

June 14, 2009

Dear BSH Supporters,

Judge Pinto's ruling signaled a major leap forward in the fight to bring Sean home to his father, David Goldman. We believe that his decision was courageous as well as admirable in that he took great pains to defend his ruling in an attempt to make it permanent. We hope that in addition to helping bring Sean home, Judge Pinto's ruling will serve as a precedent that can be used to bring home all of the 70+ children taken from the United States and illegally held in Brazil.

June 16, 2009 will mark the 5th anniversary of David's struggle. Throughout this painful time, he has trusted the advice of private legal counsel in both Brazil and the United States. Due to the unique qualities of his case, David now has both private legal counsel as well as the Advogado Geral do Uniao (AGU) representing his interests. Many supporters have questioned the difference between these two types of legal counsel. The article, [Tough Decisions for a Left-Behind Parent](#), discusses this distinction. For a better understanding of the obstacles faced by Left-Behind Parents with children in Brazil, please read the article, [The Hague Convention: Brazilian Style](#).

It is our opinion that such a dramatic ruling should not only be available to Portuguese speakers, but to all supporters. When David Goldman was quoted \$6000 to translate Judge Pinto's ruling, we decided to collaborate and use our talents to translate the document for free. Each of us contributed in different ways. We list our names in no particular order:

- tweinstein: *Rough translation, text formatting, final document preparation*
- UD\_Student: *Rough and intermediate translation, text formatting, troubleshooting*
- jjsaunt: *Rough and intermediate translation, text formatting*
- Andre Felipe: *Final translation, legal terminology*
- BrazilianForJustice: *Final translation*
- mugsiejcu: *Rough and intermediate translation, text formatting*

Technical and legal documents such as this ruling tend to be more verbose and precise in their choice of words. As we translated the document, we took great pains to reproduce Judge Pinto's intentions through the use of **bold**, *italics*, and underlining. In a further effort to maintain authenticity in the translation, we retained the judge's usage of legal terminology in Latin. Finally, the translation errs on the side of fidelity to the original text. It is important to note that one can always derive a more colloquial and cursive translation from a more precise one, but not the other way round.

Our intentions in translating this important document are not only to inform, but also to educate. Left-Behind Parents must navigate a multitude of bureaucracies in the fight to reunite with their children. For a discussion of this, please read the article, [Untangling the Bureaucracy of International Child Abduction](#).

This document is the product of hundreds of hours of hard work. We believe that it demonstrates that when people throughout the world share a common goal, they can achieve impressive results. It is our hope that through this effort, Judge Pinto's ruling can not only serve as a guide for other judges, but also offer hope to Left-Behind Parents everywhere.

Sincerely,  
tweinstein, UD\_Student, jjsaunt, Andre Felipe, BrazilianForJustice, mugsiejcu

Latin terminology used in Judge Pinto's ruling.

<b>Term</b>	<b>Definition</b>
ad argumentandum ad argumentantum	for argument
ad cautelam	for caution
ad terrorem	in fear
bis in idem	no legal action can be brought twice for the same cause of action
caput	head, top, beginning <i>usually refers to an article that has paragraphs</i>
concessa venia	with permission
data venia	with respect
data maxima venia	with utmost reverence <i>the same as "with respect" but with added emphasis</i>
decisum	<i>decision</i>
fortiori	with stronger reason
in casu	in this case
in natura	of the same nature <i>ie. if a child loses a toy, it should be replaced with a similar toy</i>
in verbis	used when one is going to make a quotation
ipso facto	by the fact <i>used to convey that an act done contrary to law is, by default, void</i>
lis pendens	provides notice of pending litigation
opinio	opinion
periculum in mora	danger in delaying
permissa venia	with due permission (the same as <i>concessa venia</i> )
pro rata	in proportion; <i>refers to a sum of money to be divided; in this case, between David &amp; the Union</i>
res judicata	Refers to a matter already adjudicated, which cannot be modified. (portuguese = "coisa julgada") In an appeal, a <i>formal res judicata</i> argues that a procedural mistake was made while a <i>material res judicata</i> argues against the merits of the case.

Brazilian legal terms and concepts used in Judge Pinto's ruling.

<b>Term</b>	<b>Definition</b>
Agravo de Instrumento	Instrument of Appeal <i>Type of appeal used against a decision that does not end a proceeding</i>
Corregedoria Nacional de Justiça	"Corregedoria Nacional de Justiça" issues administrative rules for the operation of all courts and notaries' offices, besides regularly inspecting them.
CPC	Código do Processo Civil Brasileiro (Brazilian Code of Civil Procedure)
Desembargador(a)	second level judge
Dist.	Distinguished (honorific for a Court)
litisconsorcial	Portuguese term used to describe the relationship between two or more parties involved in a litigation. David is an Assistant litisconsorcial, in that he has the same procedural privileges and responsibilities as the AGU.
Oficiais de Justiça	Bailiffs
Parquet	Another name for Ministério Público (Public Ministry), an entity which, in civil procedures, often works in collaboration with the Judiciary in cases which involve a public entity such as the Union or a state.
rapporteur	Judge responsible for compiling and presenting reports to other judges.

16º FEDERAL JURISDICTION OF RIO DE JANEIRO  
Case No: 2009.51.01.018422-0  
Author: **JOÃO PAULO BAGUEIRA LEAL LINS E SILVA**  
Defendant: **DAVID GEORGE GOLDMAN**  
Alternate Federal Judge: **RAFAEL DE SOUZA PEREIRA PINTO**

## J U D G M E N T

(Type A)

***Viewed, etc.***

I - REPORT:

It is an Action of search, seizure and return of minor, started by the **FEDERAL GOVERNMENT** against **JOÃO PAULO BAGUEIRA LEAL LINS E SILVA**, in the context of international legal cooperation, with support in the Hague Convention of 1980 on the Civil Aspects of International Child Abduction, introduced into the Brazilian legal system by means of Decree Nº 3413/2000.

According to the initial petition, the child whose restitution is sought, **SEAN RICHARD GOLDMAN**, currently 9 (nine) years old, recently completed, is son of Brazilian **BRUNA BIANCHI CARNEIRO RIBEIRO** with the American citizen

**DAVID GEORGE GOLDMAN** and held habitual residence in the United States of America since his birth in May of 2000, until the year of 2004, period in which he lived with both parents, as they were still married.

On June 16, 2004, the child came to Brazil, accompanied by the mother, with the permission of the father, for a temporary visit, with date of return previously scheduled for day of July 11, 2004, being that the return should occur, at the latest, on the day of July 18, 2004.

Nevertheless, the mother of the child decided to remain in Brazil, in a unilateral way, in what would be characterized as a violation of the rights of custody stipulated in the mentioned Convention, and also according to the applicable substantive law, according to the same treaty, that being, the law of the state of New Jersey, USA.

Still under the original piece, the Union has added that a lawsuit similar to this was started earlier by the father of the child, Mr. **DAVID GOLDMAN**, against the mother, Mrs. **BRUNA BIANCHI**, and that the first request was rejected in the first and second levels of jurisdiction, and the plea was, in short, that, despite the illicitness of the detention of the minor, the time between his transfer and the judgment of the lawsuit was enough to characterize the adaptation of the boy to Brazil, so as to cause possible psychological damage in case of a return to the U.S. without the accompaniment of the mother.

There was also the interposition of a Special Appeal, to the Dist. Superior Court of Justice (STJ), being that, nonetheless, denied the same. That process, at the judging of this lawsuit, was awaiting a judgment of Agravo de Instrumento brought by Mr. **DAVID GOLDMAN**, before the Dist. Supreme Federal Court (STF), against the order that had denied the furthering of an Extraordinary Appeal.

In parallel to this previous request for search and seizure of the boy, the 2<sup>nd</sup> Family Court of the State of Rio de Janeiro processed and decided a custody case, started by the mother of the minor, in the midst of

it was granted the request to give her, exclusively, the custody of the boy.

It occurred that, on August 22, 2008, the mother of **SEAN**, Mrs. **BRUNA BIANCHI**, who had entered into a new marriage with the Defendant herein, Mr. **JOÃO PAULO LINS E SILVA**, unfortunately died at the birth of a daughter of this new union.

After learning of this tragic episode, the father of the minor came to Brazil in order to recover the custody of his son, being denied, however, access to the child, by the Defendant, who then initiated another lawsuit, before the Court of the State of Rio de Janeiro, this time requesting the recognition of socio-affective paternity, in relation to this same boy, combined with the request of possession and custody of the child, in addition to the consequent removal of the family power of the biological father, including the change of the name of the father and the paternal grandparents, on the birth certificate of **SEAN**.

Faced with such a situation, Mr. **DAVID GOLDMAN** requested the intervention of the U.S. Central Authority, given the wrongful detention of a child by a person not holding the right of custody, from what was sent to the Brazilian State a request for inter-jurisdictional cooperation, in order to provide for the return of the minor to the then country of habitual residence, as a way of returning him to the care of his father.

Putting the facts in those terms, the Union made the following applications, as request of merit:

- i) to be granted the application for search, seizure and return of the child **SEAN RICHARD GOLDMAN**, issuing the relevant warrant for search and seizure concern to be fulfilled with the appropriate cautions, namely: compliance in the presence of the *left-behind parent* or close relative by him designated to accompany the child on the return journey and

supervision of the proceedings by a psychologist or social worker to be appointed by the Brazilian Central Authority. All with the aim of delivering the child to the Brazilian Central Authority, and then, immediately, to the U.S. Central Authority, for the return of the child to the United States of America;

ii) sentencing of the Defendant to payment of all costs resulting from the return of the child to the country of origin, as airline tickets, lodging, and others; and

iii) sentencing of the requested to bear all procedural expenses and attorney fees, determined in the manner of article 20, § 4º, of the Code of Civil Procedure.

In addition, as to anticipate the effects of the decision, the Union postulated the following:

i) a determination to execute the immediate search, seizure and return to the United States of America, of the minor in question, so that the U.S. Central Authority can proceed to deliver the child to his father;

ii) in case of non-compliance with the principal demand, in a subsidiary manner, requested the prohibition of the herein Defendant and of the minor to leave the city of Rio de Janeiro, without express judicial authorization, following the seizure and deposit with the court of the identity documents, birth certificates, and passports of the child, as well as the passport of

the Defendant himself, along with any other documents that allow the free transit in and out the country, informing also the Regional Superintendent of the Federal Police and Commissioner of the Court for Childhood and Adolescence; and

iii) also in subsidiary manner, the setting of a provisional system of visits in favor of the father of the minor

Moreover, also preliminarily, the Union intended the shifting of the competency upon the judicial procedure proposed by the Defendant, before the State Court, in favor of this Federal Court, followed, later, by its suspension, under art. 265, item IV, heading *a*, of the Code of Civil Procedure.

The initial petition came accompanied by the papers and documents of pages 26/214.

Initially, a decision was proffered, attached to pages 216/226, whereby, in broad terms, I found it most appropriate to postpone the examination of the original request for the anticipation of the effects of this decision - the search, seizure and immediate return of the child - to a time after the arrival of the response, or up to the time of such.

Furthermore, the requests were dismissed to prohibit the Defendant and the minor from leaving the city of Rio de Janeiro without previous authorization of Justice, as well as the withholding of passports and other identity documents.

Notwithstanding, I found it most appropriate to accept the subsidiary request of the Union to establish a provisional regime of visitations by the father to the child, observing the conditions there established.

Regarding the request to shift the competency upon the proposed judicial procedure before the State Court of Justice - a judicial procedure for the recognition of socio-affective paternity along with possession and custody of the child - the review of this request was also postponed



to a time after the arrival of the Defense, deferring, however, to the immediate issuance of an official letter to the scholarly Judgeship of the 2<sup>nd</sup> Family Court of the district of Rio de Janeiro, so it is made aware of the present request, as well as to adopt measures it considers fitting.

Via petition of page 237, the Union brought new documents to this file. (pages 238/247).

It was followed, then, at the first manifestation of the Federal Public Ministry (MPF), at pages 255/256, by means of which it required the approval of the application on the prohibition of the child to leave the city of Rio de Janeiro, as well as the withholding of their passports.

Mr. **DAVID GOLDMAN**, in turn, requested to join in this proceeding, via the petition of pages 269/270, as an assistant to the Union. He attached, as well, the documents of pages 273/342.

Contest to pages 345/388. In preliminary character, the Defendant argued and required: i) the suspension of this proceeding to wait for the decision of the Attorney General of the Union (AGU), for an administrative request made, under which it is postulated that the federal entity desist from these proceedings; ii) the absence of interest by the Union to postulate this proceeding; iii) active illegitimacy by the Union; and iv) the absolute lack of competency by the Federal Court, with regard to the regulation of visits. In substance, it argued for the absence of proceeding of the request, under the argument, in short, in the case of examination, the incidence of all the exceptions provided for in the Hague Convention (arts. 12, 13 and 20) according to which the Authorities should not determine the return of the child, in the situations here described, always aiming at the prevalence of better interests of the child.

A blocking piece offered the documents of pages 389/690, complemented by the documents of pages 695/712.

To the pages 763/764, Mr. **DAVID GOLDMAN** petitioned in the file, in compliance with the decision that would grant him the rights of visitation of his son,

informing his place of stay in Rio de Janeiro. Moreover, due to the high degree of litigiousness between the parties, requested the issuance of a warrant for search and seizure for the fulfillment of the order of *visitation*. The request in question was assessed and approved under the terms of the order of page 766.

Following, there was a decision originating from the Dist. TRF of the 2<sup>nd</sup> Region, at pages 768/770, rendered in a procedure of Agravo de Instrumento brought by the Defendant, *decisum* made by the Hon. Federal Judge Summoned, Dr. **MAURO LUÍS ROCHA LOPES**, in the occasional absence of eminent High Court judge rapporteur, Dr. **VERA LÚCIA LIMA**. In that decision, it was granted, in part only, the application for the award of an adjournment effect, there required, "*so that the visitation begins tomorrow only, Saturday, October 18, 2008, from 08:00 in the morning, ending at 20:00 hours the following day, Sunday.*"

This last decision led to the delivery of another order, by the Emergency Motions Judge, at page 772, by which it was ordered, in short, the collection of the warrant previously issued, and the issuance of a new warrant for search and seizure, adapted to the new time set, as well as other precautions.

On October 18, 2008, the date scheduled for the start of visitation, at the time indicated for the completion of the diligence, attended by two Justice Officials, accompanied by two other Agents of the Federal Police, being, however, *the visitation was thwarted*, as the minor and the Defendant were not at the residence of the second, despite the existence of a court order in that regard, as can be extracted from the certificate and the circumstanced legal proceedings of pages 778/780.

Considering these facts, the Federal Union (UF) petitioned, at pages 793/795, to request that this Court determine "*(...) to the Federal Police (PF) the adoption of measures aiming at locating the minor and the Requested, thus enabling the feasibility of compliance with the judicial decision that granted visitation to the father of the minor, as well as respect of the authority of Judiciary.*"

It was suggested, also, the seizure of the passports of the child, and the reexamination of the request for the prohibition of his departure from Rio de Janeiro without judicial authorization.

Before, however, these requests by the Union were considered, there was a communication of a new decision from the Dist. TRF of the 2<sup>nd</sup> Region, made by the eminent rapporteur of the first Agravo de Instrumento brought by the Defendant, giving account of a reconsideration, in part, of the previous *decisum*, for the determination, in short, the performance of a prior psychological examination as a precondition to the start of the visitation of the father to the son (pages 1,177/1,192).

Furthermore, a state of absolute ignorance of the whereabouts of **SEAN** remained up until the arrival of a petition by the Defendant of pages 799/804. By this petition, first, serious objections were imputed to the father of the minor, relative to a supposed attempt to promote oneself, through the wide dissemination, in the press, about meeting he would have with his child. Second, the Defendant sought to justify the absence of the minor from his residence, on the day and time judicially determined for start of visitations.

Moreover, the Federal Union (UF) filed, again, an application, on pages 861/862, this time to announce that the Defendant had filed an administrative requisition, addressed to the Attorney General of the Union (AGU), that the Federal Entity withdraw itself from proceedings of this case. The Union postulated, also, the conduct "psychological investigation." With this petition, came the documents of pages 863/1,032.

At page 858, it was given the order of compliance for the determination from the Dist. TRF of the 2<sup>nd</sup> Region, designed for psychological studies as a precondition to the start of the visitation. A team of three expert psychologists was appointed, as well as was given opportunity to presentation of questions and the indication of technical assistants by the parties.

Next, the assistant of the Union, Mr. **DAVID GOLDMAN**, presented three petitions to this Court. For the first, at pages 1,052/1,055, he refuted the allegations and explanations brought by Mr. **JOÃO PAULO LINS E SILVA**, via the petition of pages 799/804, related to the facts of what had occurred on the morning of Saturday, October 18, 2008 (date of attempt to start the visitation). In the second, at pages 1,057/1,058, he announced his return to the United States of America, in view of the impossibility of waiting in Brazil the completion of expert work, in view of having personal and professional commitments there, which had to be honored. And the third, at pages 1,060/1,108, his reasons were offered, by way of a reply to the defense. Register that the documents brought along with this last petition were annexed by line, and joined to the present case, hence forming three other volumes of documents.

Subsequently, a decision was made, joined at pages 1,126/1,130, and the following measures were adopted: i) the approval of the admission of Mr. **DAVID GOLDMAN** in the capacity of a *litisconsorcial* assistant to the Union, with focus on art. 54 of CPC; ii) the rejection of the application for the stay of the proceedings, made by the Defendant; iii) replacement of one of the experts initially appointed by strength of decline in function; iv) notice of the parties to express, in 48 hours, on the proposed fees of experts; v) after referral of the case to the Federal Public Ministry (MPF), for the awareness of the prosecuted to know about what was processed and delivery of items, if it were the case; vi) determination that the Defendant present in Court, the Brazilian and American passports of the minor, to be withheld by this Department; vii) prohibition of the child to leave the city of Rio de Janeiro without judicial authorization, and; viii) the determination that the Officers of Justice, responsible for the implementation of the search and seizure of the child, manifest themselves in the file, via certificate detail, on the contradictory claims by the parties (petition of pages 799/804 and 1,052/1,055), in respect to an alleged ostensible presence

of members of the press at the entrance of the condominium of the Defendant on the morning of Saturday, October 18, 2008.

This *decisum* was the object of further Agravo de Instrumento of pages 1,274/1,295, brought by the Defendant, under which, after the provision of information of pages 1,303/1,316, was given the decision at pages 1,403/1,413, made by the eminent rapporteur, Federal High Court judge Vera Lúcia Lima, rejecting the request of suspension of proceedings.

Continuing, with respect to item "viii" of the decision of this Court, mentioned above, by the Officials of Justice the certificate of pages 1,133/1,134 was presented.

In view of the contents of the certificate of pages 1,133/1,134, the assistant to the Union filed a new application, at pages 1,174/1,175, requiring the conviction of the Defendant for litigating in bad faith, under art. 17, item II, of the CPC.

Following up, a decision was made, at pages 1,199/1,211, which I adopted the following measures: i) to maintain the decision which was attacked in the appeal at pages 833/853, for its own reasons; ii) to summon the Defendant for him to inform, in 24 hours, a summary of school and extracurricular activities of the minor, so that the interview with the team of experts be adjusted to the weekly routine of the boy, as much as possible; iii) the grant of a 10 day deadline for the Federal Government to, if willing, speak in retort, in order to complete the requests stage; iv) the conviction of the Defendant, for litigation in bad faith, under art. 17, item II, of the CPC, for having flagrantly altered the truth of the facts, in regard to the developments in the morning Saturday, October 18, 2008; v) the conviction of the Defendant for acting in detriment to the exercise of jurisdiction, under art. 14, section V and paragraph one of the CPC, in face of the breach of judicial decisions in these proceedings, relating to the visitation granted to the assistant of the Union, and; vi) routing of documents from these proceedings to the Federal Prosecuting Ministry (MPF), under art. 40 of the Code of Criminal Procedure, for the practice, in theory, of the offense provided for in art. 330 of the Criminal Code, by the Defendant.

Against this decision was brought forward an Agravo de Instrumento, at pages 1,434/1,456, not there having been, up to this moment, any news of a granting of suspension.

Notwithstanding, by the assistant to the Union, another petition was presented, at pages 1,213/1,214, reporting that in the documents of the proceedings being dealt with by the 2<sup>nd</sup> Family Court of Rio de Janeiro, the Federal Union submitted a request, by which means it, in short, expressed that it has an interest on these proceedings, and required also the dispatch of the respective documents to this Federal Court.

On that basis, the assistant to the Union suggested that this Federal Court request the delivery of those documents, considering the authority ***to review*** the existence, or not, of interest by the Union is exclusive of the Federal Justice, according to jurisprudence compiled at the Dist. Superior Court of Justice (STJ) - Compilation no. 150 of the STJ.

Before these petitions were examined, one more request was made, this time by the Defendant, requesting the analysis of the preliminary arguments given at his piece of defense, as measure prior to the start of expert work, those being suspended until such appraisal.

About the latest requests made by both parties, I expressed, by means of the decision of pages 1,318/1,321, in which I deliberated in the following sense: i) reject the request for preliminary examination, since on this topic, there was already a manifestation from the Dist. TRF of the 2<sup>nd</sup> Region, which is why a decision of first degree can not overlap and, by indirect means, "reform" another upper body decision; ii) to grant the request for dispatch of the letter to the scholarly 2<sup>nd</sup> Family Court of Rio de Janeiro, in order to request the referral of the file the procedure of recognition of socio-affective paternity, so that to be ***examined*** the existence of interest by the Union, as alleged here, and; iii) to disclose the schedule of expert work, beginning on November 24, 2008 and with the end forecasted, initially, for December 1, 2008.

This *decisum* was targeted by the Agravo de Instrumento of pages 1,459/1,476, which was denied action of suspension under the decision of pages 1,581/1,596.

On pages 1,387/1,391, there is the Official Letter nº 45/08, originating from the 2<sup>nd</sup> Family Court of Rio de Janeiro, in which, in summary, it was reported the ***refusal*** in sending the file of action for the recognition of socio-affective paternity, for the reasons made explicit there.

In addition, the Official Letter nº007041/2008-CD2S (pages 1,393/1,401) was received, from the Second Section of the Superior Court of Justice (STJ), which, from the order of eminent rapporteur, Minister **LUIS FELIPE SALOMÃO**, information was requested regarding the Conflict of Jurisdiction nr. 100.345/RJ, now raised by the assistant to the Union.

This information was provided and sent via fax, to the eminent Minister rapporteur, as pages 1,479/1,489 and the certificate of page 1490.

Moreover, this court also raised a conflict of positive jurisdiction against the scholarly 2<sup>nd</sup> Family Court of Rio de Janeiro, as pages 1,527/1,539, by the refusal to refer the file of the procedure of recognition of socio-affective paternity, given the obvious harm to the Compilation no. 150 of Dist. STJ.

Subsequently, the eminent rapporteur of Conflict of Jurisdiction previously raised, Hon. Minister **LUIS FELIPE SALOMÃO**, was reported the delivery of the preliminary decision conceding (pages 1,550/1,552) to ***stay the progress of both proceedings***, until the final decision of the conflict and to designate this court as responsible for any emergency measures.

Despite already having a dispatch implementing the order of suspension of the proceedings, a reply was presented by the Federal Union (UF), on pages 1,598/1,619, by which, in short, the arguments of the Defendant in his defense piece were retorted.

Information provided to the Corregedoria Geral de Justiça, on pages 1,621/1,647, in answering the Official Letter no. 6357-E/CNJ/COR/2008.

A new decision made by the Hon. Minister **LUÍS FELIPE SALOMÃO**, on pages 1,685/1,686, gave news of the designation of a conciliation hearing, under the conflict of jurisdiction mentioned above, as well as to reverse the designation of the appropriate Court, for urgent measures, to be the scholarly 2<sup>nd</sup> Family Court of Rio de Janeiro, this *decisum* was ratified by the 2<sup>nd</sup> Section of the Dist. STJ, at pages 1,716/1,718.

On pages 1,752/1,753, there is a telegram from the Dist. STJ, communicating the trial of the referred conflict of jurisdiction, to establish the jurisdiction of this court to prosecute and try the present demand, as well as the suit to recognize socio-affective paternity, due to the connection between them.

In view of such communication, I made the decision on pages 1,754/1,756, to: I) restore the progress of these proceedings, and; II) maintain the implementation of expert examinations, which had begun before the halting of the proceedings and, consequently, disclose the new schedule of expert work.

Continuing, by means of the order of page 1856, it was allowed that the parties specify other evidence, beyond that already produced in these papers.

In response, the Federal Union, its *litisconsorcial* assistant and the Federal Prosecutors stated that no other evidence needs to be produced, according to expressions on pages 1,971/1,976, 1,893/1,903 and 1,977-verse, respectively.

Attending to the same order, the Defendant, in turn, via application of pages 1,931/1,932, argued for the production of additional documentary and oral evidence. In concerning the first, his case advocated for the issuance of a request letter addressed to the Superior Court of the state of New Jersey, USA, to which were officiated:

i) the Internal Revenue Service (IRS) to: a) inform the income of the Mr. **DAVID GOLDMAN**, in the last 5 (five) years to determine his assets and financial condition;



b) inform if Mr. **DAVID GOLDMAN** and the company Shore Catch Care Service LLC are registered with the Internal Revenue Service to receive donations that are collected by the *website* [www.bringseanhome.com](http://www.bringseanhome.com); and  
c) inform the values collected with the donations of such site until the date of the letter of response;

ii) to the institution responsible for the registration of real estate brokers of the state of New Jersey, USA, to inform the status of Mr. **DAVID GOLDMAN** in the record of that institution, it said, if he is up to date with his legal obligations and balances, if he ceased to be for a period and what that period is, or if he is active;

iii) to the United States responsible for issuing a certificate of good standing in order to ensure that with respect to Mr. **DAVID GOLDMAN**.

iv) to the competent U.S. Port Authority of the state of New Jersey, USA, to inform the situation and the condition of records of Mr. **DAVID GOLDMAN** with that institution.

Moreover, as oral evidence, the Defendant suggested a personal hearing of the assistant to the Union, a hearing of witnesses due to be listed, as well of **SEAN** himself.

Expert technical report, on pages 1,981/2,021, followed by annexes of pages 2.022/2.072.

Disputing against the report, offered by the Defendant, on pages 2,132/2,159, accompanied by documents of pages 2,160/2,221.

The Union and its assistant, in turn, agreed with the content of the report, as manifested at pages 2,223/2,247 and 2102, respectively.

About the disputing of the report, presented by the Defendant, the experts declarations, at pages 2,259/2,265, and the new petitions that followed the Defendant, the Union and its assistant, on pages 2,288/2,293, 2,295/2,296 and 2,298/2,302, respectively.

Redressing decision, on pages 2,303/2,323, to reject the request to invalidate the report, requested by the Defendant, as well as production of other evidence, under art. 130, of the CPC, close the probate stage and referring the case to the Federal prosecutors for an opinion of merit.

Against this *decisum*, the Defendant objected to embargoes of declarations on pages 2,328/2,337, which were examined and rejected, by decision of pages 2,341/2,349.

The Defendant then brought further a new Agravo de Instrumento, a copy of which is on pages 2,354/2,400, which had an action of suspension denied under the decision of pages 2,404/2,406, made by the Hon. Federal Judge summoned, Dr. **LUIZ PAULO DA SILVA ARAÚJO FILHO**.

Following up, the Federal Public Ministry offered the opinion of pages 2,408/2,424, **making the case for the partial merit of the application**, as to determine the return of the child to the United States, after a period of transition, to be fixed by this Court.

Finally, when the proceedings were already concluded for judgment, the Defendant filed two more petitions.

For the first, appended on pages 2,429/2,438, he attached a recent opinion, also made by the Federal Public Ministry, but offered in case of a further Agravo de Instrumento brought by the assistant to the Union, before the Federal Supreme Court, in the context of an earlier proceeding, filed by himself, Mr. **DAVID GOLDMAN**, in face of his deceased former wife, also based on the Hague Convention.

According to the *opinio*, in short, the death of Mrs. **BRUNA BIANCHI**, by itself, does not cause the extinction of that proceeding, since the right involved would not be personal. Hence, concluded the herein Defendant, the dealing with this demand would imply *bis in idem* ('*offense to think previously judged*')

In the second petition, the Defendant brings to the attention of the Court the recent judgment of a Direct Action of Unconstitutionality, by the Democratas Party -

DEM - against several provisions of Presidential Decree No. 3413/2000, which was introduced into our body of law by the Hague Convention of 1980. The Defendant wants, therefore, that this Court consider the matter discussed in such ADIN under art. 462 of CPC.

***It is the report as necessary. Decided.***

## **II-BACKGROUND:**

### **II.1 - PRELIMINARY ISSUES**

Despite that the formal matters of defense have already been the object of examination by Dist. TRF of the 2<sup>nd</sup> Region and, indeed, been fully refuted by that Distinguished Court, it is appropriate to confirm, at this time, the absolute rejection of such procedural objections.

This is what is to be demonstrated.

#### **II.1.1 - LACK OF PROCEDURAL INTEREST:**

In this regard, the Defendant argued that the Federal Government lacks procedural interest, in the necessity of providing legal aspect, as there already exists action proceedings with identical object and cause to action.

The demanded refers to the process previously filed by the father of **SEAN**, now assistant to the Union in the face of the deceased mother of the child, and that is in phase of appreciation of Agravo de Instrumento brought before the Supreme Federal Court (STF), against the decision that denied the continuation of the Extraordinary Appeal.

This line of defense does not proceed.

To this point, it is of notice that the above mentioned earlier proceedings, to all indications, should be declared extinct, without analysis of the appeal still pending, in the face of the absence of a presupposition for the valid development of a procedural relation, that is, ***the existence of one of the parties.***

After all, with the unfortunate death of the mother of the minor, the defendant part no longer exists, reason why, in dealing with a demand that comprises personal rights, making, therefore, impracticable any suggestion of procedural succession, there is no other solution but the extinction and the archiving of the action.

It is necessary here to draw a few considerations about the scholarly opinion of the Federal Public Ministry, the writing of Hon. Sub-Prosecutor General of the Republic, Dr. **RODRIGO JANOT MONTEIRO DE BARROS**, for recognizing that he presents demonstration against the above expressed understanding.

With due respect to the subscriber of such opinion, he lacks reason. Here is why:

Under penalty of violation of the constitutional principle of adversarial proceedings, the rule established by law is that the subjective and objective limits of material *res judicata* covering, alone, subjectively, the parties - who have nurtured the process-expression and, objectively, the case effectively examined, when the exercise of judicial functions.

Therefore, to facilitate the appropriate care of mentioned constitutional principle, the rules of Articles 264 and 294, both of the Code of Civil Procedure, establish the rule of the subjective and objective stabilization of the process, which allows exceptions only in extraordinary situations where the change in the objective elements - cause to demand and the request - and the subjective elements of the trial - through the intervention of third parties and procedural succession - ***not cause damage to the principle of "due process of law."***

Very well. In cases which are subject to litigation related to wrongful detention or abduction of a child under the discipline of the Hague Convention,

it is attributed to the Defendant party the practice of specific unlawful conduct (civil), in the view of which, it is promoted a civil responsibility **non transcendent**, since focused, exclusively, only on the implementation of the provision *in natura* and of non fungible method - the seizure and return of the child - and, therefore, does not admit, *data venia*, undue subjective extent.

After all, except the responsibility where it seeks to repair of damaged assets, i.e. a legally binding property, or non property legally binding with economic effects - the so-called moral damage case - there is no way to allocate responsibility to a person for a tort committed by others.

The responsibility of an estate, for example, has an effect strictly of property. If opinion is otherwise, one could reach fully odd conclusions, with due permission.

After all, can an estate abduct or retain a child?!?

How to "**probate**" an obligation to return a child to his country of residence?!?

When the probate eventually closes - yes, because the estate is a **temporary** universality of rights -, to whom would have been transferred the obligation to return **SEAN** to the United States of America?!?

Besides the property aspect of the question, could the new-born **CHIARA** - sister of Sean and successor by substantive Law to her mother - be held responsible for the illicit retention of her brother?!?

Could Sean - also successor to his mother by the substantive Law - be held responsible for his own abduction or unlawful retention?!? And, in the latter case, someone could argue the nonsense, *concessa venia*, that it is impossible based on the fact of a confusion between the legal position of creditor and debtor of the liability?!?

It is clear, therefore, renewed the due respect, the lack of viability of the transfer of ownership (active or passive) of the material non-property and non fungible liability the procedure deals with.

Thus, if a third party - other than the original defendant - promote the retention of the minor, the unlawful fact under review will be different, and for that, liable to judicial protection to be provided in an autonomous procedure, since it has a separate cause of action.

That is the reason why there is no basis to admit viable legal procedural succession on the defendant side, this being a procedure of search and seizure of a minor, with support in the Hague Convention.

And, even if defending the opposite conclusion - considering that, *ad argumentandum* - is to be noted that the eventual procedural succession would not prevent to bring to this procedure, which is already in motion, a new illicit fact - the retention of the minor by a the third party - to which there would be no opportunity to exercise contradiction.

Impossible, therefore, from all angles, the desired procedural succession, within the scope of the alluded earlier demand.

Turning to the alleged absence of procedural interest, it is clear the lack of basis for the thesis.

It is the tragic and unfortunate death of the mother of **SEAN** that changed, above all, the landscape of the facts hitherto existing, and to this point, yes, to legitimize the proposition of a new judicial action, which, in short, although containing similar demand, ***has support in a cause of action with its own outlines.***

This, by the way, was the same external perception by the Hon. Desembargadora rapporteur of the Agravo de Instrumento further no. 2008.02.01.016970 - Ms. **VERA LÚCIA LIMA**, who stated that "***(...) the context of the facts that gave rise to this proposition is completely different, to show profound differences between the causes of action of the two demands, as the Union pointed out in its application (.. .)***" (page 827).

Unable to prosper, moreover, is the assertion that the eventual rejection of the Appeal, still pending at the Supreme Court, would have the effect to cause the formation of *res judicata* preventing the continuation of this procedure.

In this particular, we cannot lose sight of the fact that *res judicata* presupposes **repetition of demand** already definitely decided by the Judiciary, which in turn has as a logical assumption that there is **identity of parties, of applications and of cause of action**, between both analyzed procedures.

Under this theory, as stated above, besides the demand of action presenting a new and essential fact, to differentiate it from the facts in the previous proceedings, which in itself, excludes the possibility of *lis pendens / res judicata*, **the parties here claiming are obviously different.**

Appeared there, as an author and defendant, respectively, the father and the mother of the minor. Here, in turn, the author role is occupied by the Union, while that, in defendant role, is Mr. **JOÃO PAULO LINS E SILVA**, stepfather of the child.

It is about, therefore, of two proceedings with different parties and causes of action, that puts to rest, definitely, the alleged cases of *lis pendens* and *res judicata*, *data maxima venia*.

And, as if the above arguments were not enough, the assistant to the Union has the complete reason for adding, on page 1067, the impossibility of the reasons for the decision to produce *res judicata*, as set out in art. 469, I, of the CPC. That is, the reasons which led the courts to make these decisions in a given direction in the midst of a previous demand, of course, do not bind the discretion of this Judge, and also of the Judiciary, under this new demand, especially because it was filed in the face of others, based on different cause of action, that is, **a new unlawful act.**

Notice, still, that the piece of defense, also in the topic related to the lack of procedural interest, went on to draw considerations about an alleged inapplicability of the Hague Convention in this concrete case, and it concluded it lacks the procedural interest on this proceeding (about the utility of this kind of procedure filed).

About these allegations, I believe this preliminary issue has been confused with the merits, a reason that it is going to be assessed in the chapter of this sentence dedicated to it.

### **II.1.2 - ACTIVE ILLEGITIMATE OF THE UNION:**

The thesis of active illegitimacy of the Union to make the proposition, on behalf of itself, of action with this nature, *permissa venia*, lacks any basis.

The Union, *in casu*, acts with the aim to ensure the compliance with international obligations undertaken by the Federative Republic of Brazil to other sovereign States, not in defense of private interests, as mistakenly raised by the blocking piece.

It's amazing how one tries to support the idea that the Union would be here acting on behalf of a foreigner against a Brazilian-born and that then - continue the defenders of that argument - there would be ***diversion of purpose*** in the performance of the Attorneyship of the Union.

Such line of reasoning shows itself to be so obtuse, so technically poor, that it dispenses with more argumentative digressions.

I record, only, that the legitimacy of the Union was, also, already specifically recognized by the jurisprudence of the Dist. TRF of the 2<sup>nd</sup> Region, when it examined a similar case to this, as it can be grasped from extracts of the following part of amendment:

***"INTERNATIONAL LAW AND CIVIL PROCEDURE. PRECAUTIONARY PROCEDURE. SEARCH, SEIZURE AND REPATRIATION OF CHILDREN. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL ABDUCTION OF CHILDREN. ACTIVE LEGITIMACY OF THE***



**FEDERAL UNION. MERITS: UNLAWFUL RETENTION. NO ATTESTATION. PREVALENCE OF INTEREST OF THE MINOR. GUIDELINE OF THE STJ. RESOURCES PARTIALLY PROVIDED AND, ON THE MERIT, REFUSING THE APPLICATION OF INJUNCTION (ART 515, 3, THE CPC).**

***-Based on the Policy Letter and as body of Direct Federal Public Administration, and aiming the fulfillment of obligations undertaken by the Federative Republic of Brazil, through international cooperation, to the achievement of objectives of the International Convention, the FEDERAL UNION ordinary acts as legitimate, that is, on its own behalf and in of defense of its own interest.***

***-A legitimacy and interest of the FEDERAL UNION does not arise from the private interest of the parent (custody) of minors and, yes, from the public interest nature consistent in fulfilling obligations undertaken in International Convention. Moreover, the father of minors entered the process as simple assistant having, even, appealed the sentence. - (..)"***

**(AC 388822, for Sixth Class, King. Des. Fed. BENEDITO GONÇALVES, DJU of April 18, 2008, p. 596)**

Standing strong on the same grounds above, I leave behind the argument of active illegitimacy of the Union.

### **II.1.3 - LACK OF AUTHORITY OF THE FEDERAL JUSTICE TO REGULATE VISITS AND APPLY THE PROCEDURAL STAY:**

The jurisdiction of the Federal Court to prosecute and try this demand remains finally recognized by the Dist. Superior Court, under the trial of the conflict of jurisdiction in 100.345/RJ and, therefore, matter resolved.

In turn, the application for stay of proceedings has been properly examined, in the midst of the decision of pages pages 1,126/1,130, and even precluded matter.

Overcoming all the preliminary [arguments], it is time to enter the merits [of the case].

## II.2 - MERITS:

### II.2.1 - SCOPE OF PRESENT DEMAND. IMPOSSIBILITY TO ANALYZE THE QUESTION OF CUSTODY OF THE CHILD.

Initially, we must emphasize that this demand does not aim to rule on the material legal situation of the minor **SEAN RICHARD GOLDMAN**, particularly on the definition of his custody.

It has, yes, as its scope to define, plainly, the incidence, or not, of rules of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction, of which Brazil is a signatory, to the extent that it determines the return of a child wrongfully removed or retained in another contracting State, other than that of his habitual residence.

With that in mind, considerations about who would best able to provide for the life of the child, quality of the school where the child studies, in comparison to that which he would attend, in case he is determined to return, or even the quality of health services to which he will have access, none of that, *concessa venia*, matters for the strict examination of the claims made here.

And that, given that such matters concern the very definition of the legal situation of the substantive law of the child, in a few words, it concerns the definition of custody of the child, that is not considered here, being true, still, that could be analyzed by the competent judge, which is, the ***natural judge*** for that question.

First, however, we must determine whether **SEAN** returns, or not, to his country of origin. This is a controversial question, put on trial in the present demand. Nothing beyond that.

## **II.2.2 INCIDENCE OF ARTICLE 3 OF THE HAGUE CONVENTION. PERFECT FITTING OF THE FACTS TO THE NORM.**

After the brief record above, observe the contents of 3<sup>rd</sup> Article of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction:

### ***Article 3***

***The removal or the retention of a child is to be considered wrongful where:***

***a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and***

***b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.***

***The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.***

There are, in effect, two conditions for the provision of Article 3 of the Hague Convention to be legitimately applied, namely: i) a breach of rights to custody of a given person, usually, one of the parents, according to the laws of the State in which the child had his habitual residence, and ii) the effective exercise of that right, at the time of transfer or unlawful retention of the child.

It is an undisputed fact in the case, the fact that the minor **SEAN GOLDMAN** had residence in the state of New Jersey, United States of America, until the day of June 16, 2004. About that, let it be repeated, there is no controversy.

There is also no dispute about the fact that Mr. **DAVID GOLDMAN** was exercising the full rights of custody for their child, until the coming of the latter to Brazil for what was only a vacation trip in company of the mother of the child. This fact, in the same way, is not under dispute.

In another turn, for the purposes provided in Article 15 of the Hague Convention - proof of the unlawfulness of the retention / transfer, ***under the law of the State of habitual residence of the child*** - there are trusted third documents in the file to show that the retention of **SEAN** in Brazil was in violation of the law applicable to the case in the state of New Jersey, where, as set out above, the child habitually resided.

In this sense, compare the content of the decision issued by the Supreme Court of New Jersey, in the case of proceedings brought there by Mr. **DAVID GOLDMAN** before Mrs. **BRUNA BIANCHI** and the maternal grandparents of **SEAN** (Volume 1 of joined, page 45):

*".. The law of New Jersey, specifically NJS, A 9:2-4 and NJSA 2C: 13-4, and NJSA 2A :34-31 .1, in aid application Article 15 Hague Convention on the Civil Aspects of International Child Abduction October 25, 1980, codified at 42 USC 11601 et. Seq., The continued retention by the defendant / mother and her declared intention to refuse to bring the child back to the United States, were and can still be considered 'illegal' according to the provisions applied in the law of the child's habitual residence, New Jersey."*

And, just to be registered, there is no doubt that the assistant to the Union remains, to date, the holder of the right of custody of his son, according to the law of the state of New Jersey. So much so that, by the way, a final decision pends in his favor, in American Justice, by which he was assured that right.

Thus, it forces the conclusion that the retention of the child in question in this national territory, after the short period allowed by his father for

travel vacations, set in its exact terms, is the unlawful legal situation described in Article 3 of the Hague Convention.

To that effect, there is no doubt.

***It is valid to emphasize that the unlawful retention of SEAN in this national territory, had been duly recognized by all jurisdictional organs that acted on previous demands then filed by the assistant to the Union, before Mrs. BRUNA BIANCHI. There is to say, from reading the decisions there made, it appears that if the order to return the child was not granted, under these first proceedings, this was not because the residence of SEAN in Brazil was considered lawful. No. It was understood, instead, that, despite the illegality of the situation, the thesis was the object of some exceptions under the treaty.***

This aspect, the unlawful retention of the child, since July 2004 - should be very clear, since the Defendant, in this second demand, claims, with intensity, in a given moment of his defense, that the habitual residence of **SEAN**, in the last 4 or 5 years, has been Brazil, which is why, in its conception, not even the provisions provided for in the Hague Convention would apply.

Nothing is more wrong, *data venia*.

In this particular aspect, it is important to remember that the extremely sensitive case of the boy, here examined, presents a feature that distinguishes it, particularly, from the vast majority - **perhaps even the entirety**... - of cases of international child abduction under the Hague Convention.

I refer, specifically, to the fact of there having been a **first** illegal child retention, attracting, in its time, the impact of the treaty in focus, then perpetrated by his mother, together, later, with the tragic and unfortunate

death of his mother, to which was succeeded, finally, a **second** retention of the **same boy**, now held by his stepfather. Both these retentions brought the filing of distinct demands, even though covering the same boy.

Hence the hypothesis now considered, at least to what is known, has no previous similarity.

In this vein, the point to be emphasized is that, if the first retention of **SEAN** proved to be illegal - and it has been seen that the answer is yes - there is no doubt that this second retention, now carried out by the stepfather, could never be considered otherwise. It is also unlawful. Also because the herein Defendant, **although through a new illicit act**, did nothing more than to retake the position of unlawfulness initiated by the mother of the child, in July 2004, a situation that only came to cease (at least on her part), with the sad death of Mrs. **BRUNA BIANCHI**.

Following this reasoning, if the residence of **SEAN** in Brazil was flawed in its origin, evidently, the habitual residence of the minor could never have been properly fixated in our Country, as in equivocated manner, *data venia*, the Defendant argued.

Also because, as it was very well referred to by the assistant to the Union, at pages 1,070/1,071, to conclude the contrary would be to admit that someone is likely to benefit from an illicit act. It would signify to admit, in other words, that illicit acts entail rights, which, as it is very well known, is inconceivable.

In short, it does not matter how much time has passed since the beginning of the stay of **SEAN** in Brazil, without the consent of his father, in order to ascertain what would be the habitual residence of the child. What matters is that the situation of unlawfulness never stopped existing. Therefore, *permissa venia*, it is totally incorrect to talk of fixing the habitual residence of the child in our Country, only in view of one piece of data, though significant, temporal lapse.

***A fortiori, it is of interest to note that, even assuming the admittedly mistaken idea of fixing the habitual residence of SEAN in Brazil, the conclusion reached would be no different.***

It is that, even in light of the application of Brazilian law, it appears that the domicile of **SEAN** after the death of his mother has become, **as of right**, that of his father, rather than in the one that he had lived with his mother. And that, by virtue of expressed ordinance!

This is the standard of art. 76 of the Brazilian Civil Code, *in verbis*:

***"Article 76. Have necessary domicile the incapable, the public servant, the military person, and the prisoner.***

***Sole Paragraph. The domicile of the incapable is that of his representative or assistant; (...)***"

In the case of a minor, such as **SEAN**, it is basic that his legal representatives are, as a rule, the parents themselves, and, ***in the absence or prevention of one of them, the other exercises it with exclusivity.***

Check by the way, the standard of art. 1.631 of the Civil Code of 2002:

***"Article 1631. During the marriage and the stable union, the familial power rests with the parents, in the absence or incapacity of one of them, the other exercises it with exclusivity.*** "

From the conjugation of the norms collated above, we are forced to conclude that, starting from the unfortunate death of the mother of **SEAN**, the legal and necessary domicile of the minor in question has become, as of full right, that of his surviving parent, that is, of his father. Thus, the denial of delivery of the minor to the holder of his custody, configured, *ipso facto*, the illicit detention of the minor in exact accordance with art. 3, sub-heading *a*, of the Hague Convention.

And the requirement present on sub-heading *b* would also be established, to the extent that, after the death of Mrs. **BRUNA BIANCHI**, the right to custody passed

immediately to the child father of the child, **with exclusivity**, by force of Art. 1631 of the Civil Code of 2002, reason for this right being exercised if the unlawful retention was not present.

Just subsume the facts to the standards.

As it can be seen, by any angle one intends to analyze the question, the conclusion is only one: all the requirements set under Article 3 of the Hague Convention are unequivocally present, in what concerns the characterization of unlawful retention of **SEAN** in this national territory.

### **II.2.3 - EXCEPTION FROM ARTICLE 12 OF THE HAGUE CONVENTION. ADAPTATION OF THE MINOR. INAPPLICABLE TO THE CASE.**

With the demonstration that the facts fit, with accuracy, the discipline of Article 3 of the Hague Convention behind, is to confront, soon enough, that what is perhaps the main argument of the Defendant in this demand, that is, the alleged adaptation of **SEAN to Brazil** under terms of Article 12 of the international treaty under comment.

It lacks fundament, however. And for some reasons.

To better explain, here is the content of such device:

#### *Article 12*

*"Where a child has been wrongfully removed or retained in terms of Article 3 **and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention**, the authority concerned shall order the return of the child forthwith.*

*The judicial or administrative authority, **even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph**, shall also order the return of the child, **unless it is demonstrated that the child is now settled in its new environment.***



*Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."*

From a simple reading of this legal command, it jumps to the eye that the exception there is only applicable in the event that, the date between the transfer or unlawful restraint and the date of the start of judicial or administrative proceedings, seeking the return of child, there elapsed a period of time exceeding 1 year.

It is to be noted that the exception is provided in the second paragraph of the article. The first, in turn, establishes the general rule, that is, immediate return if the administrative or judicial proceedings have been triggered in time less than 1 year from the unlawful act, not contemplating, there, any adaptation of the child.

Herein, *in casu*, the illegal retention of **SEAN**, perpetrated by the Defendant, and that is the object of examination in this case, started with the unfortunate death of Mrs. **BRUNA BIANCHI**, on August 22, 2008. The present demand, in turn, was proposed on September 26, 2008, that is, just over a month, after the beginning the new illicit act. The simple comparison of those dates removes, completely, the incidence of the exception in Article 12 of the Convention.

In this sense, note the following passage from the opinion well issued by the Federal Public Ministry, offered by the Hon. Public Prosecutor, Dr. **GUSTAVO MAGNO GOSKES BRIGGS DE ALBUQUERQUE** (page 2416):

*"(...) In this action, while the application is identical - the return of Sean to the U.S.A. -, there is new cause of action, consisting in the unlawful restraint of child by person not holding the right of custody.*

**The wrongful detention of Sean in Brazil by the stepfather became effective at the death of the mother of the child, on August 22, 2008. What is certain is that since then, Sean should be under the custody of the superposing parent, able to exercise fully the familial power over the minor.**

***The present action was filed on September 26, 2008, only thirty-five days after the consummation of the fact that triggered the new demand for restitution. That said, considering that the exception of Article 12, 2<sup>nd</sup> Part, of the Convention, applies only when the period one year from the date of the wrongful detention and the date of commencement of the process before the court has expired, it remains repelled the possibility of permanence of the minor in the country, even in the case of his integration into the new environment.***

***In other words, the standard of Article 12 of the Convention inhibits the effectiveness of the argument about the adaptation of the child to the new environment, in the event that has elapsed a period less than one year between the date of illegal occurrence - in this case the undue retention of the minor - and the formulation of the demand of administrative or judicial remedies for his immediate return.***

***The legal ordinance of the country adopted the precept that the establishing of legal rules do not permit extensive interpretation. So when it comes to rule of Except it is not feasible the use of exegesis or analogical. This is what the best of the doctrine teaches:***

***'The exceptional provisions are established for reasons or particular considerations, against other legal standards, or against Common law, so do not extend beyond the cases and time that they expressly designate.'***

The *Parquet* is completely correct.

And, *ad argumentandum*, even if it was wished to take as a temporal parameter, the date of the first wrongful detention of **SEAN** in Brazil, occurred from July 19, 2004, the conclusion would not be different. After all, already on September 23, 2004, the U.S. Central Authority sent a request for the return of the child to the Brazilian Central Authority, given that this demand had been caused by Mr. **DAVID GOLDMAN**, what is extracted from the constant chronological time report in the official document of pages 36/39.

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<sup>1</sup> MAXIMILIANO, Carlos. "Hermeneutics and Application of Law," 17th ed., Rio de Janeiro: Forense, 1998, pp. 225/227

And more: the assistant to the Union, not satisfied with having triggered the official avenues, and eager for the return of his son, decided to hire a private lawyer to represent him in Brazil, launching an independent demand, despite the prior administrative action that he had taken. In point, it appears that the application of the initial demand for search and seizure, was filed on November 16, 2004, at pages 169/186. That is less than 4 months after the start of the unlawful detention, the father of the child had taken all appropriate measures, for the return of his son. And he did it, to be repeated, by legal means.

As can be seen, both in the first and the second unlawful detentions of **SEAN**, the hypothesis is adapted to the **general rule** in the *caput* of Article 12 of the Convention, not applying, therefore, the exception set out in its second paragraph, as the time period stipulated did not occur in either of the situations.

And that is not all. There is more.

The exception contained in Art. 12 of the Convention originates from a **logical premise**, that is, that the child object of the request for restitution is in possession of one of his/her parents. Ultimately, of course, the Hague Convention works on the central premise that in the vast majority of cases, the author of the illicit act of removing or retaining the child in another country, other than that of habitual residence, is one of his/her parents. Thus, it is clear that the exceptions contained in the Convention, in particular that of Article 12 shall be read and interpreted in light of this premise, under penalty of achieving results generating of perplexity.

In other words, and thinking in theory, it is not reasonable - indeed, it reaches the level of surrealism - to admit that a given person, devoid of familial power upon the minor - **a third party** -, objects to the delivery of the child to the father or the mother, or both, under the basis that the child is integrated into their new environment.

To admit this possibility means to open dangerous gaps capable of constituting real absurdities. And the absurd, as is well known, cannot find refuge in the Judiciary.

To make clearer the idea now supported, let's reason under the following hypothetical situation:

An individual child, 4 years of age and having lived together until then with both parents, is abducted and illegally transferred to Brazil. The abductor then settles in and goes to raise the minor as his/her son. Provides to that child everything he/she needs to develop fully. Gives his/her love, care, education, nutrition, recreation, medical care, the whole apparatus required for the complete and healthful development of any child.

Let us suppose, further, that the abductor gets married here. The child now has a "father" and a "mother". One can go further. From this union, one or more children are born. The abducted child, now also has one or more "siblings".

Well. After about 5 years, the real parents, who sought, incessantly, to discover the whereabouts of their child, finally achieve success. They start by legal means, with proceedings for the return of the child, based on the Hague Convention.

Question is: will the raptor be awarded by the perpetuation of the illegality, on the grounds that the child is adapted to Brazil? Is it reasonable that one admits that possibility?

Of course not!

Well then, what is the essential difference in the example above and the case now under examination?

The parents of children described in the example are alive, never abandoned him/her, and want to exercise the parental power. As Mr. **DAVID GOLDMAN**, the only living parent of **SEAN**, has never abandoned him (although the Defendant tried,

without success, and without evidence, to say the opposite), wants and is capable of exercising parental power over his child.

Furthermore, the parents of the children in the example above never gave up looking for their child. As Mr. **DAVID GOLDMAN** never stopped fighting for the return of **SEAN** to the United States. Quite the contrary. From the first moment, he battled tirelessly in search of that goal. And has done it, to be repeated, always by legal means.

Hence, another question becomes appropriate:

Would it be reasonable to deny the parents in the above example the return of their child only because the passing of time? Or, from the perspective of the child, would it be reasonable to deny the child in the above example the right to live and to be raised by the parents simply because some time would have elapsed since the abduction?

The answers to these questions are obviously in the negative.

Now, transfer the reasoning to the case under review.

Is it reasonable to deny Mr. **DAVID GOLDMAN** the return of his son only because the time passed? Or, from the perspective of **SEAN**, is it reasonable to deny this child the *inalienable* right to live and be raised by the only parent that is left to him only because time elapsed?

I am convinced that the answers to these questions are also in the negative.

But still to sustain the impact of exception to Article 12, the Defendant argues that the Brazilian Justice, in the scope of the earlier proceedings, so many times already referred to in this sentence, would have recognized that the adaptation of **SEAN to Brazil** would have already constituted as an insurmountable obstacle to sending the child back to his country of origin. Arguing that the boy could not depart here, since the courts already decided that he should remain here.

The argument, again, is unfounded. And is unfounded because it is based on truly mistaken premises.

In this regard, it is clear that the previous court decisions, in opting for maintaining **SEAN** in Brazil, had as its main line of reasoning the fact that the child was *here with his mother.*

The adaptation of the child "to Brazil" was clearly linked to fact that the boy lived here *next to his mother.* This was, no doubt, the crucial point that ultimately determined the residence of the minor, in view of scholarly decisions made there.

However, the adaptation of **SEAN** was not exactly "to Brazil", but also to life *under the care of his mother,* what, one would have imagined, would occur if Mrs. **BRUNA BIANCHI** decided, for any reason, to live in another country.

Could anyone, in good conscience, sustain that **SEAN** was unable to go live with his mother overseas on the grounds that the Brazilian Justice had already decided that the child "was adapted to Brazil"?

Could the Public Ministry, in the defense of the primary public interest of a minor, propose a precautionary measure to prevent his removal from Brazil, shielded on previous decisions, according to which the boy was already fully adapted "to Brazil"?

Of course not!

Little **SEAN** would depart normally with his mother, to such country as decided, would adapt to a new reality, would attend a new school, learn a new language, make new friends, and all this without anyone having the audacity to object under the plea by the Brazilian Justice that ordered that he remain in Brazil.

And the reason is very simple.

The decisions issued in the previous proceeding were based, fundamentally, in the fact that in Brazil **SEAN** lived *next to his mother.* This

was the critical basis that gave rise to the denial of return of the minor to the United States of America.

This premise, however, in view of the tragic and unfortunate death of the mother of the child, is no longer valid. **SEAN** lost his mother. This is a fact against which, unfortunately, nothing can be done.

***But it must be recognized that, yes, SEAN still has a father!***

And a father, it should repeated to exhaustion, who never abandoned him. On the contrary, he never gave up on having him again under his custody. And to that end, he did not measure, and still does not measure, his efforts despite the difficulties that were and that continue to be confronted.

The records are full of evidence to that effect.

Accordingly, it is undeniable the incessant legal battle that he has been fighting for years to get his son back, a battle, by the way, rather expensive, which in itself shows the absence of the alleged abandonment. There are, likewise, recordings of telephone calls kept by the father with the child, after his arrival in Brazil. There are dozens of electronic messages exchanged. There is evidence of the sending of presents to **SEAN**.

It is possible to go further.

The defendant, to support the alleged abandonment, states that the access of Mr. **DAVID GOLDMAN** to **SEAN** was never denied, and that it was the father's own choice to not see the child, for merely procedural strategy. The assistant to the Union denies this. He maintains that any possibility of visiting his son has always been subject to a prior irrevocable waiver of any legal action to bring the minor back to the United States and he would never have agreed with that.

At this point, I acknowledge that there is no way to know, with precision, what, in fact, occurred ***before the filing of the present demand***, in terms of the possibility of the father of the child actually being able to visit his son.

But it is possible to analyze certain events ***during the processing of this action*** and, to some extent, they help to reveal how much truth there is in the version presented by the Defendant, in line that **SEAN** was always available to his father.

In the first decision granted by this Court it was awarded, to Mr. **DAVID GOLDMAN**, the right to visit his child, and set up a regimen of interim visits to the child, until further decision to the contrary.

In learning that the father of the child was on his way to Brazil to exercise the right to see his own son, the Defendant immediately appealed against that decision to the Dist. TRF of the 2<sup>nd</sup> Region, aiming to revoke such a provision, withdrawing, again, from Mr. David Goldman, the right to see his son.

It was argued, in such appeal, under the title of a threat of irreparable harm to the minor, with a demand for a suspensive effect, the simple fact that the father of **SEAN** would be in Brazil "***(...) unannounced, to impose his presence on a minor who did not see him for more than four years , already at the end of this week (October 17, 18 and 19)***" - page 852.

The suspensive effect was partially granted, but only in order to postpone the start of the visitation, passing from the Friday night to the morning of the Saturday following.

Thus, unable to stop ***by legal means***, the effectiveness of the decision, the Defendant decided, forcibly, to thwart the encounter between father and son. At the day and time judicially determined, the Defendant was not to be found with the minor at the due place (his residence), disobeying, thus, flagrantly, two judicial decisions. The one of this Court and of the one of the TRF of the 2<sup>nd</sup> region.



Days later, entered with a simple petition, in which he presented a badly explained, and poorly rehearsed story, based on a supposed trip "to the mountains," an explanation full of inconsistencies and contradictions, all seeking to justify the absence of **SEAN** from what would be the awaited reunion between a child and his father, the latter, incidentally, who had traveled more than ten hours for such.

Not satisfied, in the same application, the Defendant also attributed, to the assistant to the Union, an alleged attempt of self promotion, at the expense of meeting with his son, having brought with him a group of reporters, to the point of - it is true! - of passersby thinking that, at day and place, there was the taping of a soap opera. Used, still, the same argument to claim, once again, the revocation of access rights granted to the father of **SEAN**, being based on the determination contained in the decision of the TRF of the 2<sup>nd</sup> Region, that the minor should not be exposed, in any event, to the media.

Well.

The inconsistencies and contradictions of the story of this trip "to the mountains" were recognized and identified in the file in detail, by decision of pages 1199-1211, while the question of the "taping of a soap opera" remains properly buried, from simple certificate, launched in the file, by the Officials of Justice that were at the residence of the Defendant to comply with order.

Stated the Dignified Officials of Justice, on this point, that there was not even one reporter at the door of the condominium where the Defendant resides. They said that they had not seen any press apparatus, any journalism equipment, no camera, nothing. Explained, in short, that, on that morning of Saturday, ***the street had been dead.***

The facts above yielded the conviction of the Defendant for litigating in bad faith, given the deliberate change in the truth of the facts, and also for an act harmful to the exercise of jurisdiction, in addition to the routing of documents to the Federal Public Ministry,

through practice, in theory, of a crime of disobedience, in view of the deliberate breach of two judgments.

And all this because the Defendant - which, as seen above, states it had been Mr. **DAVID GOLDMAN** himself that decided to leave without seeing his son - decided, by its own account, to thwart the order of visitation granted by this Court, and maintained, up to then, by Dist. TRF of the 2<sup>nd</sup> Region.

That would already be much to arrive to some conclusions. But that is not all.

More recently, after the completion of an agreement between the parties, in the scope of the conciliation hearing sponsored by Dist. Superior Court, Mr. **DAVID GOLDMAN** returned to Brazil to exert, again, his right to visit his child, as provided in the aforementioned judicial transaction.

The Defendant, then, learning of the arrival of the assistant to the Union, through rapid petition, addressed to the court, "**informed**" that **SEAN** would not be available to be visited on weekdays, - **though there is no restriction according to the agreement he signed** - under penalty of, he explained, that there would be possible harm to the child's school attendance.

In view of this petition, this court, in order of pages, "**clarified**" to the Defendant that the visitation could done on weekdays, be it for the lack of restrictions in that sense, in the agreement held, or because, after so many years without direct contacts between father and son, the principle of best interest of the child, often referred to by the Defendant, would be better served if the meetings between the father and son were intensified, to the detriment of a few days of school absence by the minor.

***But the essential point is: the two situations narrated above - thwarting the first episode of visitation granted, in a breach provocation of two judgments, and the attempt to restrict, without the support in the agreement, at another opportunity, a new visit to be made by the father to the boy - translate,***

***or not, in good measure, the measure by which the Sean "was available" to be visited by his father during the past year since his wrongful retention in Brazil?***

***Or in other words, the conduct of the Defendant described above - of appeal to revoke the decision of temporary visitation by the father, deliberate breach of orders that required him to provide the boy to his father, and the attempt to interpret an agreement signed in the most restrictive access possible to the child's father - is it compatible with the disseminated talk that Sean has always been accessible for visits by the father?***

The Judiciary cannot - ***and will not*** - close our eyes to this reality!

To state, as it is done at the disputation presented, that Mr. **DAVID GOLDMAN** is an "absent and negligent" father is, to say the least, to seriously doubt the intelligence and sensitivity of this Court.

And not only that. One needs to have in mind that **SEAN** lived with his father from his birth until 4 years of age. There is evidence in the records to indicate that the relationship between father and son was the best possible. A small sample of the strong love between them can be seen in the transcripts of telephone dialogues of page 183, which occurred shortly after the illegal detention of the child in Brazil.

Indeed, this boy is only 9 years old now. In this particular aspect, it is curious to observe how the defendant party tries to overvalue the period during which the boy lived and still lives in Brazil, and, at the same time, undervalues the number of years that **SEAN** lived in the United States, and, above all, ignores how much life this minor has ahead of him.

Little, if anything, is said about the time that **SEAN** lived in the United States of America. And worse: it is forgotten, completely, the time that this minor has yet ***to live***. Nothing is said, obviously, about the long years that the boy

will still have in his life, until he becomes an adult, and can, then yes, make, freely, his own choices.

To be repeated: **SEAN** has a whole life ahead, it is widely feasible that the bonds of love, friendship, affection, respect, among many other feelings inherent in any relationship between father and son, are fully restored - ***if it is that they were lost on the part of SEAN...***

By the way, even when the case was in its embryonic stage, that same idea did not escape the scholarly perception of the Hon. Federal Judge **MAURO LUÍS ROCHA LOPES**, in assessing exactly the Agravo de Instrumento, brought by the herein Defendant, against the decision of this Court that determined the visitation regimen in favor of the assistant to the Union.

By the way, check the following excerpt from that *decisum*:

*"(...) I do not see how the contact with the biological father can bring some kind of emotional loss to the minor Sean. **The child, of eight years of age, lived with his father until four, when he was brought by the mother to Brazil. Certainly still keeps in his mind the memory of the father, and have discernment enough to recognize him as such and with him restart an affective relationship.**"*

That is why, facing all the above, especially that new factual landscape, which is, the definitive absence, lamentably, of the mother of **SEAN**, owing to her death, and even if one could contemplate the application of the exception contained in Article 12 of the Hague Convention, which was already seen not to be the case, I consider not proceeding the thesis of the defense, according to which, the adaptation of **SEAN** "to Brazil" would be an insurmountable obstacle to his return to the United States of America.

**II.2.4 EXCEPTION OF ARTICLE 13, LINE B, OF THE HAGUE CONVENTION. INAPPLICABILITY. ABSENCE OF RISK OF HARM TO THE PHYSICAL OR MENTAL WELL-BEING OF THE CHILD.**

In relation to the exception, pointed to under Article 13 of Convention, the defense states that **SEAN** could not be delivered to the father because, with that, one would be subjecting the child to an evident risk of harm to his physical or mental well-being.

With regard to this device of the Convention, the highest authorities of doctrine that examined the theme, are unanimous in stating the need for the interpretation of the standard to be restrictive, or, at least, strict.

In line with this, so wrote Professor **JACOB DOLINGER**:

*"(. ..) Critical Analysis of Exceptions to the Devolution Expressed in Article 13. A study done by a clinical and forensic psychologist with respect to the application of the Hague Convention on Abduction by the courts of various countries, based on his experience as an expert in U.S. courts and also on research done by him on the decisions made by the the courts of various countries, led him to criticize harshly the Article 13 of the Convention and especially the manner that it has been interpreted by many courts. **The expert examines the exception provisions on Article 13.1 (b) of the Convention, the first when there is serious risk that the return of the child expose him/her to an intolerable situation, and the second, if the child object is opposed to being sent back, once he/she has reached maturity and an age appropriate to take into account his/her views, arguing, preliminarily, that these objections to the return of children between the member countries of the Convention on Abduction equate to the generic objection that the devolution does not obey the principle of the "best interests of the child" and the "wishes" of the child, used in the countries that are not members of the Convention on Abduction, but who follow the United Nations Convention on the Rights of the Child.***

**The basic criticism of the psychologist is that, to answer these objections means transferring the trial of disagreement between parents on the fate of the child from the jurisdiction of habitual residence, to the court to which he/she was abducted, in what results in encouraging, rather than discouraging, the abduction.**

*In the implementation of the Convention on Abduction, the criticism goes, everything depends on the interpretation to be given to Article 13.1 (b) of the same: a strict interpretation will lead to the return of the child to the jurisdiction from where he/she was illegally*

taken, as was indeed the intention of the Hague Conference, while a liberal interpretation could lead to the acceptance of a whole suit of formulas aimed at framing the devised exceptions to the referred device in the Convention. **The explanatory report of the Convention, authored by Prof. Elisa Perez-Vera, is categorical in that the exceptions to the devolution must be interpreted restrictively, under penalty of the Convention to become a dead letter.**

**The device in question speaks of "serious risk" that the child be exposed to "physical or psychological harm" if returned to the jurisdiction of its former habitual residence, which must be understood as a measure of humanitarian character, aimed at avoiding that the child be sent to a dangerous or abusive family, to a social or national environment that is dangerous, like a country in complete upheaval. The importance is that the child had been removed from his/her habitat because of the danger he/she was in and not because of the bitterness or the hatred of a parent.** (Private International Law, *The Child in International Law*, Renovar Publishing, 2003, p. 256-257)

And, later, in the same work, in commentary to the meeting of the Special Commission of the Conference of the DIP in the Hague, in 1993, he stressed:

**"Moreover, the information given out by the participants of the meeting revealed that the exceptions laid down in Article 13 are interpreted by Courts restrictively, hence few defenses based on them are successful. All the hypotheses put forward during the debate about the dangers that may arise, in some cases, to the devolution of the child, received the same answer: it is up to the jurisdiction of origin of child to decide on the terminus to be given to the same, in order to protect him/her from any hazards, what can, furthermore, also be suggested by the returning State to the returned State."** (Ob. cit. 258-259)

From that one extracts that the prediction that art. 13, b, of the Convention considers, refers to situations of facts absolutely chaotic in the State which makes the request, among which one could count cases of armed conflict, uncontrollable epidemics, severe scarcity of food, in short, situations that are beyond the control of the own competent authorities of the State of habitual residence of the child.

Well. Laid down the correct reading that should be undertaken to the exception depicted, it appears that, *in casu*, the Defendant suggested its application - amazingly - because the father of **SEAN** would not have the conditions to pay for his health plan.

Well, the argument reaches the boundaries of absurdity.

Even if this affirmation corresponded to reality - of which there is already no certainty - it is obvious that such fact will not be a sufficient reason to deny validity to the goal of the present international treaty, depriving, in practice, a father of the exercise of parental power.

By the way, to prevail in this line of reasoning, in light of the Brazilian reality, at any given day, millions of children would wake up without the right to a father, just because their parents would not have money to pay for a health plan.

Let's agree...

The same is true of the disease that would have taken hold of Mr. **DAVID GOLDMAN**, which were, the Guillain-Barré syndrome. Aware of the overly dark panorama that seems to have been "painted" by in the blocking piece, as far as this magistrate knows, to suffer from an eventual infirmity also does not constitute enough reason to deprive a child from the familial power of a father. And also could never constitute a hypothesis for the application of the exception versed in Article 13 of the Convention, *permissa venia*.

Still in this particular, the Defendant also argues that the return of **SEAN** to the United States of America would imply psychological harm to the minor, in view of the *"breaking of familial ties that would derive from that."*

Well, the existence of relatives of **SEAN** here in Brazil, notably his maternal grandparents and his newly born sister, also do not constitute reason enough that, under the pretext of keeping him in constant contact with those people, be simply suppressed **the inalienable right of the minor** to live beside the single parent who is left him, *his father*.

Even because, if **SEAN** has maternal grandparents in Brazil, it is no less correct that he also possesses paternal grandparents in the United States, by the way, of whom, of course, he has also been deprived, improperly, from establishing any direct contact.

And in regard to his little sister, **CHIARA**, the conclusion is not different, *data venia*. Even because nothing prevents the father of **SEAN** from marrying again in the United States, and from that new union resulting other children. In that case, **SEAN** would have other siblings, been sure that, to prevail the theory of the defense, the boy would grow far from these new siblings.

The reasoning developed above, although hypothetical, serves to pay attention to the circumstances where, often, there are children who do not live alongside all of their siblings. It is logical that the ideal is that this does not happen. But the opposite is not always possible.

***The essential idea that is intended to be pointed out now is simple:***

***Siblings, it is possible there be several. Father, in turn, there is only one!***

In this regard, once again, it went very well the scholarly opinion of the Federal Public Prosecutor, in expressing that:

***"(...) The emotional connection between Sean and the maternal grandparents cannot be an obstacle to the return to the requesting State. This is not to deny the importance of the family ties, but to recognize the impossibility of stating that living together with the paternal family is less important than living together with the maternal family. Similarly, it is not to deny the value of the fraternal relationship between the minor and his younger sister. It occurs that, among families of the current era, are quite common cases where the interaction between the siblings does not exist fully, notably when they are fruits of different relationships. Besides that, fundamental to the education and the healthy development of the child is living together fully with his or her biological father. Accordingly, the expert report asserts:***



***"Separation must be avoided whenever possible, but the most significant is the separation for parental alienation, because it affects links of the child that are essential (father-mother), while the fraternal links are built with the affinities and the coexistence, being, in its nature, additional. The separation of siblings should be avoided in case of having to place children in alternative homes, which are not the original ones. One does not deprive a child of the healthy biological parental life together for the living together with a half sister, with whom the emotional bond is still in the initial phase. The fraternal relationship will strengthen throughout time, with coexistence and affinities.***

As a complement to the sound substantiation expressed by the *Parquet*, it is to be referred that, in what pertains this point specifically, the question of the existence of relatives here in Brazil must be resolved by the natural Court of the material juridical situation of the child, that is, the appropriate North American Court.

Thus, if this is the case, it may be perfectly requested, visitation rights to **SEAN**, be it in favor of little **CHIARA**, be it in favor of the maternal grandparents, be it in favor of the stepfather himself.

What is unacceptable, renewing the due respect, is to deny the return of **SEAN**, and therefore, deny him the exercise of his ***fundamental and inalienable right*** to coexist with his father, only because of this mistaken and flawed argument, related to the existence of relatives of the minor in Brazil.

#### **II.2.5 - EXCEPTION TO ARTICLE 13, LINE B, SECOND PARAGRAPH. OPPOSITION OF THE CHILD TO THE RETURN. INAPPLICABILITY.**

The Hague Convention also establishes in its article 13, b, second paragraph that *"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."*

The Defendant struggles hard on this point.

It is sustained, incessantly, that the child should here remain because this would be his will. For such, he stresses the answers given by **SEAN** to the team of psychologists, which, in his view, would be sufficient reason, in this sense, to apply to the case the exception of the treaty transcribed above.

It lacks reasoning, again.

To start, it is to be noted that the legal provision itself draws attention to the necessity that the judge evaluates whether the child has reached an age and degree of maturity capable to allow his own views to be taken into account. Note, still, that, even in establishing the presence of such requirements, the norm establishes that the authority **could** refuse the return of the child.

There is no, however, such obligation, as suggests the defendant party, in mistaken manner, that results from the necessity to take into account the whole fact-evidence context, all circumstances of the case, under the principle of free motivated conviction.

***In any case, in the present concrete case, not even such requirements are present. After all, as clearly and emphatically expressed in the content of the psychological expert report prepared here, SEAN is not fit to decide on what he really wants, be it for the limitations in maturity inherent to his young age, be it for the fragility of his emotional state, be it, still, for the fact of being subjected to a process of parental alienation on the part of the Brazilian family, unfortunately.***

In this sense, see for yourself the following excerpts from the report of expert pages 1,981/2,021:

***"(...) the choices of Sean do not have deciding value. It has no explanatory value the answer of Sean with relation to which country he wants to live in or with which of the two 'parents' he prefers to stay with. He may feel a***

*desire to know the U.S.A., to vary his routine, but states that it would be difficult, it would be a betrayal of his stepfather & of his grandparents, to whom he is connected with much affection & loyalty"*

**"(...) The choices of Sean cannot be deciding, not only by lack of maturity, characteristic of his age, but also because he is at the mercy of his emotional state at this time.** Weigh, in his innermost, the following factors: who would become angry at him; who, by their simple presence, inhibits him; the promises that they made him make. **All these elements, become intensely exacerbated, or distorted, in case the child is under Parental Alienation Syndrome, which, in the case of Sean, is the most plausible hypothesis."**

**"(...) However, Sean does not have the psychological or emotional conditions to say what he really desires.** To choose to go to the U.S.A., and stay with his father, would signify to be ungrateful, to betray his mother (...)"

*"That choice would also signify to betray his stepfather, maternal grandparents and condemn this family, already so long-suffering, to one more loss, in a fight that he has witnessed and of which he is an integral part.*

*Beyond that, to choose a different life for himself, would be to contribute to the defeat of people on which he now depends and loves. If that is heavy even for an adult, what will it say of a child of under 9 years? Sean is carrying on his shoulders a weight much greater than he can withstand."*

From that, one sees that the insistence of the Defendant to enforce, at any cost, the will of **SEAN**, *concessa venia*, is incorrect. After all, it does not find legal support in the Convention's own norms, in so far as the prescriptive precept conditions the possibility of taking into account the views of the child **to the effective demonstration that he/she has the discernment for such, which is not the case in the records, along the lines of what was punctuated in the expert report.**

In any way, if one could give the desired weight, by the Defendant, to **SEAN's** word, it is interesting to note that at the **first** opportunity in which the minor was asked to comment on his choice, to stay in Brazil or return to the United States, his response was not categorical in the sense of wanting to remain here.

Quite the contrary, as the experts testify, and was confirmed by the technical assistant to the Union, to the **first question**, **SEAN** replied **"tanto faz"**,\* followed by the saying "'é o juiz quem manda."\*\* Only after giving that answer, and facing

\* translation note: ["it doesn't matter/whatever"]

\*\* translation note: ["it's the judge who orders/the judge decides"]

vehement challenge from the technical assistant to the Defendant, Dr. Vera Lemgruber, is that the minor began to say and repeat, again and again, **"his"** willingness to remain in Brazil.

In this regard, I bring to the folder the following excerpt of the opinion of the technical assistant to the Union, in the midst of which that specific dynamics of facts, occurred in the interview of the [women] psychologists with the minor, is well demonstrated, including reporting the gestures made by the boy at the answer "tanto faz", *in verbis*:

*"(...) Finally, a free conversation was started with the child, where all present actively participated. Sean said he knew the reason for the interview, saying that David and his family in the U.S. want him to go there, while his family from here wants him to live here, and, because of that, there exists like a divorce. **When asked if he had any opinion about it, Sean answered that for him "TANTO FAZ."**\* **Please note that Sean, while using these terms, leaned back in the chair, with his body relaxed, as sign of tranquility. Vera\*\*\*, in turn, questioning in a surprised tone, repeats: "tanto faz!?" and the child supplements that he would rather stay here, but it is the JUIZ QUE MANDA\*\*. After that, Sean started to direct his sights at Vera along the conversation, as if searching for approval (...)"***

\* translation note: ["it doesn't matter/whatever"].

\*\* translation note: ["it's the judge who orders/the judge decides"]

\*\*\* translation note:[Dr. Lemgruber, for the defendant]

Well, there is the contextualization of the "tanto faz" demanded by the Defendant, in his petitions to challenge the findings. Which is worth saying, the assertion of the defense that the response in question, **effectively given by SEAN**, would not be consistent with other times in which the child stated to prefer to stay in Brazil, finds itself here very well explained.

It is more than clear. The boy **first** said that to him it would not make a difference to be in Brazil or to return to the United States of America. **Only after**, when being questioned about it and realizing the displeasure of Dr. Vera Lemgruber, representative there of his family, he started, then, to repeat, soon afterwards, to want to stay in Brazil.

This way, even if one could take into consideration the opinion of **SEAN**, which was already seen not to be the case, the statement would still not be totally correct according to which the child expressed unequivocal willingness

to remain here. No. To repeat: his **first** response, free of vehement challenges from whoever, was a simple "tanto faz."

And finally, surpassing the two aspects put together above - that is, even if Sean had not even answered the famous "tanto faz", which is contemplated, only for argument - it is to register, still on this point, the following understanding: ***it would be very convenient for the magistrate to attribute to this boy, who only recently turned 9 years old, the responsibility to decide upon a question so fundamental in his life.***

To be noted: the decision does not concern "**only**" as to the country in which **SEAN** should live, Brazil or the United States of America. No. The decision in focus goes beyond. It refers to an even more delicate dilemma, that is, that of the minor, in being denied his return, spend, at a minimum, the remainder of his childhood and adolescence without the daily coexistence with his father, being certain that this boy has already lost, in irremediable way, the coexistence with his mother, lamentably.

And more, it would not be enough to have to decide in what country to live in, it wasn't enough to have to deliberate on the daily coexistence, or not, with his father, a decision that the Defendant seeks to attribute, exclusively, to this boy of only 9 years, has, at least potentially, the effect to allow that this child go back to have the right to fully exercise his **American citizenship**, of which he has also been deprived since his first wrongful retention in Brazil.

Taking all this into account, I think that to attribute to a child of the young age - only 9 years! - such responsibility constitutes genuine recklessness, with all due respect to the Defendant.

I repeat: it would be very convenient for this magistrate to transfer from his shoulders, and those of the entire Judiciary as a whole, the responsibility of making that decision, depositing it on the shoulders of the little boy and, if it was not enough, giving him the burden of having himself, at 9, renounced to live with his own father.

**Moreover, not only convenient, it would be a cowardice towards this minor!**

But, beyond all that, in so acting this Court, the hypothesis would be, at last, of **illegal** conduct, in the light of everything that is outlined above, in concerning the inability of **SEAN** to make decisions with that level of impact on his life, what is stated in view of his immaturity for such, as well as in reason of the deep emotional shock in which he finds himself immersed, as demonstrated, with rare clarity, in the expert report.

**II.2.6 - ARTICLE 17 OF THE HAGUE CONVENTION. EXISTENCE OF PROVISIONAL DECISION, GRANTING THE CUSTODY OF SEAN TO THE DEFENDANT, BY THE STATE JUSTICE. IRRELEVANT, IN CASU. NULLIFIED DECISION, AS OF RIGHT.**

As set out in Article 17 of the Hague Conference, *"The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, **but the judicial or administrative authorities of the requested State may take into account the reasons for that decision in applying this Convention.**"*

In the hypothesis now examined, it was, by the scholarly 2<sup>nd</sup> Family Court of Rio de Janeiro, issued an anticipatory decision of custody, without hearing the opposing party, in the contents of the action for recognition of socio-affective paternity, by means of which it was deferred to Mr. **JOÃO PAULO LINS E SILVA** the provisional custody of **SEAN**.

In this regard, of plan, is to be noted that this decision proves to be invalid of full right, as recognized expressly by this Judge, under the ruling in those proceedings, here attached.

Although the reasons for the absolute invalidity being well explained in that *decisum*, it should also be recorded in this sentence.

Indeed, the invalidity of the decision, as well as all others that succeeded it, result from, primarily, of irremediable defect occurred at the origin of process, consisting of obvious harm to the constitutional principle of natural judge to the extent that there was undue distribution of the procedure led to the scholarly 2<sup>nd</sup> Family Court of the district of the capital of Rio de Janeiro.

In this regard, I transcribe below the reasons expressed in sentence issued this same date, in the case-file no. 2009.51.01.004900-0, *in verbis*:

*"(...) to start, it is noted that the application, in the first paragraph of p. 3, states that in the previous demand, in relation to which it was asked distribution of dependence, the matter judged had already happened in regard to a sentence that granted the request.*

*Despite of, therefore, the previous proceedings having been terminated and archived, it was required, as advanced above, distribution to the scholarly 2<sup>nd</sup> Family Court of the district of Rio de Janeiro, only because the first action proceeded there.*

*It draws attention, in this particular, the fact that the initial application of this proceedings did not clarify, not even minimally, the reason for such distribution by dependence. In other words, it is not justified, even in short form, the reason why it would apply to this case the standard of art. 253 of the CPC.*

*Notwithstanding, promptly, the record was forwarded to the Public Prosecution of the State of Rio de Janeiro, the Parquet submitted its opinion, manifesting itself by anticipating the effects of the decision, without, however, anything to say, concerning the request for distribution by dependency.*

*Right after, a decision was made by that scholarly Court, granting the vindicated anticipation of the effects of the guardianship, for the purposes of providing Mr. João Paulo Lins e Silva possession and provisional custody of the child Sean Richard Goldman.*

*In that same decision, it was also granted the request for distribution by dependence. However, once more, not even a line was presented, in his reasoning, to justify the reasons why it would be the case for making exceptionable the rule of free distribution.*

***With all due respect, not only to the Author, but also to the Hon. Judge of the 2<sup>nd</sup> Family Court of Rio de Janeiro himself, the deferral of distribution by dependence, in the present concrete case, is simply petrifying.***

*Finally, distribution by dependence was allowed in regard to a procedure terminated and archived, which, in itself, directly violates the jurisprudential understanding in the legal summary entry no. 235 of the Dist. Superior Court of Justice, according to which: **"The connection does not determine the joining of the proceedings, if one was already judged."***

*If that was not enough, examining the elements of the present action, in comparison to those in the previous demand, filed by Ms. Bruna, there is a lack of identity between any of those elements. Showing in even clearer manner: it is about the parties, claims and cause of action absolutely distinct, between the one and other action.*

*Otherwise see:*

***Parts:*** *the first proceedings, it appeared as an author Mrs. Bruna Bianchi. Here it appears as Mr. João Paulo Lins e Silva.*

***Causes of action:*** *in the previous demand, the cause of action derived, primarily, from the breaking of the marriage bond between Mrs. Bruna Bianchi and Mr. David Goldman, with the consequent arrival of the first to Brazil, bringing the child of the couple, and the need, resulting from the situation, to be rectified the custody of the minor. Now in this second proceedings, the cause of action is based essentially on the relationship of affection which was built between the herein Author and the minor Sean, from the love relationship maintained between Ms. Bruna and Mr. João Paulo Lins e Silva, culminating in later marriage.*

***Applications:*** *there also is no identity of claims. In the first proceedings, the request limited to the granting of custody of the child to his mother in exclusive and definitive form, while in this second proceedings, the Author posits the recognition of the condition of socio-affective father of Sean, accumulating this request with the granting of ownership and custody of that child.*



*From that it concludes, without any doubt, that the hypothesis is the grant of distribution by dependence, in regard to proceedings in which decisions have become final, ended and archived, in violation, thus, of the jurisprudential understanding in the legal summary of the Dist. Superior Court, the higher interpreter of the federal law, in the form of art. 105, item III, the CRFB/88. And if that was not enough, in that, anyway, there are still parties, claims and causes of action quite different from those in the demand identified as related. And, if that wasn't enough, based on simple request, devoid of rationale, followed by opinion of the Federal Public Ministry silent on this issue, upheld in court ruling also devoid of reasoning in this regard.*

### ***Is it or is it not to cause perplexity?***

*Continuing, in actual fact, the first lines seeking to justify such distribution requested, only joined this procedure at the time of the counter-reasons of the Agravo de Instrumento brought by the herein Defendant, aiming at the decision that granted temporary custody of the child to the Author, in anticipating the effects of the decision.*

*At that time, an opinion was offered, drawn up by Dr. Humberto de Mendonça Manes, to support the juridical viability of such distribution by dependency (pages 440/450 of the records of the proceedings in 2008.51.01.018422-0, attached).*

*Despite the recognized legal knowledge of the scholarly subscriber of such opinion, I agree that, to him, at this time, it was given a task beyond Herculean, perhaps impossible ..*

*But, in any case, the distinguished reviewer really tried to resort arguments to endorse this incredible distribution by dependence. Without success, however, data maxima venia.*

*From the reading of the opinion in question, one extracts that Dr. Humberto Manes, at first, resorted to analogical reasoning based on a device given in the Code of Judicial Organization and Division of the State of Rio de Janeiro (CODJERJ), according to which, in short, they must be distributed to the same group of chambers or isolated chambers the enactments referred to in other clauses listed in the same article, in actions that related by connection or contiguity - in other words, accessory from others - **judged** or in proceedings.*

*And concluded: 'Sure that, to the Court of first degree of the jurisdiction, the CODJERJ did not repeat the appealing rule, but it is not unreasonable that, especially in relationships of family, it deserves to be contemplated.*

*The idea advocated in the scholarly opinion, in essence, is the line that the Court that decided the first demand - the Family Court of the 2<sup>nd</sup> district of Rio de Janeiro - has "better conditions to compose a second dispute," taking into account, still, that it is family law and attempting to the fact that - as it could not be left out - the prevalence of the best interests of the minor.*

*However, even if one could, in a colossal effort, think of the application of this normative provision, the fact is that, as shown above, there is no connection, contenance or ancillary between this demand and the one previously filed by Ms. Bruna. Thus, first, it becomes imperative to remove the focus of this article from the CODJERJ, since its first premise is exactly the configuration of one such juridical concepts, which, again, is not the case.*

*Indeed, device contained in Code of Judicial Organization, of course, can never have the power of creating an exception not provided by the Code of Civil Procedure, in the harm to the principle of hierarchy of norms, especially to deny application of one of the most dear pillars of the constitutional Democratic State of Laws as is the principle of natural judge, from which derives, in turn, the need to observe the rule of free distribution.*

*Even because the possibility of the courts to develop their own internal regulations, as well as of orchestrating the functioning of their courts, is not unlimited. Quite the contrary, it finds posts predicted in the constitutional text itself, specifically in his article 96, paragraph 1, point a, in verbis:*

*"Article 96. It is the exclusive competence of:*

*I - the courts:*

*a) to elect their directive bodies and draw up their internal regulations, **in compliance with the rules of proceedings and procedural guarantees of the parts**, and regulating the competence and the operation of the respective jurisdictional and administrative bodies;"*

*As one can see, it must, always, ensure the parties the compliance with the basic rules of procedure and procedural safeguards in the fall, one of the most prominent is the just principle of the natural judge, deliberately and seriously harmed in the present concrete case.*

*Finally, with regard to the aforementioned need to observe the best interests of the child, I understand that argument again, once more, does not hold, concessa venia.*

*In this particular, it is clear that the principle of best interests of the child can not be invoked, without other parameters, as a servile mechanism to justify obvious illegalities, as practiced in casu.*

*And to add more, if both the principle of best interests of the child and the principle of natural judge have the same constitutional status and should therefore, be observed, it is clear the need to seek an interpretation that aims at reconciling both, and not to remove, completely, one at the expense of the other.*

*Hence, the question imposed is: do any of the other Family Courts of the district of Rio de Janeiro have the ability to consider the applications made here, while giving attention to the principle of best interests of the child?*

*Or, put differently, if the 'best conditions to compose the dispute' derive, exclusively, from the first proceedings have been dealt with by the 2<sup>nd</sup> Family Court of Rio de Janeiro, from that arising, it seems, greater knowledge of the facts, why not ask the natural Judge, after free distribution, the simple unarchived of the records of the previous action, so that they are joined to the new proceedings, as pieces of information?*

*After all, with this simple step, could the Court to which the proceeding was freely distributed acquaint itself with all that had occurred in the first demand, taking into consideration what was reputed to be due, without that, for such, there was a need to clearly violate the rules of natural court, as was the case.*

***Finally, by any angle one might want to consider this matter, the conclusion is always the same. It does not exist, strictly, any plausible basis in order to justify the distribution of dependency under this demand, so that to summarize all that is exposed above lines, the hypothesis, the renewed due respect, is a deliberate, unjustifiable and unacceptable trick to the principle of the natural judge, which, as is also basic, implies the invalidity of the process from its origin, which now is recognized and is declared.***

*In the same direction, for the sake of example, examine the following precedents:*

*"CIVIL PROCEDURE - PUBLIC TENDER (ECT TENDER No. 104/97) - PRECAUTIONARY MEASURE - **DISTRIBUTION "FOR DEPENDENCE"** THE OTHER PRECAUTIONARY MEASURE, WHERE SUSTAINED LIMINATE NOW SUSPENDED BY RAPPORTEUR: EXTRA PETIT - **LACK OF REQUIREMENTS AND REASONS FOR THE DISTRIBUTION BY "DEPENDENCE "- ORDER FOR FREE DISTRIBUTION OF THE PROCEDURE, REVOKE A PRELIMINARY RULING-** TORT REGIMENTAL IMPAIRED.*

1. *There is no invalidity in the Agravo de Instrumento by the argument of "no bid" for hiring the ECT patrons who subscribe the inaugural piece, therefore devoid of any evidence. The instrument of mandate is presented formally regular.*

2. ***Only a justified judicial decision can determine the "dependency" of any procedure in relation to another before, met the legal requirements necessary to figure appropriate (contenance, connection, lis pendens: CPC, article 103.104 and 105).***

3. *The hypothesis (participants from the same tender, canceled, plead before the appointment approved in subsequent contract) is not "salute" as the parties argue, because it presupposes "identity for the parties and the cause of action, but the object one, to be broader, covering the other "(CPC, article 104): absence of the three elements.*

4. *Does not consider related (CPC, article 103) the actions filed by candidates of the same competition, because the situation of each candidate is absolutely individual and unique, which is considered separately, although "look" similar to the first view.*

5. ***Embodies "directed distribution" (therefore illegal) the desired, or requested to do so, to the judge that in similar previous procedure already granted preliminary decision, so it is an "offense" directly to the principle of natural judge, secured by free and equal distribution between the bodies also competent judges.***

6. *The point made granted in breach of the rules distributed with own suffers the same defect and can not survive, especially when the first "point" that excite the targeted distribution, "had already been, or outside, suspended by the Desembargador.*

7. *Preliminary rejected. Instrument further provided. Regimental further undermined.*

8. *Parts released by the Rapporteur on September 5, 2000 agrees to publication of the ruling.*

*(TRF/1<sup>st</sup> Region, 199901000059358 AG, First Group, of May 22, 2000 Df),*

**"CIVIL PROCEDURAL LAW - "DIRECTED" DISTRIBUTION. PROHIBITION. REGARD THE INTEREST OF PUBLIC ORDER AND THE PRINCIPLE OF NATURAL JUDGE. ABSOLUTE INVALIDITY. ACT IRREMIABLE. ABSOLUTELY LACK ATTRIBUTION OF THE COURT. REVOCATION THE PROCESS OF JUDGING WITHOUT MERIT.**

**1 - Lack of free distribution. Civil procedural question. Possibility of the judge to exam matters of public policy issues, due to the translate effect of appeals.**

**2 - Non compliance with the objective legal criteria that determine the distribution by dependence (Article 253 of CPC). Distribution "addressed."**

**3 - Recognition of (i) directly "harm" to the constitutional principle of natural judge, (ii) absolute disregard to the rules of objective determination of competence - which affect the independence and impartiality of the judge, and (iii) inadequacy of the chosen route, (iv ) turmoil with numerous procedural irregularities, and therefore (v) actual damages, to influence the substantive law and reflect the decision of the case.**

**4 - Lack of attribution of the judge of the 7<sup>th</sup> Federal Court of Rio de Janeiro, It is of no effect all acts performed by him (article 248 of the first c / c article 113, 9 2, both the CPC) . Extinction of the proceeding (article 267, IV of the Code).**

**5 - Resources for appeal prejudiced.  
(TRF/2<sup>nd</sup> Region, AC 280096, Eighth Specialized Group, rap. Federal Judge **GUILHERME CALMON**, DJU of May 21, 2005) (...)"**

As it can be seen, one could not, under any circumstances, take into account the reasons for the decision rendered by the court of the scholarly 2<sup>nd</sup> Family Court of Rio de Janeiro, simply because its *decisum* is void of right, given the deliberate breach the principle of natural judge, committed there.

In any way, and even if it were not, if I had to consider the "merits" of the reasons defended by the scholarly State Judge, there would be no influence on the present decision, given the absolute lack of grounds of the precepts defended there, with the due respect.

In particular, examine, once more, the following excerpt of the sensible manifestation of the *Parquet*, in the scope of this demand, for having very well analyzed this aspect:

***"(...) With due respect, the decision of State Justice proved rushed in reputing, in perfunctory analysis of the facts, that the biological father abstained from exercising his duties arising from paternity.***

***From a complete analysis of the evidence, one gathers that since the year 2004, the biological father pleaded in court, both in Brazil and in the United States, for the return of his son. Moreover, the documents of pages 791/875 reveal attempts towards conserving the emotional bond between father and son, through the shipments of gifts and electronic correspondences.***

***It is to be emphasized the absence of any judicial act that determines the loss of familial power in disfavor of the parent from having neglected his child, removing from the case the impact of Article 1638, section LI, of the Civil Code.***

***It is worth highlighting also that the decision of custody disregarded the lack of evidence in the file that could demonstrate the coexistence of the Defendant with the minor for "more than 4 (four) years uninterrupted." There is no evidence that the defendant lived in a stable union with mother of the minor before the marriage was sealed on September 1, 2007.***

*The statements of the maternal grandparents of the minor (pg. 26 of Ordinary Action Declaratory of Socio-affective Paternity, pg. 649 in this action) do not attest to the continued cohabitation during the referred period. Instead, they are contradictory into themselves, since in this they reported that the coexistence was of four years and in that they mention that there was a period of dating and, subsequently, of marriage.*

*Furthermore, the Technical Assistant to the Defendant indicates, in transcription of the interview with Sean (pg. 2215), the **absence of cohabitation**, according to the reproduction in the text below:*

*"Technical assistant of the defendant: it is that during the week they lived in the condominium with the grandmother, the mother, etc., when the parents dated. when Bruna dated João, they lived in the condominium during the week and the weekend, João lived in Barra, he with Bruna would go to Barra, you understand? " (our highlights)*

*When considering the importance of family on the development of the personality of children, again the monocratic judge limited himself to a superficial and incomplete analysis of the facts, with maxima venia. The expert evidence was shown to be, in*

*this action, essential to elucidate the minutiae that is presented in this case, as described below.*

If the reasons outlined above were not enough, one has to refer, given the cutting arguments, to the opinion offered by the Public Prosecutor of the State of Rio de Janeiro, made by the Hon. Justice Prosecutor, Dr. **ORLANDO CARLOS NEVES BELÉM** in proceedings of the Agravo de Instrumento nº 2008.002.30509, brought here by the assistant to the Union, against the decision (null, by right ...) that, in action for the recognition of socio-affective paternity, granted to Mr. **JOÃO PAULO LINS E SILVA**, a provisional custody of **SEAN**, through anticipated decision.

From the full text of such *opinio*, with extensive and convincing substantiation, one can pick out, among others, the following excerpts, for they well represent, *concessa maxima venia*, the unfounded reasons used by the scholarly State Judge:

*"(. ..) It follows, among many things that can be presented, **the obvious misapprehension in granting anticipated custody by the Judge of Law of the 2<sup>nd</sup> Family Court of the Capital, which determined keeping of the minor in power of the stepfather, truly, a stranger and without procedural legitimacy to claim custody of the referred minor, which gives rise to a conflict of international order by the negation of validity and application of a treaty to which the Federative Republic of Brazil is a signatory.***

*As a matter of fact, the point highlighted above is one of the most important in examining the present agravo de instrumento, **since the maintenance of the decision that granted anticipated decision (...), for the sake of truth, neglects the International Convention, which established instruments of protection and defense of individual rights of those children who were prevented from returning to the country of origin wishes to restore the return of an American child improperly retained in Brazilian territory.***

**It is the decision challenged, in this line of thinking, effectively a malformation, despite the reasoning contained therein.**

*"(...) incomprehensible, for those reasons, that it is allowed the retention of a minor - American citizen - in Brazilian territory, in spite of the same*

*having a father, including, from what can be deduced from the records, without the institution of any contact with him.*

*"(...) The hypothesis recorded in the files, in fact, could not include or allow obstacle to the return of the minor Sean Richard Goldman to the coexistence with his biological father, especially, taking into consideration that the stepfather is not, and will never be, the father of the same, even if the coexistence kept with the child has been excellent."*

***"(...) The permanence of the present demand with the Judge of law of the 2<sup>nd</sup> Family Court of the Capital District translates, thus, to an act purely illogical and that reaches the limits of irresponsibility (...)."***

***"(...) In the case at hand, even if trying to deny it, the declaratory action for recognition of socio-affective paternity is an adoption of a foreign child carried out only to gain time and that seeks to perpetuate the issue under discussion, so that the Sean minor stay in contact with the the filer of the Appeal, his stepfather, preventing contact with the biological father, that is, a real disrespect for the father figure and a deeply inhumane act."***

I believe that the statements transcribed above - arising from presenters of the Public Ministry, both of the State and Federal, with independence and impartiality, and that, in demands as this, officiate for the correct application of the law and the prevalence of the best interests of the child - speaks for itself providing, dispensing with additional comments.

It is, therefore, always with due reverence, totally rejected the scholarly reasons put forth by the State Judge, as a way to justify acceptance of provisional custody of **SEAN** to the now Defendant, reason why, not in the least could constitute obstacle to the return of the minor to his country of origin.

## **II.2.7 - EXCEPTION OF ARTICLE 20 OF THE HAGUE CONVENTION. BREACH OF THE FUNDAMENTAL PRINCIPLES OF THE REQUESTED STATE. INAPPLICABILITY.**



In this regard, the Defendant argues, in his defense, that the return of **SEAN** to the United States of America would breach the constitutional principles of the best interest of the child and the full protection of children. Therefore, in its conception, it would affront the fundamental principles laid down in our Constitution of the Republic of 1988 (CFRB/88), as a consequence of the principle of human dignity.

It states more. It says that we should not fear possible infringement of the rightful custody of a father, especially a father who, in his construct, would be "*completely absent and negligent*," but focus on protecting the child, himself.

It points out, on the other side, that there is an affront to the principle of proportionality, chartered in article 5, item LIV of the CRFB/88, in the aspects of appropriateness, necessity and proportionality in the strict sense. The argument, in short, is that the minor should remain in Brazil because that would be better for the interests of the child.

The arguments are totally unfounded.

From the reading of the reasons described above, it can be seen, at once, that, for the Defendant, it matters little that, from that myopic interpretation of relevant constitutional principles, one could subtract, from that minor, an inalienable right inherent to his personal statute, that is, the right to live with the only father that is left to him.

***It is inconceivable, data maxima venia, that the principle of best interest of the child - often cited by the defense - be interpreted as intended there; in other words, that the best solution for SEAN is to "condemn him," after the irretrievable loss of his mother, to now also lose, forever, the father he still has, turning him into, almost, an orphan of father and mother!***

Yes, because the defense insists in the assertion that, if the judge upholds the claim that is being made here, it would merely protect a right of custody by a father.

Nothing like that. The perspective is quite another.

If the judge upholds the claim that is being made here, it will be to first ensure the ***right of SEAN*** to return to his father that one day was taken from him - ***and against the wishes of both, which should be added.*** And, in addition, it would be also giving full attention to an international agreement to which Brazil obliged itself before so many sovereign nations.

Moreover, contrary to what the defendant claims, denying the right of **SEAN** to live and be raised by his father - ***his only living parent!*** - that would be a flagrant violation of the principle of human dignity.

***After all, the right to live with, and be raised by, one's father is a fundamental element of human dignity!***

That is the reality.

The claim in this dispute, that a constitutional principle as important as the best interest of the child, be construed so poorly and distorted, in such a way as to legitimize the perpetuation of an illegality rather evident, with all due respect, cannot, under any angle, be given a seal by the Judiciary Branch.

The reasoning to be followed to assess the alleged occurrence of this exception can be simplified as follows:

Would the mere delivery of a child to the only living parent he has left alive, and against whom there are no signs of suspected abuse or mistreatment of the minor - indeed, *in casu*, not even one claim to that effect ... - ***would it offend***

the primordial foundations of our State of Right, notably the principle of human dignity?

The defense of the idea, in itself, would mean to handle arguments so outrageous that I consider further comment to be expendable ...

I remove, therefore, the incidence of exception to Article 20 of the Hague Convention.

### **II.2.8 NATIONALITY OF SEAN. IRRELEVANCY.**

It fits to point out the absolute irrelevance of the nationality of **SEAN**, in deciding the return, or not, of this child to his country of origin. *Data maxima venia*, it is not important if the minor is American or Brazilian, if he has dual nationality, if he is just as Brazilian while in Brazil and American while in the United States of America, in short.

There is no relevance in such debate, for what is effectively appropriate here.

The Defendant, however, says otherwise. He states that, because **SEAN** is Brazilian born, his return to the United States of America would be unconstitutional. This is equivalent to a genuine extradition of a national, which is flatly prohibited by the Charter of 1988.

Without reason, however, once again.

In this particular aspect, in fact, I make use of the words of the Hon. Federal Judge **WILNEY MAGNO DE AZEVEDO SILVA**, in ruling in a case similar to this (available for consultation at the site [www.stf.jus.br](http://www.stf.jus.br)), *decisum* that was upheld, by unanimity, in the Dist. TRF of the 2<sup>nd</sup> Region.

By the way, it reads:

*"(...) This, however, is not the case, whose subject, as mentioned, is the first part of Article 12. In systems with the rules of Articles 16 and 17 of the Convention, the standard establishes a hypothesis of **self limitation of the sovereignty of the signatory required** - one to which the child is unlawfully removed - in which, in attention to principles of law, such as those in the best interests of the child, proximity, reciprocity and cooperation, **acknowledges, spontaneously, the lack of authority of its jurisdiction to process and trial material of the legal situation of children wrongfully removed -exactly for that very important "underlying question" to be considered and decided by the court of habitual residence of the minor, his natural judge!***

*There is nothing unconstitutional about it - no offense to the principle of plenitude of access to justice. It is old, in Brazilian Law, the provision of hypotheses of lack of competence by the national Jurisdiction for the processing and trial of the case and "underlying questions," in regard to the most diverse legal principles. An example of that is the lack of authority by the Brazilian Justice for the inventory of Brazilian real estate located abroad - conclusion whose basis is the standard in Article 89, item II, the Code of Civil Procedure, associated with the principle of effectiveness of the acts of sovereignty.*

*Refer once again to the established teachings of Professor Jacob Dolinger:*

*The Convention makes clear that the state to where the child was taken to, or in which he has been held illegally, has no jurisdiction to decide the merits of the right of custody, unless its authorities have decided not to return the child to the country of habitual residence, or if not submitted in time, for any interested party, an application for return. "(Dolinger, J. Private international law. The child in the international law. Rio de Janeiro: Renovar Publishing, 2003, pp. 264-265).*

*This is why it is devoid of foundation, indeed, the claim of the defendant, about the constitutional invalidity of the rules under review, for the alleged contrast with the principle of respect for matter already judged".*

And it could not be any different.

After all, the discipline of the Hague Convention has a place exactly for cases involving Brazilian children improperly transferred or retained in national territory. This is because, for all others - read: children of other nationalities - the *unlawful* detention of a child leads to the conclusion that the minor would be in an irregular situation in the national territory, a sufficient reason

to trigger the ordinary mechanisms of deportation, applicable to any aliens who are illegally in Brazil, in order to achieve the desired practical result, that is, the return of the minor to their country of habitual residence.

Therefore, ***the scope of the Hague Convention is intended, primary, to Brazilian children***, lacking any perplexity about that, as well demonstrated in the reasoning above collected, from the works of the Hon. Federal Judge **WILNEY MAGNO**, for dealing with one, among other hypotheses legally provided for, the ***self-limitation of the sovereignty of the Brazilian State***.

#### **II.2.9 - THE RECENT DIRECT ACTION OF UNCONSTITUTIONALITY (ADIN), FILED BY THE DEM, AGAINST DEVICES OF THE HAGUE CONVENTION. INAPPLICABILITY OF ARTICLE 462 OF CPC. UNCONSTITUTIONALITY NOT VISIBLE.**

As mentioned in the chapter of the report, after the arrival of the records to be readied for the sentence, the Defendant submitted a final petition, by means of which, in short, he gave notice of the recent ruling of a Direct Action of Unconstitutionality (ADIN), by the Democratic Party - DEM, to challenge various devices of the Hague Convention.

It calls for, therefore, this Judge to take into account the proposition of such ADIN, with fulcrum in art. 462 of the CPC.

In point, it is to be mentioned, first, that the legal provisions invoked, evidently, do not apply to the case, since the ***mere filing*** of an ADIN, whose purpose, as we know, is the provocation of legislative activity by the Federal Supreme Court, does not constitute a "*fact that constitutes, modifies or extinguishes a right*," able to influence the judging of this action.

Were it the case that there was a recent *ruling* on a demand of this nature, with success, in other words, to exclude the applicability of devices of such international Conferences, one could, in theory, admit the applicability of the aforementioned legal precept.

This is not the case, however, *data maxima venia*, since the ADIN was only filed, with no notice, so far, of any assessment coming from the Dist. Supreme Court.

Notwithstanding, however, in what concern the arguments espoused in the ADIN initial petition, I dismissed them, *permissa venia*, given that, indeed, some of the alleged unconstitutionality there indicated was object of examination in the contents of this sentence, and were properly rejected.

It is valid to stress, moreover, that the Presidential Decree no. 3413, which introduced, in our system, the text of the Hague Convention of 1980, stands in full force since April 14, 2000.

Therefore, for more than 9 years, there have been no direct questions pertaining to an alleged unconstitutionality of its content. It applies, accordingly, with even greater reason, in regard to the treaty under consideration, the principle of presumption of constitutionality of laws and legislative acts.

It is important to note, likewise, that in hearing the unfounded, *data venia*, arguments of such claim of ADIN, Brazil would, undeniably, be going against history. It would be, without a shadow of a doubt, moving itself away from the elevated and fundamental legal principles of international cooperation, present in the 1980 Hague Convention, notably in view of the finality sought here, that is, to prevent, and at the same time to remedy, the undue international abduction of children.

To prevail the generous interpretation, as suggested by the DEM, of the exceptions to the return of the child, present in the text of the treaty, will be

to, in synthesis, trivialize, completely, such exceptions, subverting the logic and purpose of this important instrument of international legal cooperation.

And the worst: in sheltering the arguments of such ADIN, Brazil would be denying reciprocity to all other signatory States, and similar treatment will be accorded by such States, in the occasion of applications for the return of Brazilian children wrongfully retained abroad.

It is sad, in short, that such an important and significant political party, as is the DEM, on the grounds of defending, supposedly, the interests of Brazilians, and that has demanded the return of Brazilian children from other Sovereign states, forgets that there are as many Brazilians in the opposite situation, i.e., requiring international legal cooperation in order to return their children wrongfully retained abroad.

And there is no doubt that, in case Brazil mangles, wrongly, the text of the Hague Convention, through abstract control of constitutionality, or even extended interpretation of the exceptions to the rules established there, the reciprocity of treatment, given to Brazil, by the other signatory States, would be severely impaired.

With these considerations, while respecting the reasons in the initial piece of such ADIN, I do not see the slightest possibility that they would affect, in any angle, the ruling of the present demand.

#### **II.2.10 - NEED FOR THE IMMEDIATE RETURN OF MINOR. ANTICIPATION THE EFFECTS OF PROTECTION. AUTHORITATIVE MEASURE.**

The principal claim of anticipation of the effects of protection - search, seizure and restitution of **SEAN**, was not assessed until now. This

is because this Judge, at the beginning, thought better to give hearing to the contrary party, after which, the request for anticipating the decision's effects would be examined.

This action, however, gained new directions.

There was a decision from the Dist. TRF of the 2<sup>nd</sup> Region to condition the start of the visitations, initially granted, to the administration of a previous psychological study. After the start of the production of such expert evidence, there was a stay of the proceedings, by order of the Dist. Superior Court, until subsequent decision of the conflict of jurisdiction raised there.

Then, with the resumption of the progress of this proceedings, I understood to continue the aforementioned expert evidence, concluding the investigation process, so that, in possession of more and better information, assess all demands, in the sentence.

It is, therefore, time to analyze the request of anticipating the effects of protection, which I now get to do.

I understand, indeed, for all the fundamentals above, to be absolutely imperative the *immediate* surrender of the minor **SEAN RICHARD GOLDMAN** to the United States of America, which stems from the evident fulfillment of all the requirements of the Hague Convention of 1980, coupled with the inapplicability of any of exceptions there regimented.

After all, on the one side, more than the mere high degree of likelihood to what is considered in art. 273 of the CPC, which is now, after proceeding with exhaustive cognition, is the certainly of law raised by the author, in what derives from the extensive grounds laid above it.

One the other side, the *periculum in mora* is also clearly set, but see:

In fact, it is recorded that the Hague Convention itself requires the adoption of urgent measures to return the child, which is apparent, fundamentally, from the following devices:



*"Article 2. Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose **they shall use the most expedious procedures available**"*

*"Article 11. The **judicial or administrative authorities** of Contracting States shall **act expeditiously in proceedings** for the return of children."*

*If the judicial or administrative authority concerned has not reached a decision **within six weeks from the date of commencement of the proceedings**, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.*

*"Article 12. Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, **the authority concerned shall order the return of the child forthwith**."*

Add to that the undeniable fact that the time factor, in this case, is on the side of whom is wrong. In other words, the situation of fact - allowing the child to stay - is in favor of the Defendant, and this, in turn, has given continuity to what the deceased mother of the minor did in taking advantage of this situation, which it is to explore the argument (unfounded) that the minor "***is adapted to Brazil ...***",

***Furthermore, what's more important to demonstrate, for the urgent need to order the immediate return of the child to the United States of America, is the information, clearly and convincingly submitted in the expert report, that SEAN has been subjected to a pernicious process of parental alienation.***

From that, it concludes that the possible outliving of effective psychological damage to that child is far from being related to the child's return to the United States, but is derived, in fact, **from his stay here in Brazil**, in case the boy remains under the possession and custody of the Defendant, and therefore, the other maternal relatives.

The parental alienation imposed on **SEAN**, in short, tends to deteriorate further, to a stage in which the child does not even recognize, in the figure of Mr. **DAVID GOLDMAN**, that of his father, which is thoroughly detrimental to the child. Ergo, it is necessary to determine, immediately, the cessation of this process, something that will, only then, comply with the principle of the best interest of the child.

This was, also, the perception expression in the scholarly opinion of the Federal Public Ministry, when commenting on certain passages of the expert report, as in the transcript excerpt transcribed below:

*"(. ..) Asked about the compliance with the rights conferred by the minor by the Statute of the Child and the Adolescent (Law No. 8.069/90), the Experts stated that **"the conditions of familial 'freedom' and 'coexistence' are not adequately addressed: Sean cannot be with his father without someone watching, the father is not received in the apartment where he, SEAN, lives, and, consequently, his familial coexistence is unilateral, due to the severance and removal of his father."***

*Finally, when analyzing the relationship between Sean and the biological father, the experts concluded **that the minor is undergoing a process of hearing or understanding negative things about his father, pointing out that the absence of the parent in the development of the child usually brings emotional fragility. And attested that the participation of the parental figure in the formation of children, above all in case of death of the mother, is of extreme importance.***

***The expert report - in exposing that "the great problem here is that SEAN trusts what he sensed and heard from the stepfather and the maternal family, in other words, that his father abandoned him" - only confirmed the repeated stance adopted by the Defendant and the maternal family in these records and the Action for the Recognition of Socio-affective Paternity, which clearly demonstrates the lack of incentive for the coexistence of Sean with his father.***

***It can be concluded that the distance between Sean and the father accrues not only from the geographical distance. The stepfather and the maternal family contributed much to the lack of proximity between the minor and his parent."***

The scholarly opinion is right. The greater the delay in the execution of jurisdictional protection, greater could be the damage inflicted to this small individual, as well as greater also will be the time that the father of **SEAN** will continue to be deprived - illicitly - of the company of his son and, moreover, that this same son will remain alienated - also illicitly - from the company of his father.

This situation needs to be ended. And an immediate end, as soon as possible.

It is therefore vital that the child **SEAN** be returned with the most brevity possible to the custody of his father, so that his re-adaptation to his paternal family can also be restarted immediately.

The defendant, indeed, will argue that the action is irreversible. That once the minor is outside the national territory, he will never return. That this will be frustrating the effectiveness of future appeals brought. And so on.

The prospect, however, to say it at the outset, it is quite incorrect.

It is that, in dealing with a demand for international juridical cooperation, it applies, fully, the ***principles of trust and reciprocity among Contracting States***, which is why there is apprehension that, once outside of Brazil, the minor will become inaccessible to the implementation of steps aimed at bringing him back, if the case is so, considering, in this particular, the necessity for the foreign State to reciprocate the treatment accorded by Brazil.

In summary, it cannot be presumed that if the United States of America is required to give effect to an eventual contrary decision by the Brazilian Justice, that it will deem to simply ignore it, countering the system of inter-jurisdictional cooperation.

One cannot, putting it even more clearly, start with presumption that another signatory State would adopt indolent behavior and,

even worse, use this hypothetical and (most likely...) false premise, as a way to deny effectiveness to a judicial decision of emergency nature, such as the present one.

***Moreover, in order to have a good sense of how incorrect is the allegation of irreversibility of the protection, one has to mention that, just between the years of 1995 to 1999, the United States of America had already returned no less than 698 children to their parents abroad! Many of them - it is legitimate to suppose - to Brazil itself. This forceful and illuminating statistic is also published, on page 237, in the work of Prof. JACOB DOLINGER, referred above.***

This shows, with rare clarity, how much the argument *ad terrorem*, of a supposed irreversibility of the anticipatory measure of protection, is unfounded. Indeed, the hypothesis under consideration involves one of the signatories the Hague Convention that has been showing the most abidance in giving compliance to dictates of such international conference. There is, therefore, nothing to be afraid of, in case of a possible reversal of this *decisum*. There is, in short, no doubt that in this hypothesis, **SEAN** will be promptly returned to Brazil.

Add to that, furthermore, that, at worst, in case a judicial decision to the contrary occurs, determining the return of the **SEAN** to Brazil, ***no harm would have been caused to the child!***

***After all, what ill can there be in the simple fact of a child spending a period of time living with his own father?***

The question, although it may seem surreal to anyone endowed with a minimum of common sense, reveals itself to be inadequate, in view of the possible arguments to be thrown into the records, contrary to the acceptance of the present emergency protection.

By the way, not only there is no ill in a son going to live with his own father, but, much to the contrary, there are only positive points arising therein, especially in the case of **SEAN**, let's look:

One - the pernicious process of parental alienation, that unfortunately this minor has been subjected to, would be stopped, as demonstrated, in a clear and unequivocal way, in the psychological expert report produced into the records.

Two - it would enable **SEAN** to reestablish affective ties with his other relatives, on his paternal side, which, it must be stressed, are no less important than the maternal family.

Three - **SEAN** will resume contact with *his* first culture, North American, to which he is, also, undeniably entitled to. They are, in fact, inalienable aspects of his personality.

In this reasoning trail, it carries that the raising of obstacles, to prevent **SEAN** from interacting with both his cultural roots and, ultimately, to fully exercise his American citizenship, is a violation of the fundamental right of that child, that is, the right to his own identity.

Incidentally, Article 8 of the UN Convention on the Rights of the Child - adopted by Brazil, with the Presidential Decree Nr. 99710 of November 21, 1990 - states:

*"Article 8*

*1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*

*2. When a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.*

For all the reasons above considered, it should be granted the request to anticipate the effects of protection.

It is correct, then, that the Federal Public Ministry, in line with what was already suggested by the technical assistant to the Union, that **SEAN** be returned to the United States of America, after a transition period, to be determined by this Judge, and that would take place in Brazil.

During that period, proposed by the *Parquet*, it would be established daily coexistence of the minor with his father, before his definitive return to the United States of America.

I agree that the idea, in itself, is interesting and salutary. In fact, the establishment of a transitional period, within which **SEAN** starts to coexist more closely with his father, to form closer affective ties, as condition for the complete and definitive return of the custody to his father, appears to be endowed with undeniable reasonableness.

I consider, thus, viable the acceptance of such suggestion, observing some provisos.

In this particular, I think, beyond the need of this minor to reestablish daily coexistence with his father, one can not disregard the need for **SEAN** to also have contact again, as soon as possible, with his own country of birth.

What it is meant to say is that the transition period in question, suggested by the technical assistant to the Union, and adopted by the Federal Public Ministry, in my opinion, ***be carried out in the United States of America***, what, moreover, would enable **SEAN** to restart, immediately, not only the contact with the English language, but, also, with his other relatives on the paternal side, especially his grandparents.

Another positive aspect of this solution, I feel, lies in the fact that in the United States of America, differently from what occurs in Brazil, the school academic period, at least as a rule, begins in the month in August, so that,

until then, **SEAN** would have had more time to adapt, reacquire greater fluency in the language, in order to resume his studies, without major difficulties.

With these considerations, and for all the elements above, being present the presumed authorizers, I **APPROVE THE APPLICATION FOR THE ANTICIPATION THE EFFECTS OF PROTECTION**, with support in Article 273 of the Code of Civil Procedure, to determine the return of the child **SEAN RICHARD GOLDMAN** the United States, ***observing the following conditions concerning the implementation of this decision.***

i) first, to give Defendant the opportunity to ***spontaneously*** hand over the minor in question, avoiding, thus, search and seizure, with all the inconvenience due thereof, especially with regard to the minor himself;

ii) for such, I determine that **SEAN** be presented ***before the 14:00 hour of next Wednesday, June 3, 2009***, before the American Consulate in the City of Rio de Janeiro, whose address is Avenida Presidente Wilson, 147, at the care of the Consular Section Chief, Ms. Karen Gustafson, ***after which the minor should be directed, with maximum possible brevity, to the United States of America, to be delivered to the U.S. Central Authority.***

I assure to the Defendant, as well as to the other Brazilian relatives of **SEAN**, the right to accompany him on the return journey, granting, to such relatives, if it is the case, the respective visas for entry into U.S. territory, with term of, at least, 30 days, ***with support in art. 14, item V, of the CPC.***

Noting, however, that the expense deriving from the travel of the Defendant and of maternal relatives of the minor will be at their own expenses.

iii) During the period prescribed in items "i" and "ii", above, *ad cautelum*, with support in art. 798 of the Code, I determine that the Federal Police adopt ***all possible and necessary measures***, aimed at the immediate ***location and monitoring*** of the child in question, ***as well as obstruct the removal of this child from the City of Rio de Janeiro.***

Accordingly, report the aforementioned prohibition to the Federal Highway Police and the Military Police of Rio de Janeiro - which performs the function of State Highway Police.

**SEAN** is therefore expressly forbidden to leave the municipality of Rio de Janeiro, and/or to stay beyond that territorial limit of the same, if the case be already;

iv) After the time allowed in "ii", if **SEAN** has not been spontaneously presented, a search warrant for seizure of the child should be, immediately, dispatched, ***to be completed in the place where the minor is, according to determinations of Federal Police***, observing, at the time, the following precautions: supervision of the action by a psychologist or social worker to be appointed by the Brazilian Central Authority and accompaniment, always, of the minor, by the Defendant, or one of his Brazilians relatives, ***unless such persons expressly refuse to exercise that function.***

The investigation should be met by two Justice Officials - one of which, preferably, a female - together, under art. 842 and 843 of the CPC, which I authorize the practice the acts, including outside the time specified in *caput* of art. 172 of CPC.

I authorize, therefore, also the use of military police force or federal to the exact extent of compliance with the action here approved, ***if you must.***



***A transition period is established following the effective arrival of the child in the United States of America, and continuing until the complete and definitive return of the custody of SEAN to his father:***

i) During the first 15 days, excluding the day of arrival to United States of America, Mr. **DAVID GOLDMAN** can remain with his son, without restriction of place and without ***the need*** for the presence of any member of the maternal family, ***unless there is express consent of Mr. David***, observing the same schedule of visitation set during the reconciliation hearing held in Dist. Superior Court of Justice;

ii) After the time referred above, the assistant to the Union must deliver the minor to the place where the Defendant and the maternal relatives are staying, which is necessarily in the district of *Tinton Falls*, New Jersey, USA.

iii) from the sixteenth day, **SEAN** will spend the night at the residence of his father, and the Defendant and the other Brazilian family members there present will have child visitation hours, from 14:00 to 18:00 hours, daily;

iv) from the thirtieth day, **SEAN** must be delivered, definitely, to his father, safeguarded to the Defendant and the other Brazilian family the possibility of, in being necessary, demand the setting of a regimen of visitations, before the Judge competent for that;

v) I register, finally, that during the transition period now established, the passport of the child should remain in the possession of the United States Central Authority, after which it should be returned to Mr. **DAVID GOLDMAN**;

It should be mentioned, also, that the possibility for the establishment of the transitional arrangements, specified above, to be completed in the U.S. territory, finds support in the system of international legal cooperation, specified in the Hague Convention. It is a question of international responsibility assumed by all sovereign states that join the regime of the Convention, including Brazil and the United States of America.

So, the U.S. authorities concerned, could ensure the correct implementation of the transition effect of the measure set, ***by its very nature temporary***, for what should be notified, by means of the Central Authority of that country, being in turn, properly communicated via the Brazilian Central Authority.

#### **II.2.11 - APPLICATION FOR THE CONDEMNATION OF DEFENDANT FOR THE COST OF TRAVEL FOR THE RETURN OF THE MINOR. PRINCIPLE OF CAUSALITY. DISMISSAL.**

The Union suggested the conviction of the defendant to bear the costs concerning the return journey of the child. The election, in principle, is based on standard of Article 26 of the Hague Convention, whereby:

*"(...) Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, **the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.**"*

The device in question, however, must be interpreted under the focus of the principle of causality, according to which that who, by an unlawful act or omission

causes damage to others, should, in principle, be required to repair this damage. In short, the tort creates a duty to indemnify. But, and therefore it is necessary to show the causal link between the illegal act or omission and the damage caused.

Commenting in the event, although the Defendant has committed an unlawful act in retaining the minor in Brazil, in violation of the right to custody of the father of the boy, it is charged that it would not be correct that the defendant should bear the costs of the return of a child, since ***it was not him, the Defendant, who caused the arrival of Sean to Brazil.***

After all, there is a causal link between the unlawful act committed by the Defendant and the costs of returning the child. Note that **SEAN** was in Brazil before the unlawful act, by the Defendant.

Just to end the unlawful act of what we are considering. Imagine, therefore, that the child after the death of his mother, had been delivered spontaneously to his father. Under such circumstances, there were costs for the return of the child. The "damage" occurred in the same way, without the Defendant having any contribution to both. There is, in short, a causal link between the unlawful conduct committed by the Defendant and the costs of returning the child to the United States of America.

So, not making the application in question.

***With this, the expenditures necessary to return SEAN to the USA should be advanced to the Union or its assistant.***

### **III - DEVICE:**

For all the reasons above, I **JUDGE PARTIALLY FAVORABLY THE DEMAND**, to determine the return of the minor **SEAN RICHARD GOLDMAN** to the United States of America, and the child forwarded to the U.S. Central Authority, with all the precautions necessary in accurate terms of the Hague Convention of 1980.

In addition, the present conditions permitted, I **APPROVE THE APPLICATION FOR ADVANCEMENT OF EFFECTS OF CUSTODY**, for the purposes and manner outlined in **item II.2.10 of this decision**.

Considering that the author declined the request of the application, condemn the Defendant to reimburse the full costs of the proceedings held of course done, especially the fees advanced by the Union to the experts and the English interpreter, and the payment of attorneys' fees, the which, in the form of art. 20, § 4<sup>o</sup>, of the CPC, and in the points *a, b and c* from § 3<sup>o</sup> of same device, I arbitrate at R\$ 20,000.00 (twenty thousand Brazilian Reais), *pro rata*, in favor of the Union and of his assistant, updated at the same rates that apply to fees paid by this Federal Court, until the effective discharge.

**Officiate, with utmost urgency, to the Superintendent of Police Federal, and Federal Highway and Military Police of Rio de Janeiro, as well as INTERPOL, for the purposes described in item II.2.10 of this decision.**

Officiate, also, the Hon. Federal Desembargador relator of all the Agravos de Instrumento brought to the case, to take science to this decision.

Communicate, finally, to the Brazilian Central Authority and to the Embassy of the United States of America in Brazil, for the purposes identified above.

P. R. I., observing the secrecy of justice.

Make aware the Federal Public Ministry.

Rio de Janeiro, June 1, 2009.

**RAFAEL DE SOUZA PEREIRA PINTO**

Alternate Federal Judge