SC 1980 ABDUCTION & 1996 CHILD PROTECTION

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Title	**Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim**
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Author	PB
Agenda Item	Item TBD
Mandate(s)	C&R No 19 of CGAP 2023
Objective	- To provide background information on return applications under the 1980 Child Abduction Convention where the taking parent lodged a parallel asylum claim - To suggest items for discussion at the Eighth Meeting of the Special Commission with the goal of eventually adopting Conclusions and Recommendations on this topic
Action to be Taken	For Decision ☐ For Approval ☐ For Discussion ☒ For Action / Completion ☐ For Information ☐
Annexes	Annex I - Selected case law on return applications under the 1980 Child Abduction Convention where a parallel asylum claim was lodged
Related Documents	Prel. Doc. No 4 of January 2023 - Questionnaire on the Practical Operation of the 1980 Child Abduction Convention

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Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim

I. Background

1 Some Contracting States under the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (1980 Child Abduction Convention or 1980 Convention) have reported to the Permanent Bureau (PB) of the HCCH on the challenges of processing return applications in international child abduction cases falling within the scope of the 1980 Convention when such cases run in parallel to asylum claims lodged by the taking parent and / or by the child concerned. Such asylum claims trigger mechanisms of protection of asylum-seekers under the *UN 1951 Convention relating to the Status of Refugees* (1951 Refugee Convention) and its 1967 Protocol[1], which include protection against *refoulement*.[2]

2 Therefore, these international instruments would simultaneously apply to such cross-border situations involving a child and provide two different parallel proceedings:

- one, concerning the request for the return of the child to the State of habitual residence (return applications), and
- the other, concerning the determination of refugee status and guaranteeing asylum-seekers protection (asylum claim).

3 Instances in which these two different parallel proceedings take place simultaneously or impact one another could still be seen as rare. In many, if not most return applications under the 1980 Child Abduction Convention, the taking parent and often the child are nationals of the requested State and thus would not lodge an asylum claim there.

4 In addition, one parent opposing the action of the other parent of seeking international protection together with the child may be less likely in situations of a generalised risk of persecution, indiscriminate violence, serious human rights violations and other risks of serious harm at the hands of State authorities or non-State actors outside the family context (e.g., non-State armed groups). For example, the removal of a child from a war zone may well not meet opposition. The situation envisaged in this discussion paper might often be one where the taking parent and / or the child seeks international protection against an individualised risk of harm amounting to persecution (*e.g.*, asylum claims based on intrafamily violence, gang violence, gender, sexual orientation and / or gender identity and the lack of State protection against such types of harm[3]).

5 Against the background of this discussion and in preparation for the Eighth Meeting of the Special Commission (SC) to be held in October 2023, the PB inserted Question 39 in the Questionnaire on

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1 1967 Protocol relating to the Status of Refugees adopted on 16 December 1996 by the UN General Assembly in Resolution 2198 (XXI).

2 According to the UNHCR, "The core principle of the 1951 Convention is *non-refoulement*, which asserts that a refugee should not be returned to a country where they face serious threats to their life or freedom" (extracted from: https://www.unhcr.org/uk/about-unhcr/who-we-are/1951-refugee-convention). The PB is grateful to the UNHCR for their comments on this discussion paper.

3 See UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and / or its 1967 Protocol relating to the Status of Refugees, para. 15, "Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation could, for example, be analysed in this context."

the Practical Operation of the 1980 Convention (hereinafter, 2023 Questionnaire)[4]: "Has your State faced any challenges, or have questions arisen, in processing international child abduction cases where there was a parallel asylum claim lodged by the taking parent?". Nineteen States reported having faced challenges of a procedural or substantive nature, including, among others:

a. issues regarding the confidentiality of the asylum claim, which include, but are not limited to, challenges concerning exchanging information between Central Authorities and the extent to which courts seised with a return application can obtain updates on the status of the asylum claim;

b. the stay of return proceedings under the 1980 Convention until the asylum claim is decided, generating long delays in deciding and / or enforcing the return;

c. the determination of the wrongful character of the removal under the 1980 Convention when a parallel asylum claim is pending; and

d. overall, divergence in the approaches of courts deciding on applications for return under the 1980 Convention when a parallel asylum claim is pending decision.

6 Previous SC meetings have not discussed this topic. With this discussion paper, the PB intends to provide the necessary information for the participants of the upcoming SC meeting to discuss this topic with the goal of eventually adopting Conclusions and Recommendations (C&R) that will help Central Authorities and courts deal with return applications under the 1980 Convention that run in parallel to asylum claims.

II. Applicable Frameworks

7 Different international instruments recognise, protect and give effect to children's rights as enshrined in the UN 1989 Convention on the Rights of the Child (CRC). Altogether, these instruments form a comprehensive framework that provides for a set of rules and mechanisms that apply to specific situations affecting children. Both the 1980 Child Abduction Convention and the 1951 Refugee Convention and its 1967 Protocol can be considered as part of this framework. The first, by safeguarding the right of the child to maintain contact with both parents (Arts 9 and 10 of the CRC) and addressing the civil aspects of international child abduction by providing a mechanism that aims to protect the child from its harmful effects. Thus, giving effect, in particular, to Article 11 of the CRC (right to protection from illicit transfer and non-return of children abroad).[5] The latter two, by establishing a universal refugee protection regime which includes guaranteeing protection against *refoulement* and the recognition of fundamental rights of refugees, which, in the case of

4 "Questionnaire on the Practical Operation of the 1980 Child Abduction Convention", Prel. Doc. No 4 of January 2023, available on the HCCH website at www.hcch.net under "Child Abduction Section" then "Special Commission meetings" and "Eighth Special Commission meeting (October 2023)".

5 See Z. Vaghri, G. Kotze (2022), "Article 11: The Right to Protection from Illicit Transfer and Non-return of Children Abroad", in Z. Vaghri, J. Zermatten, G. Lansdown, R. Ruggiero (eds), *Monitoring State Compliance with the UN Convention on the Rights of the Child. Children's Well-Being: Indicators and Research*, Vol. 25, Springer, Cham. https://doi.org/10.1007/978-3-030-84647-3_16, p. 146: "This Article [11] overlaps with Article 35, which is also meant to prevent abduction of children for any purpose or in any form it might occur. However, the focus of Article 11 is distinct from that of Article 35 in two ways. First, Article 11 focuses only on international abduction, whereas trafficking and other forms of exploitation may occur within a state. Second, even though it does not refer to the identity of the abductor, encompassing as a consequence both parental and non-parental abductions, based on its drafting history it is clear that Article 11 relates primarily to parental abduction of children for personal rather than monetary or exploitative reasons (Tobin *et al*., 2019, p. 370). Paragraph 2 of Article 11 specifically requires that States Parties have an absolute obligation (using the imperative term 'shall') to promote the conclusion of international agreements to combat the illicit transfer and non-return. States Parties must therefore seek to create and join binding legal instruments that promote international co-operation to counter child abduction. These include regional instruments such as the Inter-American Convention on the International Return of Children. The principal international private law instrument in relation to Article 11 implementation is the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Abduction Convention) […]."

children, should be applied in consistency with the CRC, in particular giving effect to Article 22 (right to protection for refugee and asylum-seeking children).

8 It should be noted that these international frameworks, notwithstanding their different objectives, do not operate in a vacuum but are connected to each other in practice as part of a child protection system. The 1980 Child Abduction Convention and the 1951 Refugee Convention with its accompanying Protocol may be the subject of different implementing legislations, and, in the great majority of States, have two different competent authorities / entities responsible for each of these issues. However, authorities may have to coordinate within the framework of a child protection system so as to provide timely and effective protection of children in vulnerable situations. In all actions concerning children, guiding CRC principles such as the best interests of the child have transversal application and extend beyond each particular field and context of application (see section C, Best interests of the child considerations).

9 Despite inherent differences among States in how they function within the child protection system, it could generally be stated that child protection may be triggered in different ways and for different purposes, for example, to deal with urgent situations (*e.g.*, violence, abductions) and provide provisional measures of protection, and to secure the enjoyment of rights granted by the CRC through medium to long-term measures of protection (*e.g.*, relocation, custody arrangements). Against this backdrop, the following sections highlight some essential elements of return applications and asylum claims with the intention to underpin the differences in these proceedings in light of their different scopes, bearing in mind that the long-term situation affecting the child is not necessarily resolved or terminated by any of these proceedings.

A. 1980 Child Abduction Convention & Return Applications

10 One of the objectives of the 1980 Child Abduction Convention is to secure the prompt return of children wrongfully removed to or retained in any Contracting State to the State of their habitual residence (Art. 1). In order to achieve this object, the Convention establishes a mechanism in which administrative and judicial authorities are designated to discharge the duties imposed by the Convention and shall cooperate with each other and take all appropriate measures to fulfil its objects.

11 The summary nature of return application proceedings is established in different provisions of the 1980 Child Abduction Convention (Arts 2, 11 and 12) and has been reaffirmed by various C&R of past SC meetings.[6] The 1980 Convention establishes a desirable timeframe of six weeks for a decision to be reached concerning the return application, and the relevance of expeditious proceedings has been emphasised as essential in *all* phases of the process of a return application.[7]

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6 See "Report of the Second Special Commission Meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, held 18-21 January 1993", Conclusion 7 (1993 SC), "Delay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody.", available on the HCCH website at www.hcch.net under "Child Abduction Section" then "Special Commission meetings" and "Second Special Commission meeting (1993)".

7 See Permanent Bureau of the HCCH, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, *Part VI – Article 13(1)(b)*, The Hague, HCCH, 2020, para. 21, "The duty to return the child forthwith is reinforced by Article 11 which requires that competent courts or authorities should act expeditiously in proceedings for the return of children and that, if a decision has not been reached within six weeks from the commencement of the proceedings, there is a right to request a statement of the reasons for the delay. There is a "double aspect" to this duty: "firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.", available on the HCCH website at www.hcch.net under "Child Abduction Section", then "HCCH Publications" (hereinafter, Guide to Good Practice on Article 13(1)(b)).

12 However, the duty to return a wrongfully removed or retained child to their State of habitual residence can be lifted if one of the exceptions established by the 1980 Child Abduction Convention is present. The exception to return established by Article 13(1)(b) is the most relevant one against the context of this discussion paper. In cases where it is established that there is a grave risk that the return of the child would expose them to physical or psychological harm or otherwise place them in an intolerable situation, the judicial or administrative authority of the requested State is not bound to order the return of the child forthwith. Article 13(1)(b), therefore, is aimed at protecting children in the different circumstances that can surround an international child abduction case. In the context of an international child abduction return application, taking parents have at times raised the Article 13(1)(b) defence when they have a pending asylum claim running in parallel.

13 In the evaluation of an allegation under Article 13(1)(b), and considering that the 1980 Child Abduction Convention establishes summary proceedings, it has been noted in the Guide to Good Practice on Article 13(1)(b) that the "duty to act expeditiously does not mean that the court should neglect the proper evaluation of the issues".[8] However, the scope and nature of child abduction applications under the Convention do require a focused, targeted examination of the relevant information so that the authority can decide on the case in an expeditious manner.[9]

14 It is for the person opposing the child's return to the State of habitual residence to present evidence to satisfy the court that the exception under Article 13(1)(b) is established. Therefore, the burden of proof under this exception rests on the taking person (*i.e.*, the person who is claiming asylum). The taking person should establish the grave risk in a forward-looking manner, that is, by looking to the circumstances of the child upon return. The competent authority deciding on the return can contemplate, if adequate and appropriate, the availability of protection measures[10] that might protect the child from the grave risk upon return.[11]

15 Article 20 of the 1980 Child Abduction Convention authorises the judicial or administrative authority to refuse to order the return of the child if such return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. According to the Explanatory Report of the Convention[12], the text of Article 20 was adopted as a result of a compromise between different delegations about whether to include or not a public policy clause in the Convention. The majority of delegations agreed to adopt the final text of Article 20 because "the reference to the fundamental principles concerning the protection of human rights and fundamental freedoms relates to an area of law in which there are numerous international agreements".[13] There is not yet specific guidance on the application and

8 *Ibid*. para. 22.
9 *Ibid*.
10 Also known as ameliorative measures in some States.
11 See paras 35-37 and 43-48 of the Guide to Good Practice on Article 13(1)(b) (*op. cit.* note 7).
12 E. Pérez Vera, *Explanatory Report on the HCCH 1980 Child Abduction Convention*, The Hague, 1981, available on the HCCH website at www.hcch.net (see path indicated in note 7) (hereinafter, Explanatory Report).
13 *Ibid*., para. 33. See also para. 118: "It is significant that the possibility, acknowledged in article 20, that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the last article of the chapter: it was thus intended to emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either thought general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognised fundamental principles in internal laws. A study of the case law of different countries

uniform interpretation of Article 20, but it could generally be asserted that courts have applied it on rare occasions.[14] Article 20 has been raised in the context of return applications where the taking parent lodged an asylum claim which ran in parallel, in particular in the situation in which refugee status was already granted.[15]

B. 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol & Asylum Claims

16 This discussion paper makes references to asylum claims and the basic framework provided by the 1951 Refugee Convention and its 1967 Protocol.[16] The topic of international protection of displaced persons, however, is much broader and encompasses in its legal framework other regional instruments such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, as well as international and regional human rights instruments.[17] Therefore, in practice, cases where the taking parent and / or the child lodged an asylum claim in parallel to a return application could require the inclusion of other legal instruments that are not contemplated in this paper.

17 Article 33(1) of the 1951 Refugee Convention introduced the core refugee law principle of *non-refoulement*, which prohibits States from returning individuals in any manner whatsoever (whether directly or indirectly) to territories where they may be at risk of persecution. This principle has evolved also as a core concept of international human rights law, prohibiting the transfer of any person to a country where this would result in exposing him or her to a risk of torture or other serious human rights violations, as well as humanitarian and customary law.[18] The protection against *refoulement* extends to all persons including asylum-seekers while their asylum claim is pending final decision.[19]

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shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view."

14 See "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Child Abduction Convention (22-28 March 2001)", C&R No 4.5 (2001 SC), "The Special Commission notes that there have been very few reported cases in which a return order has been refused on the basis of Article 20.", available on the HCCH website at www.hcch.net under "Child Abduction Section" then "Special Commission meetings" and "Fourth Special Commission meeting (2001)". See also *Rosasen v. Rosasen* (U.S. 9th Cir. Jan. 9, 2023), where this exception was found by the court to be invoked only "on the rare occasion that the return of a child would utterly shock the conscience of the court or offend all notions of due process".

15 See *A.M.R.I. v. K.E.R.*, 2011 ONCA 417 (Ont. C.A.); *G v. G* 2021 UKSC 9; *Salami Ajami v Tescari Solano*, 20-5283 (U.S. 6th Circuit).

16 The following Contracting States to the 1980 Child Abduction Convention are not Contracting States to the 1951 Convention: Barbados, Cabo Verde, Guyana, Iraq, Mauritius, Pakistan, San Marino, Singapore, Sri Lanka, Thailand, United States of America, Uzbekistan, and Venezuela. Cabo Verde, United States of America and Venezuela, however, are Contracting States to the 1967 Protocol and are therefore also bound by the provisions of the 1951 Convention.

17 "The treatment of refugees and asylum seekers within a state is governed not only by the refugee treaties, but also by the broader human rights treaties (and even rules of customary international law), which set out general standards, whether of a procedural or substantive nature (*e.g.*, the requirement that a remedy be provided for every violation of human rights; or the duty of a state to protect everyone within its territory or jurisdiction from torture)", in G.S. Goodwin-Gill, "The International Law of Refugee Protection", E. Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (2014; online ed., Oxford Academic, 4 Aug. 2014), p. 43.

18 UNHCR, Note on International Protection, 1993, A/AC.96/815, available at: www.refworld.org/docid/3ae68d5d10.html. Elihu Lauterpacht and Daniel Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion, in Erika Feller, Volker Türk and Frances Nicholson (eds), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, June 2003, Cambridge University Press, available at: www.refworld.org/docid/470a33af0.html, pp. 87–177.

19 According to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Geneva, 2019), pp. 42-43 (hereinafter, UNHCR Handbook), concerning basic requirements recommended to procedures by the Executive Committee of the High Commissioner's Programme, at its twenty-eighth session in October 1977, "vii. The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above [the authority responsible for examining requests for refugee status and taking a decision in the first instance], unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending".

18 The 1951 Refugee Convention and its 1967 Protocol do not establish a specific procedure for Contracting States to hear and decide on asylum claims.[20] States can process asylum claims in different ways depending on how their domestic legislation, if existing, implements applicable refugee protection instruments and provides for specific proceedings. For instance, some States process asylum claims within an administrative system established in special departments and Ministries; some create special boards or committees comprising a mix of State and non-State representatives, and parts of the proceedings can be carried out by specialised immigration courts.[21] Thus, the issues surrounding a situation in which an asylum claim was lodged in parallel with a return application under the 1980 Child Abduction Convention may significantly vary from jurisdiction to jurisdiction.

19 In general terms, however, the legal nature and purpose of proceedings for asylum claims distinguishes them significantly from return applications under the 1980 Child Abduction Convention:

- The process leading to a determination of refugee status has two main stages, the first is meant to establish the facts of the case and the second to apply the legal framework to such facts.[22]
- The proceedings, which can be the subject of an appeal procedure, are non-adversarial in nature because their purpose is to *declare* the recognition of a status of refugee, which, when existent, precedes the submission of the claim.[23] Furthermore, because of the nature of the claim and the requirement of confidentiality (see also below) it would be inappropriate for the asylum authorities to contact the left-behind parent and / or a representative of the State the applicant is seeking refuge from with a view to enabling them to make representations (*e.g.*, against the asylum claim).
- The burden of proof in an asylum claim lies, in principle, with the applicant, but "the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner".[24] This understanding can be justified by the "special situation in which an applicant for refugee status finds himself"[25], but which still requires the presentation of credible, supported statements. It may be necessary that the examiner conduct several interviews with the applicant in order to ascertain the facts of the case.

20 To protect the security of the asylum applicant, as well as of the applicant's family members, States process asylum claims with strict rules of confidentiality. Confidentiality is required to prevent sharing of personal information concerning the applicant between government entities and, very strictly, between the State in which the person is seeking asylum and the State from which the

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20 *Ibid*. p. 42: "[…] [T]he Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure."

21 See C. Harnois (2019), "1980 Hague Convention on the Civil Aspects of International Child Abduction: The Impact of a Refugee Claim or the Grant of Refugee Status on a Hague Return Application", *Canadian Family Law Quarterly*, 38(2), pp. 121-147.

22 According to the UNHCR Handbook (*op. cit*. note 19), "29. Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained" (p. 17). Refugee Status Determination (RSD) can be conducted by the States or by the UNHCR in some cases.

23 *Ibid.,* p. 17: "28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee."

24 *Ibid.*, para. 196, p. 43.

25 *Ibid.*, para. 197, p. 44.

person is fleeing.[26] However, there are special circumstances that allow States, according to their laws, and subject to the consent of the applicant, to release some pieces of information pertaining to an asylum claim with other government agencies or local courts.[27]

21 According to the 1951 Refugee Convention and its 1967 Protocol, there is no specific timeline to which refugee determination proceedings need to adhere. It has been frequently reported that, in many States, a decision on the recognition of refugee status takes at least several months. The reason for such extended timeframes may include factors such as the need to schedule multiple fact-checking interviews with the applicant, issues with document verification and, depending on the available resources, lack of sufficient personnel to deal with the high number of asylum claims.

C. Best interests of the child considerations

22 The right of the child to have their best interests taken as a primary consideration, as established and protected by the CRC, is pivotal in such discussions where different international instruments apply, and a balance has to be reached between different provisions that ultimately aim to protect the child. According to General Comment No 14 (2013) of the UN Committee on the Rights of Children, the concept of the child's best interests is threefold. It comprises: (a) a substantive right of the child to have his or her best interests assessed and taken as a primary consideration; (b) a rule of procedure for decision-making processes concerning children; and (c) a fundamental, interpretative legal principle. It has furthermore to be applied in connection with the other general principles of the CRC (non-discrimination; right to life, survival and development; and right to be heard).[28]

23 When a best-interests assessment is to be carried out and followed by a determination in this regard, the specific circumstances of the individual child will need to be considered. Elements such as the child's views, their particular identity, the preservation of the family environment and maintaining relations (including the preservation of the wider ties of the child),[29] the child's protection, care and safety, and the child's right to health and education are to be balanced in the consideration.[30] It is of particular importance to the matter discussed in this paper to mention that an eventual situation of vulnerability of the child is an important element to be considered in the assessment because it encompasses both the situation of an abducted child and an asylum-seeker child and thus, the inclusion of the special frameworks and mechanisms of protection. General Comment No 14 also indicates procedural safeguards to guarantee the practical implementation of the child's best interests, which include, among others, appropriate legal representation in judicial or administrative proceedings in particular when there is a potential conflict between the parties involved.[31]

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26 See, for example, the recommendations in "Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection", *IACHR*, OAS, 2020, p. 89. See, also, the UK Home Office guidance on "Disclosure and confidentiality of information in asylum claims", Version 2.0, published for Home Office staff on 26 August 2022.

27 See, for example, the recommendations in *Practical Guide on Information Provision – Access to the asylum procedure*, European Union Agency for Asylum (EUAA), 2023, p. 61.

28 See General Comment No 5 (2003) of the UN Committee on the Rights of the Child on General measures of implementation of the Convention on the Rights of the Child (Arts 4, 42 and 44, para. 6), 27 November 2003, CRC/GC/2003/5, available at: https://www.refworld.org/docid/4538834f11.html

29 See General Comment No 14 (2013) of the UN Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: https://www.refworld.org/docid/51a84b5e4.html, para. 68, "The Committee encourages the ratification and implementation of the conventions of the Hague Conference on Private International Law, which facilitate the application of the child's best interests and provide guarantees for its implementation in the event that the parents live in different countries."

30 *Ibid.*, paras 52-84.

31 *Ibid.,* paras 96.

24 Under both the 1980 Child Abduction Convention and the 1951 Refugee Convention and its 1967 Protocol, the discussion about the analysis of the best interests of the child has often been raised. The 1980 Convention indicates in its preamble the conviction of signatory States of the paramount importance of the interests of children in matters relating to their custody, which is considered precisely the reason why the Convention was adopted.[32] The prompt return of the child to the State of habitual residence as established in the Convention is assumed to be in the best interests of the child as the main measure to protect them from the unlawful removal or retention, unless one of the exceptions established by the Convention applies.[33] Previous meetings of the SC have discussed the best interests of the child in light of particular case law,[34] but not yet in a more general way to address the application of the principle to child abduction cases.[35]

25 In the case of asylum claims, the UNHCR has established *Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child,*[36] which is informed by CRC General Comment No 14 and the UNHCR's years of experience applying the best interests principle in its

32 For more information on the drafting history of the Convention on this point, please see the Explanatory Report (*op. cit.* note 12), paras 22 and 23: "[…] it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched. For these reasons, among others, the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely because of this conviction that they drew up the Convention […]."

33 *Ibid.*, para. 25: "It is this legitimate to assert that the two objects of the Convention - the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment – both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore, the Convention recognises the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area."

34 See C&R No 17 of the "Conclusions and Recommendations of the Seventh Meeting of the Special Commission on the practical operation of the 1980 and 1996 Child Protection Conventions" (C&R of the 2017 SC), concerning *X. v. Latvia*: "Following Conclusions and Recommendations Nos 48 and 49 of the Sixth Meeting of the Special Commission in 2011 (Part I), the Special Commission notes the subsequent developments in *X. v. Latvia*, in particular the Court's assessment under the title 'General principles' (paras 92-108), in which the Grand Chamber of the European Court of Human Rights stated, *inter alia*, that 'in the context of an application for return made under the Hague Convention, which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention [references to Arts 12, 13, and 20 of the Hague Child Abduction Convention]' (Grand Chamber, No 27853/09, 26 November 2013, para. 101; see also para. 107 where the Grand Chamber stressed that these 'exceptions must be interpreted strictly')," available on the HCCH website at www.hcch.net under "Child Abduction Section" then "Special Commission meetings" and "Seventh Special Commission meeting (October 2017)".

35 It is to be noted that the *Inter-American Model Law on Procedure for the application of the Conventions on International Child Abduction*, developed by a group of experts coordinated by the HCCH and the Inter-American Children's Institute, provides that "[t]he guiding criterion regarding interpretation and – where applicable – integration, shall be that of best interests of the child, which, for the purpose hereof, means the right of the child not to be wrongfully retained or removed and to have the issue of the rights of custody determined before the Court of the States of his/her habitual residence, to remain in close contact with both parents and the families thereof, and to obtain a speedy determination of return or international access applications."

36 2021 Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child, available at Refworld (https://www.refworld.org/docid/5c18d7254.html), updating the 2008 Guidelines on Determining the Best Interests of the Child. The guidelines contain a section dedicated to parent's separation and custody rights (item 4.3.5) and contains a checklist for best interests determination for unresolved custody issues. It mentions the 1980 Child Abduction Convention in providing specific considerations relating to custody in the context of resettlement.

operations. UNHCR has also established general recommendations to protect child asylum-seekers.[37]

III. Trends in recent case law concerning return applications

26 Case law is still evolving on this topic but some trends can be observed in States where courts deal more often with the issue,[38] essentially because those are States that process a high number of incoming asylum claims yearly.[39] Some common facts across cases can impact the decision on the return application, such as:

- the moment at which the asylum claim was lodged;
- who are the applicants of the asylum claim (whether the taking parent submits the claim solely, together with the child, or on behalf of the child, or if the child is the sole applicant);
- the allegation substantiating the asylum claim (*e.g.*, domestic abuse by the left-behind parent, discrimination suffered by the taking parent in the State of habitual residence based on sexual orientation, and whether the risk of harm was directed at the child or at the taking parent);
- whether it would amount to the exceptions under Articles 13(1)(b) and 20 of the 1980 Child Abduction Convention; and
- the availability and the effectiveness of the protection offered in the State of habitual residence.

27 Courts have generally taken different approaches concerning ordering the return of the child in cases where a refugee status was granted. In cases where the decision on the asylum claim was pending or under review, courts have sometimes decided to stay the proceedings of the return application until a decision concerning the asylum claim was reached. In many cases, however, courts moved forward with the processing of the return application and ordered the return but conditioned its enforcement on the decision on the asylum claim. In some other cases, courts ordered the return without any caveat on the enforcement. Although courts seem to evaluate claims based on consistent factors, the importance given to each respective factor seems to vary, even within the same jurisdiction, as demonstrated by the wide variety of outcomes.[40] Different views on the competence of the authorities deciding on each respective proceeding, and to what extent they overrule each other, have also been discussed in connection with each State's structures for processing asylum claims.

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37 See Guidelines on international protection No 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and / or 1967 Protocol relating to the Status of Refugees. Concerning Arts 3 and 22 of the CRC, see also C. Whalen (2022), "Article 22: The Right to Protection for Refugee and Asylum-Seeking Children", Z. Vaghri, J. Zermatten, G. Lansdown, R. Ruggiero (eds), *Monitoring State Compliance with the UN Convention on the Rights of the Child. Children's Well-Being: Indicators and Research*, Vol. 25. Springer, p. 360: "The overarching consideration in implementation of child refugee claims under Article 22 will always be the bests interests of the individual child or children in the case (Ceriani Cernadas, 2015 p. 339; Vučković-Šahović *et al*., 2012, p. 332). This basic principle must be respected during all stages of the displacement cycle, and decisions at any of these stages must be appropriately documented through a formal and rigorous best interests determination (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, paras. 27–33; UN Committee on the Rights of the Child, 2005a, paras. 19–22). The Committee has emphasised in particular that 'the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with their own migration status' (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and UN Committee on the Rights of the Child, 2017a, paras. 27–33; UN Committee on the Rights of the Child, 2005a, paras. 19–22)."

38 See Annex I – "Selected case law on return applications under the 1980 Child Abduction Convention where a parallel asylum claim was lodged".

39 The PB acknowledges that other States not mentioned in this section also have developed or are in the process of developing case law in this topic, some of which were mentioned in the responses to the 2023 Questionnaire.

40 See C. Harnois (*op. cit*. note 21), pp. 121-147.

A. Canada

28 Canadian Courts hearing return applications under the 1980 Child Abduction Convention have generally found that parallel asylum claims should not delay nor prevent the processing of return applications, which would jeopardise the objects and purpose of the 1980 Convention.[41] They have also considered the existence of an asylum claim or granting of refugee status as a relevant when applying the exceptions under the 1980 Convention (e.g., settlement of the child in the new environment under Article 12(2) or grave risk exception under art. 13(1)(b)).[42]

29 In A.M.R.I. v. K.E.R.,[43] concerning a child who had been granted refugee status, the Court of Appeal for Ontario examined the interplay between the 1980 Child Abduction Convention and the Canadian legislation implementing the 1951 Refugee Convention, ruling that "properly interpreted, the Hague Convention contemplates respect for and fulfilment of Canada's non-refoulment obligations",[44] and that Articles 13(1)(b) and 20 of the 1980 Convention would provide for the necessary protection required in instances in which the principle of *non-refoulement* applies. More specifically, the court concluded that "[a] finding of refugee status accorded by the IRB [Immigration Refugee Board] to a child affected by a Hague Convention application gives rise to a rebuttable presumption that the removal of the child from Canada will expose the child to a risk of persecution, that is, to a risk of harm".[45]

B. United States of America

30 Case law from the USA tends to follow similar trends as reported above concerning requests for delaying or suspending the processing of the return application.[46] Cases analysed make no mention of the *non-refoulement* principle and limit decisions of return to the principles outlined in the 1980 Child Abduction Convention.

31 In surveying recent cases involving asylum claims, courts do not appear to consider refugee status separately from the general return application. In such cases, courts have entertained possible exceptions to return, including Article 12(2) and Article 13(1)(b) exceptions, and analysed the facts surrounding any outstanding asylum claim within the context of the alleged exception. In cases dealing with the Article 13(1)(b) grave risk exception, courts distinguished between the evidentiary burden of proof compared to that of an asylum claim.[47] Courts have reiterated that return proceedings under the 1980 Child Abduction Convention are merely jurisdictional and do not make concrete recommendations surrounding the granting of refugee status or custody; however, similar factors are considered across these different proceedings.[48]

32 In cases involving domestic violence by the left-behind parent, courts affirm that the taking parent must show that the risk of harm extends to the child, or that the history of abuse is so extreme and visible to create negative impacts on the child, either physically or mentally.[49] Courts have generally required substantial evidence for this to be met.[50] While the court is not obligated to explore the

41 *Kovacs v. Kovacs, 2002 CanLII 49485 (ON SC)*; *Aza v. Zagroudnitski, 2014 ONCJ 293; Toiber v. Toiber, 2005 CanLII 63821 (ON SC) (affirmed in Toiber v. Toiber, 2006 CanLII 9407 (ON CA)), Singh v. Kaur, 2022 MBQB 46.*

42 See C. Harnois (*op. cit*. note 21), pp. 121-147.

43 A.M.R.I. v. K.E.R., 2011, ONCA 417. UNHCR intervened in A.M.R.I. v. K.E.R., see UNHCR intervention before the Court of Appeal of Ontario in the case of A.M.R.I. v. K.E.R., 21 March 2011, Court File No C52822, available at Refworld: https://www.refworld.org/docid/4d889b392.html

44 A.M.R.I. v. K.E.R., 2011, ONCA 417, para. 68.

45 *A.M.R.I v. K.E.R*. (*op. cit*. note 44) para. 87. See also *Borisovs v. Kubiles*, 2013 ONCJ 85.

46 *Garcia Meza v. Agrella Diaz*, *Mendonza v. Esquivel* – referenced in C. Harnois (*op. cit*. note 21).

47 *Miltiadous v. Tetervak*, 686 F. Supp. 2d 544.

48 *Palencia v. Perez*, 921 F.3d 1333.

49 *Ischiu v. Garcia*, 274 F. Supp. 3d 339; Jacquety v. Baptista, 2020 U.S. Dist. LEXIS 186179.

50 *Arguelles v. Vasquez* (In re Hague Child Abduction Application), 2008 U.S. Dist. LEXIS 97048.

merits of claims of abuse as would be required in a custody hearing, the court may refuse to grant a grave risk exception in cases where the evidence of abuse is inconclusive or not credible.[51]

33 In cases involving the Article 12(2) exception, asylum or citizenship status has been an instructive but not decisive criterion to establish the exception.[52] Courts have understood that without the ability to prove that the child and taking parent may legally continue residing in the new State, it is nigh on impossible to prove that the child is well-settled.[53] Courts have also considered factors such as the amount of time spent in the new location, the amount of time spent in the pre-removal location, the connections with the community in the new location, and potential negative impacts on the child by removing them from that location.[54]

34 In the rare cases where return was not required, the taking parent was generally able to make a strong case under the exception of Article 12(2) or under the Article 13(1)(b) grave risk exception. Courts have confirmed that a grant of refugee status does not supersede a return order, nor does it confer a right to remain in the country.[55] US courts appear to remain loyal to the presumption for prompt return of the child, as prompt resolution takes priority over staying an application because of adjacent or parallel proceedings determining legal residence.[56]

C. United Kingdom

35 Recent case law from the Supreme Court of the United Kingdom examined in a comprehensive way the situation in which an asylum claim runs in parallel with a child abduction return application, including by making suggestions for coordination and expedition of the different proceedings.[57] In this case (*G v. G*), the Secretary of State for the Home Department, the UNHCR and other associations and NGOs intervened in the proceedings. The decision of the Supreme Court confirmed the understanding that return applications under the 1980 Child Abduction Convention can be decided regardless of a pending asylum claim. However, enforcement would depend on its outcome. The decision aligned with previous England and Wales case law deciding that in cases where refugee status was granted, ordering return under the 1980 Convention was not possible.[58] Other earlier cases indicated that the granting of refugee status or a pending asylum claim would not prevent ordering the return of the child. However, these cases were dealing with non-Contracting States to the 1980 Child Abduction Convention.[59]

36 According to the decision of the Supreme Court, the asylum claim lodged by a taking parent extends to their dependent children.[60] In particular the Supreme Court took into account the complexities of having asylum claims lodged by the taking parent, lodged by the child, and the status of the asylum claim (status granted, pending decision or pending review of a negative decision), by indicating relevant nuances and differentiating into four categories of children.

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51 *Uzoh v. Uzoh*, 2012 U.S. Dist. LEXIS 61112.
52 *Karim v. Nakato*, No 21-11458-WGY, 2022 U.S. Dist. LEXIS 90969 (D. Mass. May 20, 2022).
53 *Hernandez v. Erazo*, 2023 U.S. Dist. LEXIS 58876.
54 *Figueredo v. Rojas*, No 3:22-cv-1268-TJC-LLL, 2023 U.S. Dist. LEXIS 67831 (M.D. Fla. Apr. 18, 2023); *Delgado v. Osuna*, 837 F.3d 571.
55 *Sanchez v. R. G. L.*, 761 F.3d 495 (5th Cir. 2014).
56 *Hernandez v. Reina*, 2016 U.S. Dist. LEXIS 195786.
57 *G v. G* 2021 UKSC 9, see para. 174 of the decision and Appendix Two, "Standard directions: problem areas and suggestions".
58 *FE v. YE* 2017 EWHC 2165 (Fam).
59 Re S (Child Abduction: Asylum Appeal) 2002 EWCA Civ 843 and Re H (Child Abduction: Mother's Asylum) 2003 EWHC 1820 Fam.
60 *G v. G* 2021 UKSC 9.

IV. Challenges

A. Delays

37 Considering the inherent differences in the nature of asylum proceedings and return applications under the 1980 Child Abduction Convention, the latter which establishes summary proceedings, one of the main challenges when such proceedings run in parallel is an inevitable delay in deciding on the return application. This would happen if the authority deciding on the return application does not or cannot make a decision while the asylum claim is pending. However, time is of the essence in the context of return applications under the 1980 Convention. If a certain amount of time has passed without a decision on the asylum claim, there might be a discussion about the settlement of the child in the new environment which, if raised in the context of the return application under Article 12(2), might result in the return of the child to their State of habitual residence not being possible and/ or in their best interests anymore. That would be in the case where the return proceedings would have commenced after the expiration of a period of one year from the date of the wrongful removal or retention. This situation could result in pre-empting a return application.

38 The return of a child to their State of habitual residence may also be delayed in the case where a return decision has been made but its enforcement has been stayed because of a pending asylum claim.[61]

B. Confidentiality

39 Under the 1980 Child Abduction Convention, Central Authorities have the duty to cooperate with each other and to exchange information where desirable. In cases where there is an asylum claim pending that concerns the taking person and / or the child, Central Authorities might find themselves in a challenging position in which they are not able to share or obtain information about the taking person and / or the child. It can also be challenging for Central Authorities to know if there is an asylum claim submitted on behalf of the child and to obtain information about the different stages of the asylum claim. The same issue can apply to judicial and administrative authorities in deciding return applications under the 1980 Child Abduction Convention.

C. Burden of proof differences

40 The burden of proof differs between proceedings under the 1951 Refugee Convention and its 1967 Protocol and return applications under the 1980 Child Abduction Convention. Such differences can make it challenging to analyse allegations raised under the exceptions of the 1980 Child Abduction Convention, when they are made in the two different proceedings and especially when information on one of the proceedings is not disclosed in the other. One of the questions that can be posed is the extent to which such questions could be analysed under the return application and to what extent they would affect or impact on the asylum claim, and vice-versa. For example, this would be relevant in cases of domestic / intrafamily violence allegations under Article 13(1)(b) that would also be the reason for an asylum claim.

D. Participation of the parties

41 Asylum claims do not involve the participation of interested parties as it is a non-adversarial proceeding. However, if such asylum claims are parallel to a return application under the 1980 Child Abduction Convention, it means that there is a left-behind parent who is against the removal or retention of the child to the State to which they have been taken or retained, and who

61 *Ibid.*

will not be able to express their views in the asylum proceedings about the separation between them and the child.[62] This, however, is important for confidentiality purposes and to protect the asylum-seeking parent and the child from serious harm, in particular in situations where the left-behind parent may be the persecutor (see paras. 19 and 20 above). Different approaches can be taken if the child is the sole claimant of refugee status or if the child is dependent on a parent or other person's refugee application.[63]

E. Other issues

42 In States where the abduction of a child by a parent is considered a criminal offence, the situation in which a return application runs in parallel with an asylum claim can give rise to other questions, such as if the abduction would raise issues of exclusion cause under Article 1 F of the 1951 Refugee Convention.[64] Under certain circumstances, the removal of a child to another country by one parent without the consent of the other may constitute a crime which, given its nature and seriousness, may justify the application of Article 1F(b), provided all other criteria under this provision are also met.[65] This would need to be assessed on a case-by-case basis, with rigorous procedural safeguards in place, and taking into consideration all relevant circumstances.[66] Another issue that can be raised is the role of the right to family life and maintaining or restoring family unity

62 See C. Harnois (*op. cit*. note 21) about Canadian case law: "In many cases, the Courts noted that both parents have the opportunity in a Hague case to present evidence concerning the possible risk to the child in returning to the State of habitual residence while before the immigration board, only the claimant, usually one parent only, and the Minister, or State authorities, can present evidence relevant to the assessment of that risk [*G.B. v. V. M*., 2012 ONCJ 745]. This is particularly important for example in cases where domestic abuse is raised as a ground for claiming asylum, where the left-behind parent is not a party to the refugee claim process and will not be heard by the Immigration and Refugee Board [*Kovacs v. Kovacs*, 2002, CanLII 49485]."

63 See UNHCR Handbook (*op. cit*. note 19), "219. If the will of the parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt."

64 See C. Harnois (*op. cit*. note 21).

65 See UNHCR Handbook (*op. cit*. note 19), "155. What constitutes a 'serious' non-political crime for the purposes of this exclusion cause is difficult to define, especially since the term 'crime' has different connotations in different legal systems. In some countries the word 'crime' denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a 'serious' crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as 'crimes' in the penal law of the country concerned. [...]". See also UNHCR, Guidelines on International Protection on the Application of the Exclusion Clauses (GIP No.5) (2003): "In determining whether a particular offence is sufficiently serious, international rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime" (para. 14).

66 See UNHCR Handbook (*op. cit*. note 19), "157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances." "158. Considerations similar to those mentioned in the preceding paragraphs will apply when a crime – in the widest sense – has been committed as a means of, or concomitant with, escape from the country where persecution was feared. [...]". See also UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (2003): "UNHCR recommends a holistic approach, which facilitates a full assessment of the factual and legal issues arising in potential exclusion cases, which are often complex, and which require an evaluation of the nature of the alleged crime and the applicant's role in it on the one hand, and of the nature of the persecution feared on the other. [...] The exceptional nature of Article 1F suggests requires that inclusion under Article 1A(2) is considered before exclusion, but there is no rigid formula" (paras. 99-100). "Factors generally considered to constitute defences to criminal responsibility should also be considered" (GIP No 5, para. 22). "As with any exception to a human rights guarantee, the exclusion clauses must be applied in a manner proportionate to their objective, so that the gravity of the offence in question is weighed against the consequences of exclusion" (GIP No.5, para. 24).

in the context of an asylum claim,[67] and the benefits of appointing an independent children's lawyer to represent the interests of the child possibly in both proceedings.[68]

V. Items for discussion during the 2023 SC meeting concerning possible ways to address the challenges

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.

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67 While the 1951 Refugee Convention and the 1967 Protocol do not refer directly to family unity, refugees are entitled to the right to family life under international human rights treaties, such as the Universal Declaration of Human Rights (10 December 1948) 217 A (III) (UDHR), Article 16(3); the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR), Article 23(1); the International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 (ICESCR), Article 10(1); and the Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (CRC), preambular para. 5 and Articles 9 and 10. The Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at which the Convention was adopted, considers "that the unity of the family … is an essential right of the refugee".

68 See para. 96 of the General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)(*op. cit*. note 29).

Annexes

Annex I - Selected case law on return applications under the 1980 Child Abduction Convention where a parallel asylum claim was lodged

	Case Name	Number/ Reference	Year	Instance/Court	Status of asylum claim at the time of decision	Decision	Exception applied	Requesting State
Canada	*Singh v. Kaur*	MBQB 46	2022	Court of Queen's Bench of Manitoba (Family Division)	Pending*	Return ordered	-	Italy
	Sabeahat v. Sabihat	ONSC 2784	2020	Ontario Superior Court of Justice	Refugee status granted	Return refused	Article 13(1)(b) and Article 20	Israel
	R.G. v. K.G. (N.)	NBQB 46	2019	Court of Queen's Bench of New Brunswick (Family Division)	Pending*	Return ordered	-	Israel
	Aza v. Zagroudnitski	ONCJ 293	2014	Ontario Court of Justice	Pending* (Request for resubmission after initial withdrawal)	Return ordered	-	France
	Borisovs v. Kubiles	ONCJ 85	2013	Ontario Court of Justice	Refugee status granted	Return refused	Article 13(1)(b) and Article 20	Latvia
	G.B. v. V.M.	ONCJ 745	2012	Ontario Court of Justice	Pending*	Return ordered	-	Hungary
	A.M.R.I. v. K.E.R.	ONCA 417	2011	Court of Appeal for Ontario	Refugee status granted	New Hague Convention hearing ordered (Appeal allowed)	-	Mexico
	Toiber v. Toiber	OJ No 1191 (QL)	2006	Court of Appeal for Ontario	Pending*	Return ordered	-	Israel
	Kovacs v. Kovacs	OJ No 3074 (QL)	2002	Ontario Superior Court of Justice	Pending*	Return refused	Article 13(1)(b)	Hungary
U.K.	*R v G*	EWHC 655 Fam	2022	High Court of Justice (Family Division)	Asylum claim deemed inadmissible with pending judicial review*	Return ordered	-	Italy
	G v G	2021 UKSC 9	2021	Supreme Court of the UK	Pending*	Return order cannot be implemented while the asylum application is pending (Case remitted to the Family Division for further consideration)	-	South Africa
	In re K	EWHC 2394 Fam	2020	High Court of Justice (Family Division)	Pending*	Direct contact refused	-	Russia

	FE v YE	EWHC 2165 Fam	2017	High Court of Justice (Family Division)	Refugee status not granted but pending appeal*	Return ordered subject to outcome in asylum application appeal proceedings	-	Israel
U.S.A.	*Figueredo v. Rojas*	U.S. Dist. LEXIS 67831	2023	United States District Court for the Middle District of Florida	Pending*	Return refused	Article 12(2)	Venezuela
	Hernandez v. Erazo	2023 U.S. Dist. LEXIS 58876	2023	United States District Court for the Western District of Texas (San Antonio Division)	No formal asylum claim	Return ordered	-	Mexico
	Karim v Nakato	U.S. Dist. LEXIS 90969	2022	United States District Court for the District of Massachusetts	Refugee status not granted	Return ordered	-	U.K.
	Salame Ajami v. Tescari Solano	29 F 4th 763	2022	United States Court of Appeals for the Sixth Circuit	Refugee status granted†	Return ordered	-	Venezuela
	Palencia v. Perez	921 F.3d 1333 LEXIS 12942	2019	United States Court of Appeals for the Eleventh Circuit	Pending*	Return ordered	-	Guatemala
	Ischiu v. Garcia	274 F. Supp. 3d 339	2017	United States District Court for the District of Maryland	Pending*	Return refused	Article 13(1)(b)	Guatemala
	Hernandez v. Reina	LEXIS 195786	2016	United States Court of Appeals for the Fifth Circuit	Pending* (CAT‡)	Return ordered	-	Honduras
	Sanchez v. R. G. L	761 F.3d 495	2014	United States Court of Appeals for the Fifth Circuit	Refugee status granted§	Case remanded to the district court	-	Mexico
	Uzoh v. Uzoh	2012 U.S. Dist. LEXIS 61112	2012	United States District Court for the Northern District of Illinois, Eastern Division	Refugee status not granted on a preliminary basis	Return ordered	-	U.K.
	Miltiadous v. Tetervak	686 F. Supp. 2d 544	2010	United States District Court for the Eastern District of Pennsylvania	Refugee status granted	Return refused	Article 13(1)(b)	Cyprus

* The status "pending" is derived from the information available in the judgments. It includes matters in which no determination had been made concerning the asylum claim and matters in which a decision regarding an asylum claim was subject to a pending appeal. In the latter cases, more detailed information about the appeal has been included when available. In cases in which the status of the asylum claim is noted as "pending" and a return order has been made, it appears from the decisions that the court understood that the asylum claim was not well-founded (for example, in cases in which the arguments presented in court about the asylum claim were contradictory or inconsistent).

† In *Salame Ajami v. Tescari Solano*, the court found that "[w]hile the factors that go into a grant of asylum may be relevant to determinations under the Hague Convention, the district court has a separate and exclusive responsibility to assess the applicability of an Article 13(b) affirmative defense" (page 9), and rejected the argument that a grant of asylum would deprive federal courts of the authority to enforce the 1980 Child Abduction Convention. Please note that Circuit Judge Moore delivered a separate dissenting opinion.

‡ UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the General Assembly on 10 December 1984.

§ In *Sanchez v. R.G.L.*, the children were granted asylum while the appeal of the lower court's return order was pending. The court found that "[t]he asylum grant does not supercede the enforceability of a district court's order that the children should be returned to their mother […]" (page 9), and that "[…] grants of asylum are relevant to any analysis of whether the Article 13(1)(b) or 20 exception applies" (page 10). The court concluded that the case be remanded to the district court with instructions, among others, "to consider the asylum grants, assessments, and any related evidence not previously considered that relates to whether Article 13(b) or 20 applies" (page 10). Please note that Circuit Judge Harold R. DeMoss delivered a separate dissenting opinion.