

The limitations of the Hague Convention to solve conflicts arising out of international child kidnapping

As limitações da Convenção de Haia para solução de conflitos resultantes do sequestro internacional de crianças

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Abstract

The present article aims to promote an analysis on the major Conventions concerning the removal and retention of children in different countries than theirs of habitual residence by one of the guardians, in particular the Hague Convention on the Civil Aspects of International Child Abduction, to discuss about the effectiveness on the application of its precepts. The study purposes to identify limitations and omissions in its text susceptible to undermine its applicability in practical cases.

Keywords: International parental child abduction. Private International Law. Principle of the best interests of the child. Hague Convention. Inter-American Convention.

Resumo

O presente artigo tem como objetivo promover uma análise sobre as principais convenções relativas à retirada e retenção ilegal de crianças em países diferentes de sua residência habitual, em violação a direito de guarda judicialmente concedido pelo Estado onde residiam anteriormente à transferência. O principal enfoque recai sobre a Convenção de Haia sobre os Aspectos Cíveis do Sequestro Internacional de Crianças, ao passo em que se discute a eficácia na aplicação de seus preceitos. Pretende-se ainda identificar limitações e omissões em seu texto suscetíveis de prejudicar sua aplicabilidade em casos práticos.

Palavras-chave: Sequestro internacional de crianças. Direito Internacional Privado. Princípio do melhor interesse da criança. Convenção da Haia. Convenção Interamericana.

1 Introduction

The international kidnapping of children is an increasingly recurring theme in the modern world. The greater mobility and accessibility of people to foreign countries, as a result of globalization, has led to a progressive proliferation of relationships between citizens of different nationalities. The children from these relationships, therefore, have parental links in more than one country. An eventual separation of the couple entails the conflict over the custody of the child, moment at which the dispute about where the minor will reside will begin. In some cases, such a situation may lead to a desperate measure by one parent: to flee with the child to the country of origin or some other country in order to secure exclusive custody by preventing the access of the other parent or foster parent to child.

Such a conflict, because it involves jurisdictions from different countries, faces great difficulty in attempting a solution. There are many issues to be analyzed, such as the relationship between the child and the abductor and the person responsible for the right of access to the child, the economic possibilities and the social context to which each parent is inserted, and the child's adaptation to them etc. The conflicts between the jurisdictions of the countries involved in these cases have led to conflicts within the scope of international law, with the possibility of a just resolution that is in the best interests of the child.

Among the main consequences of illegal retention of minors in other countries is the difficulty of adapting to the language, local culture and school, due to the gross insertion in a diverse educational system and the difficulty of creating bonds of friendship; The interruption of living with family members, in addition to being often subject to situations such as the obligation to use a fictitious name and remain hidden; The lack of medical and psychological care, among others.

The Convention on the Civil Aspects of International Child Abduction was the first treaty to pacify rules on the subject, and its emergence was due to the increasing recurrence of cases related to the subject, and the countless defeats of the parents whose rights of custody Or access to children were violated after filing lawsuits in an attempt to recover them. It was approved in 1980, and has since stabilized as one of the most successful Hague Conventions.

With the increase in the number of cases, other treaties related to the topic have also been elaborated, among which the Inter-American Convention on the International Restitution of Minors stands out, which has the same purpose as the previous one, but is restricted to the territory of the American continent.

It should be noted that the term "kidnapping" adopted by the Hague Convention does not correspond to the definition given by criminal law, but refers to the unlawful removal and retention of a child by a parent or guardian in a country other than that of the habitual residence .

2 Historical context

Prior to the drafting of the treaty, cases of abduction were predominantly provoked by the child's father as a result of court decisions that, in most cases of separation, determined custody of the child to the mother. With a considerable increase in the number of cases identified on the subject, the Hague Conference noted the need in 1970 to develop studies on the illegal withdrawal of children from their countries of origin (ARAÚJO, 2006, p. 502).

The Hague Convention of 1961, however, was an obstacle to the fair settlement of conflicts, since its text stated that jurisdiction in cases of international child abduction should be attributed to the authorities of the child's place of situation who, after being taken to a different country Of her former residence, it became her country of residence. Moreover, in using the laws, values and customs of the legal system itself in the judgments, the authorities almost always considered the permanence of the child in the new country as being in their best interest.

The procedure for the parent whose access to the child had been interrupted was also complex and time-consuming, due to the lack of a simplified procedure, based on cooperation between the countries involved. The authorities were not instructed to cooperate with the injured parent and, if he succeeded in locating the minor, he should always resort to legal proceedings to try to regain custody or access to the child. After all legal proceedings, the decision was usually unfavorable to him (DOLINGER, 2003, p. 243).

The continuous cases of illegal abduction of minors encouraged the emergence of a concern on the part of the States on the subject, which culminated in discussions between their representatives, with a view to the elaboration of a treaty with the purpose of pacifying and gathering uniform rules for all The signatory countries, regulating measures to be taken in cases of illegal withdrawal and retention of children in countries other than their habitual residence. As a result, the Convention on International Child Abduction was adopted at the Hague Conference forum on 24 October 1980.

3 Discussion on the standards of the 1980 haia convention

The Convention on the Civil Aspects of International Child Abduction was adopted on 24 October 1980 at the Fourteenth Session of the Conference on Private International Law in The Hague, with unanimous vote of the States present. Since then, it has been joined by 78 (seventy-eight) countries, making it one of the most successful international Conventions.

The text of the treaty stipulates measures to be adopted by all the signatory countries regarding the illegal withdrawal and detention of minors in foreign

countries, by mutual cooperation among the participating nations, in order to regulate the procedure to be adopted by all. In this way, it aims to avoid conflicts between the jurisprudential understandings of the countries involved in the disputes between the parents and, thus, to solve the conflicts in a fair, fast and efficient way.

The content of the Convention is predominantly aimed at providing for measures and procedures capable of safeguarding the return of the child to the country of habitual residence, that is to say, the place where he / she resided with the family prior to the illegal retention situation in a foreign country. It should be noted that the habitual residence to which the text refers consists of the child's previous residence; The wrongful transfer does not have the power to change his habitual residence.

It should be noted that there is no provision regarding guardianship regulations for the parents in dispute, which must be discussed and decided in the Judiciary of the country originating from the child. Decisions and measures taken under the Convention shall in no way interfere with the grounds of the right of custody, as provided for in Article 19.

The international kidnapping will only be configured when there is a violation of a judicially granted right of custody, whether individual or shared. Therefore, when the relationship with the child is abruptly interrupted to the detriment of a parent who has a right of custody obtained through a court decision, the latter may use the Convention to guarantee the child's return to the home in which he or she previously resided. The same applies to cases of shared custody, since both parties also have the right of custody and, even if the other decides to establish residence in different parents, the treaty favors the return of the minor to the parent who remains in the country where the family previously resided with the son.

It should be noted that the application of the treaty will remain unviable when the request for restitution is made by the parent holding only the right of access to the child, since the transfer of the child does not violate the custody right stipulated in court.

However, such an understanding may be excepted if the right of custody is linked to a "ne exeat" clause, which stipulates that the transfer of the child to a foreign country may only occur under the authorization of the holder of the right of access. It is understood that this clause gives the parent who does not have the right of custody the prerogative to participate in the decision on the place of residence of the child, since his veto has the power to prevent the freedom of the court custodian to transfer the child to another country. This interpretation has motivated a large number of courts in several countries to interpret the "ne exeat" clause as a right of custody under the Convention, since, according to article 5 of the treaty, the right to custody involves, in addition to childcare, The right of decision on where it will reside (BARBOZA, 2012).

The Hague Convention sets out requirements which must be met by the applicant in order to be able to bring actions for the return of the child, such as: the mutual

recognition of the signatory States of the Convention by means of a communication to the Hague Conference Secretariat; The age of the child under 16; And the child's residence in the requesting country immediately prior to withdrawal.

Article 6 stipulates that Contracting States should establish a Central Authority to carry out the measures contained in the Convention, making it possible for federal States, or for those that contain several legal systems or autonomous territorial organizations, to designate more than one and delimit the territorial extension of action for each. Nevertheless, it shall elect an Authority responsible for receiving the requests and retransmitting them to the competent Authority in order to facilitate the procedure.

Among its duties, the Central Authority will be responsible for locating the kidnapped child, taking preventive measures to avoid harm to the child or the petitioner, ensuring the voluntary surrender of the child or facilitating a friendly solution, reporting on State legislation and reporting the situation Of the child. In case of unsuccessful attempts to negotiate amicably, the Authority shall proceed with the opening of a judicial or administrative proceeding with the purpose of restoring the child, requesting the regulation of visiting rights, when necessary. It is also your responsibility to provide legal and judicial assistance, through a lawyer to be appointed, to ensure safety in the return of the child and to enable the full implementation of the Convention, removing obstacles that compromise it.

The request for the return of the child may be offered by any person, institution or body claiming that an illegal transfer of a child to another country has occurred, in violation of the right of custody in force at the time of withdrawal, and shall be addressed to the Central Authority of any Contracting State. The request must be accompanied by: information on the identity of the applicant, the child and the possible hijacker; The date of birth of the child, if known; The reasons for the child's return; All known information about the whereabouts of the child and the person with whom the child is found, among others.

The applicant has a period of up to one year to request the return of the child judicially to the country of habitual residence, otherwise the case will be tried in the country where the child is, which makes difficult the success of the demand. As mentioned above, it is up to the Central Authority designated in each country to accept the request, make contact with the parties and try to obtain the peaceful restitution of the child. If he does not succeed in trying, he will demand the return of the child judicially, through the Attorney General of the Union. After the child returns to his country of origin, the custody dispute will no longer be protected by the treaty.

Although the main objective of the treaty is the return of the minor to the country where he resided, there are cases foreseen to authorize the maintenance of the child in the country where he is retained. The State may refuse to return the child

when it considers one of the situations provided for in the Convention as exceptions to the obligation to return the kidnapped child. The first, provided for in article 12, refers to the possibility of the minor being fully integrated into the environment in the new country, and there must be evidence that a period of more than one (1) year has elapsed since his / her removal from the previous country of residence, As well as the verification of full conditions of adaptation of the child to his new life. The same article also enables the requested State to reject the child's request for return or to suspend the proceedings when it has reason to believe that the child may have been taken to another country. However, if the Central Authority finds that the child has been taken to another Contracting State, it shall forward the request to the responsible Authority, informing the requesting State of the event, as provided for in Article 9 of the treaty.

Article 13, however, provides for a further three (3) situations in which the return of the child is not compulsory: if the person, institution or body that cared for the child previously did not exercise the right of custody at the time of withdrawal and retention, Subsequently agreed with the transfer or retention; If there is a serious risk to the child of being subject to physical or mental hazards or any other intolerable situation on his return; And also when the child has reached the age and degree of maturity sufficient to have discernment on the subject and to manifest against his return.

Lastly, article 20 allows the requested State to refuse to promote the child's return when it finds that it is incompatible with the fundamental principles relating to the protection of human rights and fundamental freedoms under its legal system.

The right of access of the non-custodial parent is also covered by the Convention, which defines it in Article 5 as "the right to take a child for a limited period of time to a place other than that where Usually resides. "That is, the device safeguards not only the right of access to the child, but also the possibility of taking it to a place other than its habitual residence for a season. In order to avoid divergent interpretations by the participating nations, the text of the treaty clearly and objectively distinguishes rights of access and custody, the definition of which pertains to the rights of the person concerned. Child, and in particular the right to decide on the place of residence.

"Therefore, the guardian, according to the article, is responsible for ensuring the child's livelihood directly, providing him with the necessary care. That is, if the legal guardian of the child does not reside with it, providing it with primary care, such as health and education, etc., it will not be recognized as such under the terms of the treaty.

The prediction and attention given to the right of visit by the parent who does not have custody of the child is intended to serve the child's best interest, which is the primary principle on which the treaty was based. Every child should be made available or facilitated full access to both parents or guardians, especially in order to ensure that their psychological development and mental health are preserved.

The procedure for requesting access rights is provided for in Article 21, which determines the competence of the Central Authority designated by each contracting

nation to receive the request, just like the request for the child's return. Initially, the authorities should try to promote the access of the applicant to the child in a friendly way, safeguarding the peacefulness of the meeting, as well as other conditions necessary to exercise the right of access, removing any obstacles that may compromise it. The authorities may also bring an action to regulate or safeguard the right to visit the applicant, and ensure that the conditions stipulated for their exercise are effectively fulfilled.

4 The inter-american convention of 1989

In 1989, a new Convention was adopted with the same objectives as the Hague Convention, but restricted to the countries of the Organization of American States, known as the Inter-American Convention on the International Return of Children. It was approved at the Fourth Inter-American Specialized Conference on Private International Law (IV CIDIP), in the city of Montevideo on July 15, 1989.

The text of this new treaty is broadly similar to that of the previous one, when it defines as its principal purpose the return of the minor to his country of habitual residence, after being illegally removed from the latter, and ensuring respect for the visit, custody or custody of Rights. As in the Hague Convention, such a treaty provides for the same requirements for the application, such as the minimum age of the child of 16 years, the period of 1 year to bring restitution action from the location, and both have a similar procedure (ARAÚJO, 2006, p. 511-512).

The Inter-American Convention also determines cases in which the request for restitution of the child may be denied by the requested State. The refusal may be based on the following allegations under Article 11: where it is shown that the applicant did not fully exercise his custody or visitation rights at the time the child was retained or withdrawn from his country of origin or if he consented Or rendered consent after retention or transfer; Where the return of the child entails a serious risk of exposure to physical or mental harm to the child; Or when the child is of sufficient age and maturity, and expresses his / her return (DINGER, 2003, p. 253).

The requested party, however, must present the reasoned opposition within 8 (eight) business days, counted from the moment the minor is located, as provided in article 12. The judicial or administrative authority shall then render 60 (sixty) days, stating the refusal or acceptance of the request for restitution, after examination of the legal rules and previous case-law of the State of habitual residence of the minor and, if necessary, assistance from the central authorities or diplomatic agents or Countries.

It is observed that the treaty of Montevideo further restricts the possibilities of restitution of the minor through the requirements provided in his text. Article 13 stipulates that when the resolution submitted by the requested State is favorable to the

return of the minor, if the requesting authority fails to take appropriate measures to effect the transfer of the child within 45 (forty-five) days, the request for restitution and The measures adopted shall have no effect. The same provision confers on the claimant the responsibility for the costs of the shipment, and the requesting State may facilitate the costs, or even collect them from the defendant.

Another restriction offered by the treaty refers to the application for restitution after the child's location in the requested State. Article 18 enables the authorities of the child's country of residence to request the country where the child was taken, instructing the request with all available information about the possible whereabouts of the child and the identity of the possible abductor. If the requested State identifies the presence of the child in its territory, it must adopt the necessary means to guarantee its health and to inhibit its concealment or transfer to another country. Such measures may, however, be suspended if the refund is not requested within sixty (60) days of notification of the child 's location as provided for in Article 20.

The courts or administrative bodies of the contracting countries where the child is located may also not decide on the right of custody until they prove that the Convention is inapplicable or that the time limit for the request for restitution is still in progress, Referred to in Article 16.

Although ratified by Brazil, due to the lack of a central authority to intervene in the application of the Inter-American Convention, most cases of abduction are still covered by the Hague Convention. As Nádia de Araújo (2006, p.274) teaches, Article 34 provides that the Inter-American Convention shall prevail in countries that are signatories to both treaties. However, States Parties have the power to establish, on a bilateral basis, the priority of application of the Hague Convention.

5 Limitations, gaps and restrictions that invantify the application of the hague convention in practical cases

The Hague Convention undoubtedly represented a major step forward in this regard, while regulating a procedure to be followed by the signatory countries and establishing among them a commitment to cooperation and immediate restitution of abducted children to their former countries of habitual residence. However, it is observed in practice that there are innumerable cases whose characteristics and developments are no longer possible to avail themselves of the application of these treaties.

It should be noted that there is no provision in the text of the Convention for sanctioning non-compliance with its precepts. In case of denial of compliance by one of the signatory countries, it shall not be punished in any way for its action or omission contrary to the provisions of the treaty. This gap opens the way for partial or complete

violation of the rules, either as regards the requirements and the procedure, or even the denial of the return of the child retained in its territory, which directly affects the driving objective of the Convention, which is to ensure The return of the minor to his / her country of origin. The requesting country, therefore, will be harmed and there will be no prospect of resolving the conflict envisaged to support it. The lack of provision for a coercive method to be used to promote the return of the child, even if it is refused by the authorities of the country where the child is located, offers full freedom for non-compliance with the treaty, without the refusing signatory country suffering any punishment In return.

Therefore, the only possibility for the requesting country to succeed in its suit would be through an attempt at a diplomatic solution, with the establishment of a friendly agreement or negotiation directly with the country where the child is retained. This finding implies that compliance with the Convention is held by the volitional conduct of the signatory countries, which have full discretion to act in accordance with their interests depending on the case. Hence, one must rely exclusively on reciprocity between them, and the mere hope that they will comply with the tenor of the treaty.

As explained above, the Hague Convention only ensures the return of the abducted child to his / her country of habitual residence, and provides mechanisms to achieve this which is its main purpose. In practice, there are innumerable cases of greater complexity, whose characteristics and ramifications make the application of the treaty impracticable. The only alternatives foreseen in its text that exclude the return of the child are the chances of keeping it in the country in which it is retained: when the return offers a serious risk, when it opposes the return itself or when more than 1 has passed (One) year of withdrawal or retention upon receipt of the request.

However, there are situations in which the best interests of the child may be that they are not in any of the two countries covered by the Convention, namely their country of habitual residence or the country in which they are retained. There are subjective factors that may prevent the maintenance of the child in both countries, among which is the hypothesis that both parents move to countries other than the place of habitual residence of the child, whether for professional reasons, financial reasons, or even In situations of war, civil strife or public calamity.

Thus, if one of the parents brings the child with him to a different country, and the other is already residing in a new country, both States being signatories of the Convention, the inapplicability of this culmination in dispute between jurisdictions with a remote possibility of just and principled resolution The best interests of the child. This situation would imply in another case where the suit would be judged by the authorities of the country where the minor is being held, which would significantly favor the kidnapper's victory. The need for a standard procedure to be adopted by

countries involved in similar circumstances is thus evidenced. The judgment of the lawsuit in these cases should be based on subjective requirements such as: assessment of the child's affinity with each parent, cultural environment and context most beneficial to their development, adaptation to the language, manifestation of the child when it has already reached a certain degree of maturity etc.

In addition to unforeseen situations, the very superficial nature of the wording of the treaty may also hinder the effective application of the treaty, since it may open the free will of the contracting nations to refuse to reinstate minors retained in their territory, relying on their own Forecasts. Article 20 of the Convention provides that the requested State may refuse to return the child when it considers that the fundamental principles contained in its own legal order with respect to the protection of human rights and fundamental freedoms indicate that the best solution for the child is to remain in its territory. While it is commendable to predict human rights and fundamental freedoms as criteria to be considered for deliberation on the best interests of the child, the comprehensiveness of the wording of that article gives States the freedom to use it as a basis for interpreting Abusive

In other words, the signatory country may refuse the return of a child unduly retained in its territory based on subjective factors, such as the interpretation of fundamental principles according to its own legal system. It can be seen that each country has particular understandings regarding notions of human rights and fundamental freedoms (TODD, 1995, p. 567). Some more conservative countries, for example, criminalize homosexuality and confer different treatment between men and women, which are inferior to many aspects of life in society. With regard to children's rights, understandings on specific issues can differ substantially, such as the criminalization of spanking, severe physical punishment and other physical and emotionally abusive conduct, the criminalization of exploitation and child labor, compulsory enrollment in an educational institution, etc.

Therefore, it does not seem reasonable to specify the understanding of each covenantal State as a basis for a possible refusal to reinstate a kidnapped child, since each child has different notions under the fundamental principles, which may further facilitate the occurrence of conflicts between the countries involved. In addition, as mentioned above, this possibility may allow abuses by the authorities of each country that can avail themselves of the scope of the rule to justify, with support in the Convention itself, the refusal to refund the child detained.

It is necessary for the Convention itself to establish delimited criteria as to the grounds on which a denial of the child's return can be based, by establishing a unified understanding of fundamental principles on human rights and fundamental freedoms, to be followed by all Countries. In this way, excessive subjectivity would be avoided in determining the reasons for refusing to return children.

In the same section, it is observed that one of the exceptions to the obligation to return the minor present in article 13 can also give rise to discord between the countries involved. The hypothesis of item “b” of the said device makes it possible to maintain the child in the state in which he is retained in the event of a serious risk of being subjected to physical or mental hazards or any intolerable situation if he is returned. Taking into account that the study that will determine the possible subjection to such risk will be carried out by evaluators from the country where the child is retained, the values and principles that guide the legal order of the child will be used as grounds for reaching a conclusion, Which clearly favors a decision for the child’s stay in the country, supported by the provisions of the Convention itself.

In order to ensure the adequacy of the expert examination, which will analyze the impact of the hypothesis provided for in Article 13 (b) of the treaty, it is necessary that the assessment be carried out by experts from both the requesting State and the requested State. In this way, unfounded decisions that could harm the author’s right and the best interests of the child would be avoided.

With regard to the difficulty of applying the abovementioned Article, it should be noted that this is already under consideration by a Working Group composed of experts appointed after the Annual Meeting of the Hague Conference on General Affairs in April 2012, on the recommendation of the (B) of the Hague Convention, which is intended to guide the activities of judicial authorities (ARAÚJO; VARGAS, 2012).

Such rules show that there are limitations and restrictions in the text of the Convention, which implies the need to complement or integrate rules in order to eliminate these shortcomings. This task demands the joint efforts of the signatory nations in order to provide the best resolution of the concrete cases involving the kidnapping of children at the international level.

6 The case of Catherine Meyer

In order to illustrate the problematic of the commitment of the application of the Conventions due to the constant limitations in their texts, it is relevant to analyze a concrete case in which it was found difficulty in the application of the treaty due to the lack of clarity in its commands.

Catherine Meyer, then known as Catherine Laylle, whose two children were retained in Germany by her father, Hans-Peter Volkmann, her ex-husband, one of the most mediated cases to be studied by lawyers around the world. In 1992, when they separated, they both agreed that custody of the children would stay with their mother. However, in 1994, when the children were 7 (seven) and 9 (nine) years old, when they visited their father in their homeland, he sent a letter to the mother informing her that she had no intention of returning the children to England, Where they lived with the mother after the divorce.

Meyer then filed a lawsuit in the city of Verden, Germany, requesting the return of the children, using the Hague Convention of 1989, at which time he was victorious. Volkmann appealed to a court in a nearby court in the town of Celle, which suspended the earlier decision and granted custody of the minor children to his father in absentia. At the final judgment, the German judicial authority ruled on the rejection of the petition of the author, in accordance with one of the exceptions of article 13 of the treaty. The decision was based on a psychological examination report carried out by a professional elected by the defendant himself, as well as testimonies made by the children in a hearing under instructions from the father, who proceeded to alienate them against the mother.

The right of visit of the mother-in-law, fixed in the sentence, allowed her to have access to her children for 4 (four) hours per month. In practice Meyer had to undergo monthly meetings of no more than an hour and a half with his children in the presence of another woman, and on condition that he communicated exclusively in German with his children, a language in which he never had fluency. His conversations monitored by his father, behind the door of the next room. (Mosel, 1997). Since the trial, Meyer has never been able to regain custody of children (HATTENSTONE, 2013).

The case in point shows the fragility of the effectiveness of the Hague Convention, since, in spite of having involved two signatory countries, namely England and Germany, its precepts were frontally misrepresented and misused. In addition to the loss of custody of the children, it was motivated by abusive interpretation and application of the hypotheses excepting the obligation to return children, the right of visit of the mother had also never been fulfilled correctly. The actual regulation of the right of access by the German court in the trial of the case was defined in a disproportionate and unreasonable manner. However, the German authorities have never suffered any form of punishment or repression since there is no provision for punishment for non-compliance or misuse of the provisions of the Convention.

7 Conclusion

The Conventions on the removal and illegal detention of children in countries other than their habitual residence, in particular the Convention on the Civil Aspects of International Child Abduction, represented a significant and significant advance in the unification of legal precepts related to the subject in the scope Of international law. The accession of 79 countries to date places the Hague Convention among the most successful Conventions on Human Rights.

However, the gaps and limitations contained in its text restrict its application in numerous concrete cases, whose characteristics are not supported by its precepts, either by restrictions imposed by its own wording, or omissions in relation to unforeseen situations.

This observation raises the question of the need to modify some of the provisions of the main Convention on the international kidnapping of children, in order to remedy such omissions and limitations in its text, in order to broaden its applicability, More cases of detention or removal of children from their countries of habitual residence.

In view of the foregoing, in order to avoid non-compliance with the provisions of the Convention, it is necessary that there be provision for a sanction to be imposed on the countries that contravene the treaty. Otherwise, the provisions contained therein will be mere recommendations, which may be complied with or not, which will violate the reason why the treaty was drawn up, that is, to unify rules to be adopted by all the signatory countries in order to avoid Conflicts of jurisdiction. Sanctions consist of the necessary means to ensure compliance with any legal provisions, acting as a method of coercion so that the persons who are submitted to them feel compelled not to fail them. The absence of possibility of punishment may encourage the contracting nations to act according to their own will, which hinders the very purpose of agreeing to a Convention, whose principle consists precisely in the act of a State abdicating the precepts of its legal system in favor of a Community: the peaceful coexistence among nations.

Another problem to be addressed in the text of the Convention is the lack of provision for situations other than the mere possibility of returning the child to his or her country of habitual residence, especially if both parents moved to countries other than those previously resided, And one of them takes the minor with him, depriving the other of the exercise of the right of custody or living with the child, depending on the case. The drafting of the treaty should enable its application in as many cases as possible related to the illegal withdrawal and retention of minors, in order to safeguard the effective fulfillment of the child's best interest.

In another respect, the possibility for participating States to refuse to return the child, on the basis of their own understanding of the fundamental principles relating to the protection of human rights and fundamental freedoms, does not seem reasonable, since the subjectivity of such criteria They incur abuse and injustice. The concepts relating to these principles must be delimited by the Convention itself in order to unify the criteria for refusing to refund children, thus avoiding unreasonable refusals.

Similarly, the mere finding by the requested State that the return of the child may cause him physical or mental harm or intolerable situation, provided for in article 13, "b" as one of the causes of exception to the obligation of restitution, Consists of a criterion of extreme subjectivity, since it does not require concrete evidence to justify it, but only a study to be carried out by an expert appointed by the authorities of the Judiciary of the country where the minor is detained. To avoid inconsistencies in the final report from the study, it is essential that the situation of the child is also assessed by experts from the requesting country, thus avoiding abusive or limited decisions that would favor the abductor.

The principle of the best interests of the child, the principal institute upon which the Conventions were conceived and agreed upon, will only be effectively met when all the most significant restrictions that are not invigorating to their applications are eliminated. The Hague Convention, in particular, as it is the main and most widely accepted treaty concerning the international abduction of children, must be subjected to such changes in order to intensively expand its field of action and to assist in the resolution of a significantly larger amount Of cases related to the topic.

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