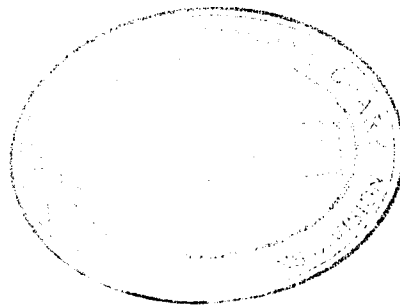


**THE HAGUE CONVENTIONS ON INTERNATIONAL CHILD  
ABDUCTION AND INTER COUNTRY ADOPTIONS: SHOULD ZAMBIA  
BE A PARTY?**

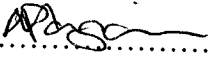
**By**  
**MALUNGA M. PANGANI**  
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Being a Directed Research essay submitted to the University of Zambia Law Faculty in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.



## **DECLARATION**

I, MALUNGA M. PANGANI, computer number 27025071, do hereby declare that this Directed Research Essay is my genuine work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.

  
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ZAMBIA BE A PARTY?**

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.....  
**PROF. M. MUNALULA**

.....  
**Date**

## **ABSTRACT**

The purpose of this dissertation was to examine the laws that are in place in Zambia to secure the return of children that are abducted and taken outside the country.

The research was carried out using both desk and field research. The desk research comprised of collection of secondary data in the form of books, journals, dissertations and the internet and primary data from Law reports and statutes. The field research consisted of open ended interviews with key stake holders.

The research was aimed at establishing whether there are laws in Zambia that can be used to secure the return of abducted children and whether these laws are effective. The research also looked at the use of the Hague Conventions and how effective the Conventions are in securing the return of abducted children and finally the research answered the question whether Zambia should be a party to the Conventions.

Through research, it was found that there is no specific legislation that governs the return of children that are abducted. The adoption procedure was viewed to be one of the instances that open children to the harm of abduction and that there is no legislation that can be used to return children that are removed from country under the guise of adoption.

The Hague Conventions were viewed to be the most effective methods of having abducted children returned.

It was finally concluded that there is need for Zambia to consider being a party to the Conventions so as to ensure that children that are abducted are returned promptly or in the alternative there is need to amend the Foreign Judgments (Reciprocal Enforcement) Act so that it permits the registration of foreign judgments that pertain to guardianship of an infant.

## **ACKNOWLEDGEMENTS**

I would like to thank the Almighty God for making the successful completion of this dissertation possible, on my own I would not have made it this far.

I sincerely thank Professor M.M. Munalula my supervisor for her guidance throughout the research and for teaching me that criticism is there to build and not break; I will always remember your words. It has been a great honour and privilege to have been supervised by you.

To my dad Mr. Brian Muyangwa Pangani, words are not enough to express my gratitude, thank you for all the support and sacrifices you had to make to ensure that I make it this far. I love you dad and God bless you.

I am grateful to my brothers and sisters; Maikisa Pangani, Luwabelwa Mundia, Monde Pangani, Brian Pangani, Sitwala Pangani and Munu Pangani for their moral and emotional support especially in the times that I felt unable to continue. You have always encouraged me to study hard and never to give up no matter what happens. Thank you very much for always being there for me. I love you and thank you most sincerely.

To the best friend a person can ever have Franchescah Bwalya words are not enough to express my gratitude, your guidance, assistance and encouragement have all contributed to the final completion of this research. You have always been there for me when I needed you the most and you have always encouraged me to pick myself up every time I am down. For this I say thank you and I am grateful to God for making you a part of my life.

To my friends and study mates Misozi Mtonga and Veronica Cheupe, I will be forever grateful for all your support and for forcing me to listen even when I did not want to, we spent a lot of time together researching and moving all around; the great treks and all the non successful visits were all better because we were together. We have been through a lot together. Thank you and I love you guys!

## **DEDICATION**

This paper is dedicated to God my father, my dad Mr. Brian Muyangwa Pangani and late mum Ms. Margret Nyambe.

Heavenly father without you I am nothing, everything I am is because you have allowed me to be; Lord I am grateful for all your blessings.

Dad I would like to express my profound gratitude for all the support rendered especially when things would not go well for me during my stay at the university. Even when I doubted myself you still believed in me and that is what encouraged me to get up again every time I fell. Thank you and may God continue to bless you.

Mum I only wish you were here to see what has become of me, a strong foundation is what you laid for me and it is on that foundation that all my academic life has been built on. I thank God for giving me a mother like you and I miss you dearly.

## **TABLE OF STATUTES**

The Adoptions Act, Cap 54 of the Laws of Zambia

The Anti Human Trafficking Act No. 11 of 2008

The Foreign Judgments (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia

The Immigration and Deportation Act Chapter 123 of the Laws of Zambia

The Penal Code, Chapter 87 of the Laws of Zambia

## **INTERNATIONAL CONVENTIONS**

The Convention on the Rights of the Child

The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on Protection of Children and Co-Operation In Respect Of Inter Country Adoption

United Nations Optional Protocol to Prevent Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol)

## **TABLE OF CASES**

Croll v. Croll 229 F.3d 133 (2d Cir. 2000)

Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996).

Zenetta Nyendwa v Kenneth Spooner SCZ Judgment No. 20 of 2010



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# **CHAPTER 1**

## **GENERAL INTRODUCTION**

### **1.0 INTRODUCTION**

This chapter gives an introduction to the research and an outline of the research. The chapter gives an introduction to the Hague Convention and the problem of Child abduction in Zambia. It deals with the preliminary aspects of the research, these include the statement of the problem, objectives of the research, significance of the study, the methodology, the chapter lay out and content of each chapter.

### **1.1 STATEMENT OF THE PROBLEM**

Zambia is not a party to the Hague Convention and as such if any matters relating to issues of child abduction are brought before the Zambian courts the provisions of the Convention would not apply. In determining matters in relation to international child custody the Zambian courts are not bound by what is contained in the Convention or by a decision to have the child returned to his country of residence but instead the Zambian courts rely on the Foreign Judgments (Reciprocal Enforcement) Act<sup>1</sup> to determine whether the child should be returned to his country of residence. The use of the Act has been shown to be restrictive in that the number or types of cases that can be registered under this Act are very limited.

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<sup>1</sup> Chapter 76 of the laws of Zambia

One would assume that an aggrieved parent would get a court order in the country where the child was abducted from ordering the abductor to return the child, but this too would prove inadequate as the Foreign Judgments (Reciprocal Enforcement) Act<sup>2</sup> states in section 2 (2) that matters involving guardianship of infants are not to be enacted under the Act.<sup>3</sup> Order 71/13/ (1),(2) and (7) of the rules of the Supreme Court provides for the types of judgments that can be subject to a certificate for reciprocal judgment and states in part that:- “only judgments with a sum of money payable” will be registered under the reciprocal Act. This then begs the question of what means will a parent who has had their child abducted to Zambia use to get their child back.

## **1.1 .1 INTERNATIONAL CHILD ABDUCTION**

There has been a steady increase in the number of international marriages and when the marriage breaks down there is a question of what happens to the children of the marriage, especially when one parent decides to move to another country. In most instances one parent is given the custody of children and the other is granted visitation rights.<sup>4</sup> However even when the court has made a decree some parents do not agree with the decision that has been passed by the court and instead of using the right procedure to air their grievances they choose to take matters in their own hands and abduct the child.

International child abduction occurs when one parent (who has no custody of child) abducts the child. This can happen in three different ways and these include; abduction - where a child is taken overseas without the other parent's consent; wrongful retention - where a child has been

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<sup>2</sup> Chapter 76

<sup>3</sup> Foreign Judgments (Reciprocal Enforcement) Act section 2(2)

<sup>4</sup> L. Mushota, *Family Law in Zambia: cases and materials* (Lusaka; UNZA Press 2005), 377

retained in a foreign country following an overseas trip; and threat of abduction - where there is a risk that a child will be taken overseas.<sup>5</sup>

Child abduction by parent is defined as an incident in which a parent physically takes, restrains or does not return a child under the age of sixteen, after a visit and keeps the child concealed so that the other parent does not know where the child is.<sup>6</sup>

When a child is abducted whether by a parent or just any other person, the person that suffers is mostly the child. Huntington,<sup>7</sup> best describes what parental child abduction fully encompasses: ‘A New Form of Child Abuse’. She states,

Child stealing is child abuse.....Children are used as both objects and weapons in the struggle between the parents which leads to the brutalization of the children psychologically, specifically destroying their sense of trust in the world around them.....We must re-conceptualize child stealing as child abuse of the most flagrant sort.<sup>8</sup>

### **1.1.2 THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION**

In response to the increase in the number of cases of children being abducted by their parents the Hague Convention on the Civil Aspects of International Child Abduction was enforced. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is a multilateral treaty, which seeks to protect children from the harmful effects of abduction across

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<sup>5</sup> Foreign commonwealth office, “International parental abduction” <http://www.fco.gov.uk/en/travel> (accessed 20/12/2011)

<sup>6</sup> D. Huntington, “Parental kidnapping a new form of Child abuse”(1982) Pdf\_files/library/Huntington\_1982pdf (accessed 09/01/2012)

<sup>7</sup> an early leader in parental child abduction issues

<sup>8</sup> D. Huntington , ( accessed 09/01/2012)

international boundaries by providing a procedure to bring about their prompt return and ensure that the rights of custody and access under the laws of one contracting state are effectively respected in another contracting state.

The preamble to the Convention states: The States signatory to the present 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 Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions <sup>9</sup>

The wording of the preamble clearly states that the rights of the abducted child are what the Convention was meant to protect and that these rights are of paramount concern. The Convention is however very restrictive as it is only applicable to a state if that state is a party to the Convention; article four provides ‘The Convention shall apply to any child who is habitually resident in a Contracting State immediately before any breach of custody or access rights,’<sup>10</sup> the Convention shall cease to apply when the child attains the age of 16 years.<sup>11</sup> The treaty governs the enforcements of judgments entered into by one country’s legal authority who is a signatory to the treaty for the enforcement of the judgment in another country who also is a signatory. A parent who has had their child abducted to a country that is not a party to the Convention faces a problem because the Convention is not applicable to them and they need to seek alternative methods of having the child returned.

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<sup>9</sup> Preamble to THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION of 1980

<sup>10</sup> Article 4 THE HAGUE CONVENTION

<sup>11</sup> Article 4 THE HAGUE CONVENTION

## **1.2 OBJECTIVES OF THE STUDY**

### **1.2.1 GENERAL OBJECTIVE**

A critical analysis of whether the laws that are enforced in Zambia are adequate to ensure the safe return of abducted children.

### **1.2.2 SPECIFIC OBJECTIVES**

- a) The effectiveness of the laws in Zambia that are used to have abducted children returned to their habitual residence.
- b) The effectiveness of the Hague convention in ensuring the return of abducted children.

## **1.3 REASEARCH QUESTIONS**

The research questions which the research answered in an effort to come to a conclusion as to whether Zambia should become a party to the Conventions are;

1. What laws are in place in Zambia to secure the return of children abducted from Zambia or children that are brought to Zambia once abducted?
2. How does the Convention provide for the return of abducted children?
3. Are the laws that are applicable to Zambia sufficient to secure the return of a child?
4. Should Zambia consider being a party to the Convention?



## **1.4 SIGNIFICANCE OF THE STUDY**

The study is aimed at analyzing the benefits that would accrue from Zambia being a party to the Convention or whether the enforcing law that is in the statute books is sufficient. The practical importance of this discussion is that parents of children that have been abducted can have their children returned. It will also determine whether the law that is in place can adequately ensure the expedient return of a child.

## **1.5 METHODOLOGY**

The research was carried out using both desk and field research. The desk research comprised of collection of secondary data from books, journals, dissertations and the internet and primary data from Law reports and statutes. The field research consisted of open ended interviews with key stake holders from various departments that deal with child welfare these departments include the Ministries in charge of child welfare in particular office of the Child Protection Unit and the Child Law Reform Unit of the Ministry of Community Development and Mother and Child Health and researchers in the field who are experienced in the field of family law.

A number of limitations were faced during the carrying out of the research and these limitations include; the lack of knowledge on the research topic by persons who were assumed to be key stake holders more especially from the ministries of Home and Foreign Affairs. Some online articles that would have been of great relevancy were not available due to the fact that most of them appeared in the university journals and the University of Zambia is not affiliated to them thus efforts to get access to the articles failed. Efforts to get in touch with the authors were futile

as communication went unanswered. Finally most of the research material was found online and the bad internet connection made the research rather troublesome.

## **1.6 OUTLINE OF CHAPTERS**

Chapter two gives an analysis of the adoption process in Zambia. The chapter will look into the laws that govern the adoption process in Zambia. The chapter will discuss the laws that can be used secure the return of a child that is abducted under the guise of an adoption.

Chapter three gives a review of the laws in Zambia used to secure the return of abducted children. The Chapter discusses the laws that are in place to secure the return of abducted children, in Zambia. The chapter looks at how effective the laws are and a conclusion will be drawn as to whether there is need to improve the laws that are used to secure the return of abducted children and whether the laws are adequate to secure the return of abducted children.

Chapter four discusses the use of the Hague Convention in securing the return of abducted children. The chapter gives an analysis of how effective the Convention is in securing the return of internationally abducted children.. The chapter will also analyse if there are any benefits a country incurs by being a party to the Convention. The chapter will draw a conclusion as to whether there is need to improve the administration of the Convention and whether the Convention in its present state fulfils the objectives it was set out to fulfill.

Chapter five will provide conclusions and recommendations to the whole research. The chapter gives recommendations on whether Zambia should be a party to the Convention and the possible

amendments to the laws in place if any are needed to ensure the safe return of children that are abducted.

## **1.7 CONCLUSION**

This Chapter has dealt with the basic aspects of the research conducted and given a prelude to the subject. It has also highlighted the salient features of the subsequent chapters. The chapter has given a brief look at the problem of parental child abduction and the Hague Convention on the Civil Aspects of International Child Abduction. The subsequent chapters will evaluate the use of the Convention and subsequently answer the question as to whether Zambia should be a party to the Convention.

## **CHAPTER 2**

### **AN ANALYSIS OF THE ADOPTION PROCESS IN ZAMBIA**

#### **2.0 INTRODUCTION**

This chapter will discuss the adoption procedure in Zambia. The chapter will discuss the adoption process in relation to the fact that the adoption process may be abused and consequently lead to the abduction of a child. The chapter will then discuss the safeguards that are in place to curb abuse of the adoption process and whether these safeguards are effective. The safeguards will be discussed to the effect of children that are adopted by non Zambian residents or cases where the child to be adopted is not a Zambian.

#### **2.1 ADOPTION**

Adoption is the process whereby the parental responsibility is by court order taken from the natural parents and granted to the adopters. In law, the child is treated as if it were the natural child of the adoptive parents and the parental connection with the child's natural parents is extinguished.<sup>1</sup> Adoption involves the severance of the legal relationship between parents and child and the establishment of a new relationship between the child and the adoptive parents.<sup>2</sup> Adoption is the only means by which all parental duties and rights can be transferred during the

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<sup>11</sup> Lillian Mushota, *Family Law in Zambia: Cases and Materials* (Lusaka: University of Zambia press, 2005), 387  
<sup>2</sup> P.M. Bromley and N.V. Lowe, *Bromley's Family Law* 7<sup>th</sup> ed. (London: Butterworth & Co, 1988), 379

life time of the parent.<sup>3</sup> The result of an adoption is that for all legal purposes the adopters step into the shoes of the natural parents.<sup>4</sup>

## **2.2 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER COUNTRY ADOPTION**

In response to the abuse of inter country adoption the international community enacted a Convention which was concluded on the 9<sup>th</sup> May 1993. The Convention was introduced so as to reduce and correct the number of adoption cases that were concluded through fraud or in which the infant was trafficked or abducted in securing the adoption.<sup>5</sup>

The preamble to the Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption states that State parties recognize “the necessity to take measures to ensure that inter country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.”<sup>6</sup>

The Convention seeks to facilitate inter country adoptions by safeguarding them from abusive practices, and by securing recognition in Contracting States of such adoptions.<sup>7</sup>

Upon closer examination, then, the Hague Convention, rather than representing a comprehensive approach to inter country adoption, is an anti-trafficking treaty, and a very incomplete anti-trafficking treaty at that. A significant impetus and purpose of the Convention is to prevent abusive adoption practices, specifically targeting abducting, buying, and trafficking in children; the Convention’s response to this set of evils is to provide for a set of safeguards and international

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<sup>3</sup> P.M. Bromley and N.V. Lowe, *Bromley’s Family Law*, 379

<sup>4</sup> P.M. Bromley and N.V. Lowe, *Bromley’s Family Law*, 380

<sup>5</sup> David M. Smolin, *Abduction, Sale And Traffic In Children In The Context Of Intercountry Adoption*, (2010), under [http://www.hcch.net/intercountry adoption](http://www.hcch.net/intercountry%20adoption) . (accessed on 4<sup>th</sup> February 2012)

<sup>6</sup> The Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption the preamble

<sup>7</sup> Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Inter country Adoption Convention, Guide to Good Practice, Guide No. 1* (2008), 100- 102

cooperation. In a sense, the Convention is ambitious, for it aims to take the “chaotic, contradictory and unsatisfactory” practice of inter country adoption which existed prior to the Convention, and replace it with an inter country adoption system with regularized sets of procedures and accredited and defined sets of actors.<sup>8</sup>

The Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption was enacted to be a safe guard against the abuse of the inter country adoption procedure and protect the interests of the children that are adopted. Zambia is not a party to the Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption this means that instances of inter country adoptions are solely governed by the Adoption Act.<sup>9</sup> As mentioned above the Convention was enacted to curb the abuse of the adoption system this is because the adoption process was recognised as one of the systems that facilitates the abduction of children, and a child’s best interest are not of paramount concern in an adoption that is secured by abduction.

### **2.3 ADOPTIONS UNDER THE ADOPTION ACT OF ZAMBIA**

Adoption in Zambia is governed by the Adoption Act,<sup>10</sup> it can thus be concluded that adoption is a creation of statute, however under the customary law of Zambia a child belongs to the whole family and does not need to be formally adopted through the court system.<sup>11</sup> The Zambian Adoption Act provides for various types of adoptions and these include the adoption of a Zambian child,<sup>12</sup> the adoption of a foreign child<sup>13</sup> and for inter country adoptions.<sup>14</sup>

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<sup>8</sup> David M. Smolin, *Abduction, Sale And Traffic In Children In The Context Of Inter country Adoption*

<sup>9</sup> Chapter 54 of the Laws of Zambia

<sup>10</sup> Chapter 54 of the Laws of Zambia

<sup>11</sup> L. Mushota, *Family Law in Zambia*. 387

<sup>12</sup> Adoption Act section 4(5)

<sup>13</sup> Adoption Act section 4(6)

The adoption Act has a number of safeguards that protect against the adoption process being abused, these safeguards are at different stages of the adoption process. The first safeguard in the Adoption Act is contained in section 4 which states;

An adoption order shall not be made in respect of an infant unless the applicant or, in the case of a joint application, one of the applicants; has attained the age of twenty-five years and is at least twenty-one years older than the infant,<sup>15</sup> has attained the age of twenty-one years and is a relative of the infant,<sup>16</sup> or is the mother or father of the infant.<sup>17</sup>

The safe guards contained in section 4 (1) of the Act are meant to ensure that the applicant is mature enough to be a parent to the child they wish to adopt.

The Act in Section 4 (2) does not permit a female child to be adopted by a single male parent unless in special circumstances these circumstances may include a situation where applicant for adoption is the biological father to the child.<sup>18</sup>

### **2.3.1 ADOPTIONS INVOLVING ZAMBIAN CHILDREN**

The qualifications that have to met in cases involving the adoption of a *Zambian* child are contained in section 4 (5) of the adoption Act.

An adoption order shall not be made in respect of any infant unless; the applicant and the infant reside in Zambia,<sup>19</sup> and the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order<sup>20</sup> and the applicant has, at least three months

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<sup>14</sup> Adoption Act section 33

<sup>15</sup> Adoption Act section 4(1) (a)

<sup>16</sup> Adoption Act section 4(1) (b)

<sup>17</sup> Adoption Act section 4(1) (c)

<sup>18</sup> Adoption Act section 4(2) (2) An Adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is male, unless the court is satisfied that there are a special circumstances which justify as an exceptional measure the making of an adoption order.

<sup>19</sup> Adoption Act section 4(5) (a)

<sup>20</sup> Adoption Act section 4(5) (b)

before the date of the order, notified the Commissioner of his intention to apply for an adoption order in respect of the infant.<sup>21</sup>

The Act provides that an applicant and the infant both have to be resident in Zambia for an adoption order to be made, it can be concluded that this particular safeguard is in the Act so as to ensure that the commissioner<sup>22</sup> has an opportunity to investigate the applicant and carry out an analysis as to whether the particular applicant qualifies to adopt a child and so that the personnel from the social welfare department can carry out visits to examine how the child is adjusting to the new family.

### **2.3.2 ADOPTIONS INVOLVING FOREIGN CHILDREN**

When an application is made for a foreign child to be adopted there are a number of qualifications that have to be satisfied and these qualifications are contained in section 4 (6) of the Adoption Act which states

Notwithstanding subsection (5) an adoption order shall not be made in respect of a foreign infant; unless the infant resides in Zambia and the applicant is ordinarily resident in Zambia,<sup>23</sup> unless the foreign infant has been continuously in the care and possession of the applicant for at least twelve consecutive months immediately preceding the date of the order,<sup>24</sup> unless the applicant has at least three months before the period referred to in paragraph (b) notified the Commissioner of his intention to apply for an adoption order in respect of the foreign infant,<sup>25</sup> and if the foreign infant is in Zambia under a temporary or visiting permit issued under the Immigration and Deportation Act.<sup>26</sup>

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<sup>21</sup> Adoption Act section 4(5) (c)

<sup>22</sup> Adoption Act section 2 the Commissioner for Juvenile Welfare appointed under the provisions of section five of the Juveniles Act

<sup>23</sup> Adoption Act section 4 (6) (a)

<sup>24</sup> Adoption Act section 4 (6) (b)

<sup>25</sup> Adoption Act section 4 (6) (c)

<sup>26</sup> Adoption Act section 4 (6) (d)



These qualifications provide for the adoption of a foreign child in Zambia. These qualifications can be said, provide a means of ensuring that in situations involving the adoption of a foreign child there is maximum security as to the identity of the applicants. The fact that applicants have to be resident in Zambia, can be argued was put in as one of the qualifications because if the applicant is resident in Zambia then the commissioner, can easily have access to their record in an effort to determine whether they are fit to adopt a child. The infant also has to be resident in Zambia this is because the infant has to be deemed suitable for adoption. Another safeguard that exists in the adoption of foreign children is that the child needs to be in Zambia under a temporary or visiting permit issued under the Immigration and Deportation Act.<sup>27</sup> This is there to ensure that the child is in the country lawfully and has not been trafficked or abducted into the country so as to carry out an adoption.

### 2.3.3 INTERCOUNTRY ADOPTIONS

As mentioned earlier the Adoption Act provides for inter country adoptions, inter country adoptions need to be highly secured because there is a high probability of the adoption process being abused and further with a country like Zambia which is not a party to the Convention on Inter Country Adoptions it makes it difficult to correct a mistake that has taken place once the child has already been moved out of the country. This is why there is need to ensure that inter country adoptions are carried out in a manner that is within the law.

The Adoption Act prohibits adoption societies from making arrangements for the placement of an infant in the care and possession of a person resident abroad, unless with the approval of the minister.<sup>28</sup>

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<sup>27</sup> Chapter 123 of the Laws of Zambia

<sup>28</sup> Adoption Act section 22 (1) (b)

The provision regulates and oversees the activities and operations of adoption societies in respect of inter country adoptions. The minister is empowered through the commissioner for juvenile welfare to grant a license when an infant is to be sent abroad for adoption. These measures are used to protect the child and ensure that the best interests of the child are of paramount consideration in the adoption.<sup>29</sup> The Act recognises that cases of inter country adoptions are prone to a lot of abuse and that is why there is a strict policy as to who is eligible to make arrangements for the placement of an infant abroad. However it can be argued that the power that is granted to the minister is too grave to be carried out by an individual thus there is need for a committee to be set up so that they are tasked with determining inter country adoptions instead of an individual.

Inter country adoptions are further provided for in section 32 which states-;

It shall not be lawful for any person in connection with any arrangements made for the adoption of an infant who is resident in Zambia to permit or procure the care and possession of the infant to be transferred to any person who is not the guardian or a relative of the infant and who is resident abroad.<sup>30</sup>

The Adoption Act goes further to state that-;

Any person who contravenes the provisions of this section shall be guilty of an offence, and the court by which such person is convicted may order any infant in respect of whom the offence was committed to be returned to his parents or guardian.<sup>31</sup>

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<sup>29</sup> Zambia Law Development Commission, *A report on the Review of child Related Legislation in Zambia* (2008) 41

<sup>30</sup> Adoption Act section 32 (1)

<sup>31</sup> Adoption Act section 32 (2). The section being made reference to is the section 32 (1) of the same Act

The Adoption Act does state that if a person is convicted of having any connection with any arrangements made for the adoption of an infant who is resident in Zambia to permit or procure the care and possession of the infant to be transferred to any person who is not the guardian or a relative of the infant and who is resident abroad the court may order that that child be returned to his or her guardians or parents. The Act does not specify which law should be used to have the child returned.

The subsequent chapter will discuss the laws that are available in Zambia to secure the return of abducted children and it shall be noticed that apart from cases that fall within the ambit of the Anti Human Trafficking Act<sup>32</sup> there is no law that can be used to secure the return of children that are abducted from Zambia

Section 33 of the Adoption Act provides that the commissioner may grant a licence for the care and possession of an infant whose adoption arrangements have been made to be transferred to a person resident abroad. Before granting the licence, the commissioner should be satisfied that the application is made by or with the consent of every person or body of persons who is a parent or guardian of the infant in question.

Section 33 does not go far enough in protecting the child as it does not provide for measures to ensure that adoptive parents and the adoptee are counseled and are subjected to home visits and case management by qualified professionals.<sup>33</sup> The need for the counseling and the home visits are so that the applicants and the adoptee are prepared mentally for the change in their lives and the visits are meant to ensure that the adoptee is settling well in the new environment. The Adoption Act is silent on how a child who is sent abroad for adoption can be returned to his

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<sup>32</sup> No. 10 Of 2008 of the Laws of Zambia

<sup>33</sup> Zambia Law Development Commission *A report on the Review of child Related Legislation in Zambia* (2008) 41

biological parents after the adoption is concluded if it is later discovered that the adoptive parents did not actually qualify to adopt the child in the first place. Once the adoption process has been completed the adoptive parents are for all intents and purposes the parents to the infant and their rights are secured even if the adoption was secured wrongfully. There is therefore need for the Adoption Act to provide for specific measures that should be taken in the event that there is need to have the child returned to Zambia.

The Foreign Judgments (Reciprocal Enforcement) Act, states that matters of infant guardianship are not subject of the Act and thus meaning that an order from a Zambian Court against the adoptive parents who live abroad cannot be registered in that country because the Foreign Judgments (Reciprocal Enforcement) Act prohibits the registration matters that deal with guardianship of an infant.

The Adoption Act does not provide a fully comprehensive procedure that should be followed in adoption cases in which the applicants are not resident in Zambia, the Act does not also specify if there is any foreign instrument that can be used in the return of children who are taken abroad through a faulty adoption process neither does the Act provide for the Law that is best applicable in securing the return of infants wrongly taken abroad.

The Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption was enacted to prevent the abduction, sale and trafficking in of children and to eliminate various forms of abuses of the inter country adoptions.<sup>34</sup> The Convention was enacted to protect the rights of the child in cases of inter country adoptions this is because it was realised

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<sup>34</sup> Professor William Duncan, "The Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption" (Conference on International Standards in Adoptions and Abduction, US Embassy Lusaka 12-13<sup>th</sup> April 2011) 10

that the inter country adoption procedure was prone to abuse and that the adoption procedure could be used to facilitate the abduction of a child.

## **2.4 CONCLUSION**

The Adoption Act does have safe guards for adoptions that are done within the country or adoptions that involve a Zambian infant and an applicant that is resident in Zambia. However when it comes to adoptions that involve a foreign child or adoptions where the applicant is not resident in Zambia the safe guards that protect the adoption process are not adequate. The Act states that once a person who abused the adoption system is convicted there will be a court order demanding that the child be returned to his guardians or natural parents but the Act neglects to mention the method or the law that will be applicable to secure the return of a child whose adoption was secured through abduction, trafficking and fraud.

The Acts provision for inter country adoption also needs to be supplemented with safe guards that ensure that the adoptions are done in the best interest of the child and stricter measures against the abuse of inter country adoptions. The Act also needs to specify how a child who has been taken outside the country through the adoption process can be returned to his country of residence.

It is thus recommended that the Act should be amended to make specific reference of the law that will be used to secure the return of the child and the Act should also provide for clear guidelines on how an applicant who is not a resident in Zambia is screened and how the office of the Commissioner ensures that the infants best interests will continue to be respected once the child is taken out of the country. The Act further needs to provide clear guidelines on how

applicants in cases involving inter country adoptions are screened and selected to be the parents of the infant. There is need to have a law that adequately and clearly provides for the return of abducted children.

As mentioned above the Anti Human Trafficking Act provides for the return of persons that are taken out of the country however its application is in a narrow sense as will be discussed in the subsequent chapter.

## **CHAPTER 3**

# **A REVIEW OF THE LAWS IN ZAMBIA USED TO SECURE THE RETURN OF ABDUCTED CHILDREN**

## **3.0 INTRODUCTION**

This Chapter discusses the laws that are in place to secure the return of abducted children in Zambia. The chapter discusses the options that a parent who has had their child abducted can use to secure the return of the child using the laws enforceable in Zambia. An analysis of the laws will be carried out and the effectiveness of the laws will be discussed. The chapter will give a conclusion on whether there is need to improve the laws and whether the laws are adequate to secure the return of children.

## **3.1 THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT<sup>1</sup>**

The Act was enacted in 1937, it governs the registration of foreign judgments in Zambia, meaning it governs the system that is used to register a judgment from a foreign country in Zambia. The Act specifies that for a foreign country's judgment to be registered in Zambia there should be a reciprocal agreement. This means that there should be a statutory instrument passed in Zambia permitting the registration of judgments from a specific foreign country. However a problem arises when it comes to matters of child abduction in that the Act does not permit the registration of foreign judgments that deal with matters of 'Guardianship of an infant,'<sup>2</sup> this

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<sup>1</sup> Foreign Judgments (Reciprocal Enforcement) Act chapter 76 of the Laws of Zambia

<sup>2</sup> Foreign Judgments (Reciprocal Enforcement) Act section 2 (2)

means that if a parent has had their child abducted and they get a judgment in their favour they cannot have that judgment registered in Zambia. This then leaves a question of how children abducted from Zambia are to be returned to their country of residence?

There is no specific statute that governs the return of children that are abducted however there are a number of statutes<sup>3</sup> that have sections that make reference to and criminalise child abduction and these will be discussed below.

### **3.2 CHILD ABDUCTION IN ZAMBIA**

The number of children abducted from Zambia in recent years has seen a steady increase, these cases of abduction have mainly been cases of children trafficked across borders for various reasons mainly bordering on children being used as sex slaves or casual workers. Abduction is defined as ‘wrongfully taking away or detaining another person usually by force or fraud,’<sup>4</sup> while child abduction is defined as ‘taking or detaining a child under the age of 16 without lawful authority or reasonable excuse, so as to remove the child from or keep him out of the lawful control of any person having lawful control of the child.’<sup>5</sup> These cases of abduction or trafficking have mainly been by relatives or close family friends promising job opportunities or an opportunity at a better education. There are however very few reports received concerning children that are abducted by their parents and the reasons for such abductions taking place.

The reason that has been attributed to the low reports on cases involving child abduction is that most cases involving cases of a child being removed from the parent with custody are mostly

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<sup>3</sup> The penal code chapter 87 and the Anti Human Trafficking Act No. 10 of 2008 of the laws of Zambia

<sup>4</sup> Oxford Dictionary of Law 6<sup>th</sup> edition, Oxford: University Press (2006) at p. 2

<sup>5</sup> Oxford Dictionary of Law at pp 86-87



considered to fall under the category of child trafficking which is highly prevalent in Zambia in recent years. The Child Protection Unit (CPU)<sup>6</sup> in its 2011 statistics of cases involving children, recorded five cases of child abduction/ child stealing country wide,<sup>7</sup> in comparison to other cases involving children, the abduction cases were the lowest reported cases. The statistics from the CPU show that cases of child abduction do not occur on a wide margin or such cases are just not reported to the relevant authority.

### **3.3 CHILD ABDUCTION IN THE ANTI HUMAN TRAFFICKING ACT**

The Anti Human trafficking Act was enacted as a reaction to the rise in the number of people being trafficked. The similarity between human trafficking and international child abduction is that both involve the removal of a child from their country of residence to another country. However the difference that exists between the two is the intention for which that child is removed from his country of residence. Child abduction takes place when a parent who has no custody of the child decides to take the child so as become the care giver and have custody which was not granted by them by the court. Child abduction is defined as ‘taking or detaining a child under the age of 16 without lawful authority or reasonable excuse, so as to remove the child from or keep him out of the lawful control of any person having lawful control of the child.’<sup>8</sup> In the case of *Zenetta Nyendwa v Kenneth Spooner*<sup>9</sup> the Appellant in this case had no lawful custody of the children thus decided to remove the children from the person who had lawful custody of them that person being their father the Respondent. Human trafficking is defined as

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<sup>6</sup> A branch the Ministry of Community Development and Mother and Child Health

<sup>7</sup> Crime Statistics for the Child Protection Unit for the year 2011

<sup>8</sup> Oxford Dictionary of Law at pp 86-87

<sup>9</sup> SCZ Judgment No. 20 of 2010

The recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or the use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a positive vulnerability or of giving and receiving payments or benefits to achieve the consent of the person having control over another person for the purposes of exploitation.<sup>10</sup>

From the definitions provided above it is clear that both instances involve the removing of removed a child from his country of residence however the difference that exists is in the intention for which this child was taken out of the country. In cases of child abduction the removal is so as to deny the person with lawful custody, the custody of the child while in cases of trafficking it is for the purposes of exploitation.

‘Traffic’ is defined as ‘to recruit, transport, transfer, labor, receive or obtain a person, within or across the territorial boundaries of Zambia, by means of abduction.’<sup>11</sup> From the wording provided in the Anti Human Trafficking Act it gives a perception that when a child has been abducted for the purposes of trafficking them then the Act can be used to ensure that the child is safely returned to his country or place of residence and the Act can further be used to prosecute the abductor. Section 3 of the Act provides that ‘a person who intentionally and unlawfully traffics another person commits an offence and is liable, upon conviction, to imprisonment for a term of not less than twenty years and not exceeding thirty years’.<sup>12</sup> The Act goes further and states ‘Where the victim of an offence under subsection (1) is a child, the offender is liable to imprisonment for a term of not Less than twenty-five years.’<sup>13</sup> The Act then provides that ‘Where the victim of an offence under subsection (1) is abducted the offender is liable to imprisonment for a term of not less than twenty-five years and not exceeding thirty-five Years’.<sup>14</sup>

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<sup>10</sup> United Nations Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons article 3

<sup>11</sup> The Anti Human Trafficking section 2 Act No. 11 of 2008 the laws of Zambia

<sup>12</sup> The Anti Human Trafficking Act section 3 (1)

<sup>13</sup> The Anti Human Trafficking Act section 3 (2)

<sup>14</sup> The Anti Human Trafficking Act section 3(5)

It can thus be interpreted that in cases of a child being abducted and trafficked then the Act can be used, we then have to analyse what happens when the offender is a parent or guardian of the child. The Act provides that

Where the offender is the natural parent, guardian or any other person who has parental responsibilities and rights in respect of a child and the offender trafficked or permitted the trafficking of the child, the offender is liable to imprisonment for a term of not less than twenty-five years and not exceeding Thirty-five years'.<sup>15</sup>

It can thus be concluded that The Anti Human Trafficking Act, can be used in cases where a parent abducts a child for the purposes of trafficking them the Act provides for the penalty that is to be imposed on any guardian or parent who traffics his/her child.

The Convention on the Civil Aspects of International Child Abduction in its preamble provides that it was enacted to secure the return of children that are abducted across international boundaries however as observed above the Anti Human Trafficking Act<sup>16</sup> provides for instances that would fall under the ambit of international child abduction. Thus it can be concluded that the Anti Human Trafficking Act provides for instances where a child is abducted for the purposes of trafficking them and finally exploiting them by their parent. The parent that has been left behind or that is aggrieved by the decision of the other parent to traffic the child can use the Anti Human Trafficking Act to secure the return of the child and have the other parent prosecuted in accordance with the law. It is clear that there is an absence of any legislation in Zambia that directly deals with matters of international child abduction. The Anti Human Trafficking Act deals specifically with matters where a child is abducted for the purpose of trafficking and not just to gain custody of a child.

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<sup>15</sup> The Anti Human Trafficking Act section 3(7)

<sup>16</sup> Act No.10 of 2008 of Zambia

The Anti Human Trafficking Act is one of the methods that can be used to return or protect the life of a trafficked child section 31 provides that ‘A child who is a victim may be placed in temporary safe care, pending an investigation’.<sup>17</sup>

The Act goes further on to state that the Ministry in charge of social welfare shall not repatriate a child if they are not sure of the safety of the child during repatriation and whether there are suitable care arrangements when the child is returned.<sup>18</sup> The Act provides that there ‘welfare officer shall be assisted by the police or any other person to trace the family of a trafficked person.’<sup>19</sup>

The Act provides that the

Ministry in charge of foreign affairs in corporation with the ministry responsible for social welfare shall assess the risks and safety of a child who is to be returned to Zambia and if the parent or guardian of the child can travel to escort the child at their own expense then the state will facilitate the travel of the guardian to go meet the child and escort the child back to Zambia.<sup>20</sup>

The above quoted sections of the Anti Human Trafficking Act clearly show that the Act is used to protect and secure the return of not only Zambian Children that are trafficked out of the country but also that of the foreign children that are brought to Zambia.

In an effort to secure the return of a trafficked person the Act provides in section 98 that

The President may, on such conditions as the President may determine-  
(a) enter into an agreement with a foreign State that is not a State Party to the Protocol in respect of any matter pertaining to trafficking in persons; and  
(b) enter into an agreement with a foreign State that is a State Party to the Protocol in respect of any matter pertaining to trafficking in person for the

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<sup>17</sup> The Anti Human Trafficking Act section 31 (1)

<sup>18</sup> the Anti Human Trafficking Act Section 36

<sup>19</sup> The Anti Human Trafficking Act Section 45 (1)

<sup>20</sup> The Anti Human Trafficking Act Section 38

purpose of supplementing the provisions of the Protocol or to facilitate the application of the principles contained therein.<sup>21</sup>

The Anti Human Trafficking Act in its preamble states that it is an Act to domesticate the United Nations Optional Protocol to Prevent Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol). The purpose of the Trafficking Protocol is to prevent and combat trafficking in persons, paying particular attention to women and children, protect and assist the victims of such trafficking, with full respect for their human rights; and promote co-operation among States in order to meet those objectives.<sup>22</sup>

With Zambia domesticating the protocol this means that the security and repatriation of persons that are trafficked to Zambia is secured. The Anti Human Trafficking Act grants the president power to enter into an agreement with a state that is not a party to, The United Nations Convention against Transnational Organized Crime and Trafficking Protocol pertaining to any matter that relates to trafficking of a person. This can be taken to mean that if county is not a party to the Trafficking Protocol then the president can enter into an agreement to secure the return of trafficked persons.

The Anti Human Trafficking Act provides for instances where the child is abducted for the purposes of trafficking and as stated above trafficking is for the purposes of exploitation thus cases of parental abductions for the purpose of having custody cannot be dealt with under the Act.

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<sup>21</sup> The Anti Human Trafficking Act Section 98

<sup>22</sup> United Nations Optional Protocol to Prevent Suppress and Punish Trafficking in Persons Especially Women and Children. Article 2

### **3.4 CHILD ABDUCTION IN THE PENAL CODE**

The Penal Code<sup>23</sup> provides for instances of child abduction:

‘Any person who unlawfully takes an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person, is guilty of a misdemeanour’.<sup>24</sup>

However it should be noticed that the Penal code qualifies abduction of a child to be by a person either than the mother or father of the child,<sup>25</sup> the section further narrows the use of the Penal Code because it restricts child abduction to a ‘girl’. This then means that under the said section of the Penal Code a parent who abducts their child cannot be prosecuted under this section as they do not fall within the ambit of the law. This shortcoming of the Penal Code is corrected in section 171 of the Penal Code which states ‘ Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of sixteen years, of the possession of such child’.<sup>26</sup> This means if a parent who does not have the lawful care of that child abducts the child then the parent with the lawful the charge can rely on section 171 of the Penal Code for the abductor to be prosecuted. The Penal Code provides for the prosecution of a person steals a child but a weakness is that it does not provide for how a child who has been removed from the person(s) with lawful custody shall be returned to the country if that child has been removed from the country. The fact that the section provides that it shall be a defence if there is proof that the accused person claims in good faith a right to the possession of the child, or, in the case of an illegitimate child, is its mother or claims to be its father.<sup>27</sup> This

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<sup>23</sup> Chapter 87 of the Laws of Zambia

<sup>24</sup> The Penal Code Chapter 87 of the Laws of Zambia Section 136

<sup>25</sup> Penal Code Section 131 defines a child to be a person below that age of 16 years.

<sup>26</sup> Penal Code Section 171 (1)

<sup>27</sup> Penal Code section 171 (2)

section provides a defence to a mother or father of child; this means that a parent to child can avoid imprisonment.

The shortcoming of the Penal Code is made worse in that if the Zambian Courts were to order that the child be returned because the child was removed wrongfully from the country, the Foreign Judgments(Reciprocal Enforcement) Act<sup>28</sup> prohibits matters of ‘Guardianship of an infant’ to be subject of the Act. Meaning you cannot have a judgment dealing with guardianship of an infant registered in accordance with the Act. However the return of an abducted child can be secured with the help of the International Police (INTERPOL) which will be discussed in the next part of the paper.

### **3.5 RETURNING OF AN ABDUCTED CHILD**

As already mentioned above cases involving child abduction are rarely reported. However this does not mean that there are no such cases reported. The Zambian law does not provide any means for the return of children that are abducted, however this does not mean that there is no process that can be used to ensure that an abducted child is returned. When a child is abducted from a parent in Zambia the parent can report to either the police or as the case is mostly to the Child Protection Unit (CPU) of the Ministry of Community Development and Mother and Child Health. The CPU will carry out investigations as to what led to the child being abducted and if the parent that has filed the complaint is the parent with lawful custody of the child. Once that is established the CPU with help of the Zambia Police will investigate the whereabouts of the child. When the whereabouts of the child have been discovered, the CPU will then report the matter to

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<sup>28</sup> chapter 76 of the Laws of Zambia

the International Police (INTERPOL) branch in Zambia who will then report the matter to Interpol in the country where the Child was been taken. Once the child is located INTERPOL will then communicate to the Zambian branch of INTERPOL that the child has been located, the CPU then organises for the return of the child, this is mostly through the help of organizations like the International Organisation for Migration (IOM) who will facilitate the transportation of the child. Once the child is returned to the country of residence he/she will remain under the custody of the IOM pending further investigations and court proceeding.<sup>29</sup>

### **3.6 CONCLUSION**

Few cases involving child abduction are reported and this has been attributed to the fact that cases that involve family ties are rarely reported as in most cases the parent that had custody of the abducted child does not have intention of reporting a former partner to the police or testifying against them if the case has to be resolved through court proceedings.<sup>30</sup> The Anti Human Trafficking Act does provide for the return of a child that is trafficked by his parent but does not provide for the return of a child is merely abducted not for the purpose of trafficking them and the Penal code does provide for the prosecution of an abductor but does not contain how a child who is removed from the country can be returned. There is need to enact a law that will deal with abducted children and how to have these children returned to their parents. The current trend of only enacting legislation when there is an increase in the type of crime<sup>31</sup> should be done away with, there is need to be proactive instead of reactive to cases. The reason for not having any

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<sup>29</sup> Interview with Mr. kumoyo of Child Protective Unit of Ministry of Community Development and mother and Child Health. CPU offices 17<sup>th</sup> January 2012

<sup>30</sup> Interview with Mr. kumoyo of Child Protective Unit 17<sup>th</sup> January 2012

<sup>31</sup> The Anti Human Trafficking Act and the Gender Based Violence Acts were both reactions to the increase in the number of reported cases involving human trafficking and gender based violence.



legislation dealing exclusively with child abduction has been attributed to the fact that there are very few cases involving child abduction are reported.

The next chapter will discuss how the international Conventions like the Hague Convention on International Child Abduction and The Hague convention on the protection of Children and the Co-operation in Respect of Inter Country Adoptions are used to secure the return of abducted children.

## **CHAPTER FOUR**

### **THE USE OF THE HAGUE CONVENTIONS**

#### **4.0 INTRODUCTION**

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction was introduced to facilitate the return of children that were abducted across international borders. To deter child abduction and forum shopping, The Hague Convention may be invoked to secure the return of abducted children.<sup>1</sup> This chapter will discuss the use of the Convention and the shortfalls of the Convention. The chapter will finally draw a conclusion on the use of the Convention and provide recommendations to improve the operations of the Convention.

#### **4.1 USE OF THE CONVENTION ON INTERNATIONAL CHILD ABDUCTION**

As mentioned in preceding chapters The Hague Convention is only applicable to countries that are a party to it, this means that provisions of the Convention are only used in countries that are a party to it. We will now look into how the convention is applied amongst member states as is provided for in the convention.

In order to understand the Convention it is necessary to look at the objectives that the Convention was aimed at achieving, these objectives include;

- (a) to protect children from the harmful effects of their removal and retention across international boundaries

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<sup>1</sup> Douglas Gillian, *An Introduction to Family Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2004), 137.

(b) To ensure the prompt return of children to their habitual country of residence.<sup>2</sup>

The Hague convention was introduced so as to ensure that children that are abducted are promptly returned, that their rights are protected and that the rights of custody under a contracting state are respected in another contracting state. This entails that in when a child is abducted from a country that is party to the Hague Convention and is taken to a country that is also a party to the Convention, then the provisions of the Convention will be applicable in trying to ensure that the child is returned promptly. The Convention further provides that if a decision is passed by the Courts in a country that is a party to the Convention concerning the guardianship of an infant then that decision should be respected in any other country that is a party to the Convention. The provisions of the Convention are meant to ensure that the rights of the child are respected and that every action concerning the child's guardianship is done in the best interest of the child.

The Convention provides for mechanisms that best ensure that the objectives of the Convention are followed; the implementing body for the Convention policies is the Central Authority of every contracting state.

#### **4.1.1 THE CENTRAL AUTHORITY**

To ensure that the Hague Convention is adhered to, a Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities,<sup>3</sup> the Convention states that Central Authorities shall co-operate with each other and promote co-

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<sup>2</sup> Professor William Duncan, "The Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption" (Conference on International Standards in Adoptions and Abduction, US Embassy Lusaka 12-13<sup>th</sup> April 2011) 5

<sup>3</sup> Hague Convention on Abduction Article 6

operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of the Convention.<sup>4</sup>

When a child has been abducted it is the role of the Central authority to discover the whereabouts of the child,<sup>5</sup> because the Hague Convention is only applicable to contracting states this is easier done when the child has been taken to a country that is a party to the Convention however if the child is taken to a country that is not a party to the Convention then the authority in that country is not obligated to help discover the whereabouts of the child whilst if the child is taken to a country that is a party to the Convention then the Central Authority in that state shall assist in discovering the whereabouts of the child. This shows an advantage that arises from being a party to the Convention as the Central Authority of a contracting state can be assisted in discovering the location of the child by the Central Authority of the state where the child is abducted to.

When the whereabouts of the child have been discovered then it is the duty of the Central Authority in the state where the child has been abducted to, to prevent further harm to the child or prejudice to interested parties<sup>6</sup> this is done by taking or causing to be taken provisional measures. The Central Authority needs to try and secure the voluntary return of the child or to bring about an amicable resolution of the issues that have led to the child being abducted.<sup>7</sup>

#### **4.1.2. RETURNING OF ABDUCTED CHILDREN UNDER THE CONVENTION**

The final and maybe most important goal the Convention is supposed to achieve is the return of the abducted child to his habitual residence. Any person, institution or other body claiming that a

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<sup>4</sup> Hague convention on Abduction Article 7

<sup>5</sup> Hague convention on Abduction Article 7(a)

<sup>6</sup> Hague convention on Abduction Article 7(b)

<sup>7</sup> Hague convention on Abduction Article 7(c)

child has been removed or retained in breach of custody rights is not restricted to only applying to the Central Authority of the child's habitual residence but can also apply or to the Central Authority of any other Contracting State for assistance in securing the return of the child.<sup>8</sup> In not restricting a person to only applying for help from the Central Authority of the Country of origin of the person applying, this allows for a quick and effective response especially where the Central Authority in the country of origin is unable at that time to help in the location of the child. The applicant can seek help from the Central Authority of any other member state that is in a position to offer effective help.

The Convention contains requirements that must be contained in the application letter<sup>9</sup> made by the applicant seeking the return of a child. When the Central Authority receives the application and conducts its investigations and believes that the child is in another contracting state then it shall without delay transmit the application to the Central Authority of that Contracting State.<sup>10</sup>

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.<sup>11</sup> The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the

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<sup>8</sup> Hague convention on Abduction Article 8

<sup>9</sup> Hague convention on Abduction Article 8 which states that The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child; b) where available, the date of birth of the child; c) the grounds on which the applicant's claim for return of the child is based; d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be. The application may be accompanied or supplemented by – e) an authenticated copy of any relevant decision or agreement; f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State; g) any other relevant document.

<sup>10</sup> Hague convention on Abduction Article 9

<sup>11</sup> Hague convention on Abduction Article 10

requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.<sup>12</sup>

It is through the provisions of the Convention that the Judicial or administrative authorities of Contracting States have to act expeditiously in proceedings involving the return of an abducted child further article 11 of the Convention provides that a decision should be reached within six weeks from the date of commencement this is also an element that was placed in the Convention to ensure that state parties act expeditiously to protect the rights of a child. The failure of the judicial or administrative authority in a contracting state to reach a decision within six weeks gives rise for the other contracting state to ask for a statement as to what is causing the delay.

However it should be realised that the Convention also empowers the judicial or administrative authority to deny the return of a child in certain circumstances and these include; if the person, institution or other body which opposes its return establishes that –

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>13</sup>

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.<sup>14</sup>

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<sup>12</sup> Hague convention on Abduction Article 11

<sup>13</sup> Hague convention on Abduction Article 13

<sup>14</sup> Hague convention on Abduction Article 13

It is the function of the judicial and administrative authorities in the country where the application has been made to, to determine whether there has been wrongful removal or retention of the child, they also have the power to request from the country of the habitual residence of the child an order verifying that the child was wrongfully removed from his country of habitual residence.<sup>15</sup> It is argued that it may be necessary for the country that has received the application to firstly request from the country of the child's habitual residence an order stating that the rights of custody concerning the child have been violated and that the applicant is the person(s) with the legal custody of the child, this would lessen instances where the child is returned to a person that does not have legal custody of the child.

Notably contained in article 13 of the Convention is that if the guardian to the infant had actually consented or acquiesced to the removal of the child from his/her country of residence then that is one of the reasons that the judicial or administrative authority in the country requested to return the child can use as a reason for not returning the child. Then this means that in instances that involve a parent obtaining the consent of the other parent in the case of an adoption then that parent that has been left behind cannot rely on the Hague Convention on International Child Abduction to secure the return of the child if both the country of residence of the child and the country to which the child is taken to, are both members states to the Convention. Similarly the Convention cannot be used in cases where the biological parents of the child agree to have their child adopted by an adopter that lives abroad as they would be deemed to have consented to the child being removed out of the country. This would be regardless of whether the adoption was secured by fraud, this weakness in the Convention raises the need to have another method of returning a child whose adoption is secured by fraud thus the need of The Hague Convention on

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<sup>15</sup> Hague convention on Abduction Article 14 and 15

Protection of Children and Co-operation in Respect of Inter country Adoption in securing the return of children removed from their country of residence through Inter country Adoptions.

#### **4.2 THE HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTER COUNTRY ADOPTION IN SECURING THE RETURN OF CHILDREN ADOPTED THROUGH FRAUD AND ABDUCTION**

As mentioned in the preceding chapter The Hague Convention on the Protection of Children and Co-Operation In Respect Of Inter Country Adoption, was enacted by member states because they saw the necessity to take measures to ensure that inter country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children. To ensure that the rights of the child are respected the Convention provides in article 21 that

Where the adoption is to take place after the transfer of the child to the receiving State and it appears to the Central Authority of that State that the continued placement of the child with the prospective adoptive parents is not in the child's best interests, such Central Authority shall take the measures necessary to protect the child, in particular -

- a) to cause the child to be withdrawn from the prospective adoptive parents and to arrange temporary care;
- b) in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption or, if this is not appropriate, to arrange alternative long-term care; an adoption shall not take place until the Central Authority of the State of origin has been duly informed concerning the new prospective adoptive parents;
- c) as a last resort, to arrange the return of the child, if his or her interests so require.

(2) Having regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken under this Article.

This provision is necessary because in an instance where a child's adoption is secured by abduction and the parents of the child had consented to the child being taken outside the country



and since the Convention on Child abduction does not permit to have a child returned if his guardian had consented to the child being removed from the country.<sup>16</sup> The Convention on inter country adoption will be the most likely and the international instrument that will ensure that the child is returned and take into account the needs of the child.

#### **4.3 MERITS OF THE CONVENTION ON ABDUCTION**

The Convention contains a number of articles that ensure that the rights of custody of the child are respected and the prompt return of an abducted child. Amongst these are: firstly the Convention provides that there should be established a body that is tasked with the duty of discharging the duties that are imposed by the Convention. Having a separate body that deals with the implementation of the duties imposed by the Convention is important because the body will be used as a means of ensuring that a state party implements its duties and sets up the necessary safeguards to protect and prevent instances of child abduction.

The creation of a Central Authority is also necessary in that it ensures that matters dealing with child abduction are expediently dealt with and that an aggrieved parent does not have to use the normal court procedure which would at times take long to finally get an order from the courts.<sup>17</sup>

The Central authority is the party that sends the request to another state this is vital because in many instances an aggrieved person would not know how to contact the authorities in the country where they believe that their child has been abducted to and the parent is at times incapable of carrying out the investigations as to the whereabouts of the child. The Central

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<sup>16</sup> Article 13 of the Hague Convention on abduction.

<sup>17</sup> Court proceedings take a long time to be finalised

Authority will carry out all the investigations thus helping a parent who would not have been able to do so, on their own.

Allowing an applicant to apply to the Central Authority of any other state party can be viewed to be very essential, this is because there may be instances where the Central authority of a country that is not the home state of the applicant has better access to the country where it is believed that the child was taken to. This provision is also essential in that in instances where the Central Authority in the home state is unable to carry out its functions the applicant will not be left without any other avenue for seeking assistance.

The Convention emphasizes the need for the expedient return of an abducted child, this is contained in various articles of the Convention this goes to show that the major concern of the Convention is the prompt return of abducted children.

In ensuring further that the best interest of the child is of paramount consideration the Convention provides that

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.<sup>18</sup>

This provision ensures that in every decision that is made in the best interest of the child and allowing the state that has been requested to return the child to consider the information they have received from the child's habitual residence ensures that the decision that will be made is in the best interest of the child.

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<sup>18</sup> Hague Convention on Abduction Article 13

The Convention also goes on to provide the judicial and administrative authorities in the contracting state have an option not to have the child returned to his country of residence if

The person, institution or other body which opposes its return establishes that- the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>19</sup>

This provision gives the judicial and administrative authorities the right to deny the return of an abducted child if it is established any grounds provided for in article 13 of the Convention are present. This shows that the fact that an applicant applies to have the child returned using the provisions of the Convention does not automatically mean that the child will be returned.

#### **4.4 SHORT FALLS OF THE CONVENTION**

The Hague Convention only provides for instances where the child is taken away from the parent with custody but does not cater for an instances where one parent has the right of access and the other has the custody rights. If the parent with the custody rights leaves the country with the child thereby denying the parent with rights to access of his rights then the parent whose rights have been infringed cannot seek redress using the Hague Convention.

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<sup>19</sup> Hague Convention on Abduction Article 13

In the case of *Croll v. Croll*<sup>20</sup> a custody order issued by a Hong Kong court granted custody of the child to the mother and gave the father a right of “reasonable access.” Contained in the order was a clause stating that the mother could not leave the country with the child before obtaining leave of the court. The mother ignored the order and travelled with the child to the United States of America (USA). The father filed a petition in the USA under the Child Abduction Convention for return of the child to Hong Kong.

Because only a violation of “custody rights” (and no “rights of access” alone) is sufficient to trigger the return remedy under the Child Abduction Convention, the issue facing the court was whether a non-custodial parent’s right of access conferred “custody rights” within the meaning of the Child Abduction Convention. On appeal from the decision of the district court, Second Circuit reversed the decision to have the child returned. In looking to both Webster’s Third and Black’s Law Dictionaries as the source for a definition of “custody rights,” the Second Circuit majority overlooked the Child Abduction Convention’s quite self-conscious goal of creating an autonomous treaty definition for “custody rights”<sup>21</sup> consistent with the structure and objectives of the Child Abduction Convention.<sup>22</sup>

Another short fall that the Convention has is contained in Article 13(b) of the Child Abduction Convention provides for a defence to return when there is “grave risk” that return would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” This defence it is argued by some writers<sup>23</sup> seems to be against the male folk as in most instances the women leave with the child for fear of abuse which is at times aimed at them

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<sup>20</sup> 229 F.3d 133 (2d Cir. 2000)

<sup>21</sup> Article 3 of the Child Abduction Convention defines a wrongful removal or retention as a “breach of rights of custody” under the law of the state in which the child was habitually resident immediately before the removal or retention. Article 5 then defines “rights of custody” as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence”

<sup>22</sup> Linda Silberman NYU *Journal of International Law and Politics* Annual Symposium, *Celebrating Twenty Years: The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, The Hague Child Abduction Convention Turns Twenty: Gender Politics And Other Issues available at <http://www.hcch.net> cite (accessed on the 9<sup>th</sup> March 2012)

<sup>23</sup> <sup>23</sup> Linda Silberman <http://www.hcch.net> cite (accessed on the 9<sup>th</sup> March 2012)

and not the child. However, in an effort to ensure that the defence is not wrongly used it has been suggested that the defence be construed narrowly both substantively and procedurally. In *Friedrich v. Friedrich*,<sup>24</sup> the United States Court of Appeals for the Sixth Circuit captured the essence of the inquiry that should be made by a court faced with an Article 13(b) defense on a return application:

We believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute—*e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.<sup>25</sup>

The court suggested that whatever the nature of the harm, the child should be returned so long as there is assurance that the courts in the country of habitual residence are in a position to assess the merits of the harm posed to the child and to protect the child if necessary. One method of providing that protection is to include undertakings and/or mirror safe harbor orders to ensure the return of the child to a protective environment while the allegations are assessed in the state of habitual residence.<sup>26</sup>

This weakness is brought about by the idea that existed when the Convention was enacted, that in most instances it is the mother that would receive custody of the child and the father would merely have access rights.

The number of countries that are members to the Convention is another shortfall. This is because the Convention is only applicable to countries that are party to the Convention.

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<sup>24</sup> 78 F.3d 1060 (6th Cir. 1996).

<sup>25</sup> 78 F.3d 1060 (6th Cir. 1996).

<sup>26</sup> Linda Silberman Twenty: Gender Politics And Other Issues available at <http://www.hcch.net> cite accessed on the 9<sup>th</sup> March 2012

#### **4.5 CONCLUSION AND RECOMMENDATIONS**

The Convention on Abduction protects children that have been removed from their country of residence this is done by implementing the articles contained in the Convention. The Convention provides that is important for a child that has been abducted to be returned promptly so as not to cause the child any psychological damage this is implemented by the various articles that provide for the Central Authority to act expediently in determining whether to return the child and in enforcing the actual return of the child. To ensure that the Convention is not abused, it contains articles that state that just because an applicant claims to be the guardian the Central Authority in the country that has been requested to return the child is not mandated to return the child without considering the child's best interest and inquiring from the Central Authority of the habitual residence of the child the laws that relate to the guardianship of the child.

The Convention however needs to be amended because, Convention should not only provide for redress for persons whose custody rights have been violated but should also protect the rights of access that a parent has. The denial of one parent's right of access to the child can equally affect the child just much as if the parent with custody were to be denied that right. It is important for the Convention to protect both the rights of access and rights of custody.

It is recommended that the Convention provides for an interpretation of section 13 (1) (b) so as to ensure that the provision is not to be abused. The Special Commission recommended that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) *b*) but not limited to, allegations of domestic and family violence.

There is need for the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) *b*)), including allegations of domestic violence, are an exclusive matter for

the authority competent to decide on the return, having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child.<sup>27</sup>

In an effort to ensure that the membership to the Hague Convention on Child Abduction is increased it is recommended that the Permanent Bureau should:

- (a) Focus on the promotion, implementation and effective practical operation of the 1980 and 1996 Conventions;
- (b) Encourage regional activities including conferences, seminars and training;
- (c) Where requests for assistance are received from individuals, provide general information concerning the relevant competent authority(ies).<sup>28</sup>

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<sup>27</sup> Special Commission on the practical operation of the 1980 and 1996 Hague Conventions *Conclusions and Recommendations* under <http://www.hcch.net/inter> abduction guide conclusion . (accessed on 4<sup>th</sup> February 2012)

<sup>28</sup> Special Commission on the practical operation of the 1980 and 1996 Hague Conventions *Conclusions and Recommendations* under <http://www.hcch.net/inter> abduction guide conclusion . (accessed on 4<sup>th</sup> February 2012)

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.0 INTRODUCTION**

Having discussed the laws that are used in Zambia to secure the return of an abducted child, the use of the Hague Conventions on Child Abduction and Inter country Adoptions and how the two Conventions operate. This chapter will discuss the recommendations that can be made to ensure that the rights of children are adequately realised and respected and finally the chapter will answer the question of whether Zambia should consider being a party to the Conventions.

#### **5.1 GENERAL CONCLUSIONS**

The Anti Human trafficking Act would seem to be the most secure method of using to secure the return of abducted children. However, as mentioned in preceding chapters the weakness that the use of this Act carries is that of the difference in the intention between abduction and a case of trafficking.

The Anti Human trafficking Act can only be used to secure the return of a child that has been abducted for the purpose of being trafficked and not because the parent without custody wanted to have custody of the child.



The Penal Code<sup>1</sup> in section 171<sup>2</sup> provides the most suitable and comprehensive method of prosecuting a person who is suspected of child stealing.

The Penal Code provides for the prosecution of a person that steals a child but a weakness is that it does not provide for how a child who has been removed from the person(s) with lawful custody shall be returned to the country if that child has been removed from the country. The fact that the section provides that it shall be a defence if there is prove that the accused person claimed in good faith a right to the possession of the child, or, in the case of an illegitimate child, is its mother or claimed to be its father.<sup>3</sup>

The shortcoming of the Penal Code is made worse in that if the Zambian Courts were to order that the child be returned because the child was removed wrongfully from the country, the Foreign Judgments Act<sup>4</sup> chapter 76 of the Laws of Zambia prohibits matters of 'Guardianship of an infant' to be subject of the Act.

The adoption process is viewed as one of the procedures that may lead to a child getting abducted especially in instances of inter country adoptions. The Adoption Act of Zambia provides for inter country adoption however this Act fails to provide the needed safeguards to protect against abuse of the Act. The Act provides that it shall be unlawful for any person in connection with any arrangements made for the adoption of an infant who is resident in Zambia to permit or procure the care and possession of the infant to be transferred to any person who is

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<sup>1</sup> Chapter 87 of the Laws of Zambia

<sup>2</sup> that any person who with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of sixteen years, of the possession of such child, is guilty of a felony and is liable to imprisonment for fourteen years

<sup>3</sup> Penal Code section 171 (2)

<sup>4</sup> chapter 76 of the Laws of Zambia

not the guardian or a relative of the infant and who is resident abroad.<sup>5</sup> The Act states that any person who transferred abroad shall makes arrangements or procures or permits the adoption of an infant who is resident in Zambia to be guilty of an offence and the court by which such person is convicted may order any infant in respect of whom the offence was committed to be returned to his parents or guardian.<sup>6</sup>

The Adoption Act like the Penal code also provides that the court shall order that the child be returned to his/her child parents. However both Acts do not specify which law or instrument can be used to secure the return of a child that has been taken outside the country.

The Convention on International Child Abduction protects children that have removed from their country of residence this is done by implementing the articles contained in the Convention. The Convention provides that it is important for a child that has been abducted to be returned promptly so as not to cause the child any psychological damage. This is implemented by the various articles that provide for. The Convention provides that the Central Authority to act expediently in determining whether to return the child and in enforcing the actual return of the child.

The Convention on International Child Abduction that if the guardian to the infant had actually consented or acquiesced to the removal of the child from his/her country of residence then that is one of the reasons that the judicial or administrative authority in the country requested to return the child can use as a reason for not returning the child. Then this means that in instances that involve a parent obtaining the consent of the other parent in the case of an adoption then that parent that has been left behind cannot rely on the Hague Convention on International Child

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<sup>5</sup> Adoption Act section 32 (1)

<sup>6</sup>Adoption Act section 32 (2). The section being made reference to is the section 32 (1) of the same Act

Abduction to secure the return of the child if both the country of residence of the child and the country to which the child is taken to, are both members states to the Convention. Similarly the Convention cannot be used in cases where the biological parents of the child agree to have their child adopted by an adopter that lives abroad as they would be deemed to have consented to the child being removed out of the country. In this instance the best alternative to have the child returned is The Hague Convention on Protection of Children and Co-operation in Respect of Inter country Adoption.

## **5.2 RECOMMENDATIONS**

The Convention on Child Abduction however needs to be amended because at the time the Convention was enacted there was a perceived belief of who were most likely to violate the custody rights of the child. It can also be argued that the Convention should not only provide for redress for persons whose custody rights have been violated but should also protect the rights of access that a parent has. The denial of one parent's right of access to the child can equally affect the child just much as if the parent with custody were to be denied that right. It is important for the Convention to protect both the rights of access and rights of custody.<sup>7</sup>

Zambia should consider being a party to the Conventions to ensure that the children that are taken outside the country either through adoptions or abductions are returned to the country or there is need for the Adoption Act and the Penal Code to specify exactly how children that are adopted wrongly or stolen should be returned to the country.

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<sup>7</sup> Linda Silberman NYU *Journal of International Law and Politics* Annual Symposium, *Celebrating Twenty Years: The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, The Hague Child Abduction Convention Turns Twenty: Gender Politics And Other Issues available at <http://www.hcch.net> cite accessed on the 9<sup>th</sup> March 2012

The Registration of Foreign Judgments Act was enacted at a time when cases of intermarriages were not so common and thus matters involving custody of a child where the child parents are of different nationalities was not considered to be of high concern. However in these times when such cases are highly prevalent there is need for the Act to be amended so as to provide for judgments involving guardianship of an infant to be registered in Zambia and that such cases should be considered as qualifying to be registered even in the absence of a reciprocity statutory instrument.

### **5.3 CONCLUSION**

Zambia should consider being a party to the Hague Conventions on Inter country adoptions and on International Child abduction so as to ensure that the rights of children that are removed from the country are protected and that in instances of abduction the child is promptly returned to his country of residence. In the alternative Zambia should also consider amending The Foreign Judgments Act to permit the registration of judgments involving the guardianship of infants to be registered in Zambia and vice versa without having the need of reciprocity Statutory Instrument.

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