

# **PARENTAL ALIENATION WITHIN THE CONTEXT OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: *THE BRAZILIAN PERSPECTIVE***

Bruno Rodrigues de Almeida

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Adjunct Professor of Civil and Private International Law  
at Universidade Federal Rural do Rio de Janeiro, PhD in  
International Law by Universidade do Estado do Rio de Janeiro,  
LLM in International Law by Universidade do Estado do Rio  
de Janeiro, Member of ASADIP, Attorney at Law.

Gisela Vieira Dalfeor Vidal

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Law Degree by Universidade Federal Rural do Rio de Janeiro.

**ABSTRACT:** The number of cases of relocation of children and adolescents to Brazil has increased significantly in the last years. One must consider that abducting or wrongfully retaining children from the places of their habitual residence prevents them from enjoying fundamental rights such as those to historical, social and cultural identities and even the right to enjoy full family life with both sides of their families. This article shows that unilateral relocation of children to Brazil (as well as their wrongful retention in Brazilian territory) in violation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, is actually one form of Parental Alienation practiced in cross border circumstances, pursuant to Federal Law nº 12.318, from August 26, 2010 (Brazilian Parental Alienation Act). On that sense, Brazilian administrative and judicial authorities must not only engender public policies and strategies to enhance acknowledgement about rules of the Convention among Brazilian communities living abroad, they must also encourage extrajudicial agreements between interested parties to increase the rates of voluntary return of abducted or retained children. In cases brought to courts, since Parental Alienation is a form of emotional abuse of the child, magistrates must count on the opinion of interdisciplinary advisors before considering opinion of the

abducted children in the ruling of the return order. In sum, the search for international cooperation with other Contracting States of the 1980 Hague Convention and the respect of the best interest of the child must be in permanent harmony.

**KEYWORDS:** 1980 Hague Convention on the Civil Aspects of International Child Abduction – Brazilian Parental Alienation Act of 2010 – best interest of the Child – international cooperation.

## 1. INTRODUCTION

Parental Alienation Syndrome (PAS) is a term coined in 1985 by child psychiatrist Richard Garner to address the recurrent problem in child custody disputes where one of the parents deliberately (or even unconsciously), and without justification, promotes brainwashing and manipulation of the child's own perception focusing in the disparagement of the targeted parent<sup>1</sup>.

Although there are dissenting opinions on the subject, many specialists have concluded that PAS is indeed a method of emotional abuse of the child, since alienating parents are often worried about punishing the former spouse by leading their child into hating the targeted parent. Although there are many different possibilities and degrees for the alienating parent to launch this denigrating campaign, the myriad of venues usually aims at the emotional detachment of the child from the targeted parent (and his/her side of family such as grandparents, uncles and other relatives)<sup>2</sup>.

Within such context, the 1980 Hague Convention on the Civil Aspects of International Child Abduction is an international cooperation treaty concerned with the swift return of the child to the place of habitual residence when any person (usually one of the parents) wrongfully removes the child from there, or illegally retains the children in the territory of a contracting State<sup>3</sup>.

Brazil, as a Member of this treaty, is internationally committed to its goals and participates in the Post-Convention works, regularly organized by The Permanent Conference of Private International Law

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1 GARDNER, Richard. Parental Alienation Syndrome (PAS): Sixteen years later. *Academy Forum*, v. 45, issue 1, 2001, p. 10-12.

2 BERNET, William. Parental Alienation Disorder and DSM-V. *The American Journal of Family Therapy* v. 36, Issue 5, 2008, 349-366. For dissenting opinion on the matter see HOULT, Jennifer. The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy (2006). *Children's Legal Rights Journal*, vol. 26, n° 1, 2006. Available at < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=910267](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=910267)

3 BEAUMONT, Paul R.; McELEVAY, Peter E. *The Hague Convention on International Child Abduction*. Oxford: Oxford University Press, 1999, pp. 86 e 87.

in order to discuss more efficient of enforcement among Member-states.

Considering the current trend of intensification of cross border relationships – promoted by facilitation of transport and instant communication methods<sup>4</sup> – many families around the world can actually overcome political and juridical frontiers, with branches settled in different countries.

The current work intends to analyze the connections between International Child Abduction and Parental Alienation through the perspective of Brazilian enforcement of the 1980 Hague Convention. For such goals, it will study different strategies and approaches to cases of children abducted to/ illegally retained in Brazilian territory in order to address this recurring practice as a form of Parental Alienation.

## **2. THE IMPACT OF THE ENFORCEMENT OF 1980 HAGUE CONVENTION BY BRAZILIAN AUTHORITIES.**

The 1980 Convention on Civil Aspects of International Child Abduction is the most successful – in terms of number of ratifications – document celebrated under The Hague Permanent Convention of Private International Law, an intergovernmental entity that has been working since 1893<sup>5</sup>.

This treaty, which was approved in the city of The Hague on October 25, 1980 and later enforced into Brazilian legal order through enactment of Presidential Decree number 3.413 (from April 14, 2000), actually inaugurated a new era for international cooperation in Brazil<sup>6</sup>.

Recent studies about the enforcement of the 1980 Hague Convention in Brazil indicate that there has been a significant increase on the number of children/adolescent unilaterally brought or retained in national territory. However, Brazilian judicial and administrative authorities' awareness about impact of the 1980 Hague Convention in our legal scenario has equally improved in the last years, given the increasing number of cases of children being abducted to/ retained in Brazilian territory<sup>7</sup>.

One of the greatest changes brought by developing enforcement

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4 JAYME, Erik. O Direito Internacional Privado do novo milênio: a proteção da pessoa humana face à globalização. In: ARAUJO, Nadia de; MARQUES, Cláudia Lima (organizadoras). *O novo Direito Internacional – estudos em homenagem a Erik Jayme*. Rio de Janeiro: Renovar, 2005, p.5.

5 [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php).

6 DOLINGER, Jacob. *A criança no Direito Internacional*. Rio de Janeiro: Renovar, 2003. p. 248-249, note 37. See also: ARAUJO, Nadia de. *Direito Internacional Privado – Teoria e prática brasileira*. 4. ed. Rio de Janeiro: Renovar, 2008. p. 520-521.

7 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 1-5.

of this treaty into Brazilian legal scenario is the acknowledgment of Federal Justice to judge cases of international child abduction falling under the 1980 Hague Convention, which, until the enactment of the Convention, has been previously dealt by State judges. In fact, this particular breakthrough has even drawn attention from US President Barack Obama in the year of 2009<sup>8</sup>.

However, unlike foreign practitioners must have imagined back then, the competence of Brazilian Federal Justice in child abduction cases falling under the 1980 Hague Convention does not arise from a potential lack of impartiality of State Courts when Brazilians and foreigners figure as opposed parts in a lawsuit.

It actually arises from the juridical effects of the treaty itself.

Article 1 of the 1980 Hague Convention on Civil Aspects of International Child Abduction sets the main goals of this Convention which are: “ (a) to secure the prompt return of children wrongfully removed to or illegally retained in the territory of a contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States”.

In order to reach such goals, Article 7 establishes the specific obligation of cooperation that each contracting State will comply via designated Central Authorities:

*Article 7. Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.*

*In particular, either directly or through any intermediary, they shall take all appropriate measures -*

*a) to discover the whereabouts of a child who has been wrongfully removed or retained;*

*b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;*

*c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;*

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<sup>8</sup> <http://brasil.estadao.com.br/noticias/geral,obama-agradece-analise-da-justica-federal-no-caso-sean,338926>.

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

For such reasons, some scholars classify the 1980 Hague Convention as an example of contractual treaty (*tratados-contrato*) – as opposed to law-treaty (*tratados-lei*)<sup>9</sup>.

When States sign up to law-treaties, they manifest the same volition (coincident or parallel) to establish general rules of law, thus creating *norma agendi*<sup>10</sup>. However, upon celebrating contractual treaties their wills are not only different, they actually converge towards a same goal, which establishes specific rights and obligations to each of the Member States (*facultas agendi*)<sup>11</sup>.

Since Brazilian Federative Republic has indeed assumed specific and international obligations to fully cooperate with other Contracting States in cases of international child abduction under the 1980 Hague Convention, it must comply with the measures described in Article 7.

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9 TIBURCIO, Carmen; BARROSO, Luís Roberto. *Temas de Direito Constitucional Internacional*. Rio de Janeiro: Renovar, 2013, p. 225-241.

10 REZEK, José Francisco. *Direito dos Tratados*. Rio de Janeiro: Renovar, 1984, p. 130.

11 MELLO, Celso D. de Albuquerque. *Curso de Direito Internacional Público*, v. I, 1997, p. 219.

The Special Secretariat for Human Rights (*Secretaria Especial de Direitos Humanos da Presidência da República*) – which functions as the Central Authority for this particular convention (*Autoridade Central da Área Federal – ACAF*) – is responsible authority for conducting extrajudicial measures (including mediation between interested parties).

However, if judicial measures become necessary, members of the General-Advocacy of the Union will have to function in the case, which, according to Article 109, I of Brazilian Federal Constitution of 1988<sup>12</sup>, will automatically trigger the competence of Federal Justice for cases of international Child abduction within the scope of the 1980 Hague Convention<sup>13</sup>.

Another meaningful and worthy of note impact is the recent jurisprudence of the High Court of Justice (*Superior Tribunal de Justiça*) concerning the competence of Federal Justice to analyze matters concerning custody rights about children who have been abducted or retained into Brazilian territory, changing a former trend of firming State Courts jurisdiction through the issuing of provisory custody orders<sup>14</sup>.

In fact, whenever facing cases that potentially fall under the 1980 Hague Convention, state judges must, according to Article 265, IV<sup>15</sup> of Brazilian Code of Civil Procedure, notify local Central Authority (SEDH/ACAF) to assess if there's interest in the particular case. In case of affirmative response, all proceedings in State Justice will be

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12 Article 109. The federal judges have the competence to institute legal proceeding and trial of: I – cases in which the Union, an autonomous government agency or a federal public company have an interest as plaintiffs, defendants, privies or interveners, with the exception of cases of bankruptcy, of job-related accidents, and of those subject to the Electoral and Labour Courts;

13 GASPARG, Renata Alvarez; AMARAL, Guilherme. Sequestro internacional de menores: os tribunais brasileiros têm oferecido proteção suficiente ao interesse superior do menor? *Meritum*, v. 1, n. 8, 2013, p. 351-387.

14 BRAZIL, Superior Tribunal de Justiça (STJ). Conflito de Competência nº 64.012. Rapporteur: Carlos Alberto Menezes Direito, Published in *Diário de Justiça da União* in 11/9/2006; Conflito de Competência nº 64.120. Rapporteur: Castro Filho. Published in *Diário de Justiça da União* in 10/25/2006.

15 (*Free translation*) Article 265. The suit shall be suspended : I - In case of the death or loss of procedural capacity of any of the parties, their legal representatives or attorneys; II - by agreement of the parties; (According to Federal Law nº 11. 481 of May 31, 2007) III - upon a motion for dismissing the case on the grounds of incompetence of the judge or the court, as well as their personal suspicion or legal impediment; IV - when the judgment on the merits of the case:a) depends on the judgment of another cause, or declaration of the existence or nonexistence of legal relationship that constitutes the main subject of another pending case; b) can not be given until another court recognizes the occurrence of a certain fact or produces certain evidence; c) requires previously judgement which has been request as incidental matter ; V - by force majeure; VI - in other cases, regulated under this Code.

suspended, awaiting for decision in Federal Justice<sup>16</sup>.

More recently, STJ has also decided that even suits concerning custody rights from the recognition of socio-affective paternity, should be judged by Federal Courts if arising from cases of international child abduction falling under the 1980 Hague Convention<sup>17</sup>.

The Brazilian High Court of Justice decided that, because of the common object, both suits should be reunited and judged in Federal courts. In a deeper analysis, the interest of the Federal Union (article 109, I of 1988 Constitution) and the obligations to Federative Republic of Brazil arising from international treaties (article 109, III of 1988 Constitution)<sup>18</sup> attract suits that originally fall under State Courts jurisdiction (*via atrativa*).

It must be also pointed out that Brazil has recently instituted the Permanent Commission on International Child Abduction, an organ composed by representatives of authorities of different branches of Brazilian government such as: The Special Secretariat for Human Rights, The Ministry of Justice, The General-Advocate of the Union, The Special Secretariat for Women Policies, The Federal Union's Public Defender and the Federal Police<sup>19</sup>.

The Permanent Commission, following the directives analyzed in post-convention works organized and celebrated by The Hague Permanent Conference on Private International Law, has established specific goals towards locally improvement of the effectiveness of the 1980 Hague Convention such as:

*I - studying new measures to prevent international abduct or retention of children and teenagers;*

*II - divulgation of the structure and functioning of The 1980 Hague Convention on the Civil Aspects of International Child Abduction and provide for the*

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16 MIGUEL FILHO, Theophilo Antônio. *Questões constitucionais e legais da Convenção de Haia sobre os aspectos civis do Sequestro Internacional de Crianças*. PhD thesis. Orientated by: Nadia de Araujo. Rio de Janeiro: Pontificia Universidade Católica do Rio de Janeiro, 2010. p.98.

17 BRAZIL, Superior Tribunal de Justiça (STJ). Conflito de Competência nº 100.345/RJ. Raporteur: Luis Felipe Salomão. Published in *Diário de Justiça da União* in 03/25/2009.

18 TIBURCIO, Carmen; BARROSO, Luís Roberto. *Temas de Direito Constitucional Internacional*. Rio de Janeiro: Renovar, 2013, p. 234. ARAUJO, Nadia de. *A Convenção da Haia sobre os aspectos civis do sequestro de menores: algumas notas recentes*. Available at <http://www.sdh.gov.br/assuntos/adocao-e-sequestro-internacional/legislacao-e-publicacoes/a-convencao-de-haia-algumas-notas-recentes-nadia-de-araujo>. Last access: September 13<sup>th</sup>, 2014.

19 The Permanent Commission was established by Portaria SEDH/PR nº 34, published in *Diário Oficial da União* in January, 24, 2014.



*capacitation of Brazilian civil servants involved in the cooperation processes;*

*III - adoption of conjoint procedures to deal with special circumstances such as the occurrence of domestic violence against the mother or the child/teenager;*

*IV - establishing uniform procedures to be adopted in the 1980 Hague Convention and the 1989 Inter-American Convention on the International Return of Children (internalized by Decree n° 1.212, from December 3, 1994.)*

*V - developing strategies and public policies to improve the implementation of the above mentioned conventions.*

According to the President of the Permanent Commission, although factors such as the worldwide economic and financial crisis and the growing divorce rates can contribute to such phenomenon, one of the main reasons for the afore mentioned increase could actually be the lack of information available about the rules on the previous legal measures to avoid problems regarding international abduction or retention of children (or adolescents)<sup>20</sup>.

That happens because, unbeknownst to most of Brazilian parents living abroad, pursuant to Article 3 of The 1980 Hague Convention, any decision regarding custody rights or access to children or adolescents (especially concerning their international relocation) must be taken in accordance with the law of the Contracting State in which the child/adolescent has his/her habitual residence, whether by parental agreements or judicial decisions performed in that territory<sup>21</sup>.

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20 LIMA, Georges. *Retorno Legal: prevenir a subtração internacional de crianças*. Available at <http://www.sdh.gov.br/assuntos/adocao-e-sequestro-internacional/legislacao-e-publicacoes/retorno-legal-prevenir-a-subtracao-internacional-de-criancas>. Last accessed in September 13th, 2014, p. 1.

21 Article 3 The removal or the retention of a child is to be considered wrongful where - a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise



Brazilian Central Authority (*Special Secretariat for Human Rights*) believes that many cases of abduction/retention occur because the rules of the 1980 Hague Convention have not, insofar, sufficient divulgation throughout the community of Brazilian people living abroad. Hence, the conclusion of the Permanent Commission is that prevention should become a priority on its agenda.

For such reasons, SEDH currently develops multimedia public policies towards the prevention of cases of international abduction/illegal retention of children related with Brazil. This campaign consists on the development of material (virtual folders, booklets and alike) focusing on social network media, and the establishment of multi-leveled cooperative network reaching Brazilian government authorities (such as diplomatic and consulate agents), entities of civil society such as community leaders and Non-Governmental Organizations and other international institutions dedicated to the protection of Women<sup>22</sup>.

Although the 1980 Hague Convention provides for judicial measures to enforce the return of the abducted or retained child/adolescent, one cannot deny the increasing relevance that alternative dispute resolutions (ADR's) such as mediation have gained within the context of International Child Abduction. In fact, the Guide to Good Practice of the 1980 Hague Convention of 2012 beseeches Contracting States to promote conciliation between interested parties through interdisciplinary mediation committees, whose work should be supervised and advised by the Central Authorities<sup>23</sup>.

On that note, Central Authorities, following the provisions of Article 10 of the 1980 Hague Convention, should also pursue the goal of voluntary solution of the case, taking necessary measures to secure the prompt and swifter return of the child/adolescent to his/her place of habitual residence<sup>24</sup>.

Carmen Tiburcio and Guilherme Calmon present the following statistics concerning the number of extrajudicial agreements promoted by Brazilian Central Authority (SEDH) on the matter of international child abduction/retention within the period between 2002 and 2012<sup>25</sup>:

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in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

22 LIMA, Georges. *Retorno Legal*: prevenir a subtração internacional de crianças. Available at <http://www.sdh.gov.br/assuntos/adocao-e-sequestro-internacional/legislacao-e-publicacoes/retorno-legal-prevenir-a-subtracao-internacional-de-criancas> . Last accessed in September 13th, 2014, p. 3.

23 Available at. [http://www.hcch.net/upload/guide28mediation\\_en.pdf](http://www.hcch.net/upload/guide28mediation_en.pdf) . Last access on 9/13/2014.

24 Article 10. 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.

25 TIBURCIO, Carmen; CALMON, Guilherme (in collaboration with Patrícia Lamego).

**CASES CLOSED BY AGREEMENT (Passive cooperation) – 2002-2012:**

Year	Private/Lawyer/ Others	ACAF/SEDH	Judicial (State/Federal)	TOTAL
2002	1			1
2003	2			2
2004		3	2	5
2005	2	5		7
2006	3	5	1	9
2007	3	1	1	5
2008	2		4	6
2009	7	2	5	14
2010	3	11	6	20
2011	7	8	13	28
2012	6	2	4	12
<b>TOTAL</b>	<b>39</b>	<b>35</b>	<b>35</b>	<b>109</b>

**RESULTS OF CLOSING AGREEMENTS 2002-2012**

Year	Return to habitual residence	Remaining in Brazil	Access/visitation rights	TOTAL
2002	1			1
2003	2			2
2004		4	1	5
2005	4	1	2	7
2006	7	2		9
2007	5			5
2008	3	1	2	6
2009	10	1	3	14
2010	13	5	2	20
2011	15	12	1	28
2012	10	2		12
<b>TOTAL</b>	<b>69</b>	<b>26</b>	<b>11</b>	<b>109</b>

*Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 194-195.

**YEARLY PERCENTAGE OF CASES CLOSED BY ARRANGEMENT – 2004-2014**

<b>Year</b>	<b>TOTAL CLOSED</b>	<b>CLOSED BY AGREEMENT</b>	<b>%</b>
2004	15	5	33%
2005	34	8	23,5%
2006	31	9	29%
2007	22	5	23%
2008	33	6	18%
2009	37	14	27%
2010	40	20	50%
2011	64	25	39%
2012	31	13	42%
<b>TOTAL</b>	<b>308</b>	<b>105</b>	<b>34 %</b>

From such data, it is possible to conclude that Brazilian Central Authority (SEDH/ACAF) is increasingly becoming an important agent in the promotion of extrajudicial agreements between interested parties. It also had a high rate of success on concluding cases through extrajudicial agreements between the abductor and the left behind parent.

Actually, in most of cases closed by extrajudicial agreements (almost two in each three cases), the child was voluntarily returned to the State of habitual residence, which actually attends the best interest of the child, as defined by the 1980 Hague Convention.

For such reasons, besides the adoption of public policies to educate people in order to prevent cases of International Child Abduction, SEDH/ACAF (as the Brazilian Central Authority for the 1980 Hague Convention) should also work set mediation as its primary goal. Through the encouragement of self-reconciliation between interested parties, not only the voluntary return of the child is more often achievable, but also the reestablishment of institutional dialogue within transnational families.

### **3. THE CONFLUENCE OF THE BEST INTEREST OF CHILD IN THE 1980 HAGUE CONVENTION AND THE BRAZILIAN PARENTAL ALIENATION ACT OF 2010.**

The best (or superior) interest of children is a value that deserves special attention of several documents on Brazilian legal order such

as: the Federal Constitution of 1988 (article 227<sup>26</sup>), The Children and Teenagers Act of 1989 Articles 3 (1),<sup>27</sup> and 9 (1) and (3)<sup>28</sup> of The UN Convention on The Rights of the Children (Decree n° 99.710, November, 21, 1990), among others.

In the meantime, Brazilian legal order has also addressed the problem of Parental Alienation Syndrome by enacting Federal Law n° 12.318, from August 26 2010, also known as the Parental Alienation Syndrome Act.

According to Article 2, Parental Alienation consists of any method capable of *“causing interference with the psychological upbringing of a child or adolescent, promoted or inducted by one parent, grandparent or the person entitled of his/her custody, authority or surveillance in order to make the child or adolescent to disown his/her parent, or causing hindrances in the establishment or maintenance of emotional bonds with the targeted parent”*<sup>29</sup>.

Psychological studies on children who have been victims of Parental Alienation Syndrome report that they are more likely to develop psychological disorders such as chronical depression, social phobias, identity and self-image distortions. These patients also might develop traits like desperation, hostile behavior, and tendency for self-isolation. In more extreme cases, these children might become adults tormented by guilty, more susceptible to drug addiction and suicidal

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26 Article 227. It is the duty of the family, the society and the State to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.

27 Article 3 (1). In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

28 Article 9 (1). States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's p (3). States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests lace of residence.

29 Art. 2º. *Considera-se ato de alienação parental a interferência na formação psicológica da criança ou do adolescente promovida ou induzida por um dos genitores, pelos avós ou pelos que tenham a criança ou adolescente sob a sua autoridade, guarda ou vigilância para que repudie genitor ou que cause prejuízo ao estabelecimento ou à manutenção de vínculos com este.*

tendências<sup>30</sup>.

The sole paragraph of the afore mentioned article establishes an open list (*numerus apertus*) of the typical conducts of Parental Alienation Syndrome, without prejudice of other behaviors noticed by magistrates by themselves or with the help of specialists. On that note, Parental Alienation occurs when one of the parents<sup>31</sup>:

*I – promotes disqualification campaign against the targeted parent;*

*II - hampers the exercise of parental authority;*

*III – raises difficulties on the access of the child by the other parent;*

*IV – creates obstacles to rights of visitation and family life with the other parent;*

*V – deliberately hides relevant informations about the child or teenager such as educational, medical or address changes;*

*VI – presents false accusations against the other parent, grandparents and other relatives in order to jeopardize their relationship with the child or teenager;*

*VII – unilaterally and without justification changes the domicile of the child or teenager in order to prevent access of the left-behind parent, grandparents and other relatives.*

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30 SILVA, Denise Maria Perissini da. *Psicologia Jurídica no Processo Civil Brasileiro*. São Paulo: Casa do Psicólogo, 2003. p. 86.

31 *Parágrafo único. São formas exemplificativas de alienação parental, além dos atos assim declarados pelo juiz ou constatados por perícia, praticados diretamente ou com auxílio de terceiros: I - realizar campanha de desqualificação da conduta do genitor no exercício da paternidade ou maternidade; II - dificultar o exercício da autoridade parental; III - dificultar contato de criança ou adolescente com genitor; IV - dificultar o exercício do direito regulamentado de convivência familiar; V - omitir deliberadamente a genitor informações pessoais relevantes sobre a criança ou adolescente, inclusive escolares, médicas e alterações de endereço; VI - apresentar falsa denúncia contra genitor, contra familiares deste ou contra avós, para obstar ou dificultar a convivência deles com a criança ou adolescente; VII - mudar o domicílio para local distante, sem justificativa, visando a dificultar a convivência da criança ou adolescente com o outro genitor, com familiares deste ou com avós.*

There are Brazilian legal scholars defending that one of the gravest forms of Parental Alienation is the wrongful and unjustified removal of the child from the State of his/her habitual residence, which not only severely hinders the access to the left-behind parent, but due to physical distance, also increases the possibility of manipulating the child's emotions and thoughts<sup>32</sup>.

In fact, upon the enactment of Federal Law 12.318/2010, if one parent is entitled to full custody over progeny, it does not mean he/she can overlook fundamental rights of the child such as the right to family life. Even parents that only have visitation rights are capable of vetoing the relocation of the child, if proved that such change has the main objective of hampering his/her access to the child<sup>33</sup>.

As a matter of fact, Article 8 of Brazilian Parental Alienation Syndrome Act of 2010 establishes that jurisdiction over the custody rights of a child/teenager will not change because of wrongful relocation, which actually restates the very spirit of the 1980 Hague Convention<sup>34</sup>.

Thus, according to Articles 3 and 5<sup>35</sup> of The 1980 Hague Convention, any parent (whether having full or shared custody or visitation rights) who unilaterally relocates (or retains) children up to 16 year olds to (or in) Brazil in infringement the law of their habitual residence is committing an act of Parental Alienation, pursuant to Article 2, Sole Paragraph of Federal Law 12.318/2010.

Pursuant to Article 13, b, authorities of the Contracting States might refuse to enforce the return of the abducted or retained child to the State of habitual residence if:

*Article 13*

*Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*

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32 DIAS, Maria Berenice (coordenadora). *Incesto e Alienação Parental*. São Paulo: Editora Revista dos Tribunais, 2013, p. 15-19.

33 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 128.

34 Article 8 (Free translation). Eventual relocation on the domicile of the child or adolescent will not affect the original jurisdiction over claims regarding right to family life, unless such change results from parental agreement or judicial order.

35 Article 5 For the purposes of this Convention – a) “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence; b) “rights of access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

*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.***

*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.*

Statistic surveys realized under request of The Hague Permanent Conference of Private International Law reveal that allegations of physical and/or emotional abuse committed against the child or teenager by the left behind parent (grandparents or other relatives) are the most frequently invoked arguments by Contracting States authorities to refuse the issuing of returning order, thus keeping the abducted or retained child in the State of refuge<sup>36</sup>.

In fact, regular post-convention works held in The Hague have dealt with the interpretation, meaning and scope of this rule. In the Overall Conclusions of the First Special Commission of October 1989 on the Operation of The Hague Convention of 25 October 1980, deputies have concluded that in many reported cases of this international treaty, abducting or retaining parents repeatedly invoke the exception of Article 13, b to keep the child in the State of refuge<sup>37</sup>.

Thus, subsequent Special Commissions for Reviewing the

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36 2011 Hague Global Statistical Analysis, p. 30. Available at [www.hcch.net/upload/abduct2011pd08ae.pdf](http://www.hcch.net/upload/abduct2011pd08ae.pdf). Last access 09/14/2014.

37 Overall Conclusions of the Special Commission of October 1989 on the Operation of The Hague Convention of 25 October 1980 on The Civil Aspects of International Child Abduction, 1989, item 26. Available at <http://www.hcch.net/upload/abdrpt89e.pdf>. Last access 09/16/2014.



Operation of the 1980 Hague Convention, held in 1993 (Second)<sup>38</sup>, 1997(Third)<sup>39</sup>, 2006 (Fifth)<sup>40</sup> have reinstated that to attend the best interest of child, Article 13, b must remain only as an exception. That is to keep the very meaning of the Convention, which estates that in order to guarantee respect to family and social backgrounds, decisions regarding any custody or visitation rights regarding children and teenagers up to 16 years old should be preferably taken by authorities of the State of their habitual residence.

Specialized studies report that in many PAS cases, the alienator deliberately accused the targeted parent of child abuse in order to hamper his/her access on the child. Additionally, Parental Alienation is also a recognized form of emotional abuse of the child, since one parent might indeed manipulate the child's emotions and thoughts about the targeted parent in such manner that he or she will fully support the alienator and refuse any contact with the targeted parent<sup>41</sup>.

Contracting States are deeply concerned with allegations of abuse and violent behavior in familiar relationships. For that matter, the 2012 (Sixth) Special Commission has even suggested the installation of specialized works regarding the uniform interpretation of Article 1.3, b of the 1980 Hague Convention to address specific circumstances such as domestic violence against the mother<sup>42</sup>.

However, there is no logical reason in acknowledging the enforcement of an exceptional clause as a regular rule for international child abduction cases. Scholars agree that the scope of this Convention is not to primarily deal with custody/visitation matters over abducted/retained children, because their best interest requires that authorities of the State of their habitual residence are able to decide such issues and

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38 *Report of The Second Special Commission to Review the Operation of the Hague on the Civil Aspects of International Child Abduction Held* (18-21 January 1993), 1993, item 23. Available at: <http://www.hcch.net/upload/abdrpt93e.pdf>

39 *Report of The Third Special Commission to Review the Operation of the Hague on the Civil Aspects of International Child Abduction Held* (17-21 March 1997), 1997, item 54. Available at: <http://www.hcch.net/upload/abdrpt97e.pdf>

40 *Report of The Fifth Special Commission to Review the Operation of the Hague on the Civil Aspects of International Child Abduction and the Practical Implementation of The Hague Convention of October 19, 1996 on Jurisdiction, Applicable Law, Recognition Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the protection of Children* (30 October-9 November 2006), item 164, 2006. Available at: [http://www.hcch.net/upload/wop/abd\\_2006\\_rpt-e.pdf](http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf).

41 LOTUFO, Renan; NANNI, Giovanni Ettore; MARTINS, Fernando Rodrigues (coordenadores). *Temas relevantes do Direito Civil contemporâneo: reflexões sobre os 10 anos do Código Civil*. São Paulo: Atlas, 2012. p. 799-800.

42 *Special Commission on the practical operation of the 1980 and the 1996 Hague Conventions* (25-31 January 2012), 2012, item 81. Available at [www.hcch.net/upload/wop/concl28-34sc6\\_en.pdf](http://www.hcch.net/upload/wop/concl28-34sc6_en.pdf)

to enforce their decisions<sup>43</sup>.

Before considering the opinion of the child that refuses to be returned to his/her State of habitual residence, judicial and administrative authorities must take necessary cautions<sup>44</sup>, such as hearing the opinion of interdisciplinary specialists, in order to attest not only the level of maturity, but, especially, to verify if he/she is not being victim of emotional abuse or manipulation. It should also be pointed that children cannot be accounted for such crucial decisions when they are so deeply and emotionally immersed in the matter, which makes them even more susceptible to emotional abuse<sup>45</sup>.

For such matters, analyzing the elements and evidences presented on suits requesting return of abducted/retained children in Brazil, federal magistrates might conclude by themselves (or with the help of expertized survey) that some children or teenagers are actually being victims of Parental Alienation such as established in Article 5<sup>46</sup> Federal Law 12.318/2010<sup>47</sup>.

This procedure, which is also regulated in Articles 145 through 147 of the Brazilian Code of Civil Procedures (Federal Law nº 5.869, January 10, 1973), allows interested parties to indicate assistant experts, in order to attest impartiality throughout the survey. It is important to highlight that, although magistrates are not bound to the opinion of experts, they often rely on their professional experience and technical knowledge one assessing these particular subjects<sup>48</sup>.

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43 BEAUMONT, Paul R.; McELEVAY, Peter E. *The Hague Convention on International Child Abduction*. Oxford: Oxford University Press, 1999, p. 115.

44 SHAPIRA, Amos. *Private International Law: aspects of child custody and child kidnapping cases*. *Recueil des Cours*, v. 214, 1989, p. 196.

45 BODENHEIMER, B.M. *The Hague Convention on International Child Abduction*. *Family Law Quarterly*, v. 14, 1980, p.110.

46 Article 5 (Free transaltnion). If a magistrate suspects of parental alienation, he/she will take necessary measures, whether in autonomous or incidental suits, and will, if necessary, determine bio psychosocial or psychological survey. § 1 The expert report will be based on extensive psychological evaluation or bio psychosocial background, as appropriate for each case, and might comprise personal interview with the parties, examination of documents, historical of the couple's relationship and separation, chronology of incidents, personality assessment of the involved persons, and the examination of the level of concernment the child displays about possible charges against that parent. § 2 The survey will be performed by a multidisciplinary team of professionals, whose proof of experterise can be attested by professional or academic documents on experience of diagnosing acts of parental alienation . § 3 The expert or a multidisciplinary team of professionals appointed to assess the occurrence of parental alienation will within 90 (ninety) days to submit the report, renewable only by judicial authorization based on detailed justification.

47 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p.128.

48 FREITAS, Douglas Phillips. *Alienação Parental – Comentários à Lei 12.318/2010*. 2nd

Brazilian federal judges, upon attesting Parental Alienation behaviors against abducted (or retained) children in Brazil, might as well enforce available legal tools to protect them, until the issuing of return order. Article 6 of Federal Law nº 12.318/2010 describes some possible measures:

*Art. 6. Characterized typical acts of parental alienation or any conduct that hampers the coexistence of child or adolescent with parent in autonomous lawsuit or incidentally, the judge may enforce, separately or cumulatively, without prejudice of civil or criminal liabilities, and the general procedural instruments to inhibit or mitigate such effects, according to the severity of the case:*

*I - warn the alienating parent about the occurrence of parental alienation;*

*II - expand access to child in favor of the alienated parent;*

*III - apply a fine to the alienator;*

*IV - require psychological and / or bio psychosocial monitoring;*

*V - change the system of custody rights to joint custody or unilateral custody;*

*VI - prohibit changes on the domicile of the child or adolescent;*

*VII - suspend rights arising of parental authority of the alienator parent.*

*Sole paragraph. Characterized abusive change of address, impracticability or obstruction to family life, the court may also reverse the obligation to take or remove the child or adolescent from the residence of each parent throughout alternated periods of time.*

At the same time, pursuant to Article 13, b of The Hague Convention they might also not take in consideration objections made by involved children/teenagers if, despite of maturity level, there are strong elements to conclude on the practice of Parental Alienation by abductor or alienator parent.

Carmen Tiburcio and Guilherme Calmon emphasize, with reference to Elisa Péres-Vera Explanatory Report of the 1980 Hague Convention, that in order to keep the scope of the Convention, exceptions must be fully proved and not simply alleged. Thus, the burden of proof falls over claiming parties. Nonetheless, there must be grave physical or emotional risks (but not necessarily actual damages to the child/teenager) to justify the refusal of return<sup>49</sup>.

The same authors consider that the expression “*intolerable situation*” refers to circumstances exterior to the children but with strong impact in their condition, such as outbreaks, natural disasters but also acts of domestic violence committed against the mother, when she has performed the abduction/retention<sup>50</sup>.

In sum, Brazilian Parental Alienation Act of 2010 must serve as an important tool in judicial claims of returning abducted children within the scope of The 1980 Hague Convention which shall be brought forward federal magistrates, according to Article 109, I and III of 1988 Federal Constitution.

In such cases, when abducting parents argue that returning the child will imply on physical and/or emotional harm to the child, or when the involved child/teenager in question objects the return to the State of habitual residence, Brazilian Federal magistrates must attest (by themselves or relying the opinion of professional experts) that there are no signs of practice of Parental Alienation before refusing to return the child on the grounds of the exception of Article 13, b of the 1980 Hague Convention.

#### **4. OTHER SELECTED CASES.**

In order to illustrate that the link between of The 1980 Hague Convention on The Civil Aspects of International Child Abduction and The Parental Alienation Syndrome Act of 2010 is actually based on the best interest of the child, it is now important to look at a few selected cases.

Pursuant to Article 155, II of Brazilian Code of Civil Procedure, any lawsuit regarding marriage, divorce, legal separation, filiation or

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49 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 289.

50 TIBURCIO, Carmen; CALMON, Guilherme. *Sequestro Internacional de Crianças*. Comentários à Convenção da Haia de 1980. Rio de Janeiro: Atlas, 2014, p. 290.

child custody and maintenance obligations are under judicial secrecy. Therefore, all names, and possible identification items were dully removed to preserve legal secrecy.

#### **4.1. Case nº 2005.51.01.009792-9 (16th Federal Civil Court of Rio de Janeiro)<sup>51</sup>**

**Facts:** In June, 2004, the boy L.B.L, who was 5 years old then, was taken from Quebec by his mother, I.L.B., to Rio de Janeiro, without permission of the father, who was under the impression that they had traveled to the US. The mother later informed to the former companion that she and their son would not return to Canada. The Father reported the case to Canadian Central Authority, which soon contacted the Brazilian Central Authority (SEDH/ACAF) to function in case, but attempts of voluntary return of the child were unsuccessful, and General Advocacy of Union triggered to present the proper lawsuit requiring judicial order for the return of the child (*ação de busca e apreensão de menor*). In her defense, the mother invoked, among other arguments, that her son would be exposed to serious risk of physical and/or emotional harm if returned to live with his father because of his alleged alcoholism and violent behavior.

**Decision:** Realizing the illegal relocation of the child from his place of habitual residence (which already configures Parental Alienation behavior) the Federal Judge granted the request of the Union, issuing the judicial order to return the boy L.B.L to Canada, rejecting the arguments of the abducting parent, on the grounds that mere allegations cannot justify the exceptional clause of Article 13, b of The Hague Convention. The same magistrate also determined the notification of that Sate Courts (which have issued orders granting temporary custody rights to the mother).

#### **4.2. Case nº 2003.51.01.06976-2 (14th Federal Civil Court of Rio de Janeiro)<sup>52</sup>**

**Facts:** The girl, born in Israel, daughter of Brazilian mother and Israeli father, was brought to Brazil by her mother in December 2002, without permission of the father, who then filed a judicial lawsuit, claiming the return of the child.

**Decision:** After analyzing the elements brought to the case, the

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51 16ª Vara Federal do Rio de Janeiro. Ação de Busca e Apreensão de Criança nº 2005.51.01.009792-9. Published in March 19, 2007.

52 14ª Vara Federal da Seção Judiciária do Rio de Janeiro, Ação de Rito Ordinário nº 2003.51.01006976-2. Federal Judge Claudia Maria Pereira Bastos Neiva, date of ruling May 14th 2007.

Federal judge concluded that relocation of the girl to Brazil was indeed contrary to custody rights conferred to father by the law of habitual residence, because his obligatory military service did not suspend such rights. However, given extensive proof regarding moral and physical aggression practiced against the mother in the presence of the child, eviction notices due to lack of rental payment, food deprivation to the child, and violent behavior of the father, the Judge concluded that the exceptional clause of Article 13, b was enforceable, thus refusing to issue the order of the return.

#### **4.3. Case n° 2012.00577779-5 (Brazilian High Court of Justice)<sup>53</sup>**

**Facts:** a Brazilian woman married a Norwegian man in Norway back in 1999, habitually residing in that country where she two children, born in the years of 200 and 2002 respectively. In 2003, upon divorce of the couple, a Norwegian court granted joint custody rights to the couple over their oldest child and unilateral custody to the mother over the youngest with visitation rights granted to the father. The decision also ruled that the mother could spend up to one month per year with her children in Brazil, granted that she would inform the father about the dates of departure and arrival with one month of advance.

In July 2004, however, after bringing the children with her to Brazil, the mother reported to the father that they would not return to Norway, thus violating custody rights granted in that country. The father flew in to Brazil, where the parents discussed the possibility to change family residence to Rio de Janeiro, a trial that only lasted from August through December 2004, period during which they verbally agreed that the father could bring the children back to Norway with him if that attempt failed. In fact, in December 2004, the Norwegian father flew back to his home country bringing the children along, without permission of the mother, who flew back to Norway in May 2005 where she requested revision of custody rights over her children to local courts.

In 6/27/2006, Norwegian judicial authorities rendered their decision conferring full custody rights to the father and limited visitation rights to the mother, who would not be able to remove the children from that country without express permission of the father. However, on October 2006, she brought her children back with her to Brazil with the help of false passports. The father reported these facts to Norwegian Central Authority, which then contacted Brazilian Central Authority to trigger proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

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<sup>53</sup> BRASIL STJ, REsp 1315342/RJ. Rapporteur: Napoleão Nunes Maia Filho. Ruled in 11/27/2012, published in 04/12/2012.

**Decision:** The 17<sup>th</sup> Federal Civil Court of Rio de Janeiro considered that Norway was the place of habitual residence of these children, pursuant to Article 4<sup>54</sup> of the 1980 Hague Convention. They only were in Brazil originally because their mother illegally retained them in the country. Therefore, Norwegian authorities has jurisdiction over any parental agreement or claims about changing the habitual residence of these children.

Despite the ruling for immediate return of the children to Norway, the mother kept them in the country, by use of judicial methods such as *writs of mandamus* filed in State Courts of Rio de Janeiro. These decisions, which clearly overlooked the Article 16 of the 1980 Hague Convention<sup>55</sup>, granted custody rights to the mother to keep their children in Brazil until decision by Federal Court of Justice.

Meanwhile, she appealed on the merits of this decision to Federal Court of Appeals (Tribunal Regional da 2<sup>a</sup> Região) invoking the exceptional clause of Article 13, b of the Hague Convention. The Federal Court of Appeals initially reversed the decision on returning the children by majority of votes, but in the end it revised this ruling to recognize that the father, back in 2004, did not breach custody rights conferred by Norwegian authorities, unlike the mother in 2006, thus deciding that the children should return to Norway.

Notwithstanding, the mother appealed to the ultimate organs of Brazilian Judiciary Power. The appeal to the High Court of Justice (*Recurso Especial*) was on the grounds of breaching of the 1980 Hague Convention (article 13, b of Decree nº 3.413/2000) requesting precautionary order to keep the children in Brazil until the ruling on the issue. She also filed for an appeal to the Supreme Court (*Recurso Extraordinario*) alleging disrespect of constitutionally granted rights (right to family life and best interest of the child).

Nonetheless, both High Court of Justice and Supreme Court rejected to reverse the ruling of return the Children to Norway, which finally took place in the year of 2013.

In fact, the leading vote on STJ restated that The 1980 Hague Convention preconizes the right of children to enjoy life in close and

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54 Article 4. The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

55 Article 16. After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.



intimate coexistence with both parents, and for such reasons it equally protects custody and visitation rights, pursuant to Articles 1, 2 and 21<sup>56</sup>.

For such matters, the High Court of Justice recognized that it is the best interest of child to enjoy full family life, and thus, to avoid the menace of Parental Alienation, which greatly hinders their right to a normal social, psychological, and emotional development. Thus, Contracting States must ensure that any decision regarding custody or visitation rights (such as the change of habitual residence) must be taken by the authorities of the Contracting State of habitual residence, and for such reason it rejected the appeal of the mother.

Henceforward, it also relied on the expert opinion that the children were not under threat of physical or emotional harm with the possible return to Norway. In fact, both of them enjoyed Brazil, but freely displayed desire to return to their homeland to live with their father. This survey proved to magistrates that none of the exceptional clauses of Article 13, b happened in the case<sup>57</sup>.

At the same time, Brazilian Supreme Court rejected the appeal because it concluded that such claim implied in reexamination of factual matters, which pursuant to Brazilian procedural law can only take place in lower stances. In addition, Justice Gilmar Mendes concluded that the ruling of Federal Court of Appeals also respected infra constitutional legislation<sup>58</sup>.

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56 Article 21. An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

57 “Com efeito, é por demais alardeado pelos estudos de Psicologia e Assistência Social, cujos profissionais mais gabaritados tem insistentemente alertado para os malefícios do que se convencionou chamar alienação parental, a importância para o desenvolvimento psicossocial, emocional e psicológico das crianças ao partilhar da convivência com ambos os pais. Essa constatação é uma realidade sentida por todos os cidadãos, tenham eles filhos ou não, sentimento este encampado pelo Estado Democrático de Direito quando elegeu a proteção da família e das crianças com um dos seus maiores objetivos.” See full text in [ww2.stj.jus.br/revistaelectronica/ita.asp?registro=201200577795&dt\\_publicacao=04/12/2012](http://ww2.stj.jus.br/revistaelectronica/ita.asp?registro=201200577795&dt_publicacao=04/12/2012). Access on 9/20/2014.

58 “Verifico que o Tribunal a quo decidiu a causa com fundamento na legislação infraconstitucional. Assim, eventual ofensa à Constituição Federal, caso existente, dar-se-ia de maneira indireta ou reflexa, o que inviabiliza o processamento do recurso extraordinário. Demais disso, ressalto que a tese desenvolvida no recurso extraordinário demanda a reanálise

## 5. CONCLUSIONS

The selected cases, along with other precedents reported throughout the current work, and the highlighted scholarly opinions justify the conclusion around the necessary convergence of the best interest of the child in Brazilian Constitutional and infra constitutional legislation.

It is necessary to conclude that wrongful international relocation of children and/or teenagers in Brazilian territory in breach of the 1980 Hague Convention (by either abduction or retention) is recognizably a form of Parental Alienation. Such conclusion is pursuant to Federal Law nº 12.318/2010 Article 2, Sole Paragraph, item VII, since it represents unjustified change of the child's domicile in order to prevent access to the child.

Consequently, Article 13, b of the Hague Convention requires certain precautions prior to its enforcement. Hence, authorities of the requested Contracting State can only refuse return of abducted children to the States of habitual residence under strict circumstance, since it represents exceptional clauses that require substantial proof of physical or psychological harm (or risk of harm) for the children. Mere allegations shall not be considered, especially if magistrates conclude, especially with the help of experts, that the abductor or retaining parent is actually practicing any form of Parental Alienation.

For the same matter, the eventual objection of related children or teenager is only considerable if attested that the abductor/retaining parent is not manipulating the opinion of his child in any form.

Hence, the scopes of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the Federal Law nº 12.318/2010 must converge to prevent that unilateral and illegal behavior of parents to interfere with the best interest of children in transnational context. This fundamental right consists in the right to family life with both parents according to the decisions enacted according the law of the contracting State of habitual residence.

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