# IAFL OBSERVER'S REPORT OF THE EIGHTH SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE 1980 AND 1996 HAGUE CONVENTIONS, 10 – 17 OCTOBER 2023

## Introduction

The HCCH convenes a meeting of the Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions roughly every six years. The previous Special Commission was in 2017, and the IAFL Observer's Report can be found here.

The purpose of a Special Commission ("SC") is to monitor the operation of the Hague Conventions and to agree upon conclusions and recommendations as to how the operation of the Conventions may be improved in the future. Per Article 8 of the Statute of the Hague Conference on Private International Law:

*Article 8*

*(1) The Sessions and, in the interval between Sessions, the Council, may set up Special Commissions to prepare draft Conventions or to study all questions of private international law which come within the purpose of the Conference.*

*(2) The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.*

There is extensive preparation for each SC. At this link, the HCCH has published the preparatory documents (described as Preliminary Documents or 'Prel. Doc.'). There are then published a series of draft conclusions and recommendations for discussion at the SC, the focus of which are guided by the issues raised by Contracting States within the responses to the questionnaires on the Practical Operation of the two Conventions that were the focus of this SC. As can be seen from the timing of the questionnaires (Oct 2022), preparation for the SC begins far in advance of the meeting.

Prior to the SC, the IAFL lodged an Information Document explaining its role and the scope of its operations, a copy of which can be read here.

## Attendees

The SC is attended by delegates from Signatory States to the Conventions, and by observers from other groups (including practitioners, academics and other NGO's, for example ISS). A

full list of the Members of the HCCH and Contracting Parties to either the 1980 or 1996 Hague Conventions that attended can be found within the Conclusions and Recommendations at Footnote1. Intergovernmental organisations that attended are listed at Footnote3. The NGO's that attended in addition to the IAFL are listed at Footnote4.

## The IAFL delegation

The IAFL was represented at the SC by Michael Gration KC (England and Wales), Richard Min USA) and Fabiana Quaini (Argentina). Fellow Wendy Hickey (USA) and Susan Jacobs also participated in their capacity as Board Members of the US Friends of the Hague Foundation. This is a combined report to which all members of the delegation have contributed.

In addition to that core group, other IAFL fellows were present in their capacity as representatives of other organisations. This included Barbara Connolly KC (IBA), Melissa Kucinski (ILI) and Carolina Marin Pedreno (AIJUDEFA), and Daniela Horvitz (UIA).

IAFL Observers attend the SC and engage in discussions and other activities in relation to it in accordance with the IAFL HCCH Observer Policy.

## The structure of the SC

The SC proceeds in accordance with an annotated agenda that is circulated in advance. This SC focused first on the 1980 Hague Convention, which occurred a little over the first two days, and then the 1996 Hague Convention (a little under the following two days). The final two days involved discussion and agreement of the conclusions and recommendations.

At the commencement of the SC, the Co-Chairs are appointed. For this SC, they were the Hon. Justice Victoria Bennett (Australia) and Dr Daniel Trecca (Uruguay). A drafting committee was appointed which was made up of certain State parties, which committee was chaired by Lord Justice Moylan (UK). The role of the drafting committee is to tailor the draft conclusions and recommendations to reflect the discussions held during the course of the SC, so that the final draft reflects any consensus reached during the course of those discussions.

As can be seen from both the draft agenda (here) and the finalised Conclusions and Recommendations (here), the matters discussed in relation to each Convention ranged from issues of significant principle which may have a considerable impact upon practice (e.g. the way that issues of domestic abuse are dealt with under Article 13(b) of the 1980 Hague Convention and the approach to protective measures in that context, or the nature and scope of the jurisdictional scheme that applies pursuant to Chapter II of the 1996 Hague Convention) to more technical matters concerning the operation of Central Authorities. The matters discussed that we consider may be of particular interest to IAFL Fellows are set out below.

Each topic for discussion is introduced by a member of the Permanent Bureau (PB) before being opened up for discussion by delegates (both those from Member and Contracting States and from other organisations). It is possible for NGO delegates to comment on particular issues, but we considered that generally the better approach was to try and influence the

discussions through engagement with Central Authority and judicial delegates rather than by direct comment during the course of discussions. This was because (as summarised below) there were a large number of interventions from certain NGO's that it became increasingly apparent were being tolerated rather than welcomed.

Following the discussions, the draft Conclusions and Recommendations are put to the drafting committee. The finalised (but not yet approved) recommendations are then discussed on the last two days. It is generally understood that interventions from NGO delegates are not welcomed at that stage.

## General comments

As was explained within the report drafted for the IAFL following the Seventh SC meeting, the conclusions and recommendations are advanced by the HCCH in the form of guidance for good practice. They are not binding on States or courts, though experience suggests that they can be persuasive if deployed in the right context.

Perhaps as a consequence, State delegations seemed to exercise caution in relation to agreement to certain aspects of the draft conclusions and recommendations, particularly where adopting them would place obligations upon the courts or Central Authorities of a state. As a consequence, some suggestions that seemed obviously helpful (an example of that might be found in C&R VII 3, described at para 27 of the Conclusions and Recommendations, which relates to a document prepared by the Australian Central Authority that describes, in the form of an information sheet, exactly what protective measures are available in Australia to safeguard a return under the 1980 Hague Convention) received only muted support, if any.

It is necessary, in order to place the comments below about specific Conclusions and Recommendations into context, to note in this introduction the focus that developed during the course of the SC upon issues of domestic abuse and how the 1980 Hague Convention deals with that issue, whether in the context of Art 13(b) or more generally. The information documents included a letter to the PB from the UN Special Rapporteurs on: a) violence against women and girls, its causes and consequences; b) the sale, sexual exploitation and sexual abuse of children; and c) torture and other cruel, inhuman or degrading treatment or punishment in relation to the approach to the Article 13(b) exception (here). Prior to the SC, the advocacy group Hague Mothers had written to the PB raising similar issues (here) and on the first morning of the SC, GlobalARRK and Hague Mothers presented to Dr Christophe Bernasconi a petition calling for an independent review on the operation of the Convention and the establishment of a regulatory body to provide oversight of the Convention (petition here, publicization of its handing to Christophe Bernasconi here). The ISFL made a number of interventions in relation to this issue.

At the commencement of the Special Commission, Dr Bernasconi explained that he had accepted the petition, and that he had engaged in a respectful and open dialogue with the representatives of Hague Mothers and GlobalARRK that had attended, but that he could not endorse the comments on their websites that related to the petition nor to their criticism of the 1980 Hague Convention and its operation. He encouraged more states to sign up to the

Convention, which, he explained, focused upon the protection of children in abduction situations, and to ensure the protection of rights of custody in a safe place for all concerned.

**The Conclusions and Recommendations that appear to be of particular significance**

The 1980 Hague Convention

I – Contracting Parties

Five new States have brought the Convention into force since the previous SC – Barbados, Botswana, Cabo Verde, Cuba and Guyana. The total number of States signatory to the Convention is now 103. The PB recognized, in its introduction of this topic, that whilst there was significant take up of the 1980 Hague Convention in some parts of the world, there were regions where much work was required in order to encourage States to sign up. The EU delegation endorsed this, stating that it was of utmost importance to the EU that all States are encouraged to accede to the 1980 Hague Convention

II – Evaluating and Taking Stock of the Convention

Discussion in relation to this primarily concerned Nigel Lowe and Victoria Stephen's statistical study. When introducing the study, the PB added that from analysis of the questionnaires, certain challenges arose at each Special Commission, such as difficulties in communication between Central Authorities. There did seem to be some improvement. A further issue that had arisen was in relation to the benefits of concentrating jurisdiction to certain courts or judges within States. States that have concentrated jurisdiction were shown to operate the Convention better, with less delays.

The study had, of course, covered the COVID-19 pandemic, which it was considered was likely to have had an impact on certain areas, including the total number of cases brought. There had been a notable increase in delays in reaching a final decision in 1980 Hague Convention cases, and a significant increase in the number of returns refused on the basis of Article 13(b).

Whilst the statistical study is plainly valuable in showing a picture of the operation of the Convention and changes in the way that the Convention is being applied (both practically in relation to how long cases take to reach a decision, and legally in relation to the analysis of the prevalence of particular defences), it is important to note that, albeit expressed in discussions around the study rather than as interventions during the course of the formal discussion, there were some questions raised about the interpretation of the data within the statistical analysis.

The 'headline' points from the statistical analysis were as follows:

- Within the relevant period, there had been 2579 incoming applications, of which 2180 were for return and 399 were access applications. That represented a 4% decrease in return applications from 2015, and a 1% increase in access applications;
- The two busiest Central Authorities remained the same – USA and UK;

- The overall return rate was 39%, the lowest ever recorded having dropped from 45% in 2015;
- The proportion of return applications decided in court dropped to 38%, the lowest ever recorded;
- The proportion of voluntary returns fell to 16%, again the lowest ever recorded;
- The rate of judicial refusal to return was 35%;
- 46% of refusals were based in whole or in part on Art 13(b), a significant increase from 25% in 2015 and 34% in 2008;
- More cases were appealed – 42%, up from 31% in 2015. However 81% of appeals confirmed the first instance decision;
- Applications took longer to resolve than previously – 207 days on average, compared with 164 days in 2015.

Finally – this seems certain to be Nigel Lowe's last year undertaking the statistical study and analysis. It is currently unclear whether the HCCH have considered alternative provision for this study in future years.

III – Addressing delays under the 1980 Hague Convention

It is an obvious point that delays hinder the effective operation and application of the Convention (whether in its administration by Central Authorities prior to the commencement of proceedings, or within those proceedings).

The PB considered that the outcome of the statistical study in relation to delay was alarming, showing an average duration of 7 months not including any time taken to enforce the decision. In 20 years it had not proved possible to improve the issue of delays. The PB considered it to be necessary to reassess this problem, and to reflect on ways to make more progress in the years to come. The timeframes taken by return cases was disproportionate with the urgency required in such cases.

The significance of this issue was emphasized within C&R 10, alongside a strong recommendation (C&R 11) that states experiencing delays review their procedures in order to identify potential causes for delays, and thereafter to make adjustments in order to expedite proceedings and make them more efficient.

IV – Relationship between the 1980 Convention and other international instruments, including the UNCRC

1 – Best interests of the child

Inevitably, this discussion was focused upon the concept of 'best interests' as it is engaged in the context of the 1980 Hague Convention. As such, it was forcefully stated by the PB when opening this discussion (and reiterated within the C&R at no. 13) that it is in the best interests of children to be protected against their wrongful removal or retention and, further and importantly, that the abduction of a child is a harmful act in and of itself. The PB reiterated that any wrongful removal involves a breach of rights of custody, and will likely also involve a restriction of the right of the removed child to have contact with both of their parents.

Notwithstanding this, it was explained that the PB often hear of courts undertaking a full best interests enquiry in an abduction context, which is inconsistent with the approach taken under the Convention. The Convention operates on the basis that it is the jurisdiction of the child's habitual residence that should undertake such an enquiry.

The PB's commentary and proposed C&R's were supported by the EU and a number of other states. Opposition was advanced by ISFL, which argued that whilst parents who remove children would want to go to court to resolve issues with the other parent, they would wish to do so in a place where they felt safe including from domestic abuse.

The importance of expedition is underlined at C&R 14, as is the principle that the exceptions to return, which derive from a consideration of the interests of the child, must be applied restrictively so as to avoid return proceedings from turning into custody proceedings.

All of the above is in furtherance of the overarching principle of the 1980 Hague Convention, that it is the courts of the child's State of habitual residence that are best placed to determine the merits of a custody dispute (C&R 15).

2. 2011 Optional Protocol to the UNCRC on a Communications Procedure

This was an aspect of the agenda that impacted upon only 54 States that had implemented the 1980 Hague Convention. C&R 16 and 17 reflect the general support of States for the route that was proposed by the PB, which reinforces the particular nature of the 1980 Hague Convention and the fact that it is not a substantive 'best interests' determination.

V. Legal aid and representation under the 1980 Child Abduction Convention

The Questionnaires submitted by Contracting States had demonstrated different approaches to the funding of proceedings under the 1980 Hague Conventions as between States, and also different approaches within States to funding as between applications for return and applications to safeguard rights of access. The PB pointed out that differentiating between return and access applications may lead to escalation of proceedings by incentivizing applicants to apply for return rather than access.

It was also pointed out that Art 7 of the Convention places an obligation upon States, through their Central Authority, to protect rights of access.

That having been stated, it was acknowledged that states differ in the way that they provide access to funding and to advice, and that some states had made a reservation under Art 26 in relation to the provision of funding.

ISFL intervened to point out that in the C&R's made following the sixth SC, it was recognized that access to justice was important for both parties in both return and access proceedings, and that inequality of arms in return proceedings was a significant problem.

It was agreed in principle that it is important to encourage the facilitation of legal aid in cases of access. The C&R (No. 18) encourages States to provide for legal aid and representation in return proceedings, and also to consider doing so in proceedings for access / contact.

VI. Direction judicial communications and the International Hague Network of Judges

During the SC there was a separate meeting (held on Saturday 14 October) of the IHNJ which was attended by 43 judges from 33 States. Judicial communication can plainly have an important role in 1980 Hague Convention proceedings. Comments from States during the course of the discussion demonstrated the various different ways in which direct judicial communication was facilitated, and the need for there to be a proper legal framework to regulate judicial communications. Issues arose in relation to the involvement of parties in such communications, for example.

It was agreed that Prel. Doc. No. 5 ("Document to inform lawyers and judges about direct judicial communications, in specific cases, within the context of the International Hague Network of Judges") and Prel. Doc. No 8 ("Information on the legal basis for direct judicial communications within the context of the International Hague Network of Judges (IHNJ)") which had been prepared for the 2017 SC could be finalized and published.

Discussions were held to hold further meetings of the IHNJ in 2024 and 2025 aimed at improving the process of judicial communications and thereby the application of the 1980 Hague Convention.

VII. Exceptions to the return of the child under the 1980 Child Abduction Convention and protective measures upon return

1. Article 13(1)(b) of the 1980 Child Abduction Convention – Domestic violence / family violence

The first topic that was discussed in the context of Article 13(1)(b) was a point that arose from the questionnaires returned by the Central Authorities in relation to criminal proceedings / investigations brought following an abduction. The PB, in its introduction, pointed out that they seemed to be rare, having been raised only twice in the responses. It was highlighted that there had been discussions of this issues at the SC's in 2001 and in 2006, following which C&R's were made suggesting that a Central Authority should notify parents of possible adverse effects of criminal proceedings upon an application for return. It was suggested that

parents should be careful about initiating such proceedings, though it was recognized that in some States that must be done.

Further, it was pointed out that reliance upon Art 20 as an exception to return remains rare, though this was further discussed in the context of discussions about linked Hague Convention and asylum claims, which are analysed below.

In relation to Article 13(1)(b) specifically, the PB introduction highlighted the fact that 13 years ago there had been a detailed discussion about amending the Convention in the light of statistics shared by Professor Lowe concerning Art 13(1)(b) defence. At that point, two "extreme scenarios" were identified. Firstly, states that systematically refused return where Art 13(1)(b) was raised, without analysing the issue properly. Secondly, states that ordered the return of children, and sometimes their accompanying parent, into extreme situations. Those cases were described by the PB as decisions that were wrong and which turned out to be "very bad decisions". The PB explained that it had, in the run up to the SC, received a lot of emails including testimonies of people who had had a really bad experience under the Convention.

The discussions about amendment had not reached consensus. The decision was taken (by consensus) to develop new tools to develop the operation of the Convention. That included The Guide to Good Practice on 13(1)(b) which was adopted in March 2020 and then published. The PB praised the Guide, suggesting that it should help to a great extent.

The introduction then touched upon the statistics, which showed that the proportion of judicial non-returns reliant upon Art 13(1)(b) had doubled. It was not clear why that had happened. Some decisions seen by the PB suggested that return had not been ordered because the Judge could not rely upon the available protective measures to make return safe for the child. It was suggested that if States improved the protection that could be made available to parents and children that had experienced domestic abuse, that might reduce abduction.

For the purposes of the SC, four working documents had been prepared (Working docs 4, 5, 6 and 7).

There was then a great deal of debate in relation to what constitutes 'harm' for the purposes of the exception, and whether the Guide to Good Practice properly explains that a risk of harm to the taking parent can also give rise to a grave risk to the child. ISFL made a number of interventions, suggesting that this was not clear from certain parts of the Guide to Good Practice on Art 13(1)(b) if read out of context. It was made clear by the Chair (the Hon. Diana Bryant) that the Guide had been approved by the Council and published, and so its language was not amenable to debate or to further refinement.

States that contributed to the discussion thereafter supported adherence to the wording of the Guide, which had been the subject of a great deal of debate in relation to its content and particular wording.

The outcome of this discussion can be found within C&R's 23, 24 and 25. C&R's 23 and 24 relate to the availability of information in relation to protective measures. The Australian Central Authority had prepared and circulated a very detailed fact sheet explaining what

protective measures could be put in place on return to Australia, how to obtain such protective measures and the legal basis for them. C&R 24 relates to that, and suggests that other Contracting States prepare and make available similar information. C&R 25 is perhaps of particular relevance, bearing in mind the criticism that arose (almost entirely from ISFL) of the wording of the Guide and the recommendations based upon it.

There was a degree of concern raised about CA's providing information about protective measures as a standard factsheet in every case. Those concerns included that the provision of such information might lead to assumptions as to the provision of such measures, which might impact upon the return process, that the need for the provision of specific information may suggest distrust in the processes and protective frameworks available in the requesting State, and that providing such information may lead to a focus on the measures themselves, and detract from consideration of whether the harm that is alleged requires any measures to ameliorate it.

2. Possible forum on domestic violence and Article 13(1)(b) of the 1980 Child Abduction Convention

The establishment of a working group was raised by both ISFL and EAPIL (which supported ISFL in this regard). The proposal really stemmed from the focus that has now arisen on issues of domestic abuse both generally, and specifically in the context of 1980 Hague Convention proceedings. There was general support, during the course of discussions, for further work to look at the issue of domestic abuse and how it is dealt with in abduction proceedings.

Having heard the discussion, Dr Bernasconi reiterated the significance of the Guide to Good Practice, but added that the Hague Conference should not be seen to be thinking that, as a Guide has been developed and published, the work is done. He suggested that a formal setting, such as the SC is not an appropriate forum for a full and frank discussion about the issue. As such, he suggested that an open forum may be appropriate, to allow the SC and States to listen to the voices that have emerged in relation to issues of domestic abuse in an abduction context, but also to inform the audience of what the HCCH has done and to inform them of good decisions that have been made under Art 13(1)(b).

That suggestion (of an open forum) was supported generally.

This was then condensed into C&R no. 26, which found general support as a position at the conclusion of discussions and prior to final drafting of the C&R over the weekend of 15 and 16 October. C&R no. 26 supports the holding of an open forum for discussions among organizations representing parents and children, and those applying the Convention, in relation to the issue of domestic violence in the context of Article 13(1)(b). It was proposed to establish a steering committee to set the agenda, and suggested that conclusions of that forum may inform future HCCH work.

3. Art 13(1)(b) – safe return including urgent measures of protection

This topic overlaps with the discussion (above) in relation to the provision of information as to protective measures in the form of a 'fact sheet' type document as pioneered by the Australian Central Authority (which was welcomed) by C&R no. 27.

By C&R 28, the SC expressly recognized (which was language not used within the Guide to Good Practice in such an express way) that protective measures may be implemented to protect the accompanying parent, in order to address the grave risk to the child. That said, the Guide to Good Practice does expressly recognize that a risk of harm to the accompanying parent may give rise to a grave risk to the child.

There was a detailed discussion, in the context of protective measures, of the use that can be made of the 1996 Hague Convention in this context. Art 11 of the 1996 Convention permits the making or 'urgent' measures of protection on the basis of the presence of the child, which measures have extraterritorial effect and are capable therefore of recognition and, if appropriate and necessary, enforcement in the country to which the child would be returned pursuant to the 1980 Hague Convention (assuming that both countries are signatories to the 1980 and 1996 Hague Conventions).

Certain states questioned whether Art 11 could properly be used to make orders that are intended to provide protection to a child upon return order pursuant to the 1980 Hague Convention. They questioned whether such a situation could properly be described as 'urgent' (a condition precedent for the use of Art 11).

The PB responded that the SC has always believed that the return of a child to the state of habitual residence is a matter of urgency, and that accordingly Art 11 was available to be used in that context.

In addition to States that questioned the use of Art 11, there were others that accepted that Art 11 of the 1996 Hague Convention could be used in that context, but suggested that in practice it was difficult to operate. An example was given of a case involving Spain and Uruguay which required judicial liaison to put in place the ordered measures and so achieve a safe return. Return did take place, but the process was described as difficult and burdensome.

That discussion resulted in C&R no 34, which makes specific reference to Art 11 of the 1996 Hague Convention and its use in this context.

4. Undertakings

The discussion in relation to protective measures then moved to the use of undertakings. The PB explained that an undertaking, as used in this context, is an assurance. A voluntary promise given by a person, usually the left behind parent, before a court to do or not to do certain things. It was suggested that in certain jurisdictions courts will accept or even require such undertakings.

The issue in relation to undertakings was explained as being their lack of enforceability, or otherwise difficulties in enforcing them. This is something that is recognized and explained in the Guide to Good Practice. Certain of the questionnaires returned prior to the SC raised

issues in relation to undertakings, and particularly that they give rise to an expectation, on the part of the returning parent, that they will be enforceable which may in fact not be the case.

The general point raised within the discussions was that undertakings should be used with caution unless it can be demonstrated that they would be enforceable upon return.

This resulted in C&R's 31 – 34, which seem intended to 'shore up' the process of using undertakings as a form of protective measures insofar as that is possible (including by placing the undertakings within the return order in an effort to facilitate enforcement in the state of habitual residence). Overall, however, the message (particularly of C&R 31) is that voluntary undertakings may not be effective, and so should be used with caution.

5. Hearing the child

The proposed C&R set out (based it seems upon proposals or suggestions made by or on behalf of the UK) a series of steps that should be taken in relation to the hearing of children in 1980 Hague Convention cases. It provoked a detailed discussion, largely it seemed on the basis that the proposed structure sought to put in place a procedure that differed (sometimes significantly) from approaches taken in different Contracting States, in accordance with either substantive law or procedural rules that operated within those states.

It was also felt that the proposed structure, which was focused upon Article 13(2) child's objections cases, but did not expressly state as such, did not take sufficient account of the different contexts in which a child might be heard in Convention proceedings, which are of course not limited to exploration and determination of the child's objections exception.

During the course of the discussion, it was clarified by the PB that the wording had been drafted for the purposes of the 13(2) exception, and was not intended to apply more widely than that.

The general proposition that it would be helpful to have a C&R that dealt with hearing the child was unanimously supported. The discussion focused upon how the importance of hearing the child might best be reflected within the C&R.

The eventual C&R's in relation to this topic (C&Rs 35 – 39) reflect the detail of the discussion that was held. They begin with recognition that different States approach the hearing of children in Convention proceedings in different ways, which is a reflection that it is a matter of national law for Contracting States to determine their own procedures (C&R 35). C&R36 emphasises the important distinction between hearing the child's voice for the purposes of determining objections, and doing so in the context of a substantive welfare investigation.

C&R37 represents what might be described as a somewhat watered down version of the draft C&R, but nonetheless seeks to establish 'headlines' in relation to good practice when hearing children. That different approaches might be required in different contexts is then made clear by C&R no 39.

VII. Processing of return applications under the 1980 Child Abduction Convention

1. Return applications where the taking parent lodged a parallel asylum claim

Prior to discussion by the delegations of this issue, there was a presentation on the current situation in Ukraine and the steps that are being taken by the Ukrainian Central Authority to administer the 1980 Hague Convention at the current time. Importantly, there is information available on the website of the Ukrainian Central Authority as to the areas in Ukraine where it is considered safe to return children at this time.

The issue of parallel return applications and asylum claims is one that seems to have caused difficulty in a number of jurisdictions. From discussions between the members of the IAFL delegation (and other IAFL Fellows that were present) it is clear that the approach that is taken in England is very different to that which applies in the US. Indeed, it was suggested by the UK delegation that the case law in England is not yet settled, notwithstanding consideration at the highest appellate level and procedural guidance from both the Family Division of the High Court (which deal with 1980 Hague Convention return applications) and the President of the Tribunals (which deal with appeals in asylum claims) as to how such cases should be properly managed where there are links between them.

In the circumstances, much of what the PB seemed to wish to achieve in terms of guiding best practice in this area seemed impossible. There was opposition to detailed C&R's from both the UK and the USA. In the end, the C&R that arose from the drafting committee and was endorsed (C&R no. 40) does little more than highlighting the need for expedition in both the return application and the parallel asylum claim.

2. Determination of wrongful removal (Arts 8, 14 and 15)

At this point, the discussion moved from substantive matters of law and practice in relation to the determination of issues under the Convention, to matters of practical administration. As a consequence, we will not detail the discussions. The C&R's (no.s 41 – 46) are available to be read.

IX. Rights of custody, access / contact under the 1980 Child Abduction Convention

1. Access / contact – Central Authority services under the 1980 Child Abduction Convention (Art 21) and the 1996 Child Protection Conventions (Arts 32, 34 and 35)

This discussion was significant primarily in that it was the first occasion on which the 1996 Hague Convention was discussed at the SC, other than in the context of protective measures (Art 11 of the 1996 Convention, as to which see the notes of the discussion above). It was highlighted by the PB that this demonstrated the complimentary nature of the 1980 and 1996 Hague Conventions in relation to cooperation between Central Authorities, in this example in a manner specifically relevant to the protection of rights of access.

In relation to the C&R, they explain: 1) that an application for securing of rights of access need not be linked to an abduction situation (C&R47); 2) that Art 35 of the 1996 Hague Convention

is complimentary to and can be operated alongside of a request made pursuant to Art 21 of the 1980 Hague Convention (C&R48); and 3) That the majority of States that responded to both the 1980 and 1996 Convention questionnaires made legal aid available under both Conventions. The SC, through this C&R, encouraged other States to do the same.

X. Tools to assist with the implementation of the 1980 Child Abduction Convention

1. Revised request for return recommended model form / new request for access recommended model form
2. Revised country profile under the 1980 Child Abduction Convention

It was proposed that there be a virtual meeting between Central Authorities in relation to the proposed new request forms. Dr Bernasconi suggested formal cooperation between the PB and a working group with a view to presenting outcomes to the Council on General Affairs in 2024. That approach was adopted and forms the basis of the C&R (no 50).

In relation to country profiles, they were discussed and amendments proposed during the course of the SC, with the result that they were agreed subject to final editing by the PB (C&R no 51)

XI. Mediation as relevant to the 1980 Child Abduction (Art 7(c)) and 1996 Child Protection (Art 31(b)) Conventions

When introducing this topic, the PB reminded participants that it has previously been agreed that both the 1980 and 1996 Hague Conventions make express reference to the resolution of disputes in an amicable way. The 1996 Convention also provides for mediation regarding the protection of the interests of the child. There has been a Guide to Good Practice in relation to mediation in 1980 Hague Convention cases.

That having been said, it has also been recognized that attempts to reach amicable resolution should not give rise to unjustifiable delays.

The questionnaires submitted demonstrated how many Central Authorities encourage mediation, some by providing mediation services, others by recommending specific services. It was recognized by the PB as important that mediators are available that specialize in abduction. Knowledge of other languages and cultures was also seen as being important.

States then described their experiences of mediation and the models that they had adopted in an effort to ensure that mediation did not introduce or indirectly cause delay.

There were particularly interesting and important contributions from Argentina, Australia, Japan and the Netherlands. Reunite (through its CEO, Alison Shalaby) was also invited to speak to explain its mediation model and the training that it has conducted in the use of that model.

The C&R is pithy and to the point- the SC encouraged the promotion and provision of mediation in abduction and access cases, and thank the States and organisations for their presentations on the topic.

**The 1996 Hague Convention**

Discussion then moved from the 1980 Hague Convention to the 1996 Hague Convention. Perhaps necessarily, given the fewer number of States party to that Convention, the discussions were less full but they were nonetheless extremely interesting and covered a number of important topics.

The first topic discussed was item XII on the C&R.

XII. International family relocation as relevant to the 1980 and 1996 Child Protection Conventions

This topic was introduced by an extremely interesting and important presentation from Carolina Marin Pedreno, who attended the SC on behalf of AIJUDEFA. AIJUDEFA had resolved at a meeting in Santiago to undertake a study into different approaches taken by courts to international relocation. The presentation given dealt with the outcomes of that study, highlighting the importance, as an agreement, of the Washington Declaration in relation to relocation cases which must be contrasted with the relative lack of familiarity that practitioners and judges seem to have with that declaration.

In response, the UK highlighted that there were potential difficulties with work seeking a uniform or 'joined up' approach to relocation issues, as it is a matter of domestic law, but welcomed exploration of whether a 'light touch' approach involving information documents or points of best practice might prove helpful.

Spain highlighted the lack of harmonization between different approaches under national law as an issue, and highlighted problems involving delays to resolution of such cases.

The USA noted general support for the PB undertaking work to promote the Washington Declaration and other relevant tools.

Summing up, the chairs noted that delays in relocation cases may lead to abductions, which suggests in favour of expedited resolution of relocation applications. It was recognized that it is important to promote the Washington Declaration, whether in publications or perhaps by questionnaires to States so that best practices can be identified.

The C&R's follow this conclusion. By C&R53, the SC notes that expeditious determination of relocation applications may strengthen the aims of the 1980 Hague Convention by acting as a deterrent to abduction. It further encouraged the promotion of the Washington Declaration through publication in the Judges Newsletter on International Child Protection and by other means.

The varied approaches taken by States to relocation issues was noted (C&R54) and it was proposed that a questionnaire be developed by the PB for States to gather information about procedures that States have to facilitate lawful relocation.

Finally, the SC underlined the benefits of ratification/accession to the 1996 Hague Convention in order to facilitate lawful relocation (C&R55).

XIII. Contracting Parties to the 1996 Hague Convention

There had been eight new Contracting Parties to the 1996 Convention since 2017. They are: Barbados, Cabo Verde, Costa Rica, Fiji, Guyana, Honduras, Nicaragua and Paraguay. The total number of Contracting Parties are, therefore 54. The SC encouraged States that have not yet joined to do so.

Canada (which signed the 1996 Convention in May 2017, but is yet to bring it into force) explained that in order for Canada to bring the Convention into force, it requires implementation first at a federal level, and then in the regions. Since the SC in 2017, work had been undertaken at a federal level via modification of the law on divorce. The entry into force of those amendments would become valid when the Convention has been ratified in Canada. No timescale was given as to when that might be done.

XIV. Evaluating and taking stock of the 1996 Hague Convention

It appeared, from the responses to the questionnaires, that the 1996 Convention is operating effectively.

XV. Scope of the application of the 1996 Hague Convention

1. Measures of protection

As set out in C&R no 58, discussion in relation to this area related to the scope of the Convention. Article 3 sets out the types of issues that fall within the broad interpretation of 'measures of protection'. It is not intended to be an exhaustive list (hence the use of language – "The measures referred to in Article 1 may deal in particular with…"*)*. Article 4, by contrast, sets out areas that the Convention does not apply to. Article 4 is an exhaustive list (it being introduced with the phrase – "The Convention does not apply to…").

2. Articles 31(c), 32(b) and 34 of the 1996 Convention

C&R 59 notes that the application of these articles is not limited to situations of urgency.

XVI. Jurisdiction issues under the 1996 Child Protection Convention

1. The rules on jurisdiction form a complete and closed system which applies as an integral whole to Contracting Parties

The PB introduced this topic as being relevant to the aim of the Convention of avoiding competing decisions. A starting point for that is recognition that the jurisdictional scheme is a complete and closed system that does not, where the Convention is engaged, allow for access to national law as an alternative ground for jurisdiction. That aims to ensure that where

a Contracting State is identified as having primary jurisdiction, it is that State which takes decisions in relation to the child, and no other State exercising jurisdiction on some different ground can make its own decisions which may conflict.

This proposal drew broad support. There were some technical issues raised, which were resolved in the drafting process. The approved C&R's are at nos 60 and 61, which support and emphasise the principles set out above.

2. Change of habitual residence under Articles 5(2), 34 and 36 of the Convention.

Within the questionnaires, States were asked to identify and to elaborate upon some significant court decisions in relation to issues arising under the Convention. Some of those related to the absence, from the Convention, of the principle of *perpetuatio fori*, which is exemplified within the jurisdictional scheme by Art 5(2). In introducing the topic, the PB explained that a change of habitual residence implies both the loss of the existing habitual residence and acquisition of a new habitual residence, the process of which can be instantaneous or can only occur after a period of time. It was highlighted that determination of habitual residence is a question of fact, which is the province of the competent authority.

The C&R was approved following some changes by the drafting committee. It (C&R no 62) notes that where the habitual residence of the child changes to another Contracting State, the competent authorities of the new habitual residence will have primary jurisdiction. Whether habitual residence has changed is a question of fact to be assessed by the competent authority called upon to determine the issue. The competent authority could consult the competent authorities of other States to obtain relevant information, making use of the cooperation provisions in Articles 30, 34 and 36.

3. Definition of 'urgency' under Art 11 of the 1996 Convention

This was a topic that had previously been the subject of some discussions when considering protective measures to safeguard return ordered under the 1980 Hague Convention.

The C&R (no 63) emphasizes that whether or not a situation is urgent is for the competent authorities of the territory in which the child is present to determine. When doing so, the competent authorities should consider whether the child in question is likely to suffer irreparable harm or if their interests will be compromised if protection is not pursued immediately.

It must, of course, be recalled that when addressing this issue in the context of protective measures to safeguard a return ordered pursuant to the 1980 Hague Convention, it was the view expressed by the PB that such a situation is likely to be urgent. That interpretation is consistent with the approach that has been taken by the English courts to date.

4. Communication regarding jurisdiction issues and direct judicial communications (Arts 5 – 12 and 44)

The 1996 Hague Convention includes a number of jurisdictional provisions that may require effective communication between the competent authorities of Contracting States in order to operate effectively. The specific examples that are given in the relevant C&R's (nos 64 and 65) are Articles 8, 9 and 10, which concern the transfer of jurisdiction from one State to another (Arts 8 and 9) and the prorogation of jurisdiction alongside divorce proceedings (Art 10).

It was highlighted, in the course of discussions, that it is always helpful, where jurisdiction has been taken by the courts or authorities of a Contracting State, for the court or authority that has seised jurisdiction clearly to identify the grounds upon which they have taken measures of protection (for example habitual residence under Art 5, or retained jurisdiction following a wrongful removal or retention under Art 7).

The SC noted, through C&R no 65, that for the purposes of communication for the purposes of the 1996 Hague Convention, the General Principles for Judicial Communications within the context of the International Hague Network of Judges would be equally applicable to both judicial and administrative authorities.

5. Transfer of jurisdiction under Articles 8 and 9 of the 1996 Child Protection Convention

The UK delegation (through Lord Justice Moylan) gave full support to proposed C&R's which were intended to streamline procedures for requests for transfer of jurisdiction under these articles. It was said that the UK had encountered delays in the context of transfer requests due to a lack of clarity about the appropriate process.

This issue was then highlighted in the course of the further discussions. For example, Denmark explained that there, it was not always Judges that made requests to transfer jurisdiction under Articles 8 and 9, but that those articles were operated by administrative authorities. They welcomed guidance that would reflect that different process. The Swedish delegation agreed, as a similar approach was taken there.

The PB asked whether, in those circumstances, the questionnaires (or parts of them relevant to transfer) could in the future be more widely circulated by Central Authorities to social workers or other administrative authorities involved in the making of such requests.

The French delegation agreed with that proposal.

The finalized C&R's seek to establish best practice in transfer requests by establishing (or proposing that States establish) a more streamlined procedure.

First, it is suggested (C&R no 66) that Contracting States designate one or more members of the judiciary for the purpose of direct judicial communications within the context of the International Hague Network of Judges.

Second, that States designate the authorities to which requests under Articles 8 and 9 are addressed, in an effort to improve the processing times of requests for a transfer of jurisdiction (C&R 67).

Third, the SC encouraged authorities requesting a transfer informally to consult their counterparts in the requested State, to ensure that the request made is as complete as possible and that all necessary information and documentation can therefore be provided from the outset (C&R 68).

Fourth, the SC encouraged Central Authorities that are involved in a transfer request and judges engaging in direct judicial communications pertaining to a transfer request to keep one another informed regarding the process and outcome (C&R 69).

Fifth and finally, the SC invited the PB to circulate the questionnaire to al Contracting Parties to the 1996 Convention, with a view to collecting information from judges and Central Authorities regarding transfer requests (C&R 70).

Before moving on to discuss the applicable law aspects of the 1996 Hague Convention, the PB then presented an information item in relation to the differences between Article 6 of the Convention (which allows for a presence based jurisdiction where children have been displaced from their country of habitual residence, and also where the child's habitual residence cannot be established) and Art 11 (which allows for a presence based jurisdiction where the situation is urgent and the child is outside of their country of habitual residence).

It was explained that Art 11 is based only on presence, and might cover (by way of an example) a runaway child, present in a Contracting State on a temporary basis, where the child has a habitual residence and where the courts or authorities of the State of habitual residence still have jurisdiction. Art 6, by contrast, involves a situation where the habitual residence cannot exercise jurisdiction any longer.

Art 11 was explained as having extraterritorial effect. It was said to be (along with Art 12) extremely well explained in the Practice Handbook and in the Explanatory Report. Both Arts 11 and 12 are provisional. Art 12 is subject to Art 7, so cannot easily be used where a child has been abducted. Art 11 is not so limited, but requires urgency. Unlike Art 11, measures taken under Art 12 do not have extraterritorial effect.

XVII. Applicable law under the 1996 Hague Convention

1. Determining parental responsibility and rights of custody

The PB introduced this item by suggesting that no issues had been identified in relation to the operation of Art 16. There was a suggestion of a lack of awareness of the nature and effect of the Article. It was explained as being of great use in the context of child abduction where both the 1980 and 1996 Hague Conventions are applicable.

There was no significant debate about this point. The C&R (no 71) reflects the PB's expressed view about the Article and the need for greater awareness of it, as it notes that in situations of child abduction, the provisions of Chapter III of the 1996 Convention, and particularly Articles 16 and 21, are relevant to the determination of the law applicable to parental responsibility and custody rights.

XVIII. Recognition and enforcement of measures of protection under the 1996 Hague Convention

1. Recognition of measures by operation of law under Art 23(1) of the 1996 Hague Convention

The PB explained in its introduction that the questionnaires had demonstrated some issues in relation to Art 23(1). For ease of reference, Art 23(1) provides that "The measures taken by the authorities of a Contracting State shall be recognized by operation of law in all other Contracting States".

Questions had been raised as to what that required of States in practice. For example it had been asked whether that required the State of recognition to issue its own order, or some form of mirror order, to recognize the measures.

The PB explained that the concept of recognition by operation of law required such recognition without any particular step having to be taken. It would not be necessary to commence proceedings for recognition. The effects of the measures must be produced in the requested State automatically in circumstances where there is voluntary compliance or no opposition to that recognition.

The discussion focused upon differences in interpretation of measures, or, in certain circumstances, the impossibility of reproducing them due to differences of approach between States. For example, the Swedish delegation explained that sometimes measures which required recognition were very detailed in what was required, for example for the purposes of supervision of access / contact arrangements. In Sweden, such supervision was conducted by social authorities, and it could be difficult for such authorities to do what the decision requiring of recognition provided for. Belgium and France agreed.

The PB suggested that this was not an issue of recognition, but one of enforcement of the decision which was a different and separate ground.

The C&Rs (nos 72 and 73) reflect the PB's initial summary, reiterating that recognition under Art 23(1) entails that the effects of a measure are recognized without the need of any further action or special process, but that the use of a certificate as envisaged in Art 40 would facilitate such recognition.

2. Enforcement of measures in accordance with the law of the requested State to the extent provided by such law under Articles 26 and 28 of the 1996 Hague Convention

The PB stated, in relation to this aspect, that enforcement seemed generally to be rare. The procedure for securing enforcement was required to be simple and rapid.

The C&Rs (nos 74 – 76) emphasise that not all measures of protection require enforcement. It was necessary, when considering an application, to differentiate between measures that require enforcement and those that do not. Once a measure has been declared to be

enforceable or registered for enforcement, the measure must be enforced in the other Contracting State as if it had been originally taken there, in accordance with domestic law.

3. Describing the grounds of jurisdiction and the measures of protection in the decision to facilitate its recognition and enforcement

This C&R links back to a comment that was made by the German delegation in relation to item XVI 4 (described above) that it would be helpful, there for the purposes of communication between relevant authorities, for the courts or authorities of States that have seised jurisdiction to make clear the basis upon which they have done so. In the context of recognition and enforcement, the PB sought to emphasise (and the C&Rs at nos 77 and 78 to make clear) that:

A) In order to facilitate the recognition and enforcement of measures of protection, the competent authority should carefully describe those measures in its decision; and

B) To avoid non-recognition on the basis of Art 23(2)(a) (which provides that recognition may be refused if taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II of the 1996 Hague Convention) the competent authority taking the decision should carefully describe the grounds upon which it based its jurisdiction, including when it bases its jurisdiction on Art 11.

XIX. Cooperation and general provisions under the 1996 Hague Protection

1. Elements to consider as to where to establish a Central Authority under the 1996 Hague Convention

This C&R (no 79) emphasizes the significance of Central Authorities to the operation of the 1996 Hague Convention, and suggests that States co-locate Central Authorities that are responsible for the 1980 and 1996 Hague Conventions in the same body.

2. General duty to cooperate under Art 30 of the 1996 Hague Convention

This topic concerned general cooperation to achieve the aims of the Convention. It was suggested (by C&R no 81) that Central Authorities engage in dialogue and, where it is identified that a number of States are experiencing a common problem, that they engage in joint meetings which might, in some cases, be facilitated by the PB.

XX. Placement or provision of care of the child in another Contracting Party under Articles 3(e) and 33 of the 1996 Hague Convention

1. General procedure

Article 33 is the only provision within the 1996 Hague Convention that provides for mandatory cooperation between Contracting States. It provides that where an authority having

jurisdiction under Articles 5 to 10 contemplates the placement of a child in a foster family or institutional care in another Contracting State, it must first consult with the Central Authority or other competent authority of that State. The placement can then only be made if the Central Authority or other competent authority of the requested State has consented to the placement.

In practice, this seems to have been a difficult provision to operate. The discussions demonstrated that there was a considerable difference of opinion as to what a 'placement in a foster family or institutional care' entailed. Issues that have arisen include whether a family placement falls within that definition. Other issues that were discussed included whether a child that has been placed in a foster family within one Contracting State, but then travels to another Contracting State on holiday would fall within Art 33. A further issue that was explored is whether a child that is placed within a foster family within one Contracting State, but then relocates with that family to another Contracting State would fall within Art 33.

Various States described experiences of placements being made without the proper consent being sought, leaving children in a situation where proper safeguards have not been put in place for them.

The PB sought to clarify some of the issues that had been raised. It was explained that a child that had been placed in foster care and then gone on holiday with those foster carers would not be in a situation to which Art 33 applied.

It was clarified that Art 33 relates to a decision that is to be taken in the future. The authority with jurisdiction must be *contemplating* placement of the child in a foster family or institutional care. That engages the duty to consult with the relevant authorities in the State in which the child would be placed. Following consultation, the placement can only be made *if* the authorities of the requested State have consented.

If the placement is made with a foster family, and that foster family then relocate, there are still checks and balances in relation to the relocation, but not necessarily through the mechanism of consent under Art 33. As such, Art 33 would not apply to a relocation situation. Other aspects of the Convention might be engaged, such as recognition and enforcement, Art 16(3) in relation to the transfer of parental responsibility, or a need to transfer jurisdiction.

The C&R's (at nos 82 – 90) seek to clarify the issues and set in train future work in order to establish best practice in this difficult area.

C&R82 sets out the minimum steps required before a placement can be made under Art 33.

C&R84 clarifies that purely private arrangements do not engage Art 33, and C&R85 clarifies that travelling abroad for tourism purposes does not either.

C&R89 makes reference to Art 34, which may be used in preparation for a request being made under Art 33.

C&R90 is perhaps of greatest significance, as it seeks to establish the process of collecting information about the operation of Art 33, in preparation for a working group being established to develop both: a) a model form for cooperation under Art 33; and b) a guide on the operation of that article.

XXI. Unaccompanied and separated children and the application of the 1996 Hague Convention

The UNHCR gave an informative and interesting presentation in relation to refugee children and the approach taken to children in such situations under the 1996 Hague Convention. The EU delegation explained its work with the Ukrainian authorities in relation to children displaced from Ukraine due to the ongoing war. The PB, through C&R91, thanked them for their contributions and welcomed the participation of the PB in ongoing discussions through the Council of Europe.

**Future work**

As we hope can be seen from the summary above, the SC is a lengthy and detailed discussion of a significant number of different topics that arise from the operation of the 1980 and 1996 Hague Conventions. Whilst primarily the discussions are engaged in by the delegations from State parties, NGO's play an important role in contributing to the discussions in different ways, informed by their particular standpoint and expertise. The IAFL is a significant, large and diverse organization with fellows from a large number of different countries, that will no doubt all have different experiences of how the 1980 and 1996 Hague Conventions operate in their own particular jurisdictions. As a consequence, the IAFL has an important part to play in the SC and also in preparation for future SC. It would be our recommendation that to have the greatest impact on future SC and thereby the practical application of the Hague Conventions, a long term project should be developed with a focus on sharing the unique perspective on behalf of the IAFL.