# Moroccan Supreme Court Confirms Child Return Order to Switzerland under the HCCH 1980 Child Abduction Convention

**I. Introduction**

It is not uncommon for scholars examining the interplay between the HCCH 1980 Child Abduction Convention and the legal systems of countries based on or influenced by Islamic Sharia to raise concerns about the compatibility of the values underlying both systems. While such concerns are not entirely unfounded and merit careful consideration, actual court practice can present a very different reality.

Morocco's engagement with the Hague Conventions, notably the HCCH 1980 Child Abduction Convention and the HCCH 1996 Child Protection Convention, provides a particularly illustrative example. As previously reported on this blog (see here, here and here), Moroccan courts have thus far demonstrated a clear willingness to engage constructively with the HCCH instruments, effectively dispelling – at least to a significant extent – concerns about the existence of a so-called "Islamic exceptionalism" as an obstacle to resolving parental child abduction cases. The case presented here provides yet another compelling example of how Moroccan courts interpret and apply the HCCH 1980 Child Abduction Convention in a manner consistent with Morocco's international obligations. This is particularly noteworthy given the presence of elements often cited as indicative of "Islamic exceptionalism."

Although the Supreme Court's ruling was issued over a year ago (*Ruling No. 198 of 25 April 2023*), it has only recently been made available, bringing the total number of Hague Convention cases to ***eight*** (based on my own count and the available information. For an outline of the other Hague Convention cases, see here). Its legal significance and broader implications therefore warrant special attention.

## II. The facts

The case concerned a petition for a return order to Switzerland for a child (a girl, *in casu*) who had been wrongfully retained in Morocco by her father. Although the text of the decision lacks sufficient detail to fully clarify the circumstances of the case, it can be inferred from the Court's summary of facts that the child was approximately 8 years old at the time Moroccan courts were seized and that the father is likely a Moroccan national. However, the ruling does not provide details regarding the nationality (or religion) of the left-behind mother nor does it specify the time frame within which the application was made.

As previously noted, the legal proceedings were initiated by the public prosecutor, who petitioned for the return of the child to her habitual residence in Switzerland under the HCCH 1980 Child Abduction Convention. The petition followed an official communication from the Ministry of Justice to the Office of the Public Prosecutor.

In response, the father contested the petition on two main grounds. First, he challenged the standing of the public prosecutor to initiate the proceedings, arguing that the petition should have been filed by the Ministry of Justice in its role of Central Authority under the Convention. Second, he invoked the child's refusal to return to Switzerland, attributing her reluctance to emotional distress and physical abuse allegedly suffered while living with her mother. The father further asserted that the child had now settled into her new environment in Morocco, where she was continuing her education.

The Court of First Instance accepted the petition and ordered the return of the child to her habitual residence, a decision that was upheld on appeal. The father subsequently appealed to the Supreme Court.

Before the Supreme Court, the father reiterated his earlier arguments, particularly challenging the public prosecutor's standing to initiate such proceedings. He further invoked Article 12 of the HCCH 1980 Child Abduction Convention, arguing that the child was now settled in her new familial and educational environment. In addition, he asserted that the child suffered from emotional distress and anxiety due to alleged domestic violence she experienced while living with her mother. The father referred to reports and certificates issued by Moroccan medical and psychological institutions which were submitted as

evidence of the child's state of mind and her strong resistance to being returned to Switzerland. The father also argued that the mother had not effectively exercised custody rights at the time the child came to live with him, and contended that the mother had consented to the child's relocation.

## III. The Ruling

In its *Ruling No. 198 of 25 April 2023*, the Moroccan Supreme Court rejected all the father's arguments and upheld the order for the child's return, providing the following reasoning:

Regarding the first argument, the Supreme Court referred to Article 11 of the HCCH 1980 Child Abduction Convention, which mandates contracting states to take urgent measures to secure the return of abducted children. The Court also cited Law No. 33.17, which transferred the Minister of Justice's responsibilities to the Public Prosecutor at the Supreme Court, in its capacity as Head Public Prosecutor Office. This transfer enables the public prosecutor to replace the Ministry of Justice in overseeing judicial proceedings and exercising appeals related to the cases falling under their competence.

As for the second argument, the Supreme Court emphasized that determining whether the exception in Article 12 of the HCCH 1980 Child Abduction Convention applies is a matter for the trial court to investigate based on the evidence presented. Based on the lower courts' finding, the Supreme Court concluded that the father's retention of the child, who had been living with her mother in Switzerland, where the mother had been granted sole custody, constituted wrongful retention and a violation of the mother's custody rights as stipulated by Swiss law. The Court also noted that the medical reports submitted did not provide evidence of mistreatment.

Finally, the Supreme Court found that the mother was actively exercising custody of her daughter, as confirmed by the Swiss court decision granting the appellant only visitation rights. The Court also dismissed the father's claims, particularly those regarding the risk of physical or psychological harm to the child, finding them unconvincing and unsupported by sufficient evidence.

## IV. Comments

The Supreme Court's ruling is remarkable in many respects. It directly challenges the notion of "Islamic exceptionalism" in matters of custody and parental authority under the HCCH 1980 Child Abduction Convention. Under traditional interpretation of Islamic law, which underpins the Moroccan Family Code of 2004 – known as the *Mudawwana* – (notably article 163 to 186 on custody), the father's right to exercise legal guardianship (*wilaya*) over the child is often seen as prevailing over the mother's right to custody (*hadanah*). For instance, a mother may lose her custody rights if she relocates to a distant place, especially a forign country. Similarly, the environment in which the child is to be raised is considered a critical factor, with particular emphasis on whether the child will grow up in an *Islamic environment*. This concern is even more pronounced when the custodial mother is not Muslim and resides in a non-Muslim country (Cf. M. Loukili, "L'ordre public en droit international privé marocain de la famille" in N. Bernard-Maugiron and B. Dupret, *Ordre public et droit musulman de la famille* (Bruylant, 2012) 137, 155-157).

What is striking in this case is that the Supreme Court did not consider these "traditional" concerns at all. Instead, it focused solely on the legal framework established under the Hague Convention. The Court simply observed that the mother had been granted sole custody of the child and concluded that the wrongful retention of the child in Morocco constituted a violation of those rights. This finding justified the return order under the HCCH 1980 Child Abduction Convention.

Another noteworthy aspect of the ruling, which can also be observed in other Hague Convention cases, is that the Moroccan Supreme Court does not adhere rigidly to its traditional approach in assessing the admissibility of return orders requests or the revocation of the mother's custody rights. Under Moroccan private international law, family law issues in general, including matters of parental authority and custody, are generally governed by Moroccan law whenever one of the parties is Moroccan (Article 2(3) of the 2004 Family Code). Traditionally, Moroccan courts have often concluded that public policy is violated when Moroccan law is not applied or a foreign judgment diverges from Moroccan domestic family law regulation (Loukili, *op. cit.*, 150).

In the present case, however, the Supreme Court not only accepted that sole

custody was granted to the mother under Swiss law, but also it did so although the application of Moroccan law would have led to a different outcome. Indeed, the Supreme Court has consistently ruled that the mother's refusal to return with the children to Morocco deprived the father of his right to supervise and control the children under his legal guardianship (*wilaya*), thus justifying the father's claim to have the mother's custody rights revoked (Supreme Court, *Ruling of 21 June 2011*; *Ruling of 23 August 2011*). The Supreme Court took the same stance in a case involving child abduction, where the request for the return order, based on the French-Moroccan bilateral Convention of 1981 (article 25), was rejected on the ground that the issuing of such an order would contradict with Moroccan law on custody (Supreme Court, *Ruling of 15 October 2003*).

The Supreme Court's approach in Hague Convention cases, including the one commented on here, marks a notable departure from this traditional stance. Not only has the Court repeatedly affirmed the primacy of international conventions over domestic law—though this issue was not explicitly raised before the Court *in casu*, it can be inferred from the absence of references to Moroccan law on custody—but it also approvingly referred to the law of the child's habitual residence rather than Moroccan law, despite a literal reading of Article 2(3) of the *Mudawwana* suggesting otherwise.

The Supreme Court stance in dealing with the Hague Child Abduction cases reflects a growing willingness on the part of the Court to align its reasoning with international obligations and to prioritize the principles enshrined in the Hague Conventions over more restrictive domestic norms. In this sense, this approach challenges the perception of "Islamic exceptionalism" and highlights a progressive interpretation of Moroccan law within the framework of international child abduction cases.