INTERNATIONAL CHILD ABDUCTION

Parental Child Abduction to non-Hague countries: Where the law is incomplete.

by
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"There can be no keener revelation of a society's soul than the way in which it treats its children" – Nelson Mandela.

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Acronyms and Abbreviations

ACRWC	**:**	**AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD**
CRC	**:**	**CONVENTION ON THE RIGHTS OF THE CHILD**
CHILDREN'S ACT:		**CHILDREN'S ACT 38 OF 2005 (SOUTH AFRICA)**
DIRCO	**:**	**DEPARTMENT OF INTERNATIONAL RELATIONS & CO-OPERATION (SOUTH AFRICA)**
DHA	**:**	**DEPARTMENT OF HOME AFFAIRS (SOUTH AFRICA)**
HCCA	**:**	**HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**
ICARA	**:**	**INTERNATIONAL CHILD ABDUCTION REMEDIES ACT (U.S.A)**
INTERPOL	**:**	**INTERNATIONAL CRIMINAL POLICE ORGANIZATION**
SAPS	**:**	**SOUTH AFRICAN POLICE SERVICES**
UNCRC	**:**	**UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD**
UCCJEA	**:**	**UNIFORM CHILD-CUSTODY JURISDICTON & ENFORCEMENT ACT (U.S.A)**

Abstract

At the forefront of human rights atrocities in recent years is the subject of the abduction of women and children, most commonly and distressingly encountered in cases of human trafficking and in more recent years increasingly found in the abduction of youngsters in war-time conflict. A surprising number of abductions are however perpetrated by parents or family members, an area seemingly sufficiently governed by the United Nations Convention on the Civil Aspects of International Child Abduction wherein the Convention offers a quick result in the immediate return of a child to the country of habitual residence.

However, little to no similar efficient legal remedy is currently available to parents or legal guardians in the instance where their child is taken to a non-Hague country. This paper endeavours to analyse and compare the legal mechanisms employed in South Africa to retrieve children abducted to non-Hague countries by relating South African laws and legal process to legal practices applied in other States in similar situations and further assessing what, if any, effective enforcement mechanisms can be found in international and regional legal instruments. In particular custody laws of Islamic States are considered in relation to western concepts of custody and rights. In doing so, the comparative analysis seeks to examine which areas within the national and global legal system may require further attention and possible improvement whilst acknowledging the significance and role of the child's best interest and the duty of care owed by the State to protect those interests.

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CHAPTER 1. THE PROBLEM WITH CHILD ABDUCTION

1.1 Introduction

Abduction and kidnapping are classified as common law crimes in terms of South African law. Abduction is defined as "unlawfully taking a minor out of the control of his or her custodian parent with the intention of enabling someone to marry or to have sexual intercourse with that minor."[1] Kidnapping consists of "unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if such person is a child, the custodians of their control over the child."[2] It is arguable that the internationally accepted term of child abductions holds both elements of what South African common law terms abductions and kidnappings. This aspect will be reviewed further in a later chapter.

Abduction of a minor is not uncommon and often occurs when the relationship between parents and mostly parents of differing nationalities comes to an end and where one parent or legal guardian unilaterally and without the other's consent removes a child or children from the country of their habitual residence.

The Hague Convention on the Civil Aspects of International Child Abduction[3] (HCCA) clearly sets out the procedure to be followed when dealing with international parental child abduction and also covers familial access to a child where the parent or guardian of a child does not live in the same country as the child.

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[1] CR Snyman *Criminal Law* Durban Lexis Nexis SA (Pty) Ltd (2014) 395 & 471.

[2] Ibid.

[3] Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ;ibid.

In contrast, the HCCA does not define either kidnapping or abduction but rather refers to the wrongful removal or retention of a child whilst the Universal Declaration of Human Rights[4] does not attempt to define abduction but rather entrenches in Article 3 the universal right to life, liberty and security of the person.

Article 1 of the HCCA provides that the object of the Convention is *"(a) to secure the prompt return of children wrongfully removed or retained in any contracting state; and (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states*."[5]

South Africa is a contracting party to the HCCA.[6] In a South African context this would entail that the parent deprived of access to, and custody of the minor child would report the abduction to the South African Police Services and any other relevant authorities such as the Bureau of Missing Persons South Africa.[7] If the parent reporting the abduction suspects that the child has been removed outside the borders of South Africa to a member country of the Hague Convention, the matter is brought to the attention of the Central Authority, whose duty it is to trace the child to the member country to which the abductor has fled and to contact the Central Authority of that country to request the immediate return of the child. The Central Authority in the country where the child is situated must then through means of their legal processes, trace the abductor and child within their borders,

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[4] Universal Declaration of Human Rights - 10 December 1948 (GA Resolution 217A)

[5] Hague Convention on the Civil Aspects of International Child Abduction concluded on 25 October 1980

[6] Hague Convention on the Civil Aspects of International Child Abduction ratified by South Africa in 1996

[7] South African Police Service 'Reporting of a missing person ' available at *https://www.saps.gov.za/services/report_missing_person.php*, accessed on 23 May 2023.

secure custody of the child and obtain a court order authorizing the immediate return of the child to the child's place/country of habitual residence.[8]

The only recourse available to the parent-abductor, if so inclined, to pursue the matter, would be to return to the country of habitual residence to face possible charges and to work out a custody arrangement in terms of the laws of that applicable country. Typically, such applications are expeditious and court orders are most often granted.

This process seems straight-forward enough unless of course there are accusations and evidence of abuse towards the mother or child and issues of the child's safety come to the fore. This expedient process can be attributed to the fact that both countries have acceded to and ratified the Hague Convention on the Civil Aspects of International Child Abduction (HCCA).

By contrast, where States are not contracting parties to the HCCA, the parent or legal guardian from whom a child has been taken has no recourse to such an expedient legal or diplomatic process to retrieve the abducted child from a foreign country.

1.2 Context / Background

The news headline in the Weekend Argus dated 7 November 2022 reads, "Cape mother's desperate pleas to be reunited with her children". The article explains that Chelsea Whitaker, a South African woman married a Bangladeshi businessman, Riad Aminul Islam who absconded with their children to Bangladesh on the premise that the children were being taken to visit Mr Islam's parents who had never met the children. Ms Whitaker agreed that her husband could travel to Bangladesh with their children because he had satisfied her that they would return by showing her the return flight tickets

[8] RSA Department of Justice & Constitutional Development 'The Central Authority of South Africa' available at *https://www.justice.gov.za/hague/convention.html#cnt*, accessed on 4 April 2023.

which put Ms Whitaker at ease; her family would therefore travel to Bangladesh, whilst she travelled from Malawi to visit her family in Cape Town. No sooner had she reached her destination when she received a text message from her husband saying that she would never see her children again. Ms Whitaker reported the matter to the South African Police Services who were still investigating the case at the time that the news article was published.[9] This scenario begs the question, what legal options does the mother have to secure the return of her children to South Africa in terms of domestic and international laws and what is the State's duty to assist her in this exercise?

In the case of *R v C and The Minister of Home Affairs*[10] an unreported matter which was not proceeded with in the Western Cape High Court, the South African biological father was in a relationship with the mother of his child, a Chinese citizen. The father launched an urgent High Court application for the return of his minor child against the mother and the Minister of Home Affairs because the child was removed from South Africa by the mother without the father's consent. It is noted in this case that the mother, although a Chinese citizen, also held residency status within South Africa.

However, the father could not prove parentage because even though he and the mother lived in a common home with the child as a family unit, he authorized the mother to make application for the child's birth certificate at the Department of Home Affairs (hereinafter DHA) on her own without his presence. DHA could not find any record of a child linked to the father and it transpired that the mother, registered the birth without any reference to the father's name and furthermore registered the child as a Chinese citizen, thereby affording her the opportunity to obtain from the Chinese Consulate

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[9] Tracy-Lynn Ruiters 'Cape mother's desperate plea to be reunited with her children ' *Weekend Argus News* 7 November 2022 2022 available at *https://www.iol.co.za/weekend-argus/news/cape-mothers-desperate-plea-to-be-reunited-with-her-children,*

[10] *R v C and The Minister of Home Affairs - In the High Court of South Africa Western Cape Division at Cape Town Case No. 14893/2022*

a Chinese Passport in the name of the minor child. The mother then subsequently absconded to China with the minor child without the biological father's consent as the South African authorities at the port of exit did not have legal cause to question the removal of the child from the country when that child was registered as a Chinese citizen, albeit so registered within South African borders.[11]

In both scenarios above, however, the child/children were taken to countries who are not party to the HCCA.

According to 2022 statistics issued by Safe at Last, an American security company, approximately eight million children are reported missing each year worldwide.[12] Missing Children South Africa in a News24 article dated 13 June 2022 stated that at least one child is reported missing every five hours in South Africa.[13]

Missing Children Europe, a federation of grassroots organisations collaborating to protect missing and sexually exploited children, collected and analysed data from various hotlines in an effort to prepare a report on statistics related to child abductions in Europe due to a lack of comparable data from official sources. According to their 2020 report, parental abductions accounted for 25,36% of cases and cases classified as otherwise missing and other were 5,75% and 9,53% respectively.[14]

A 2020, UN Secretary-General's report on children and armed conflict, recorded 1268 victims of sexual violence and 3202 abductions. The highest numbers were in Somalia, the Central African

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[11] Ibid.

[12] Safe at Last *The Truth About Child Abduction Statistics 2023* (15 March 2022) https://safeatlast.co/blog/child-abduction-statistics/#gref

[13] News24 "'A real and present danger: Missing Children SA shares read flags to look out for and safety tips'" available at *https://www.news24.com/parent/child_7-12/development/health_safety/a-real-and-present-danger-missing-children-sa-shares-red-flags-to-look-out-for-and-safety-tips-20220613* accessed on 4 April 2023.

[14] Missing Children Europe *Facts and Trends 2020* (2020) United Kingdom of Great Britain and Ireland *Missing Children Europe* available at *https://reliefweb.int/report/world/figures-and-trends-2020*, accessed on 8 April 2023.

Republic, Sudan, the Democratic Republic of Congo and the Lake Chad Basin Region.[15] These statistics however relate predominantly to instances of armed conflict. Accurate statistical information for the African continent specifically relating to child abductions and/or child abductions by parents/guardians appear less readily available.

The South African Police Services' ("SAPS") first quarter reported crime statistics for the 2022 / 2023 financial year[16], indicates that a total of 77 national incidents of child removal from parents/ guardians without consent was reported with the three highest rates recorded in Gauteng, Kwa-Zulu Natal and Limpopo provinces. Domestic related kidnapping was reported at 121 incidents and Human Trafficking was reported at 17 nationally for the same period.

The incidents reported under the qualifications of domestic related kidnapping and human trafficking may not be altogether accurate because the report does not define what number of these cases involve minor children and if a child is abducted by a family member or a third party it would not be immediately apparent to a parent or guardian at the time of the incident, whether the abduction relates to human trafficking. The statistical report also does not indicate what percentage or number of these types of offences have been successfully resolved.

The website for the South African Centre for Missing and Exploited Children (SACMEC)[17] has a lack of statistical data and the last statistics offered by the Children's Institute of the University of

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[15] Institute for Security Studies 'PSC Report - Time for action to protect Africa's youth' available at *https://issafrica.org/pscreport/psc-insights/time-for-action-to-protect-africas-youth*, accessed on 8 April 2023

[16] South African Department of Police: South African Police Services 'First Quarter 2022/2023 Crime Stats Presentation ' available at *https://www.saps.gov.za/services/crimestats.php* accessed on 8 April 2023.

[17] South African Centre for Missing and Exploited Children available at *http://www.missingkids.co.za/* accessed on 3 April 2023.

Cape Town date back to 2016 stating that abductions rated at 3 abductions per one hundred thousand (100 000) children.[18]

In 2021 in a four-part investigative journalistic report by Robyn Wolson Vorster for Daily Maverick,[19] Vorster explores and details the discrepancies in statistics within South Africa regarding child abductions, the informal and relaxed manner in which police stations handle such cases and the rising commonality of child kidnappings. Vorster's third instalment in the series touched on the estimated number of 23% of missing children who are categorized as still not found.

There does not appear to be an authoritative central organisation within South Africa able to offer independent verified statistics of child abductions to either (a) other States in general and (b) to non-Hague member States.

The global statistics on child abduction are alarming and more importantly varied and one reaches the overriding conclusion that these cases are not altogether accurately, regularly or uniformly recorded for every country. Some abductions are either not reported at all or the authorities of a particular country do not record such statistics in an accurate manner.

More than this, child abductions globally by parents form a large component of the category of abductions in that more than 90% of child abductions are committed by parents or legal guardians and three in every three thousand children are abducted by a family member each year as suggested by Safe at Last statistics.[20]

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[18] UCT Children's Institute 'Children Count ' available at *http://www.childrencount.uct.ac.za/indicator.php?domain=8&indicator=88*, accessed on 2 April 2023.

[19] Robyn Wolsen Vorster 'South Africa's missing children (Part Four): The search for solutions' *Daily Maverick* 29 September 2021 available at *https://www.dailymaverick.co.za/article/2021-09-27-south-africas-missing-children-part-two-dead-or-still-not-found/* accessed on 5 March 2023.

[20] Ibid.

Safe at Last also reports that in most cases (they say 99%) of parental or family abduction, children are returned, but whether these statistics are accurate on the global front is unsure.

1.3 Problem statement and Research Question

The South African Police Service website advises that parents of abducted children need to report their missing children immediately as there is no waiting period applicable before reporting a missing person and sets out the reporting procedure.[21] Similar information may be found on the website for the national and provincial government authorities with a direction to further contact non-governmental agencies such as the South African Centre for Missing and Exploited Children and Missing Persons South Africa.[22]

Of these organisations, it is only the South African Centre for Missing and Exploited Children (SACMEC) which explains on its website that "cases of cross-border abduction will be handled by SACMEC in cooperation with INTERPOL agencies in the respective countries."[23]

The limitations of the HCCA are well defined in its first article by the use of the term "Contracting States". No alternative convention has yet been implemented to deal with abductions to non- HCCA countries. South Africa has also not enacted any independent legislation to deal with this specific issue.

The parents or legal guardians of an abducted child at this juncture are left in the unenviable position of having to, at their own cost and without the institutional support and sponsorship of the

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[21] South African Police Services 'Reporting a Missing Person ' available at *https://www.saps.gov.za/sapswebsite/index/.php/faq/*, accessed on 5 March 2023.

[22] South African Government 'How to report a missing person ' available at *https://www.gov.za/services/report-crime/how-report-missing-person* accessed on 5 March 2023

[23] SACMEC ibid

government, retrieve their child by normal civil process.[24] The complainant parent /legal guardian will have to first track and trace the abducted child, and then obtain a civil court order confirming that he or she has suffered a breach of parental rights and that the removal of the child from the country of habitual residence was unlawful together with a mirror order for enforcement in a foreign jurisdiction.[25] This legal route will entail the use of South African and foreign attorneys which can become a very expensive exercise especially when there is a large disparity in currency exchange rates between the country from which the child was taken and the country where the abducted child is located.[26]

In addition, thereto, time is of the essence, as the more time a child is separated from the complainant parent, the more difficult it may become to trace the child and enforce a court order in another jurisdiction. Above and beyond this, the more time spent away from the country of habitual residence, the more accustomed the child becomes to his or her new surroundings especially when the abductor parent / family member has indoctrinated the child to believe that the complainant parent has died or no longer loves and wants them.[27]

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[24] Lisa R Havilland "'One Year Isn't Enough: How the Hague Abduction Convention's One-Year Limitation Encourages Abductors to Conceal Their Child's Whereabouts.'" (2017) *Family law quarterly 51.1 : 73–94.*

[25] Bertus Preller & Associates 'International Child Abduction ' available at *https://www.divorceattorney.co.za/international-child-abduction.html*, accessed on 13 April 2023.; Abrahams & Gross Attorneys 'Parental child abduction: when a child is taken overseas without consent' available at *https://www.abgross.co.za/parental-child-abduction/*, accessed on 13 April 2023.

[26] Associates ;ibid.

[27] Havilland

Cultural prescripts in certain non-Hague countries favour cultural or religious rules and practices above Western laws and court orders,[28] and it is uncertain when a ruling may be made in favour of the abductor parent instead, despite the fact that a court in the country of habitual residence has ordered that the child be returned. Enforcement is key in any legal setting and gives laws even consensual ones, the teeth it needs to fulfil the bite.

The concept of child abduction to non-Hague States is not a new one and each country may have had to deal with it in their own ways taking into account the particularities of each case but also regional, religious and cultural influences.

In light of the above information, the question in these instances is what legal and other measures are in place within South African law and international law to deal with child abductions by parents to countries which are not party to the Convention on International Child Abduction? and in identifying loopholes within the system, what can be done to better prevent such abductions?

1.4 Methodology

This study thus evaluates the current international and South African domestic laws, legislation, policies and enforcement mechanisms available to retrieve a child abducted by a parent or legal guardian to countries who are not party to the Convention on the Civil Aspects of International Child Abduction. A particular examination of Islamic concepts of custody and rights is done because in the first context example, the children were abducted to Bangladesh which is a non-HCCA state. Barring Morocco and Iraq, the majority of Islamic states including Bangladesh have not ratified the HCCA. The aim of the research is to identify or outline loopholes in the international and South

[28] Anver M. Emon *Islamic Law and Private International Law: The Case of International Child Abduction* (2015) Institute for Advanced Studies, https://www.ias.edu/ideas/2015/emon-law, accessed 20 July 2023

African domestic legal systems which require re-evaluation specifically with regard to abduction to non-Hague and non-compliant countries. In the course of this evaluation, consideration is given to binding and non-binding forms of international law and differences in cultural perspectives on custody and access in Islamic non-HCCA states. Bearing in mind that no field work has been undertaken in this research, the study is reliant on available public statistics and resources for contextual information.

1.5 Chapter breakdown

Chapter 2 will review the current applicable international and regional conventions as well as South African domestic legislation and enforcement mechanisms dealing with international child abduction. Consideration is also given to domestic legislation which has an effect on international child abduction.

In Chapter 3, the paper conducts a comparison on how child abductions are dealt with in foreign jurisdictions highlighting the centrality of custody to parental abduction matters. Custody and abductions within an Islamic state are considered as a comparison to western concepts of custody and rights. This chapter also looks at international policing mechanisms related to child abductions.

The effects of parental abduction on child abductees and the human rights of children which are affected by abduction are considered in Chapter 4 with a view to expressing why this issue still requires international attention and better management. The Chapter considers the importance of child participation and whether the child himself or herself has the right to ask to be returned to the parent from which they were taken.

Chapter 5 concludes the research, in relation to the loopholes identified, by recommending certain adjustments to international policy, to South African domestic legislation and enforcement mechanisms and includes recommendations by authors on the subject.

CHAPTER 2. IDENTIFYING THE LIMITATIONS IN EXISTING LAWS

2.1 Introduction

In order for us to understand whether there are loopholes in the system of parental abduction and before we can determine what those loopholes are, we need to be aware of what existing conventions and laws are in place internationally and domestically to regulate parental abduction. This chapter will briefly remind us of the aims of the HCCA and what its sphere of application is. Having regard to its sphere of application, we will see that the convention finds application in limited circumstances. We will also briefly review the African Charter on the Rights and Welfare of the Child[29] and the Convention on the Rights of the Child[30] to determine if it offers any additional or alternative relief to abductions by parents. South African domestic law specifically relating to child abduction as well as ancillary domestic legislation which may have an influence on the unlawful removal of a child from the country will also be considered.

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[29] African Charter on the Rights and Welfare of the Child Adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU Addis Ababa, Ethiopia - July 1990 entered into force on 29 November 1999

[30] United Nations Convention on the Rights of the Child, 1989 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49

2.2 The Hague Convention on the Civil Aspects of International Child Abduction

South Africa ratified the Convention on International Child Abduction on 16 July 1996 and the convention came into effect on 1 October 1997 by means of Act 72 of 1996.[31]

Article 1 of the HCCA reads: "The objects of the present Convention are –

"(a) to secure the prompt return of children wrongfully removed or retained in any contracting state; and

(b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states."[32]

The explanatory notes to the HCCA states clearly that the intention of the Convention is not to regulate custody rights between parents of children but that its intention is rather to place the family before the authorities in the child's country of habitual residence with the competence to decide such matters, and in doing so it affords a mechanism whereby a child who is 'wrongfully' removed from the country of habitual residence is returned.[33]

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[31] RSA Department of Justice & Constitutional Development 'The Central Authority of South Africa: The Hague Convention of the Civil Aspects of International Child Abduction' available at *https://www.justice.gov.za/hague/main.htm*, accessed on 4 April 2023.

[32] Hague Convention on the Civil Aspects of International Child Abduction *ibid*

[33] HCCH Publications – Explanatory Report by Elisa Pèrez- Vera *Explanatory report: Convention on the Civil Aspects of Child Abductions* (Offprint from the Acts and Documents of the Fourteenth Session (1980), tome III, Child abduction) *United Nations Hague Conference on Private International Law* available at *https://www.hcch.net/en/publications-and-studies/details4/?pid=2779* accessed on 4 March 2023.

The scope of application of the HCCA sets out at Article 37 that the convention is "open for signature by States which are members of the Hague Conference on Private International Law at the time of its 14th session." In addition, thereto Article 38 states: [34]

> "The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

The parameters of the Convention are clear in that:

(a) It applies only to contracting States (preamble, Articles 1 and 2) which means that its provisions cannot be enforced against countries who have not acceded to or ratified the Convention.

(b) For the provisions of the Convention to be effective, the contracting State must give effect to its provisions in domestic law (Article 2). It often happens that some States who have ratified the Convention have not or do not give effect to its measures as a result of cultural or religious beliefs.[35]

(c) Whilst the HCCA deems a child to be under the age of sixteen years (Article 4), South African law (The Children's Act 38 of 2005 etc.) and the African Charter on the Rights and Welfare of the Child (Article 2) as well as the CRC regard the age of majority as eighteen years. There is therefore disparity between a minor's age in terms of the HCCA and other legislation. The HCCA does not recognise that the age of majority for some contracting states may be eighteen as opposed to sixteen years of age.

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[34] Hague Convention on the Civil Aspects of International Child Abduction

[35] Emon

(d) Article 8 is ambiguous in that it gives the impression that the Convention can be relied upon by "any person,…claiming that a child has been removed or retained in breach of custody rights may apply to the Central Authority …for assistance in securing the return of the child" but again it is qualified by the use of the words 'contracting state'.

(e) Article 29 of the HCCA however provides that an applicant will not be prevented from making direct application to the judicial or administrative authorities in contracting States for the return of an abducted child whether or not under the convention. This however presupposes (i) that the applicant (i.e. parent / guardian) has obtained a court order for the return of the child in the country of habitual residence and (ii) only refers to an application to a member country. It does not deal with the situation where the application stems from a member country which is also the country of habitual residence to a country which is not a member country. This means that essentially it is incumbent upon the parent or guardian trying to retrieve the child on their own, to pursue private civil action which is costly and to take matters into their own hands to find the child in a foreign country.[36]

(f) The HCCA stifles a parent or legal guardian's ability to retrieve a child because Article 12 determines that where a period of one year has elapsed since the date of abduction and the child is well-settled, a court may not order the child's return and the left-behind parent has no further remedy.

(g) The HCCA does not have an oversight body to ensure compliance with the Convention or to censure states for non-compliance.

The HCCA in its current form cannot apply in either of the examples set forth in the context examples in Chapter 1 because the Convention is a multilateral treaty between signatory states who have

[36] Preller; Abrahams & Gross ibid.

undertaken to abide by and give effect to the objects of the Convention. In the example above, where the minor child has been taken by the father to his home country of Bangladesh, we note that Bangladesh has not acceded to or ratified the HCCA and is therefore not a party to the Convention.[37] Approximately 80% of the population of Bangladesh are Muslims and the Constitution of Bangladesh designates it as an Islamic state although it supports secular laws. Bangladesh can therefore be said to be predominantly an Islamic State.[38]

The Children's Act[39] follows from the HCCA (Chapter 17 Sections 275 to 280) and does not introduce any further or alternate measures relating to child abduction in respect of countries who are not party to the HCCA. South Africa has also not also entered into any separate treaty with Bangladesh or China or any other non-Convention country to determine legal protocols for abduction of children by parents.

Given that the HCCA cannot be used in cases where a child has been taken to a non-member State, it is necessary to review whether there are legal avenues within other conventions or domestic legislation which can be applied to expedite the process of repatriation of an abducted child from a non-member State.

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[37] Office of the United Nations High Commissioner for Human Rights 'Un Treaty Database: Ratification, Reporting & Documentation for Bangladesh' available at *https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx* accessed on 13 May 2023.

[38] Embassy of Bangladesh 'Embassy of Bangladesh in the Republic of Uzbekistan - Population and Religion ' available at *https://bangladesh.uz/population-religion#:~:text*, accessed on 10 February 2024.; United States of America Department of State '2022 Report on International Religious Freedom: Bangladesh' available at *https://www.state.gov/reports/2022-report-on-international-religious-freedom/bangladesh/*, accessed on 10 February 2024.

[39] Children's Act 38 of 2005 *Government Gazette No. 28944 dated 19 June 2006, assented to 8 June 2006*

2.3 The Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child[40] entered into force on 2 September 1990 and to date has been ratified by all United Nations member states excluding the United States of America.[41] South Africa signed the CRC in 1993 and ratified it in 1995.[42] As such, states who are party to the Convention are obliged to follow its provisions and regularly report on its compliance with the convention's principles to the United Nations Committee on the Rights of the Child. The UN Committee on the Rights of the Child was established in terms of Article 43 of the CRC to monitor the compliance with convention obligation by member states and is empowered by means of Article 45 to make recommendations and comments to the General Assembly.[43]

The CRC does not however contain provisions specific to child abduction; and noticeably counter to the HCCA, confirms in Article 1 that a child is a person below the age of eighteen years, unless the national legislation of a country prescribes a younger age.

On reading the CRC we find that the convention deals with a child's custodial relationship to parents in Articles 9, 10, 11 and 18.

Article 9 (1) of the CRC stipulates that "States Parties shall ensure that a child shall not be separated from his or her parents against their will".

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[40] United Nations Convention on the Rights of the Child, 1989

[41] UNICEF:For every child 'Convention on the Rights of the Child: Frequently Asked Questions' available at *https://www.unicef.org/child-rights-convention/frequently-asked-questions*, accessed on 10 February 2024.

[42] United Nations 'United Nations Treaty Collection - Convention on the Rights of the Child ' available at *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en* accessed on 13 May 2023.

[43] United Nations Convention on the Rights of the Child, 1989

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis" (Article 9(3) of the CRC). This Article too can be relied upon in an international action to secure the return of the child but given the sovereignty of each State, it is hard for the requesting State or the UNCRC to police this aspect in practice.

Article 10(1) provides in relation to States Parties in Article 9 that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner" and shall not involve adverse consequences for the claimant and family.

Article 10(2) protects a child's right to maintain personal relations with both parents who may live in different States whilst Article 11 places responsibility on the State party to implement procedures to combat the illicit transfer and non-return of a child abroad, which procedures are to include the conclusion of bilateral or multilateral agreements dealing with these matters.

Finally, Article 18 enjoins member States to ensure recognition of each parent's common responsibilities to the rearing and development of the child. The Optional Protocols[44] to the CRC find no real application in the case of abduction by parents and are they are specifically geared towards children involved in armed conflict, or children who are victims of illicit sale, prostitution and pornography. Most notable of the aforementioned CRC articles is that it at all times places a burden on the State Party to act in the interests of the child.

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[44] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 25 May 2000 - General Assembly Resolution A/RES/54/263 ; Optional Protocol to the Convention on the Rights of the Child on a communications procedure 19 December 2021 - General Assembly Resolution A/RES/66/138 ; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 25 May 2000 - General Assembly Resolution A/RES/54/263

In reference to the context example in Chapter 1, Bangladesh signed and ratified the CRC in August 1990 as well as 2 of the 3 optional protocols in 2007.[45]

2.4 African Regional Conventions on Children

The African Charter on the Rights and Welfare of the Child[46] does not purposefully delve into the area of child abduction and no other African regional conventions dealing with such matters exist. Article 19 of the ACRWC however secures the child's right to parental care by decisively stating that a child shall not be separated from his parents against the child's will, without judicial determination according to applicable laws and due regard to the child's best interests (Article 19(1)); and that a child so separated has the right to maintain contact and personal relations with the parent from whom the child is separated (Article 19(2)). The Charter cannot apply to a country which is not a party thereto and therefore won't be applicable to the examples contained in the introduction, but South Africa is a State Party to the Charter since 2000 and does have the ability to give effect to these provisions in its domestic laws as well as any bilateral agreements which it may conclude with countries not party to the Charter or the HCCA. Again, this convention does not provide for any expedient enforcement measures to retrieve an abducted child and reliance is placed on the civil remedies within each State, thus we move to assess the domestic South African laws.

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[45] United Nations Treaty Body Database, accessed 13 May 2023 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx

[46] African Charter on the Rights and Welfare of the Child, signed by South Africa on 10 October 1997 and ratified on 7 January 2000

2.5 Domestic South African laws

2.5.1 The Children's Act 38 of 2005

The Children's Act 38 of 2005 came into force on 1 April 2010 in South Africa and gave effect to the provisions of the HCCA in Chapter 17. The Act does not define the concept of 'child abduction' but rather states in section 274 that the purpose of the Chapter is "to combat parental child abduction." The scope of the Act, in so far as child abduction by parents is concerned, is limited to the provisions of the HCCA.

Article 7 of the United Nations Convention on the Civil Aspects of International Child Abduction empowers the Central Authority of a member country to "secure the prompt return of children and to achieve the other objects of the Convention."

In turn, Section 276 of the Children's Act 38 of 2005 defines the Central Authority of South Africa for the purposes of the aforesaid Convention as the Chief Family Advocate appointed by the Minister of Justice and Constitutional Development.

In the normal course of events, where a child has been abducted from South Africa and it is confirmed that the child was taken to another country, the complainant parent or legal guardian would engage the services of the Central Authority to secure the prompt return of the minor. However, this legal avenue is only available to the complainant if the child has been taken to a country which has acceded to and ratified the HCCA (Article 1). The Central Authority/ Office of the Family Advocate has not it seems been empowered by means of other legislation to also assist in the retrieval / repatriation of parental abducted children from non-Convention countries.

2.5.2 Immigration Act 13 of 2002 and regulations

To limit child abduction, the South African government implemented certain requirements for children travelling through South African ports of entry or exit by amendment to the Immigration Regulations of 2014.[47] Regulation 6 has been amended to delineate the supporting documents to be presented to immigration officials in each circumstance where a child travels through a South African port of entry or exit. It states at sub-regulation 12 (a) that where one parent, legal guardian or other person travels abroad with a child, that person must present the child's unabridged birth certificate, unless the child is from a visa required country. A letter of consent from the other parent on affidavit authorising the travel must accompany the travellers. In practice, the parental consent is a template form created by the Department of Home Affairs[48] which does not require any other independent authentication and so it is open to forgery. However, a notarial authenticated parental consent letter is required by some other countries to which the child may be travelling.

The safeguard in this latter practise means that the parent granting the consent in the presence of a notary has been independently identified and verified by the notary. The office of the notary is a special office which enjoys high regard and is grounded on the principles of impartiality, credibility, responsibility and independence. Acts performed and documents prepared and authenticated by a notary are deemed to be done on the highest degree of faith.[49]

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[47] *First Amendment of the Immigration Regulations, 2014 made under the Immigration Act 13 of 2002* Government Notices *42071* 2018)

[48] Republic of South Africa Department of Home Affairs 'Updated Advisory November 2019: New Requirements for Children travelling through South African ports of entry' available at *http://www.dha.gov.za/index.php/statements-speeches/621-updated-advisory-new-requirements-for-children-travelling-through-south-african-ports-of-entry*, accessed on 18 November 2019.2019.

[49] FE Van Der Merwe *Notarial Practice* Butterworths (Durban) pg 6 (2001)

Regulation 6(12)(a) further provides that the child's unabridged birth certificate must contain the particulars of the child and the parents; and that where only one parent has custodial rights, a certified copy of the court order or other parent's death certificate must be presented. Guardians travelling overseas with minor children must obtain permission from the Director-General of Home Affairs,[50] though it doesn't set out the procedure for such applications.

The aforementioned legal process governing the international movement of children through South African borders is not full proof in so far as abducted children are concerned in that:

(a) although the regulations refer to the consent in affidavit form, the suggested template form proffered by the Department of Home Affairs does not make provision for signature before a commissioner of oaths;

(b) there is no uniform international procedure for these types of parental consents because some receiving countries require a notarised parental consent letter whereas others only require a written parental consent which may or may not need to be on affidavit;

(c) even though the form stipulates the period for which the child is allowed to travel abroad, there are no further regulations determining the legal recourse available to the consenting parent when the travelling parent / guardian has failed to return the child to the Republic once the time period for which the consent was granted has lapsed nor does it authorise the DIRCO to alert authorities in the receiving country as to the missing child; and

(d) in cases where a child has travelled with both parents to another country and the child is abducted by one parent from that other country, there is no clear and immediate international legal recourse available to the parent left behind when acting from a country which is not the habitual place of residence. One would assume that the left behind parent has to return to the

[50] Regulation 6(12)(b) of the Immigration Act, as amended.

country of habitual residence to institute recovery action if the country from which the child was taken is not a signatory.

(e) In 2020, the South African Human Rights Commission resolved to establish a dedicated Children's Rights Unit. The purpose of this exclusive unit is the protection, promotion and education of children's rights. By means of the Children's Court, effect has been given to the protection of children's rights though the court does not deal with criminal matters. It is a special court dealing with child related matters such as abandonment, neglect and abuse. Despite the fact that the Children's Act specifically creates this court and makes provision for the court to be approached in terms of Regulation 6 and Section 53 in international child abduction matters, this specifically relates to international child abductions in terms of the HCCA.

2.5.3 The Crime of Kidnapping / Child Abduction

In terms of South African law, kidnapping is a common law crime "consisting of unlawfully and intentionally depriving a person of his/her freedom of movement and/or if such person is a child, his/her custodians of their control over him/her."[51] The anomaly within South African law is that a parent is not necessarily guilty of the crime of kidnapping his/her own child, even where custody of that child was awarded to the other parent.[52] Snyman states that the abductor parent is instead guilty of infringing the court order in terms of which custody of the child is granted to the parent from whom

[51] Snyman ibid at page 473; this definition was confirmed and applied in Hoffman 1983 (4) All SA 232 (T), S v Blom 1977 (3) SA 513 (AD) and S v Sam 1980 (4) SA 289 (T)

[52] Ibid.

the child was taken. This is a misdirected application of the definition of kidnapping. In the illustrations in the introduction to this paper, the parents were not divorced and there was no court order setting out custody arrangements yet one parent illicitly and permanently removed the minor child/ children from South Africa or from the custody of the other parent without the other parent's lawful consent or a court order authorising the removal. If the definition of kidnapping were strictly applied to the example/s in the introduction, it is noted that the actions of the abductor parent fulfil the essential elements of kidnapping in that the abductor has unlawfully by means of fraudulent conduct or by obtaining the other parent's consent to a limited overseas stay, deprived the other parent of custody of the minor child with the intention of removing the child from the control and guardianship of the other parent indefinitely.

There are no separate or alternative laws dealing with the abduction or kidnapping of children by parents in South Africa.

2.5.4 The Births and Registration Act 51 of 1992

Having regard to the second context example in Chapter 1, we note that Chapter 2 of Act 51 of 1992 deals with the registration of births in South Africa.[53] Section 9(1) states that any one of the child's parents must within seven days of the child's birth, give notice thereof to the Department of Home Affairs and that an illegitimate child (i.e., a child born out of wedlock) will be registered under his mother's surname (section 10) unless a person who acknowledges himself to be the father of that child requests the registration under the father's name with the mother's consent.

[53] Births and Death Registration Act 51 of 1992

This archaic manner of birth registration leaves the process open to fraudulent misrepresentation by the mother and a third party misrepresenting himself as the father of the child; or by a mother who intends to remove the child from the country without the father's consent as seen in the second example referred to in the context. An unmarried mother can register the birth of the child without the consent or knowledge of the father and without recording the father's details on the birth certificate simply because our law does not require it.

In *Centre for Child Law v Director General: Department of Home Affairs & Others* [54]the court considered the constitutional validity of Section 10 of the Births and Registrations Act[55] in reference to children born out of wedlock. The provisions of Section 10 limit the registration of such child's birth to (i) the surname of the mother (Section 10(1)(a)), or (ii) in the name of the person who acknowledges himself to be the father of the child upon joint request with the mother (Section 10(1)(b), or (iii) under the surname of the mother where the person who is the father consents to such registration (Section 10(1)(c)). The determined that Section 10 of Act 51 of 1992 is discriminatory against the father of a child born out of wedlock and that such discrimination violated the father's right to equality in terms of Section 9(3) of the Constitution.

2.6 Comparison between the laws applicable to abductions for trafficking and parental abductions

[54] *Centre for Child Law v Director General: Department of Home Affairs and Others (CCT 101/20) [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC) (22 September 2021)*

[55] Births and Death Registration Act 51 of 1992

Chapter 18 of the Children's Act sets out the provisions relating to trafficking in children. In comparison to Chapter 17 which encompasses the legal rules pertaining to international child abduction, the provisions relating to how child trafficking victim cases are handled are more definitive.

(a) Section 283 recognises international co-operation by affording the President of the Republic, the right to conclude international agreements relating to child trafficking with foreign States who are not members of the UN Protocol on Trafficking in Persons. No similar provision has been included in respect of international child abductions.

(b) Section 286 states in summary that the Director – General of Foreign Affairs must facilitate the return of a South African child who is a trafficking victim. It further states that the Director General of Home Affairs must accept return of the child, facilitate travel documents, refer the child to a social worker and arrange a State funded escort if it is in the best interests of the child. Again, no direct duty has been placed on any division of government to assist in or facilitate the retrieval of child who is the subject of international child abduction in Chapter 17.

(c) In cases where the parent or legal guardian of the child is responsible for trafficking the child, a court has the authority to suspend such person's parental rights and responsibilities (Section 287). In many cases of parental child abduction, the child is not abducted for purposes of trafficking and so again parents cannot rely on this provision.

(d) Where a child trafficked from another country is found, such child must be referred to a designated social worker for investigation in terms of Section 289(1). (Section 288).

Paragraphs c and b above show that well- thought out consequential and facilitation actions have been taken into account in order to give effect to the best interests of the child in cases of trafficking, but no similar provisions have been enacted in the case of children abducted by parents without

trafficking motives. There are therefore clear deficiencies in the law relating to the abduction of children by parents.

2.7 Conclusion

Having briefly considered conventions and legislation directly or indirectly affecting the parental abduction of children in the above paragraphs, we have found that the application of the HCCA is limited to contracting States. The HCCA is also not automatically applicable between all contracting States upon the accession and ratification of the convention by a new member State, thus there is no automatic recourse where states have not ratified between each other. There are no regional treaties or conventions on the African continent dealing specifically with child abduction by parents and South African domestic laws are found wanting in respect of preventative measures to parental child abduction. In the following section, the laws relating to parental abduction are examined in further detail in relation to other jurisdictions and the opinions of authors.

CHAPTER 3: COMPARATIVE FOREIGN LEGAL PERSPECTIVES ON CHILD ABDUCTION BY PARENTS

3.1 Introduction

In Chapter Two, we found that South Africa does not have domestic legal measures in place which strictly deal with parental child abductions to non-HCCA countries. By virtue of its international nature, we therefore need to consider whether the countries to which the children were taken in the context examples in Chapter 1 have differing perspectives on custody and how they and other States deal with such issues. This Chapter therefore compares what constitutes custody in South Africa and Islamic states such as Bangladesh and how it differs. This is in light of the fact that a large number of Islamic States have not ratified the HCCA because they argue that it contravenes Islamic legal principles of child custody.[56] In addition, thereto, Chapter 3 reflects on how child abductions to non-HCCA countries are dealt with in the United States of America and European Union.

3.2 The issue of parental custody

The element of custody and guardianship is key in parental abduction matters. Many years ago in South Africa, married fathers were afforded more dominant rights in respect of parental authority and retained sole guardianship until mothers' parental authority was recognised with the implementation

[56] Emon

of the Matrimonial Affairs Act 37 of 1953.[57] Parental authority at that time encompassed all parental rights and duties in respect of children born within a marriage and under common law this parental authority included guardianship, custody and access.[58] Later the Guardianship Act[59] bestowed equal and joint guardianship status on both parents of children born within a marriage. Common law however continued to govern custody of and access to children. The Children's Act 38 of 2005 repealed the Guardianship Act and refreshed this position by providing for shared parental responsibilities and rights regardless of whether the parents are married to each other, never married, divorced or are co-holders of parental rights but who are not the biological parents. Section 18 of Act 38 of 2005, says that parental responsibilities and rights entail four elements namely, (a) care for the child (b) the right to maintain contact with the child, (c) the right to act as guardian of the child, and (d) to contribute to the maintenance of the child. Full parental responsibilities and rights are automatically attributed to the biological mother of a child whether married or unmarried.[60] A biological father is only bestowed with full parental responsibilities and rights if (a) married to the child's mother (various scenarios are outlined)[61] or where unmarried and, (b) the biological father consents or applies to being identified as the child's father or is in a permanent life partnership with the mother of the child.[62]

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[57] Matrimonial Affairs Act 37 of 1953, as amended of

[58] Trynie Boezaart *Child Law in South Africa* Juta, Claremont (SA) (2016) page 4 - 20.

[59] Guardianship Act 192 of 1993 (South Africa)

[60] Section 19 of the Children's Act 38 of 2005

[61] Section 20 of Act 38 of 2005

[62] Section 21 of Act 38 of 2005

According to South African law, any High Court per Section 166 of the Constitution[63] or divorce court with divorce jurisdiction under Section 10 of the Administration Act 9 of 1929, as amended, granting a decree of divorce, may make an order as to the custody of a child.

Bangladesh like many other Islamic countries is not a signatory to the HCCA and the country does not have a legal regime dealing with the abduction of children to and from the country.[64] It follows Islamic principles and thus in Bangladesh, the father is the natural guardian of the child, and the mother is deemed to be the custodian of the child. In the case of sons, the mother retains custody until the child reaches the age of seven years, whilst in the case of daughters, custody is retained until the child reaches puberty. Fathers bear responsibility for a child and as such have a duty to maintain that child even after divorce. However, where a mother re-marries, custody of the child reverts to the father.[65]

The Islamic laws on personal status are governed by Sharia or Sharia law which encompasses rules on succession, religious endowments, inheritance and custody. The Quran provides the framework for Islamic life and is the most authoritative source of Islamic principles. The second most authoritative source for Islamic law is the 'Sunna' or the traditional teachings of the Prophet Muhammad. Ijma is the third source of Sharia and provides conclusive arguments proving the existence or interpretation of a law.[66]

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[63] The Constitution of the Republic of South Africa Act 108 of 1996 *South African government*

[64] Wiselaw 'Bangladesh Divorce & Family Law ' available at *https://www.wiselaw.co.uk/international-divorce-lawyers*, accessed on 13 July 2023 ; Barrister Aiman R Khan *International parental child abduction in the eyes of Bangladeshi Law* (21 June 2023) The Business Standard ; The Penal Code Act XLV (People's Republic of Bangladesh) of 1860

[65] Wiselaw

[66] Geraldine van Bueren *The Best Interests of the Child - International Co-operation on Child Abduction* The British Institute of Human Rights (1993)

The rights and responsibilities of the child and of that of the parents are thus closely linked to the status of men and women in Islamic society. According to Islamic law, children have a right to guardianship from birth. Guardianship is a duty, and a person is entitled thereto by virtue of natural kinship, testament or court appointment.[67]

Contemporary Islamic States apply traditional Islamic law according to which a child is entitled to fosterage and custody, which is a duty owed by the mother as well as maintenance and guardianship which are duties obligated by the father. The guardianship of infancy refers to the care of an infant during the earliest years. Hadhina or fosterage refers to the provisions of care, food and nourishment which under religious imperative regards the care and control of the child during the early years as belonging to the mother. The mother can be deprived of Hadhina if she is ineligible to retain custody for example because she is raising the child outside of the father's faith. Three scholastic approaches, namely Hanafi, Shafie and Hanbali suggest that Hadhina can be restored if the mother remedies the situation. Muslim women are not allowed to marry non-Muslim men whilst Muslim men are allowed to marry non-Muslim women. In instances of mixed marriages, the mother has rights of custody of male children until the age of two years (suckling) or until the age of seven years (age of discretion) and in cases of female children until the age of puberty. Otherwise, the mother only retains access to her child which may be restricted if the mother attempts for instance to raise the child in another religion. In the period that the mother has custody of the child, the father is not entitled to travel with the child unless he has the permission of the mother. This requirement for consent at least seems to be comparative to secular laws.[68]

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[67] Ibid.

[68] Ibid.

Guardianship of the person in relation to children are functions which fall within the authority of the father or other male relatives. A child's religious upbringing in Islam appears to play a pivotal role in the principles surrounding custody of the child and regards it in the best interests of the child to be raised in an Islamic state as opposed to non-Islamic states which could expose the child to interferences from other religions.[69]

Islamic law thus recognizes that both parents have responsibilities toward the child. The responsibilities and rights of the family to provide guidance to a child in accordance with a child's evolving capacities is recognized in both international law and Islamic law. Although Islamic States adopted the Convention on the Rights of the Child, reservations were entered in terms of which the State would only be bound by those provisions which were in conformity with Islam. Van Bueren notes that it would be difficult to see how international child abduction could be countered in the case of Islamic States who differentiate strongly between the custodial rights of mothers in earlier years, and which grants the father exclusive religious and legal responsibility for children older than a certain age. However, both the Quran and Sunna predate the modern era in which international travel and transport has made the removal of a child from a State with the intention of not returning easier.[70] Parental consent could be obtained by one parent from the other parent under the guise of visiting family or going on holiday which is most often the case. Thus, if the father of an abducted child is Muslim and returns to his Islamic home state, his rights to custody and guardianship of that child are validated in terms of the laws of the father's home country.

Bangladesh itself adheres to the Family Courts Ordinance of 1985 and the Guardians and Wards Act of 1890 when dealing with custody and guardianship of children. These laws determine that the father

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[69] Ibid.

[70] Ibid.

is the legal and natural guardian of a child until such child attains the age of majority which is 18 years of age. Mothers have rights of custody until a certain age only. Essentially, the Islamic principles of custody and guardianship are codified in the aforementioned legislation.[71]

We already know that Bangladesh as an Islamic State has not adopted the Hague Convention on the Civil Aspects of International Child Abduction and that there is no legal framework in Bangladesh dealing with such matters. This leaves parents who reside in westernized countries which are member States of the HCCA in the unenviable position of having no clear, decisive and expeditious legal recourse if their child is abducted and taken to an Islamic State. It is also not surprising then that Muslim parents who are responsible for child abductions to Islamic countries take this recourse where the laws may be more favourable to their rights as parents.

By way of illustration, in *Ahmed v Naviwala*,[72] the family court awarded the mother sole custody of the children, but she agreed that the father could take the children to Saudi Arabia to visit with him. During the visitation period, the father obtained an *ex parte* order from the Saudi Court in terms of which he was granted sole custody. He therefore refused to return the children to their mother. Later, whilst on a visit to Texas in the United States with the children, the father and children were seized and transported to New York on the basis of an order of the Broome County Family Court. The Family Court, however, granted custody to the father and visitation rights to the mother subject to certain conditions notwithstanding the fact that Saudi Arabia is not a party to the HCCA. The matter was taken on appeal, where the Court awarded sole custody to the mother and allowed visitation by

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[71] Meherun Wahed 'On norms of custody and guardianship' *The Daily Star (Bangladesh)* 13 November 2018 (accessed 13 July 2023) available at *https://www.thedailystar.net/law-our-rights/rights-advocacy/news/norms-custody-and-guardianship-1659541*,

[72] *Ahmed v Naviwala, 306 A.D.2d588, 762 N.Y.S.2d (3rd Dept. 2003), Iv dismissed 100 N.Y.2d 615 (2003)*

the father strictly within the US borders. The Appellate Division acknowledged that the Family Court's efforts to ensure the mother's access to the children in Saudi Arabia were lacking.[73] What is concerning about this case, is that despite the fact that the mother was initially granted sole custody of the children, the Saudi Arabian court did not consider this fact when making their order and that the Broome County court completely ignored this order when it confirmed the Saudi Court decision. In *United States v Amer,*[74] the father abducted the children to Egypt from which country both parents originated. The mother could not successfully secure the children's return but when the father entered the United States without the children, he was arrested for international parental kidnapping. The father was sentenced to 24 months' imprisonment and one-year supervised release, with a special condition that the children be returned to the United States. The Second Circuit Court upheld the condition because it was closely related to the crime, and it served as a precedent to parents who considered abducting their children in contravention of custody orders. Courts in Japan on the other hand will not enforce foreign custody orders or assist in returning abducted children.[75]

In the case of *Summayyah Moses v SHO and Others*[76], a South African mother had married her Pakistani husband and they resided together with their two sons in South Africa. The family visited the husband's parents in Pakistan but only the wife returned to South Africa at the scheduled time to resume work and to take care of her ill mother whilst the husband and children stayed on for longer, on the understanding that he would return to their country of habitual residence with the children a

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[73] Jeremy D. Morley 'Parental Abductions: When the Hague Convention won't help' available at *https://www.international-divorce.com/When-the-Hague-Convention-Wont-Help.htm* accessed on 5 March 2023.

[74] *United States v Amer, 110 F3d 873 (2d Cir.1997)*

[75] Morley

[76] *Summayyah Moses v SHO and Others (Writ Petition No. 74048 of 2019) PLD 2020 Lahore 716*

short while later. The father did not return with the children but instead obtained an *ex parte* court order from a Pakistani court in terms of Section 7 of the Guardians and Wards Act of 1890 granting him sole guardianship of the children. The mother filed a petition with the Lahore High Court to recover her sons citing that the children were habitual residents and citizens of South Africa and that the father had deceitfully brought them to Pakistan and deprived her of custody and her parental rights. The mother simultaneously instituted legal proceedings in South Africa which was still pending at that time.[77] A few significant issues were raised in this matter.

Firstly, the court considered various legal case precedents and other sources and, in its judgement, opined that the principle of comity of courts only demands consideration of an order passed by a foreign court and is not required to enforce such an order. Where the best interest of the child is in question, the court is required to make its own independent determination and at most may consider the foreign judgement upon final adjudication.

Secondly, in respect of its reference to the HCCA, the court determined that "the Hague Convention is not an extradition treaty, as it focuses on procedure and jurisdiction rather than on the merits of any underlying custody issue." Meaning that even though Pakistan had acceded to the HCCA, it could not be used to move the children to the mother's country for determination of the issues. Tariq Saleem Sheikh J stated that even so accession by a member state to a Convention does not mean that it automatically partners with all other countries who have ratified or acceded to it. Countries must therefore accept another member's accession to the Convention under the treaty terms before a treaty is created. Since South Africa acceded in 1997 and Pakistan acceded in 2016 (with reservations),

[77] Asad Ali Khan *Pakistan and Child Abduction: Lahore High Court holds 'Hague Convention is not an extradition treaty'* United Kingdom Immigration Law Blog 31 October 2020 (accessed 27 February 2023)

South Africa needed to accept Pakistan's accession which it has not yet done thus the HCCA is not in force between them.

Thirdly, on the mother's argument that the children were citizens of South Africa and that the Guardian Court in Pakistan had no jurisdiction to appoint her husband as guardian, the court ruled that in terms of Section 5 of the Pakistan Citizenship Act 1951, all children born of a Pakistani father are citizens of Pakistan by descent.[78] The same rule of law applies to children born of a Bangladeshi man (subject to registration of that child's birth at a Bangladesh consulate or embassy when the child is born in a foreign country).[79]

3.3 The United States' perspective on child abduction by parents

The United States of America as at 1997 was responsible for the lion's share of Hague abduction cases. The HCCA is in force between the United States of America and fifty other countries. The Convention was implemented into US national legislation in 1988 by means of the International Child Abduction Remedies Act 42 U.S.C. § § 11601 - 11610 (ICARA). Ultimately, the HCCA is based on a civil legal process and is not based on the best interests of the child. Where the child was abducted before the country becomes a party to the Convention or if the child is abducted to a country which is not a party to the Convention, then courts in those other countries are not bound to honour any custody orders made by courts within the country of the child's habitual residence.[80]

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[78] Ibid.

[79] Immigration and Refugee Board Research Directorate, Canada 'Bangladesh: Information on whether someone obtains Bangladeshi citizenship by marriage to a Bangladeshi citizen (1 December 1994, updated July 2023) ' available at *https://www.refworld.org/docid/3ae6ab7650.html* accessed on 2 August 2023.

[80] Linda Girdner and Patricia Hoff Janet Chiancone 'Issues in Resolving Cases of International Child Abduction by Parents ' (December 2001) *OJJDP: Juvenile Justice Bulletin* (accessed 5 March 2003)

The US has instead developed its own system of legal processes regarding these matters. Section 23 of the Uniform Child Custody Jurisdiction Act[81] provides that when a child has been abducted to the United States from the custodial parent, the custodial parent may request a court in the jurisdiction in which the child is found upon proper notice to all concerned parties to enforce a foreign custody order.[82] A similar civil remedy is not provided for in South African law.

The United States of America enacted the Uniform Child-Custody Jurisdiction and Enforcement Act (hereinafter the UCCJEA) to promote uniform jurisdiction and enforcement provisions in interstate child-custody and visitation matters but it is also the legislation dealing with the Hague Convention enforcement orders. It regulates State courts' jurisdiction to make or modify child custody determinations and obliges the courts to enforce valid child custody and visitation orders of courts in other States. This legislation operates in conjunction with the Parental Kidnapping Prevention Act[83], the purpose of which is to minimize abuse of the process of custody applications by parents in different states. In relation to the HCCA, the UCCJEA authorizes public officials to locate and secure the return of a child. It also determines when foreign custody orders based on factual circumstances, from both Hague and non-Hague countries are entitled to enforcement or when courts in the US must defer custody jurisdiction to a foreign court. US state courts however are not required to apply the Act if the child custody law of the foreign country violates fundamental human rights. The Act goes so far as to set out the procedure to ensure a child's safety and presence in its jurisdiction when notice of an enforcement proceeding may cause the person against whom an order is made to flee with the child. Section 311 sanctions a court to issue a warrant directing law enforcement officers to take

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[81] Uniform Child-Custody Jurisdiction and Enforcement Act (1997), 9 (1A) U.L.A. 657 (1999)

[82] Janet Chiancone ibid

[83] Parental Kidnapping Prevention Act of 1980, 28 U.S.C

immediate physical custody of a child if it finds that "a child is imminently likely to suffer serious physical harm or is likely to be removed from the state".[84]

Further than that, all states in the US have criminalized parental abduction in one form or another. Some abduction cases only amount to a felony when the child has crossed state lines.[85] In US law a felony is usually described as a crime punishable by a term of imprisonment of one year or more and the offender may consequentially also lose some civil rights but this varies from state to state.[86] If a state felony warrant is issued, it is possible to obtain a warrant for unlawful flight to avoid prosecution under the Federal Fugitive Felon Act, which would entail procuring the involvement of the Federal Bureau of Investigation (FBI).[87]

In addition to these laws, the Parental Kidnapping Crime Act 18 U.S.C. § 1204 was passed in 1993 in terms of which the parental abduction of a child to another country and the retention of that child in another country was made a federal felony. However, parental abduction is not necessarily criminalized in other countries and/or it is not an extraditable offense in the country to which the child was abducted. It could also happen that the country has a law or policy against extraditing its own citizens.

Researchers at the American Bar Association Centre on Children, under its benefactor, The Office of the Juvenile Justice and Delinquency Prevention, undertook a study between 1995 and 1997 to pinpoint obstacles in resolving international parental child abduction. As part of this process, the ABA surveyed left behind parents and the problems they experienced in attempting to retrieve their

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[84] Patricia M. Hoff 'The Uniform Child-Custody Jurisdiction and Enforcement Act ' (December 2001) *OJJDP: Juvenile Justice Bulletin*

[85] Janet Chiancone ;ibid.

[86] Editor *Britannica Dictionary accessed 7 August 2023 https://www.britannica.com/topic/felony*

[87] Janet Chiancone ibid

abducted children. The survey entailed "(i) Identifying circumstances surrounding abductions, (ii) Identifying basic demographic, social and cultural statistics of families and abductors, (iii) Identifying the legal and administrative procedures available as preventative measures, (iv) Consideration of the left behind parents' perceptions of how various governmental and non-governmental agencies responded, (v) Assessment of the social and financial costs experienced by the left behind parents, and (vi) Increasing knowledge about the role of missing children's organisations and other entities with regard to international abductions."

The survey received a 63% response rate. It reflected that 46 countries were listed as abduction destinations with only one-third of abductions taking place to Hague Convention countries. Latin American countries accounted for one-third of all abduction destinations, whereas abductions to Islamic countries accounted for one-fourth of the destinations.

It also found that parents of an abducted child often differed in nationality (83 per cent), ethnicity (69 per cent) and religion (58 per cent), with the abductor having close connections or ties to the country to which he or she fled. The number of children abducted per incident ranged from one to three and the abductees were predominantly younger in age (between 5 months and 13 years). The study further determined that recovery of the child and length of separation are linked, with significantly shorter periods of separation being recorded for abductions to Hague Convention countries.

Furthermore, high levels of dissatisfaction with law enforcement were experienced by the left behind parents because some individuals and organisations considered the abductions to fall within the private family domestic sphere which did not require involvement by law enforcement. The left behind parents were also placed in the difficult position of having to make use of professionals in foreign jurisdictions to find and secure the return of their children at their own personal expense. The findings also indicated that even in Hague Convention countries the treaty was not uniformly applied by Central Authorities.

Interestingly, the United States Department of Justice website advises the reader that the Central Authority for the US is the Office of Children's Issues and that "Even in situations where the abducted child is taken to a non-Hague Convention country, the Office of Children's Issues may be able to initiate efforts to locate the abducted child, inquire as to the child's welfare, and possibly open communications to effect a return of the child."[88]

In 2022, the US Department of State's Office for Children's Issues ('the Department') submitted its annual report on International Child Abduction to Congress on the exact steps it had taken in response to Hague countries who have remained non-compliant to its treaty obligations. These annual reports became obligatory in terms of The Goldman Act [89]; a piece of legislation which was enacted as a direct result the Sean and David Goldman case, where an American father fought a legal battle initiated in terms of the HCCA, to retrieve his son from Brazil for more than five years. This Act places certain statutory obligations on the US government to continuously monitor and report on the compliance of other countries with requests for return of American children to the US in international child abduction cases.

The report provided a synopsis of the Department's endeavours to tackle unresolved international parental child abduction cases and its engagements with foreign governments to promote their compliance with the Convention.

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[88] United States Department of Justice 'Alternate Remedy - Hague Convention on the Civil Aspects of International Child Abduction ' available at *https://www.justice.gov/archives/jm/criminal-resource-manual-1960-alternate-remedy-hague-convention-civil-aspects-international*, accessed on 13 May 2023.

[89] United States Department of Justice 'The Goldman Act to Return Abducted American, Children, U.S.A., 11 June 2015' available at *http://www.foreignaffairs.house.gov/*, accessed on 15 August 2023.

The Report states that diplomatic engagement has proven to be the most effective tool thus far to increase a foreign country's adherence to the HCCA treaty obligations but that the Department continues to improve on strategies to ensure more effective outcomes.

In it, the report identifies thirteen problematic countries who have failed to abide by requests from the United States for the return of abducted children. Of these, India, Jordan, the United Arab Emirates and Egypt have the highest rates of failure to return abducted children on request of the US authorities. In respect of each of the thirteen countries cited in the report, senior Department officials personally visited the countries in question. They also continued to engage with the relevant officials and Central Authority figures, in the foreign jurisdictions for more than a year to facilitate either the safe return of abducted children and/or the implementation or adherence to the convention undertakings.

Non-compliance generally entailed the judiciary of a State's failure to regularly implement and comply with the provisions of the HCCA, the failure of competent authorities within each State to take appropriate steps to locate and secure the abducted child and the untimely manner in which abduction cases were dealt with by these countries. In an effort to promote the proper application of the Hague Convention provisions, the US authorities in 2020, even went so far as to offer and implement training in international best practices on international child abduction for officials from Costa Rica's Constitutional Court, Family Court, and the Children & Adolescent Courts.

The efforts by the US Department on Children's Issues yielded some satisfactory results due its ongoing interaction with foreign authorities, some of which saw the return of abducted children even after 12 years of having been abducted and in other areas, the improvement of judicial processes such as the introduction of Hague Network Judges in Brazil. It is not surprising that the lowest return rates of internationally abducted children recorded by the United States are for countries who are not party to the HCCA namely, Egypt, India, India Jordan, The Republic of Korea and the United Arab

Emirates. Despite the fact that these countries are not member countries to the HCCA, the US continued to engage with them as part of their international relations strategy and in keeping with the Goldman Act.

To date however, the USA has only succeeded in concluding one bilateral agreement with Egypt in 2003.[90] This bilateral agreement, though is nothing more than a Memorandum of Understanding between the two States determining procedures for access to and visitation with children who have parents with differing nationalities.

3.4 The European answer to parental child abduction

According to the HCCH website, France has similarly entered into bilateral agreements with at least five other countries. Contrary to the format of the USA and Egypt agreement, the bilateral agreements concluded between France and Algeria (1988), Egypt (1982), Lebanon (2000) as well as Tunisia (1982) are framed as treaties. The text of all the agreements are primarily in French with some having Arabic versions. [91] In a 2002 report titled "International abduction of children by one of the parents" submitted to the Parliamentary Assembly of the Council of Europe,[92] it was noted that only 30 of the 69 Council of Europe States had at that date ratified the HCCA and that no States governed by Islamic law had ratified the convention at all. It further recorded that at least 40% of all parental abductions fell outside the scope of the Hague Convention, meaning it encompassed abductions to non-Hague

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[90] United Nations 'HCCH: Non Hague Convention Countries ' available at *https://www.hcch.net/en/publications-and-studies/details4/?pid=5215*, accessed on 15 August 2023.

[91] HCCH website 'HCCH: Miscellaneous: Non-Hague Convention Child Abductions' available at *https://www.hcch.net/en/publications-and-studies/details4/?pid=5215* accessed on 15 August 2023.

[92] United Kingdom Mr Michael Hancock, Liberal Democractic and Reformers Group *Report: Social, Health and Family Affairs Committee - International abduction of children by one of the parents* (3 June 2002) available at *https://assembly.coe.int/nw*, accessed on 17 August 2023.

member States. The 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters served to ensure that domestic judgements in members States within the European Union were recognised and enforceable by other members. This included determining which courts have jurisdiction between citizens of different member States, but its application was limited to civil and commercial matters and thus matrimonial matters encompassing divorce, legal separation, annulment, child custody and access were not covered. This resulted in an unsatisfactory position because national laws governing these last-mentioned legal issues were mutually incompatible.[93] The Brussells II Regulation which came into force in 2001 remedied the position by also validating the recognition and enforcement of matrimonial court orders related to divorce, legal separation, annulment and parental responsibility. It bound all EU States except Denmark. The Brussells II(b) Regulation (No. 2201/2003 (EC) which came into effect in 2005, is a revision of the first Brussells II Regulation. The intention of the revision was to (i) extend the rules on mutual recognition and enforcement of Brussels II to all decisions on parental responsibility, (ii) to reinforce the obligation of the courts to order the return of children within member States, and (iii) to instil the essential rule that the State of the child's habitual residence is most suitable to adjudicate on custody issues. The effect of the amended provision is that it protects all children not only children of both spouses and takes precedence over the HCCA in cases between EU Member States.[94] This legislation alas does not speak to instances where a child has been abducted to a non- Hague member or non-EU States. The aforesaid 2002 report further acknowledged while most European countries did enter into bilateral treaties with countries from whom they receive immigrants, the use of these mechanisms

[93] Advocate (Netherlands Bar Association) Hendrik Goosen 'European Civil Law: The Brussells II Regulation 2003' available at *http://www.europeancivillaw.com/brusselstwo2003.htm*, accessed on 19 August 2023.

[94] Ibid.

seldom proved useful. France's bilateral conventions with Turkey, Morocco and Egypt were mentioned as examples of the failure of this exercise as children were rarely returned to France by these countries and it proved to be quite difficult to obtain rights of access in the countries concerned. The predicament was found to be prevalent in countries governed by Islamic law in whose jurisdiction the nationality of the father took precedence. Authorities in EU States are thus limited to providing assistance by corresponding and mediating such matters with foreign governments.

3.5 Policing international child abduction by parents

This paper has already noted that child abduction by parents is not a crime in South Africa and therefore no strict policing procedure has been enacted for the South African Police Services to investigate such matters. At most, SAPS may arrest a parent for contravening a custody order made by court. It does not allow for situations where no custody order exists in favour of the left behind parent because the parties had not yet instituted or finalised divorce or custody proceedings.

The International Criminal Police Organization or INTERPOL is an inter-governmental organisation of 195 countries who work together to combat a range of international criminal activities. Daily administrative operations are coordinated by the Secretary General under the General Secretariat and personnel are staffed by both police and civilians. The INTERPOL headquarters are located in Lyon, France with a Global Complex for Innovation in Singapore and regional satellite offices. Interpol National Central Bureaus (NCBs) located in each country act as a central hub of contact and is placed within each country's government ministry for policing. Countries contact each other via a secure network called the I-24/7 and have access from central and remote locations to Interpol databases and services in real-time. Amongst Interpol services, they offer investigative support in locating fugitives

around the world.[95] South Africa is a member country of Interpol since 1993, and its NCB is situated in Pretoria, South Africa within the Crime Intelligence Division (CID) of the South African Police Service headquarters. According to Interpol, South Africa's priority is organised crime and generally relates to wildlife and forestry poaching, trafficking in drugs, firearms, humans and counterfeit products with an increase in cybercrime.[96] Parental abductions do not feature as an area of high concern because parental abductions are not criminalised in South Africa.

However, South Africa by virtue of its membership in Interpol does issue yellow notices on the Interpol network or database for missing persons. A yellow notice is a global police alert transmitted to all member countries for a missing person and includes notices related to parental abductions, criminal abductions and unexplained disappearances. This service enables border officials to be alerted about the missing person, but yellow notices are also accessible to the public via the Interpol website.[97]

It is noteworthy that Bangladesh has been a member of Interpol since 1976 and China has been an Interpol member since 1961. One cannot therefore help but wonder how it is that their border authorities do not act on yellow notices related to parental abductions, when the abductor-parents enters the country with the abducted child.

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[95] INTERPOL 'What is Interpol? ' available at *https://www.interpol.int/en/Who-we-are/What-is-INTERPOL* accessed on 1 February 2023.

[96] INTERPOL 'Interpol - South Africa ' available at *https://www.interpol.int/en/Who-we-are/Member-countries/Africa/SOUTH-AFRICA* accessed on 20 August 2023.

[97] INTERPOL General Secretariat 'INTERPOL Yellow Notices ' available at *https://www.interpol.int/en/How-we-work/Notices/Yellow-Notices/View-Yellow-Notices*, accessed on 21 August 2023.

3.6 Conclusion

From the foregoing, the principle of State sovereignty has shown that in an international context, states are free to determine their own custodial laws, in accordance with their religious and cultural precepts. Thus, Islamic States like Bangladesh who have not ratified the HCCA and/or who have entered reservations to the CRC do not subscribe to westernized ideas of custody and access.

However, the manner in which both the US and EU have chosen to deal with child abduction matters has some benefits. The US's stance on criminalizing parental child abductions have proven useful where a US court order has been applied to arresting an abductor to secure the return of abducted children within their own territory. America's continued diplomatic efforts and its obligation to regularly report on attempts to retrieve abducted children per the Goldman Act, speaks to the State's recognition of its accountability towards citizens in the international environment.

The European model of recognition of foreign judgements, throughout the EU relating to custody of minors shows that where States adhere to and apply the decision of a foreign court, it will serve to reduce unnecessary additional legal adjudication and result in a speedier return of an abducted child.

CHAPTER 4: THE CHILD'S RIGHTS AND INTERESTS

4.1 Introduction

Ignoring for a moment the applicability or not of the HCCA, it bears taking a closer look at the specific rights and interests of the child which are or may be affected in cases of international child abduction. Chapter four takes a closer look at what amounts to human rights for children and which of these rights are contravened when a child is abducted by a parent. In alluding to these rights, this chapter further considers the negative impact parental child abduction can have on minors and how the State has a duty to protect such rights and act in the child's best interest.

4.2 The Child as the bearer of fundamental rights

In South Africa, a child is defined as a person below the age of eighteen years,[98] whilst Article 1 of the CRC refers not to a person but rather says "a child means every human being below the age of eighteen years".[99] A natural person or human being acquires legal subjectivity at birth, and as such a child has legal capacity in that he or she bears juridical competencies, subjective rights and certain legal obligations.[100]

The recognition of human rights after World War II brought with it a re-examination in 1959 of child rights as espoused in the Declaration of the Rights of the Child. The Declaration enumerated at least ten fundamental child rights including 'the right to special protection of his/her physical, mental and

[98] Chapter 1 Section 1(g) of The Children's Act 38 of 2005 - RSA

[99] United Nations Convention on the Rights of the Child, 1989

[100] Boezaart

social development, the right to understanding and love from parents and the right to protection from all forms of neglect, cruelty and exploitation.'[101]

Human rights are derived from natural law and amount to basic inalienable fundamental rights which entitle all humans including children to the protection thereof.[102] The fundamental rights of children have since its initiation been more fully developed and distinguished in numerous international conventions and domestic laws across the world.

The seminal international treaty on the human rights of children is the Convention on the Rights of the Child.[103] The elemental principle underpinning the protectionisms contained in the CRC is the best interests of the child. It is that international yardstick used to measure the actions of third parties in relation to children and the laws applicable to children. What is in the best interests of the child is, however, determined on a case-by-case basis. Article 3(1) of the CRC states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This ideal is reiterated three more times in the Convention and has found its way into the South African Constitution at Section 28. Under the Bill of Rights, this constitutional provision enshrines the child's right to 'family or parental care' and charges the world at large to place the best interests of the child at the forefront of all matters or decisions affecting the child.

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[101] United Nations Digital Library 'Declaration of the Rights of the Child, adopted by the UN General Assembly (14th sess. : 1959)' available at *https://digitallibrary.un.org/record/195831?ln=en#record-files-collapse-header*, accessed on 11 September 2023.

[102] WJ & Ab Edwards & Francis Bosman & Joan Church Hosten *Introduction to South African Law and Theory* Durban, Butterworths (1997) 542-549.

[103] United Nations Convention on the Rights of the Child, 1989

South Africa follows a dualist approach to the integration of international treaties/law meaning that such accords must be negotiated, signed, ratified and approved by the National Assembly and National Council of Provinces.[104] Section 231 of the 1996 Constitution confirms that the negotiation and signing of all international agreements lies within the authority of the national executive and that such agreements only bind the State once approved by both the National Assembly and National Council of Provinces. International agreements which do not require ratification or accession are automatically binding on South Africa without approval from the National Assembly and National Council of Provinces but must be tabled before the Assembly and Council within a reasonable time.[105] It is through this process that South Africa signed the CRC on 29 January 1993 and ratified the convention on 16 June 1995,[106] and gave effect to its principles under Section 28 of the Constitution.

4.3 The right to understanding and love from parents and society.

Broadly speaking, Principle 6 of the Declaration on the Rights of the Child[107] states that in order for a child to achieve "full harmonious development" the child requires love and understanding and needs to grow in the care of his or her parents. The CRC gives credence to this value in its introduction by describing family as 'the fundamental group of society' and 'the natural environment for the growth

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[104] Du Plessis M Dugard J, Maluwa T, Tladi D. *Dugard's International Law: A South African Perspective. Vol Fifth edition. Juta and Company [Pty], https://search-ebscohost-com.ezproxy.uct.ac.za/login.aspx?direct=true&db=nlebk&AN=2524109&site=ehost-live (accessed 11 February 2024)* (2018)

[105] Section 231(3) The Constitution of the Republic of South Africa Act 108 of 1996

[106] United Nations Treaty Collection, accessed 18 November 2023 - https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4#11

[107] UN Declaration on the Rights of the Child, 1959

and well-being of children'.[108] The Convention appreciates that in order for a child to develop a balanced personality, he or she must 'grow in an environment of happiness, love and understanding' and to do so the family unit requires protection and assistance.[109]

The Universal Declaration of Human Rights, 1948 describes family as "the natural and fundamental group unit of society which is entitled to protection by society and the State", and this same sentiment is bolstered in Article 23(1) of the International Covenant on Civil and Political Rights[110] and Article 10(1) of the International Covenant on Economic, Social and Cultural Rights [111]. The ICESCR goes a little further and enjoins State parties to recognize that the 'widest possible protection and assistance should be accorded such family unit ..while it is responsible for the care … of dependent children.' This sentiment of the family is however not carried through in the HCCA.

It is a fact that parents are a child's primary caregivers. The healthy development of a child's brain, physical and emotional well-being and the ability to form relationships stems from the love and affection a child experiences.[112] A child's first and most constant exposure to such love and affection is within a parental relationship.

Article 9 (1) of the CRC instructs State parties to prevent the separation of a child from his/her parents against their will without application of appropriate laws and furthermore in Article 9(3) demands

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[108] United Nations Convention on the Rights of the Child, 1989 (Preamble)

[109] Geraldine Van Bueren *The International Law on the Rights of the Child* Dordrecht, Marthinus Nijhoff Publishers (1998) pg 67

[110] International Covenant on Civil and Political Rights, 1976 (adopted by General assembly Resolution 2200A (XXI) of 16 December 1966 entered into force on 23 March 1976)

[111] International Covenant on Economic Social & Cultural Rights, 1976 (adopted by General assembly Resolution 2200A (XXI) of 16 December 1966 entered into force on 23 March 1976)

[112] Parenting NI *Parent-Child Relationships* (28 October 2018) , accessed 2 September 2023 https://www.parentingni.org/blog/parent-child-relationship-why-its-important

that State parties respect the child's right to maintain regular personal relations and direct contact with both parents where such child has been separated from a parent unless of course such contact is manifestly not in the child's best interests.

Article 8 says in respect of a child's right to family relations that State parties assume the responsibility to respect and preserve such right without unlawful interference.

Furthermore, States are obliged in terms of Article 18 to recognize that both parents have responsibilities in raising their children. Parental rights and responsibilities entail the ability and opportunity to care for and maintain contact with the child.[113]

In the circumstances where there is no abuse towards a child, when a child is abducted from a parent or legal guardian, that child is taken against their will and true consent is absent because the child is not aware of the abductor's ulterior motives at first. Where the abductor further prevents the child from contacting the left behind parent and vice versa, the child's right to maintain a connection to or personal relations with and to receive love and guidance from the left behind parent is contravened.

Michael Agopian suggests that parental abduction can be more traumatic than other kidnappings because the abductor is known and trusted by the child. In a quantitative analysis, Agopian conducted a study on the impact of abduction on children and differentiated the effects on children between short term and long-term abductions. He found that in the cases of long-term abductions, i.e., periods of longer than six months, the victims exhibited severe trauma, profound social disorders, lied frequently and were generally untrusting of other people. Most abductees who were very young at the time of the abduction, developed an affection for the abductor and showed no memory of the left behind parent. Agopian also noted that upon recovery of older children, the abductees showed resentment towards both parents and often blamed the left behind parent for not finding them

[113] Chapter 3 Section 18 of the Children's Act 38 of 2005

sooner.[114] This latter response shows that there is a desire by abducted children to maintain personal ties with the left behind parent and that children suffer from emotional trauma when they are summarily removed from a loving parental relationship without warning or justifiable reason.

It is clear that children should not be separated from their parents unless it is essential to their well-being and best interests, and unless due legal process has been followed. In *Kok v Clifton*[115] the court acknowledged the importance of the child-parent relationship when it stated: "It is a common-place that it is in the interests of the child of divorced parents that it should not be estranged from either parent; the child should not be placed in such a position as to lose affection for either of its parents, nor that either of the parents should lose affection for and interest in the child."

4.4 The right to special protection of a child's physical, mental and social development

Principle 2 of the Declaration on Child Rights, 1959 sets out that a child's right develop mentally, physically and socially shall be protected by the law or by other means. Article 3(2) of the CRC establishes this right by making State parties responsible for the protection and care of a child which is necessary to ensure the child's well-being. In the context of child abduction by parents or familial relations, it is easy to overlook the effect of these actions on children.

The issue of child abduction by a parent generally occurs when the parents of the child or children are either divorced, on the verge of divorce or are experiencing difficulties within the parental relationship. In these cases, a custody battle can ensue and as a result of that battle it may happen that one parent actively foster's a child's rejection of the other parent or manipulates the child with the

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[114] Michael W Agopian 'The Impact on Children of Abduction by Parents ' (1984) *Child Welfare League of America Volume 63 No.6*

[115] *Kok v Clifton 1955 (2) SA 326 (W) at 330B-C*

aim of undermining the other parent's relationship with the child. This parental alienation includes amongst other things targeted strategies to bad-mouth and limit contact with the other parent or that parent's extended family as well as threats of withdrawal of the instigating parent's affection.[116]

It may happen in cases of child abduction that such alienation tactics also occur. Experts agree that severe alienation of this kind amounts to child abuse. The effects thereof are detrimental to a child and range from low self-esteem, self-hatred, lack of trust to depression, substance abuse and the inability to show and accept parental love. It is argued that a child's depression in these instances arises from feeling unloved by the absent parent and from being separated from them. The child in the presence of the parent initiating the alienation cannot properly process their emotions because they are denied the opportunity of talking about the other parent or mourning the loss of that parent.[117]

The author, Edward Kruk references Amy Baker's study in which she found that alienated children are at higher risk of being alienated from their own children. Kruk also says that in the absence of abuse, children who experience forced separation from one parent, suffer post-traumatic stress disorder.[118]

Experts similarly contend that child abductees experience severe anxiety as well as emotional and psychological distress. The abductor falsely tells them that the other parent has died or no longer loves them. These children live as fugitives forced to endure name changes and are sometimes

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[116] Kruk, Edward – Child Rights NGO '*Undermining loving parent-child relationships as child maltreatment'*, accessed 31 August 2023 (https://childrightsngo.com/the-impact-of-parental-alienation-on-children/)

[117] Edward Kruk - Child Rights NGO 'Undermining loving parent-child relationships as child maltreatment ' available at *https://childrightsngo.com/the-impact-of-parental-alienation-on-children/* accessed on 31 August 2023

[118] Ibid.

deprived of access to proper schooling and medical care because their parent abductor may not want to them to be traced.[119]

It is therefore clear that the abuse of a child's mental and emotional state when a child is systematically alienated from the left behind parent does harm to the healthy development of that child which cannot be in his or her best interests. It has a direct impact on the child's well-being as provided for Article 3(2) of the UNCRC.

4.5 The child's right to be heard.

Article 12 of the CRC secures a child's right to be heard in any judicial or administrative proceedings affecting that child.[120] The courts in HCCA matters have given effect to the child's right to be heard. This has most often been the case where a court hears evidence as to whether the return of the child to the country of habitual residence would harm the child or not. Where the child is of sufficient maturity to express his or her views, the court may take that opinion into consideration.[121]

Johanna Kruger in her paper on 'Judicial interference with parental authority' explains that "…. childhood is a unique concept. It is a 'process' rather than a 'state'. Childhood is a process of continuous change, which takes place as the child develops from newborn to adolescent. This maturation results in the gradual development of the child's capacity for rational thought and action. As the child develops and matures, so do the dynamics of the concept of parental authority change. Initially the parent exercises total control, but later parental authority amounts to little more than

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[119] Frans M Mahlobogwane 'Parental Abduction Cases: Prevention is better than cure ' (2018) *Obiter: Nelson Mandela Bay University*

[120] United Nations Convention on the Rights of the Child, 1989

[121] Article 12; Frans M Mahlobogwane *ibid*

advice. Secondly, children are usually (and ideally) part of families. This interaction in family life complicates legal relationships and necessitates constant balancing of the interests of the different family members."[122]

This is in keeping with the idea that what is in the best interests of the child must be informed not only by the will of the parents but also by participation of the child whose interests need to be objectively assessed and understood[123] in each case.

In a blog dated 6 May 2010,[124] Carrie an adult woman who was abducted by her mother when she was a child explains that children always eventually find out the truth. Carrie and her sister were abducted by their mother in the United States of America and lived on the run from their father for several years. They moved from state to state within the U.S. to avoid being detected and they were taught to keep their lifestyle a secret from everyone. Carrie and her sister were trained to use codes when receiving calls from their mom, they were shown escape strategies, and they were made to believe that their father would hurt them if they were ever caught. The effect of this experience was that the girls lived very solitary lives unable to build friendships or connect with their extended family. The father who had never stopped searching, found them when Carrie was twelve years old. Carrie's mother continued her attempts to alienate Carrie and her sister from their father who had since remarried and started another family. She recounted that the reunification with her father and her

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[122] Johanna Margaretha Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* (2009) Pretoria University of South Africa, accessed 11 September 2023,

[123] Frans M Mahlobogwane *ibid*

[124] Carrie '*My story of parental kidnapping and parental alienation'* (2010), accessed 31 August 2023 https://distanceparent.org/personal-experience/my-story-of-parental-kidnapping-and-parental-alienation/

extended family had its own challenges and that because of her mother's actions, her relationship with her mother disintegrated.

In the case of Carrie and her sister, it is evident that their rights (i) to be heard[125] and (ii) to preserve their familial relations[126] with their father and extended family was negatively impacted when they were abducted by their mother. The fact that her mother groomed the children to not trust anyone or to share any personal information about themselves, made it difficult for perhaps teachers, social workers or outsiders to identify the situation as a parental abduction. The mother also lied about the father and painted him as the villain, so although Carrie missed her father, she was not allowed to express that longing or tell a third party about her situation.

Children in parental abduction cases hidden from authorities have no means to approach a court or other administrative body directly to voice their displeasure or grievance if they want to return to their place of habitual residence or at least to return to the left behind parent.

The Committee on the Rights of the Child observes that a child's best interest must be assessed and the right to express his/her opinion respected. States must therefore provide means for the child's interests to be represented in matters directly affecting them.[127]

The perspectives of children who were or are the subject of familial or parental abduction are therefore essential to determining what the value of changing or updating legislative and enforcement

[125] Article 12 of the UNCRC

[126] Article 8 of the UNCRC

[127] General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration - CRC/C/GC/14 pg11

mechanisms will be. The right to be heard is underpinned by both the recognition of the subject's dignity and the fact that it is inherent to better administration.[128]

Professor Marilyn Freeman conducted research on the long-term effects of abduction on child abductees who had since then become adults, titled "International Child Abduction: Research on the effects of Abduction and Reunification" which was presented in 2019.[129] The results of the study showed that the children did not want to be caught between conflicting parents, they felt that their opinions were of little value and the study revealed that all the children were affected in some or other harmful way. What is of keen interest here is that some of the interviewees felt that (i) parents should be made aware of the detrimental consequences child abduction has on children, (ii) that the abductees felt they had no control over the situation, (iii) that the law should have done more and that (iv) abduction by a parent is not just a domestic dispute.

Child participation furthermore promotes the complete development of a child's personality and evolving capacity in accordance with Article 6.[130] There is thus currently no mechanism within the HCCA or otherwise for children of sufficient maturity to independently approach authorities to initiate processes for return to their habitual place of residence.

The Committee on the Rights of the Child has recognised Article 12 of the CRC as one of the four general principles of the Convention.[131] In its General Comment on the right to the heard, the

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[128] Mahlobogwane ibid

[129] Professor Marilyn Freeman *International Child Abduction: Research on the effects of abduction and reunification* (10 June 2019) Symposium - International Research Centre, Japan available at *https://www.mofa.go.jp/files/000495491.pdf*, accessed on 31 August 2023.

[130] Ziba Vaghari *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes.Print* Poland, Springer International Publishing (2022)

[131] General Comment No. 12 (2009): The right of the child to be heard - CRC/C/GC/12)

Committee opines that States parties should provide an environment that enables a child to freely exercise his or her right to be heard and thereby promote participation.[132] The UNCRC has highlighted the significance of Article 12 as a political and civil rights tool by means of which children are able to advocate their rights and hold States accountable.[133] The South African Children's Act 38 of 2005 recognises this right in Section 10. The child's right to be heard specifically includes "in any judicial or administrative hearings" which could have an effect on him or her and includes the right to be heard in person or by means of a representative.[134]

4.6 The State's duty towards the protection of children within international law: In a South African context

The abduction of a child by one parent from the other parent contravenes the principles contained in Article 9 of the CRC. Essentially, this Article determines that children should not be separated from their parents against their unless due process has been followed and such separation is in the best interests of the child.[135] Article 9(3) extends this by protection by obliging a State to respect the child's right to maintain personal relations with their parent.[136]

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[132] General Comment No. 12 of 2009 pg5

[133] Vaghari

[134] *General Comment No. 12 (2009): The right of the child to be heard - CRC/C/GC/12* ; *KV v PV (2020/13126) [2021] ZAGPJHC 825 (14 December 2021)*

[135] Article 9(1) of the Convention on the Rights of the Child, 1989

[136] Convention on the Rights of the Child, 1989

The Children's Act, 2005 acknowledges the need for a child to remain with a parent and retain familial and cultural connections.[137] The Act goes on to stipulate that the all organs of state within South Africa are compelled to "respect, protect and promote" the rights of children as contained in the Act and supplemented by the Bill of Rights.[138] South Africa, being a party to the CRC, is therefore bound not only to enact laws and enforce measures to better prevent the abduction of children to non-Hague countries; but it also carries the positive obligation of ensuring that where a child has been so separated from a parent, to make concerted efforts to restore the child-parent relationship with the left behind parent regardless of the applicability of the HCCA. So too, is South Africa bound to realize its obligations in terms of Articles 8, 10, 11, 18 and 35 of the CRC in conjunction with Article 9 which provisions all denote the importance of the child's right to family, to familial relations and to not be arbitrarily taken from their parents.[139]

South Africa is also a party to the ACRWC which stipulates that State parties must protect and support the family as it is the natural unit and basis for society.[140] In terms of its Article 18(2) obligations to this treaty, South Africa is required to 'take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution' and that in case of dissolution of the marriage the child is protected. These aforesaid provisions establish at least the country's minimum international obligations.

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[137] Section 7(1)(f) of the Children's Act 38 of 2005

[138] Section 8 of the Children's Act 38 of 2005.

[139] Vaghri, Ziba. *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes*. Ed. Ziba Vaghri et al. Cham, Switzerland: Springer Nature, 2022. Print. pg

[140] Article 18(1) African Charter on the Welfare and Rights of the Child

Section 3 of the South African Constitution says that 'there is a common South African citizenship.' By virtue of Section 2 of the Citizenship Act 88 of 1995, children born in South Africa and of a South African parent, qualify as citizens of the country. All South Africans are entitled to the rights, benefits and privileges of its citizenship. [141]

The Bill of Rights contained in the Constitution preserves the rights of all its citizens and mandates the state to protect, respect, promote and fulfil these rights. It especially recognizes the vulnerability of children and recognizes rights specific to their needs in Section 28. More than that, the state must therefore protect a child's right to 'family or parental care'.

South Africa has some of the most forward-thinking child rights legislation and in order to give effect to its constitutional and international child rights treaty obligations, it enacted the Children's Act 38 of 2005 which includes the provisions of the HCCA at Chapter 17 and child trafficking laws at Chapter 18. In addition, thereto Act 38 of 2005 contains further noteworthy provisions in relation to unlawful removal or movement of a child.

To this end, the South Africa Human Rights Commission was inaugurated on 2 October 1995 in terms of the 1996 Constitution and under the auspices of the Human Rights Commission Act 54 of 1994.[142] The latter legislation has since been repealed. The Children's Rights Unit was established within the SAHRC to advance children's rights in the international, regional and domestic spheres. A branch of the SAHRC is situated in each province of the country. The SAHRC website provides information and documents relating to international child abduction, but this is limited to abductions in terms of the HCCA and offers assist to parents who want to initiate retrieval proceedings.[143]

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[141] Section 3 of the Constitution of the Republic of South Africa Act 108 of 1996

[142] South African Human Rights Commission - https://www.sahrc.org.za/ , accessed 9 May 2023

[143] Ibid.

The State has also attempted to advance the rights of children with the appointment of the Commissioner for Children, but this has fallen short of its obligations under the CRC because a commissioner has been appointed for the Western Cape Province only and has not been empowered to deal with international abduction matters directly.

In Chapter 2, we noted that the court found Section 10 of the Births and Registrations Act 51 of 1992 unconstitutional because it limited the instances in which the biological father a child could be recorded on a birth certificate. Not only does this affect the fundamental rights of the father but it contravenes the fundamental rights of the child in respect of Articles 3, 8, 9, 10, 11 and 18 of the UNCRC.

In addition, thereto, the State has made it impossible for itself to abide by the prescripts of Article 35 of the CRC as well as Sections 138 and 139 of the Children's Act.

Section 138 of the Children's Act deals with the unlawful removal or detention of children. It states that:

"(1) No person may without lawful authority or reasonable grounds –

(a) Remove a child from the care of a person who lawfully cares for the child; or

(b) Detain a child with the result that the child is kept out of the care of a person entitled to lawfully care for the child.

(2) For the purposes of subsection (1) a person must be regarded as detaining a child if that person –

(a) causes the child to be detained; or

(b) induces the child to remain with him or her or any other person."

Section 139 reads as follows:

"Unlawful taking or sending of a child out of the Republic –

(1) No person may take or send a child out of the Republic –

(a) In contravention of an order of court prohibiting the removal of the child from the Republic; or

(b) Without the consent –

(i) Obtained in terms of Section 18(5) from persons holding relevant parental responsibilities and rights in respect of that child;

(ii) Obtained in terms of Section 169 with regard to a child in alternative care; or

(iii) Of a court.

(2) For purposes of subsection (1) a person may be regarded as –

(a) taking a child out of the Republic if that person

(i) causes the child to be taken, or in any way assists in taking the child out of the Republic; or

(ii) causes or induces the child to accompany or to join him or her or any other person departing from the Republic; or

(b) sending a child out of the Republic if that person causes the child to be sent, or in any way assists in sending the child, out of the Republic.

Herein lies the state failure. In keeping with the underlying principle of the child's best interests, the Committee on the Rights of the Child highlighted in General Comment No. 14, that as a rule of procedure States must ensure the child's best interests is reflected in in all national laws and policies.[144] When South Africa ratified the HCCA in 1996 its provisions were included in the

[144] General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration - CRC/C/GC/14 pg4

Children's Act 38 of 2005 some eight years later but no consideration was given to the best interests of children who are abducted to non-HCCA countries.

In not enacting laws and enforcement mechanisms to deal with the abduction of South African child citizens to non-convention countries, the state has failed in its duty to protect its citizenry and failed in its duty to duty to protect the best interests of the child.

4.7 Conclusion

Children have recognizable fundamental rights to the love, interaction with and care of both parents. Parental abduction of children therefore has dire emotional and development consequences on minors, when they are forcibly removed or withheld from the left behind parent. A State has a duty to protect child citizens from the effects of such actions. South Africa thus has the responsibility to establish enforcement mechanisms to proactively prevent or deal with child abductions to non-Hague countries. With this in mind, in the next chapter we reflect on the efficacy of the HCCA in its current form in relation to societal changes and advancements in human rights awareness for children.

CHAPTER 5: THE WAY FORWARD

5.1 Introduction

The goal of the HCCA has always been to protect and/or prevent children from being wrongfully removed or kept from a lawful parent or guardian.[145] Notwithstanding the overall success of the Convention, the previous chapters herein have underlined that its effectiveness is limited not only within the South African sphere, but internationally as well. In light of the fact that non- members States cannot be held accountable under the Convention, it is necessary for States to consider adapting their existing domestic laws to deal with such issues. Chapter five theorises on the possible legal avenues which South Africa as a State could take to better avert child abduction by parents.

5.2 A retrospective check on the HCCA

The effectiveness of the HCCA lies in the fact that it is procedural, thus leaving the substantive arguments about the custody of a child to be dealt with in the forum of the child's habitual place of residence,[146] that is if a child can be successfully transferred back to the State of habitual residence. Linda Silberman, a Professor of Law at New York University School of Law conducted an evaluation on the Progress of the Hague Convention in 1994[147] and her conclusion at that stage already was that

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[145] Linda Silberman 'Hague International Child Abduction: A progress report' (1994) *Duke University Schoool of Law - Law & Contemporary Problems* pg 210

[146] Ibid. pg 212

[147] Ibid.

the HCCA is effective in and between treaty States, but its influence is ineffective on non-member countries. Silberman notes that while it is important to include non-Western States as members of the HCCA, these States' interpretation of the Convention in relation to their country's respective cultural perspectives, may lead to a less effective return mechanism. The Convention as a tool petitions the immediate return of an abducted child, and therefore by implication prevents the country to which the abductor has fled from applying its own standards of morality, sociology and cultural precepts ((bar legitimate exceptions of defence in Article 13(b)). If therefore an Islamic State were to ratify the Convention, it may want to impose its cultural practices of custody and what would be in the best interests of the child according to its religious principles which is ultimately out of sync with the simplistic procedural goal of the Convention.[148]

Even more so, Silberman suggests that the increase in the overzealous use of Article 13(b) defences to 'stave off return orders by well-intentioned child saver' has resulted in the undermining of the efficient procedural goal of the Convention by attempting to convert it to a substantive legal action.[149]

We have seen in the preceding chapters that the best interests of the child although internationally recognized does not have a uniform standard or application; meaning the HCCA does not determine what the best interest of the child is, nor does it determine how those interests should be gauged or protected.

In her conclusion, the professor further noted her concern that there was not enough empirical data reflecting the actual outcomes of return cases more especially with regard to what the courts in the

[148] Ibid. 264 - 266

[149] Ibid. 266

State of habitual residence have ordered regarding custody and access to the child concerned and whether an impartial hearing was conducted.[150]

5.3 Differing perspectives on human rights

Human rights are universal whether they relate to civil, political economic, environmental or other interests. The problem with the recognition of human rights on an international level is that human rights lose their universality when influenced by non-Western socio-cultural, religious or national traditions and customs.

In this regard, it is encouraging to note that Islamic States like Bangladesh who have not ratified the HCCA have ratified the CRC and have not made reservations to Article 11 of the CRC which speaks specifically to the illicit transfer of children between States. This does not mean though, that States who do not subscribe to western philosophies on universal human rights and who are non-HCCA States will automatically submit to requests for return of children from HCCA countries. Article 11 at least provides a basis from which countries can initiate their bilateral or regional negotiations or agreements.

A child's human rights are certainly being affected where he or she is removed from an otherwise loving home or from a loving relationship with the left-behind parent without the child or other parent's consent, and without lawful reason or other justifiable cause. This offence against the child and left behind parent often places the child and parent so far from each other thereby affecting the child's basic right to liberty because the child is not in a position to simply travel back to the left-behind parent or back to the home he or she was taken from. The abduction contravenes the child's right to family and his or her ability to develop in a healthy manner.

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[150] Ibid. pg 269

Human rights are generally accepted standards of inherent rights mostly derived from the concept of natural human rights and which each human being is entitled to. Adherents of cultural relativism deny the universality and/or inherent nature of human rights. China and Iran (and one could add that Islamic countries) are in favour of allowable or justifiable deviations to human rights in relation to the individual's culture or religion. The ideals of cultural relativism were supported by the allegations of China and Iran during the discussion on human rights issues at the World Conference on Human Rights in Vienna in 1993.[151]

China argued that "human rights is a product of historical development and that as such countries are in varying stages of human rights development because of differences in the understanding and practices of human rights". By example, in Chinese ideology practiced for many years, the underlying concept of Confucianism is "harmony aimed at the social well-being of all as opposed to the individual." Thus, the rule of State above individual is an accepted way of life and a principle of the Chinese community.[152]

In a seminar on human rights in Kuwait in 1980, an international commission of jurists concluded that both the Quran and the Sunna comprise basic human rights principles and that they also permit the Islamic community in line with Islamic law to devise ways of enforcing human rights principles in a flexible and constructive way. Similar reforms in Islamic law have already taken place in relation to adoption and succession laws. Rule 6 of The Charter on the Rights of the Arab Child guarantees a child's right to freedom of movement and the Cairo Declaration on Human Rights in Islam recognizes that children are entitled to special protection.[153] However, both pieces of legal code are subject to

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[151] Ildus Yarulin & Evgeny Posnyakv 'Are human rights universal? ' (2021) *Ksiegarnia Akademicka*

[152]Van Bueren

[153] Van Bueren, Geraldine "The Best Interests of the Child- International Co-operation on Child Abduction"

Islamic law and principles. Saudi Arabia, Bangladesh and most other Islamic nations entered reservations either specifically to Article 14 of the CRC or entered general reservations to the CRC against any provisions of the convention which may be incompatible with Islamic law.[154] It is therefore seems unlikely that in the face of territorial sovereignty, States which do not subscribe to the HCCA principles or western values of human rights protections will be convinced to adopt and ratify the HCCA or relinquish their cultural custody laws which are in contrast to western laws.

5.4 Has the HCCA become customary law?

Circumstantial evidence of the fact that offensive parental abduction and the application of the principles of the Convention on International Child Abduction qualifies as customary international law can be found in the case of *Re F (1991) 1 FLRI* where the father removed the child, without the mother's consent, from Israel to the United Kingdom. The mother secured an interim custody order in Israel as well as an order that the father return the child to Israel. The UK court found that although Israel is not a party to the HCCA, the general principles of the Convention were applicable in any decision relating to the custody of a child which was best decided in the State of habitual residence of the child. The court opined that there was no risk of persecution and no indication that the Israeli courts would adopt an approach different than that of English courts and therefore ordered the return of the child.[155] This case shows that western courts can be convinced to apply the HCCA principles

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[154] United Nations 'UNCRC List of Countries IV-11' available at *https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4#11* accessed on 18 November 2023.

[155] Sandra Davis Jeremy Rosenblatt Tanya Galbraith *International Child Abduction* London, Sweet & Maxwell (1993) Pg 33.

of return and custody in favour of non-HCCA countries, the question is rather if a non-HCCA country would be willing to abide by the same?

At a minimum, it seems apparent then that child abduction by parents and in general are contrary to good morals and public policy regardless of whether the States involved are members of the HCCA or not. This is what at least should be relied upon when States engage with each other for the return of an abducted child. Protocols dealing with parental abductions specific to Islamic and secular States should perhaps be enacted to guarantee the return of abducted children.[156]

In this regard, the UN Child Rights Committee should take a more active role in the oversight of child abductions. The Committee should establish an Office of the Child Ombud to investigate all human rights violations against children. The Office of the Child Ombud should have specialized units one of which would deal with international parental child abductions, with its goal to not only collect and maintain abduction data received from various States but also to actively help expedite the return of abducted children whether by parental abduction or trafficking. Legally trained regional UN Ombud Officers should be entitled to represent the interests of children and left-behind parents in cases of parental child abduction being heard in foreign courts. Thus, the regional or national divisions of the Child Ombud should always be cited as an interested party to custody matters especially in non-HCCA States so that it is not possible for the abductor parent to obtain an *ex parte* order of custody in their favour without the court hearing all the facts.

Sanctions should be applied to contraventions of any and all human rights violations regardless of whether these human rights are deemed to be a western understanding of human rights. It is not enough for a State to be compliant in certain respects and not others and then expect the benefit of open trade and diplomacy. Currently UN Conventions laws are dealt with separately and in isolation

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[156] Van Bueren -ibid

of each other instead of applying the laws concurrently. For example, State A has ratified the CRC and the HCCA but is non-compliant with the HCCA in that it does not return children to the USA despite its several diplomatic requests for the return of a child. For all intents and purposes, State A is compliant with the CRC prescripts but on closer inspection by harbouring parents who have abducted children from the left behind or custodial parent, they have contravened articles 11, 13, etc. Or in the case of Bangladesh, it has ratified the CRC and not the HCCA but is still technically guilty of not complying with Articles 9, 11 and several others.

Many authors contend and the writer agrees that in the case of international child abduction, preventative efforts may be better[157] than having to endure the ordeal of having to retrieve one's child from a State which is either a non-HCCA State or is a non-compliant HCCA State or both.

In keeping with that sentiment, we look at how South Africa can improve its national legal measures to prevent or minimise international parental child abduction.

5.5 Recommendations for domestic South African improvements

5.2.1 International Adjustments

In an attempt to reduce the negative effects of international parental child abduction, South Africa should firstly ensure that it is has ratified the Convention on International Child Abduction with countries who it has not yet ratified the convention with.

Secondly, South Africa should enter into bilateral international agreements with countries who have not acceded to or ratified the HCCA at all and countries who have ratified the HCCA but who have proven to be non-compliant. Domestic legislation should be enacted which provides that children

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[157] Mahlobogwane ; Thalia Kruger *International Child Abduction: Inadequacies in the Law* Oxford and Portland, Oregon, Hart Publishing (2011) 212 - 227.

who are South African citizens and whose habitual place of residence falls within the jurisdiction and borders of South Africa enjoy the protection of the State. Thus, citizen children in the care and custody of their South African parent and habitually resident here at the time of abduction, will remain in the lawful custody of such parent unless or until a South African court directs otherwise, regardless of what the laws or cultural practices of the other parent's home country dictate about custody. Any arbitrary interference with such custody by any person, shall amount to an afront against the child and therefore an offence capable of criminal punishment. Notwithstanding the current subject of child rights and based on the child's right to receive the love and care from both parents, the act of parental abduction should also constitute an offence in so far as the rights of the left-behind parent have been affected.

Thirdly, South Africa should with the help of STATS SA determine the number of foreigners from non-HCCA States who enter into marital relationships with South African citizens or who are a parent of a child also born to an SA citizen. Based on this information, South Africa should conclude treaties with those countries for recognition of foreign judgements. The contracting States should similarly implement domestic legislation recognizing judgements and custody orders from South African courts and the return of the child to its habitual place of residence in South Africa. Clearly outlined legal processes should be provided for in these treaties with due regard to the fact that the best outcome for the child would be an amicable custody and access arrangement between parents.

5.5.1 Policing abductions

The concept of 'family' is understood to entail certain rights of privacy and autonomy. However, these entitlements are not absolute because they also affect rights against society. Parents are obliged to employ good judgement in relation to each child's needs and rights.[158]

Where parents wilfully and/or maliciously take a child from the other parent, such behaviour is against the good morals of society and public policy. Therefore, effective policing and regulation of even these relationships are needed as regards parental abduction. Family abductions thus cannot be strictly relegated to the domain of civil matters within the private law sphere and as such, the proposals are as follows:

- South African domestic legislation needs to regulate parental child abductions that fall inside and outside of the scope of the HCCA and in so doing the Children's Act 38 of 2005 and its regulations would need to be amended.

- Notwithstanding the provisions of the HCCA, in terms of South African law a child is considered to be a person under the age of eighteen (18) years. Therefore, South African national laws should apply and children above the age the age of sixteen years should not be excluded from the protection of parental abduction laws. Where necessary in future, South Africa should enter reservations to the conventions to adjust the applicability of convention provisions in line with its domestic law.

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[158] Ferdinand Schoeman 'Rights of Children, Rights of Parents and the Moral Basis of Family' (October 1980) Volume 91 No. 1 (pg 6-19) *Ethics - Chicago University Press*

- The concepts of child abduction and child abduction by parents must be clearly defined within the law and not be left open to interpretation by the courts or common law.

- The legislature should allow for public comment and consider making parental child abduction a new offence which could be incorporated into an amended version of the Children's Act and/or regulations.

- SAPS should be properly authorised to investigate such matters. A specialist unit should be created within SAPS to deal strictly with child matters, a division of which in each major city in each province would deal only with child abduction cases whether parental abduction or other types of abduction. Cognisance should be taken of how the US deals with such issues.

- SAPS must keep accurate records of child abduction reported cases including statistical information, which data should also be independently recorded and maintained by STATS SA. These statistics should include a record of successful retrievals.

- In light of the fact that many nations have not ratified the HCCA but that instead the UNCRC is one of the most widely ratified treaties, the basis of this offence could stem from the UNCRC provisions. The updated legislation could even borrow from the Child Trafficking Act in respect of the offence procedure.

- The SAPS child abduction policing unit should be an integrated working combination of state social workers, state appointed family psychologists, the Child Commissioner's Office and the Central Authority/ Office of the Family Advocate.

5.5.2 Other legislation influencing parental child abduction.

- The South African government needs to introduce compulsory procedures within clinics, hospitals, maternity institutions and other health facilities including making the legislation applicable to medical staff, midwives, medical practitioners to keep a record of all births. The record should contain the mother and father's full names, identity numbers or passport details and contact details in the birth register so that fathers can be named in birth records where this is clearly evident. This is to account for those instances where the biological father of the child is not married to the mother but has presented himself and verified his connection to the child as such at the place of birth.

- The Department of Home Affairs should have a closed online platform with medical facilities and practitioners so that this birth record can be transmitted directly to Home Affairs electronically. This will serve as a duty to be complied with by the medical facility / practitioner.

- This procedure does not replace or circumvent the existing DHA requirements for the child's birth to be registered at the Department of Home Affairs. However, if the mother subsequently registers the child at Home Affairs, DHA can cross-reference the birth record

supplied by the medical fraternity with the information supplied by the mother when physically registering the birth at a DHA office.

- If a mother attempts to register the birth without acknowledging the paternity of the child, DHA can query this with the mother immediately and can place a hold or restriction on the child's DHA profile with as much detail as possible. This restriction should not prevent DHA from issuing an abridged birth certificate. DHA can then call the father to bring the issue to his attention and send him in writing by email or post the process needed to be complied with for him to successfully register as the child's father.

- The effect of this restriction or hold on the child's profile would result in:
  - the parents being forced to resolve the issue of paternity and to have the DHA records updated because schools and other institutions will eventually require an unabridged birth certificate reflecting both parents' names; and
  - DHA not issuing any passport in respect of a child whose father is most likely a South African citizen without that parent's consent.

- This adjusted procedure is especially important where the father is a South African citizen and mother is a foreign national. This will to some extent prevent such foreigners who have retained citizenship in another country from falsely registering birth certificates without reference to the biological father. If the mother is reflected as a single parent on the birth certificate and DHA records, she can obtain a passport for the child from the embassy or consulate of her home country and thereby circumvent the international cross-border movement protocols of Regulation 6(12) of the Immigration Act.

- If there is any discrepancy with which DHA is not satisfied, it can suspend the passport application of the minor child unless or until satisfactory resolution of the issue of paternity.

- Where the biological or legally adoptive father of a child has died, his death certificate should count as sufficient evidence and this fact should be recorded against the child's DHA profile.

- Passports issued for children under the age of eighteen years must contain both parents' names and details as per DHA records. This will make it easier for parents travelling with children to verify their details against those of the child at ports of entry or exit.

- If one parent is deceased or the child only has one parent, then the child's passport must be endorsed accordingly to this effect by DHA together with a verification stamp authorizing international travel with only one parent much like a VISA approval.

- In cases of surrogacy for single parents, a pre-formulated DHA medical certificate must be issued by the medical officer responsible for the IVF or medical procedure and delivery of the baby to certify that the parent is a single parent in terms of surrogacy laws. Perhaps a DHA code can be included on a child's birth certificate or passport identifying this position for easy reference by immigration officials.

- DHA staff and immigration officials must be properly and thoroughly trained in the new laws and procedures and where necessary tested before holding certain positions which can affect the illicit transfer of children across our borders.

- Parental consent, regardless of which country the parent and child are travelling to must be a notarized document. In the notarised document, there must be a legally binding undertaking in terms of which the parent removing the child from South Africa promises to return the child within a certain period of time.

- In terms of this authority, South African embassies or consulates in the country to which the child has been taken can call on the authorities of that country to retrieve the child and take that child into their custody, when it is clear that the travelling parent has abducted the child and/or does not intend to return the child to his or her place of habitual residence. This could be an advanced directive implemented by virtue of a court order issued in South Africa, confirming that the child is a citizen of South Africa and that he or she has been unlawfully removed from the custody and care of the left behind parent.

5.5.3 Court process

High Courts should have a specialized court dealing with these types of abduction matters, where the courts are especially cognizant of their fiduciary duty as upper guardian of the child. Hearings for internationally abducted children should be conducted on an urgent basis, allowing first for the *ex parte* appointment of the curator ad litem. In terms of South African law, the High Court is the upper guardian of all persons and more especially this comes into play in the case of minors and persons who are mentally incapable of managing their own affairs. According to our Roman-Dutch common law, the High Court (previously the Supreme Court) is the guardian of all minors with prevailing authority even above parents and guardians; its mandate, is to ensure that the interests of the minor

are paramount.[159] In the case of *GS v AH*[160], the court confirmed that the High Court in its capacity as upper guardian could exercise its rights of custody as provided for in Article 3 of the HCCA. Thus, in cases where the interests of a minor need to be acted upon, it is common practice for the court to first approve the appointment of a curator ad litem, who acts as the legal representative in the interests of the child. The concept of curatorship originates from Roman law and usually relates to the control over another person's property where such person is incapable of managing his or her own affairs. A *curator ad litem* on the other hand is a person appointed by the court (most often a suitably qualified legal practitioner) to assist another such as a person with mental incapacity or a minor in litigation.[161] The benefit of this system is that the *curator ad litem* can argue the child's case.

Where a left behind parent therefore reports their child abducted by the other parent and an urgent court application is brought before the specialised High Court in South Africa, it would serve the legal process well to have a *curator ad litem* appointed by the court to represent the interests of the child.[162] Similarly, in any bilateral or multilateral treaties concluded between South Africa and non-HCCA States, it could be made a condition of that agreement that no *ex parte* court order will be issued in favour of the abductor parent arbitrarily granting the abductor custody of the minor child, (i) without an independent and impartial *curator ad litem* having been appointed first to represent the interests of the abducted child; and (ii) without the child having been given an opportunity to consult

[159] Hosten, WJ et al.

[160] *GS v AH 2007 (3) SA 330*

[161] Hosten

[162] *DKD v BDK N.O. and Another (2022/6381) [2023] ZAGPJHC 382 (26 April 2023)*

with a social worker, child psychologist and the *curator ad litem* beforehand for that child to exercise his or her rights to be heard through the *curator ad litem*.

For this purpose, the South African Human Rights Commission and/or the Office of the Child Commissioner should be included in the legal process. These offices should maintain a panel of senior attorneys and advocates who specialize in family law and are willing and able to urgently act in this capacity.

By extension, the mandate of the Commissioner for Children should be extended to act on behalf of abducted children themselves. On the subject of upper guardian and Ombud, the South African Child Commissioner in each province could act as extensions of the office of the international Child Ombud within the UN Child Rights Committee.

The Office of the Commissioner for Children was established in the Western Cape Province, South Africa as an independent institution to protect and promote the rights of children.[163] Section 78 of the Constitution of the Western Cape establishes the office of a provincial Commissioner for Children and the first Commissioner for Children was appointed for a five year term by the Premier of the Western Cape from 1 June 2020.[164] Similar institutions are set up in Australia, the United Kingdom, Belgium, New Zealand, Cyprus and Russia. However, in South Africa, the Office of the Child Commissioner's functions are limited to monitoring laws and policies on children, investigating complaints against government, researching policies or practices affecting children, educating the public about children's rights and causes, advising and making recommendations to government,

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[163]Western Cape Commissioner for Children Act 2 of 2019 assented to on 29 March 2019 commenced 15 April 2019 by Proclamation 5 of 2020

[164] Parliamentary Monitoring Group 'Introduction of the Western Cape Commissioner for Children' available at *https://pmg.org.za/committee-meeting/30424*, accessed on 22 November 2023

lobbying for change, and engaging with children.[165] There have been no further appointments of Child Commissioners within other provinces in South Africa yet. There is however space within the Child Commissioner's authority and office to ensure that the layperson who does not have vast sums of money to spend on litigation has access to resources to initiate legal and diplomatic processes to retrieve their children from other States. In this way, the Child Commissioner's office can facilitate the legal processes which need to be followed.

5.6 Suggestions by authors

It goes without saying that if more States do not ratify the HCCA and/or fully comply with its procedures, then States need to seek alternative measures to retrieve abducted children. Some authors have suggested the following measures to protect children against parental abduction, namely:

- "Custody orders must have very specific requirements spelling out contact and removal from the child's habitual place of residence. The implications for contempt of these orders must also be specified. Copies of court orders must be given to the child's school, day care and agencies that issue passports requesting those agencies to deny issuance or replacement of the child's passport without the custodial parent's permission."[166] The concern with this recommendation is that it concentrates on abductions where a court order has already been made. Parental abductions do take place before a court order is issued determining custody and access rights.

- "Even where a child has been taken to a State where he or she has dual nationality the originating State still retains a degree of responsibility. In addition to assisting in locating

[165] Western Cape Commissioner for Children Act 2 of 2019 ; Parliamentary Monitoring Group

[166] Mahlobogwane

children through consular services, efforts should be made to contact the children to ascertain whether they are content with their new situation. If they are not, diplomatic channels should be used conveying the child's wishes to the appropriate government. Where the State is also a party to the convention on the Rights of the Child, the originating State should emphasise the relevant applicable provisions."[167]

- The provision of legal aid, advice and a means of tracking and locating the abducted child in a foreign State should be subsidized because the victim parent is placed in a worse financial position having to institute legal proceedings and litigate in a country where they are not familiar with the language or processes.[168]
- "International parental abduction of a child should be criminalized in two specific circumstances. First, where a court has specifically ordered that a child should not be taken out of the country. Secondly, where it can be shown that the person taking the child abroad is doing so to prevent someone else from having the child's custody decided and controlled by the courts in the country from which the child is taken."[169]
- Promote and even enforce family mediation as a preventative tool to minimise conflicts and avoid parental abduction. [170]

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[167] Bueren

[168] Van Bueren

[169] Scottish Law Commission *Child Abduction: What changes if any should be made to the criminal law relating to the abduction of children? - an invitation to comment* Edinburgh : (140 Causewayside, Edinburgh, EH9 1PR): The Commission, 1985. Print

[170] United Kingdom Mr Michael Hancock, Liberal, Democratic and Reformers' Group Report by Social, HealthFamily Affairs Committee: International abduction of children by one of the parents (3 June 2002) available at https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9757&lang=EN, accessed on 17 August 2023.

- Create specialised courts at national level to deal with parental abduction matters on a rapid basis with well-trained judges.[171]

5.7 Conclusion

From the foregoing chapters, this analysis of the current position in relation international child abduction has shown that:

(i) The Convention on International Child Abduction is an effective procedural remedy with limited application.

(ii) The largest loophole in the system is that existing international conventions and domestic South African legislation and enforcement mechanisms have not made adequate or any provision for international parental abduction to non-HCCA countries.

(iii) There is no accurate independent statistical data available on child abductions by parents either domestically in South Africa or on a global level.

(iv) South Africa needs to implement independent and effective preventative legislation and enforcement mechanisms to deal with parental child abduction to non-HCCA countries.

(v) A child centred approach is lacking in dealing with parental child abductions and a child should be allowed to say what their feelings are and whether they want to return to the left behind parent.

(vi) Independent child advocate/s may be necessary or compulsory in non-HCCA matters to represent the child's interests in custody or return hearings; and

171 Ibid.

(vii) The State should be held accountable for, actively assist and subsidize the costs of retrieving an abducted child from a non-HCCA country.

(viii) The HCCA itself may need to be re-evaluated in light of changes in society and the recognition of children's rights since its coming into operation.

(ix) States should be made to submit reports annually to the UN Committee on Child Rights confirming the number of parental abductions (to HCCA and non-HCCA States), demographics of parents (cultural, marital status, religion, ethnicity, etc.), whether the States were compliant or not, turn -around times from date of abduction to date of retrieval and the outcome of custody and access hearings in the State of habitual residence.

(x) Non- HCCA States should be held accountable for abductions under the UNCRC.

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