Inter-American Commission on Human Rights: Thematic Hearing

Gender-Based Violence and the Legal Response to International Child Abduction in the Americas

Guatemala City, 11 March 2026

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Responses to Commissioners' questions

Thank you for your many thoughtful questions. We very much appreciate the opportunity to provide more detail about the lack of alignment between the human rights of mothers and their children, and the abduction conventions operating in the Americas.

We have answered each question in the order in which it was posed i.e. questions from:

Rapporteur Marion Bethel, pp 1-5

Rapporteur Rosa María Payá, pp 5-9

Executive Secretary Tania Reneaum Panszi, pp 9-11

Rapporteur Andrea Pochak, pp 11-14.

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Rapporteur Marion Bethel

Q1. What measures can States, courts, and civil society adopt to ensure that international child abduction proceedings are survivor-centered, gender-responsive, and consistent with human rights standards?

We believe that States and their courts must take a number of steps to ensure that these proceedings are survivor-centered, gender-responsive, and consistent with human rights standards. As described below, this includes States working with civil society to improve application of the abduction conventions.

First, States with strong legal frameworks on gender-based violence, particularly regarding domestic violence, should apply these frameworks to this context. Some States are bound by the Belém do Pará Convention (and the Inter-American System jurisprudence on the matter) and/or the CEDAW Convention, alongside CEDAW's Committee General Recommendations 19, 35 (gender-based violence) and 33 (access to justice). These frameworks require training on gender and human rights for all the members of the judicial system (police officers, social workers, lawyers, judges etc). Without adequate training, those applying the abduction conventions harbor misconceptions and stereotypes about gender-based violence that are unfair to survivors of domestic violence. Too often courts penalize survivors for failure to have corroborating evidence, ignoring heightened challenges that survivors, especially migrant women, face in reporting domestic abuse to authorities or even to medical professionals. Without corroboration, some courts do not treat the survivor's testimony as evidence at all. Fear or embarrassment may stop survivors from reporting abuse or telling their doctors the truth about their injuries. Similarly, judges often believe that the violence ceases once

the parties separate, which is more often than not factually untrue. The specialized literature on domestic violence indicates that the moment of separation is one of the most dangerous moments for a survivor of domestic abuse, since it is in this moment that femicide is more likely to occur. There are other serious misconceptions about the dynamics of domestic violence, trauma, and trauma bonding that make targeted training critical for anyone adjudicating a Hague Convention proceeding.

Also, without reference to Belém do Pará Convention (and the Inter-American System jurisprudence on the matter) and/or the CEDAW Convention, alongside CEDAW's Committee General Recommendations 19, 35 (gender-based violence) and 33 (access to justice), States ignore the human rights implications of their actions. This is true both in the application of Article 20 of the Hague Convention (Article 25 of the Inter-American Convention), but also in formulating rules in their implementing legislation that are fair to survivors. For example, some countries require clear and convincing evidence to make out the grave risk of exposure to harm defense (Article 13 of the Hague Convention and Article 11(b) of the Inter-American Convention), and this allocation of the burden of proof misguidedly puts the risk of error on the survivor and child.

Second, States without a strong legal framework on gender-based violence can still decide – as a matter of good policy, prodded by international human rights law – to adopt laws and procedures that are survivor-centered, gender-responsive, and consistent with human rights standards. In terms of Article 13(b) specifically, Professor Merle H. Weiner has proposed a Convention on Safety that would ensure that the abduction conventions are survivor-centered, gender-responsive, and consistent with human rights standards. Each of her recommendations for provisions in the Convention would be a beneficial step for States to take and it would be best if members of the OAS came together to adopt a comprehensive Convention on safety to address the variety of issues that cause injustice for survivors in these cases. However, absent collective action, States could adopt the various recommendations incrementally as a matter of common law development. (See generally Merle H. Weiner, *Convention on Safety for Survivors of Family Violence Involved in International Custody Disputes*, 46 Cardozo L. Rev. 1167, 1228-1244; 2025) Four of the recommendations are highlighted here. Others are mentioned below in response to Rapporteur Rosa María Payá's question about practical measures (*What practical criteria or safeguards could help judges assess the situation in a balanced and child-centered manner?*).

- Many countries use an outdated understanding of domestic violence and focus on episodic physical acts instead of examining coercive control. Courts applying the Conventions could do otherwise.
- Many countries apply protective measures and return a child who is at a grave risk of exposure to physical or psychological harm because of domestic violence instead of simply not returning the child, as the defense allows. Since protective measures are not mentioned by the Conventions and are inherently less safe than not returning a child and maintaining geographical distance between the perpetrator and the victims, a position that embraces protective measures is neither required, survivor-centered, gender-responsive, nor consistent with human rights.
- States need to recognize that domestic violence harms the child, and stop requiring survivors to prove that through expensive testimony. This harm is acknowledged in the leading literature on the matter and well-established by the World Health Organization. States could

do so by adopting a presumption that domestic violence gives rise to the Article 13(b) defense.

- States need to provide survivors with free legal counsel for Hague cases. Currently, States provide legal representation to the perpetrator, or they advocate his interests in court, and this provides an inequality of arms. Survivors often cannot afford legal counsel or have to scramble to try to find pro bono counsel. Sometimes they cannot find counsel and are unrepresented. In some countries, the court can award legal fees to the prevailing petitioner and so some survivors have been made to pay their perpetrator's legal fees. The prevailing respondent does not receive her legal fees when she has paid them herself.

Third, States need to work with domestic violence advocates, scholars, and survivors to ensure the application of the Conventions is survivor-centered, gender-responsive, and consistent with human rights standards to protect women and children (CRC). For example, as mentioned above, many courts apply an understanding of domestic violence that is not aligned with the Belém do Pará or with CEDAW (and its Gen. Rec. 19 and 35). Women who are fleeing with their children for safety often face many power imbalances and control tactics; the abuse can encompass coercive control, financial abuse, sexual abuse, technological / digital abuse, litigation abuse, reproductive abuse, and immigration abuse, among others. States would be educated on these issues by working with domestic violence advocates, scholars, and survivors.

Q2. Could you elaborate more on intersectionality, in terms of ethnicity, race, social class, sexual orientation for example? Could you give more information on survivors who reflect this and how it impacts gender-based violence and abduction cases?

The intersection of gender, race, ethnicity, class, sexual orientation, religion, national origin, migration status and geographical location, significantly magnifies human rights implications for migrant mothers caught in the gender-blind application of the abduction conventions. In the international context, women from the Global South tend to be racialized and stereotyped in extremely harmful ways in the Global North, placing them in situations of heightened vulnerability. We note also that race, rather than being a fixed category, can be affected by geographical displacements. For example, a woman who is considered 'white' in some Latin American and Caribbean (LAC) countries is defined as a Latin American woman in the USA and Canada, regardless of the color of her skin. In this context, we see gender and race, together with colonialism, operating to magnify human rights violations. In times of far-right regressive politics and widespread xenophobia, social discourses on LAC women can severely obstruct their access to justice in local courts, in many cases leading them to flee. Therefore, we can say that when such a woman flees domestic abuse across international borders, her experience in accessing justice is complicated and compromised by her multiple layers of identity:

- **Ethnicity and Race:** Latin-American women, in particular, face harmful stereotypes in the Global North. They are often unfairly characterized as hypersexual, subservient, hysterical or manipulative by both the general public and judicial authorities. These biases can lead police and judges to dismiss reports of abuse, resulting in cases where women cannot prove the violence they suffered before fleeing At the investigative stage, authorities may discourage formal complaints, minimizing incidents or framing them as difficult to prove or irrelevant to the proceedings. Even where physical violence occurs, it may be treated as an isolated

incident and explicitly dismissed as not constituting domestic violence, disregarding the broader coercive control in which it is embedded.

These biases are also reproduced in technical assessments, including those carried out by social services and child protection authorities. In such contexts, mothers may be perceived not as victims but as sources of risk to their children, particularly where their situation is marked by housing instability or lack of income. This assessment is not only linked to material conditions but is also shaped by discriminatory assumptions that portray migrant women as unstable or unfit, thereby undermining their position in proceedings concerning children.

- **Language and Isolation:** Many migrant survivors do not speak the local language or only have a superficial grasp of it. This allows the abuser to act as the sole translator to the outside world, deepening the mother's isolation and enhancing the abuser's control. Lack of proficiency also prevents women from understanding legal documents or independently seeking help. Specialized training programs and dedicated units equipped to assist women, particularly migrant women, remain scarce. Access to shelters is inconsistent, with limited capacity and, in many cases, a lack of preparedness to receive mothers with children or to adequately support migrant families.
- **Social Class and Economic Vulnerability:** Restrictive work permits often prevent migrant women from achieving economic autonomy. This financial vulnerability makes it difficult to afford legal representation, or quality legal representation, during restraining order, relocation, or divorce proceedings. In the USA and Canada, these mothers often rely on under-funded and overburdened legal-aid systems while the batterer may have robust financial means to fight the case.
- **Migration Status as a Coercive Tool:** Abusers frequently use a woman's migration status as a method of coercive control. Mothers often fear that reporting abuse will lead to unemployment, deportation, or permanent separation from their children—threats that abusers emphasize to ensure silence.

Survivors talk about these and other obstacles to achieving safety in the child's habitual residence and as a reason why they flee for safety. The obstacles are magnified for migrant women, as discussed.

In addition, it is important to note the recurrent use of allegations of so-called mutual violence and parental alienation, frequently invoked in the USA and Canada, and growing in use in many LAC countries. Legal frameworks often fail to assess domestic violence through a gender-sensitive lens, disregarding the disproportionate impact on women. As a result, acts of self-defense or reactive behavior may be interpreted as reciprocal violence of equal gravity, becoming an effective barrier to reporting, efforts to relocate, or criminal proceedings.

In evidentiary terms, various obstacles create a significant deficit. In many cases, even a police report may be impossible to obtain. Criminal convictions, restraining orders or other formal protective measures are rare, and technical reports are frequently produced in a manner that is unfavorable to the mother. There is often little documentary record capable of capturing the full extent of the violence experienced. In many cases, survivors do not reach the authorities at all. Shame, lack of knowledge of available remedies, absence of support networks and a pervasive fear of losing custody of their children act as powerful deterrents. Given that domestic violence predominantly occurs

within the private sphere, the absence of witnesses is common. As a result, many situations remain entirely undocumented, with victims never contacting authorities.

All this makes a woman's flight to safety with her child not only understandable but essential. Unfortunately, when the woman later faces a Hague petition for her child's return in an expedited proceedings, judges often penalize the survivor because the patterns of control, dependency or psychological abuse do not necessarily align with courts' expectations of domestic violence, the woman lacks corroborating evidence, or the judge ignores the obvious truth that for most children, it would be an intolerable situation for the child to have his or her mother subject to a risk of violence again. Instead, the judge 'fills the gaps' by believing the State of habitual residence can provide effective protection, especially where formal mechanisms exist, even though these are often neither accessible nor effective in practice.

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Rapporteur Rosa María Payá

Q1. How can courts more effectively ensure that decisions in international child-return proceedings incorporate the best interests of the child, particularly when allegations of domestic violence are raised?

The Hague Abduction Convention (HAC) and the Inter-American Convention on the International Return of Children (IACIRC) do not require that judges decide these cases based on the best interest of the particular child before the court. Rather, the legal instruments are based on the assumption that they, in their own right, meet the best interests of all children. This is not true, however, for the children whose mothers take them transnationally to avoid domestic violence and then find themselves returned pursuant to the HAC or IACIRC because the Conventions' defenses did not work for them.

The best way to ensure that the proceedings incorporate the best interests of the child is to recognize that it is not in a child's best interests to return the child of a domestic violence survivor to the place from which she has just fled. Nor is it required by the Conventions. Rather, any custody contest, which evaluates what is in the child's best interest, can and should be held while the mother and child are in a safe location. Today, technological advances and networks facilitating judicial cooperation make it possible for judges in one country to adjudicate custody while the mother and child remain in a safe location. Assuming the child's habitual residence retains jurisdiction to decide custody, it would ideally transfer jurisdiction to a court in the location where the mother and child are located.

Q2. What practical criteria or safeguards could help judges assess the situation in a balanced and child-centred manner?

First, judges must accept and apply the principle that domestic violence directed towards a child's parent and/or in the child's home, causes harm to the child. The nexus between domestic violence and harm to the child is well-established in social science research and is already codified in the laws of some States.

Second, judges must accept and apply the principle that domestic violence includes an array of harmful behavior and that coercive control is one of the most insidious and harmful domestic violence tactics.

Third, judges must understand and apply the principles of the empirically-backed 'Danger Assessment', a clinical research tool designed to assess the likelihood of lethality or near-lethality occurring in a case of domestic violence. Understanding the lethality factors can help judges better analyze particularly high-risk behavior, like strangulation and sexual assault. It can also help judges better contextualize other risk factors that are not always obvious to those working outside the domestic violence field - drug use, controlling behavior, constant jealousy, suicidality, and alcohol abuse.

Fourth, judges should appoint attorneys for children who are the subjects of Hague Convention cases. The appointed children's attorneys should come from a pool of attorneys trained in trauma and domestic violence. The attorney should help ensure that the voice of the child is heard, including through private and confidential testimony (i.e. testimony without their parents or parents' attorneys present) in the judge's chambers, if age-appropriate.

Fifth, judges should appoint attorneys to both parties if they are unrepresented.

Sixth, where there are allegations of domestic violence and a court nonetheless issues a return order, and the respondent subsequently appeals the return order, there should be a rebuttable presumption that the return order is stayed until the appeal is final.

Seventh, court administrators should mandate comprehensive domestic violence and trauma training for judges and other hearing officers who preside over Hague Convention proceedings, and for attorneys for the children who will be appointed in Hague Convention proceedings.

Many of these recommendations, and others, can be found in Professor Weiner's article *Convention on Safety for Survivors of Family Violence Involved in International Custody Disputes* at pages 1228 - 1244*).*

Q3. From your experience, what institutional conditions or guarantees should exist in the country of habitual residence for protective measures to be considered credible and effective?

As we suggested at the hearing, protective measures will *never* be as effective as simply granting a defense and not returning the child to the child's habitual residence, considering that the child's habitual residence was already incapable of protecting the mother and the child from domestic abuse. It is unfortunate that the Hague Conference on Private International Law has recently elected to address the issue of domestic violence by focusing on ensuring protective orders are enforceable across jurisdictions, and thereby continuing to return the child, instead of adopting real reform that could make the application of the Hague Abduction Convention just.

The protective measure approach is less safe for women and children because true protection necessitates more than merely an enforceable order. It also requires the enforcement of that order (by, for example, the police officer on the beat) and, most importantly, compliance with the order by the perpetrator. Protective orders are routinely violated by perpetrators. Even if the order is enforceable, that typically occurs *after* its violation. It is unfair that a woman and child should have to continually look over their shoulders when the Conventions allow a judge to simply grant a defense.

Apart from the fact that protective measures are seldom adequate to deter violence and are typically enforced only after their violation, there are numerous obstacles for protective measures to be viable from a practical standpoint. Frankly, the child's habitual residence would need to offer a set of institutional guarantees that, taken together, are not currently found in a single jurisdiction. These would include, non-exhaustively: a domestic legal basis for the immediate recognition and enforcement of measures ordered by a foreign return court, without requiring full re-litigation; a mechanism for coordinating across civil, criminal, and administrative jurisdictions simultaneously, so that legal measures of different types do not fall between institutions operating independently of one another; the capacity to activate protective measures before or simultaneously with the child's return, rather than merely making them available in principle; a guarantee that the taking parent's immigration status or the 'abduction' will not adversely affect enforcement, or subject the parent to criminal proceedings during the duration of the custody determination; funded legal representation from the moment of return, independent of documentation or means-testing requirements that cannot be satisfied immediately upon arrival; access to safe and confidential accommodation that does not conflict with any contact arrangement in place; and a review mechanism by which breaches of conditions attached to the return order can be brought back before a competent authority after the child has been returned.

No such comprehensive institutional framework currently exists and each of these conditions represents a gap that inevitably results in a structural failure. Allowing the return to happen under protective measures not only creates more barriers to the survivors' defense, but also is an unrealistic and unsafe response to the problem.

Q4. Are there examples of good practices, judicial guidelines, or policy reforms that reconcile child abduction frameworks with human rights protection?

If you have any data or comparative analysis, that would also be very helpful.

Unfortunately, we are unaware of many States with good practices, judicial guidelines, or policy reforms that reconcile child abduction frameworks with human rights protection. Some of us attended two fora hosted by the Hague Conference on Private International Law regarding Article 13(1)(b) and domestic violence, in South Africa and Brazil in 2024 and 2025 respectively. It was evident that these basic tools were sorely missing. While some countries' laws recognize expressly that exposure to domestic violence can qualify a survivor for the Article 13(b) defense (for example, Japan in its statutory law and Brazil in its Supreme Court case law), and while some countries have decisions that appear sensitive to the plight of domestic violence victims fleeing for safety (for example, Colombia and El Salvador), and while the U.S. Supreme Court in the *Golan v. Saada* case gave trial courts some guidelines to consider in assessing the adequacy of protective measures, we are not aware of adequate guidance both within States and across States that reconciles the Convention frameworks with human rights protection to protect survivors and their children.

In fact, despite an occasional advance from the highest court in a State, we often see the lower courts continuing to disregard the human rights of the domestic violence survivor. For example, as alluded to in the prior paragraph, in the Brazilian context, the recent judgment of the Supreme Federal Court in two Direct Actions for the Declaration of Unconstitutionality (ADIs 4245 and 7686) advances the reconciliation of the operation of the 1980 Hague Convention with human rights protections. The ruling expressly recognizes that domestic violence may fall within the scope of Article 13(1)(b), even where the child is not the direct victim, and introduces a series of structural

and procedural measures. However, the judgment leaves unresolved a central issue, namely, what constitutes evidence of violence sufficient to meet the grave risk threshold. In practice, this lack of clarity has generated uneven application across courts, with some adopting a more flexible evidentiary approach and others maintaining thresholds that are difficult, if not impossible, to meet in cases involving migrant mothers. As a result, while the decision represents an important interpretative shift, its capacity to effectively bridge the gap between the Convention's return mechanism and the lived realities of domestic violence remains contingent on its implementation in practice. Similarly, in the U.S. context, the *Golan v. Saada* case was a significant step forward, with the U.S. Supreme Court saying trial courts should 'prioritize the child's physical and psychological safety' in any consideration of ameliorative measures, but the Court still left trial courts with significant discretion to rely on ameliorative measures with no clear guidance on when these might be inappropriate. Subsequent trial court decisions with troubling outcomes suggest that much more guidance is needed.

Instead of States adopting clear guidance that would help protect survivors and their children, the opposite exists. There are examples of bad practices and judicial guidelines, mostly coming from the Hague Conference on Private International Law (which are then approved by the States), that undermine the human rights of survivors and their children. For example, the Hague Conference has put out a Guide to Good Practice on Article 13(1)(b). Some of the problems with the Guide include: stating that the application of the 13(1)(b) defense will be for 'exceptional' circumstances; not defining domestic violence as including coercive control; telling courts to examine protective measures as a way to return a child despite domestic violence, and indicating that such protective measures may be inadequate only if the petitioner has 'repeatedly' violated court orders in the past, as if one time should not be sufficient; not addressing issues such as equality of arms.

Among our recommendations, we suggested that the Commission consider a regional conference with gender-based violence advocates and civil society organizations, and also with States, to 'develop concrete and measurable pathways to eliminate and prevent harm in cases involving the Convention.' It would be incredibly useful to gather States together to canvas and promote any beneficial practices that are successfully reconciling the frameworks.

In addition, Member States should develop gender protocols that can help courts evaluate their approach to cases of international child abduction at the national level. For instance, there are at least twelve OAS countries that have a protocol for the judiciary to tackle gender discrimination, and other States should do the same, ensuring mandatory training on its application for all the members of the justice system. However, these protocols are not being followed comprehensively in cases of international child abduction, if at all. These frameworks could be strengthened to include cases of international child abduction, at the national level. Unfortunately, there is a lack of comprehensive protections for survivors, or national legislations that ensure legal protections to implement international and transnational legal frameworks.

Sometimes countries' domestic law adequately addresses the intersection of domestic violence and 'abduction,' but the mechanisms are for domestic flight and are not applied to international cases. For example, in the U.S., under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a judge need not return a child to another state when the mother has fled to safety. Rather, the court can assume emergency jurisdiction, communicate with a court in the other state, and that court considers whether jurisdiction should be transferred to the second state with the mother and child's safety being a primary consideration. In addition, that law permits any custody

hearing held in the child's home state to occur without the mother and child returning, by utilizing technology and judicial cooperation. The Act also recognizes in commentary to section 208, that flight for reasons of safety is not 'unjustifiable conduct' for which a court should reject jurisdiction. These models are useful for recognizing that the two topics can be reconciled.

Ultimately, more research, information, and case studies are urgently needed both in the region and internationally. The Commission can prioritize the issue and bring attention to it, in part by recommending States collect data and reliable information in a trauma-informed manner from impacted survivors.

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Executive Secretary Tania Reneaum Panszi

Q1. How should a case be brought before the Inter-American system, considering that domestic remedies must be exhausted?

For three reasons, domestic remedies are often futile in a case in which a respondent has lost an abduction proceeding.

First, procedurally, any appeal typically occurs *after* the child has been returned and is, therefore, not an effective avenue of redress. For example, in order to further a prompt return the U.S. Supreme Court encourages return pending appeal. *See Chafin v. Chafin,* 568 U.S. 165 (2013). It has suggested that if an appellant is successful, the appellant can seek 're-return' of the child. However, 're-return' almost never occurs.

Second, the substantive law is so anti-survivor in many States (i.e., pro-return) that appealing is futile. A particular case, of course, depends upon why the court rejected the mother's defenses. If, however, the reason is because the mother was not sufficiently credible because her story was not corroborated, such a finding of fact is often immunized from appellate review under a standard such as 'clear error.' If the reason is a legal reason —e.g., that the risk must be to the child and not the mother but evidence showing potential future risk to the child was lacking—the hostile doctrine is so established that any appeal is unlikely to succeed.

Third, there are the practical reasons why exhaustion of domestic remedies is almost impossible. After a child is returned, a parent has to decide whether to use their limited resources to fight the return and hope for re-return, or to turn their attention to the custody dispute in the habitual residence. Many survivors elect the latter due to resource constraints. After all, the violent perpetrator often has legal counsel to fight the appeal provided by the State, unlike the survivor who seeks to appeal, raising not only inequality of arms but also access to justice. In addition, mothers often return with their children to the children's habitual residence, making it very difficult to exhaust remedies in the state to which she fled. This is especially true as the mother is typically preoccupied with her and her child's safety, as she fled because she was not safe in the country in which she now must live.

Q2. How should the different jurisdictions - criminal, civil, kidnapping - engage with the Inter-American system?

Survivors of domestic violence face hardship and discrimination from various legal processes within multiple States, often in interrelated ways. For example, a woman may flee for safety with her child and face a criminal prosecution in the child's habitual residence for kidnapping, instituted at the insistence of the batterer. She may then face a child abduction proceeding in the place to which she fled, again instituted at the insistence of her batterer. If she does not prevail in the abduction proceeding, she will then face the repercussions in a custody adjudication in the child's habitual residence, where she will be labelled as an abductor and potentially lose custody or have her visitation with her child supervised. If she does not return to the child's habitual residence, she may be extradited to face criminal prosecution there.

While the Commission would have jurisdiction to address any State action that violates the survivor's human rights (and all of the proceedings mentioned above present problems), these multiple interrelated actions increase the potential injustice faced by the survivor.

The Commission and recurrent recommendations from MESECVI and CEDAW have already recognized that multiple proceedings can aggravate injustice for survivors, albeit in a different context. States are responsible for ensuring coordinated procedures (e.g., hybrid jurisdiction) for victims of gender-based violence to ensure that they can obtain essential protections against gender-based violence without being subject to multiple legal proceedings that are exhausting, time-consuming, and expensive. Similarly, multiple proceedings (including and adjacent to the return proceedings under the Conventions), held in multiple places, contribute to a survivor's exhaustion and expense, although she has simply tried to protect herself and her child from violence.

The Commission should acknowledge that the Conventions' labelling of protective behavior as 'abduction' has effects that ripple out and harm a survivor through other types of proceedings. In addition, the Commission's attention to one aspect of the problem (i.e., the way survivors often lose when subject to the abduction conventions) should not be the end of the Commission's attention to this topic generally. The various separate (and yet interrelated) processes all violate rights guaranteed by the American Convention on Human Rights and the Belém do Pará Convention, when based on the erroneous idea that a flight for safety is a wrongful abduction.

Q3. How is a case built in a context of multiple parallel proceedings?

Child abduction proceedings often do involve multiple proceedings, but they tend to be sequential rather than parallel. In fact, Article 16 of the Hague Abduction Convention (HAC) and Article 16 of the Inter-American Convention require that any custody matter be stayed pending the decision in the Hague Abduction proceeding. Article 16 of the HAC states: 'After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.' Consequently, any custody proceeding that occurs is technically irrelevant to the Hague proceeding and its resolution, as well as the exhaustion of domestic remedies.

Q4. How have you developed a strategy for exhausting domestic remedies?

For the reasons discussed above, it is futile for a survivor to pursue domestic remedies when a child has been returned pursuant to the Hague Abduction Convention or the Inter-American Convention on the International Return of Child. First, children are typically returned despite an appeal. While a successful appeal *may* lead to re-return, there is no guarantee as this is outside of the abduction convention's scope. Courts are not mandated to re-return a child and a decision will often turn on a variety of considerations, including that the child is now settled. Second, the law is so stacked against survivors that pursuing an appeal is often meaningless. Third, there are the very real practical problems with mothers pursuing an appeal, including resource constraints (sometimes caused by the inequality of arms during the trial and appellate proceeding since free legal counsel is only afforded to the petitioner-perpetrator), and their need to direct scare resources to the subsequent custody matter. The fact that most women do not have protection against domestic violence in the countries they are fleeing from (this is precisely why they flee), and the fact that most women return to those locations when their children are returned despite the risks, causes mothers to be preoccupied with safety rather than exhausting domestic remedies in a foreign jurisdiction.

Due to this reality, we understand survivors' inability or unwillingness to appeal an adverse judgment. Where we are asked, we explain the exhaustion requirement and the potential implications for bringing a case before the Inter-American Commission. We also explain why we think pursuing an appeal might be considered futile and not prohibit an admissibility determination. Because we believe that it is essential to empower domestic violence survivors and not make decisions for them, we ultimately respect the choices of the survivor, as she knows her own situation best.

Rapporteur Andrea Pochak

Q1. How can we ensure that States can adequately analyze situations of violence in contexts of weakened migration systems and mass deportations?

It is essential for States to analyze situations of violence adequately in each and every case in which the 'abductor' raises a defense that depends upon that violence. Even apart from the challenges posed by weakened migration systems and mass deportations, decision-makers are not adequately analyzing situations of violence. That is because, *inter alia*,

- domestic violence is often defined narrowly, emphasizing serious physical violence and ignoring psychological violence and coercive control
- judges often lack any type of training in domestic violence, assuring that they buy into stereotypes and myths that undermine their ability to adequate analyze situations of violence (for example, most cases in the U.S. are heard by federal judges who do not adjudicate domestic relations matters)
- judges frequently exhibit gender bias, discounting the domestic violence victim's testimony as biased or incredible with no equivalent skepticism about the perpetrator's denials.

To the extent that weakened migration systems and mass deportations impact the survivor's support system (with potential effects on her resiliency and testimony) and/or cause the unavailability of her fact witnesses during proceedings, judges must institute practices that promote due process. For example,

judges should allow witness testimony via Zoom or similar technology. They should also allow testimony about the deportations of family members to the extent that it impacts the survivor's demeanor. In the event a removal order or deportation order threatens a respondent who alleges an Article 13(1)(b) grave risk defense based on safety concerns, enforcement of the order should be stayed pending the determination of that defense in the Hague proceeding. If the grave risk defense is established, States also must ensure a mechanism whereby successful individuals can reopen their removal or deportation order and request that it be vacated on safety grounds.

In some abduction litigation, women or children have a pending claim for asylum or have been granted asylum. Some of these claims are based on the inability or unwillingness of the State to protect them from domestic violence. While some countries are weakening protection for asylum seekers generally, the relevant international law, and the principle of non-refoulement, remains strong. To adequately analyze the situation in the context of 'abduction,' courts must appreciate the relationship between asylum claims and the defenses to return under Article 20 of the Hague Abduction Convention and Article 25 of the Inter-American Convention, respectively. Simply, i) ordering the return of a child who is requesting protection from the left-behind country through an asylum claim (or who has asylum status) and ii) *de facto* ordering the return of that child's primary caretaking parent who is requesting protection from the left-behind country through an asylum claim (or who has asylum status), automatically forfeits their claim of asylum from the left-behind country and violates the fundamental international principle of non-refoulement. Therefore, the Article 20 and/or Article 25 defenses should always be successful.

Q2. How can we adapt or interpret the Inter-American Principles on Mobility in these cases?

The Inter-American Principles on Mobility is a very important instrument that has many parts that are applicable to these 'abduction' cases. We call your attention to the following provisions that have particular relevance for the problem we've identified. By identifying these provisions, we do not intend to diminish the potential relevance of other parts of the Principles that we do not highlight here.

In the preamble, the Principles acknowledge the ubiquity of gender-based violence and the lack of adequate protection for many migrants in their country of destination, and that these issues 'must be analyzed from a human-rights, gender, and differentiated perspective.' The reason the abduction conventions fail survivors of gender-based violence is because the drafters did not realize the ubiquity of gender-based violence, the lack of adequate protection for many migrants in their country of destination, and the need to remove their children transnationally for reasons of safety. Using a human rights, gender, and differentiated perspective, the problem comes into focus.

The Principles 'seek to guide OAS member States in their obligations to respect, protect, promote, and guarantee the human rights of all persons, regardless of their nationality or migration status … These Principles serve as a guide to State authorities as they develop legislation, regulations, administrative decisions, public policies, practices, and programs and relevant jurisprudence.' In fact, these Principles can help judges decide abduction cases involving a victim of gender-based violence justly, and help State authorities adopt legislation to further the just application of the conventions.

Principle 6 on non-refoulement supports an interpretation of Article 20 of the Hague Abduction Convention and Article 25 of the Inter-American Convention on the International Return of Children that would deny return when the child or the child's primary caregiver is seeking, or has been granted, asylum (see answer to question immediately above).

Principle 8 requires that 'Migration laws and policies implied by States must incorporate a gender perspective considering the specific risks, as well as the differentiated impacts faced by women, men, children and adolescents of both sexes, and LGBTI persons in the context of human mobility.' This speaks to the fact that the abduction conventions, which are a form of migration law, and the related policies, must incorporate a gender perspective and analysis of differentiated impacts.

Principle 9, on cooperation and coordination, imposes obligations on States to work together to fix the problems evident with application of the abduction conventions. It requires States to get technical assistance from civil society to ensure an approach consistent with human rights obligations.

Principle 10, on the best interests of migrant children, suggests that a court adjudicating the defenses under an abduction convention must be much more holistic in its analysis of the individual child than is done at present. This is further supported by Principle 51, which also includes the right 'To have their best interests evaluated before the making of any decision regarding their life.' The conventions would permit this approach. For example, a court could interpret 'intolerable situation' in Article 13(1)(b) of the Hague Abduction Convention as a situation that is inconsistent with the child's best interests. That could be considered an intolerable situation for the child, both in terms of lived experience and because it would violate the child's human rights to disregard the child's best interests.

Principle 14 requires States 'to prevent, investigate and punish all forms of sexual and gender-based violence against migrant women, men, girls, boys and LGBTI persons at all stages of displacement and from any type of actor.' That provision means States should not use protective measures and return a child to the child's habitual residence if to do so carries with it a risk of violence greater than granting a defense to return outright.

Principle 15 reinforces Principle 14. It requires States to prevent 'torture or to cruel, inhuman, or degrading treatment or punishment,' or 'violations of personal integrity.' Domestic abuse is degrading treatment and, in some instances, can be regarded as torture. See U.N. Special Rapporteur on Torture, *Domestic violence and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/74/148 (July 2019). Prevention is best achieved by a non-return decision in abduction cases.

Principle 16 recognizes women and children as vulnerable populations where 'multiple factors of discrimination converge that increase their levels of vulnerability' It encourages States to take positive measures 'to reverse or change existing discriminatory situations that are detrimental to a particular group of people. States should incorporate a gender and intersectional perspective in all actions and responses regarding migrants and refugees that allows for an understanding of the situations and needs of each population group, based on gender, age and other social constructs such as ethnicity, race, sexual orientation, gender expression, creed, among others.' This principle highlights the fact that States should solve the problem we've identified.

Principle 40, on access to justice, is very relevant to the inequality of arms that currently exists in abduction proceedings. It says, '*Every migrant has the right to access to justice for the protection of all their rights*, and to integral reparation of harm done, *free of charge* and on an equal basis with nationals of the State, including the right to due process and judicial guarantees. States shall guarantee the real possibility of access to justice and effective protection, in an effective, impartial and expeditious manner, subject to the principles of immediacy, celerity and due diligence, through the mechanisms that the national legislation provides for all inhabitants, so that just resolution of a dispute is reached, *with care taken to ensure that no migrant is left without appropriate and effective legal representation*. Guarantees shall be established to facilitate the recognition of rights, their requirement when they have been disregarded,

their reestablishment when they have been violated, and their implementation when their exercise encounters unjustified obstacles.' One can read Principle 41 as consistent with Principle 40 in the context of domestic violence survivors who have fled for safety: 'Protection of the victims of crimes. All migrant victims of crime have the *right to assistance*, protection, access to justice and full and effective reparation of damage done.' It is unfair that petitioners receive legal representation in these proceedings and respondents, who allege gender-based violence, do not.

Principle 44 talks about cross-border justice and says, 'Coordination between State authorities is essential to ensure access to justice across borders in fair, effective, and accessible conditions for migrants and their families.' This suggests that States should cooperate to ensure victims of violence have access to documents that may be in the child's habitual residence. Central authorities exist in all contracting States and they could do much more to help ensure access to justice.

Principle 51, on due process in procedures involving children and adolescents, states that children have a right 'To be assisted by an attorney trained and/or experienced in representing children and adolescents at all stages of the proceedings and communicate freely with the representative, and have access to free legal aid.' Children currently do not usually have an attorney in these cases. They should.

It is critical that judges deciding these cases and legislators considering legal reform respect human rights as inalienable and interconnected. The Principles help with this orientation. Without addressing abduction directly, the Principles help highlight the fact that survivors and their children are migrants in these cases. They are not sufficiently protected under their destination's legal systems and therefore flee to another country. To subject them to a legal proceeding that would return the child to the place from which the survivor has just fled, to give the perpetrator legal counsel and not the survivor, to apply a restrictive understanding of domestic violence, to require individualized expert testimony about how that violence will affect the child if returned, to assume that protective measures will work to protect the mother and child when they haven't in the past, and to return the child in disregard of the mother's human rights, is cruel and certainly does not protect the survivor and child from violence. The Principles help ground these aspects of the problem in human rights principles.

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