This week begins the Special Commission on the 1980 Child Abduction Convention and the 1996 Child Protection Convention

Written by Mayela Celis

The eighth meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention will be held from 10 to 17 October 2023 in The Hague, the Netherlands. For more information, click here.

One of the key documents prepared for the meeting is the Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention, where crucial information has been gathered about the application of this Convention during the year 2021. However, these figures were perhaps affected by the Covid-19 pandemic as indicated in the Addendum of the document (see paragraphs 157-167, pp. 33-34). Because it refers to a time period in the midst of lockdowns and travel restrictions, it is not unrealistic to say that the figures of the year 2021 should be taken with a grain of salt. For example, the overall return rate was the lowest ever recorded at 39% (it was 45% in 2015). The percentage of the combined sole and multiple reasons for judicial refusals in 2021 was 46% as regards the grave risk exception (it was 25% in 2015). The overall average time taken to reach a final outcome from the receipt of the application by the Central Authority in 2021 was 207 days (it was 164 days in 2015). While statistics are always useful to understand a social phenomenon, one may only wonder why a statistical study was conducted with regard to applications during such an unusual year – apart from the fact that a Special Commission meeting is taking place and needs recent statistics -, as it will unlikely reflect realistic trends (but it can certainly satisfy a curious mind).

Other documents that are also worth noting are the following (both Preliminary Documents and Information Documents):

Child abduction and asylum claims

- Prel. Doc. No 16 of August 2023 – Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim. This document submits the following for discussion and includes a useful annex with decisions rendered in the UK, Canada and USA about this issue (SC stands for Special Commission):

43. The SC may wish to discuss how the issue of delays in processing the asylum claims could be addressed when a return application is presented, and what the solutions could be to avoid such delays ultimately pre-empting a return application under the 1980 Child Abduction Convention, in particular:

a. Bearing in mind the confidentiality rules that apply to asylum proceedings, consideration can be given to whether general information can be shared, where possible and appropriate, (between authorities of the requested State/country of asylum only) for example, regarding timeframes and average duration periods, steps or stages of such proceedings.

b. Where possible and appropriate, consideration can be given to whether asylum claims can be treated and assessed on a priority basis when a return application is presented under the 1980 Child Abduction Convention.

c. Consideration can be given to whether stays of return proceedings can be avoided in order to prevent that allegations are made concerning the settlement of the child in the new environment, and whether an eventual stay can only be considered regarding the implementation and enforcement of the return order.

44. The SC may wish to discuss to what extent it is possible to have some level of coordination or basic exchange of information between the different spheres of the government and competent authorities that process the different proceedings, when/if allowed by the relevant domestic laws and procedures and respectful of confidentiality and judicial independence principles. Where possible and appropriate, such coordination could:

a. Encompass, for example, that the competent authority responsible for the return application informs the competent authority responsible for the asylum claim of the return application.

b. Include establishing procedures, guidelines or protocols to ensure that both proceedings are dealt with expeditiously.

This is a sensitive topic that deserves attention, as disclosing that a child is present in a specific State can have a great impact on the safety of the person seeking asylum (usually, the parent).

Transfer of jurisdiction under 1996 Child Protection Convention

- Prel. Doc. No 17 of August 2023 – Transfer of jurisdiction under the 1996 Child Protection Convention (Arts 8 and 9). It is submitted the following:

55. The SC may wish to consider adopting the following Conclusions and Recommendations:

a. The SC invited Contracting States, which have not done so already, to consider designating, in accordance with the Emerging Guidance regarding the Development of the IHNJ, one or more members of the judiciary for the purpose of direct judicial communications within the context of the IHNJ.

b. Recalling Article 44 of the 1996 Convention, the SC encouraged Contracting States to designate the authorities to which requests under Articles 8 and 9 are to be addressed, as such a designation could greatly assist in improving the processing times of requests for a transfer of jurisdiction. Depending on domestic policies and requirements relating to the judiciary, Contracting States may choose to designate a member of the IHNJ (if applicable) and / or the Central Authority to receive requests for transfers of jurisdiction.

c. The SC encouraged authorities requesting a transfer of jurisdiction to, in the first place, informally consult their counterparts in the requested State, to ensure that their requests are as complete as possible and that all necessary information and documentation is furnished from outset to meet the requirements of the requested State.

d. Recalling Principle 9 of the Emerging Guidance regarding the Development of the IHNJ,139 the SC encouraged Central Authorities that are involved in a transfer of jurisdiction request and judges engaging in direct judicial communications pertaining to a request for a transfer of jurisdiction to keep one another informed regarding the progress and outcome of such a request.

Doing so could further assist in addressing delays and enhance the efficiency of processing requests under Article 8 or 9 of the 1996 Convention.

e. The SC invited the PB to circulate the questionnaire annexed to Prel. Doc. No 17 of August 2023 to all Contracting States to the 1996 Convention, with a view collecting information from judges and Central Authorities regarding requests under Article 8 or 9. The SC further invited the PB to review Prel. Doc. No 17, in the light of the responses from Contracting States, and to submit the revised version of Prel. Doc. No 17 to the Council on General Affairs and Policy (CGAP). The SC noted that it will be for CGAP to determine the next steps in this area (e.g., whether there is a need to form a Working Group consisting of judges and representatives from Central Authorities to identify good practices pertaining to requests for a transfer of jurisdiction under the 1996 Convention).

The transfer of jurisdiction (as foreseen in those articles) is sometimes little known in some civil law States (in particular, Latin America) so these suggestions are very much welcome.

Placement or provision of care of a child (incl. kafala) under the 1996 Child Protection Convention

- Prel. Doc. No 20 of September 2023 – Placement or provision of care of the child in another Contracting State under the 1996 Child Protection Convention (Art. 33). Interestingly, this document includes as annex Working Document No 10 Proposal from the delegation of Morocco about "The Kafala procedure as established by the law of 10 September 1993 on abandoned children" of 30 September 1996. This Prel. Doc. suggests the following:

64. The SC may want to discuss what clearly falls within the scope of application of Article 33 of the 1996 Convention and what clearly falls out of the scope of application of Article 33.

65. The SC may want to consider discussing the use of the term "approved" in C&R No 42 of the 2017 SC as it does not appear in Article 33 of the 1996 Convention.

66. The SC may want to consider whether additional information should be

provided in the Country Profile for the 1996 Convention in addition to what appears under Sections 16 to 19 and 36 of the draft Country Profile to assist with the implementation of Article 33.

67. The SC may want to consider developing a Guide, illustrated by examples, to assist Contracting States with the implementation and operation of Article 33. In addition to covering issues relating to the scope of application of Article 33, the Guide could cover the different issues of procedure relating to Article 33 as presented in this Prel. Doc. Such a Guide would raise awareness as to the mandatory nature of Article 33. The SC may wish to recommend that such a Guide be developed by a Working Group.

68. The SC may want to consider the need to develop a model recommended form for the purpose of requests under Article 33.

The conclusions suggested in this document are very much needed, in particular given that the operation of Article 33 of the 1996 Convention in the Contracting States is far from ideal (the FAMIMOVE project is studying this Article in the context of kafala).

The Guide to Good Practice on the grave risk exception (art. 13(1)(b)) under the Child Abduction Convention – pointing to a mistake in the Guide

- Info. Doc. No 6 of October 2023 – "A mistake waiting to happen: the failure to correct the Guide to Good Practice on Article 13(1)(b)" – Article by Professor Rhona Schuz and Professor Merle Weiner. I fully endorse the position adopted by Professors Schuz and Weiner and have included my views on this issue in a previous post see here and have discussed this at length in my recent book on international child abduction.

The Note of the International Social Service (ISS) where it highlights (perhaps rightfully), among other things, that the Malta Process and the Central Contact Points are underutilized

- Info. Doc. No 1 of February 2023 – ISS – General information & Response to Prel. Doc. No 2 of October 2022

The Note of the International Association of Child Law Researchers

showcases the new publication *Research Handbook on International Child Abduction: The 1980 Hague Convention* (Cheltenham: Edward Elgar Publishing, 2023) – We will be preparing a book review, which will be posted on CoL – stay tuned!

- Info. Doc. No 4 of September 2023 – International Association of Child Law Researchers (IACLaR) – Observer Note