European Court of Human Rights (ECtHR)** has recognised the right to obtain information about one's origins under the right to private and family life, as outlined in *Odièvre v. France*²⁷; *Gaskin v. the United Kingdom*²⁸; *Çapın v. Turkey*²⁹.³⁰ Other cases have also taken note of the importance of having information and/or maintaining contact with the family.³¹

However, these decisions do not promote an absolute right to access to origins. This balance is also reflected in Recommendation 2156 of 2019 which recommends anonymity be waived and use of only known gametes.³² The most recent case-law of the ECtHR proves restrictive, contrary to the views of the UN Committee on the Rights of the Child (CRC Committee).³³ For example, in *Gauvin-Fournis and Silliau v. France*,³⁴ the ECtHR refused the applicants' access to any information relating to their origins, including medical. In *Cherrier v France*,³⁵ the ECtHR again refused to align with the CRC as when they refused to provide information about a birth mother to an adoptee born through '*naissance sous X*'.

VI. Global opportunities to access to justice to restore children's and adults' identities

a) OPIC

In addition to multiple Concluding Observations to States Parties,³⁶ **OPIC serves an important role for access to justice**. In a case against Chile, the communications contributed to the restoration of some aspects of the identities of children placed unnecessarily in care in the country.³⁷ Other relevant decisions include those relating to children trapped in detention camps in Syria and States Parties' approaches to repatriation and family relations, such as *L.H. et al. v France*,³⁸ *F.B. and Others v. France*³⁹ and *P.N. et al. v Finland*⁴⁰.

b) Other international mechanisms

In 2022, several UN mandates issued a **Joint Statement on illegal intercountry adoptions**⁴¹ which if implemented could contribute to access to justice, reparations and truth mechanisms.

The reports by the **UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence** offer inputs in the search for mechanisms of access to justice and reparation including apologies,⁴² memory processes and importance of archives.⁴³

The **International Criminal Court (ICC)** may also offer a means of addressing systematic violations of children's rights to identity in situations of conflict or genocide (e.g. arrest warrant issued in relation "*unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation*").⁴⁴

VII. Concluding recommendations

- **Authorities should be well equipped and trained to detect potential missing or falsified elements** of children's identities
- States must ensure that there are **no legal or practical obstacles hindering access to justice**, e.g. statutes of limitations, complex access to personal records, lack of legal and psychosocial support or risk of re-victimisation.
- **Regional jurisprudence and initiatives at global level** offer a means to access justice when domestic channels have been unsuccessfully exhausted as well as a diversity of potential remedies, and demonstrate a need for cooperation mechanisms.
- **States should consider a range of mechanisms** to ensure children's identities are promptly created, only duly modified, not falsified or sold, preserved in perpetuity as well as restored if any of the previous have not been safeguarded. Informal mechanisms should complement judicial procedures e.g. DNA databases, centralised registries, psychosocial support for family tracing and reunification, etc.⁴⁵

¹ [Child Identity Protection \(CHIP\)](#).

² See [submission of WG on Identity and expert meeting summary](#).

³ *Ibid.*

⁴ Baglietto, C., Bordier, L., Dambach, M. and Jeannin C. (2022). [Preserving "family relations": an essential feature of the child's right to identity](#). CHIP. At pp. 3, 8.

⁵ See ongoing research outlined in Dambach, M (2024) Chapter 1: Using international frameworks for access to justice and effective remedies for systemic removal of children from their families.

⁶ See [further explanation in submission of WG on identity](#), Supra 2.

⁷ CHIP (2022). [Briefing note: aligning data protection rules with international standards](#).

⁸ Department of Children, Equality, Disability, Integration and Youth (2021). [Final Report of the Commission of Investigation into Mother and Baby Homes](#). See also: HRC (2019). [Visit to Ireland Report of the Special Rapporteur on the sale and sexual exploitation of children](#). A/HRC/40/51/Add.2. 15 November 2019. Para. 78(d).

⁹ Mother and Baby Homes Commission Archive. (n.d.). [Justice for Magdalenes Research](#).

¹⁰ O'Halloran, M., Keena, C. (2021). [Confidential records destroyed 'without consent', TD claims](#). *The Irish Times*. 4 February 2021.

¹¹ Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2019). [Fonds Heimerziehung](#).

¹² Federal Assembly of the Swiss Confederation (2016). [Federal Act on Compulsory Social Measures and Placements prior to 1981](#) (CSMPA). 30 September 2016.

¹³ Federal Office of Justice (2023). [Victims of compulsory social measures and placements](#).

¹⁴ Baglietto, C., Bordier, L., Dambach, M. and Jeannin C. (2022). *Supra* 4. At p. 66.

¹⁵ Rechtspraak (2022). [Onrechtmatig gehandeld bij Sri Lankaanse adoptiezaak](#).

¹⁶ See further explanation in submission of WG on identity, Supra 2.

¹⁷ The Child, Early & Forced Marriages & Unions and Sexuality Working Group (2023). [Position statement and recommendations: Are existing laws on child, early and forced marriages and unions working for adolescent girls and young women?](#)

¹⁸ [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#). 29 November 1985, Para. 11.

¹⁹ These obstacles were addressed in the 2022 Joint Statement on illegal intercountry adoptions issued by several UN mandates. *Infra* 41.

²⁰ Attorney-General's Department. (2013). [National Apology for Forced Adoptions](#). See also: Parliament of Australia (2008). [Apology to Australia's Indigenous Peoples](#).

- ²¹ Government of Canada (2008). [Speech: Prime Minister Harper Offers Full Apology on Behalf of Canadians for the Indian Residential Schools System](#).
- ²² [Comisión Nacional por el Derecho a la Identidad – CONADI](#); Ministerio Público (n.d.). [Unidad Especializada para Casos de Apropiación de Niños durante el Terrorismo de Estado](#) (UFICANTE); [Banco Nacional de Datos Genéticos](#); [Red por el Derecho a la Identidad y Relaciones Institucionales](#).
- ²³ [Fornerón and Daughter v Argentina](#), 27 April 2012, Para. 113.
- ²⁴ [Ramírez Escobar et al. v. Guatemala](#), 2018.
- ²⁵ *Ibid.*
- ²⁶ Kruger, T. (2023). ‘[The Inter-American Court of Human Rights: first judgment on international child abduction](#)’. Conflict of Law.net. See: [Córdoba vs Paraguay](#), 4 September 2023.
- ²⁷ [Odièvre v France](#). 42326/98. 2003.
- ²⁸ [Graham Gaskin v United Kingdom](#). 10454/83. 1987.
- ²⁹ [Capin v. Turkey](#). 44690/09. 2020.
- ³⁰ See: ECtHR (2020). [Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence](#), p. 56. See also: Besson, S. (2007). [Enforcing the child’s right to know her origins : contrasting approaches under the Convention on the rights of the child and the European Convention on human rights](#). *International Journal of Law, Policy and the Family*, (21) 137–159.
- ³¹ [Jäggi v Switzerland](#). 58757/00. 2006; [Strand Lobben and Others v. Norway](#). 37283/13. 2015; [Pedersen and Others v. Norway](#). 39710/15. 2016; [Roda and Bonfatti v. Italy](#). 10427/02. 2007; and [Scozzari and Giunta v. Italy](#). 39221/98 and 41963/98. 2000.
- ³² Parliamentary Assembly / Council of Europe (2019). [Recommendation 2156 \(2019\): Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children](#).
- ³³ CHIP (2024). [March 2024, Europe: Recent judgements contrary to the child’s right to identity](#).
- ³⁴ [Gauvin-Fournis and Silliau v. France](#). 21424/16 and 45728/17. 2023.
- ³⁵ [Cherrier v France](#). 18843/20. 2024.
- ³⁶ See, e.g.: CRC Committee. COBR. CRC/C/IRL/CO/5-6. 28 February 2023. Para. 20; CRC Committee. COBR. CRC/C/UKR/CO/5-6. 27 October 2022. Paras. 20 and 21.
- ³⁷ CRC Committee. [Informe de la investigación relacionada en Chile en virtud del artículo 13 del Protocolo facultativo de la Convención sobre los Derechos del Niño relativo a un procedimiento de comunicaciones](#), CRC/C/CHL/INQ/1. 2018. Para 133.
- ³⁸ CRC Committee. [Decision adopted by the Committee concerning communications No. 79/2019 and No. 109/2019](#). Communications submitted by: L.H., L.H., D.A, C.D. and A.F. S. CRC/C/85/D/79/2019–CRC/C/85/D/109/2019. 30 September 2020.
- ³⁹ CRC Committee. [Views adopted by the Committee concerning communications Nos. 77/2019, 79/2019 and 109/2019](#). CRC/C/89/D/77/2019, CRC/C/89/D/79/2019, CRC/C/89/D/109/2019. 9 March 2022.
- ⁴⁰ CRC Committee. [Views adopted by the Committee concerning communication No. 100/2019](#). CRC/C/91/D/100/2019. 7 October 2022.
- ⁴¹ CRC Committee *et al.* (2022). [Joint statement on illegal intercountry adoptions](#).
- ⁴² UNGA. [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#). A/74/147. 12 July 2019.
- ⁴³ HRC. [Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice](#). A/HRC/45/45. 9 July 2020. Paras. 70 to 73.
- ⁴⁴ ICC (March 2023). [Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova](#).
- ⁴⁵ See, e.g., [Afstammingscentrum](#) (Belgium).