



Published by the International Reference Center for the Rights of Children Deprived of their Family

# Monthly Review

## EDITORIAL

### The 1996 Hague Convention: A unique role in the cross-border protection of children?

*An international conference co-organised by ISS (see box below) was an opportunity to observe the added value of the HC-1996 ‘as a unique instrument comprehensively regulating the rules of private international law and co-operation mechanisms on child protection in order to ensure the primary nature of the best interests of the child’<sup>1</sup>. Yet, the low levels of ratification/accession to this Convention and the difficulties linked to its implementation still raise a considerable number of challenges.*

In a global context, in which human displacement of different kinds (migration, professional relocation, separation and divorce of bi-national couples, etc.) is becoming more common, more complex, and in which the children are often overlooked, the need for cooperation and dialogue – not only amongst States but also amongst the involved professionals – is obvious. 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<sup>2</sup> (HC-1996) strengthens the UNCRC in this regard and confronts States with their responsibilities in terms of the protection of these children in a vulnerable situation.

#### A unique convention for the regulation of cross-border placements

The HC-1996 offers an international legal framework for the positive undertaking of alternative care measures, whose implementation goes beyond a country’s borders. Some measures that are specific to some countries – such as intercountry *kafala* (see p. 5) or the international placement within the extended family and put into practice by some ISS Branches in the last few years (see p. 10) – are provided for in addition to those offered by the Guidelines for the Alternative Care of Children (hereinafter, the ‘Guidelines’), which are, in principle, rather focused on domestic solutions.

As for intercountry adoption, even though it is excluded for the scope of the HC-1996, the latter may, nonetheless, take over from the HC-1993 in cases of failure in the adoption, when a new family placement measure must be decided by the authorities in the receiving country, sometimes with the approval or, at least, based on consultations with the country of

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origin, as required by Russia, for example. Furthermore, as stated in the Practical Handbook on the operation of the HC-1996, *'the co-operation mechanisms and some of the general principles of the 1993 Convention may [...] prove useful in relation to the cross-border provision of care'* through the measures aimed at by the HC-1996.

### **A unique convention for the protection of displaced children**

During the above-mentioned conference, international organisations, such as UNICEF and the UNHCR, shared their concerns with regards to the increasing number of unaccompanied or separated and refugee or displaced children, victims of trafficking and exploitation of any kind, and the search for sustainable protection measures for them. UNICEF mentioned that, in 2015, there were 23,000 unaccompanied and separated children, of which 15,000 were in Europe, and it estimated that there were 1.2 million children, who were victims of trafficking. The HC-1996 may play an important role in the protection of these children, on the one hand, by appointing the State as responsible for adopting measures that respect their interests and are aimed at their protection (see p. 8), and by establishing the mechanisms that promote cooperation amongst authorities.

From 21 to 23 October 2015, over 200 legal, social and administrative experts, as well as 52 mediators, from around the world, met in Geneva in the framework of an international conference, organised by ISS and the Hague Conference on Private International Law, with the support of numerous actors, such as the University of Geneva, in order to share their views on the issue of cross-border child protection and the potential role of 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.

### **Gaps due to insufficient cooperation**

Similarly to the HC-1993, the HC-1996 provides for the appointment of Central Authorities, which must cooperate amongst themselves and promote collaboration between the administrative and judicial authorities in their State. Furthermore, the Convention provides for the potential intervention of other public authorities or bodies, such as ISS, to fulfil the tasks that these are being delegated<sup>3</sup>, which include the use of mediation, conciliation or other analogous means (see p. 7).

However, this essential cooperation faces numerous challenges in practice, whether amongst the various countries or within the latter. Amongst these, the issue of the costs of the procedure, the absence of a multidisciplinary approach or potential differences linked to the nature of the child protection measures, which may only exist in some countries, raise the issue of their equivalence in other countries. In order to overcome these obstacles and to strengthen this cooperation, direct communication is encouraged through initiatives, such as the International Hague Network of Judges (see p. 3).

### **Gaps due to a lack of training and advocacy**

Even though it is promoted by the Guidelines<sup>4</sup>, the HC-1996 and its wider scope of implementation remain, nonetheless, little known amongst child protection actors at domestic and international level. On the one hand, it only has a limited number of State Parties (42), and, on the other hand, its implementation is complex given the lack of knowledge of legal child protection systems, their operation and their interaction with foreign systems, often insufficient material and human resources within Central Authorities or the language barrier.

Faced with these needs, responses are already offered by bodies, such as ISS, in relation to the support to families and children affected, through protection measures that are adapted and result from a planned and multidisciplinary approach, driven by the spirit of mediation, the training of the various actors on international conventions, such as the HC-1993, and active advocacy aimed at a variety of domestic and international actors, such as the Committee on the Rights of the Child and other UN bodies.



In a world in which dialogue and the development of common approaches that respect differences and give priority to the human interest, international instruments, such as the HC-1996, must be subject to wider ratification/accession, and countries must be supported in their implementation. The spirit of cooperation, which they convey, and the practical means, which they offer, must be made available to the children and families, who need protection worldwide. ISS is now, more than ever, committed, through its daily support, advocacy and educational activities, to the constant improvement of the cross-border protection of children.

The ISS/IRC team  
November 2015

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### References:

<sup>1</sup> Extract of the Conclusions and Recommendations adopted at the end of the conference and available in English, Spanish and French at: <http://www.iss-ssi.org/index.php/fr/conference2015-fr#1-7-conclusions-and-recommendations>.

<sup>2</sup> Full text of the Convention available at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=70](http://www.hcch.net/index_en.php?act=conventions.text&cid=70).

<sup>3</sup> See Practical Handbook, p. 119: '[...] *the possibility that Central Authorities will have recourse to bodies of uncontested competence in the field, such as the International Social Service*', <http://www.hcch.net/upload/handbook34en.pdf>.

<sup>4</sup> Para. 139. '*To ensure appropriate international cooperation and child protection in such situations, States are encouraged to ratify or accede to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996*'.

### Conclusions and Recommendations generally endorsed at the end of the conference

#### *"Cross border child protection: Legal and social perspectives – Towards a better protection of children worldwide"* 21 – 23 October 2015, Geneva

(Extracts)

#### **General aspects**

The participants welcomed the opportunity to discuss the practical operation of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("1996 Convention"), including the practical implementation of its provisions concerning jurisdiction, applicable law, recognition and enforcement of measures concerning the protection of children and their property.

#### ***The protection of particularly vulnerable children, including refugee and displaced children, unaccompanied and separated children, and victims of trafficking, sexual exploitation and other forms of abuse***

The participants acknowledged the role of the 1996 Convention in relation to the increasing number of unaccompanied and separated children crossing borders and finding themselves in vulnerable situations in which they may become subject to exploitation, abuse or other risks. The participants noted the practical examples shared during the conference concerning the use of the 1996 Convention in relation to these children, such as obtaining a welfare report on the child from a State with which the child has a substantial connection (Art. 32) or by arranging a cross-border placement of the child in another State (Art. 33).

#### **International co-operation among judges**

The participants recognised the benefits of direct judicial communications in the context of international child protection. The participants took note of the Hague Conference's publication "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".



### **Central Authorities, other authorities and bodies**

The participants acknowledged the key role played by Central Authorities and emphasised the need for States to provide them with adequate resources and appropriately qualified personnel.

The participants urged enhanced co-operation between Central Authorities and bodies competent in the area of child protection, for example the International Social Service in accordance with Articles 31 and 32 of the 1996 Convention.

### **Mediation**

The participants acknowledged the great significance of mediation in solving and preventing cross-border family disputes. They noted that through mediation, parents can find a holistic solution to their dispute in a non-confrontational way. The participants urged that the mediation process should take full account of the best interests of the child as required by the 1996 Convention.

The participants also welcomed the additional efforts to promote and facilitate international family mediation by the International Social Service, other mediation entities and mediators.

### **Next steps**

The participants emphasised the importance of information and training sessions for government officials, judges, social workers and other professionals involved in the operation of the 1996 Convention.

The participants welcomed the plans of the Hague Conference on Private International Law to organise a Special Commission in 2017 on the practical operation of the 1980 and 1996 Conventions, subject to the decision of the Council on General Affairs and Policy, the governing body of the Organisation.

The participants expressed their interest in and support for other conferences on the 1996 Convention and the cross-border protection of children.

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## **BRIEF NEWS**

### **Recent publication of a working paper on social service workforce development in child care reform**

The working paper, titled *The Role of Social Service Workforce Development in Care Reform* and produced by the Global Social Service Workforce Alliance and the Better Care Network, explores the topic of social service workforce development as it relates to child care reform. It is intended to be a useful resource for reform efforts and a practical and accessible overview for use by policy-makers, practitioners, and service providers in contexts that are either considering the implications of care reforms for their social service workforce or are already engaged in a process and are searching for strategies to align and increase the effectiveness of the workforce to implement care reforms. The paper illustrates key issues by drawing on the experiences of Indonesia, Moldova, and Rwanda, which highlight each country's reform processes and identify learning in terms of the approach taken to strengthen and align the social service workforce given the needs of the system, the scope and actors involved, and the different care reform strategies and outcomes. The paper concludes with lessons and recommendations based on the workforce strengthening strategies and learning identified from the case studies. The case studies highlight the importance of stakeholder relationships and the engagement of a wide range of actors in care reform and social service workforce development. The lessons learned from these case studies also point to the importance of reforming policy at a national level as well as developing strategies and approaches in practice, developing and supporting the workforce, and shifting human and financial resources in care reform.

For further information, see: N. Beth Bradford, Better Care Network, Global Social Service Workforce Alliance, *The Role of Social Service Workforce Development in Care Reform*, 2015, [http://www.socialserviceworkforce.org/system/files/resource/files/The%20Role%20of%20Social%20Service%20Workforce%20Strengthening%20in%20Care%20Reforms\\_0.pdf](http://www.socialserviceworkforce.org/system/files/resource/files/The%20Role%20of%20Social%20Service%20Workforce%20Strengthening%20in%20Care%20Reforms_0.pdf).



### International *kafala*: Towards a better protection of children through the HC-1996?

Sonia Ben Mansour<sup>1</sup>, a Lawyer at the Paris Bar and a specialist in Family Law and the Law in Arab countries, presents, in this article<sup>2</sup>, the issues linked to transposing a *kafala* into a legal order by disregarding this measure of alternative care and taking as an example the specific case of France.

*Kafala* is a legal measure for the care of a child (*makfûl*), whilst he is underage, by a family (*kafil*) who will support, educate and protect the child until his majority. As adoption is prohibited in Morocco and Algeria according to Muslim Law<sup>3</sup>, only *kafala* is authorised for a person or couple, of which at least one of the spouses is a Muslim. This measure does not create a parentage relationship and has no inheritance implications. In some countries of Islamic Law, such as Tunisia, adoption is also recognised through their law of 19 June 1959<sup>4</sup>.

#### International framework

Recognised by the Convention on the Rights of the Child of 20 November 1989 as a long-term protection measure for a child deprived of his family, *kafala* is also considered as such by the 1996 Hague Convention (HC-1996), which provides for its recognition and implementation within other Contracting States. In addition, the HC-1996 provides a mechanism for collaboration between the authorities of two Contracting States in a cross-border *kafala* placement. Among Muslim law countries, only Morocco is a signatory to the HC-1996. As a reminder, *kafala* is excluded from the scope of application of the HC-1993, an approach that was reaffirmed by the Special Commission in June 2015<sup>5</sup>. Despite the existence of these international standards, this measure of protection raises concerns regarding its recognition and implementation. Thus, even within the relations maintained between Morocco and France – both State Parties to the HC-1996, transposing the effects of *kafala* in the receiving country, France in this case, remains problematic as regards the rights of the child.

#### Respect for the personal law of the child

According to Article 370-3 of the French Civil Code, an adoption cannot be declared if the national law of the foreign child, or of one of the spouses, prohibits it. On this legal basis, the Court of Cassation (Supreme Court of Appeal) has repeatedly refused to declare the adoption of a child cared for through *kafala*, stating that legal guardianship was not comparable to simple or full adoption. This legislative procedure was judged as compliant with Article 8 of the European Convention on Human Rights. The European Court found that this 'did not establish any difference in treatment in respect of the child's family life or disregard the right to respect for the latter, [...] in so far as *kafala* was expressly recognised by [...] the New York Convention [...] on the Rights of the Child, as preserving, on a par with adoption, the child's best interests'<sup>6</sup>.

#### Transposing the effects of *kafala* in the law of the receiving country

French Law does not recognise the legal placement through *kafala*; it should be noted, however, that the child and the person taking care of him 'benefit from a legal framework reflecting the effects of the measure declared abroad'<sup>7</sup> as determined in the Ministry of Justice Circular of 22 October 2014, in the absence of which the child is at risk of being in a legal void. Thus, the 2014 Ministerial Circular anticipates that, for orphaned children or those without known parentage, *kafala* should produce in France comparable effects to those of guardianship; and for children with established parentage and living parents, a legal placement by *kafala* should be considered as a total or partial delegation of parental responsibility. The ISS/IRC would stress here that the HC-1996 provides, in Article 33, for clear and unambiguous terms, which a Contracting State must respect when considering a cross-border placement through

*kafala*: preliminary consultation of the competent authorities of the receiving country followed by the transmission of a report on the child, including the reasons for an international placement, and finally the mandatory receipt of consent. In the case of non-compliance with this procedure, all cross-border protection measures, including *kafala*, will not be recognised (Article 23.2 of the HC-1996).

### Current responses in French Law

In France, however, an adoption is possible if the child was born and habitually resides in France (Civil Code, Article 370-3, Para. 2). Also, a child who, for at least five years, has been cared for in France and brought up by a person of French nationality may also claim French nationality (Civil Code, Article 21-12)<sup>8</sup>. Thus, as his usual residence is in France, a French Judge would be competent<sup>9</sup>. Indeed, as the **international element** is **eliminated**, the situation is brought back within the orbit of French Law. Consequently, the child becomes adoptable<sup>10</sup>. Paris's Court of Appeal proceeded as such in the ruling of 15 February 2011<sup>11</sup>. It is therefore possible to circumvent the personal law prohibiting adoption thanks to the law on nationality.

However, the **requirement relating to the consent** expressed by parents or the child's legal representative cannot be overlooked (Civil Code, Article 370-3)<sup>12</sup>. According to the 2014 Ministerial Circular, two examples should be highlighted:

**It is only through the establishment of mechanisms of cooperation, communication and compatibility between the different legal systems that concrete solutions, which are in the best interests of the child, may be reached. The application of the procedures provided for by the HC-1996 could remedy situations that often go against the rights of the child placed under *kafala*.**

(1) When the child is an orphan or has no known parentage, the creation of an *ad hoc* Family Council has been allowed on French territory, enabling the members to consent to the adoption (Civil Code, Article 348 Para. 2). According to the above-mentioned Circular, it would also be appropriate to appoint an *ad hoc* administrator to fully safeguard the interest of the child.

(2) However, for children, who have been recognised by birth parents, who continue to exercise their parental authority, the consent of the *ad hoc* Family Council will have no effect before the French Courts.

Notwithstanding the framework of the Circular, the transformation of a *kafala* into an adoption depends on the inherent uncertainties of any legal proceedings, because, as recently announced by the Cour de Cassation, 'the solution does not depend only on ascertaining the acquisition of French nationality, but it also involves the examination of a concrete situation within the office of the Trial Judge'<sup>13</sup>.

It therefore seems necessary to establish clear mechanisms of cooperation between the countries concerned, as foreseen by the HC-1996, to reach a solution that safeguards the child's full enjoyment of his rights, without infringing the legal systems at stake. Belgium has developed a mechanism with Morocco that the ISS/IRC will present in a forthcoming issue of the Monthly Review.

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### References:

<sup>1</sup> Sonia Ben Mansour is a lawyer at the Paris Bar and a PhD Candidate at the Paris 1 Pantheon Sorbonne University. Her thesis is on family concepts under Muslim law.

<sup>2</sup> Sonia Ben Mansour's full article, entitled 'La transformation d'une kafala en adoption par le truchement de l'obtention de la nationalité française', is available upon request at the ISS/IRC.

<sup>3</sup> Verses 4 and 5, Sourate XXXIII (Koran),

<sup>4</sup> In Tunisia, thanks to the process of *Ijtihad*, which introduced the reform; also in Turkey and Indonesia.

<sup>5</sup> Para. 30 of the Conclusions and Recommendations: 'The SC recommended that kafala, as a child protection measure, be discussed at the next Special Commission on the Practical Operation of the 1996 Hague Convention (...)', [http://www.hcch.net/upload/wop/adop2015concl\\_en.pdf](http://www.hcch.net/upload/wop/adop2015concl_en.pdf).

<sup>6</sup> European Court of Human Rights, *Harroudj v. France*, Application No. 43631/09, 4 October 2012.

<sup>7</sup> Circulaire du 22 octobre 2014 relative aux effets juridiques du recueil légal en France, *Bulletin Officiel du Ministère de la Justice*, [http://www.textes.justice.gouv.fr/art\\_pix/JUSC1416688C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSC1416688C.pdf).

<sup>8</sup> The *Proposition de loi relative à la protection de l'enfance* has been adopted in second reading by the Senate on 13



October 2015, and intends to reduce the delay from five years to three years.

<sup>9</sup> *Brussels 11a Regulation*, No. 2201/2003, 27 November 2003 (primarily applicable in the EU).

<sup>10</sup> Ministerial response of 21 August 2008.

<sup>11</sup> *Parism* 15 February 2011, *AJ fam.* 2011, 320, obs. *Douris*, No. 10/127/18.

<sup>12</sup> The Family Council will be made up by the Judge and includes at least four individuals, who demonstrate an interest in the child (relatives of the persons caring for the child) and able to intervene even from a distance if they live in the country of origin.

<sup>11</sup> *Civ. Avis*, 17 December 2012, No. 12-00013.

## PRACTICE

### International Family Mediation: A key element of the implementation of the HC-1996 that benefits all the parties affected

*International Family Mediation, which is strongly encouraged by the international community, has generated the launch of a large-scale project within ISS and, in this framework, over 50 specialised practitioners met together during the conference on cross-border child protection (hereinafter, the ‘Conference’).*

Family mediation is a means of conflict resolution recognised in the majority of countries, which allows families to resolve their conflicts in a peaceful and respectful manner, taking into account the values and interests of each person. The Hague Conventions of 1980, 1996 and 2007, together with the Brussels 11a Regulation, grant Contracting States the responsibility and the necessary competence to promote mediation agreements in situations, in which these Conventions apply. Article 31(b) of the HC-1996 explicitly mentions the resort to *mediation, conciliation or similar means* by the Central Authority of the Contracting State. Based on its experience in the treatment of cross-border family situations, and with the aim of supporting both the political will of States and mediation professionals, in 2011<sup>1</sup>, ISS launched a project with three components primarily aimed at professionalising the practice and facilitating the access to mediation for families.

#### Strengthening international family mediation services through cooperation

With the increased movement of people on a global scale, the difficulties associated with cross-border family situations increase significantly. Based on its field of activity, ISS noted the urgent need to develop international cooperation and, in particular, to strengthen international family mediation services (IFM).

Aimed at the latter, ISS initiated a collaborative

process on IFM (hereinafter, ‘collaborative process’). Following this development, there was – in the first instance – *a guide aimed at families and professionals* (see below). Then, ISS continued with the development of international cooperation through a *Charter*, which is currently being drafted and which relates to the process of IFM. As part of this process, a questionnaire on the practices and challenges encountered in the course of IFM was sent by ISS to practitioners worldwide. On the basis of the responses received, a group of mediators, representing practices from all continents, deliberated during the Conference organised by ISS in October 2015, on a proposed set of principles and on a series of promising practices to be included in the Charter. In addition, all the mediators in the collaborative process recognised and encouraged enhanced cooperation between States and specialised mediation services or recognised and qualified mediation practitioners.

#### Equipping families and professionals

To enable a better understanding of IFM and to facilitate access to it, particularly for affected families, in 2014, ISS published a manual for families and professionals entitled *Resolving Family Conflicts – A Guide to International Family Mediation*<sup>2</sup>. This guide, developed by a group of international experts in mediation, is intended for all families worldwide who are living with a conflict of an international nature, whatever their composition, origin and religion. It underlines that



the interests of children are at the heart of IFM, and recommends IFM as a potential means to contribute to resolving conflict in parallel with court or legal proceedings.

Furthermore, ISS, as part of the collaborative process, also underlines the importance of the legal framework, which these conflicts occur within, and therefore the importance of defining minimum standards of qualification. In time, this will allow for the establishment of a reliable network of specialised international family mediators, visible and accessible to all parties concerned with the international protection of children, starting with the families themselves.

### Promoting IFM and ensuring the rights of those involved

Furthermore, the Conference was an opportunity for those practitioners present,

**At a time when cross-border situations requiring assistance and protection are increasing, IFM must, now more than ever, be promoted in relation to all the parties concerned. This must be done through the development of international instruments – such as the Charter on the IFM process, the strengthening of cooperation between all the stakeholders, the establishment of an international network of qualified mediators and the large-scale dissemination of appropriate tools. ISS works, through its day-to-day actions, to make Article 31.b of the Hague Convention a reality on the ground.**

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### References:

<sup>1</sup> For further information on the ISS project, see: <http://www.iss-ssi.org/index.php/en/what-we-do-en/mediation-en>.

<sup>2</sup> Available in French, English, Russian, Spanish, German and Italian at: <http://www.iss-ssi.org/index.php/en/what-we-do-en/mediation-en#1-1-project-1-a-guide-to-international-family-mediation>.

<sup>3</sup> Available at: [http://www.iss-ssi.org/images/Conf-MFI/Recommendations\\_ENG.pdf](http://www.iss-ssi.org/images/Conf-MFI/Recommendations_ENG.pdf). For further information on the Mediation Workshop, see: <http://www.iss-ssi.org/index.php/en/conference-2015#family-mediation-workshop>.

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## INTERDISCIPLINARY RESOURCES

### ***Safe and Sound: What states can do to ensure respect for the best interests of unaccompanied and separated children in Europe***

*This joint UNHCR-UNICEF publication<sup>1</sup> aims at proposing guidance to States of the European Union (EU) and the European Free Trade Association (EFTA) in the application of the best interests principle as a primary consideration when dealing with unaccompanied and separated children in their territory.*

As stipulated in the publication, unaccompanied and separated children are entitled to a special protection as a vulnerable group of children, who are temporarily or permanently deprived of parental care. This means that cooperation among the States is more than ever needed. This document of reference emits guidelines and

specialised in the resolution of cross-border conflictual family situations throughout the world, to gather on this occasion and to formulate a series of recommendations<sup>3</sup> aimed, firstly, at administrative and legal authorities. These authorities are therefore encouraged through very concrete proposals, such as the information about persons concerned by a cross-border family conflict, about the possibility of resorting to IFM, to services and specialised professionals or the appointment of a reference person within these authorities for all matters related to IFM. With regards to the rights of persons, who engage in mediation, the key elements highlighted by the specialists are the agreement of the parties to the mediation, the confidentiality of the process and the consideration of the rights and interests of the child in all decisions.

propositions, which States shall implement into their legislations and into practice in order to optimally fulfil their responsibilities. The guide suggests national practices to help policy-makers, institutions and other actors working with and on behalf of unaccompanied and separated children (UASC) in order to ensure their better protection.





### The concept of the child's best interests (Art. 3.1 UNCRC)

The guide explains that the concepts of Best Interests Assessment (BIA) and Best Interests Determination (BID) are part of the same process, which starts when the child arrives in a country and ends when a durable and adequate solution is found. Both concepts shall guide all decisions affecting UASC, from policy to legislation, enshrined in the allocation of resources and in procedures.

The BIA describes a simple and continuous procedure for the decision-making of immediate actions in accordance with the individual child's best interests, involving among others, consultations and interviews with the child. The BID describes a more formal procedure for making decisions that will have a fundamental impact on a child's future development. They also involve the child's participation in the process.

Additionally, the guide gives concrete examples of safeguards that European States may put in place, such as an independent representative of the child, child-friendly information, priority processing, legal representation and advice, written decisions, interpretation and review of decisions. These kinds of measures clearly contribute to a better implementation of the principle of the best interests of the child.

### Implementing the principle of the child's best interests in Europe

The guide lists 16 principles, in a chronological order, which state authorities should put in place in order to respect the principle. It also offers practical examples of their implementations in specific countries:

Arrival and preliminary identification: *Detention should be the last resort and last for the shortest time.* UNHCR developed a protection training manual for European border and entry officials and FRONTEX<sup>2</sup> – a manual and training on

interview techniques. In Ireland, immigration officers, who encounter UASC refer them immediately to the Child and Family Agency, which includes also health service executives and a social work team.

Access to territory and identification: *States should try to harmonise actors and stakeholders around the child. Contact and coordination with, and referrals to, child protection services are extremely important. Establishing trust is crucial.* It is very difficult to distinguish between the various protection needs of children, in particular those at risk of trafficking. Most EU Member States have adopted provisions for ensuring that

trafficking victims, who have been forced to commit other crimes, shall not be prosecuted.

Registration and documentation:

*The child should be heard and listened to in*

*accordance with his age and maturity. Family tracing may be in the child's best interests.* In Norway, a guardian and case manager are present at the initial registration of the child. In Belgium, the child is assisted by an adviser. Ireland has printed a guide with child-friendly information. At this stage of the procedure, it is essential that States ensure the presumption of minority concerning a child, who seeks international protection, until it has proven otherwise.

Immediate care provisions and durable solutions: Furthermore, the guide proposes a set of recommendations regarding the referral to state child protection services. In Ireland, for instance, a child protection assessment is conducted by a professionally qualified social worker; in Germany the child is taken into emergency foster care, similar to the proceedings in the United Kingdom. An important element is that questions related to the child's care, health, safety and education must be ensured by a child protection officer specifically appointed for the child, in addition to his legal

*The guide reminds us that the principle of best interests of the child is a three-fold concept:*

A substantive right: The right of the child to have his best interests assessed and taken as primary consideration;

A legal principle: If a legal provision can be interpreted in many ways, the interpretation, which most effectively serves the child's best interests, should be chosen;

A rule of procedure: The decision-making process affecting a child or group of children must include an assessment of the possible impact of the decisions on the child concerned.

*For further details, see CRC General Comment N° 14, [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).*



representative/guardian, who is essentially in charge of the legal and administrative issues related to the child. Therefore, it is crucial to establish clear responsibilities and roles for each professional with regards to the child.

Other recommendations are made concerning the process planning, the application of the child's best interests principle in asylum and immigration procedures. It ends with a list of minimum safeguards in the case of the child's return. It also

mentions the issues raised when the child turns 18, when unaccompanied or separated, because he suddenly loses all his rights and protections entitled to as a child. A great example on how to implement those standards and recommendations at national level is a professional handbook developed by ISS Switzerland, which covers all stages of care concerning UASC in Switzerland<sup>3</sup>.

**The ISS/IRC recommends this reference document to all actors in child protection systems. The combination of expert information and first-hand experiences constitutes great guidance for strengthening existing structures and procedures in order to ensure the practical implementation of the principle of the child's best interests in protecting UASC. While specifically developed for the European context, the ISS/IRC believes in the great added-value of this document for a worldwide application.**

### References:

<sup>1</sup> UNHCR and UNICEF, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014. Available at: <http://resourcecentre.savethechildren.se/sites/default/files/documents/5423da264.pdf>.

<sup>2</sup> The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU.

<sup>3</sup> For further details on this handbook, see:

[http://www.ssiss.ch/fr/system/files/132/manuel\\_de\\_prise\\_en\\_charge\\_mna\\_ssi\\_fr\\_pdf\\_61670.pdf](http://www.ssiss.ch/fr/system/files/132/manuel_de_prise_en_charge_mna_ssi_fr_pdf_61670.pdf).

## ISS ACTION WORLDWIDE

### Considering international family-type care options: ISS's experience in the framework of the HC-1996

*Over the years, several ISS Branches, such as Australia, the United Kingdom, Switzerland and the United States of America, have acquired distinct expertise in promoting, advocating and facilitating family-based care options for children in cross-border contexts, such as international kinship care<sup>1</sup>.*

Considering and implementing international family-type care options, when dealing with children on the move, is a core activity of ISS. International kinship care are placements with kinship carers that occur in a third country, particularly helpful when options in the country of origin or the destination country are not suitable. Although not frequently envisaged due to an unawareness of the measure's potential, and of how to undertake cross-border home assessments, ISS practice shows that an international kinship placement can bring numerous

advantages: possibility to preserve the child's family, community and cultural ties or more likely support into adulthood often due to a greater commitment of the kinship carer. Such significant benefits are solely possible if each placement has

#### International kinship care

Underpinned by several provisions of the UN Convention on the Rights of the Child, the Guidelines for the Alternative Care of Children<sup>2</sup> and enshrined in most domestic legislation<sup>3</sup>, kinship care is defined as the **'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>4</sup>.

been evaluated to be in the child's best interests; if relevant authorities of different countries adequately cooperate to ensure the placement's adequate implementation and monitoring, which are aspects facilitated by the HC-1996 provisions.



### Added value of the HC-1996 to evaluate the best interests of the child

International kinship placements are uniquely covered by the HC-1996 in its article 3.e: '(...) *the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution* (...)'. To ensure that each placement is truly in the best interests of the child, international care options must be considered and supported by a legislative framework. The HC-1996 provides such a framework by requiring the cooperation of local child protection authorities<sup>5</sup> and social services to ensure the safety, sustainability and appropriateness, prior, during and after the placement.

Practically, ISS network members have launched initiatives to promote the benefits of international kinship care. For instance, several of them have adapted their assessment forms, including specific questions and guidelines to authorities and professionals for the assessment of family members abroad<sup>6</sup>. ISS-USA has even developed a specific training module for child welfare and judicial professionals. ISS Australia as well as CFAB (ISS-UK) are currently updating research reports on the effectiveness of such placements<sup>7</sup>.

### Added value of the HC-1996 for an adequate implementation of international kinship care

The HC-1996 has a clear and specific procedure for cross-border placements that promotes a concrete cooperation, communication and compliance system between the involved authorities, prior to the placement<sup>8</sup>. The HC-1996 establishes, furthermore, regulated jurisdiction transfers, which facilitate the enforcement of protection measures, and establishes a

coordination mechanism by Central Authorities with other relevant authorities. The HC-1996 can help tackle common challenges regarding international kinship care, which are mostly due to the complexity of intercountry casework, such as possible delays, cost factors, recognition issues, equivalence problems of protection measures in different legislations<sup>9</sup>, complicated registration procedures, etc. But most importantly, the implementation of the HC-1996 framework could help avoid immigration deadlocks where the permanent status of the child may be an additional obstacle to accessing services, especially in cases of informal arrangements<sup>10</sup>.

Yet, such advantages are not widely known, which is why CFAB (ISS-UK) has focused its efforts on raising awareness among local authorities in the United Kingdom, consular services and the judiciary about working in collaboration with overseas authorities.

### Added value of the HC-1996 to adequately monitor and follow-up on international kinship care

Post-placement assistance is an integral part of ensuring a successful placement. This is important given that, in practice, authorities tend to reject – far too often – their competence in a matter, in particular when costs are involved, if the legal custody has been transferred to the kinship carer or in the case of a failed placement abroad.

Therefore, ISS-USA, for instance, advocates for a post-placement follow-up during at least one year, on a bimonthly basis. In addition, ISS-Australia encourages kinship carers to contact the agency for post-placement assistance, as the access to support services is often lacking to kinship carers.

**For the ISS/IRC, cross-border kinship placements can ensure the best interests of the child and must, as such, be taken into consideration when assessing the most appropriate care option for the concerned child. However, the ISS/IRC also believes that the rights of the concerned child can only be ensured if such placements are adequately assessed, implemented and monitored in the framework of domestic legislation and international standards, such as the HC-1996.**

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#### References:

<sup>1</sup> ISS's work, in principle, consists of evaluating the suitability of potential kinship carers, facilitating the assessment of the latter in their country by referring the case to the competent agency and, in some cases, in providing post-placement monitoring.

<sup>2</sup> Safeguard of several rights (Arts. 3, 8, 20 UNCRC). Arts. 5 and 10 UNCRC: priority shall be given to kinship care if the extended family offers the same level of protection. Paras. 76-79 of the Guidelines for the Alternative Care of



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Children.

<sup>3</sup> Preference given to placing a child with relatives, if in accordance with best interests of the child: *The Fostering Connections to Success Act* (in the U.S.A.) and the *Children and Young Persons Act* (in the United Kingdom; 2008, amended in 2011). Differentiation between the placement of children with Swiss nationality abroad (Art. 2.a – with alleviated conditions for kinship placements in 2.a-II) or placement of children with foreign nationality in Switzerland (Art. 6 *sqq*). The latter foresees the specific involvement of migration authorities (Art. 8.a), an assessment of the receiving conditions (Art. 7) and monitoring at least once a year (Art. 10); see <https://www.admin.ch/opc/fr/classified-compilation/19770243/201401010000/211.222.338.pdf>.

<sup>4</sup> See Para. 29.c.i of the Guidelines for the Alternative Care of Children.

<sup>5</sup> E.g. Art. 2 of the Swiss Federal Law: responsibility of the child protection authority as to the placement's location.

<sup>6</sup> Assessment forms and specific factsheets developed by ISS network members are available at the ISS/IRC upon request; e.g. *Placing Children with Family Overseas*, CFAB, September 2015, available at the ISS/CIR.

<sup>7</sup> For further details, see: <http://www.iss.org.au/our-projects/kinship-care-orphan-relative-visa/>.

<sup>8</sup> Arts. 33 and 23.2(f) of the HC-1996.

<sup>9</sup> Some countries transfer the legal custody to the child welfare agency and the physical custody to the carer. This can take various forms (foster care or legal guardianship, etc).

<sup>10</sup> Informal arrangements are often not recognised as legitimate or in a legal form, and are excluded from legal protection, which can put a child's welfare at high risk.

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## FORTHCOMING CONFERENCES AND TRAININGS

- **Online:** *Caring for vulnerable children*, CELCIS, online, 11 January 2016 (Duration: 6 weeks with about 4 hours per day). For further information, see: [http://www.celcis.org/training-and-events//event/caring\\_for\\_vulnerable\\_children](http://www.celcis.org/training-and-events//event/caring_for_vulnerable_children).
- **Switzerland:** *Comment penser son projet d'adoption dans le contexte national et international? – Regards croisés du droit, de la psychologie et de l'éthique*, Espace A, Geneva, 20 January 2016. For further information, see: <http://www.espace-a.org/agenda/>.
- **United Kingdom:** *"Attachment in adoptive families - Patterns, profiles and outcomes from early childhood through to adolescence"*, coramBAAF and Anna Freud Centre, London, 21 January 2016. For further information, see: <http://www.baaf.org.uk/node/7565>.
- **United States of America:** *'Let's Adopt Reform' – Ignite Conversations, Strengthen families*, The Donaldson Adoption Institute, 13 January 2016. For further information, see: <http://adoptioninstitute.org/>.

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