January 22, 2010

Dear BSH Supporters,

In June, 2009, Judge Pinto ruled for the immediate return of Sean to his father, David Goldman. This ruling was then confirmed by an appellate ruling. From this, came a firestorm of legal maneuvering. Ultimately, the Chief Justice of the Federal Supreme Court of Brazil (STF), Gilmar Mendes, took it upon himself to rule on the merits of the numerous forms of legal relief sought by both parties. Beyond the first few pages, both of Justice Mendes' rulings are identical. As such, we chose to include both as part of one packet of translated documents.

As we translated the documents, we took great pains to reproduce Judge Mendes' intentions through the use of **bold**, *italics*, and <u>underlining</u>. Throughout the rulings, we chose to retain the original Latin terminology as well as the original Portuguese when there was no direct translation into English. In each instance, we included a thorough definition on the following pages. These translations err on the side of fidelity to the original text.

Each of us contributed in different ways to the translation process. We list our names in no particular order:

- tweinstein: Intermediate translation, text formatting, introduction, final preparation
- ::ultranol:: Intermediate and final translation, text formatting
- Andre Felipe: Intermediate and final translation, legal terminology
- FC_Florida: Intermediate and final translation, text formatting
- cmdealin: Rough and intermediate translation
- Sashia: Intermediate translation, text formatting

Sincerely,
tweinstein, ::ultranol::, Andre Felipe,
FC_Florida, cmdealin, Sashia

Latin terminology used in Judge Mendes' ruling

Term	Definition
decisum	decision
error in procedendo	Refers to an error in the application of the law which has a procedural nature. It is different from *error in iudicando* where the judge misinterpreted the law or the facts. If an appeal is filed based on *error in procedendo*, and if the appellant wins, the court of second instance will order the judge to remake the decision and correct the procedural error. If the appeal is based on *error in judicando* and it is granted, the second instance (or above) can change by itself the decision without the need to send the case back to the court of first instance.
fumus boni iuris	Along with *periculum in mora*, it is a requirement for the granting of a preliminary decision (medida cautelar or tutela antecipada). The petitioner must explain the existence, in the case, of the *periculum in mora* and *fumus boni iuris*.
Habeas Corpus	One of a variety of writs that can be issued by anyone who feels that their freedom from restraint is being violated, either by an unlawful act or an abuse of power. A Habeas Corpus is supported by the Constitution and can be requested on behalf of anybody, not just the aggrieved party.
in casu	in this case
Periculum in mora	A requirement for a "Medida Cautelar/Tutela Antecipada" to be analyzed. Translates literally to "danger in the delay".
quaestio juris	Refers to a situation in which the solution of an issue is found in the law.
res judicata	Refers to a matter already adjudicated, which cannot be modified. In an appeal, a *formal res judicata* argues that a procedural mistake was made while a *material res judicata* argues against the merits of the case.

Brazilian legal terms and concepts used in Judge Mendes' ruling.

Term	Definition
Agravo Interno / Agravo Regimental	Similar to "Agravo de Instrumento", with the same procedure rules, but the "Agravo Regimental" is used to challenge an "interlocutória" decision from a second instance judge, or from a STJ/STF Minister to be decided by a panel of the same Court the judge/Minister belongs, i.e., at the same instance.
direito líquido e certo	A right whose existence does not need the production of evidence to be proven. The sole allegations of the author or the documents produced are sufficient to demonstrate the existence of this right. These rights are part of the procedural requirement for a Mandado de Segurança to be accepted and judged.
em grau de apelação	Indicates the current phase of a judicial proceeding. In this instance, an appeal was filed yet is still pending judgment.
litispendência	Indicates that another judicial proceeding with the same parties and goals already exists. In such case, another one is not necessary and should be closed.
Mandado de Segurança	A judicial action used to protect a "*direito líquido e certo"* that is being violated by an illegal act or an act committed with abuse of power by some authority (eg. a judge or minister) or by some person who is exercising attributions of the State. A Mandado de Segurança can only be used in cases where *Habeas Corpus* and *Habeas Data* are not the proper action to challenge the act of the authority. In U.S. law, a Mandado de Segurança is similar, though not exactly the same as, a *Writ of Mandamus*.
memorial	A document presented in court that serves as the closing arguments for a case.
paciente	Refers to a person who is an alleged victim of an illegal act or an act committed with abuse of power and is the object of a Habeas Corpus action. In this case, the *paciente* is Sean.
PIS/COFINS	PIS - PROGRAMA DE INTEGRAÇÃO SOCIAL Program of Social Integration COFINS – CONTRIBUIÇÃO PARA O FINANCIAMENTO DA SEGURIDADE SOCIAL Contribution for the financing of Social Security
summula	The term, *summula*, refers to a text that 'sums up' the knowledge in a certain field.

ANTICIPATORY DECISION ON MANDADO DE SEGURANÇA
28.524 FEDERAL DISTRICT

RAPPORTEUR : MINISTER CEZAR PELUSO
PETITIONER(S) : UNIÃO [Brazil]
ATTORNEYS : ATTORNEY GENERAL OF BRAZIL
PLEADED : SPEAKER AT HC No. 101.985 OF THE FEDERAL SUPREME COURT

DECISION: This is a mandado de segurança (pages 2-26), requesting a preliminary order, filed by the Union against an act of the rapporteur of the HC No. 101.985/RJ, Minister Marco Aurelio, pending at the Supreme Court (STF), which at the outset determined the *"suspension of the effectiveness of the ruling delivered by the Federal Civil Appellate Court of the 2nd Region on No. 2008.51.01.018422-0, which resulted in the peremptory order for delivery of the paciente to the American Consulate in Rio de Janeiro in 48 hours* "(pg. 37).

Preliminarily, the Union argues the pertinence of this *writ* (pages 3-4), because it understands there is not an appropriate appeal or possibility of correction of the impugned act, under the terms of the Law No. 12.016/2009 (art. 5, II), the Rules of Procedure Rules of Supreme Court (art. 201, II) of the Statement of Summula 267 and of the jurisprudence of this Court (HC No. 94,993 MC-AgR/RR, Full, Rep. Celso de Mello, Dje of 12.02.2009).

The petitioner points out that, in the contested decision, given in place of *habeas corpus*, an injunction had been granted to prevent the delivery of the paciente to the American Consulate in Rio de Janeiro until final adjudication of that process. Thus, there was a suspension of the appellate ruling handed down by the 2nd TRF Region in the case of an Ordinary Action of Search, Seizure and Return No. 2009.51.01.018422-0, filed by the Union to the detriment of the stepfather of that paciente.

To demonstrate the plausibility of the clear legal right invoked, relied on exordial claims that "*the teratology of the injunction now under attack" (pg. 13),* arguing that the challenged HC and its granted injunction are clearly unacceptable, "*since there is no obvious illegality or abuse of power that justifies its*

impetration, as already decided by this Excelsa Court "(pg. 17) in the HC No. 99.945/RJ (DJ 05.08.2009), which dealt previously with the case.

The petitioner asserts that the maintenance of the challenged decision may involve a breach of the Convention on the Civil Aspects of International Child Abduction (Hague Convention of 1980) by the Brazilian government and the imposition of sanctions of international scope (pages 13-23).

It also argues that the ordinary instances, by thorough sentence and ruling on appeals office, determined, after extensive cognition in fact and law of all the elements of the case, the return of the paciente to his biological father and the impossibility of such a *habeas corpus* (granted at the outset) be managed as a substitute appellate.

It affirms that the assumptions made in the grounds of the challenged decision clash with the elements of fact and right established by the suspended ruling, by applying none of the exceptions provided for by the Hague Convention of 1980 that could hinder the return of the paciente to the United States (pages 18-23), and including the matter of the paciente being heard during the expert evaluation report (pages 19-20).

Regarding the *periculum in mora*, the petitioner indicates that the possible failure to comply with the Hague Convention on the Civil Aspects of International Child Abduction by Brazil could affect several other Brazilian citizens, to the extent that other countries may deny requests of international legal assistance made by Brazilians under the above Treaty, for violation of the principle of reciprocity (pages 23-25).

Even in this regard, the Union has reported the existence of a petition filed to the detriment of Brazil, presented to the Inter-American Commission on Human Rights, in the face of "*the delay of the Brazilian Judiciary to deliver final jurisdictional provision in the event of unlawful abduction of minors* "pg. 25), for breach of the Hague Convention.

Finally, it points out the potential negative effect multiplier of the challenged decision in other situations when the correct application of the Hague Convention (pg. 26) are invoked, requesting the following:

"Based on the foregoing, the Union requests the **granting of a preliminary decision** as a matter of urgency, in order that the effects of the decision rendered in proceedings HC No. 101.985/RJ are suspended - and restore the effectiveness of the ruling delivered by the Federal Court of 2nd Region of the Civil Appellate No. 2008.51.01.018422-0, which results in the order of return of the minor S.R.G to his biological father, upon presentation of the first to the American consulate in the city of Rio de Janeiro, within 48 hours. "(pg. 26)

Thus, I decide.

Preliminarily, it is fitting to query the pertinence of this present mandado de segurança.

The orientation of this Supreme Federal Court is to find unacceptable the *mandado de segurança* against a jurisdictional act of the Court. Tried according to the following precedents: MS 25,413-AgRg, my rapporteurship, Plenary Session, DJ 14/6/2007; MS 22,515-AgRg, Rep. Min Sydney Sanches, Plenary Session, DJ 4/4/ 1997; MS 22,626-AgRg, Rep. Min Celso de Mello, DJ 22.11.96, MS 21,734-AgRg, Rep. Min Ilmar Galvão, 15.10.93 DJ.

However, under exceptional circumstances, this Court has conceded filing for *mandado de segurança* against unappealable jurisdictional acts and formally recorded by a single Minister of the STF.

I refer to MS 24,159-QO, Rep. Ellen Low Gracie, Plenary Session, DJ 31.10.2003. On that occasion, the Plenary granted the injunction on a *mandado de segurança* to reform the decision of the President of the Supreme Court at that time, Minister Marco Aurelio, who, after reconsidering the decision of President that preceded him (Min. Carlos Velloso), denied the Suspension of Security Measure No. 1962/RJ.

Given that the decision denying the suspension was not subject to appeal and that there was great risk of serious damage to the petitioner, the Plenary saw fit to admit the mandado de segurança against an act of the Minister

of the Supreme Federal Court. The docket of the ruling so provides:

> "MANDADO DO SEGURANCA AGAINST A JURISDICTIONAL ACT. EXCEPTIONAL NATURE. SUSPENSION OF SECURITY MEASURE DENIED. EVIDENCE OF RISK OF DAMAGE TO THE ECONOMY AND THE PUBLIC HEALTH. PIS AND COFINS. Law No. 9718/98 and MP 1.991/00.
> 1. Exceptional situation in which is known that a mandado de segurança is invoked against a jurisdictional act of the Presidency which, having previously revoked a conceded order, refused the Suspension of Security Measure sought.
> 2. Clear evidence of bad faith, in view of placing similar requests in various Federal Courts and obtaining favorable adjudication in court apparently incompetent. Sentence which granted safe-conduct to a fuel distributor against fiscal authorities nationwide.
> 3. Lack of legal plausibility of the claim pretenses upheld by the sentence. Suspension of the appropriate motion denied by the 2nd instance. Suspension of Security Measure denied by the Presidency of the Federal Court Circuit.
> 4. Evidence of risk of damage to the coffers of Social Security, given the fragility in the corporate assets and partnerships of the company which benefited from the release (at least partial) of the collection of contributions.
> 5. Injunction upheld."

A similar situation happened on the MS No. 25,024, filed against the monocratic decision rendered regarding ADI No 3273, by rel. Minister Carlos Britto. Minister Nelson Jobim, then President, granted the injunction requested in the *mandado de segurança* to suspend the ruling issued in that ADI, since a monocractic decision order was not appropriate in the case, "except during the recess period" (Law No. 9868/99, art. 10, heading).

At the occasion, the Minister President pointed out that ADI No. 3273 had been distributed and concluded to the Rapporteur on 9/8/2004, received in the office on 10.08.2004, and plenary session held on 12.08.2004. However, the precautionary measure was partially accepted by the Minister Carlos Britto on 16.8.2004 (DJ 23.8.2004) and was suspended the next day, by the decision of the Minister President in MS No. 25,024, considering

an auction would be held that day. On 02.05.2005, the Minister Eros Grau, rapporteur of the MS No. 25.024, found him wronged in the face of the Supreme Federal Court (STF) Plenary for having rejected the ADI No. 3273.

So, once again, it was the feasibility of the exception, according to the jurisprudence of this Court, to file a *mandado de segurança* against a monocratic decision by a Minister of the STF.

Along the same lines, the rapporteur of the MS 25853/DF, Min Cezar Peluso, granted the injunction to "suspend the effects of the injunction order of the MS No. 25,846, restoring the content of the *decisum* recorded by Celso de Mello, at the ACO No. 840.

At the time, the *mandado de segurança* challenged the injunction granted by the Minister Marco Aurelio found in the minutes of another *mandado de segurança* (MS 25.846/DF), which required the Union to guarantee international loans obtained by the Federal District. The injunction on the second *mandado de segurança* remains deferred, in view of its exceptional character and the absence of another remedy, as follows:

> "(...)
> And, as old and mature as Court's jurisprudence is, in principle, inadmissible a *mandado de segurança* against a judicial pronouncement that comes from a body of the Court, be it the Plenary, one of their Panels, or one of its Ministers, to the extent that such decisive acts can be restored through the resources provided, or, in the case of the judging of merits, with res judicata, through action rescission (MS No. 24.399, Rep. Min ALVES MOREIRA, DJ 09.04.2003; MS No. 24.885, Rep. Min SEPÚLVEDA MINE, DJ of 18.05.2004; MS No. 23.715-MC, Rel Celso de Mello, DJ 26.06.2000; MS No. 22.515 - AgR, Rep. Min Sydney Sanches, DJ 04.04.1997; MS No. 21.734, Rep. Min Ilmar Galvão, DJ 15.10.1993; MS No. 24,056, Rep. Min ELLEN GRACIE, DJ 12/09/ 2001; MS No. 24.483, Rep. Min Carlos Velloso, DJ, 02.04.2003, MS 25.008, Rep. Min NELSON JOBIM, DJ 09.08.2004). This sense I have been deciding (MS No. 25.380, of 06.06.2005 DJ; MS No. 25.070, DJ 28.03.2005; MS No. 25.026, DJ 08.09.2004; MS No. 25.452, DJ, 10.11.2005).
>
> There is no expeditious way to remedy the situation, which involves a clear risk of legal harm to the

petitioner, if not the exceptional use of the same mandado de segurança.
And we are able to consider, in addition, that the injunction now contested possesses obvious satisfactory nature, because it exhausts the questions posed in the injunction.
3. From the above, I GRANT the appeal, in order to suspend the effects of the injunction issued in mandado de segurança #25.846, restoring the content of the *decisum* recorded by Justice Celso de Mello, in the ACO #840. Notify the constraining authority so it provides information within 10 (ten) days (arts. 7th, inc. I, of Law #1533 of December 31st of 1951 and 203, of RISTF).
I determine the Secretariat to create copies of pages 375-378 (decision by Justice Celso de Mello) and pages 380-388 (information by the Treasury Department) from the records of the ACO #840, adding them to these records. Next, give notice to the Attorney General (arts. 103, 1st paragraph of the Constitution, and 52, inc. IX, of RISTF)." (MS 25.853/DF, monocratic decision, Rap. Justice Cezar Peluso, DJ 9.3.2006)

It should be noted that the plenary did not strip this second injunction which suspended the effects of the first, but decided to put the acts together under the same rapporteurship, in a ruling that goes as follows:

"mandado de segurança against an act o a Supreme Court Justice: uniqueness of the concrete case, which leads to the assertion of jurisdiction, by prevention, of the rapporteur of writs of mandamus 25.846 and 25.853." (mandado de segurança 25.846-QO, composed for the ruling the Justice Sepúlveda Pertence, *DJ* of September 14th, 2007).

In this case, I believe that the current controversy assembles exceptional conditions that justify the pertinence of this mandado de segurança, in the terms of above mentioned precedents.

Indeed, the impugned act is unappealable and there is no expeditious remedy to overcome the situation of serious damage to the petitioner.

The jurisprudence of the Supreme Court is firm when it comes to the inadequacy of the appeal of agravo regimental of judicial decision that upholds or rejects application for an injunction in the case of habeas corpus (according to HC 94.993 MC-AgR/RR, Rap. Celso de Mello, Full, DJ Feb 13th 2009; HC 91.927 AgR/MG, Rap. Eros Grau, 2nd Class, DJ Apr 17th 2009; HC 93.531/SP, Rap. Menezes Direito, 1st Class, DJ May 30th 2008;

HC 93.494 MC-AgR/PR, Rap. Eros Grau, 2nd Class, DJ Apr 25th 2008; HC 89.837 MC-AgR/DF, Rap. Celso de Mello, 2nd Class, DJ Feb 16th 2007; HC 89.649 MC-AgR/ SP, Rap. Cezar Peluso, 2nd Class, DJ Dec 1st 2006).

Whenever there is not any other appropriate judicial or administrative appeal, the mandado de segurança renders itself a capable means to challenge the monocratic decision, under Summula #267 of the Supreme Federal Court.

It should be emphasized, reinforcing the now delineated exceptionality, that the Federal Supreme Court has voiced its opinion more than once on the background of the current impetration, whether in the *habeas corpus* #99.945/RJ (singular decision) or whether in the midst of the referendum on the anticipatory measure in ADPF #172/RJ (plenary decision), whose decisions settled the need for compliance with the ordinary instances as a essential rule to the proper disentangling of the controversy in question.

So, I recognize the impetration.

I envision the presence of the requirements for granting the anticipatory measure in this writ.

There is evidence on the records of the inadequacy of the means of *habeas corpus* to turn over a matter of fact already decided by sentence and ruling on the merits and to serve as the substitute of an appeal.

It is further revealed the existence of previous decisions of the Federal Supreme Court pointing to the need for effective attainment of the decisions on merits and legal impropriety of continued judicial actions causing procedural turmoil.

I also emphasize that the new fact regarding the appealed ruling of the Federal Court of the 2nd Region, of December 16th of 2009, strengthens the understanding of inadequacy of the challenged *habeas corpus*, and not the contrary, as it concludes in the opposite direction of all claims of the contested decision.

In short, the fundamentals that authorize the granting of this anticipatory measure are pointed out here:

(1) peculiarity of the case having been already discussed, explicitly, by the Plenary of this Court (in ADPF #172/RJ), with clear manifestations in the sense of compliance to what was decided by the ordinary instances;
(2) impetration that decided an identical situation of the one contained in HC 99.945/RJ (Federal Supreme Court) - pending appeal since August 2009 - in which the continuation of the *habeas corpus* was refused by it being inadequate to review facts and evidence and to serve as a means to reform a decision on merits;
(3) absence of proof of illegality or abuse of power required for the concession of the appeal granted by the *habeas corpus now challenged*;
(4) inadequacy of narrow path of *habeas corpus* for the revolving of facts and evidence, as the jurisprudence of this Court;
(5) inadequacy of the path chosen as a substitute for appeal, as the jurisprudence of this Court;
(6) existence of sentence and ruling, which define on the merits the legal situation of the case, with the determination of immediate delivery of the minor SRG to the biological father and the questionable procedural turmoil shown on the records.

The challenged act, thus, is not supported by the jurisprudence of this Court.

Non-compliance with the jurisprudence of the Federal Supreme Court

First, there is an explicit manifestation of Plenary of this Court, particularly in the votes of the trial of the

referendum in injunction in ADPF #172/RJ, strongly reinforcing the impossibility of discrediting what was decided by the ordinary instances, especially through multiple procedural measures that distort the established proceedings from the Hague Convention of 1980, as it seems to be this case.

Justice Marco Aurelio, rapporteur on the case, granted an injunction on the aforesaid ADPF on June 2nd of 2009, based on a general power of precaution, to suspend the anticipatory measure granted in the sentence of lawsuit of search, seizure and return of the minor S.R.G.

On that occasion, the Justice Marco Aurelio said, even establishing grounds on what was decided on the HC #69.303-2/MG, the following: the "*irreversibility of psychosocial effects that the comings and goings could cause* [...]", "*being imposed the maintenance of the child within the heart of the family where he has been for almost five years* [...]", "*without discussing, for now, the hit or the miss of the lengthy and careful decision made by the Judge - 82 pages long - considered fundamental of the Federal Constitution and even the accommodation of the case in exceptions contemplated in the above mentioned Hague Convention, I GRANT the sought injunction. I suspend, submitting this act to the Plenary, the effectiveness of the aforementioned sentence.*"

Thus, he granted the injunction that suspended the decision on merits, judging, in short, the non-existence of sufficient legal certainty to the acceptance of the anticipatory measure.

However, in referring the matter to referendum by the plenary of the Federal Supreme Court, the rapporteur Justice reviewed his analysis about the knowledge of that ADPF, noting that he only granted the appeal to safeguard the situation that presented itself urgent at that time. Thus, at the trial of the referendum of the anticipatory decision itself, the rapporteur Justice recognized the inadequacy of the aforesaid step to the case.

It is important to emphasize here that the colleagues of this Court, at that time, took extensive knowledge of the case now discussed, although inside the boundaries of the discussion about the adequacy of that ADPF, with multiple manifestations of

reinforcement of the impossibility of discrediting what was decided through the ordinary instances.

This guidance is explicit in the votes of several Justices of this Court, in relation to the trial of the referendum on the anticipatory decision in the ADPF #172/RJ, occurred on June 10th of 2009. In this trial, the Plenary of the Federal Supreme Court settled, unanimously: (1) the existence of other suitable procedural means to fight the challenged judicial step; (2) the exceptional nature of the allegation of breach of fundamental precept; and (3) its inadequacy for the case, damaging the consideration of the anticipatory measure accepted earlier.

It stands out, for example, the brilliant vote of Justice Ellen Gracie, expressing clearly the validity of the Hague Convention of 1980 in Brazil and the need for the swift compliance by the Brazilian judicial and administrative instances:

> "The commitment assumed by member States, in this multilateral treaty, was to establish an international cooperation system, both administrative, by central authorities, and judicial.
> [...]
> **The Convention** also **recommends** that the judicial **proceedings** of such claims has to be made **with extreme swiftness and as a matter of urgency** in order to cause as little damage as possible to the welfare of the child.
> [...]
> **Unfortunately, the underlying case that is implied to the present claim of breach of fundamental precept, neglects all these recommendations**. By ignorance of the text of the Convention, the Court of the State of Rio de Janeiro was induced, repeatedly, to decide a case that is entirely outside of its jurisdiction. **With this, and the sequence of appeals and defensive measures from one of the parties, the case extends itself beyond all that is reasonable.**
> [...]
> And according to the news brought by Solicitor-General of the Union in his memorial, **it seems to have been submitted to the Federal Court of the 2nd Region at least three different instruments for the containment of effects of the sentence now challenged**: a *habeas corpus*, an anticipatory measure and a mandado de segurança.
> [...]
> In my view, it borders on the absurd when it is attempted to, urging the concentrated control of constitutionality, demonstrate the mistakes of conclusions of the expert technical report of psychological evaluation used in the reasoning of the decisory manifestation canvassed. **What is clear, therefore, is the intention of discussing again and reforming the trial, not the**

demonstration of breaking a fundamental precept."
(emphasis added)

Minister Ricardo Lewandowski also asserted in his vote that there is no obstacle for the processing of the issue by ordinary ways, by emphasizing that:

"[...] the judicial machinery is working perfectly and there is no point, in my view, for the Supreme Court to intervene in the action, at least at this procedural moment."

And, in the vote of Justice Cezar Peluso, also contained the following:

"It seems to me, Mr. President, with all due respect, that an act of public authority, here, cannot be understood as any judicial decision subject to appeal - like that of the case - this for several reasons.
[...]

In addition - and this is another reason for the inadmissibility, Mr. President - is that another intelligence would undermine the whole legal procedural order, allowing to bring directly to this Court, without observing the instances of action, causes that do not fit in the original jurisdiction of this Court and which are of constitutional descendent.
[...]

Here I limit myself, let's say, more specifically to a fundamental reason in this preliminary extinction in the process, notwithstanding any appeal against the sentence - not confirmed, but granted after a full cognition of the cause, the anticipatory decision - does not have suspensive effect: **the case has and had found effective procedural remedies.**"
(emphasis added)

As proof of the inadequacy of this procedural step for reforming the award of merit, it is notable that the decision was taken by unanimous vote.

Despite this understanding, signed on June 10, 2009, the contested injunction upheld fundaments of facts removed by ordinary proceedings, specifically the unnecessity for hearing of the minor S.R.G., by the existence of an expert technical report, in order to suspend the execution not of the sentence, more serious, but of the ruling that upheld it at the Federal Court of the 2nd Region.

If, at that time, this Court was confronted with the discussion of the compatibility of the ADPF in relation to challenging a sentence, which is to say, now, when there is a judgment issued by the Federal Court of the 2nd Region, which examines, in broad cognition, all the elements of fact and law, and lays the correction of sentence on its grounds, requiring even the cessation of postponements for the compliance with the foreseen consequences set out in the mentioned treaty (of repatriation of the child).

It is important to consider, likewise, that the ruling of the Federal Court of the 2nd Region settled the configuration of an unlawful retention of the minor S.R.G. under terms of the international treaty. The legal, political and social repercussions -- especially internationally -- are extremely serious. Thus, there is no way to deny the illegality of conduct of maintaining the child in the Brazilian State.

Moreover, one can not forget that this Court -- particularly because of the role it plays in the legislation of Brazil -- positions its plenary repudiating the postponement of court proceedings by way of merely dilatory measures - including constitutional actions - used as a substitute appellate act which seems clearly consonant with the present case.

To make clear, once again, the illegitimacy of the injunction being challenged, one must simply confront the reasoning for granting the relief order passed, at that time, by the Justice Marco Aurélio, under the ADPF No. 172-MC/RJ, with the arguments for granting the HC No. 101.985/RJ, he also being the rapporteur, at the present time.

From a simple analytical collation, it is noted that exactly the same arguments are used, namely: support as decided in the HC No. 69.303-2/MG of this Court; doubt as to whether the will of the child must be manifested; possibility of reversing the decision on merits (sentence or ruling) by the ordinary challenging means; and doubt about the unlawfulness of conduct of maintaining the child with the maternal family (Brazilian).

Well, it is seen, in short, that arguments of both factual and legal orders that already were, in an insightful way, collated and valued by the sentence and the ruling of the Federal Court of the 2nd Region, are being taken as premises. Having established the legal certainty, particularly in relation to assumptions of fact, there are no more ways to challenge them through ordinary means, moreover through extraordinary ones.

It is what is evident in the arguments brought by Justice Marco Aurelio on issues of fact and evidence pointed both at the trial of ADPF, as in the trial of HC No. 101.985/RJ, when he states, at the latter, that the child was never directly heard by the body vested with adjudicative office, despite the insistence of the defense in achieving that goal.

The ruling by the Federal Court of the 2nd Region is explicit in this aspect:

> "**In this case, it is clear, as it is stated in the expert technical report, that the minor is not able to decide on what he really wants**, be it because of limitations of maturity inherent in his youth, be it because of the fragility of his emotional state, be it, still, because he is already under a process of parental alienation by the Brazilian family. **Lacking reason, therefore, the appellant, as the legislative provision conditions the possibility of taking into account the child's view to the effective demonstration that he has discernment to it, <u>which does not occur in this case</u>, in consonance of the conclusion of the expert technical report.**" (emphasis added)

At this point, there is no way to extract from the aforesaid ruling, especially in the narrow path of a *habeas corpus*, any demonstration of illegality or abuse of power -- necessary to grant the injunction. Even if it is possible to dispute the rightness of the expert technical report or the refusal of evidence production (via personal testimony), it is not possible to detect any unlawfulness on the decision reasoned, based on expert evidence, notably, performed by an expert, based on full cognition of merit.

It should be noted that everything that is argued through *habeas corpus*, in this case, results in

the inadequacy of the elected way, because it is not an appropriate measure for the resolution of issues.

Similarly, there was a petition of *habeas corpus* in this Supreme Court (HC No. 99.945/RJ) in July 2009, in which were reiterated the arguments about the *habeas corpus* being the appropriate way to ensure the paciente the right to "stay" on Brazilian soil, correcting the illegality characterized by error in analyzing the factual question (unnecessity of personal testimony by the minor and unusefulness of results of expert technical report) made by the Judge of the 16th Federal Court of the Judiciary Section of Rio de Janeiro.

On July 29, 2009, the President of this Court denied the continuation of the impetration, as follows:

> "**The way of *habeas corpus* does not seem appropriate to the goal pursued by the petitioner**, rendering it fit to deny the continuation of the impetration.
>
> It is true that habeas corpus, although bearing predominant nature of protection procedure against arbitrary decisions in criminal matters and criminal procedure, also serves to correct acts that attack freedom of coming and going with a purely civilian trait, as it is the case of the civil prison of the unfaithful depositary, **provided that**, in any case, there is a glimpse of blatant **illegality** or **abuse of power**.
>
> In that sense it follows the majoritarian jurisprudence of the Court, being possible to collate the following excerpts:
> [...]
>
> **Therefore, being absent hypothesis of illegality or abuse of power, any dissatisfaction with the sentence that remains unfavorable to the interests of the petitioner's family should be discussed in the ordinary way and the means and remedies provided in civil procedural law**.
>
> Based on the foregoing, I deny the continuation of the impetration under art. 21, § 1, RI-STF." (emphasis added).

There was the filing of agravo in order to reform this decision, with a ruling still pending in this Court, **notably, since August 2009, without any trial of the action by the body**.

It was strongly affirmed, to the case in question, the inadequacy of *habeas corpus* for revolving facts and evidence, and the existence of unfounded unacceptability by the petitioner to ensure, through this extraordinary constitutional action,

the maintenance of the Brazilian family interests, which were rejected in the merit by the sentence.

This position even remained in agreement with the understanding given in the two *habeas corpus* that preceded it, one in the Federal Court of the 2nd Region and another in the STJ; all stating the impropriety of allegations of fact, evidence and reform of decision on merits as characterizing illegality or abuse of power.

In this sense, it is stressed that, in the same HC 99.945/RJ mentioned above, there was explicit mention of the serene jurisprudence of the Supreme Court on this issue:

> "RESUME: - Habeas corpus. Custody of minor. 2. Indication of the Superior Court of Justice as constraining authority. 3. The aim is to ensure, through this way, the minor "the right to remain in United States with mother and sister, integrated to the family unit to which the infant belongs for more than three years." 4. Habeas corpus is not substitute for a fitting appeal, not being, by this means, of intending to solve the question regarding custody of children. 5. The *quaestio juris* is already submitted to the judge in the competent civil scope. Matter duly analyzed by the Judge of the 7th Family Court and Probate of the Central Jurisdiction of Porto Alegre-RS. 6. Habeas corpus is not known. (HC No. 81.681/RS, 2nd panel, Rap. Min. Neri da Silveira, DJ of Aug 29, 2003).
>
> RESUME: CRIMINAL. CRIMINAL PROCEDURE. HABEAS CORPUS. Custody of children. I. - The Habeas corpus is not suitable to decide question regarding the custody of children, a matter to be dealt with in civil court. II. -- H.C. not known. (HC No. 75.352/CE, 2nd panel, Rap. Low Carlos Velloso, DJ Jun 28, 2001).
>
> HABEAS CORPUS IS NOT THE PROPER MEANS TO APPRECIATE THE SENTENCE THAT GRANTS SEARCH AND SEIZURE OF MINOR. CONSTRAINING JUDGE OF FIRST DEGREE. AGRG DENIED. (HC No. 60,482 AgR / RJ, 2nd panel, Rap. Min Cordeiro Guerra, DJ Nov 12 1982).
>
> HABEAS CORPUS. SEARCH AND SEIZURE OF MINOR. MATTER STRANGE TO THE SCOPE OF THE "WRIT". LACK OF JUST CAUSE FOR CRIMINAL ACTION. IMPETRATION DEFECTIVELY INSTRUCTED. RESOURCE NOT PROVIDED. (RCH No 53.457/RJ, 1st Class, Rap. Min. Rodrigues Alckmin, DJ Jun 3, 1975). "

Therefore, there is no doubt that the case related to action of search, seizure and return of the child S.R.G. to

his biological father has already been considered by this Court, consistently, both times above mentioned (ADPF No. 172/RJ and HC No. 99.945/RJ), which sought unduly the revolving of facts and evidence and the reform of decision on merit regarding the factual information (testimony of minor and expert technical report).

Non-configuration of illegality or abuse of power abling the grant of the injunction in habeas corpus

After all the manifestations of the Supreme Federal Court already mentioned above, which showed the ordinary means as the legitimate way for discussions on the merits of the case (including the validity of the expert technical report and the need for personal testimony of the child), **a new *habeas corpus* (challenged in this *writ*) is filed before the Supreme Court**, with the reasoning as follows:

> "According to the petitioner, **despite the interposition of the proper appeal against the sentence, it is effective the risk to send the paciente to the United States of America as a result of the appeal trial, to be held tomorrow, December 16th, 2009, by the Fifth Panel of the Federal Court of the 2nd Region. Reiterates**, then, the **argument of illegality** perpetrated by the Federal Judge, **which rejected the collection of the testimony of the child**, considered Article 13 of the Hague Convention, Article 12 of the Convention on the Rights of the Child and subsection II of Article 16 of the Statute of Children and Adolescents. **States that the paciente's right of coming and going is at stake, which is why the impetration is deemed as admissible, being essential the precautionary measure due to the fact that the decision of the President of the Supreme Court has been the subject of agravo regimental**, still pending evaluation.
>
> **Calls for the granting of the injunction, in order to avert, until the final trial of this impetration, the compliance with the court order related to delivery of the child (page 33). In merit, claims the recognition of the wrongfulness of that act, taking into account the fact that the testimony of the child was not collected.**"
> (pages 29-30 - emphasis added)

In fact, on December 16th, 2009, came the ruling of the Federal Court of the 2nd Region, which partially upheld the appeal of J.P.B.L.L.S. only to reform the anticipatory decision granted before.

But the mentioned ruling upheld the sentence of merit in all of its terms, except for the way the precaution measure would be granted. Thus, the ordinary instances defined the merits of the lawsuit, establishing the occurrence of unlawful retention of minor and the non-compliance with the international treaty, as well as ensuring the validity of the expert technical report and unnecessity of hearing the minor S.R.G. (by personal testimony), as it is certified his inability to decide what would be the best for himself.

The mentioned ruling pushed back all the appeals' preliminary arguments and maintained the following grounds of the sentence: (1) inadequacy of the claim of invalidity of sentence by obstruction of defense, of unusefulness of expert technical report and the right of custody under that appeal; (2) certification of the juridical situation of illegality (Article 3 c / c art. 15 of the Hague Convention of 1980); (3) absence of stipulated exceptions to the repatriation of minor S.R.G.; (4) certification of inability of the child to decide on what he really wants, by technical report.

Thus, there were two major changes regarding what was decided in the sentence.

First, the regime of transition was repealed (due to the visitation agreement set in STJ -- CC No 100.345/RJ).

At this point, it is essential to emphasize that decision from the Superior Court (STJ) on the conflict of jurisdiction above mentioned ensures a visitation agreement between Brazilian and American relatives, evidencing that the fostering of continuity of kinship is ensured.

This aspect is explicit in the ruling of the Federal Court of the 2nd Region:

> "On the other hand, it is unnecessary to determine a transition scheme, because the possibility of coexistence of the child with his biological father is ensured, since February 9th, 2009, under visitation agreement signed within the Superior Court of Justice, in Conflict of Competence No. 100.345/RJ, allowing, ever since, the readaptation to the cohabitation with his parent"

Secondly, all other effects of precaution measure granted in the sentence were changed, for, in essence, "determine to the appellant the term of 48 hours for the voluntary submission of the minor to the US Consulate in Rio de Janeiro.

It is against the previous ruling that the *habeas corpus* 101.985/RJ was filed, and here challenged, which had the temporary appeal granted, based on the following arguments:

(1) adequacy of the elected mean in line with the precedent of HC 69.303-2/ MG of this Court;

(2) pending of the trial of agravo regimental mentioned in HC 99.945/RJ;

(3) the ruling on appelation is subject to appeal;

(4) the case involves "child that was never heard directly by the body vested with adjudicative office, despite the insistence of the defense in achieving that goal", and that the child would be entitled to it;

(5) absence of international child abduction in the case.

I stress once again that all these issues were alleged, but refuted in all *habeas corpuses* previously filed and in the aforesaid ADPF (always identified as unfit for discussion in the elected means) including regarding the HC No. 99.945/RJ, which is being dealt with by this Court.

It should be noted, therefore, the absence of demonstration of any illegality or abuse of power in the challenged act, which goes against two decisions of merit in the main lawsuit (sentence and ruling of the Federal Court of the 2nd Region). It is not verified, even implicitly, the demonstration of the mentioned requirements, rendering the HC No. 101.985/RJ completely unreasonable.

In the decision of the HC No. 101.985/RJ , the trial of HC No. 69.303-2/MG (STF, 2nd Class, DJ 02.12.1992) is invoked as a basis that would legitimize the adequacy of

the elected manner. However, this assertion does not hold itself, because they discuss distinct factual issues. It is obtained from the conducting vote of the ruling in the HC No. 69.303-2/MG, verbatim:

> "[...] **At an age that enables reasonable understanding of life's twisted ways, they have the right to be heard and having considered their views regarding living in this or that place**, this or that family environment, ultimately, and consequently, to coexist with this or that ancestor, once there are no moral grounds that remove the reasonableness of the definition. **An illegal constraint is set by the definition of**, peremptorily, as if they were things, returning them to the previous place, aiming to stay under custody of a parent. The right to this does not override the requirement that the holder must preserve the formation of the minor, what the wording of Article 227 of the Federal Constitution predominantly targets. **Granted the order to lend to the will from the minors - to remain at the residence of their maternal grandparents and by the company of them and they own mother - greater efficiency**, surpassing the definition of guardianship, which always has relative color and therefore, has the ability to be changed as soon as prevailing circumstances require. (Second Class - Editor for the ruling, Justice Marco Aurelio published in the Journal of Justice of November 20, 1992)."

There are distinct reasons adopted in the mentioned decisions. In the ruling taken as a paradigm, the court was faced with a dispute in which the interest of the parents was given prestige in its cognition stage, opting by the need to guide the decision by the interests of the minors. The criticism of the proceedings that ran in ordinary instances was that the minors were never considered, with attention being paid chiefly to the legal relationship between the spouses.

Obviously, this is not the case here, where, while investigating, the child's interests received proper consideration, including the realization of expert technical report in order to identify if he would be able to decide what he wants.

Moreover, the contested decision does not take into account the factual and legal identity that motivated the decision stated in the HC 99.945/RJ that, in short, treated the same controversy, including from the angle of adequacy of constitutional action. There are mentions only of

grievances filed in this HC, pending consideration by the Supreme Federal Court.

However, it is noteworthy that the aforementioned grievances were filed in August 2009, and were not brought to trial to date. The *habeas corpus* challenged in these grievances turns against the decision that already does not subsist to the issuing of the ruling, including a new grant of precaution measure. In addition, in the mentioned HC 99.945/RJ, there is already an opinion from the Attorney General, dated October 08, 2009, suggesting the dismissal of the appeal.

Thus, it appears that the grounds adopted in the HC No. 101.985/RJ in order to grant the injunction do not demonstrate the occurrence of any illegality or abuse of power. There is not even an assertion that, even implicitly, points to the presence of such requirements.

On the contrary, there is a mere reiteration of grounds rejected by the plenary in the grounds of ADPF No. 172/RJ, giving shelter to inappropriate procedural expedients to delay the regular processing of the action of search, seizure and return of the child.

Secondly, for the purpose of granting an injunction in *habeas corpus*, the grounds related to the possibility of recourse against the ruling issued on appellation lacks legal plausibility.

The existence of appropriate appeals or appeals pending trial, in this case, does not demonstrate any illegality or abuse of power. In fact, there is a decision on merits of all ordinary instances, which sets a uniform demarcation of the controversy, though contrary to the interests of the petitioner of HC No. 101.985/RJ.

It renders itself impossible the handling of the aforesaid *habeas corpus*, as there are effective means to achieve the suspensive effect of the ruling by the ordinary and extraordinary means of appeal.

Moreover, if there is no possibility of granting suspensive effect, the determination that is inferred from the Brazilian legal system is the immediate compliance of decisions, be it in civil or criminal scope.

Thus, in all aspects analyzed, we conclude that the narrow path of *habeas corpus* is inadequate for reviewing evidence and matters of fact of the case, by the *habeas corpus* not serving as a substitute for appeals, in line with the settled jurisprudence of this Court (HC 75.352/CE, Min. Celso Carlos Velloso, 2nd Class, DJ 18.5.2001; 81.681/RS HC, Min. Néri da Silveira, 2nd Class, DJ 28.8.2003; 73.261/PR HC, Min. Carlos Velloso, 2nd Class, DJ 10.5.1996; 83.115/SP HC, Min. Carlos Velloso, 2nd Class, DJ 18.3.2005; 91.155/SP HC, Min. Ricardo Lewandowski, 1st Class, DJ 10/8/2007; HC 80829 - Justice Maurício Corrêa, 2nd Class, DJ 24/8/2001; HC 74006 - Justice Celso de Mello, 1st Class, DJ 27/8/1996; RHC 93248 - Justice Ellen Gracie, 2nd Class, DJ 22/8/2008; RHC 83625 - Justice Ellen Gracie, 2nd Class, DJ 30.4.2004; HC 98732-AgR - Justice Carlos Britto, 1st Class, DJ 21.8.2009).

It is evident the procedural turmoil due to impetrations of *habeas corpus* and other inadequate procedural measures, as I emphasize here, in this short account of the major procedural events prior to this *writ,* which offers evidence of the exceptionality of the case.

The procedural turmoil on the compliance with the action of seizure, search and return of the minor, S.R.G.

The paciente of HC No. 101.985/RJ, challenged in this mandado do seguranca, is the minor, S.R.G. - son of Brazilian citizen Bruna Bianchi Carneiro Ribeiro Lins e Silva and U.S. citizen, David Goldman - born May 25th of 2000, in the State of New Jersey (USA), being registered at the Brazilian Consulate in New York (USA) and in the 1st Circumscription of Civil Registry of Natural Persons of Ilha do Governador, in Rio de Janeiro, and, therefore, possessing Brazilian nationality.

In 2004, Bruna traveled to Brazil bringing with her S.R.G., with the father's authorization for the vacation period.

However, once here, she decided to separate from him, filing a divorce action that led to the end of the marriage.

In the same year, the biological father, David Goldman, filed a first action of search and seizure of the child against Bruna (lawsuit #2004.51.01.022271-9), which followed the legal channels of the 6th Circuit Court of the Judicial Section of Rio de Janeiro, and later of the 6th Specialized Panel of the Federal Court of the 2nd Region.

Against the ruling, the Special Appeal #900.262/RJ was lodged before the STJ, of which its 3rd Panel, by a majority, did not recognize the appeal due to procedural obstacles. Then, an extraordinary appeal was lodged, though not admitted. Against this decision was placed, before the Supreme Court, the Agravo de Instrumento #728,785, which was deemed impaired by the rapporteur Justice Marco Aurelio on July 15th of 2009, due to the supervening death of the offended, the mother. This question is pending trial on an agravo regimental.

In mid-2005, Bruna began a relationship with João Paulo Lins e Silva, contracting in marriage in 2007. However, she died on August 21st of 2008, after giving birth to her daughter C., born of her relationship with João Paulo.

On August 28th of 2008, João Paulo Lins e Silva filed declaratory action of socio-affective paternity, combined with possession and custody of the child, before the judge of the 2nd Family Court of the Central Forum of Rio de Janeiro. The requests were granted.

After being provoked by the Federal Administrative Central Authority (ACAF) - the body responsible for ensuring the observance of the Hague Convention in Brazil and that, in turn, was triggered by the corresponding entity in the United States - the Union, on September 26th of 2008, requested the search, seizure and return of the child before the 16th Federal Court of the Judicial Section of Rio de Janeiro **(lawsuit #2008.51.01.018422-0).**

Then the Conflict of Jurisdiction No. 100.345/RJ was raised before the Superior Court of Justice, between the Federal Judge of the 16th Federal Court of the Judicial Section of Rio de Janeiro and the Judge of the 2nd Family Court of the Central Forum of Rio de Janeiro. The exceptionality of the case was also proven in those proceedings, as it is verified by the appointment of a hearing for attempting a conciliation between the parties on February 2nd of 2009, in the Supreme Court courtroom (decision of rapporteur Minister Luís Felipe Salomão, DJe of 11.12.2008).

On the merits, the 2nd Section of the STJ, unanimously declared the competence of the Federal Judge of the 16th Federal Court of the Judicial Section of Rio de Janeiro to process and decide the two cases (CC 100.345/RJ, 2nd Section, rap. Min Luis Felipe Solomon, DJ 18.03.2009).

The regular process was underway, with completion of an expert technical report to investigate the psychological condition of the minor. On June 1st of 2009, a decision favorable to the biological father, David Goldman, was given, and granted an anticipatory measure, determining the *"immediate return of the minor (...) to the United States of America",* by fixing the date of June 3rd of 2009 for the spontaneous submission to the U.S. Consulate in Rio de Janeiro or, alternatively, the issuing of a search and seizure warrant.

Not satisfied with the sentence of merit in the action of search, seizure and return, João Paulo Lins e Silva, defendant in that case, filed an appeal. As the appeal was received in a purely devolutionary effect, an agravo de instrumento was filed before the Federal Court of the 2nd Region, to which the Rapporteur granted an anticipatory appellate decision to suspend the immediate delivery of the child.

An agravo interno by the opposite party arrived, whose trial started on June 30th of 2009. The Rapporteur voted for dismissal of the appeal, maintaining the decision that suspended the delivery of the child for submission to the United States of America, and Second Level Judge Cruz Netto voted for partial

acceptance of the agravo interno. The trial remained suspended due to Judge Castro Aguiar requesting to examine the process.

Of the vote of Justice Marco Aurélio at ADPF 172/RJ, it is possible to extract that the mandado do seguranca #2009.02.01.008575-0 was filed before the Federal Court of the 2nd Region, which went as far as *"to grant an injunction so that the transition period - the adaptation of the minor to the new coexistence - does not occur in the United States of America, but in Brazil, as recommended by the prosecutor."*

In parallel, against the order to submit the child to the U.S. Consulate in Rio de Janeiro, ***Habeas Corpus #2009.02.01.008630-3*** was filed before the Federal Court of the 2nd Region. The initial petition was rejected by a decision confirmed in subsequent trial of agravo interno, according to the following resume:

> AGRAVO INTERNO - HABEAS CORPUS - PRECAUTIONARY ACTION FOR SEARCH AND SEIZURE OF MINOR - CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION -- INADEQUATE MEANS -- REFUSAL OF INITIAL CLAIM OF THE WRIT.
> - As a rule, it is unacceptable the handling of a *habeas corpus* as a substitute for a procedurally appropriate appeal (STJ, AgRg the HC #74.920/SP, HC 26.705 and HC 37.704/SP), being acceptable the impetration of the *writ* only in cases where it is verified the obvious illegality of the challenged act.
> - Situation in which there was not certified such exceptionality, given that the narrow path of *habeas corpus* does not allow, *in casu*, the verification of occurrence of the alleged *error in procendendo*, because, in order to do so, it would be required the extensive revolving of the matter of fact-evidence.
> - Agravo Interno not provided.

Immediately thereafter, ***Habeas Corpus* #141.593** was filed before the Superior Court of Justice, which injunction was rejected by the Minister Laurita Vaz in July 10th of 2009, as follows:

> "Notwithstanding the laborious arguments brought in the initial regarding the alleged *error in procedendo* by the erudite Judge of First Degree, **I do not verify, in this anticipated judgment, the possibility of disentangling the controversy in the narrow path of *habeas corpus*, as it is well known and customary that it does not combine with the probationary deferment, apparently needed**

for knowing, after all, if the child's rights were observed or not [sic] in the contested decision in court proceedings.

It must also be highlighted the lack of urgency of the injunction request deducted by the impetration, when, as noted by the initial petition, the decision authorizing the exit of the child of the country is suspended by the determination of the Regional Court.

Based on the foregoing, I REFUSE the injunction of appeal. "(Emphasis added)

Against this decision there was a filing for a **new *habeas corpus* in the Supreme Court (HC #99.945/RJ)**, reiterating the arguments about the pertinence of *habeas corpus*, as the paciente would have the right to "stay" in the Brazilian territory.

Also against this sentence was filed the **ADPF #172/RJ** by the Progressive Party. The rapporteur Minister Marco Aurelio, on June 2nd of 2009, granted injunction in that ADPF, based on the general power of caution, in order to suspend the anticipatory decision given in the sentence of search, seizure and return of the child.

Thus, it appears that the issue has been widely discussed, which shows that the *habeas corpus* is not an appropriate measure for reviewing the ruling of the Federal Court of the 2nd Region.

Regarding the *periculum in mora*, the petitioner demonstrated that the repeated non-compliance of what was decided by the ordinary instances is compromising the Brazilian State regarding the regular compliance with the Hague Convention of 1980, including with the information that there is already a petition within the Inter-American Court of Human Rights in relation to this case, which could result in serious sanctions to Brazil.

At the same time, it is made clear the occurrence of inverse damage, to the extent that the petitioner demonstrates the high possibility of adverse and multiplicative effects of the maintenance of the contested decision in relation to other Brazilian citizens who use the Treaty to claim international judicial assistance - which may be denied by other countries, given the relevance of

the principle of reciprocity as a central interpretive vector in these cases.

From all the above, the result is:

a) that there was already a ruling and a sentence on the merits in the records of the action of search, seizure and return of the child and that the jurisprudence of this Court has already been settled in the ADPF #172/RJ and the HC #99.945/RJ that the resolution of this case competes with the ordinary instances;

b) that the challenged act in place of *habeas corpus* does not show any illegality or abuse of power, restricting themselves to attack the factual contours defined by the ordinary instances;

c) that the only change in the factual context, since the trial of ADPF #172/RJ and HC #99.945/RJ was the issuing of the ruling favoring the Union, keeping the merit determined by the sentence;

d) that the ruling of the Federal Court of the 2nd Region settled that, under terms of the trial of CC #100.345/RJ (Superior Court of Justice) it is ensured a visitation agreement between Brazilian and American relatives, securing the nurturing of continuity of kinship.

It is therefore concluded the inadequacy of means of *habeas corpus* to turn over a matter of fact already decided by sentence and ruling on the merits and to serve as a substitute appeal.

As the peculiarities of the case were demonstrated, showing clearly its exceptional nature, with the adequacy of the current measure being able to present itself as the only means for the suitable reversal of the decision challenged at this moment, also as verified by the absence of unequivocal evidence of the requirements that authorized the award of injunction in *habeas corpus,* it renders itself necessary the acceptance of this injunction, because the requirements of *periculum in mora* and *fumus boni iuris* are present.

Based on the foregoing, I grant the request for injunction in order to halt the effects of the injunction issued by the Rapporteur Justice in the HC #101.985/RJ, of the Federal Supreme Court, restoring the effects of the decision given

by the Federal Regional Court of the 2nd Region in the Civil Appeal #2008.51.01.018422-0.

Communicate with urgency.

Publish.

Notify the constraining authority, so that they provide the information within the stated period.

Next, give notice for the examination of records to the Attorney General.

Brasília, December 22nd of 2009.

Justice **GILMAR MENDES**
President
(art. 13, VIII, RI-STF)

ANTICIPATORY DECISION ON MANDADO DE SEGURANÇA
28.525 FEDERAL DISTRICT

RAPPORTEUR : JUSTICE CEZAR PELUSO
PETITIONER(S) : DAVID GEORGE GOLDMAN
ATTORNEY : RICARDO ZAMARIOLA JUNIOR AND OTHERS
PLEADED : SPEAKER AT HC No. 101.985 THE SUPREME FEDERAL COURT

DECISION: This is a mandado de segurança (pages 2-20), requesting an injunction, filed by David George Goldman against the act of the rapporteur Justice of the HC #101,985/RJ, Justice Marco Aurélio, following the legal channels of the Federal Supreme Court, which preliminarily determined the suspension of the "*effectiveness of the ruling given by the Federal Court of the 2nd Region in Civil Action #2008.51.01.018422-0, which, in its turn, results in a peremptory order of delivery of the* paciente *to the U.S. Consulate in Rio de Janeiro in 48 hours*" (pg. 32).

Preliminarily, the petitioner supports the adequacy of this *writ* (pages 5-6), deeming nonexistent any proper appeals or the possibility for correction of the challenged act, according to the Rules of Procedure of the Federal Supreme Court (art. 5, V) and the Proposition of Summula 267. It maintains that its legal interest lies in the fact that he is the biological father of the minor.

Still preliminarily, the petitioner claims that Justice Marco Aurelio was not the default judge for the evaluation of neither the HC #101,985/RJ nor the HC #99,945/RJ, further suggesting between them a case of litispendência. It maintains that the ruling issued by the Federal Court of the 2nd Region, em grau de apelação, replaced the sentence challenged in the HC #101,985/RJ, which, therefore, would have lost its object. It adds that the path chosen (*habeas corpus*) is not a substitute for appealing and does not admit probationary postponement. Finally, it argues that

it was not included in the records of HC #101,985/RJ, the expert technical report produced by the Federal Court in the original lawsuit.

In substance, the petitioner asserts that he is not deprived of his paternal power and that the minor was heard by legal experts, so that his manifestation should be taken into account under art. 12 of the Convention on the Rights of the Child.

At the end, it requests examination of the records of the HC #101,985/RJ for the extraction of copies (pages 18-19). As to the injunction, it argues that the *periculum in mora* resides in the immediate need for the reunion of father and son, having in mind the occurrence of a process of parental alienation of the minor. The *fumus boni iuris* would reside in the fact that the petitioner, the only living parent of the child, is not deprived from his family power (pages 19-20).

Thus, I decide.

Preliminarily, it is fitting to query the pertinence of this present mandado de segurança.

The orientation of this Supreme Federal Court is to find unacceptable the *mandado de segurança* against a jurisdictional act of the Court. Tried according to the following precedents: MS 25,413-AgRg, my rapporteurship, Plenary Session, DJ 14/6/2007; MS 22,515-AgRg, Rep. Min Sydney Sanches, Plenary Session, DJ 4/4/ 1997; MS 22,626-AgRg, Rep. Min Celso de Mello, DJ 22.11.96, MS 21,734-AgRg, Rep. Min Ilmar Galvão, 15.10.93 DJ.

However, under exceptional circumstances, this Court has conceded filing for *mandado de segurança* against unappealable jurisdictional acts and formally recorded by a single Minister of the STF.

I refer to MS 24,159-QO, Rep. Ellen Low Gracie, Plenary Session, DJ 31.10.2003. On that occasion, the Plenary granted the injunction on a *mandado de segurança* to reform the decision of the President of the Supreme Court at that time, Minister Marco Aurelio, who, after reconsidering the decision of President that preceded him (Min. Carlos Velloso), denied the Suspension of Security Measure No. 1962/RJ.

Given that the decision denying the suspension was not subject to appeal and that there was great risk of serious damage to the petitioner, the Plenary saw fit to admit the mandado de segurança against an act of the Minister

of the Supreme Federal Court. The docket of the ruling so provides:

> "MANDADO DO SEGURANCA AGAINST A JURISDICTIONAL ACT. EXCEPTIONAL NATURE. SUSPENSION OF SECURITY MEASURE DENIED. EVIDENCE OF RISK OF DAMAGE TO THE ECONOMY AND THE PUBLIC HEALTH. PIS AND COFINS. Law No. 9718/98 and MP 1.991/00.
> 1. Exceptional situation in which is known that a mandado de segurança is invoked against a jurisdictional act of the Presidency which, having previously revoked a conceded order, refused the Suspension of Security Measure sought.
> 2. Clear evidence of bad faith, in view of placing similar requests in various Federal Courts and obtaining favorable adjudication in court apparently incompetent. Sentence which granted safe-conduct to a fuel distributor against fiscal authorities nationwide.
> 3. Lack of legal plausibility of the claim pretenses upheld by the sentence. Suspension of the appropriate motion denied by the 2nd instance. Suspension of Security Measure denied by the Presidency of the Federal Court Circuit.
> 4. Evidence of risk of damage to the coffers of Social Security, given the fragility in the corporate assets and partnerships of the company which benefited from the release (at least partial) of the collection of contributions.
> 5. Injunction upheld."

A similar situation happened on the MS No. 25,024, filed against the monocratic decision rendered regarding ADI No 3273, by rel. Minister Carlos Britto. Minister Nelson Jobim, then President, granted the injunction requested in the *mandado de segurança* to suspend the ruling issued in that ADI, since a monocractic decision order was not appropriate in the case, "except during the recess period" (Law No. 9868/99, art. 10, heading).

At the occasion, the Minister President pointed out that ADI No. 3273 had been distributed and concluded to the Rapporteur on 9/8/2004, received in the office on 10.08.2004, and plenary session held on 12.08.2004. However, the precautionary measure was partially accepted by the Minister Carlos Britto on 16.8.2004 (DJ 23.8.2004) and was suspended the next day, by the decision of the Minister President in MS No. 25,024, considering

an auction would be held that day. On 02.05.2005, the Minister Eros Grau, rapporteur of the MS No. 25.024, found him wronged in the face of the Supreme Federal Court (STF) Plenary for having rejected the ADI No. 3273.

So, once again, it was the feasibility of the exception, according to the jurisprudence of this Court, to file a *mandado de segurança* against a monocratic decision by a Minister of the STF.

Along the same lines, the rapporteur of the MS 25853/DF, Min Cezar Peluso, granted the injunction to "suspend the effects of the injunction order of the MS No. 25,846, restoring the content of the *decisum* recorded by Celso de Mello, at the ACO No. 840.

At the time, the *mandado de segurança* challenged the injunction granted by the Minister Marco Aurelio found in the minutes of another *mandado de segurança* (MS 25.846/DF), which required the Union to guarantee international loans obtained by the Federal District. The injunction on the second *mandado de segurança* remains deferred, in view of its exceptional character and the absence of another remedy, as follows:

> "(...)
> And, as old and mature as Court's jurisprudence is, in principle, inadmissible a *mandado de segurança* against a judicial pronouncement that comes from a body of the Court, be it the Plenary, one of their Panels, or one of its Ministers, to the extent that such decisive acts can be restored through the resources provided, or, in the case of the judging of merits, with res judicata, through action rescission (MS No. 24.399, Rep. Min ALVES MOREIRA, DJ 09.04.2003; MS No. 24.885, Rep. Min SEPÚLVEDA MINE, DJ of 18.05.2004; MS No. 23.715-MC, Rel Celso de Mello, DJ 26.06.2000; MS No. 22.515 - AgR, Rep. Min Sydney Sanches, DJ 04.04.1997; MS No. 21.734, Rep. Min Ilmar Galvão, DJ 15.10.1993; MS No. 24,056, Rep. Min ELLEN GRACIE, DJ 12/09/ 2001; MS No. 24.483, Rep. Min Carlos Velloso, DJ, 02.04.2003, MS 25.008, Rep. Min NELSON JOBIM, DJ 09.08.2004). This sense I have been deciding (MS No. 25.380, of 06.06.2005 DJ; MS No. 25.070, DJ 28.03.2005; MS No. 25.026, DJ 08.09.2004; MS No. 25.452, DJ, 10.11.2005).
>
> There is no expeditious way to remedy the situation, which involves a clear risk of legal harm to the

petitioner, if not the exceptional use of the same mandado de segurança.
And we are able to consider, in addition, that the injunction now contested possesses obvious satisfactory nature, because it exhausts the questions posed in the injunction.
3. From the above, I GRANT the appeal, in order to suspend the effects of the injunction issued in mandado de segurança #25.846, restoring the content of the *decisum* recorded by Justice Celso de Mello, in the ACO #840. Notify the constraining authority so it provides information within 10 (ten) days (arts. 7th, inc. I, of Law #1533 of December 31st of 1951 and 203, of RISTF).
I determine the Secretariat to create copies of pages 375-378 (decision by Justice Celso de Mello) and pages 380-388 (information by the Treasury Department) from the records of the ACO #840, adding them to these records. Next, give notice to the Attorney General (arts. 103, 1st paragraph of the Constitution, and 52, inc. IX, of RISTF)." (MS 25.853/DF, monocratic decision, Rap. Justice Cezar Peluso, DJ 9.3.2006)

It should be noted that the plenary did not strip this second injunction which suspended the effects of the first, but decided to put the acts together under the same rapporteurship, in a ruling that goes as follows:

"mandado de segurança against an act o a Supreme Court Justice: uniqueness of the concrete case, which leads to the assertion of jurisdiction, by prevention, of the rapporteur of writs of mandamus 25.846 and 25.853." (mandado de segurança 25.846-QO, composed for the ruling the Justice Sepúlveda Pertence, *DJ* of September 14th, 2007).

In this case, I believe that the current controversy assembles exceptional conditions that justify the pertinence of this mandado de segurança, in the terms of above mentioned precedents.

Indeed, the impugned act is unappealable and there is no expeditious remedy to overcome the situation of serious damage to the petitioner.

The jurisprudence of the Supreme Court is firm when it comes to the inadequacy of the appeal of agravo regimental of judicial decision that upholds or rejects application for an injunction in the case of habeas corpus (according to HC 94.993 MC-AgR/RR, Rap. Celso de Mello, Full, DJ Feb 13th 2009; HC 91.927 AgR/MG, Rap. Eros Grau, 2nd Class, DJ Apr 17th 2009; HC 93.531/SP, Rap. Menezes Direito, 1st Class, DJ May 30th 2008;

HC 93.494 MC-AgR/PR, Rap. Eros Grau, 2nd Class, DJ Apr 25th 2008; HC 89.837 MC-AgR/DF, Rap. Celso de Mello, 2nd Class, DJ Feb 16th 2007; HC 89.649 MC-AgR/ SP, Rap. Cezar Peluso, 2nd Class, DJ Dec 1st 2006).

Whenever there is not any other appropriate judicial or administrative appeal, the mandado de segurança renders itself a capable means to challenge the monocratic decision, under Summula #267 of the Supreme Federal Court.

It should be emphasized, reinforcing the now delineated exceptionality, that the Federal Supreme Court has voiced its opinion more than once on the background of the current impetration, whether in the *habeas corpus* #99.945/RJ (singular decision) or whether in the midst of the referendum on the anticipatory measure in ADPF #172/RJ (plenary decision), whose decisions settled the need for compliance with the ordinary instances as a essential rule to the proper disentangling of the controversy in question.

So, I recognize the impetration.

I envision the presence of the requirements for granting the anticipatory measure in this writ.

There is evidence on the records of the inadequacy of the means of *habeas corpus* to turn over a matter of fact already decided by sentence and ruling on the merits and to serve as the substitute of an appeal.

It is further revealed the existence of previous decisions of the Federal Supreme Court pointing to the need for effective attainment of the decisions on merits and legal impropriety of continued judicial actions causing procedural turmoil.

I also emphasize that the new fact regarding the appealed ruling of the Federal Court of the 2nd Region, of December 16th of 2009, strengthens the understanding of inadequacy of the challenged *habeas corpus*, and not the contrary, as it concludes in the opposite direction of all claims of the contested decision.

In short, the fundamentals that authorize the granting of this anticipatory measure are pointed out here:

(1) peculiarity of the case having been already discussed, explicitly, by the Plenary of this Court (in ADPF #172/RJ), with clear manifestations in the sense of compliance to what was decided by the ordinary instances;
(2) impetration that decided an identical situation of the one contained in HC 99.945/RJ (Federal Supreme Court) - pending appeal since August 2009 - in which the continuation of the *habeas corpus* was refused by it being inadequate to review facts and evidence and to serve as a means to reform a decision on merits;
(3) absence of proof of illegality or abuse of power required for the concession of the appeal granted by the *habeas corpus now challenged*;
(4) inadequacy of narrow path of *habeas corpus* for the revolving of facts and evidence, as the jurisprudence of this Court;
(5) inadequacy of the path chosen as a substitute for appeal, as the jurisprudence of this Court;
(6) existence of sentence and ruling, which define on the merits the legal situation of the case, with the determination of immediate delivery of the minor SRG to the biological father and the questionable procedural turmoil shown on the records.

The challenged act, thus, is not supported by the jurisprudence of this Court.

Non-compliance with the jurisprudence of the Federal Supreme Court

First, there is an explicit manifestation of Plenary of this Court, particularly in the votes of the trial of the

referendum in injunction in ADPF #172/RJ, strongly reinforcing the impossibility of discrediting what was decided by the ordinary instances, especially through multiple procedural measures that distort the established proceedings from the Hague Convention of 1980, as it seems to be this case.

Justice Marco Aurelio, rapporteur on the case, granted an injunction on the aforesaid ADPF on June 2nd of 2009, based on a general power of precaution, to suspend the anticipatory measure granted in the sentence of lawsuit of search, seizure and return of the minor S.R.G.

On that occasion, the Justice Marco Aurelio said, even establishing grounds on what was decided on the HC #69.303-2/MG, the following: the "*irreversibility of psychosocial effects that the comings and goings could cause* [...]", "*being imposed the maintenance of the child within the heart of the family where he has been for almost five years* [...]", "*without discussing, for now, the hit or the miss of the lengthy and careful decision made by the Judge - 82 pages long - considered fundamental of the Federal Constitution and even the accommodation of the case in exceptions contemplated in the above mentioned Hague Convention, I GRANT the sought injunction. I suspend, submitting this act to the Plenary, the effectiveness of the aforementioned sentence.*"

Thus, he granted the injunction that suspended the decision on merits, judging, in short, the non-existence of sufficient legal certainty to the acceptance of the anticipatory measure.

However, in referring the matter to referendum by the plenary of the Federal Supreme Court, the rapporteur Justice reviewed his analysis about the knowledge of that ADPF, noting that he only granted the appeal to safeguard the situation that presented itself urgent at that time. Thus, at the trial of the referendum of the anticipatory decision itself, the rapporteur Justice recognized the inadequacy of the aforesaid step to the case.

It is important to emphasize here that the colleagues of this Court, at that time, took extensive knowledge of the case now discussed, although inside the boundaries of the discussion about the adequacy of that ADPF, with multiple manifestations of

reinforcement of the impossibility of discrediting what was decided through the ordinary instances.

This guidance is explicit in the votes of several Justices of this Court, in relation to the trial of the referendum on the anticipatory decision in the ADPF #172/RJ, occurred on June 10th of 2009. In this trial, the Plenary of the Federal Supreme Court settled, unanimously: (1) the existence of other suitable procedural means to fight the challenged judicial step; (2) the exceptional nature of the allegation of breach of fundamental precept; and (3) its inadequacy for the case, damaging the consideration of the anticipatory measure accepted earlier.

It stands out, for example, the brilliant vote of Justice Ellen Gracie, expressing clearly the validity of the Hague Convention of 1980 in Brazil and the need for the swift compliance by the Brazilian judicial and administrative instances:

> "The commitment assumed by member States, in this multilateral treaty, was to establish an international cooperation system, both administrative, by central authorities, and judicial.
> [...]
> **The Convention** also **recommends** that the judicial **proceedings** of such claims has to be made **with extreme swiftness and as a matter of urgency** in order to cause as little damage as possible to the welfare of the child.
> [...]
> **Unfortunately, the underlying case that is implied to the present claim of breach of fundamental precept, neglects all these recommendations**. By ignorance of the text of the Convention, the Court of the State of Rio de Janeiro was induced, repeatedly, to decide a case that is entirely outside of its jurisdiction. **With this, and the sequence of appeals and defensive measures from one of the parties, the case extends itself beyond all that is reasonable.**
> [...]
> And according to the news brought by Solicitor-General of the Union in his memorial, **it seems to have been submitted to the Federal Court of the 2nd Region at least three different instruments for the containment of effects of the sentence now challenged**: a *habeas corpus*, an anticipatory measure and a mandado de segurança.
> [...]
> In my view, it borders on the absurd when it is attempted to, urging the concentrated control of constitutionality, demonstrate the mistakes of conclusions of the expert technical report of psychological evaluation used in the reasoning of the decisory manifestation canvassed. **What is clear, therefore, is the intention of discussing again and reforming the trial, not the**

demonstration of breaking a fundamental precept."
(emphasis added)

Minister Ricardo Lewandowski also asserted in his vote that there is no obstacle for the processing of the issue by ordinary ways, by emphasizing that:

"[...] the judicial machinery is working perfectly and there is no point, in my view, for the Supreme Court to intervene in the action, at least at this procedural moment."

And, in the vote of Justice Cezar Peluso, also contained the following:

"It seems to me, Mr. President, with all due respect, that an act of public authority, here, cannot be understood as any judicial decision subject to appeal - like that of the case - this for several reasons.
[...]

In addition - and this is another reason for the inadmissibility, Mr. President - is that another intelligence would undermine the whole legal procedural order, allowing to bring directly to this Court, without observing the instances of action, causes that do not fit in the original jurisdiction of this Court and which are of constitutional descendent.
[...]

Here I limit myself, let's say, more specifically to a fundamental reason in this preliminary extinction in the process, notwithstanding any appeal against the sentence - not confirmed, but granted after a full cognition of the cause, the anticipatory decision - does not have suspensive effect: **the case has and had found effective procedural remedies.**"
(emphasis added)

As proof of the inadequacy of this procedural step for reforming the award of merit, it is notable that the decision was taken by unanimous vote.

Despite this understanding, signed on June 10, 2009, the contested injunction upheld fundaments of facts removed by ordinary proceedings, specifically the unnecessity for hearing of the minor S.R.G., by the existence of an expert technical report, in order to suspend the execution not of the sentence, more serious, but of the ruling that upheld it at the Federal Court of the 2nd Region.

If, at that time, this Court was confronted with the discussion of the compatibility of the ADPF in relation to challenging a sentence, which is to say, now, when there is a judgment issued by the Federal Court of the 2nd Region, which examines, in broad cognition, all the elements of fact and law, and lays the correction of sentence on its grounds, requiring even the cessation of postponements for the compliance with the foreseen consequences set out in the mentioned treaty (of repatriation of the child).

It is important to consider, likewise, that the ruling of the Federal Court of the 2nd Region settled the configuration of an unlawful retention of the minor S.R.G. under terms of the international treaty. The legal, political and social repercussions -- especially internationally -- are extremely serious. Thus, there is no way to deny the illegality of conduct of maintaining the child in the Brazilian State.

Moreover, one can not forget that this Court -- particularly because of the role it plays in the legislation of Brazil -- positions its plenary repudiating the postponement of court proceedings by way of merely dilatory measures - including constitutional actions - used as a substitute appellate act which seems clearly consonant with the present case.

To make clear, once again, the illegitimacy of the injunction being challenged, one must simply confront the reasoning for granting the relief order passed, at that time, by the Justice Marco Aurélio, under the ADPF No. 172-MC/RJ, with the arguments for granting the HC No. 101.985/RJ, he also being the rapporteur, at the present time.

From a simple analytical collation, it is noted that exactly the same arguments are used, namely: support as decided in the HC No. 69.303-2/MG of this Court; doubt as to whether the will of the child must be manifested; possibility of reversing the decision on merits (sentence or ruling) by the ordinary challenging means; and doubt about the unlawfulness of conduct of maintaining the child with the maternal family (Brazilian).

Well, it is seen, in short, that arguments of both factual and legal orders that already were, in an insightful way, collated and valued by the sentence and the ruling of the Federal Court of the 2nd Region, are being taken as premises. Having established the legal certainty, particularly in relation to assumptions of fact, there are no more ways to challenge them through ordinary means, moreover through extraordinary ones.

It is what is evident in the arguments brought by Justice Marco Aurelio on issues of fact and evidence pointed both at the trial of ADPF, as in the trial of HC No. 101.985/RJ, when he states, at the latter, that the child was never directly heard by the body vested with adjudicative office, despite the insistence of the defense in achieving that goal.

The ruling by the Federal Court of the 2nd Region is explicit in this aspect:

> "**In this case, it is clear, as it is stated in the expert technical report, that the minor is not able to decide on what he really wants**, be it because of limitations of maturity inherent in his youth, be it because of the fragility of his emotional state, be it, still, because he is already under a process of parental alienation by the Brazilian family. **Lacking reason, therefore, the appellant, as the legislative provision conditions the possibility of taking into account the child's view to the effective demonstration that he has discernment to it, <u>which does not occur in this case</u>, in consonance of the conclusion of the expert technical report.**" (emphasis added)

At this point, there is no way to extract from the aforesaid ruling, especially in the narrow path of a *habeas corpus*, any demonstration of illegality or abuse of power -- necessary to grant the injunction. Even if it is possible to dispute the rightness of the expert technical report or the refusal of evidence production (via personal testimony), it is not possible to detect any unlawfulness on the decision reasoned, based on expert evidence, notably, performed by an expert, based on full cognition of merit.

It should be noted that everything that is argued through *habeas corpus*, in this case, results in

the inadequacy of the elected way, because it is not an appropriate measure for the resolution of issues.

Similarly, there was a petition of *habeas corpus* in this Supreme Court (HC No. 99.945/RJ) in July 2009, in which were reiterated the arguments about the *habeas corpus* being the appropriate way to ensure the paciente the right to "stay" on Brazilian soil, correcting the illegality characterized by error in analyzing the factual question (unnecessity of personal testimony by the minor and unusefulness of results of expert technical report) made by the Judge of the 16th Federal Court of the Judiciary Section of Rio de Janeiro.

On July 29, 2009, the President of this Court denied the continuation of the impetration, as follows:

> "**The way of *habeas corpus* does not seem appropriate to the goal pursued by the petitioner**, rendering it fit to deny the continuation of the impetration.
>
> It is true that habeas corpus, although bearing predominant nature of protection procedure against arbitrary decisions in criminal matters and criminal procedure, also serves to correct acts that attack freedom of coming and going with a purely civilian trait, as it is the case of the civil prison of the unfaithful depositary, **provided that**, in any case, there is a glimpse of blatant **illegality** or **abuse of power**.
>
> In that sense it follows the majoritarian jurisprudence of the Court, being possible to collate the following excerpts:
> [...]
>
> **Therefore, being absent hypothesis of illegality or abuse of power, any dissatisfaction with the sentence that remains unfavorable to the interests of the petitioner's family should be discussed in the ordinary way and the means and remedies provided in civil procedural law**.
>
> Based on the foregoing, I deny the continuation of the impetration under art. 21, § 1, RI-STF." (emphasis added).

There was the filing of agravo in order to reform this decision, with a ruling still pending in this Court, **notably, since August 2009, without any trial of the action by the body**.

It was strongly affirmed, to the case in question, the inadequacy of *habeas corpus* for revolving facts and evidence, and the existence of unfounded unacceptability by the petitioner to ensure, through this extraordinary constitutional action,

the maintenance of the Brazilian family interests, which were rejected in the merit by the sentence.

This position even remained in agreement with the understanding given in the two *habeas corpus* that preceded it, one in the Federal Court of the 2nd Region and another in the STJ; all stating the impropriety of allegations of fact, evidence and reform of decision on merits as characterizing illegality or abuse of power.

In this sense, it is stressed that, in the same HC 99.945/RJ mentioned above, there was explicit mention of the serene jurisprudence of the Supreme Court on this issue:

> "RESUME: - Habeas corpus. Custody of minor. 2. Indication of the Superior Court of Justice as constraining authority. 3. The aim is to ensure, through this way, the minor "the right to remain in United States with mother and sister, integrated to the family unit to which the infant belongs for more than three years." 4. Habeas corpus is not substitute for a fitting appeal, not being, by this means, of intending to solve the question regarding custody of children. 5. The *quaestio juris* is already submitted to the judge in the competent civil scope. Matter duly analyzed by the Judge of the 7th Family Court and Probate of the Central Jurisdiction of Porto Alegre-RS. 6. Habeas corpus is not known. (HC No. 81.681/RS, 2nd panel, Rap. Min. Neri da Silveira, DJ of Aug 29, 2003).
>
> RESUME: CRIMINAL. CRIMINAL PROCEDURE. HABEAS CORPUS. Custody of children. I. - The Habeas corpus is not suitable to decide question regarding the custody of children, a matter to be dealt with in civil court. II. -- H.C. not known. (HC No. 75.352/CE, 2nd panel, Rap. Low Carlos Velloso, DJ Jun 28, 2001).
>
> HABEAS CORPUS IS NOT THE PROPER MEANS TO APPRECIATE THE SENTENCE THAT GRANTS SEARCH AND SEIZURE OF MINOR. CONSTRAINING JUDGE OF FIRST DEGREE. AGRG DENIED. (HC No. 60,482 AgR / RJ, 2nd panel, Rap. Min Cordeiro Guerra, DJ Nov 12 1982).
>
> HABEAS CORPUS. SEARCH AND SEIZURE OF MINOR. MATTER STRANGE TO THE SCOPE OF THE "WRIT". LACK OF JUST CAUSE FOR CRIMINAL ACTION. IMPETRATION DEFECTIVELY INSTRUCTED. RESOURCE NOT PROVIDED. (RCH No 53.457/RJ, 1st Class, Rap. Min. Rodrigues Alckmin, DJ Jun 3, 1975). "

Therefore, there is no doubt that the case related to action of search, seizure and return of the child S.R.G. to

his biological father has already been considered by this Court, consistently, both times above mentioned (ADPF No. 172/RJ and HC No. 99.945/RJ), which sought unduly the revolving of facts and evidence and the reform of decision on merit regarding the factual information (testimony of minor and expert technical report).

Non-configuration of illegality or abuse of power abling the grant of the injunction in habeas corpus

After all the manifestations of the Supreme Federal Court already mentioned above, which showed the ordinary means as the legitimate way for discussions on the merits of the case (including the validity of the expert technical report and the need for personal testimony of the child), **a new *habeas corpus* (challenged in this *writ*) is filed before the Supreme Court**, with the reasoning as follows:

> "According to the petitioner, **despite the interposition of the proper appeal against the sentence, it is effective the risk to send the paciente to the United States of America as a result of the appeal trial, to be held tomorrow, December 16th, 2009, by the Fifth Panel of the Federal Court of the 2nd Region. Reiterates**, then, the **argument of illegality** perpetrated by the Federal Judge, **which rejected the collection of the testimony of the child**, considered Article 13 of the Hague Convention, Article 12 of the Convention on the Rights of the Child and subsection II of Article 16 of the Statute of Children and Adolescents. **States that the paciente's right of coming and going is at stake, which is why the impetration is deemed as admissible, being essential the precautionary measure due to the fact that the decision of the President of the Supreme Court has been the subject of agravo regimental**, still pending evaluation.
>
> **Calls for the granting of the injunction, in order to avert, until the final trial of this impetration, the compliance with the court order related to delivery of the child (page 33). In merit, claims the recognition of the wrongfulness of that act, taking into account the fact that the testimony of the child was not collected.**"
> (pages 29-30 - emphasis added)

In fact, on December 16th, 2009, came the ruling of the Federal Court of the 2nd Region, which partially upheld the appeal of J.P.B.L.L.S. only to reform the anticipatory decision granted before.

But the mentioned ruling upheld the sentence of merit in all of its terms, except for the way the precaution measure would be granted. Thus, the ordinary instances defined the merits of the lawsuit, establishing the occurrence of unlawful retention of minor and the non-compliance with the international treaty, as well as ensuring the validity of the expert technical report and unnecessity of hearing the minor S.R.G. (by personal testimony), as it is certified his inability to decide what would be the best for himself.

The mentioned ruling pushed back all the appeals' preliminary arguments and maintained the following grounds of the sentence: (1) inadequacy of the claim of invalidity of sentence by obstruction of defense, of unusefulness of expert technical report and the right of custody under that appeal; (2) certification of the juridical situation of illegality (Article 3 c / c art. 15 of the Hague Convention of 1980); (3) absence of stipulated exceptions to the repatriation of minor S.R.G.; (4) certification of inability of the child to decide on what he really wants, by technical report.

Thus, there were two major changes regarding what was decided in the sentence.

First, the regime of transition was repealed (due to the visitation agreement set in STJ -- CC No 100.345/RJ).

At this point, it is essential to emphasize that decision from the Superior Court (STJ) on the conflict of jurisdiction above mentioned ensures a visitation agreement between Brazilian and American relatives, evidencing that the fostering of continuity of kinship is ensured.

This aspect is explicit in the ruling of the Federal Court of the 2nd Region:

> "On the other hand, it is unnecessary to determine a transition scheme, because the possibility of coexistence of the child with his biological father is ensured, since February 9th, 2009, under visitation agreement signed within the Superior Court of Justice, in Conflict of Competence No. 100.345/RJ, allowing, ever since, the readaptation to the cohabitation with his parent"

Secondly, all other effects of precaution measure granted in the sentence were changed, for, in essence, "determine to the appellant the term of 48 hours for the voluntary submission of the minor to the US Consulate in Rio de Janeiro.

It is against the previous ruling that the *habeas corpus* 101.985/RJ was filed, and here challenged, which had the temporary appeal granted, based on the following arguments:

(1) adequacy of the elected mean in line with the precedent of HC 69.303-2/ MG of this Court;

(2) pending of the trial of agravo regimental mentioned in HC 99.945/RJ;

(3) the ruling on appelation is subject to appeal;

(4) the case involves "child that was never heard directly by the body vested with adjudicative office, despite the insistence of the defense in achieving that goal", and that the child would be entitled to it;

(5) absence of international child abduction in the case.

I stress once again that all these issues were alleged, but refuted in all *habeas corpuses* previously filed and in the aforesaid ADPF (always identified as unfit for discussion in the elected means) including regarding the HC No. 99.945/RJ, which is being dealt with by this Court.

It should be noted, therefore, the absence of demonstration of any illegality or abuse of power in the challenged act, which goes against two decisions of merit in the main lawsuit (sentence and ruling of the Federal Court of the 2nd Region). It is not verified, even implicitly, the demonstration of the mentioned requirements, rendering the HC No. 101.985/RJ completely unreasonable.

In the decision of the HC No. 101.985/RJ , the trial of HC No. 69.303-2/MG (STF, 2nd Class, DJ 02.12.1992) is invoked as a basis that would legitimize the adequacy of

the elected manner. However, this assertion does not hold itself, because they discuss distinct factual issues. It is obtained from the conducting vote of the ruling in the HC No. 69.303-2/MG, verbatim:

> "[...] **At an age that enables reasonable understanding of life's twisted ways, they have the right to be heard and having considered their views regarding living in this or that place**, this or that family environment, ultimately, and consequently, to coexist with this or that ancestor, once there are no moral grounds that remove the reasonableness of the definition. **An illegal constraint is set by the definition of**, peremptorily, as if they were things, returning them to the previous place, aiming to stay under custody of a parent. The right to this does not override the requirement that the holder must preserve the formation of the minor, what the wording of Article 227 of the Federal Constitution predominantly targets. **Granted the order to lend to the will from the minors - to remain at the residence of their maternal grandparents and by the company of them and they own mother - greater efficiency**, surpassing the definition of guardianship, which always has relative color and therefore, has the ability to be changed as soon as prevailing circumstances require. (Second Class - Editor for the ruling, Justice Marco Aurelio published in the Journal of Justice of November 20, 1992)."

There are distinct reasons adopted in the mentioned decisions. In the ruling taken as a paradigm, the court was faced with a dispute in which the interest of the parents was given prestige in its cognition stage, opting by the need to guide the decision by the interests of the minors. The criticism of the proceedings that ran in ordinary instances was that the minors were never considered, with attention being paid chiefly to the legal relationship between the spouses.

Obviously, this is not the case here, where, while investigating, the child's interests received proper consideration, including the realization of expert technical report in order to identify if he would be able to decide what he wants.

Moreover, the contested decision does not take into account the factual and legal identity that motivated the decision stated in the HC 99.945/RJ that, in short, treated the same controversy, including from the angle of adequacy of constitutional action. There are mentions only of

grievances filed in this HC, pending consideration by the Supreme Federal Court.

However, it is noteworthy that the aforementioned grievances were filed in August 2009, and were not brought to trial to date. The *habeas corpus* challenged in these grievances turns against the decision that already does not subsist to the issuing of the ruling, including a new grant of precaution measure. In addition, in the mentioned HC 99.945/RJ, there is already an opinion from the Attorney General, dated October 08, 2009, suggesting the dismissal of the appeal.

Thus, it appears that the grounds adopted in the HC No. 101.985/RJ in order to grant the injunction do not demonstrate the occurrence of any illegality or abuse of power. There is not even an assertion that, even implicitly, points to the presence of such requirements.

On the contrary, there is a mere reiteration of grounds rejected by the plenary in the grounds of ADPF No. 172/RJ, giving shelter to inappropriate procedural expedients to delay the regular processing of the action of search, seizure and return of the child.

Secondly, for the purpose of granting an injunction in *habeas corpus*, the grounds related to the possibility of recourse against the ruling issued on appellation lacks legal plausibility.

The existence of appropriate appeals or appeals pending trial, in this case, does not demonstrate any illegality or abuse of power. In fact, there is a decision on merits of all ordinary instances, which sets a uniform demarcation of the controversy, though contrary to the interests of the petitioner of HC No. 101.985/RJ.

It renders itself impossible the handling of the aforesaid *habeas corpus*, as there are effective means to achieve the suspensive effect of the ruling by the ordinary and extraordinary means of appeal.

Moreover, if there is no possibility of granting suspensive effect, the determination that is inferred from the Brazilian legal system is the immediate compliance of decisions, be it in civil or criminal scope.

Thus, in all aspects analyzed, we conclude that the narrow path of *habeas corpus* is inadequate for reviewing evidence and matters of fact of the case, by the *habeas corpus* not serving as a substitute for appeals, in line with the settled jurisprudence of this Court (HC 75.352/CE, Min. Celso Carlos Velloso, 2nd Class, DJ 18.5.2001; 81.681/RS HC, Min. Néri da Silveira, 2nd Class, DJ 28.8.2003; 73.261/PR HC, Min. Carlos Velloso, 2nd Class, DJ 10.5.1996; 83.115/SP HC, Min. Carlos Velloso, 2nd Class, DJ 18.3.2005; 91.155/SP HC, Min. Ricardo Lewandowski, 1st Class, DJ 10/8/2007; HC 80829 - Justice Maurício Corrêa, 2nd Class, DJ 24/8/2001; HC 74006 - Justice Celso de Mello, 1st Class, DJ 27/8/1996; RHC 93248 - Justice Ellen Gracie, 2nd Class, DJ 22/8/2008; RHC 83625 - Justice Ellen Gracie, 2nd Class, DJ 30.4.2004; HC 98732-AgR - Justice Carlos Britto, 1st Class, DJ 21.8.2009).

It is evident the procedural turmoil due to impetrations of *habeas corpus* and other inadequate procedural measures, as I emphasize here, in this short account of the major procedural events prior to this *writ,* which offers evidence of the exceptionality of the case.

The procedural turmoil on the compliance with the action of seizure, search and return of the minor, S.R.G.

The paciente of HC No. 101.985/RJ, challenged in this mandado do seguranca, is the minor, S.R.G. - son of Brazilian citizen Bruna Bianchi Carneiro Ribeiro Lins e Silva and U.S. citizen, David Goldman - born May 25th of 2000, in the State of New Jersey (USA), being registered at the Brazilian Consulate in New York (USA) and in the 1st Circumscription of Civil Registry of Natural Persons of Ilha do Governador, in Rio de Janeiro, and, therefore, possessing Brazilian nationality.

In 2004, Bruna traveled to Brazil bringing with her S.R.G., with the father's authorization for the vacation period.

However, once here, she decided to separate from him, filing a divorce action that led to the end of the marriage.

In the same year, the biological father, David Goldman, filed a first action of search and seizure of the child against Bruna (lawsuit #2004.51.01.022271-9), which followed the legal channels of the 6th Circuit Court of the Judicial Section of Rio de Janeiro, and later of the 6th Specialized Panel of the Federal Court of the 2nd Region.

Against the ruling, the Special Appeal #900.262/RJ was lodged before the STJ, of which its 3rd Panel, by a majority, did not recognize the appeal due to procedural obstacles. Then, an extraordinary appeal was lodged, though not admitted. Against this decision was placed, before the Supreme Court, the Agravo de Instrumento #728,785, which was deemed impaired by the rapporteur Justice Marco Aurelio on July 15th of 2009, due to the supervening death of the offended, the mother. This question is pending trial on an agravo regimental.

In mid-2005, Bruna began a relationship with João Paulo Lins e Silva, contracting in marriage in 2007. However, she died on August 21st of 2008, after giving birth to her daughter C., born of her relationship with João Paulo.

On August 28th of 2008, João Paulo Lins e Silva filed declaratory action of socio-affective paternity, combined with possession and custody of the child, before the judge of the 2nd Family Court of the Central Forum of Rio de Janeiro. The requests were granted.

After being provoked by the Federal Administrative Central Authority (ACAF) - the body responsible for ensuring the observance of the Hague Convention in Brazil and that, in turn, was triggered by the corresponding entity in the United States - the Union, on September 26th of 2008, requested the search, seizure and return of the child before the 16th Federal Court of the Judicial Section of Rio de Janeiro **(lawsuit #2008.51.01.018422-0).**

Then the Conflict of Jurisdiction No. 100.345/RJ was raised before the Superior Court of Justice, between the Federal Judge of the 16th Federal Court of the Judicial Section of Rio de Janeiro and the Judge of the 2nd Family Court of the Central Forum of Rio de Janeiro. The exceptionality of the case was also proven in those proceedings, as it is verified by the appointment of a hearing for attempting a conciliation between the parties on February 2nd of 2009, in the Supreme Court courtroom (decision of rapporteur Minister Luís Felipe Salomão, DJe of 11.12.2008).

On the merits, the 2nd Section of the STJ, unanimously declared the competence of the Federal Judge of the 16th Federal Court of the Judicial Section of Rio de Janeiro to process and decide the two cases (CC 100.345/RJ, 2nd Section, rap. Min Luis Felipe Solomon, DJ 18.03.2009).

The regular process was underway, with completion of an expert technical report to investigate the psychological condition of the minor. On June 1st of 2009, a decision favorable to the biological father, David Goldman, was given, and granted an anticipatory measure, determining the *"immediate return of the minor (...) to the United States of America",* by fixing the date of June 3rd of 2009 for the spontaneous submission to the U.S. Consulate in Rio de Janeiro or, alternatively, the issuing of a search and seizure warrant.

Not satisfied with the sentence of merit in the action of search, seizure and return, João Paulo Lins e Silva, defendant in that case, filed an appeal. As the appeal was received in a purely devolutionary effect, an agravo de instrumento was filed before the Federal Court of the 2nd Region, to which the Rapporteur granted an anticipatory appellate decision to suspend the immediate delivery of the child.

An agravo interno by the opposite party arrived, whose trial started on June 30th of 2009. The Rapporteur voted for dismissal of the appeal, maintaining the decision that suspended the delivery of the child for submission to the United States of America, and Second Level Judge Cruz Netto voted for partial

acceptance of the agravo interno. The trial remained suspended due to Judge Castro Aguiar requesting to examine the process.

Of the vote of Justice Marco Aurélio at ADPF 172/RJ, it is possible to extract that the mandado do seguranca #2009.02.01.008575-0 was filed before the Federal Court of the 2nd Region, which went as far as *"to grant an injunction so that the transition period - the adaptation of the minor to the new coexistence - does not occur in the United States of America, but in Brazil, as recommended by the prosecutor."*

In parallel, against the order to submit the child to the U.S. Consulate in Rio de Janeiro, ***Habeas Corpus #2009.02.01.008630-3*** was filed before the Federal Court of the 2nd Region. The initial petition was rejected by a decision confirmed in subsequent trial of agravo interno, according to the following resume:

> AGRAVO INTERNO - HABEAS CORPUS - PRECAUTIONARY ACTION FOR SEARCH AND SEIZURE OF MINOR - CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION -- INADEQUATE MEANS -- REFUSAL OF INITIAL CLAIM OF THE WRIT.
> - As a rule, it is unacceptable the handling of a *habeas corpus* as a substitute for a procedurally appropriate appeal (STJ, AgRg the HC #74.920/SP, HC 26.705 and HC 37.704/SP), being acceptable the impetration of the *writ* only in cases where it is verified the obvious illegality of the challenged act.
> - Situation in which there was not certified such exceptionality, given that the narrow path of *habeas corpus* does not allow, *in casu*, the verification of occurrence of the alleged *error in procendendo*, because, in order to do so, it would be required the extensive revolving of the matter of fact-evidence.
> - Agravo Interno not provided.

Immediately thereafter, ***Habeas Corpus* #141.593** was filed before the Superior Court of Justice, which injunction was rejected by the Minister Laurita Vaz in July 10th of 2009, as follows:

> "Notwithstanding the laborious arguments brought in the initial regarding the alleged *error in procedendo* by the erudite Judge of First Degree, **I do not verify, in this anticipated judgment, the possibility of disentangling the controversy in the narrow path of *habeas corpus*, as it is well known and customary that it does not combine with the probationary deferment, apparently needed**

for knowing, after all, if the child's rights were observed or not [sic] in the contested decision in court proceedings.

It must also be highlighted the lack of urgency of the injunction request deducted by the impetration, when, as noted by the initial petition, the decision authorizing the exit of the child of the country is suspended by the determination of the Regional Court.

Based on the foregoing, I REFUSE the injunction of appeal. "(Emphasis added)

Against this decision there was a filing for a **new *habeas corpus* in the Supreme Court (HC #99.945/RJ)**, reiterating the arguments about the pertinence of *habeas corpus*, as the paciente would have the right to "stay" in the Brazilian territory.

Also against this sentence was filed the **ADPF #172/RJ** by the Progressive Party. The rapporteur Minister Marco Aurelio, on June 2nd of 2009, granted injunction in that ADPF, based on the general power of caution, in order to suspend the anticipatory decision given in the sentence of search, seizure and return of the child.

Thus, it appears that the issue has been widely discussed, which shows that the *habeas corpus* is not an appropriate measure for reviewing the ruling of the Federal Court of the 2nd Region.

Regarding the *periculum in mora*, the petitioner demonstrated that the repeated non-compliance of what was decided by the ordinary instances is compromising the Brazilian State regarding the regular compliance with the Hague Convention of 1980, including with the information that there is already a petition within the Inter-American Court of Human Rights in relation to this case, which could result in serious sanctions to Brazil.

At the same time, it is made clear the occurrence of inverse damage, to the extent that the petitioner demonstrates the high possibility of adverse and multiplicative effects of the maintenance of the contested decision in relation to other Brazilian citizens who use the Treaty to claim international judicial assistance - which may be denied by other countries, given the relevance of

the principle of reciprocity as a central interpretive vector in these cases.

From all the above, the result is:

a) that there was already a ruling and a sentence on the merits in the records of the action of search, seizure and return of the child and that the jurisprudence of this Court has already been settled in the ADPF #172/RJ and the HC #99.945/RJ that the resolution of this case competes with the ordinary instances;

b) that the challenged act in place of *habeas corpus* does not show any illegality or abuse of power, restricting themselves to attack the factual contours defined by the ordinary instances;

c) that the only change in the factual context, since the trial of ADPF #172/RJ and HC #99.945/RJ was the issuing of the ruling favoring the Union, keeping the merit determined by the sentence;

d) that the ruling of the Federal Court of the 2nd Region settled that, under terms of the trial of CC #100.345/RJ (Superior Court of Justice) it is ensured a visitation agreement between Brazilian and American relatives, securing the nurturing of continuity of kinship.

It is therefore concluded the inadequacy of means of *habeas corpus* to turn over a matter of fact already decided by sentence and ruling on the merits and to serve as a substitute appeal.

As the peculiarities of the case were demonstrated, showing clearly its exceptional nature, with the adequacy of the current measure being able to present itself as the only means for the suitable reversal of the decision challenged at this moment, also as verified by the absence of unequivocal evidence of the requirements that authorized the award of injunction in *habeas corpus,* it renders itself necessary the acceptance of this injunction, because the requirements of *periculum in mora* and *fumus boni iuris* are present.

Based on the foregoing, I grant the request for injunction in order to halt the effects of the injunction issued by the Rapporteur Justice in the HC #101.985/RJ, of the Federal Supreme Court, restoring the effects of the decision given

by the Federal Regional Court of the 2nd Region in the Civil Appeal #2008.51.01.018422-0.

Communicate with urgency.

Publish.

Notify the constraining authority, so that they provide the information within the stated period.

Next, give notice for the examination of records to the Attorney General.

Brasília, December 22nd of 2009.

Justice **GILMAR MENDES**
President
(art. 13, VIII, RI-STF)