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SOME CONSIDERATIONS ON THE ENFORCEMENT IN SPAIN OF THE HAGUE CONVENTION OF OCTOBER 25, 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Elisa Pérez Vera
Professor
Judge of the Constitutional Court

Madrid - Montevideo

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Introduction. The ratification by Spain of the Hague Convention mentioned in the title took place on 28 May, 1987 (and was published in the BOE 202/1987 of 24 August, 1987). Now, any analysis of its application by Spanish Courts inevitably leads to establish a distinction between proceedings prior and further to the Organic Law 1/1996, of 15 January, on child juridical protection, partially amending the Civil Code and the law on Civil Prosecution, in which articles 1901 through 1909 were introduced in Section II, Title IV, under the title *"Measures related to the return of children under the assumption of international abduction"*[1].

The difficulties encountered by Spain for the adequate fulfillment of its commitments under the Convention, were recorded in the general conclusions of the Special Commission that met in October 1989 to examine the implementation of the 1980 Convention. Thus, paragraph III contains an admonishment to Spain, which is insistently urged to *"... take, without further delay, any appropriate measures to ensure that its Central Authority, as well as its judicial and administrative authorities, are given the necessary powers and adequate means enabling the country to fully meet its obligations under the Convention"*[2]. As opposed to such situation, the current Spanish practice (although not free from problems) shows a satisfactory level of compliance with the 1980 Convention.

[1] This regulatory framework has been expressly kept in force by Law 1/2000, of 7 January, on Civil Prosecution, as provided for in the single first article of its Annulment Provision.

[2] The Hague Conference on Private International Law. *Conclusions sur les points les plus importants discutées* par *la Commission Spéciale*, adopted on 26 October, 1989.

Thus, a first conclusion imperatively arises from this preliminary introduction: the adoption by States Parties of a procedure enforcing the celerity and informality impromptu required by the Convention -which will be always suitable as it will enable Law enforcers to become acquainted with the peculiarities of the Convention- may become indispensable in those juridical frameworks where judicial proceedings are highly crystallized. This is due to both the need of adapting internal procedural provisions to the requirements contained in articles 22 through 30 of the Convention, and to the fact that, through such adaptation framework, judges and courts will be able to grasp the true *ratio* of a cooperation Convention that requires from courts a substantially limited intervention that is, accordingly, often difficult to assume.

I. The nature of the 1980 Convention: a pragmatic approach to a complex juridical problem.

From the juridical viewpoint of our concern, it might be said that international child abduction *involves the use by private individuals of de facto means to establish artificial jurisdictional links with a view to obtain their custody.*

Consequently, and leaving aside the human drama that inevitably surrounds all child protection-related issues, the juridical problem arising from child abduction derives from the possible establishment by private individuals of more or less artificial jurisdictional links on an international level, which, together with existing discrepancies in domestic laws, makes them think on the possibility of attaining a decision favoring their claims, as well as legitimizing their actions.

The fact that under these assumptions, the person who removed the child looks for the connivance of the authority responsible for the child’s guardianship, and as such

authority's proceedings in accordance with the wishes of that person should not necessarily involve any type of irregular action, is precisely the reason why we often face true "conflicts of cultures or civilizations", where the authorities are imbued of a more or less aware conviction that they act as "natural judges" on this matter, and finally reflect in their decisions their views on a given way of life and the values on which it is grounded, as opposed to their own, that has been voluntarily adopted by the "abductor".

It is necessary to recall that in a large number of cases, child abduction takes place following the dissolution of mixed couples (of different nationality), which is increasingly frequent in a world where migration is facilitated by an uncommon development of communications; the possibility that the members of such couple look for the "protection" of the authorities in their State of origin, finally turns them into especially well-positioned champions of a given way of conceiving family relations in general, and parental-filial relations in particular. This is why, from our peculiar perspective, it is so important to deactivate the incidence of decisions taken at the request of only one party within a forum of his/her election, on such relations as parental-filial ones are, that should only be the object of a unified regulation.

These are the terms of the issue faced by the Convention we are dealing with, within a context marked by a certain lag between the preparatory works on which it was based, and those that took place within the framework of the Council of Europe, leading to the European Convention on the recognition and enforcement of decisions taken on child custody cases, as well as to the restoration of such custody, signed in Luxembourg on May 20, 1980[3]. Indeed,

[3] Presently in force in the 15 Member States of the European Union, plus Cyprus, Iceland, Liechtenstein, Norway, Poland and Switzerland.

despite the date that identifies such Convention (when it was opened to accession), the work of the Council of Europe actually dated back to May 1972, and its text had been adopted by its Ministerial Committee on 30 November, 1979, that is, almost a year before the XIV session of the Hague Conference.

However, the simultaneous membership of a significant number of States in both Organizations, as well as the fact that the Special Commission that prepared the preliminary draft Convention at the Hague Conference met when the work of the Council of Europe was almost complete (March and November, 1979), explain better than any theoretical argument –the *a posteriori* reasoning of which would be too easy-, the efforts made by the drafters of the Hague Convention in order to find an original approach avoiding overlaps which, in the best of cases, would turn to a great extent superfluous one of both texts.

Consequently, the starting point should be the consideration of the work developed by the Council of Europe, in order to avoid incurring into fruitless duplications. Then, the work carried out by the European Organization seemed to respond to a basically judicial approach to this phenomenon, paying special attention to juridical security requirements. Consequently, the resulting text is based on the existence of a custody-related decision as a prerequisite to consider the child's removal or retention as wrongful.

This approach responds to the classical notions of Private International Law; thus, the definition of "*wrongful removal*" in the Convention's sense, is set forth in article 1.d), understanding as such "*the child's removal through an international border, with a breach of a resolution on custody rights pronounced and enforceable in a Contracting State*". Therefore, the actual application scope of the Council of Europe's Convention is restricted

to the assumption of a pronouncement on guardianship and access rights (or the authority's approval of the terms agreed upon by both parents). Furthermore, although the possibility of establishing wrongfulness in a *subsequent* decision is provided for (art. 12), the exceptional nature of such provision is confirmed through its possible exclusion by the States by way of reservation (art. 18)[4].

Therefore, the requirement of a formal decision favoring whoever claims to restore the relationship with the child, that was altered by the child's "unlawful removal", leads to the prevalence of the "decision recognition and enforcement Convention" approach in the Luxembourg Convention, as opposed to the "cooperation Convention" approach to which some Convention provisions might be aimed, such as those that set forth the creation of Central Authorities responsible for watching over the Convention's enforcement.

In contrast with the above system, where classical instruments and notions of Private International Law are applied, the drafters of the Convention of October 25, 1980 on the civil aspects of child abduction, conceived a resolution mechanism of a quite different nature, which to a great extent drifts away from the traditional conceptual framework on this matter.

However, as it usually happens in the world of ideas, the seed of the notion that would in time become the core of the Hague Convention, did not come out of nowhere, but had already been considered for some time through various juridical formulae.

It should be borne in mind that during the drafting process of the Convention of October 5, 1961 concerning the powers of authorities and the law applicable in respect of

[4] Thus, when Spain ratified the Convention in 1984, it made a reservation in this connection, albeit it was withdrawn in 1991.

the protection of minors, Article 6 of the Preliminary Draft even included a provision denying those who were responsible for a child's unlawful removal, the right of appeal before the Courts; this provision was finally ruled out due to its formulation difficulties. On the other hand, this idea has a resemblance with the solution promoted for inter-state relations in the United States of America in Article 8 of the U.S. Uniform Child Custody Jurisdiction Act prepared by the 1969 National Conference of Commissioners on Uniform State Laws that was endorsed by the American Bar Association and adopted by a significant number of states (28 as of 1978). This provision applies the "clean hand doctrine" by denying the parent who has acted in a reprehensible manner the right to appeal before the Courts.

More recently, the so-called Dyer Report of 1978 (submitted for the consideration of all Member States of the Hague Conference, together with a questionnaire), that marked the actual start of the preparatory works for the Convention, reported on the proposal of the Swiss Delegate to the Council of Europe, Walter Baechler, aimed to impose on the authorities of the country where the child is removed, the obligation of restoring guardianship -avoiding as far as possible to go into further depth- in those cases of an alleged "arbitrary" or "wrongful" abduction from the respective guardian[5].

It seems to be clear that the proposed action, as far as it restricts the scope of judicial intervention under the above assumptions, reflects a position of distrust vis-à-vis those Conventions that look for a *fast* enforcement of decisions on child's guardianship; in any case, such mistrust was endorsed in practice in the enforcement of both bilateral and multilateral Conventions.

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[5] *"Rapport sur l'enlèvement international d'un enfant par un de ses parents"*, by A.Dyer, preliminary document Nº 1 of August 1978, in **Acts and documents of the Fourteenth Session, t. III**, pp.48-49.

On the other hand, when the Hague Conference directed its work along the path opened by the above mentioned proposals, it did it so driven by both the wish to deepen into the juridical possibilities that they provide for, and the existence of a determining sociological input. In fact, a thorough consideration of the reality to be regulated –a reality that caused true social alarm- took the experts and delegates to the Hague Conference, from an early stage in the Convention drafting, to the conclusion that child's removal often took place right before the adoption of any relevant custody-related decision.

Hypothetically, under such circumstances the deprived parent cannot resort to any decision prior to the removal and, what is even more serious, he/she will face difficulties to obtain such decision once the child, precisely due to the wrongful removal, is already physically outside the action scope of the authorities of his former place of residence.

In view of the above, the Conference understood that the best way of fighting against the scourge involved in either the use of children to settle old quarrels, or, in the best of cases, the total disregard of his/her rights at the time of organizing a new life where the other parent has no place, was to impede the adult removing the child to alter the relevant juridical data. Once this position was accepted as an starting point, every effort in the Convention should focus on ensuring the child's return to his/her place of habitual residence, in the assumption that the judicial or administrative authorities in such place are the best positioned to pronounce on the guardianship and access rights over children residing in their jurisdiction.

II. The Spanish practice from 1987 up to date: a sample of the gradual "internalization" of the Convention's objectives.

I have just pointed out that, in my opinion, the leading idea governing the Convention, and embodied in its main objective, is to achieve the immediate return of the wrongfully abducted child to his/her habitual place of residence. I have also mentioned how such purpose can be met by, *inter alia,* restricting the actual jurisdictional scope of the judges in the State of refuge of the child's abductor, and stating that no decision adopted on the child's return within the Convention's framework will affect the basic issue of custody rights (art.19). Otherwise, as a final outline of the meaning of the interventions promoted by the Convention, it should not be forgotten that it establishes that the authorities in the "State of refuge" will only pronounce on the basic issue after determining that the child is not to be returned under the Convention or unless an application under the Convention is not lodged within a reasonable time (art. 16).

But, the first lesson that the Spanish experience has taught us is that the acceptance of such objectives by judges and courts is not always easy for various reasons, either for the celerity that proceedings should have or the priority that should be assigned to the child's immediate return.

a. As to the first issue, from the Convention's perspective, the greatest obstacles to attain judicial solutions within a "reasonable" time frequently arise from internal procedural regulations. Actually, Article 11 in the Convention only provides for the authorities in the Contracting States *to act expeditiously*, while paragraph 2 establishes that if a decision has not been reached within six weeks from the date of commencement of the proceedings,

the applicant or the Central Authority of the requested State *shall have the right to request a statement of the reasons for the delay*. Therefore, the way in which the domestic Authorities fulfil these provisions depends upon the juridical order of the States Parties that should consequently provide for the suitable procedural means for such purpose.

In the specific case of the Spanish domestic Law, the absence of a suitable procedural channel at the time of Spain's ratification of the Convention, makes it easy to imagine the difficulties that judges and magistrates faced to pronounce according to the deadlines provided for in the Convention. Thus, the Spanish practice during the early years of the Convention's enforcement reflected the rarely successful efforts made by the Courts to adapt to the pace set forth in the Convention.

Organic Law 1/1996 of January 15 on the Juridical Protection of Children put an end to such situation, by modifying the Law on Civil Prosecution and introducing a whole Section of Title IV, Book III, under the title "Measures related to the return of children under the assumption of international abduction". In the case of Spain, this was the end of a period of uncertainty and faulty compliance with its obligations, at least as far as the celerity in the judicial processing of return claims was concerned.

Nevertheless, although the undue delay in proceedings resulting from claims on the return of abducted children may be directly approached (and solved, in principle) by means of a legal provision, it is more difficult for a "rule" (whatever its hierarchy may be) to be able to modify acquired habits that sometimes could oppose the mandate in the Convention. In any case, the above mentioned Spanish law has indeed served to offer a clear juridical ground for the actions of those administrative officials who are first

entrusted to fulfil the objectives of the Convention; I am referring to the Central Authority. This is the situation as far as the eventual participation of the Government Attorney on the proceedings and the necessary intervention of the Attorney General's Office are concerned. Finally, in this brief overview of the Spanish practice I shall make reference to the free legal counsel system in force in the Spanish Law and its extension to conflicts arising from international child abduction.

b. Government Attorney. As part of the State Juridical Service, Government Attorneys are responsible for "counseling, representation and defense in trials filed by the State and its autonomous Organizations" (Art. 1, Law 52/1997, of 27 November, on Legal Assistance to the State and to Public Institutions); consequently, whenever the Spanish Central Authority must resort to Courts in order to obtain a child's return, the Government Attorney corresponding to the place where the child has been located, will promote the relevant proceedings to achieve such return.

This fact has two significant consequences that should contribute to the adequate enforcement of the Hague Convention by Spanish authorities:

- The first consequence refers to the highest technical quality of those attorneys who will advocate the thesis of the Central Authority as custodian of the Convention and representative of whoever requests the child's return (as provided for in Art. 28 of the Hague Convention). Indeed, in Spain the Government Attorneys consist of an elite corps of officials with the highest qualifications.

- The second consequence relates to the so-called "State territorial jurisdiction" and its incidence on the subject-matter jurisdictional concentration, which was

qualified as suitable in the Conclusions of the last meeting of the Special Commission in 2001.

In principle, the knowledge of these claims corresponds to the First Instance Judges (specifically, those acting on family issues) whose jurisdiction applies to the child's location; taking into account their distribution throughout the national territory and their significant number, any specialization on this matter becomes difficult. As a counterpart, this jurisdictional assignment has the advantage that claims will be known by a court close to the child, which will be able to become acquainted with his/her actual situation.

Therefore, the fragmentation caused by the above mentioned jurisdictional distribution will be solved by the intervention of the Government Attorney (which will take place whenever the return claim is filed before the Central Authority). This is so due to a traditional State procedural privilege stating that, whenever the State is a party in a civil suit, the jurisdiction will correspond to the Judges and Courts based in province capital cities, Ceuta and Melilla (Art. 15 of the above 1997 Law). Such privilege has occasionally caused some delay whenever the Court at the province capital city disqualifies itself in favor of the Court in the town where the child is located, and the Government Attorney appeals such disqualification writ. In order to avoid any possible delay for this reason (as sometimes reported by the Permanent Office of the Hague Conference), the State Attorney General's Office instructs the Government Attorney's not to appeal disqualification and to appear before the Court that was declared as competent, thus resigning the territorial jurisdiction which the State is entitled to.

In any case, as an incompetence sentence is unusual, the intervention of Government Attorneys achieve the above mentioned positive effect, as it facilitates some degree of

specialization of Courts at province capital cities, which are better acquainted with most claims on child abduction. Both for such reason, and for the remarkable professional qualifications of Government Attorneys, this peculiar features of the Spanish system should be preserved, at least as far as the number of child abduction cases remains unchanged (148 files summoning Spain in the last three years).

c. The intervention of the Attorney General's Office. In order to understand the role played by the Attorney General's Office in proceedings derived from the Convention's enforcement, it should be noted that its mission is "to promote justice action on behalf of legality, the rights of citizens and the public interest protected by law, either *ex officio* or at the request of the concerned parties" (Art. 1 of Law 50/1981, of 30 December, regulating the Organic Statutes of the Attorney General's Office). This definition results in its presence in all civil status-related proceedings, and especially those concerning legal capacity, filiation, marriage or minors, "as far as any of the parties concerned in the proceedings is under age" (Art. 749.2 of LEC).

Specifically, the intervention of the Attorney General's Office in the proceedings designed for child's return on the assumption of international abduction, is mandatory and always acts on behalf of the child's interest. Therefore, its various roles on the proceedings filed as a result of the Convention's enforcement are easily identified. On one hand, it should be understood that the Government Attorney who represents the Central Authority will defend the juridical position of the person from whom the child has been abducted. In turn, the intervention of the Attorney General's Office, governed by the preservation of the child's interest, may not coincide with the position of the Government Attorney, that is, with

the thesis of the Central Authority representing the person who claims for the child's return.

Some issues that legislation does not provide for clearly enough should be noted in connection with the Attorney General's action holding a position that gains autonomy, precisely because it responds to a direct assessment of the concerned child's interest.

The first issue of concern is to determine whether and to what extent the Attorney General's Office has the necessary autonomy to file the exceptions to the child's return provided for in Articles 13 and 20 of the Convention. In my view, this matter becomes especially realistic when exceptions are related to the assessment of a serious risk, either physic, psychic or of any other nature, caused by the return, that might put the child in an unbearable situation; the same applies if the return is not possible due to essential Spanish principles on the protection of human rights and basic liberties.

Nevertheless, although there seems to be no problem when the Attorney General acts in support of the party that files any of the above exceptions, the situation is not so clear when they are filed directly and independently from the position of the parties. I have no information on whether this assumption has even taken place in practice, but I understand this hypothesis may arise and its solution within the Spanish regulatory framework should possibly be accompanied by adequate measures in order to achieve the child's guardianship by the competent public Administration, subject to a previous declaration of abandonment (Art. 172 of the Civil Code). In fact, child's abduction initially create an *inter privatos* relationship, where the intervention of public powers as such should be restricted to what is required in the best interest of the child.

The conclusions on the possible filing by the Attorney General of exceptions on the child's return as provided for in the Convention, in my view also extend to the possibility that the Attorney General's Office appeals to the sentence on the child's return (Art. 1908 LEC), either positive or negative. My reasons for such solution are the same as for exceptions: unless there is a fair cause to understand that the child is in a situation of abandonment, any appeal to the judicial decision should be reserved, as a general rule, to those who dispute his/her guardianship and custody.

A different matter would be if the Attorney General's Office could promote, together with whoever files the action, the adoption of the child's temporary custody or any other securing measure as deemed relevant (Art. 1903 LEC); in such case, the basic intent is to guarantee the enforcement of the judicial decision without any new interference from the person who, by abducting the child, already proved to be prone to the use of *de facto* methods. Any way, except in those cases where the above temporary measure is determined by considerations on the child's safeguard, it should be acknowledged that its use would make the Attorney General's Office to appear as adopting an attitude that might be qualified as hostile vis-à-vis the person who removed the child.

d. In this overview on some practical problems of the enforcement of the Hague Convention in the Spanish juridical framework, I wish to mention the free legal counsel, using for that purpose the denomination pertaining to our Legal system.

This issue is approached in two articles in the 1980 Convention. The first one, Article 25, extends the individual scope of the legal aid system applicable in all States Parties to the Convention, providing that nationals and habitual residents in the other Contracting States will

be also entitled to such aid “in matters concerned with the application of this Convention”, “on the same conditions as if they themselves were nationals of and habitually resident” in that State.

In the Spanish case, this means that the access to the comprehensive benefits of free legal aid established by Law 1/1996 of 10 January, may be claimed by the persons mentioned in Article 25, on the same conditions as “Spanish citizens, nationals of other Member States of the European Union, and foreigners with legal residence in Spain” (Art. 1 of the above mentioned Law)[6]. The scope of benefits involved in the right to free legal aid can be verified through the mere reading of Art. 6 of the corresponding regulatory Law. Let's just mention that, among others, it includes free counsel and orientation prior to trial, as well as free defense and representation by an attorney and a solicitor in judicial proceedings.

From the above it can be assumed that, besides being represented by the Central Authority and, through it, by the Government Attorney, the plaintiff lacking economic means can litigate before Spanish Courts with an adequate legal aid. This assumption will logically take place if whoever claims for the child’s return directly applies to Spanish courts without doing so through the Central Authority, as expressly provided for in Art. 29 of the Convention.

The second article dealing with this issue is Article 26, where paragraph 2 establishes that Central Authorities will neither be paid for their services, nor “require any

[6] Also including foreigners visiting Spain... in connection with administrative or judicial proceedings that may imply the rejection of their entry, their return or expulsion from Spanish territory, as well as asylum proceedings provided for in Art. 22 of the Organic Law 4/2000 of 11 January, as per the wording of Law 8/2000 of 22 December.

payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers". However, this provision, together with the one regulating the use of languages among Central Authorities, may be the object of reservation, as per the terms provided for in paragraph 3 of that same Article. This confirms, if the obvious should be confirmed, the world of difference existing between juridical systems on this issue: Art. 26, which was conceived for those regulatory frameworks that do not provide for an autonomous mechanism of procedural representation by the Central Authority, faces failure (through a possible reservation) when such frameworks neither provide for a general system of free legal aid. To a great extent, the problems experienced by some countries, such as the United States of America, for a proper enforcement of the Convention, arise from the combination of both negative circumstances.

III. Issues for debate in connection with child abduction from the perspective of Spanish Law.

Once procedural obstacles are overcome, and counting on a jurisprudence that starts enforcing the Hague Convention in a rather accurate manner, there are still many issues left that have not been approached in this presentation, some of which have a special *de lege ferenda* importance. Let me recall them, just *pro memoria*.

- The "shaded" extension of the above regulatory framework to access rights-related claims, in pursuance of Article 21 in the Convention. The limitations of the procedural provisions that have been examined under the assumption of child abduction, and the consequent need of resorting to jurisdictional cooperation proceedings set forth in Arts. 277 LOPJ and 300 LEC.

The trend to restrict the Central Authority's intervention to those cases where access rights appear to be allegedly involved with the child's abduction or retention.

- The possible punishment of child abduction by one of the parents, including international abduction, according to a Draft Law submitted to the Deputy Chamber on 11 June, 2001, that consolidates previous draft laws respectively presented by the *Partido Popular* and the *Partido Socialista Obrero Español.*

- The scope and consequences of a "one single purpose" appeal on decisions concerning the legitimacy of the child's return. In this connection, the problem arisen on STC 120/2002 of 20 May, 2002, is of relevance.