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## ZIMBABWE

## HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

**Introduction**

The Convention on the Civil Aspects of International Child Abduction of October 25, 1980,<sup>1</sup> emanated from the Final Act of the 14<sup>th</sup> Session of the Hague Conference on Private International Law. The draft Convention from this Conference was then submitted to governments of participating countries for accession and adoption. It was modeled on the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and Restoration of Custody of Children of 1980.<sup>2</sup>

Zimbabwe was member of this Hague Conference. At the time of the Conference, Zimbabwe was just emerging from a neo-colonial status then known as Rhodesia and later, Zimbabwe Rhodesia. To turn the country from minority white rule to independence, a Constitutional Conference held at Lancaster House in London from September to December 1979, ushered in the new independent Republic of Zimbabwe.<sup>3</sup> In order to render the Convention applicable to Zimbabwe, the President of the country on May 24, 1996, declared that consistent with article 2 of the Convention on contracting states, the Child Abduction Act, 1995, to which the Convention was attached as an integral part of this law would become effective as the law of Zimbabwe on June 1, 1996.<sup>4</sup> On August 2, 1996<sup>5</sup> and June 6, 1997,<sup>6</sup> respectively, Zimbabwe published a list of countries which it considers its contracting partners with respect to the Convention. These include the following: United States, United Kingdom of Great Britain and Northern Ireland, Luxembourg, Netherlands, New Zealand, Mexico, Australia, Chile, Cyprus, Ireland, Norway, Argentina, Germany, Italy, Switzerland, and Spain.

**I. Domestic Laws and Regulations Implementing the Hague Convention**

Zimbabwean implemented the Hague Convention on the Civil Aspects of International Child Abduction through the Child Abduction Act, No. 12 of 1995.<sup>7</sup> This law became operative on June 1, 1996.<sup>8</sup> The Child Abduction Act is a short piece of legislation of 13 sections with a long schedule or annex, which is the text of the Convention. The Act is enabling legislation, and hence, the Convention can be, and currently is, enforced as an integral part of Zimbabwean national law. In Zimbabwe, therefore, national law is the Convention itself.

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<sup>1</sup> 19 I.L.M. 1501-1505 (July-Nov, 1980).

<sup>2</sup> *Id.* at 273.

<sup>3</sup> *Id.* at 387-408.

<sup>4</sup> *Infra* notes 7 & 8.

<sup>5</sup> Stat. Ins. 154, 1996. *Supp. to the Zimbabwean Gazette* of Aug. 2, 1996 at 869-870.

<sup>6</sup> Stat. Ins. 127, 1997. *Supp. to the Zimbabwean Gazette* of June 6, 1997 at 863.

<sup>7</sup> 1 Stat. L. of Zimbabwe, Ch. 5:05 (rev. 1996).

<sup>8</sup> Stat. Ins. 80, 1996, *Supp. to the Zimbabwean Gazette* of May 24, 1996 at 525.

The Convention requires that a Central Authority handle matters relating to this instrument. This role in Zimbabwe is performed by the Secretary in the Ministry of Justice, Legal, and Parliamentary Affairs according to section 2 of the Child Abduction Act. However, the President of the country enjoys discretionary powers to designate any other ministry of the government to fulfill this role.

## **II. Domestic Laws Regarding Child Abduction and Parental Visitation**

### **A. Child Abduction**

Section 10 of the Child Abduction Act requires that the High Court may declare that the removal of any child from or his retention outside Zimbabwe was wrongful within the meaning of article 3 of the Convention on an application for the purposes of article 15 of the Convention by any person who appears to the court to have an interest in the matter.

### **B. Parental Visitation**

The Children's Protection and Adoption Act, 1972 as amended,<sup>9</sup> the Guardianship of Minors Act as amended,<sup>10</sup> and the Matrimonial Causes Act, 1986 as amended,<sup>11</sup> are relevant to article 16 of the Convention. This article gives priority to decisions relating to the return of a child over decisions concerning child custody. According to section 11 of the Child Abduction Act, 1996, the reference in article 16 of the Convention to decide on the merits of the rights of custody means issuing, altering, or evoking appropriate orders for the custody of the child in terms of the three above-mentioned pieces of legislation.

## **III. Court System and Structure – Courts Handling the Hague Convention**

The primary court for matters arising under the Convention is the High Court of Zimbabwe. The High Court enjoys jurisdiction to deal with applications and other proceedings with respect to the Convention, consistent with section 6 of the Child Abduction Act. According to section 9 of the Child Abduction Act, the Court is also vested with the power to issue interim directions and other temporary orders to secure the welfare of the child or to prevent changes pertinent to the determination of issues involved in the case.

The High Court of Zimbabwe used to sit in two divisions, the Appellate Division and the General Division.<sup>12</sup> On August 28, 1981, the Appellate Division was named the Supreme Court of Zimbabwe, and the General Division was reconstituted as the High Court of Zimbabwe, as required by the High Court Act of the same date.<sup>13</sup> Currently, the Supreme Court is organized under the Supreme Court Act, also of

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<sup>9</sup> 1 Stat. L. of Zimbabwe, Ch.5:06, 223-247 (rev. 1996).

<sup>10</sup> *Id.* ch.5:08, 253-256 (1996).

<sup>11</sup> *Id.* ch.5:13, 277-280 (rev. 1996).

<sup>12</sup> See generally, R. Redgment, *The Legal System of Zimbabwe* in MODERN SYSTEMS CYCLOPEDIA (R. Redden ed., 1990) at 200.25; see also, ZIMBABWE: A COUNTRY STUDY, 199 (1982).

<sup>13</sup> 1 Stat. L. of Zimbabwe, Ch. 7:06, 417-429 (rev. 1996).

August 28, 1981.<sup>14</sup> The Supreme Court of Zimbabwe constitutes the ultimate court of appeal for the country. It does not exercise original jurisdiction. Below the Supreme Court and High Court are the Magistrates Courts administered under the provisions of the Magistrates Courts Act, 1932 as amended<sup>15</sup> and the Local Courts established under the Customary Law and Local Courts Act, which traces its history to the Customary Law and Primary Courts Act, No. 6 of 1981.<sup>16</sup> Local Courts apply customary law in civil cases only. Appeals lie to Magistrates Courts from Local Courts. Magistrates Courts enjoy both civil and criminal jurisdiction. Appeals are directed to the High Court from Magistrates Courts.

### A. The High Court

According to the High Court Act of 1981 as amended, cited above,<sup>17</sup> the court is organized in terms of composition, original jurisdiction in civil and criminal matters, powers of review, appellate jurisdiction in both civil and criminal matters from the Magistrates Courts, and appeals from the High Court to the Supreme Court.

The doctrine of judicial notice in matters of proof as espoused by article 14 of the Convention has been adopted by Zimbabwe. In any proceedings of the High Court of Zimbabwe under the Convention, a document purporting to be an authenticated copy of a decision or determination of a court or judicial authority outside Zimbabwe is admissible on its face value as presented to the court. However, this fact does not preclude any other inquiry the court may wish to make regarding any document presented to it, whether such a document be local or foreign.

## IV. Law Enforcement System

The High Court under the above-mentioned provisions enjoys the power to issue orders, as well as see to their execution by the nation's law enforcement agents, pertaining to the return of the child under the Convention, visitation by the parent who was left behind, and the determination of the custody of the child. These powers of the High Court as contained in the High Court Act are further reinforced by the provisions of the Child Abduction Act itself. Sections 9 to 11 confer on this Court the power to issue interim orders, declaratory orders, and any others deemed relevant to enforce the Convention. The nation's law enforcement assets for purposes of enforcing the Convention include the Sheriff's department, consistent with the provisions of sections 19-22 of the High Court Act and the Zimbabwe Republic Police under the Police Act, 1995 as amended.<sup>18</sup> Section 3 of the Preservation of Constitutional Government Act, 1963 as amended,<sup>19</sup> further enables law enforcement agents to pursue a matter upon a resolution of Parliament initiated by the Ministry of Home Affairs declaring that any provision of law of Zimbabwe is of extra-territorial effect.

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<sup>14</sup> *Id.* ch. 7:13, 485-492 (rev. 1996).

<sup>15</sup> *Id.* ch. 7:10, 439-455 (rev. 1996).

<sup>16</sup> *Id.* ch. 7:05, 411-416 (rev. 1996).

<sup>17</sup> *Supra* note 13.

<sup>18</sup> 2 Stat. L. of Zimbabwe, Ch. 11:10, 161-174 (rev. 1996).

<sup>19</sup> *Id.* Ch. 11:11, 175 (rev. 1996).

To this end, such a provision would not apply to any person resident in Zimbabwe, but abroad at the time of declaration. If such person acts or speaks in a manner which would be considered a violation of the laws of Zimbabwe, law enforcement assets have the power to pursue through appropriate channels the apprehension of such an individual and bring him to justice in Zimbabwe.

In addition, legislation, such as the Civil Matters (Mutual Assistance) Act, 1996 as amended,<sup>20</sup> assures the reciprocal enforcement in Zimbabwe of civil judgments issued in foreign countries and territories and those of Zimbabwe in the foreign countries and territories. Similarly, the Criminal Matters (Mutual Assistance) Act, 1991 as amended,<sup>21</sup> also provides reciprocal arrangements in criminal matters between Zimbabwe and foreign countries. The Extradition Act, 1990 as amended,<sup>22</sup> further affords an opportunity to any foreign country and Zimbabwe itself to extradite any person to and from the country to Zimbabwe for appropriate matters as regulated by this Law. Finally, the general Criminal Law of Zimbabwe is available to parties to the Convention, as recognized by Zimbabwe, to ensure that all provisions of the Convention are complied with. Thus an ample regime of law enforcement mechanisms is at the disposal of the government of Zimbabwe to ensure the enforcement of orders issued by the nation's courts, in particular the High Court with respect to matters of the Convention.

## V. Legal Assistance Programs

Article 26 of the Convention regulates liability for administrative and other costs, expenses, and charges. The premise of this article is that the Central Authorities and other public services connected with the contracting states do not impose any charges with respect to applications filed under the Convention.

In particular, they may not require any payment from the applicant towards the costs and expenses of the proceeding or, those arising from the participation of legal counsel or advisers. However, they may require the payment of expenses incurred or to be incurred in implementing the return of the child. However, a contracting state may, by making a reservation in accordance with article 42 declare that it will not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as these costs may be covered by its legal system of legal aid and advice. Upon the return of a child or issuing of an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay the necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Section 13 of the Child Abduction Act stipulates, having made a reservation as required by the third paragraph of article 26 of the Convention, the costs referred to in paragraph three will not be the responsibility of the state or any government official of Zimbabwe, except in so far as they are so born, consistent with the grant of legal aid under any legislation.

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<sup>20</sup> 1 Stat. L. of Zimbabwe, ch.8:02, 511-516 (rev. 1996).

<sup>21</sup> *Id.* ch. 9:06, 563-573 (rev. 1996).

<sup>22</sup> *Id.* ch. 9:08, 657-664 (rev.1996).

Furthermore, the Legal Assistance and Representation Act, 1969 as amended,<sup>23</sup> ensures the granting of legal assistance to indigent persons appearing in the courts of Zimbabwe with respect to criminal proceedings only. There are no identical provisions to cover civil cases. The law of 1969 also provides terms to compensate attorneys who appear for such persons in the High Court and Supreme Court. One should also be mindful of section 13 of the Child Abduction Act, noted above, which prohibits the state bearing costs as a reservation to article 26 of the Convention.

## **VI. Conclusion**

It is hard to gauge the effectiveness of the Convention in Zimbabwe in the absence of any case law to this effect. However, the fact that Zimbabwe, though not an original participant in the Hague Conference of 1980, has deemed it fit to integrate the Convention as part of its national law is indicative of the importance the government of Zimbabwe attaches to the subject of child abduction, domestically and internationally.

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<sup>23</sup> *Id.* Ch.9:13, 673 (rev.1996).