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Amongst the many horrifying psychological effects of being removed from one's home is the sheer trauma of being placed in an alien environment. Thousands of child abduction cases every year are ones in which children are taken across international borders: trafficked or simply abducted by a bereaved parent. International child abduction was recognised by the United Nations as a global threat to the safety and wellbeing of all children in 1980, with the adoption of The Hague Convention on the Civil Aspects of International Abduction by more than 90 nations. [1]

For the past 20 years the convention has served as an invaluable road map for the return of abducted children, but as child abduction numbers continue to rise its flaws become all the more glaring. For one, the convention is limited only contracting parties, severely limiting its application to the near hundred members of the UN who have chosen not to ratify it. Secondly, The Hague Convention is not an extradition treaty[2]. It does not deem the abduction a criminal act, solely a civil one, and provides the necessary mechanisms for returning an abducted child. unlike an extradition treaty which requires the fugitive to be returned to the home country within a certain period of time, the convention does not concern itself with the imprisonment of the abductor, if deemed a fugitive. As a result, while the objectives of the convention remain clearly delineated, its reach remains severely limited.

The Hague convention's inability to function as a truly international mechanism highlights the main problem behind all UN framework on abducted children: there is no universal standard or requirement for nations to fulfil. The original convention on civil aspects of child abduction recommends only the creation of a national central authority to deal with the return of abducted children. Perhaps this provision comes out of respect for the sovereignty of nations, in any case nations choose to exercise their sovereignty through their jurisdiction and by extension through their central authority. Kathryn Selleck, writing on the subject of international jurisdiction for kidnappers, writes "the arrest of a citizen of one state on the territory of another violates the tenet that nations may not exercise acts of sovereignty over the territories of others."[3] Since The Hague convention does not act as an extradition treaty, states from which children have been removed have no authority to bring back the abductor or the child; in doing so they would risk violating the sovereignty of that nation to which the child has been taken. The question of jurisdiction therefore becomes an important one.

In examining the subject of missing children as a violation of the fundamental right of every child, and thus a violation of human rights, the case could be made for international jurisdiction over child abductions that are intentioned to place children in a dangerous and degrading environment. The International Labour Organisation estimates that almost 5.5 million children are trafficked worldwide every year.[4] Designating international jurisdiction over the violation of fundamental rights of the child would eliminate questions of sovereignty and territorial jurisdiction; nations would be empowered to take any enforcement action on any territory to capture and penalise abductors and traffickers. The problem with this approach is that there is no unambiguous list of crimes that do qualify for international jurisdiction, in fact the UN has at multiple times in the past, deemed this concept of too large a scope[5].

While the convention itself is not an extradition treaty, it does not impair the application of one in complement. Essentially if a nation chooses to do so, it is well within its rights in extraditing an abduct deemed fugitive by the nations law provided an extradition treaty between the two nations exists.

The convention must be lauded for establishing such a mechanism, there is still one major problem with this approach. In the current mechanism of the Hague convention on the civil aspects of

international child abduction, the judicial authority of the requested state (the state which has been requested to return the child) is not required to return the child if it deems that the requesting party did not have custody rights at the time of the child's removal or if the return of the child to its habitual residence would place it in grave danger.[6] Thus the convention puts the onus of adjudicating whether the child has been unlawfully removed on the courts of the country to which the child has been taken. In doing so, it fails to account for cultural differences between nations. Since the convention itself offers no unambiguous international standard for custodial rights or 'best interests' of the child, this decision is left to the national courts of the country.

Writing for the Journal on family law, Dr Rhona Schuz explains this mismatch with an example- "in the case of *Malinger & Shirak v. Switzerland* the majority judges rejected the mother's claim that the Swiss return order violated her rights under the European Convention on Human Rights. She had claimed her rights were violated because the father now belonged to an Ultra- Orthodox Hassidic group, which she described as fanatical, and because she would not be able to prevent the father from imposing on the son a radical religious lifestyle. The mother did not invoke Article 20 directly and her allegations were not aimed directly at the Israeli court system. However, her claim that there was no guaranteed legal action against the influence of the child's father and the movement to which he belongs clearly implies that the Israeli court system would not protect her right to have a say in relation to the education of her child. Moreover, one of the dissenting judges not only accepted the mother's claims, but took them a step further. Justice Steiner of Austria described the majority's rejection of the mother's claim that she would not be able to exercise any influence over the religious upbringing of the son as "theoretical optimism." The reason given by Justice Steiner for this view is that, in the Israeli legal system, matters of personal status is only justiciable before religious courts which apply traditional religious rules "sometimes significantly different from those with which are familiar with [sic] in Europe." This assertion is patently unfounded and demonstrates complete ignorance as to the nature of the Israeli legal system and of the facts in this particular case. It was the secular Family Court which had jurisdiction over all matters relating to the upbringing of the child in this case. Furthermore, this court had already shown its willingness to protect the mother and the child by issuing an injunction forbidding the father from entering the mother's apartment or the child's school and providing for supervised visitation, which had been complied with by the father" [7].

Dr Schuz uses this example primarily to note the importance of understanding cultural norms while adjudicating on matters like custody which are affected by variations of personal and family law in certain nations. She also identifies two major cases where differing cultural and religious norms may become relevant to international abduction. "The first category involves situations where the law in the country origin in relation to custody of children is based on religious law or cultural norms and conceptions which are not consistent with basic human rights or with the principle of the welfare of the child as understood in the country of refuge"[8]. She does go on to note that this is rarely the case since most nations who have ratified The Hague convention are western nations and do not follow a different form of religious personal law[9]. The most problematic of these cases are generally characterised by the courts of the state of origin following a different set of principles that may be inconsistent with international norms in their own proceedings, thus placing the state in conflict with The Hague convention.

The second category, writes Dr Schuz, involves situations where the parents belong to different religious or cultural communities, and the abducting parent claims that a return to the lifestyle of the left-behind parent will cause harm to the child or in some other way violates his own or the child's rights[10] This case is far more common and in its own ways equally problematic. Especially when mixed marriages happen between religions whose personal code or law clearly ascribes some

sort of preference to the parent of that religion. In Islamic countries that follow Sharia Law, for example, many scholars continue to believe that the prerequisite for raising a Muslim child Is being a Muslim[11]. Whenever such preference is given to one of the parents, it becomes difficult to determine where the best interests of the child lie. Furthermore, in the case of marriages between citizens of Hague contracting countries and non-hague convention countries, the state may not be obliged to abide by the international norm at all. Sharia Law dictates that custody of a child always goes to a woman of the family before passing to the father i.e. if the mother is unfit, custody is given to the grandmother, to the aunts or to nieces before passing to the father of the child. At the same time, this custody is extremely conditional, a Muslim woman loses custody of her child if she remarries at all[12]. From an international perspective this appears to be a violation of the mother's right to freedom, after all, whether a woman remarries should not curtail her ability to see her child. Yet, Islamic scholars have repeatedly justified such customs by claiming that they appear foremost in a cultural context and are acceptable to the Muslim community, the community to which they apply. This could be a possible explanation for why Islamic nations, especially those in the Middle East and North Africa region refuse to ratify the convention. (till date, Israel remains the only nation in the Middle east to have ratified The Hague convention. Whilst Iran and Saudi Arabia have their own central authority for child abductions (as the convention demands) they are yet to join the convention itself.

One explanation of custody under Sharia Law could be given as this: "Under Islamic law, the mother is normally drawn from the mother's female relatives. Depending on the school of Islam, the temporal period of custody may run as short as two years of age for boys, or as long as up to the age of marriage for girls. Guardianship of education and property are exclusively the domain of the father or other male relatives. In order to be awarded custody, the parent must show that they are mentally able to care for the child as well as capable of "safeguarding the child's interest".[13]

Herein lies the fundamental problem: there is no unambiguous, universally recognised definition of the child's 'best interests'. Different cultures prioritise different needs of the child: in Sharia, 'best interest' happens to be based on religious dictates that represent some natural bias against non-Muslim parents.

Can these national religious norms coexist with internationally agreed upon principles in an increasingly transboundary world? How should participation in The Hague convention be increased while remaining sensitive to differing cultural norms? These are all questions the SOCHUM has to address as a body. As delegates strive to address criticism of the Hague's international utility, they must take into account instances that deter nations from joining the convention at all. For example, India recently decided to reconsider its position on the convention after refusing to ratify it because it would penalise women fleeing danger and abusive marriages[14]. This is a fair point, the original convention itself also provides for consideration of the reasons of the removal of the child from its habitual residence.

Cultural differences, however, are not entirely bypassed by nations; Belgium, Canada and the United States are among many that have turned to bilateral treaties as a method of recourse.[15] These treaties typically establish common principles, and then set up joint consulates and communication channels to streamline the process of returning the child to the custodial parent[16]. Though obviously not universal, encouraging such treaties and agreements presents a promising solution to the by and large alienation of middle eastern nations from the global discussion on child abduction.[17]

As an extension of this principle, Ericka A. Schnitzler-Reese, in the North-western Law Journal, recommends the creation of an International Family Court, a global forum based on the UN Convention on the rights of the child that adjudicates matters on the return of child from all nations,

Hague contracting or non-contracting[18]. She also recognises the need for such a forum to be inclusive and tolerant of all cultural and religious norms saying "Such a court would have to be structured so as to respect and value the perspectives of all cultures and legal systems, which would be no small task."[19] Should the SOCHUM choose to recommend such a body, it must also answer basic questions about its framework, transparency and accountability, make up and jurisdiction. If this court is established with complete international jurisdiction, it may be accused of infringing on national jurisdiction and the territorial jurisdiction of all nations (a founding principle of the UN). On the other hand, were this court limited to adjudicating solely on nations that had ratified The Hague convention, its utility would be severely limited, as it would fail to fulfil the essential task of universalizing important terms like "best interest". Thus, as delegates try to address this topic, they must keep in mind certain reasons responsible for the systemic failure of the current global mechanism on returning missing children.

ENDNOTES

[1] "Members." Hague Convention on Private International Law.

[2] The Hague Convention on civil aspects of international abduction of children- Legal Analysis; Office of Children's issues, Central Authority of the United States of America

[3] Kathryn Selleck, Jurisdiction after International Kidnapping : A comparative study, 8B.C. Int'l & Comp.L Rev. 237 (1985). http:/ /lawdigitalcommons.bc.edu/iclr/vol8/iss1/9

[4] International Labour Organisation; Trafficking in person's report

[5] The scope and application of the principle of universal jurisdiction (Agenda item 84), The General Assembly Sixth Committee: Legal

[6] Article 13; convention on the civil aspects of international child abduction

[7] Schuz, Rhona. "The relevance of religious law and cultural considerations in International child abduction disputes." *Journal of Law and Family Studies* (2010). Document.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ericka A. Schnitzler-Reese, International Child Abduction to non-Hague Convention Countries: The need for an International Family Court,
2 Nw. J. Int'l Hum. Rats. 1 (2004).
http://scholarlycommons.law.northwestern.edu/njihr/vol2/iss1/7

[12] Ibid.

[13] Ibid.

[14] Nair, Shalini “India will not ink Hague treaty on civil aspects of child abduction” *The Indian Express*

[15] Non-Hague Convention child abductions - bilateral agreements

[16] Agreement Between the Government Of Australia And The Government Of The Arab Republic Of Egypt Regarding Cooperation On Protecting The Welfare Of Children

[17] Ericka A. Schnitzler-Reese, International Child Abduction to non-Hague Convention Countries: The need for an International Family Court, 2 Nw. J. Int'l Hum. Rats. 1 (2004). http://scholarlycommons.law.northwestern.edu/njihr/vol2/iss1/7

[18] Ibid.

[19] Ibid.