

**International parental child abductions- Remedial mechanisms within the African Human Rights System**

**Submitted in partial fulfilment of the requirements for the degree LLM  
(Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria**

**By  
Lorato Felicity Rammule  
Student No: 21300390**

**Prepared under the supervision of Associate Professor John-Jean Barya at the  
Faculty of Law, University of Makerere, Uganda**

**29 October 2007**

## DECLARATION

I, Rammule Lorato E, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Associate Professor. John- Jean Barya

Signature.....

Date.....

## DEDICATION

First and foremost, to the highest God, you are exalted. Thank you for my life and for giving me extra 'brain power' and endurance.

I don't remember your name but I remember your plight. Though ten years late, I hope this will open the debate on *transfrontier* child protection. This is for you and your little boy. I hope that you were able to resolve the issue. Chances are you may never even read this, but I hope it will help others who find themselves in your situation.

To my siblings Tsholofelo, Tumelo and Amantle, because we know how painful it is to be denied contact with your parent when parents have divorced each other. I hope our children will not become pawns in a bigger battle for control. I love you guys.

My mom, Lulama Cynthia Rammule, you have been my rock and I thank you for all your sacrifices to get me to where I am. I love you now and forever. Steven Sechele, thank you for believing in me, the encouragement and love. I love you.

Motsi, you are one in a million. I love you.

Teko Reuben Rammule, you taught me the best lessons; one of them is that I have to believe in myself if I want to make it in life. Thank you

To all my family and friends (alive and passed on) who have supported me and continue to support and love me, this is dedicated to you.

## **ACKNOWLEDGEMENTS**

First and foremost I want to extend my deepest gratitude to Professor M. L. Mbao and Miss M. Mooki for believing in a small town girl like me. May God bless you and give you many fat babies.

I am grateful to the Centre for Human Rights, University of Pretoria and its entire staff, for according me the opportunity to participate in this challenging programme my view of life will never be the same. Mrs Gill Jacot Guillarmod, your endless toil to see this programme continue is acknowledged. It gives students like us an opportunity to see the world differently. It gives us the resolve to make a difference.

I would also like to thank the Staff at HURIPEC, University of Makerere for the extra mile they went to ensure that our studies and particularly our dissertation preparation went well.

Thank you to Associate Professor John-Jean Barya for the guidance. Thank you to Miss Grace Nakasi and Mr Kabuye who became our parents. You were ceaselessly patient with us. I thank you.

Estelle Nkounkou thank you very much for staying up late with me and for coping with my complaints- God is still working miracles so hang in there. I am a testament to that fact.

Anthony C. Diala thank you for you patience, editing expertise, and friendship.

## TABLES OF CONTENT

Title page .....	i
Declaration.....	ii
Dedication.....	iii
Acknowledgements.....	iv
Tables of contentT .....	v
List of abbreviations .....	vii
1. INTRODUCTION .....	1
1.2 Background to the Study .....	2
1.3 Problem Statement.....	5
1.4 Aims .....	6
1.5 Research Questions.....	6
1.6 Significance of the study.....	6
1.7 Literature Review .....	7
1.8 Limitations .....	9
1.9 Methodology.....	9
1.10 Chapterisation .....	9
2. ANALYSIS OF THE HAGUE CONVENTION.....	10
2.0 Introduction .....	10
2.1 Differing terminologies.....	10
2.2. Pre-Hague Convention .....	10
2.3 Exposition of the Hague convention .....	11
2.4 Domestic Application of the Hague Convention.....	13
2.4.1 The Unites States of America (USA) .....	13
2.4.2 The Republic of SA.....	17
2.5 Criticism of the Hague convention on its effectiveness to ensure the return of parentally abducted children.....	20
2.6 Conclusion .....	20
3 CHILDREN'S' RIGHTS PROTECTION IN AFRICA.....	22
3.1. Analysis of the African charter .....	22
3.2 Analysis of the ACRWC.....	24
3.3. Nature of state obligations.....	26
3.4 Weaknesses of the two instruments .....	26
3.5 Conclusion .....	27

4:	REMEDIAL MECHANISMS PROVIDED BY AFRICAN HUMAN RIGHTS REGIONAL BODIES .....	28
4.0	Introduction .....	28
4.1	Procedures for child return from non-signatory countries to the Hague Convention.....	28
4.1.1	Extradition .....	28
4.1.2	Instituting proceedings in the country where the abducting parent is .....	30
4.1.3	Diplomatic Remedies.....	30
4.2	Competent forum for the adjudication of international parental abduction.....	30
4.2.1	The African Child Committee .....	31
4.2.2	The African Commission.....	31
4.3	Jurisdiction of states in cases of international parental abduction.....	35
4.4	Lessons from the European system of Human rights.....	36
a.	European Convention On Recognition And Enforcement Of Decisions Concerning Custody Of Children And On Restoration Of Custody Of Children.....	37
b.	European Convention On The Exercise Of Children's Rights .....	37
c.	Convention On Contact Concerning Children .....	38
d.	European Convention on the Legal Status of Children born out of Wedlock .....	38
4.6	Conclusion .....	40
5:	CONCLUSIONS AND RECOMMENDATIONS.....	41
5.0	Summary .....	41
5.1	Conclusion .....	41
5.2	Recommendations .....	44
	BIBLIOGRAPHY .....	46

## LIST OF ABBREVIATIONS

<b>African Charter</b>	The African Charter on Human and People's Rights
<b>ACRWC</b>	The African Charter on the Rights and Welfare of Children
<b>ECtHR</b>	The European court For Human Rights
<b>SA</b>	South Africa
<b>USA</b>	The United States of America
<b>AHRCrt</b>	The African Court on Human and Peoples' Rights
<b>AHRCrt Protocol</b>	The Protocol to the African Charter on Human and People's Rights on the Establishment of an AHRCrt on Human and People's Rights
<b>IGOs</b>	Intergovernmental Organisations
<b>NGOs</b>	Non-governmental Organisations
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>VCLT</b>	The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

## 1. INTRODUCTION

Human rights are an integral aspect of daily life. As such they permeate all divisions of the law; be it private law or public law. To a large extent, human rights protection has been associated with public law in support of the notion that states are responsible for the protection of human rights because of their 'unequal' relationship and the fact that the state and individuals interact only in the public sphere.<sup>1</sup> A good illustration of this is found in the fact that human rights documents which extensively deal with civil and political rights, known as first generation rights, have always enjoyed immediate recognition.<sup>2</sup> Conversely social, economic and cultural rights, which can mostly be described as rights largely relating to the private sphere of a persons life, have struggled for acknowledgement. This is evident from the many constitutions of countries that relegate these rights so called 'second generation rights' to national objectives and directive principles of state policy which are non-binding and merely act as guides to state policy.<sup>3</sup>

Private law is as a body of rules governing human interaction<sup>4</sup> based on an equal power balance and as such human rights protection has no place in private law.<sup>5</sup> Family law is illustrative of this in that other than protecting the right to family, international human rights generally did not regulate cases of divorce or access to children especially across borders.<sup>6</sup> The institution largely regulating these issues is the International Conference on International Private Law which was formed in 1893.<sup>7</sup> The Hague Conference on Private International Law was organised in an attempt to synergise the differing and often conflicting legal traditions of different countries in an attempt to respond to global needs regarding international protection of children, international family and international family property relations; international legal co-operation and litigation; and international commercial and finance law.<sup>8</sup>

---

<sup>1</sup> Raday F, Privatising Human Rights and the Abuse of Power in Canadian (2000) 13 *Journal of Law and Jurisprudence* 103

<sup>2</sup> This can be seen in the Constitution of the Republic of Uganda of 1995 and the 1999 Constitution of the Federal Republic of Nigeria

<sup>3</sup> Same as above

<sup>4</sup> Raday n1 p104

<sup>5</sup> Dotan Y, Review Essay on The "Public", the "Private", and the Legal Norm of Equality (2005) 20 NO 2 *Canadian Journal of Law and Society* 207

<sup>6</sup> Inference drawn from the adoption of the Hague Convention in 1980; the UN CRC only came into force in 1989, the ACRWC in 1990, and the ACRWC in 1999

<sup>7</sup> Overview of the Hague Convention on Private international law  
<[http://www.hcch.net/index\\_en.php?act=text.display&tid=1](http://www.hcch.net/index_en.php?act=text.display&tid=1)> accessed 02/09/2007

<sup>8</sup> Same as above



This conference, held in The Hague, in Netherlands, was the first to come up with a framework on coordinating inter-country cooperation in cases of international child abduction,<sup>9</sup> which became the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention).<sup>10</sup> The Hague Convention was a response to the growing phenomenon of parents who abducted their children to foreign countries in order to gain benefit within a foreign legal system when applying for sole custody of the child.

The Hague Convention is the first attempt to deal with civil aspects of international child abduction. It regulates how a child wrongfully removed from his place of habitual residence can and should be returned to such a place.<sup>11</sup>

Parental child abduction often occurs when marriage between two nationals disintegrates. In this scenario, one of the parents, often the parent who is not a national of the country of matrimonial domicile, moves back to his<sup>12</sup> country of nationality, with the child without the approval, or the knowledge of the other parent.<sup>13</sup> All this is done to gain an advantage in an award of custody. Often, upon arrival in his country; the abducting parent applies for sole custody.<sup>14</sup> It is on this field that this research will focus.

## 1.2 Background to the Study

Humpty Dumpty sat on the wall,  
Humpty Dumpty had a great fall.  
All the king's horses and all the king's men,  
Couldn't put Humpty together again.<sup>15</sup>

This over simplistic children's nursery rhyme aptly describes the condition in which most African children find themselves. They are 'broken' and can never be 'put together again.' This condition results from atrocities committed against them such as forced slavery,

---

<sup>9</sup> Same as n7

<sup>10</sup> Concluded in 25 October 1980, entered into force 1 December 1983

<sup>11</sup> Article 1 states that the objects of the Convention are -  
a) to secure the prompt return of children wrongfully removed to 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 other Contracting States

<sup>12</sup> He/his is gender inclusive

<sup>13</sup> Wolfe K, 'A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany' (2000)33 *New York University Journal of International Law & Politics* 285

<sup>14</sup> same as above

<sup>15</sup> Nursery rhymes at <[http://www.rhymes.org.uk/humpty\\_dumpty.htm](http://www.rhymes.org.uk/humpty_dumpty.htm)> (accessed 12/09/2007)

conscription to become child soldiers, forced prostitution, and sexual slavery.<sup>16</sup> These atrocities have been well documented and are widely accepted as violations of children's rights.<sup>17</sup>

Unfortunately in Africa, the issue of international parental child abduction is overlooked. Parental abduction is the "taking, retention, or concealment of a child or children by a parent, other family member, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member".<sup>18</sup> Although abductors may be other family members or their agents, in most cases the abductor is the child's parent.<sup>19</sup>

The trauma that parentally abducted children go through is noteworthy. They are separated from their parent and family, moved to another country, forced to adapt to a new situation, and the most conflicting emotion of all is the fact that the person inflicting pain and confusion is the child's parent. This also contributes to children being 'broken' as the nursery rhyme suggests. However, the disheartening fact is that this matter seems to be a 'non-issue'.<sup>20</sup> The children are left in their 'broken' status and have no one to 'put them back together again.'

The left-behind parent also often suffers in silence. This inaction is caused by feelings of helplessness because the child is with his/her parent. Ordinarily nothing seems wrong with this scenario. However, this opinion fails to take into cognisance the emotional and psychological impact parental child abduction has on the child. Increased awareness of children's rights and more importantly the principle of the 'best interests of the child'<sup>21</sup>, require close scrutiny of the problem of parental child abduction.<sup>22</sup> Is it in the best interests of the child to wrench him from an environment he knows, from his parent's love and force him to relocate all in a bid to gain sole custody and spite the other parent? Article 18(3) of the

---

<sup>16</sup> Child protection from violence, exploitation and abuse  
<[http://www.unicef.org/protection/index\\_exploitation.html](http://www.unicef.org/protection/index_exploitation.html)> accessed 02/09/2007

<sup>17</sup> ACRWC prohibits use of children in armed hostilities-article22(2), inducing/coercing engagement of children in sexual activity; prostitution and or pornographic activities, performances and materials- article 27

<sup>18</sup> S. Aiyar, International Child Abductions Involving Non-Hague Convention States: The Need For A Uniform Approach (2007) 21 Emory International Law Review 277

<sup>19</sup> J. Chiancone, L. Girdner, and P. Hoff (2001) Issues in Resolving Cases of International Child Abduction, U.S. Department of Justice Office of Justice Programs: Office of Juvenile Justice and Delinquency Prevention <[www.ojjdp.ncjrs.org](http://www.ojjdp.ncjrs.org)> (accessed 02 September 2007)

<sup>20</sup> This is demonstrated by the lack of literature in Africa dealing with this issue

<sup>21</sup> Article 4 (1) of ACRWC

<sup>22</sup> van Bueren G, *The Best Interests of the Child – International Co-operation on Child Abduction* (the British Institute of Human Rights, The Programme on the International Right of the Child Reunite: National Council For Abducted Children)

African Charter on Human and people's rights (African Charter)<sup>23</sup> states: 'the State shall ensure ... the protection of the rights of ... the child as stipulated in international declarations and conventions.'

Departing from this principle, the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>24</sup> states

States Parties to the present Charter shall 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. In case of the dissolution, provision shall be made for the necessary protection of the child.

And

States Parties to the present Charter shall take appropriate measures to prevent the abduction... of children for any purpose or in any form, by any person including parents or legal guardians of the child.<sup>25</sup>

Moreover in 'all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.<sup>26</sup> Thus, in such cases the protection and best interests of the child must be considered. This includes looking into a child's psychological wellbeing. Otherwise these children will also fall into the category of children that are 'broken and cannot be put together again.'

The purpose of this research is to look for a legal basis which a parent whose child has been abducted can retrieve his child. This is especially so when all other methods have failed. Africa is a part of the global village and with increased globalisation; it is inevitable that African cultures will be affected. This change will also touch upon the way in which children are viewed (as belonging to the husband or the woman).<sup>27</sup> Gradually, the concept of shared custody and rights of access will take hold. This idea will empower parents whose children have been parentally abducted, to seek a remedy.

Another factor is that our society has become increasingly mobile due to the increased interaction of countries. This mobility has contributed to increased marriages between people of different nationalities, cultures, religions and ethnic groups. These marriages are not impervious to the increased phenomenon of divorce. Divorces between bi-nationals have contributed to an increase in the rate of child abductions by custodial parents. When bi-

---

<sup>23</sup> Adopted 27 June 1981, entered into force 21 October 1986

<sup>24</sup> Adopted in 1990, entered into force on 29 November 1999 ;Article 4 (2) of the ACRWC

<sup>25</sup> Article 29 (a)

<sup>26</sup> Article 4 (1)

<sup>27</sup> A. Lloyd, A theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child (2002) 2 *African Human Rights Law Journal* 11

national marriages dissolve, one parent often returns to his or her country of nationality in search of a more considerate environment for the determination of child custody.<sup>28</sup>

Africa has also experienced these recent migratory patterns of people. This movement has been mainly due to war, famine, and employment opportunities. The exodus has in some cases resulted in multiracial and multicultural matrimonies. Thus the problem of child abductions is a growing concern in Africa. The problem of Child abductions is controlled by The Hague Convention.<sup>29</sup> However, South Africa (SA), Burkina Faso, and Zimbabwe are the only African States that have ratified the Hague Convention in Africa.<sup>30</sup> Thus, custodial parents of abducted children in Africa have few remedies to get their children back from spouses or relatives who have abducted them. This leaves a gap in African jurisprudence in relation to procedures that can be used in these cases.

### **1.3 Problem Statement**

The Hague Convention deals with the question of parents who abduct their own children and take them to foreign countries. They do this hoping to use a more sympathetic legal system to apply for sole custody. Under the Convention, a parent can secure the prompt return of his child if the child is wrongfully removed from one contracting state to another.<sup>31</sup>

Although this Convention has been instrumental in securing the safe return of parentally abducted children, it has its limitations- it applies only to ratifying state parties, and where the child was habitually resident in a ratifying state.<sup>32</sup> Thus, a country that has not ratified the treaty is under no obligation to help with the safe return of an abducted child. This means that a parent may be left without a remedy.

Parents need an alternative remedy when dealing with countries who are non state parties to the Hague Convention. The study seeks a similar remedy within the African Human Rights system given that very few African states have ratified the Hague Convention. It also explores how African treaties particularly, the ACRWC can provide a remedy to fill the lacuna in the jurisprudence of the African human rights system.

---

<sup>28</sup> Wolfe, n13

<sup>29</sup> Of 25 October 1980

<sup>30</sup> HCC Status table of the Hague Convention  
<[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24)> (accessed 01 march 2007)

<sup>31</sup> Article 1

<sup>32</sup> Preamble, article 1 & 4

## **1.4 Aims**

The traumas parental child abduction causes to children and left-behind parents has led to the curiosity on, what can a parent do in a situation as this? Firstly, the research aims at finding a legal basis for holding a state responsible for the abduction, and secondly, what mechanisms are available to left-behind parents in Africa for the retrieval of parentally abducted children.<sup>33</sup>

## **1.5 Research Questions**

This dissertation aims at answering the following question:

To what extent can the African Human Rights System complement the mechanism provided by the Hague Convention? More specifically:

1. What legal obligations do states owe custodial parents in cases of child abductions under the African Human rights System?
2. How effective is the remedial machinery within the African Human Rights system to give effect to the obligations of states?
3. If there are shortfalls, how can the defects be improved?

## **1.6 Significance of the study**

The significance of this study is that it captures a seemingly harmless act for what it truly is. The ripple effect of a custody battle is that a parent is not just denied custody of his/her children, but also access. In addition, the psychological effects to the child are significant. The child is often left dejected, confused and frightened. The relationship with the parent is completely tarnished which often leaves the child feeling inadequate and angry.

Africa is becoming more industrialised and its people have become more mobile as they search for better opportunities. This will lead to marriages between different nationals. These marriages are not impervious to divorce. Upon divorce, in a search for a sympathetic forum for a custody hearing some parents will resort to forum shopping. This will lead to an increase in international parental abductions. This research is in anticipation for this problem. The purpose of this research is to determine available mechanisms within the African human rights system that can be utilised for retrieval of children abducted by their parents.

---

<sup>33</sup> The words international parental child abduction and parental child abduction will be used interchangeably

## 1.7 Literature Review

Three main themes are discussed with in the literature review.

The first is the idea that there should be a regional body that deals with child abduction in order to have uniform application of the right to be free from abductions and the right to family life. Some advocate for the establishment of an international family court that can reconcile different cultures, religions and legal systems that clash whenever a case of parental abduction occurs.<sup>34</sup> Whilst others advocate the use of existing child protection instruments to compel states of refuge to help return parentally abducted children.<sup>35</sup> They are all in unison on the difficulties experienced by countries in rescuing parentally abducted children. I agree with Ericka that a common platform should be created for the resolution of disputes of this kind. However, I disagree that a new court should be created. It will take time to set up, will be costly, and there is no guarantee that all the parties will agree to it. She also realises this dilemma and admits to it. Thus we should use existing structures that all have already agreed to such as Ong suggests.

Cardin<sup>36</sup> examines available remedies to 'left-behind parents' in cases of non-signatory states. She like other authors<sup>37</sup> focussed on American, British and Australian jurisprudence, and her work does not cover the scope of the proposed study. However she and other stated authors reveal the maze that left behind parents often have to navigate when their children have been parentally abducted, only for their efforts to be fruitless. They illustrate how difficult retrieval is without the help of a supranational instrument binding states to help in child return. These efforts are so frustrating that Harper suggests re-abduction.<sup>38</sup> This theme helps in illustrating the frustration left-behind parents deal with in fighting for the return of their children. It supports the argument that in the absence of the Hague Convention, another treaty is needed to facilitate cooperation amongst states in securing the return of

---

<sup>34</sup> E. A. Schnitzer-Reese, 'International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court' (2004) 2 *Northwestern University Journal of International Human Rights* 7

<sup>35</sup> D.S. L. Ong, *Parental Child Abduction In Singapore: The Experience Of A Non-Convention Country* (2007)21 *International Journal Of Law, Policy And The Family* 220; Aiyar, n18 ; Wolfe, n13

<sup>36</sup> L. Cardin, 'The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One' (1997) 20 *Houston Journal of International Law* 141

<sup>37</sup> S. Kreston, *Prosecuting International Parental Kidnapping* Symposium on International Security 2001 *Notre Dame Journal of Law, Ethics and Public Policy* 533; T. Harper, *The Limitations Of The Hague Convention And Alternative Remedies For A Parent Including Re-Abduction* (1995) 9 *Emory International Law Review* 257

<sup>38</sup> Harper, above

parentally abducted children. These works also show how the issue has been largely ignored in Africa resulting in a lack of literature.

The last theme centres on state obligations. Udombana<sup>39</sup> articulates these obligations in relation to social rights. However it is still pertinent in that they are discussed under the African Charter which does not distinguish between the different levels or groups of rights<sup>40</sup> thus implying that the same obligations exist for all rights. His paper is relevant in that he expounds that

States' obligations under the African system are peremptory because they command and permit no refusal. This means that each state is bound to take the necessary steps to secure the human rights concerned from the moment the treaty enters into force for that state. The obligations are also durable, meaning that a state is constrained by norms prescribed in a treaty and must discharge the duties established in international human rights law, irrespective of the system of governance that is in place.<sup>41</sup>

Nmehielle confirms this and adds that the African Charter is still the main document for human rights protection in Africa.<sup>42</sup> Additional protocols that were adopted enhance either 'its substantive provisions or complement the system's institutional enforcement mechanism'.<sup>43</sup>

These authors support the idea that *states of refuge*<sup>44</sup> are obliged to perform obligations towards left-behind parents as stipulated in the Charter and that all these rights can be enforced under one body as the instruments are interrelated and the protocols merely expound on protection already stipulated by the African Charter.

Although some of these articles show the current trend of handling child abduction cases, they reveal a lacuna in remedies especially within Africa in the absence of ratification of the Hague Convention. They also reveal how alternative remedies can be frustrating. They all focused on the Americas and Europe; this is indicative of how the issue has been neglected within the African context. My research aims to investigate an alternative within the African Human Rights system to the current state of affairs. In so doing, the articles focusing on state

---

<sup>39</sup> N. J. Udombana, *Social Rights Are Human Rights: Actualizing The Rights To Work And Social Security In Africa* (2006) 39 *Cornell International Law Journal* 181

<sup>40</sup> V. O. Nmehielle, *Development of the African Human Rights System in the Last Decade* (2004) 11 NO.3 *Human Rights Brief* 6

<sup>41</sup> At 190; this idea is also expressed by Nmehielle above who points to the Constitutional Rights project and another *v Nigeria* (2000) AHRLR 191 (ACHPR 1998) in which the African Commission reinforced the idea that human rights as enshrined in the African Charter are not subject to flimsy domestic laws or regulations that tend to limit the enjoyment of human rights protection without cause, or in a very irregular situation

<sup>42</sup> Nmehielle, n40

<sup>43</sup> N40, p7

<sup>44</sup> refers to a state which the abducting parent has fled to

obligation and advocating for a common forum help to develop the search for an alternative within the African human Rights System.

### **1.8 Limitations**

Children may also be abducted by relations other than their parents. However, this study will largely focus on parental child abduction.

Given the current Hague Convention ratification status of most African countries, this study will be limited to regional child protection instruments pertinent to Africa. The study is hampered by insufficient literature on parental child abductions within the African context.

### **1.9 Methodology**

To resolve questions raised in this study, the research is library-based, and involves analysing international human rights instruments, domestic legislation, law reports, textbooks, journals, and materials from the internet. The research is non-empirical and involves a comparative analysis of two signatory states – SA and the USA.

### **1.10 Chapterisation**

This study is divided into five chapters. Chapter one provides the context in which the study is set, the focus and objectives of the study, its significance and other preliminary issues including the hypothesis and the literature review. Chapter two delimits the meaning, content and the resultant obligations of children's rights under the Hague Convention and its domestic application. Chapter three analyses the rights of children and parents and state obligations under the African Charter, and the ACRWC in relation to child abductions. Chapter four explores whether there are any alternatives to the current protectory procedures provided by the Hague Convention by looking in the African regional System of Human rights. This analysis will rely heavily on the conclusions drawn in chapter two and three. Chapter five draws conclusions and gives recommendations.



## 2. ANALYSIS OF THE HAGUE CONVENTION

### 2.0 Introduction

This chapter will analyse the protection of children from abductions and available remedies for restoring the abducted children to their place of habitual residence under the Hague Convention and its domestic application.

### 2.1 Differing terminologies

African countries, especially common law countries, define abduction as the taking or concealment of a child from his or her parents with an intention of having sexual relations with them.<sup>45</sup> The Hague convention, however, regards abduction as the wrongful removal of the child from his place of habitual residence in contravention of the other parent's custodial rights.<sup>46</sup>

### 2.2. Pre-Hague Convention

Historically, the problem of international parental child abduction was a national issue.<sup>47</sup> Consequently, international child custody law was largely ambiguous. Custody jurisdiction was established on a number of different grounds such as '(a) the child's physical presence; (b) the child's domicile; (c) the physical presence and/or domicile of one or both parents; or (d) the continuing rights or jurisdiction in a court rendering an initial decree.'<sup>48</sup> Frequently, state courts refused to enforce custody decisions of other jurisdictions.<sup>49</sup> The interlocutory nature of the award and the 'best interests of the child' were used as a shield for not extending jurisdiction to another state's order.<sup>50</sup> This created fertile ground for child snatching. Parents who were disgruntled with a custody decision in one country could move to another country in order to get a more positive outcome. This has also contributed to aggravating the problem.<sup>51</sup>

This led to the adoption of the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (Convention on the Protection of

---

<sup>45</sup> Children - The International Dimensions  
[http://www.doj.gov.za/salrc/reports/r\\_prj110\\_childcare/r\\_prj110\\_21\\_2002dec.pdf](http://www.doj.gov.za/salrc/reports/r_prj110_childcare/r_prj110_21_2002dec.pdf) (accessed 06/09/2007)

<sup>46</sup> Article 3 Hague Convention

<sup>47</sup> L. R. Herring, Taking Away The Pawns: International Parental Abduction & The Hague Convention (1994) 20 *North Carolina Journal of International Law and Commercial Regulation* 137

<sup>48</sup> above

<sup>49</sup> Schnitzer- Reese, n34

<sup>50</sup> n47

<sup>51</sup> Same as above

Minors) in 1961. This Convention allows 'administrative authorities of the state of the habitual residence of an infant to have power to direct the protection of a minor and his property.'<sup>52</sup>

Thus the Convention on the Protection of Minors dealt with the protection of infants, and did not expressly deal with parental child abductions. The authorities had to be creative in its interpretation to include cases of parental child abduction.<sup>53</sup> This was not the only problem, the other obvious omission was that it only dealt with infants and thus excludes a significant portion of minors from its protection.<sup>54</sup> Thus this Convention fell far short of addressing parental child abduction.

### 2.3 Exposition of the Hague convention

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, [signatory states] have resolved to conclude a Convention to this effect.<sup>55</sup>

The drafters of the Hague Convention, 'firmly' believing that interests of children have become the last concern in issues of child abduction, saw a need to look for new methods to protect children caught between custody battles between their parents. Attempting to make a difference, the Hague Convention seeks to

[s]ecure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.<sup>56</sup>

Removal or retention is to be considered wrongful if

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or because of a judicial or administrative decision, or because of an agreement having legal effect under the law of that State.<sup>57</sup>

The aim is to ensure that rights of access or custody that prevailed before the child was abducted are respected. The purpose is not to question the custody rights or to confirm them

---

<sup>52</sup> Article 1

<sup>53</sup> Wolfe, n13

<sup>54</sup> Children are persons under the age of 18 according to article 2 of ACRWC; whilst infants constitute a small percentage of children

<sup>55</sup> Preamble of Hague Convention

<sup>56</sup> Article 1 (a) & (b)

<sup>57</sup> Article 3

but to return the child to his place of habitual residence so that these rights can be contested in a proper forum.

The Hague Convention's approach is unique in that it avoids difficulties of requiring enforcement of an existing custody order or jurisdictional rules.<sup>58</sup> The Convention is principally designed to compel the abducting parent to return the child voluntarily to the place of habitual residence,<sup>59</sup> if the abductor refuses, the Convention provides procedures for the court to order a child's return.

The crux of the Convention is set forth in Articles 3 and 12. If there has been a wrongful removal according to article 3, then article 12 provides a remedy in the return of the child to his place of habitual residence. The return ordered has a one-year deadline. If the proceedings were initiated within one year of the child's abduction, judicial authorities within the Contracting State are required to return the child. However, if proceedings were instituted after one year, the authorities are only required to return the child if the child has not settled in his new environment.

Facilitation of the return is to be done through central authorities of signatory states.<sup>60</sup> If a person wants to secure the return of his child, his country's central authority must contact the central authority of the abducting state to help in facilitating return. This facilitation is done through helping to find the child, coaxing a voluntary return of the child and if this is not possible, helping to institute judicial proceedings for return. This is aimed at reducing the burden on a parent to navigate through unfamiliar foreign legal systems.<sup>61</sup>

Should a parent oppose the return of an abducted child, he can rely on articles 13 and 20. Article 13 lists the grounds for non-return. These include: if the person, institution or other body caring for the child was not actually exercising the custody rights at the time of removal or retention, or had approved or after the removal agreed to the removal of retention,<sup>62</sup> or there is a serious risk that the child's return would expose him to physical or psychological

---

<sup>58</sup> L. Silberman- Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence (2006) New York University School of Law New York University Public Law and Legal Theory Working Papers (IILJ Working Paper 2005/5) <[www.iilj.org](http://www.iilj.org)> or <<http://lsr.nellco.org/nyu/plltwp/papers/18>> (accessed 01/08/2007)

<sup>59</sup> Article 10

<sup>60</sup> Article 6

<sup>61</sup> J. Starr, The Global Battlefield: Cultural and International Child Custody Disputes at Century's End (1998) 15 *Arizona Journal of International and Comparative Law* 791

<sup>62</sup> Article 13(a)

harm or otherwise place him in an intolerable situation;<sup>63</sup> or the child objects to being returned and is at an age and degree of maturity at which his views should be considered.<sup>64</sup>

Article 13 (b) is comparable to the 'best interests of the child' standard in that the child is returned to the country and not a particular parent in order for custody to be properly determined. Thus if return would somehow expose a child to serious harm because the court or officials in that country cannot provide sufficient protection, the condition will be satisfied.<sup>65</sup> Article 20 bars return if it will be contrary to 'the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.'

The primary goal of the Convention is to secure return of the child without initiation of formal proceedings. However it has other objectives mainly, to "reverse" the abduction by returning the child; minimise the traumatic effects of separation and abduction; enforce the idea that the place of habitual residence is the appropriate place to make a decision about custody and visitation- it is where much of the evidence about what will be in the best interests of the child will be located and thus makes the custody hearing faster and easier; and to help discourage potential abductions because it reduces the possibility of 'forum shopping' for the custody dispute.<sup>66</sup> Thus, the Convention is both remedial and preventive.<sup>67</sup>

## **2.4 Domestic Application of the Hague Convention**

The aim of this case study is to show how the Hague Convention applies within the domestic arena. The two countries were chosen because they are both signatories to the Hague Convention.

### **2.4.1 The United States of America (USA)**

The USA is a federal constitutional republic comprising fifty states and one federal district.<sup>68</sup> It is one of the world's most ethnically diverse nations, the product of large-scale immigration from many countries.<sup>69</sup> This provides fertile soil for bi-national or bicultural / bi-religious marriages. Thus, they have an escalating problem of international child abduction. In fact,

---

<sup>63</sup> Article 13(b)

<sup>64</sup> Article 13

<sup>65</sup> Silberman; n58

<sup>66</sup> Same as above

<sup>67</sup> n36

<sup>68</sup> The World Fact book- United States of America <<https://www.cia.gov/library/publications/the-world-factbook/print/us.html>>(accessed 01 August 2007)

<sup>69</sup> J. Q Adams and P. Strother-Adams (2001). *Dealing with Diversity*, Chicago: Kendall/Hunt.

upon average, the US State department deals with an average of 1100 cases of international parentally abducted children per year.<sup>70</sup>

Due to increased parental child abductions, in the late 1960s, the USA passed the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>71</sup> The UCCJA was adopted as law in all 50 States, the District of Columbia, and the Virgin Islands.<sup>72</sup>

The UCCJA aimed to unify child abduction cases amongst American states.<sup>73</sup> It based jurisdiction for custody of courts on the court sitting in the child's home state<sup>74</sup>, the state having significant connection with the child and its family,<sup>75</sup> or the child being present in the state, abandoned or subject to or threatened with abuse or neglect.<sup>76</sup> If either of the above was established, no other state would have or assume jurisdiction.<sup>77</sup>

Thus it was hoped that the UCCJA would stop rogue parents from manipulating the law to suit their ends and clear the ambiguities in the law.<sup>78</sup> However, due to state adoption, interpretation and application led to courts significantly departing from the original text. This left the states in their original predicament of substantial inconsistency in interpretation by state courts. As a result, the goals of the UCCJA became unobtainable in many cases.<sup>79</sup> This then led to the enactment of the Parental Kidnapping Prevention Act (PKPA) of 1980 to supplement the UCCJA.<sup>80</sup> Its main aim was to prevent the modification of custody orders made by other states pursuant to the UCCJA and to force them to comply with them.<sup>81</sup> Again

---

<sup>70</sup> M. Harty, Assistant Secretary of State for Consular Affairs 'Remarks before the House Committee on International Relations' in Washington, DC June 22, 2004  
<<http://www.state.gov/r/pa/ei/otherstmy/37012.htm>> (accessed 01 July 2007)

<sup>71</sup> Act of 1969

<sup>72</sup> <<http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uccjea97.htm>> (accessed 01 August 2007)

<sup>73</sup> Adams, n69

<sup>74</sup> S 2 (5) "[H]ome state" is defined as "the state in which the child immediately preceding the time involved lived with his parents ... for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned."

<sup>75</sup> s 3(a) (2)

<sup>76</sup> s 3(a) (3)

<sup>77</sup> s 3(a) (4)

<sup>78</sup> Starr, N61

<sup>79</sup> Uniform Child Custody Jurisdiction And Enforcement Act (1997)  
<http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uccjea97.htm>

<sup>80</sup> Herring, n47

<sup>81</sup> M. Winterbottom, *The Nightmare Of International Child Abduction: Facing The Legal Labyrinth* (1996)  
5 *Journal of International Law and Practice* 495

in 1997, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>82</sup>

As noble as the intentions of the drafters of the above mentioned laws were they have no extra-territorial application. Moreover, the provisions could only be applied to cases where an official custody order existed prior to the abduction and the abducting parent tried to legitimize his or her custody in another forum<sup>83</sup>. It fails to deter those who have no intention of legitimising their custody in a foreign country.

Thus, until the passage of the Hague Convention, there was a need for an international instrument to facilitate international cooperation to address the problem of international child abduction. The USA signed the Hague Convention on the 23<sup>rd</sup> of December 1981 and ratified it on the 29<sup>th</sup> of April 1988.<sup>84</sup> Since the Hague convention became operational, the USA has had numerous cases dealing with parental abductions. I will only discuss two in an attempt to indicate its domestic application.

In the case of *Croll v Croll*<sup>85</sup>, the Second Circuit court had a unique opportunity to interpret how the Hague Convention applies to cases involving the wrongful removal of a child by a custodial parent in contravention of an order of access. The Court had to decide whether the right of access could be a premise for a return order under The Hague Convention's provisions especially if the parent had an order preventing the child from being removed from the country. In this case, the parties were divorced. The mother had sole custody whereas the father had rights of reasonable access. Attached to the order of access, the child could not be removed from her place of habitual residence- Hong Kong- until she was 18 years old. Despite this, the mother moved with her then eight-year-old daughter to the USA, to which both parties were citizens. The father then instituted action in USA based on the Hague Convention for his daughter's return. The mother argued that he could not institute the action as he did not have custody rights and that the Courts lacked jurisdiction on the subject matter. The father argued that the Court order gave him the right to decide where his daughter lived and this transformed into rights of custody. The Court *a quo* decided in his favour. However, on appeal, the Court decided that he did not have custody but could apply for an order to compel the custodial parent to arrange 'visitation' at her expense.

---

<sup>82</sup> Became operational in 1998

<sup>83</sup> Winterbottom, n81

<sup>84</sup> <[http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24)> it became operational on 1 July 1988 (accessed 06 June 2007)

<sup>85</sup> 229 F.3d 133 (2d Cir. 2000)

This decision shows that the Hague Convention does not cover the rights of access adequately. Due to the distinction created by the Convention between rights of access and custody rights, the court lacked jurisdiction to order the return. Daniel M. Fraidstern<sup>86</sup> argues that there should be no distinction between the two rights as a unilateral decision to move a child and abduction have the same consequences.<sup>87</sup> In this instance, the Convention was given a literal interpretation. I agree with Daniel when he states that the spirit and purport of the convention as well as the best interests of the child should be considered in order to extend remedies to parents who have access rights.<sup>88</sup> Otherwise the object of the Convention is negated which is to ensure that parents do not make unilateral decisions to remove children and in the process harm the child. If we are to 'put humpy dumpty back together again', interpretation should allow for this.

In *Blondin v Blondin*<sup>89</sup> the Second circuit court had to decide on the interpretation of article 13 (b)<sup>90</sup> by considering the extent and meaning of 'grave risk'. In this case, the Appellate Court developed a new test- whether the country of habitual residence can provide an alternative custody situation for the duration of the custody proceedings.<sup>91</sup> If it can, then a return order is issued. This is because it stated that the grave risk condition did not necessarily apply to the parent but to the country as the central authority is the 'applicant' in the proceedings and not necessarily the parent.<sup>92</sup> At this point, it is necessary to point out that the reason for the return is because the country of habitual residence has jurisdiction to deal with the matter as evidence is easily found and adduced there. This however, does not mean that automatically, the requesting parent will be awarded custody. The Hague convention provides a level playing field for both parties. For instance, if the court finds that the requesting parent is not fit to have custody, custody will be granted to the abducting parent with perhaps provision for access for the requesting parent.

These two cases show strict adherence to the Hague Convention. However, they also reveal that the best interest of the child principle should always play a decisive role in the

---

<sup>86</sup> D. M. Fraidstern, *Croll v Croll and the unfortunate Irony of the Hague Convention on the Civil Aspects of Child Abduction: Parents with rights of access get no rights to access courts*, (2005) 10 *Brooklyn journal of International Law* 640

<sup>87</sup> above p660

<sup>88</sup> p684

<sup>89</sup> 189 F .3d 242

<sup>90</sup> When the court feels that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation

<sup>91</sup> P. Glass, *Blondin v Dubois: A closer step to safeguarding the welfare of abducted Children?* (2000) 26 *Brooklyn International journal of International Law* 725 p725

<sup>92</sup> above p732

interpretation of the Hague Convention, as this is an international principle designed to protect children.<sup>93</sup>

#### 2.4.2 The Republic of SA

SA is a dualist state. Thus, an international instrument to be binding on it must be domesticated.<sup>94</sup> SA ratified the Hague Convention in 1996 and the SA Parliament passed the Hague Convention on the Civil Aspects of International Child Abduction Act (HCCAICAA).<sup>95</sup> The Act incorporated the provisions of the Convention into its domestic law.

The supreme law of the Country is the Constitution of the Republic of South Africa Act.<sup>96</sup> The Constitution protects children's rights under section 28. The main provision of this section is section 28 (2) which stipulate that when a case concerns a child, the 'best interests of the child shall be the paramount consideration'. In the case of *Sonderup v Tondelli and another*,<sup>97</sup> the Constitutional court confirmed the constitutionality of the HCCAICAA and its procedures. However it was noted that there were situations that could conflict with the best interest of the child principle and that in that instance, the conflict would have to be justified under the limitations clause.<sup>98</sup> Goldstone J, stated that

SA court[s] seized with an application under the Convention [are] obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court on the other. ... [T]he court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of Article 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is

---

<sup>93</sup> Article 4 (1) of the UNCRC stipulates that in all matters concerning children the best interest of the child shall be a primary consideration; USA signed it in 1995, the Vienna Law on treaties states that before ratification, after signature states are obliged to refrain from acts which would defeat the object and purpose of a treaty

<sup>94</sup> Article 231 of the Constitution of the Republic of SA Act 108 of 1996 states (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces ..., (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament

<sup>95</sup> Act 72 of 1996; entered into force 1997 through Reg. 65 of 1997 in Republic of SA Government Gazette, No 18322, October 1997, p1

<sup>96</sup> Act 108 of 1996

<sup>97</sup> 2001 (2) BCLR 152 (CC)

<sup>98</sup> Section 36 of the Constitution allows limitation of certain rights if justified in an open and democratic society



necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.<sup>99</sup>

In this case, a desirable balance was achieved however it is indicative that should The Hague Convention conflict with Constitutional principles, that particular provision will not be upheld by the courts.

The Children's Act,<sup>100</sup> in Chapter 17 makes specific mention of the Hague Convention and sets out the procedure to be followed in cases of international child abduction. The Chief Family Advocate is named as the country's central authority in dealing with Hague Convention cases.<sup>101</sup> It also outlines the powers of the court.<sup>102</sup> It may give interim protective relief to the child or either of the parties whilst deciding on the return of the child.<sup>103</sup> When deciding whether to return the child, any objections from the child must be given 'due weight taking into account the child's age and maturity.'<sup>104</sup> Also, in determining that there has been wrongful removal, the court may request the central authority for a report on the child's 'domestic circumstances of the child prior to the alleged abduction.'<sup>105</sup>

In the case of *Pennello v Pennello and another*,<sup>106</sup> the court stated that the Hague Convention centred on urgent applications and thus proceedings were peremptory and should not be allowed to be anything more than a precursor to a substantive hearing in the State of the child's habitual residence. This is in line with the objectives of the Convention which are to defeat forum shopping for a custody hearing. This statement rings true unless one of the exceptions is satisfied, in which case the custody proceedings will proceed in the abducting parent's country.

In *Central Authority v Houwert*,<sup>107</sup> in order for the court to decide whether the removal of the minor from Holland to SA was 'wrongful removal' the court had to consider the meaning of article 13 (a)<sup>108</sup> of the Hague convention. The court confirmed the English decision of in *Re K*

---

<sup>99</sup> Para 35 pg25

<sup>100</sup> Act 38 of 2005, entered into force in 19 June 2006

<sup>101</sup> Article 276 (1)

<sup>102</sup> Article 278

<sup>103</sup> Article 278 (2)

<sup>104</sup> Article 278 (3)

<sup>105</sup> Article 278 (1)

<sup>106</sup> [2004] 1 All SA 32 (SCA)

<sup>107</sup> [2007] SCA 88 (RSA)

<sup>108</sup> The judicial or administrative authority of the requested State is not bound to order the return of the child if the person ... who opposes its return establishes that the person ... having the care of the person of the child ... had consented to or subsequently acquiesced in the removal or retention

*(Abduction: Consent)*.<sup>109</sup> In this decision, Holman J stated that consent “needs to be proved on the balance of probabilities.” However the evidence in support of it needed ‘to be clear and cogent. If the court is left uncertain, then the ‘defence’ under Art 13(a) fails.” He went further to state that

. . . [I]t is obvious that consent must be real. It must be positive and it must be unequivocal. If it is clear, viewing a parent’s words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Art 13. It is not necessary that there is an express statement that “I consent”. In my judgment, it is possible to infer consent from conduct.<sup>110</sup>

Based on the test above, Van Heerden JA decided that there was no consent and ordered the child’s return. This case is important in that it shows that though proceedings brought under The Hague Convention must be expeditious, they still take a long time. This was something that the acting judge was quick to point out stating that three years was too long for a child wrongfully removed to have stayed in SA. However, he did point out that in assessing the condition imposed by article 12 in relation to the delay in accessing remedial action, the date of application rather than the date of decision was important. The left-behind parent should not suffer for the failings of the competent authorities. This is an important observation by the judicial officer in that the aim of the Convention is to reinstate the status ante and this is negated by lengthy procedures and would prejudice the applicant if failures of the legal system were to be taken into account.

The above cases reveal the primary aim of the Hague Convention being the prompt return of children. However, the best interest principle is the primary consideration and should return be detrimental to the child’s ‘best interests’, it will not be ordered. This then raises the question: ‘if the child is not returned then what is the legal remedy in that case?’ Does it then mean that the current court embroiled in the return application would then have to make a custody order? And if this is the case will it be made in favour of the abducting parent? It must be kept in mind that the reason for return is to balance the scales in determining custody that were tipped in favour of the abducting parent through his abduction of the child. If return is denied, it would seem then that the custody hearing would have to be held in the country of refuge. This puts the left-behind parent in a disadvantaged position. This is the very situation the Hague Convention seeks to eliminate.

The cases show a strict adherence to the provisions of the convention. In all three cases, the child’s return was ordered. However, in an attempt to secure the safety of the child as

---

<sup>109</sup> [1997] 2 FLR 212 (FD) at 217

<sup>110</sup> Para 20 of Houwert’s case

mandate by the SA Constitution, courts have imposed conditions and awarded interlocutory protective orders. This is all done in an attempt to ensure that the child experiences as little psychological harm as possible due to the multiple changes in environments. This innovation is desirable especially in attempting to minimise the disadvantaged position the left-behind parent is in a foreign court.

## **2.5 Criticism of the Hague convention on its effectiveness to ensure the return of parentally abducted children**

It cannot be denied that the Hague Convention helps left behind parents to navigate foreign legal systems to retrieve their children. However there are a few short falls to the procedures. Some of these are discussed below.

The cut off age for protection is sixteen whereas a child is considered to be anyone under the age of 18.<sup>111</sup> There is a disparity in its protection of abducted minors. There should not be a blanket disregard for the rights of children above 16 but below 18. They still form part of vulnerable group that need protection and can be victims of abduction. The interpretation of its provisions has been left to national courts. This creates incongruence in interpretation and application and often leads to the non-return of children. This affects its effectiveness. Additionally, once a return order has been given, its enforcement may be cumbersome. The Convention does not specify how the child will be returned also, if a year lapses without action being taken, return becomes difficult. A fact that is often disregarded is that of the thousands of international child abductions reported, a large number of them go to countries that are non-signatories to the Hague Convention and are thus not bound by its provisions and often protect the abducting parent from legal ramifications for their actions.<sup>112</sup> This is due to differing legal principles. This means that a substantial percentage of the cases are not solved.<sup>113</sup>

## **2.6 Conclusion**

The Hague Convention is instrumental in restoring the status ante child abduction. The cases discussed show this fact as the return of the child was often ordered. However it also demonstrates how its narrow interpretation can deny access. This is especially so when parents only have access orders and not custody orders. The principle of the best interest of the child is essential and is always applied in considering return orders. This is the primary consideration for refusing child return even for article 13 exceptions.

---

<sup>111</sup> Article 3 of ACRWC

<sup>112</sup> Schnitzer-Reese, n34

<sup>113</sup> Winterbottom, n81

The importance of the discussion above is that it illustrates how limited the application of the Hague Convention remedies are. It operates strictly between signatory states. Thus despite the Hague Convention being a 'novel' idea in the protection of children against parental abduction, in Africa, it has had very little application. This means that there is a need for alternative methods of protection of children in order to stop the 'humpty dumpty' condition.

### 3 CHILDREN'S' RIGHTS PROTECTION IN AFRICA

#### 3.0 Introduction

In a quest to find an alternative to the Hague Convention, the study examines the African Charter and ACRWC. This is aimed at examining the protection under the two instruments. This will later provide a basis for analysing the nature of state parties' obligations, whether the protection under the two instruments is adequate and if not, determine whether the current mechanisms need restructuring.

#### 3.1. Analysis of the African charter

The African Charter is the mother document in human rights protection in Africa.<sup>114</sup> It was the first conceptual document of the OAU after its Charter.<sup>115</sup> It was designed to encompass rights within the African perspective or reality. It encapsulates both civil and political rights; economic, social and cultural rights; third generation rights –these include rights to a safe environment, group rights,<sup>116</sup> natural resources,<sup>117</sup> and individual duties towards the state, other individuals, the family and the community.

The first form of protection of children's rights in the African Charter is within the language used in its provisions, which refers to 'every individual'.<sup>118</sup> The choice of these words emphasise individual rights and in recognising that each individual has rights. Children are included in the apportionment of rights as they fall under this description.

Article 18 of the African Charter provides the second form of protection for children within the Charter. It states that 'the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health'.<sup>119</sup> It also states that the 'State shall ensure the ... protection of the rights of the child as stipulated in international declarations and conventions'.<sup>120</sup>

This, it can be said, is the point of departure in Africa's quest to ensure the safety of its children. It directs us to international standards and norms in child protection. This provision

---

<sup>114</sup> F. Viljoen, *The African Regional System: Substantive Human Rights Norms* (mimeo)

<sup>115</sup> 1963, replaced in 2001 by the Constitutive Act of the African Union

<sup>116</sup> Peoples' rights

<sup>117</sup> Articles 20, 21, 22 & 24 of African Charter

<sup>118</sup> Viljoen n114, pg39

<sup>119</sup> Article 18 (1)

<sup>120</sup> Article 18 (3)

seems to suggest that international norms can be invoked without the need for the particular state in question having signed or ratified that particular treaty. It seems to suggest that by proxy that particular provision can be binding. As progressive as the words ‘as stipulated in international declarations and conventions’<sup>121</sup> sound, it is doubtful that this is what the drafters had in mind. The most rational probability is that they intended the international instruments to be of persuasive force only. This view is supported by the fact that article 60 directs the African Commission on Human and Peoples’ Rights (the Commission) to

‘draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity<sup>122</sup>, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

In addition, article 61 directs the commission to

... take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people’s rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

These provisions allow, during adjudication of cases, for the African Commission on Human and Peoples’ Rights (the Commission) to look to both international law and African jurisprudence for comparative analysis and to ‘draw inspiration’. Thus, the international instruments referred to in article 18 as in articles 60 and 61 would merely be of persuasive force and are not binding. They are merely there to assist in interpreting and defining children’s rights.

The two above-mentioned articles were used to refer to international instruments in the cases of *Social Economic Rights Action Campaign v Nigeria*<sup>123</sup> and *Purohit and another v the Gambia*<sup>124</sup>. In the Purohit case, the Commission stated that

In interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by Articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards....<sup>125</sup>

---

<sup>121</sup> My emphasis

<sup>122</sup> These words should be read to include the Constitutive Act of the African Union

<sup>123</sup> (2001) AHRLR 60 (ACHPR 2001)

<sup>124</sup> (2003) AHRLR 153 (ACHPR2003)

<sup>125</sup> Paras 47 &48

In the case of *Law office of Ghazi Suleiman v Sudan (II)*,<sup>126</sup> the Commission used article 60 to refer to the Inter-American and European Human Rights systems for an interpretation of the right to freedom of assembly. After comparing the two systems, it endorsed and relied on the inter-American interpretation to expound this right in Africa.

This supports the earlier argument that the international instruments are there merely as tools of interpretation should the commission chose to follow them. If this is the case then children's rights protection in Africa is wanting. What would seem to be a breakthrough in child protection is but a mere 'smokescreen'. Yet again the children are left 'broken' with no one to 'put them back together again. As Nmehielle<sup>127</sup> states that 'the usefulness of article 60 and 61 depends on the creative imagination of the Commission. The same can be said for Article 18(3). Effective protection through this provision will depend on how the commission is willing to interpret it.

### 3.2 Analysis of the ACRWC

The ACRWC was adopted in 1990, a year after the adoption of the UNCRC.<sup>128</sup> Scholars have given two main reasons for the adoption of the ACRWC: Africa's 'marginalisation' in the drafting process of the CRC and the fact that the CRC did not take into account the unique circumstances of the African child such as harmful cultural practices, children living under apartheid, and their socio-economic conditions.<sup>129</sup> The ACRWC's level of protection is wider than the CRC in that it completely bars the use of child soldiers.<sup>130</sup> It also addressed the issue of refugee children and internally displaced children, and raised the age of marriage to 18 without exception. These are African peculiarities that the ACRWC addresses. Thus, it can be said that the two instruments are complementary in that the ACRWC addresses issues not properly addressed by the CRC. The ACRWC's preamble specifically mentions 'reaffirming adherence' to the CRC as one of the motivations for the adoption of the ACRWC. Of the 53 States in Africa, only three have not signed the ACRWC. Of these 50 signatures, only seven have not ratified the ACRWC.<sup>131</sup> This shows a common view within Africa that children's rights need to be protected.

.

---

<sup>126</sup> (2003) AHRLR 144 (ACHPR 2003) 47

<sup>127</sup> Nmehielle, n40

<sup>128</sup> General Assembly resolution 44/25 of 20/11/1989; 2 /9/1990,

<sup>129</sup> Viljoen, n114 p34-36

<sup>130</sup> Article22 (2)

<sup>131</sup> <[http://www.hcch.net/index\\_en.php?act=Conventions.status&cid=24](http://www.hcch.net/index_en.php?act=Conventions.status&cid=24)> it became operational in 1988 (accessed 6 June 2007)

Under the ACRWC, it can be said that children's rights fall under four categories. These include survival rights,<sup>132</sup> development rights,<sup>133</sup> participation rights<sup>134</sup> and protection rights.<sup>135</sup> The research's main interest within the ACRWC is article 29, which deals with the sale, trafficking, and abduction of children. Thus, the discussion of the ACRWC will centre on this provision. Article 29 (a) states:

States Parties to the present Charter shall respond appropriately to prevent the abduction, the sale of, or traffick in children for any purpose or in any form, by any person including parents or legal guardians of the child

This provision protects children from being abducted by anyone including their parents. Thus, since the ACRWC is a document that not only provides protection but provides procedures to restore rights, the assumption is that parental abductions fall within the jurisdiction of the African Child Committee. This is a body created by article 32 to 'promote and protect the rights and welfare of the child.'<sup>136</sup> Therefore, Hague Convention is not the only international instrument dealing with parental abductions. Thus, jurisdiction in this matter also extends to the African Child Committee.

---

<sup>132</sup> These include the right to life, shelter, nutrition and health (article14)

<sup>133</sup> These target the realisation of children's potential such as the right to education and the progressive realisation of free primary education. These rights are encapsulated in article 11

<sup>134</sup> This relates to the family (article18, 19 & 20, 25), their culture and to have a say in matters that affect them (article 4)

<sup>135</sup> This is to protect them from harmful practices like female genital mutilation, child marriages( Article 21), being abducted, trafficked (article 29) or being involved in armed hostilities (article22); abuse and torture (article 16)

<sup>136</sup> Article 42 states the mandate of the Committee as

(a) promotion and protection of rights enshrined in the ACRWC including

(i) collecting and documenting information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;

(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;

(iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.

(d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.



### 3.3. Nature of state obligations

The Member States of the [African Union]<sup>137</sup> parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.<sup>138</sup>

The words 'shall recognise the rights' and 'shall undertake to' imply that there is an obligation on the state to 'act' in a certain way. In this case, it is to recognise rights and adopt laws that recognise these rights. As the laws of physics dictate, if force is applied to an object, that object is set in motion by the force; the transfer of energy from one object to another causes a reaction. The same can be said in relation to state obligations. The state is obliged to act in a certain way. That act must then produce results. These results will be in the form of protection of rights resulting from the enactment of laws recognising rights.

States' obligations under the African charter have been aptly defined by Udombana thus:

States' obligations under the African human rights system, like elsewhere, can generally be said to be obligations of conduct and result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right.<sup>139</sup>

These obligations gives article 18 of the African Charter and 29 (a) objectives and quantifiable content which is necessary in assessing the kind of protection a child should be extended.

### 3.4 Weaknesses of the two instruments

It appears that the weakness of the two bodies is that to date, they have not heard complaints dealing specifically with children's rights. It then follows that they are not fulfilling their mandates. General comments by the African Children's Committee reveal that children suffer violations daily. However, no communications come before the bodies. This is partly because the African Children's Committee had not adopted guidelines on how to accept communications and was thus inoperative.<sup>140</sup> Nevertheless, it does not explain the lack of cases before the African Commission. This seems to imply that children are merely subsidiary recipients of rights contained within the African Charters. This may also be because of lack of awareness of the protection the two bodies provide. Either way this impacts on the effectiveness of their remedial procedures.

---

<sup>137</sup> My insertion

<sup>138</sup> Article 1 of the African Charter & ACRWC

<sup>139</sup> Udombana, n39

<sup>140</sup> 8th Meeting Of The African Committee Of Experts On The Rights And Welfare Of The Child 27 November – 1 December 2006 Addis Ababa, Ethiopia, Aferwc/8/4 <[www.africa-union.org](http://www.africa-union.org)> (accessed 13 September 2007)

The fact that children have their own body to deal with violations is duplication and a disadvantage given the problems that the Commission has had with finances. The African Child Committee is bound to suffer the same plight and this will affect its effectiveness.<sup>141</sup> If there is only one body, there will be effective use of resources aimed at better protection instead of having two bodies that struggle to subsist. The most glaring deficiency is that neither of the two bodies can give binding decisions.

### **3.5 Conclusion**

In chapter two the Hague Convention was shown to be instrumental in facilitating the court to order the return of parentally abducted children to their country of habitual residence for custody hearings. As instrumental as it has been, it has had very little application in Africa thus creating a glaring deficiency in remedies. This means that ingenuity must be employed to find other ways to protect children. Two state binding instruments protect children's rights in Africa namely the African Charter and the ACRWC. Whilst the African charter is general in its application, the ACRWC is specific. These are the anchor for protection and deterrence within Africa.

---

<sup>141</sup> D. M. Chirwa The merits and demerits of the African Charter on the Rights and Welfare of the Child (2002) 10 *International Journal of Children's rights* 158

## **4: REMEDIAL MECHANISMS PROVIDED BY AFRICAN HUMAN RIGHTS REGIONAL BODIES**

### **4.0 Introduction**

Itsy bitsy spider climbed up the waterspout,  
Then came the rain and washed the spider down,  
Out came the sunshine that dried up all the rain and  
Itsy bitsy spider climbed up the spout again<sup>142</sup>,

Children, like itsy bitsy spiders are fragile and need protection. Child rights violations wash them down and hamper their healthy and normal development in life. We must be the sun to dry the rain and the itsy bitsy spiders so that they can continue in their normal development into well-adjusted adults.

Chapter four considers procedures available for returning parentally abducted children, and bodies competent to order the return. This study attempts to answer two main questions: what are states' obligations to parents in cases of parental abductions? What is the extent of this obligation? The study delves into the jurisdiction of the African Commission, the African Child Committee and domestic courts in an attempt to find alternatives to the procedures provided by the Hague Convention.

As stated, the Hague Convention was partly created because of the lack of comity amongst nations in relation to parentally abducted children. The maze created by the jurisdictional rules prior to The Hague Convention created confusion and yielded very little remedies.

### **4.1 Procedures for child return from non-signatory countries to the Hague Convention**

There are several procedures within domestic courts open to a parent to retrieve a wrongfully removed. These include extradition, initiating proceedings in the country where the abducting parent is, or using consular relations.

#### **4.1.1 Extradition**

Extradition is defined as the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted of a crime by a state on whose territory he happens to be in at the time.<sup>143</sup>

---

<sup>142</sup> [http://www.famousquotes.me.uk/nursery\\_rhymes/incy\\_wincy\\_spider.htm](http://www.famousquotes.me.uk/nursery_rhymes/incy_wincy_spider.htm) as retrieved on 15/10/2007

<sup>143</sup> J. Dugard "extradition" in *International Law- A South African Perspective*, (2005), 3<sup>rd</sup> edition, ,p210

Extradition is secured through bilateral treaties between countries. These agreements are a result of the fact that domestic courts have no jurisdiction in foreign countries and thus these crimes would go unpunished.<sup>144</sup>

This procedure involves laying criminal charges against the abducting parent. The requesting state must then apply for extradition to the Minister of Justice of the country where the abducting parent is. The minister subsequently notifies national courts which issue a warrant of arrest. Upon arrest, the court conducts an enquiry into the alleged crime as to whether it is an extraditable offence and whether the requesting state has enough evidence for prosecution. The judicial officer then makes his findings, which the Minister of Justice must either confirm or deny. If the Minister agrees to extradite him, he will be extradited.

There are a few impediments to this procedure, namely: the extradition offence must be an extraditable offence under the extradition agreement. Civil law countries prefer to prosecute their nationals for crimes committed abroad and often do not extradite their nationals.<sup>145</sup> Secondly, the crime must be a crime in both countries. Thirdly, the accused cannot be prosecuted for a crime that he was previously acquitted or convicted of by the requesting state. Lastly, he may not be tried for an offence other than the one he has been extradited for.<sup>146</sup> In addition, human rights principles impose a duty on states not to extradite people for 'political offences';<sup>147</sup> and the sentence that he is likely to receive must comply with the national laws of the requested state.<sup>148</sup>

The principle of double criminality often impedes extradition of the abducting parent. However, the most important consideration about this procedure is that the return of the child is not certain. In *United States v. Amer*<sup>149</sup>, the defendant was convicted of international parental kidnapping under federal statute and sentenced to two years imprisonment and a

---

<sup>144</sup> n143

<sup>145</sup> Article 1 of The European Convention in Extradition of 1957/1960 allows signatory states to 'refuse to extradite their nationals.

<sup>146</sup> This means he cannot be extradited for one offence and then whilst being prosecuted for that crime, be charged with another.

<sup>147</sup> This relates to 'freedom fighters'. This is often difficult to separate from mere insurgents or 'terrorists'.

<sup>148</sup> For instance if the crime he is accused of is a capital crime in that country contrary to the requested state principles, then the requested state can refuse to extradite him. If they do decide to extradite him, they must get written undertaking by the requesting state that they will not sentence the accused to death. It is also another human rights norm for states not to extradite accused persons that are being prosecuted based on discriminatory grounds such as race, gender, ethnicity, race or political opinion; See Sicalides B, Comment on RICO, CCE, And International Extradition (1989) 62 *Temple Law Review* 1281

<sup>149</sup> 110 F.3d 873

one-year term of supervised release, with a special condition that he returns the children to the United States. Despite the arrest, the abducted children were not returned. This leaves the left behind parent often frustrated because the extradition does not impose nor guarantee the return of a child.

#### **4.1.2 Instituting proceedings in the country where the abducting parent is**

The left behind parent has to physically go to the country where the abducting parent is and enforce custody rights there. This is in line with rules of jurisdiction in that the victim follows the accused if he wants to prosecute or sue the accused/defendant. This procedure can be very costly; and governments are often reluctant to aid parents financially with this process;<sup>150</sup> there is no obligation for a court to recognise a custody order of a foreign court, and the system may be hostile to the particular parent based on clashing religious or cultural norms and countries.<sup>151</sup>

#### **4.1.3 Diplomatic Remedies**

The parent relies on the mercy of diplomats. This effort can go either way depending on the bilateral relations of the two countries. However, the problem arises when a child is in a state that a parent's country has no relations with. The scenario is often that the child is not returned and the parent is again left frustrated.

The procedures described above show the need for a unified regional system that actually results in children being returned to their country of habitual residence. In Africa, there are three bodies that can hear individual cases of human rights violations. These are the African Commission, the AHRCrt on Human and Peoples' Rights (AHRCrt) and the African Child Committee.

#### **4.2 Competent forum for the adjudication of international parental abduction**

The issue is which is the correct forum for adjudging international parental abductions? From the discussion above, it is evident that the forum that gives the decision must have binding powers and must have the capacity to expedite the process.

---

<sup>150</sup> An example of this is the reservation made by SA on acceding to the Hague Convention. SA will not bear costs of securing returning of a child. The parent must have qualified for legal aid

<sup>151</sup> Schnitzer-Reese, n34

#### 4.2.1 The African Child Committee

The African Child Committee has competence to receive communications pertaining to violations of the ACRWC.<sup>152</sup> Every two years, it must submit to the Ordinary Session of the Assembly of Heads of State and Government a report on its activities and on any communication heard under article 44.<sup>153</sup> Thus, if a state does not comply with the decision of the African Child Committee, the Heads of State will be notified through the report. They can therefore exert pressure on the non-compliant state to comply.

The African Child Committee is an untested battle ground. As innovative as its methods of enforcement, i.e. naming and shaming and pressure from the AU Commission, it faces some stumbling blocks. The forum is yet to deal with communications. If lessons are to be drawn from the African Commission, the Committee may experience a starvation of funds and resources<sup>154</sup>. This will hamper its effectiveness. The Committee is an unnecessary duplication and may become an obsolete body. This idea is also supported by the fact that since the ACRWC became operational; the Committee is yet to start fulfilling its protective mandate. The protection of children should use the same forum as the protection of women and general human rights protection – the African Commission.

#### 4.2.2 The African Commission

The African Charter's supervisory body is the African Commission. It also has competence to hear communications relating to children's rights<sup>155</sup>. Cases of child protection should be instituted at the African Commission. This will ensure effective usage of limited resources<sup>156</sup>. One may criticise this position in that the main instrument for protection before the African Commission is the African Charter and it does not articulate the rights of children properly given that it makes a brief reference to the protection of children.

This is an interesting point. However, article 18 (3) states: 'The State shall ... ensure the protection of the rights of ... the child as stipulated in international declarations and conventions.'

---

<sup>152</sup> Article 44(1): The Committee may receive communication, from any person, group or non-governmental organization recognized by the OAU, Member States, or UN relating to any matter covered by this Charter.

<sup>153</sup> Article 45 (2)

<sup>154</sup> Chirwa, n141

<sup>155</sup> Article 18(3)

<sup>156</sup> Chirwa, n141

As argued in previous chapters, this provision allows the commission to look at current standards of protection of children when interpreting child protection. A counterargument to this could be that the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLT),<sup>157</sup> clearly states that 'a treaty does not create either obligations ... for third States ... without consent of that State .... '

Yet again, I disagree for what could '*as stipulated in international declarations and conventions*' mean other than that states would be bound by general principles regarding child rights protection? If we are to scrutinise the above quoted provision from the VCLT, it refers to '*the consent of that State*'. States ratified the African Charter with their eyes open. Unless they made a reservation to article 18 (3) then it means that they consented to 'ensuring protection of the child as stipulated in international declarations and conventions.' Thus in assessing protection of children, international declarations and conventions can be used as a yardstick to assess the level of protection. One of those international 'Conventions' is the ACRWC.

Further, article 60 of the African Charter allows the Commission [to]

draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, ... and, other instruments adopted ... by African countries in the field of human and peoples' rights....

In consequence, the African Commission can enforce provisions of the ACRWC based on the above provision. However, the practice is that the instruments that have been referred to by the African Charter through article 60 have been of persuasive force.<sup>158</sup> The Commission has been very protective of its option to abide by or not to rely on the imputed provisions.<sup>159</sup> Thus chances are that article 18 (3) will be interpreted as not creating obligations under international instruments that states have not ratified or acceded to. However, the ACRWC can and should be used if a state has ratified it. In interpretation of international law the law as it is and the law as it ought to be<sup>160</sup> are essential to securing rights. Thus, the African Commission must take into account the prevailing circumstances and human rights protection.<sup>161</sup> Protection of individuals also requires an evolutive interpretation of human

---

<sup>157</sup> Of 1986; Article 34

<sup>158</sup> See also Olowu D, *Protecting Children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child* (2002) 10 *International Journal of Child Rights* 127; p133

<sup>159</sup> Viljoen, n114

<sup>160</sup> U. O. Umzurike, *The African Charter on Human and people's rights: Suggestions for more Effectiveness* (2007) 13 *Annual Survey of International Comparative Law* 179

<sup>161</sup> above

rights treaties.<sup>162</sup> Human rights are not static and therefore effective protection of these rights involves taking into account developments in law and society

The ECtHR indicated that 'human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances.'<sup>163</sup> thus article 18 (3) must be given a purposive interpretation.

The short falls to the communication on parental child abduction to be heard by the African Commission are that firstly, it meets only twice a year resulting in delays in determining communications.<sup>164</sup> Secondly, exhaustion of local remedies may impede protection. However, if there are no local remedies to speak of, i.e. if parental child abduction is not considered to be a crime then what local remedies would there be to exhaust? Having regard to the cases pursued in the ECtHR however, exhaustion of local remedies includes enforcing custody rights in a country of refuge. This then means that the process will be delayed.

#### 4.2.3 AHRCrt

The AHRCrt was established by the AHRCrt Protocol,<sup>165</sup> it has the competence to receive communications from individuals, IGOs, NGOs, and the African Commission.<sup>166</sup>

Within the African context, only the AHRCrt has the competence to make binding decisions<sup>167</sup> and can expedite the process for child return<sup>168</sup>. Moreover, it must submit to each regular session of the AU Assembly, a report on its work during the previous year. The report must indicate States that have not complied with the Court's judgment.<sup>169</sup> The African Commission's mandate is similar to the African Child Committee. These institutions are plagued by the same institutional and functional weaknesses and thus it seems only logical to supplement and reinforce their protective mandate by introducing the AHRCrt as a judicial body with competence over its provisions.

---

<sup>162</sup> J. Sloth-Nielsen & B. van Heerden, 'Putting Humpty Dumpty back together again: Towards restructuring families and children's lives in South Africa' (1998) 15 *South African Law Journal* 156 at 171

<sup>163</sup> Quoted in *Mayagna Awas Tingni Community v. Nicaragua*; Inter-Am CtHR, (Ser. C) No. 79 (2001)

<sup>164</sup> Rule 2 of Rules of Procedure of the African Commission (1995)

<sup>165</sup> , 1998 entered into force 2004

<sup>166</sup> Article 5

<sup>167</sup> Article 30 mandates States Parties to the Court Protocol to comply with the Court judgment in cases which they are parties to within the time stipulated by the Court and to guarantee its execution

<sup>168</sup> Article 28 mandates the Court to render judgment within 90 days of completing its deliberations

<sup>169</sup> Article 31



According to Article 10, 'the Court shall conduct its proceedings in public and free legal representation may be provided where the interests of justice so require.' This allows for naming and shaming which may prompt governments to comply with the court's order and, it makes the court accessible to indigent people. These are important in ensuring access to justice.

Article 3 provides that the AHRCrt's jurisdiction extends to the African Charter, the AHRCrt Protocol and "other relevant human rights instruments ratified by the states concerned."<sup>170</sup> Its sources are 'the provisions of the Charter and any other relevant human rights instruments ratified by States concerned.'<sup>171</sup> Thus though the African Commission 'may draw inspiration' from other instruments, the AHRCrt can apply treaties ratified by a particular country. This extends its field of protection beyond the African Charter. However, given the fact that the main instruments of interpretation are the African Human Rights instruments, any claim made in relation to 'other relevant human rights instruments ratified by the states concerned' would have to have the African Charter or any African Human rights Instrument as a starting point for an alleged violation. Another advantage to the AHRCrt is that as a court, the assumption is that it can make orders that any high court in any state can make such as restitution orders which are essential in securing the return of parentally abducted children.

The inexcusable impediment to individuals and NGOs accessing the AHRCrt is that the country concerned must make a declaration accepting the AHRCrt's competence. It is inexplicable why this provision exists, as states will be reluctant to submit themselves to the jurisdiction of the Court if they know that they will be sued for breaches of human rights.<sup>172</sup> This is a major regression in protection of rights in Africa. The only saving grace is that the African Commission may submit cases to the AHRCrt. Thus to circumvent the barrier of an article 36 declaration, individuals may submit cases to the African Commission which will then submit the case to the AHRCrt. In light of this colossal barricade, the African Commission and the African Child Commission seem to be the only saving graces.

The importance of the discussion about the three bodies above is to illustrate that there are procedures available within the African Regional system for protection of Children from parental child abductions through a decisions by either of the bodies to return the child.

---

<sup>170</sup> F.Viljoen, A Human Rights Court For Africa, And Africans (2004) 30 *Brooklyn Journal of International Law* pg1

<sup>171</sup> Article7

<sup>172</sup> Viljoen, n170

### 4.3 Jurisdiction of states in cases of international parental abduction

In accepting obligations under international or regional treaties, states agree to a legal order within which they, for the common good, assume various obligations, towards all individuals within their jurisdiction.<sup>173</sup> Jurisdiction empowers states to prescribe, adjudicate, and enforce law within their territories.<sup>174</sup> They are responsible for maintaining law. Thus, they owe all that are within their borders the duty to protect them from violations of human rights by virtue of the social contract between states and individuals and the binding human rights instruments they have signed or acceded to.

From cases submitted to the African Commission, the assumption in Africa is that the alleged victim must be a national or citizen of the country it alleges violations against. This can impede access to remedial action. Within the inter-American and European Human rights systems, rights can be claimed against both the state of nationality and all other contracting states.<sup>175</sup> In the case of *Loizidou v Turkey*,<sup>176</sup> the victim based her claim on the fact that the contracting state had 'effective control of the territory' and that the violators were officials of the country and as such the country owed the victim a duty of care. This duty should be applicable in Africa. Such an inference can be drawn from the wording of the African Charter.

Article 1 reads:

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

From there on, each article extends protection to 'every individual' save for article 13 which specifically mentions citizens.<sup>177</sup> It follows then that protection of rights is encapsulated within the African Charter if a sufficient nexus exist between the claimant and the country alleged to be the violator of treaty obligations. This stand point is further cemented by article 2 which prohibits discrimination in the enjoyment of Charter Rights on the basis of amongst others 'national or social origin'.

This means the country of refuge has obligations towards the left behind parent on three bases. First the state owes to all those within its jurisdiction a duty to protect them from

---

<sup>173</sup> Compilation of Human rights Documents and Treaties: Human Rights Education Project  
www.upeace.org

<sup>174</sup> Dugard, n143, p148

<sup>175</sup> *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A, no. 510, pp. 23-24,

<sup>176</sup> above n175

<sup>177</sup> Article 13 protects the rights of citizens 'to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law, and to equal access to public service of his country'

violations by undertaking to respect and protect human rights within its territory.<sup>178</sup> A sovereign state controls its territory and thus is responsible for legal order, and protection of all those that are within its territory. By not helping to secure the prompt return of a child, it fails to protect both the child and parent's right family life<sup>179</sup> and access after the dissolution of a marriage.<sup>180</sup> Second, objective territorial jurisdiction prescribes authority to adjudge all matters within a territory by the physical presence of the person within the state or the fact that the act continues to take place in the state. The abducted child, being in the territory of the country of refuge, must be protected from human rights violations as per treaty obligations. Human rights treaties impose protection of rights of individuals irrespective of their nationality.<sup>181</sup> Also, if the abducting parent has sought refuge in a country of nationality, the state can exercise passive jurisdiction. Lastly, the left behind parent, as the legal guardian, has a duty to enforce rights on behalf of the child. Thus if a country of refuge, fails to discontinue the act of abduction, an act continuing within its jurisdiction, it violates the protection of rights accorded children by the African Charter<sup>182</sup> and the ACRWC.<sup>183</sup>

#### **4.4 Lessons from the European system of Human rights**

The Council of Europe has devised instruments to deal with international parental child abduction amongst its member states namely:

---

<sup>178</sup> Article 1 of the African Charter

<sup>179</sup> Article 18(1) of African Charter and ACRWC: family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.

2. States shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

Article 18(2) of ACRWC: States Parties shall 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. In case of the dissolution, provision shall be made for necessary protection of the child.

Article 19(1) of ACRWC: Every child shall be entitled to enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child.

(2): Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.

<sup>180</sup> Although the right to continued access is accorded to children, it also protects the rights of parents to access to their children. This is the only interpretation that gives meaning to the rights.

<sup>181</sup> Article 1 of African Charter

<sup>182</sup> Article 18 (3)

<sup>183</sup> Article 29 (a) of ACRWC

**a. European Convention On Recognition And Enforcement Of Decisions Concerning Custody Of Children And On Restoration Of Custody Of Children<sup>184</sup>**

This Convention was drafted in response to the Hague Convention. It covers custody when parents live in different European states and authorises enforcement of custody and access orders relating to children.<sup>185</sup> The difference with this Convention in comparison to the Hague Convention is that it is only concerned with the enforcement of existing custody or access orders.<sup>186</sup> It does not apply to cases where no such order exists.

**b. European Convention On The Exercise Of Children's Rights<sup>187</sup>**

This Convention deals with family proceedings that take place before judicial authorities affecting children. It creates procedural rights to facilitate exercising of substantive rights of children.<sup>188</sup> The rights can be exercised by children themselves or through other persons or bodies.<sup>189</sup> They may exercise these rights not only before such authorities but also before the ECtHR to file a communication under The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)<sup>190</sup> against a state party to the Convention.<sup>191</sup> The Convention's standing Committee may 'consider any relevant questions concerning the interpretation or implementation of the Convention'<sup>192</sup> propose amendments<sup>193</sup> and give advice and assistance to national bodies regulating children's rights.<sup>194</sup> The Convention emphasises the idea of promoting children's rights as the term 'promotion' is broader than 'protection.'

---

<sup>184</sup> Luxembourg, 20.V.1980/1983 European Treaty Series - No. 105

<sup>185</sup> Article 1

<sup>186</sup> Nygh P, The International Abduction of Children in Doek J, van Loon H, Vlaardingerbroek P(eds), (1996) *Children on the Move: How to Implement Their Right to Family Life* pg31

<sup>187</sup> Strasbourg, 25.I.1996 European Treaty Series - No. 160

<sup>188</sup> Article 3(a) & (b) &(c) provides for a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, to be granted, and entitled to request, to receive all relevant information; to be consulted and express his or her views; and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

<sup>189</sup> Article 4&5

<sup>190</sup> Rome, 4.XI.1950, as amended by Protocol No. 1;1European Treaty Series - No. 5

<sup>191</sup> Article 15

<sup>192</sup> Article 16 (2) (a)

<sup>193</sup> article 16 (2) (b)

<sup>194</sup> Article 16(2)(c)

### **c. Convention On Contact Concerning Children<sup>195</sup>**

This Convention establishes general principles for issuing or varying contact orders or agreements; sets up guarantees to ensure that contact takes place properly and that the child is immediately returned at the end of the contact period, in particular in cases of *transfrontier* contact. It recognises the right to contact not just for children and parents but of children and people with whom they share family ties. Central authorities are to cooperate to ensure contact and the return of the child at the end of the contact.

### **d. European Convention on the Legal Status of Children born out of Wedlock<sup>196</sup>**

This Convention equates the legal status of a child born out of wedlock with that of a child born in wedlock, and harmonisation of states' laws in this field.

Apart from these instruments, cases of international parental abduction have come before the ECtHR under article 8 of the European Convention<sup>197</sup> which provides:

1. Everyone has the right to respect for his private and family life....
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the case of *Ignaccolo - Zenide v. Romania*<sup>198</sup> the applicant alleged that Romanian authorities had not taken sufficient steps to ensure rapid execution of the court decisions granting her access to her children and facilitation of their return to her. The authorities had thus breached Article 8 of the Convention. She succeeded in recovering costs for the suit and travel expenses to Romania to see her children only to not getting access to them. She alleged that officials did nothing to secure the whereabouts of her daughters when her former husband had hidden them in violation of an order of access.<sup>199</sup>

The Court stated that 'the State enjoyed a certain margin of appreciation in striking a fair balance between the competing interests of the individual and of the community as a whole.'<sup>200</sup>

---

<sup>195</sup> Strasbourg, 15.V.2003 European Treaty Series - No. 192

<sup>196</sup> European Treaty Series No. 085: 1975/1978

<sup>197</sup> as amended by Protocol No. 11; European Treaty Series - No. 5 Rome, 4.XI.1950

<sup>198</sup> Application no. 31679/96 (ECtHR 2000), < <http://www.echr.coe.int>> ( Ignaccolo case)

<sup>199</sup> same as above

<sup>200</sup> n198 At 91

However,

notwithstanding the ... margin of appreciation in the matter, the Romanian authorities failed to make adequate and effective efforts to enforce the applicant's right to the return of her children and thereby breached her right to respect for her family life, as guaranteed by article 8.<sup>201</sup>

This reasoning of the Court hinged on the fact that

There are ...positive obligations inherent in an effective "respect" for family life. As to the State's obligation to take positive measures, ... article 8 included a parent's right to take[e] measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such. [Though] the national authorities' obligation to take measures to facilitate reunion is not absolute, the understanding and cooperation of all concerned [is] always an important ingredient.<sup>202</sup>

Despite the lengthy reasoning the applicant was only awarded monetary compensation. This is poor consolation for the loss of her daughters. The ideal situation would have been for the Court to impose a duty on the Romania Government to take steps towards enforcing her rights under article 8. However, this case is essential in outlining the obligations states owe left-behind parents of international parentally abducted children.

In a similar case of *Hansen v. Turkey*<sup>203</sup> the Turkish Courts had awarded the mother right of access. However, at each scheduled visit, the applicant's former husband absented himself with the children. The authorities did not take any steps to locate the children with a view to facilitating contact with the applicant. The Court expressed the view that 'the authorities should have taken measures to allow the applicant access, including realistic coercive measures against her former husband likely to lead to compliance.'<sup>204</sup>

Although measures against children obliging them to re-unite with one or other parent are not desirable in this sensitive area, such action must not be ruled out in the event of non-compliance or unlawful behaviour by the parent with whom the children live<sup>205</sup>.

It went further to state that

The fines imposed on the applicant's former husband were neither effective nor adequate. As to the Government's suggestion that the applicant could have asked the enforcement officers to enter [the former husband's] home by force, the Court finds that, even if this was so, it does not absolve the authorities from their obligations in the matter of enforcement, since it is they who exercise public authority.<sup>206</sup>

---

<sup>201</sup> Ignaccolo at 94

<sup>202</sup> Same as above

<sup>203</sup> Application No. 36141/97 Judgement of 23 September 2003; For other cases decided under the same article see *Holdry v Germany* No Application 36141/97 Judgement of 23 September 2003; *Tiemann v France and Germany* application 47457/99, 47458/99 decided in Dec. 27 April 2000

<sup>204</sup> *Hansen* at 178

<sup>205</sup> n203 at 179

<sup>206</sup> *Hansen* at 180

Thus in assessing if the Country did all it could to secure the right to family, the court had to enquire as to whether

the national authorities took all such necessary steps to facilitate execution as could reasonably be demanded in the special circumstances of the case [...] and whether the national authorities struck a fair balance between the interests of all persons concerned and the general interest in ensuring respect for the rule of law.<sup>207</sup>

This reasoning ties in with the above argument that states, as exercisers of public authority, are obliged to enforce the law as stipulated under state obligations in international instruments. This protection is accorded to all who have a nexus with the respondent country and has no relation to citizenship. This gives human rights a universal appeal in that nationality is immaterial. What is considered is whether, in relation to the act that particular state had effective control of the territory for them to have had the responsibility to enforce and adjudicate. Thus human rights protection is not limited to nationals of a country that is a signatory to a treaty. This principle can be imputed to the African System.

Another lesson for Africa is that it has to go beyond just awarding reparations but order the country in breach to help in reuniting the left behind parent with his child. Cases of parental child abduction do not have to bring despair or hopelessness. The human rights regional mechanisms such as the African Commission and the AHRCrt can and must be used when seeking remedies.

#### **4.6 Conclusion**

From the above discussion, it emerged that human rights protection has no borders. If a violation takes place within a country, regardless of the ties with the country, the aggrieved person can seek redress from regional bodies that have been set up to protect and remedy violations. This is mostly demonstrated by cases from the ECtHR. The above lay a foundation for subject matter jurisdiction for a claim of human rights violation by the left behind parent.

States owe the left behind parent a duty to protect the child from parental abduction as the act continues within the borders of the country of refuge by assisting in the safe return of his child. In order to seek redress, the left behind parent can approach any of the three regional human rights bodies within Africa.

---

<sup>207</sup> Hansen at 172

## 5: CONCLUSIONS AND RECOMMENDATIONS

### 5.0 Summary

The research aims to investigate how effective the remedial mechanisms within the African Regional Human rights system are to discharge the obligation on states towards left-behind parents to retrieve parentally abducted children. Under the African setting, all African countries excluding the Kingdom of Morocco, are members of the African Union and have ratified the African Charter and are bound by it. The African Charter protects the right to a family life<sup>208</sup> and children.<sup>209</sup> These rights are also protected by the ACRWC.<sup>210</sup>

These bodies have never been used in cases of parental child abduction to compel signatory states where the abducting parent is seeking refuge in their territory to help to retrieve the child. However, the ECtHR has been approached for this very reason. Thus the paper investigated if the same method could be used in Africa. This was done through the analysis of the ACRWC, the African Charter, case law from the African Commission and the ECtHR and drawing of comparisons.

### 5.1 Conclusion

In answering the three questions posed by the research, it is important to reiterate the words of Udombana who states:

States' obligations under the African system are peremptory because they command and permit no refusal. This means that each state is bound to take the necessary steps to secure the human rights concerned from the moment the treaty enters into force for that state. The obligations are also durable, meaning that a state is constrained by norms prescribed in a treaty and must discharge the duties established in international human rights law, irrespective of the system of governance that is in place<sup>211</sup>

It was demonstrate in the study that states owed left-behind parents and parentally abducted children obligations under the African Charter and ACRWC to reunite them. This obligation is a two tiered obligation of conduct and result. States of refuge must conduct themselves in a

---

<sup>208</sup> Ignaccolo case n198

<sup>209</sup> Article 18 of the African Charter states: The family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of its physical and moral health. The State shall ensure the elimination of discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions and the ACRWC Articles19( parental care and protection), and 29(prohibition of abduction of children even by parents or relatives)

<sup>210</sup> Articles19( parental care and protection), and 29(prohibition of abduction of children even by parents or relatives)

<sup>211</sup> n39 at p190



way that results in protection and promotion of human rights. In relation to conduct, they must maintain borders or enact laws that prevent parental child abductions. In the event that it does occur and the state happens to be a state of refuge, upon request by the left-behind parent, it must assist in the return of the child. If they fail, they will have breached obligations under the African Charter and the ACRWC. In this instance, the parent can then claim violation of human rights principles outlined in African instruments.<sup>212</sup>

Thus the question of an existence of state obligations in relation to the prevention and remedy of international parental abductions was answered in the affirmative. It was determined that states, as controllers of their borders and territory, have the power to prescribe and adjudicate matters and enforce decisions. They are in effective control and as such are responsible for the conduct of its officials. Consequently, cases in which remedies for the left behind parent in the form of child return, are frustrated by agencies of state or the laws of a state, contrary to regional obligations, a basis is created for a communication to be submitted to either the AHRCrt or the African Commission to compel the state to help the left behind parent to retrieve his parentally abducted child.

The question of the existence of remedial procedures was also answered in the affirmative. There are three treaty bodies in Africa that are charged with the protection of human rights through the consideration of individual communications. All these bodies have the jurisdiction to hear cases dealing with children. The African Commission is empowered by articles 18(3), 60 and 61 of the African Charter; the African Child Committee by article 29 of the ACRWC, and the AHRCrt by article 5 of the AHRCrt Protocol. The most beneficial of these bodies is the AHRCrt as it can give binding decisions.

Another important aspect is that the AHRCrt is that its protocol can bind both signatory and non-signatory states to the Hague Convention. So if a country has ratified any of the four above instruments, a person can bring a communication as long as the claim is primarily based on the African Charter. Thus the procedures do exist.

Time will tell how effective this procedure will be as they are yet to be tested. However, if we are to draw lessons from the European cases, we need to ensure that these procedures are expedient in order to remedy the situation as soon as possible. In the Ignaccolo case<sup>213</sup> the

---

<sup>212</sup> These rights include the right to family, which has been interpreted to include right to contact with children or parents, the right to be free from all forms of abduction, the best interest principle, and non-discrimination based on country of origin.

<sup>213</sup> n198

court held that 'in a case of this kind the adequacy of a measure is to be judged by the swiftness of its implementation.'<sup>214</sup>

The obstacles to accessing the AHRCrt appear to be firstly, the fact that it is yet to adopt its rules of procedure. Without these it cannot start functioning. This then denies access and enforceable remedies to those who need it most. Secondly, there is no direct access to the court unless states make a declaration accepting the competence of the Court to receive cases instituted directly by individuals before it under the AHRCrt Protocol.<sup>215</sup> Thirdly, the court supplements the protective mandate of the African Commission. At this point it is not clear whether a case will have to go first to the Commission for a determination on admissibility before it can be heard by the Court. This may delay the procedure instead of expediting it.<sup>216</sup> Fourth, the procedure proposed for the retrieval of parentally abducted children can only be pursued as a measure of last resort after exhausting local remedies. In this case the remedies refer to the remedies of the country of refuge. In order for the State to breach human rights provisions, the judicial and administrative remedies must have been tested and found lacking. It is only then a person can approach a regional body. This is not satisfactory in that the longer returns take, the longer the suffering of the child and the left-behind parent.

These shortfalls may impede the effectiveness of the protective and remedial role of the Court. Moreover, until the Court begins to function, the only sanctuary for redress is the African Commission. Thus article 18 (3) has to be given a purposive interpretation that takes into account the current situation. The protection of individuals requires an evolutive interpretation of human rights treaties. Human rights are not static and therefore effective protection of these rights involves taking into account developments in law and society.<sup>217</sup> These developments include a move towards increased cooperation in order to eradicate international parental abduction. Which is a principle upheld by the ACRWC. Even if the ordinary interpretation of words<sup>218</sup> was used, then the African Commission has to take account of international instruments such as the ACRWC which is a regional arrangement. This obligation is peremptory and may not be waived by a state.

---

<sup>214</sup> n198 at 102

<sup>215</sup> Article 5 (3)

<sup>216</sup> Viljoen n170

<sup>217</sup> The Inter-American Court in the case of Mayagna Awas Tingni Community v. Nicaragua indicated that 'human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances.

<sup>218</sup> VCLT, article31

## 5.2 Recommendations

At the end of day, we have to ask ourselves if we helped to put humpty dumpty back together again; did we emulate the sunshine and dry the rain so that the incy wincy spider climbed to the top of the spout.

The reason parental contact is essential to us as human beings, more especially children is that we need an affirmation from those who contributed to our existence in order to accept ourselves. Human are social beings that thrive on social contact. Parental contact shapes and moulds us. It can mean the difference between well adjusted and being 'broken' or washed down.

The alternative system of retrieval that has been described within this paper is not without flaws. The ideal situation would be for comity to exist within countries in case dealing with violation of children's rights. It is a procedure that will be utilised in cases of desperation when all other methods have failed. Thus in order to avoid frustration with legal systems it is recommended as follows:

- a. African governments should develop effective inter-State structures which focus on the needs and the protection of children who are at-risk across borders such as border controls and regulating that children have their own passports which both parents must agree to its issuance.<sup>219</sup>
- b. National courts should develop a judicial network on the African continent focusing on the international protection of children in which they recognise foreign custody and access orders. And in the request for return, they should take international law into consideration.
- c. Governments should sensitise the community, parents, border control officials and law enforcement officials on children's rights and the ACRWC on its protection against abductions in general. It should also provide procedures that allow for quick recovery of the child through ministries that deal with children's issues.

---

<sup>219</sup> Guide to Good Practice under The Hague Convention of 25 October 1980 On the Civil Aspects of International Child Abduction Part III – Preventive Measures <[www.Hcch.Net](http://www.Hcch.Net)> (accessed 03/05/2007)

- d. Governments should if they do not have it, Set-up a system of free legal aid and assistance for left-behind parents to help them retrieve their children.
- e. As stated by Nmehielle<sup>220</sup> the protocols to the African charter are there to improve its protective mandate. They are part and parcel of the Charter. Thus the AHRCrt is there as an improvement to the current African Commission. It is recommended that the adoption of rules of procedure be expedited in order to facilitate regional application and protection of the African Regional Instruments in the protection of children.

**Word count: 17,940 (including footnotes)**

## **BIBLIOGRAPHY**

### **A. Books**

1. Adams J. Q and Strother-Adams P, (2001) *Dealing with Diversity*, Chicago: Kendall/Hunt.
2. Dugard J, *International Law: A South African Perspective*, 3rd edition (2005), Lansdowne: Juta law
3. Nygh P, *The International Abduction of Children* in Doek J, van Loon H, Vlaardingerbroek P(eds), (1996) *Children on the Move: How to Implement Their Right to Family Life* The Hague: Martinus Nijhoff Publishers
4. van Bueren G, *The Best Interests of the Child – International Co-operation on Child Abduction* (the British Institute of Human Rights, The Programme on the International Right of the Child Reunite: National Council For Abducted Children) University of London

### **B. Journal Articles**

1. Aiyar S., International Child Abductions Involving Non-Hague Convention States: The Need For A Uniform Approach (2007) 21 *Emory International Law Review* 277
2. Cardin L, 'The Hague Convention on the Civil Aspects of International Child Abduction as Applied to Non-signatory Nations: Getting to Square One' (1997) 20 *Houston Journal of International Law* 141
3. Chirwa D. M. The merits and demerits of the ACRWC (2002) 10 *International Journal of Children's rights* 158
4. Dotan Y, Review Essay on The "Public", the "Private", and the Legal Norm of Equality (2005) 20 NO. 2 *Canadian Journal of Law and Society* 207
5. Fraidstern D. M, *Croll v Croll* and the unfortunate Irony of the Hague Convention on the Civil Aspects of Child Abduction: Parents with rights of access get no rights to access courts, (2005) 10 *Brooklyn journal of International Law* 640
6. Glass P, *Blondin v Dubois*: A closer step to safeguarding the welfare of abducted Children? (2000) 26 *Brooklyn International journal of International Law* 725 p725
7. Harper T, The Limitations Of The Hague Convention And Alternative Remedies For A Parent Including Re-Abduction (1995) 9 *Emory International Law Review* 257
8. Herring L. R, Taking Away The Pawns: International Parental Abduction & The Hague Convention (1994) 20 *North Carolina Journal of International Law and Commercial Regulation* 137

9. Johnson T. A The Hague Child Abduction Convention: Diminishing Returns And Little To Celebrate For Americans Symposium Issue Celebrating Twenty Years: The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction Article and Remark (2000) *New York University Journal of International Law and Politics* 125
10. Kreston S, Prosecuting International Parental Kidnapping Symposium on International Security 2001 *Notre Dame Journal of Law, Ethics and Public Policy* 533
11. Lloyd A, A theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the ACRWC (2002) 2 *African Human Rights Law Journal* 11
12. Olowu D, Protecting Children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child (2002) 10 *International Journal of Child Rights* 127
13. Ong D.S. L, Parental Child Abduction In Singapore: The Experience Of A Non-Convention Country (2007) 21 *International Journal Of Law, Policy And The Family* 220
14. Raday F, Privatising Human Rights and the Abuse of Power in Canadian (2000) 13 *Journal of Law and Jurisprudence* 103
15. Schnitzer-Reese E. A, 'International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court' (2004) 2 *Northwestern University Journal of International Human Rights* 7
16. Sicalides B, Comment on RICO, CCE, And International Extradition (1989) 62 *Temple Law Review* 1281
17. Sloth-Nielsen J. & van Heerden B, 'Putting Humpty Dumpty back together again: Towards restructuring families and children's lives in South Africa' (1998) 15 *South African Law Journal* 156
18. Sriram C. L., Globalising Justice: From Universal Jurisdiction to mixed tribunals (2004) Volume 22 No1 *Netherlands Quarterly for Human Rights* p7-32
19. Starr J, The Global Battlefield: Cultural and International Child Custody Disputes at Century's End (1998) 15 *Arizona Journal of International and Comparative Law* 791
20. Udombana N. J., Social Rights Are Human Rights: Actualizing The Rights To Work And Social Security In Africa (2006) 39 *Cornell International Law Journal* 181
21. Umozurike U. O, The African Charter on Human and people's rights: Suggestions for more Effectiveness (2007) 13 *Annual Survey of International Comparative Law* 179
22. Viljoen F, A Human Rights Court For Africa, And Africans (2004) 30 *Brooklyn Journal of International Law* pg1
23. Waters C. P .M, Book Note on Friedmann D & Barak-Erez Daphne, (Eds), Human Rights in Private Law. Oxford: Hart, 2001 Pp. xxi, 393 (2003) *McGill Law Journal* 788

24. Whitman C. B, Croll V. Croll: The Second Circuit Limits "Custody Rights" Under The Hague Convention On The Civil Aspects Of International Child Abduction (2001) 9 *Tulane Journal of International and Comparative Law* 605
25. Winterbottom M, The Nightmare Of International Child Abduction: Facing The Legal Labyrinth (1996) 5 *Journal of International Law and Practice* 495
26. Wolfe K, 'A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany' (2000) 33 *New York University Journal of International Law & Politics* 285.

### C. Internet Sources

1. Bayar B, and Levush R, Hague Convention on International Child Abduction (2003) Law Library of Congress South Africa on The Hague Convention on the Civil Aspects of Child abduction <<http://www.kinder-nach-hause.de/docs/safrica.pdf>> accessed on 20 may 2007
2. Chiancone, L. Girdner, and P. Hoff (2001) Issues in Resolving Cases of International Child Abduction, U.S. Department of Justice Office of Justice Programs: Office of Juvenile Justice and Delinquency Prevention.<[www.ojjdp.ncjrs.org](http://www.ojjdp.ncjrs.org)> or <<http://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf>> accessed 02/09/2007
3. Child protection from violence, exploitation and abuse <[http://www.unicef.org/protection/index\\_exploitation.html](http://www.unicef.org/protection/index_exploitation.html)> (accessed 02/09/2007)
4. Children - The International Dimensions [http://www.doj.gov.za/salrc/reports/r\\_prj110\\_childcare/r\\_pr110\\_21\\_2002dec.pdf](http://www.doj.gov.za/salrc/reports/r_prj110_childcare/r_pr110_21_2002dec.pdf) (accessed 06/09/2007)
5. Harty M, Assistant Secretary of State for Consular Affairs 'Remarks before the House Committee on International Relations' in Washington, DC June 22, 2004 <<http://www.state.gov/r/pa/ei/othertstmy/37012.htm>> (accessed 01/10/2007)
6. Commission on Human Rights Resolution: 2004/47 'Abduction of children in Africa' <[http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2004-47.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2004-47.doc)> (accessed 05/06/2007)
7. Overview of the Hague Convention on Private international law <[http://www.hcch.net/index\\_en.php?act=text.display&tid=1](http://www.hcch.net/index_en.php?act=text.display&tid=1)> accessed 02/09/2007
8. [http://www.rhymes.org.uk/humpty\\_dumpty.htm](http://www.rhymes.org.uk/humpty_dumpty.htm) accessed 12/09/2007
9. <[http://www.famousquotes.me.uk/nursery\\_rhymes/incy\\_wincy\\_spider.htm](http://www.famousquotes.me.uk/nursery_rhymes/incy_wincy_spider.htm)>accessed 15/10/2007
10. Silberman L, Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence (2006) New York University School of Law New York University Public

Law and Legal Theory Working Papers (IILJ Working Paper 2005/5) <[www.iilj.org](http://www.iilj.org)> or <<http://lsr.nellco.org/nyu/plltwp/papers/18>> (accessed 01/08/2007)

11. The World Fact book- United States of America  
<<https://www.cia.gov/library/publications/the-world-factbook/print/us.html>> (accessed 01/10/2007)

#### **D. Cases**

1. Blondin v Blondin 189 F.3d 242
2. Central Authority v Houwert [2007] SCA 88 (RSA)
3. Constitutional Rights project and Another v Nigeria (2000) AHRLR 191 (ACHPR 1998)
4. Croll v Croll 229 F.3d 133 (2d Cir. 2000)
5. Hansen v. Turkey Application No. 36141/97 Judgement of 23 September 2003
6. Holdry v Germany Application No 36141/97 Judgement of 23 September 2003
7. Ignacolo - Zenide v Romania, No. 31679/96 Judgement of 23 September 2003
8. Law office of Ghazi Suleiman v Sudan (II) (2003) AHRLR 144 (ACHPR 2003)
9. Loizidou v. Turkey (preliminary objections); Judgment of 23 March 1995, Series A, no. 510
10. Mayagna Awas Tingni Community v Nicaragua (Ser. C) No. 79 (2001)
11. Pennello v Pennello and another 2004 (1) All SA 32 (SCA)
12. Purohit and another v the Gambia (2003) AHRLR 96 (ACHPR)
13. Re K (Abduction: Consent) [1997] 2 FLR 212 (FD) at 217.
14. Social Economic Rights Action Campaign v Nigeria (2001) AHRLR 60 (ACHPR 2001)
15. Sonderup v Tondelli and another 2001 (2) BCLR 152 (CC)
16. Tiemann v France and Germany application 47457/99, 47458/99 Judgement of December 27 April 2000.

#### **E. Legislation**

1. Uniform Child Custody Jurisdiction Act of 1969
2. Uniform Child Custody Jurisdiction and Enforcement Act of 1997
3. Parental Kidnapping Prevention Act of 1980
4. Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996
5. The Children's Act 38 of 2005
6. the Constitution of the Federal Republic of Nigeria 1999
7. the Constitution of the Republic of Uganda of 1995
8. The Constitution of the Republic of South Africa Act 108 of 1996



## **F. International Instruments and Declarations**

1. The African Charter on Human and people's rights 1981
2. The African Charter on the Rights and Welfare of the Child 1990
3. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
4. The European Convention On Contact Concerning Children 2003
5. The European Convention On The Exercise Of Children's Rights 1996
  
6. European Convention on the Legal Status of Children born out of Wedlock 1975
7. The European Convention On Recognition And Enforcement Of Decisions Concerning Custody Of Children And On Restoration Of Custody Of Children 1980
8. The Hague Convention on the Civil Aspects of International Child Abduction of 1980.
9. The Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants of 1961
10. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986

## **G. Other sources**

1. Compilation of Human rights Documents and Treaties: Human Rights Education Project <[www.upeace.org](http://www.upeace.org)> (accessed on 02 August 2007)
2. Guidelines For The Consideration Of Communications Provided For In Article 44 Of The African Charter On The Rights And Welfare Of The Child at the 8th Meeting Of The African Committee Of Experts On The Rights And Welfare Of The Child 27 November – 1 December 2006 Addis Ababa, Ethiopia Acerwc/8/4 <[www.africa-union.org](http://www.africa-union.org)> (accessed 13 September 2007)
3. Guide to Good Practice under The Hague Convention of 25 October 1980 On the Civil Aspects of International Child Abduction Part III – Preventive Measures <[www.Hcch.Net](http://www.Hcch.Net)> (accessed 03/05/2007)
4. Heyns C, and Killander M, (2006) Rules of Procedure of the African Commission of 1995 in *Compendium of Key Human Rights Documents of the African Union 2<sup>nd</sup> Edition* Pretoria: Pretoria University Law Press
5. Regional Developments: document drawn up by the Permanent Bureau Preliminary Document No 10 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (*The Hague, 30 October – 9 November 2006*) <[www.hcch.net](http://www.hcch.net)> (accessed 08/07/2007)

6. South African Law Commission Issue Paper 13, Project 110 -The Review Of The Child Care Act First Issue Paper [18 April 1998]
7. Viljoen F, The African Regional System: Substantive Human rights Norms (mimeo) pg39