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Some juridical-political obstacles that should be overcome in order to achieve the effective enforcement of international conventions on the international "abduction" of minors

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SUMMARY

Let the task started by Dr. Luis Morquío, and continued through time by the Inter-American Children's Institute, to perpetuate forever as "a long-standing seed".

1.- Introduction and preliminary remarks.

1. I have been asked to make a presentation from a practical standpoint on the enforcement of regulatory instruments related to the unlawful international removal or retention of minors (*abduction*), thus contributing to the design of an *Inter-American Cooperation Program for the Prevention and Remedy of cases of International Abduction of Minors by one of their Parents*. The Inter-American Children's Institute (IIN) is acting as coordinator of this effort, aimed to prepare a final document that will be submitted to the Directing Council, and through it, to the 2003 OAS General Assembly. The work developed during this meeting in Montevideo, will also serve as a contribution to the Special Session of The Hague Conference to be held on September 2002.

2. Notwithstanding the particular focus of this international event on the conventional Inter-American system –Inter-American Conference on Private International Law (CIDIP) -, the experience of The Hague Conference[1] and the European continent, in the European Council and the European Union, should be necessarily taken into account. Consequently, the following are the international instruments and texts taken into consideration in this presentation, on each of which attention should be drawn to their signing and ratification status:

> **CIDIP**[2]: *Inter-American Convention on the International Return of Minors, Montevideo, 15 July, 1989*[3] (CIDIP-IV) and *Inter-American Convention on the International Traffic of Minors, Mexico, 18 March, 1994*[4] (CIDIP-V);
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> **The Hague Conference on Private International Law**[5]: *The Hague Convention on the Civil Aspects of International Child Abduction, of 25 October,1980*[6] and *Convention on*

[1] In this connection, please see among other works: José Luis Siqueiros, *"La Conferencia de La Haya y la perspectiva latinoamericana", Boletín de la Facultad de Derecho (BFD),* second period, nº 16, 2000, Madrid, Spain, pp. 203-224 and "The development of Private International Law within the Inter-American Ambit", International Law Course of the OAS Legal Committee, b. XXV, Washington, D.C., 1998, Didier Opertti Badan; *"L'Oeuvre de la CIDIP dans le contexte du droit international privé actuel"*, Chapter in *E Pluribus Unum. Liber Amicorum Georges A.L. Droz,* Marthinus Nihoff Publishers, The Hague, The Netherlands, 1996, pp. 269-286; Antonio Bogiano, *La Conferencia de La Haya y el derecho internacional privado en Latinoamérica*, La Ley, Buenos Aires, Argentina, 1993; Gonzalo Parra Aranguren, *Codificación del derecho internacional privado en América*, Central University of Venezuela, Caracas, 1982 and Vol. II of the same work, Central University of Venezuela, School of Juridical and Political Sciences, Caracas, 1998, and Diego P. Fernández Arroyo, *La codificación del derecho internacional privado en América Latina*, Eurolex, Madrid, Spain, 1994.

[2] http://www.oas.org

[3] Currently in force and ratified by Argentina, Belize, Bolivia, Brazil, Costa Rica, Ecuador, Mexico, Paraguay, Uruguay and Venezuela.

[4] Currently in force and ratified by Argentina, Belize, Brazil, Colombia, Costa Rica, Ecuador, Panama, Paraguay and Uruguay.

[5] http://www.hcch.net

[6] Currently in force and ratified by the following Member States of the Conference: En vigor y con las siguientes ratificaciones de Estados miembros de la Conferencia: South Africa (accession), Albania, Alemania, Argentina, Australia, Austria, Bielorrussia (accession), Belgium, Bosnia-Herzegovina, Brazil (accession), Canada, Chile (accession), China (only applied in Hong Kong and Macao), Cyprus (accession), Croatia, Denmark, Spain, Estonia (accession), United States, former Yugoslav Republic of Macedonia, Finland, France, Georgia (accession), Greece, Hungary (accession), Ireland, Israel, Letonia (accession), Lithuania (accession), Luxembourg, Malta (accession), Mexico (accession), Monaco (accession), Norway, New Zeland (accession), Panama (accession), The Netherlands, Peru (accession), Poland (accession), Portugal, Roumania (accession), United Kingdom, Slovakia, Slovenia (accession), Sri Lanka (accession), Sweden, Switzerland, Czech Republic, Turkey, Uruguay (accession), Venezuela, Yugoslavia; and the following accessions by non Member States of the Conference: Bahamas, Belize, Burkina Faso, Colombia, Costa Rica, El Salvador, Ecuador, Fidji, Guatemala, Honduras, Iceland,

the jurisdiction, applicable law, recognition, enforcement and cooperation on matters related to parents' responsibility and child protection measures, The Hague, 19 October, 1996[7];

European Council[8]: *European Convention on the Recognition and Enforcement of Decisions on Child Custody and Custody Restoration,* Luxembourg, 20 May, 1980[9];

And, although is not a matter of conventional law, the following provision should be noted within the ambit of the **European Union**[10]: *Council Regulation (EC) nº. 1347/2000 of 29 May, 2000 on the competence, recognition and enforcement of judicial resolutions on matrimonial matters and parents' responsibility on common children*[11], and *Draft Council Regulation on the competence, recognition and enforcement of judicial resolutions on matrimonial matters and parents' responsibility,* revoking Regulation (EC) nº 1347/2000 and amending Regulation (EC) nº 44 on alimony issues[12].

3. As a result of this heterogeneous regulatory situation, there is a large number and variety of juridical-political obstacles that should be overcome in order to achieve the effective enforcement of the conventional system in force on *abduction*, and therefore it is necessary to restrict, even as a mere indication, the list of such obstacles to be examined, without disregarding the need of making some contribution to the conventional Inter-American system in this connection. Complementary to the above, and with due respect to the necessary organization limitations set forth in this event, attention will be particularly drawn to regulatory texts currently in force.

4. I will dispense with any all-encompassing classification of these obstacles, and will only present some thoughts on what might be understood as *traditional* juridical-political restrictions to the above mentioned conventional effectiveness. Thus, some mention will be made to avoidable reservations ***(2),*** unnecessary public order exceptions ***(3)***, the abusive increase of conventional exceptions to child return ***(4)***, other obstacles similar to the above ***(5)***: ***a)*** the long path of ratifications; ***b)*** the non fulfillment of the required appointment of Central Authorities; ***(c)*** the limited resources allocated to international cooperation between authorities and Central Authorities, and ***d)*** some considerations will be made on the need to inform about the above mentioned anti-*abduction* conventional system in every involved geographical ambit. Finally, some conclusions will be drawn ***(6)*** that are expected to be useful, at least to promote debate.

5. The unavoidable relationship between the juridical and political areas, particularly in the case of a practical reflection such as this, has taken me to introduce this hyphen between those matters that apparently should be exclusively dealt with by lawyers (*juridical*), and those that

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Mauritius, Moldovian Republic, Nicaragua, Uzbekistan, Paraguay, St-Kitts and Nevis, Trinidad and Tobago, Turkmenistan and Zimbabwe.

[7] Currently in force and ratified by: Monaco, Slovakia and the Czech Republic.

[8] http://www.coe.fr

[9] Currently in force and ratified by the following Member States of the European Council: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Letonia, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey and the United Kingdom, and also ratified by Yugoslavia, a non Member State of the European Council.

It should be taken into account that the European Council adopted the *European Convention on Child Repatriation*, The Hague, 28 May, 1970, although it has not entered into force and has only been ratified by Ireland and Turkey.

[10] http://europa.eu.int

[11] DOCE L 160 of 30 June, 2000, p. 19, in force as of lst. March, 2001.

[12] See the initial proposal of the Commission, DOCE C 332 of 27 November, 2001, p. 269.

should never be left aside in any juridical comments of a practical nature as proposed, that is, the conditioning *political elements*.

6. These juridical obstacles that are necessarily conditioned by political elements, should be reviewed with extreme care in order to detach the negative features of current *globalization*[13], understanding as such the definition of the economist and writer Joss Luis Sampedro: "A constellation of centers with a strong economic power and profiting purposes, united by parallel interests, the decisions of which rule over world markets, particularly the financial ones, by means of the state-of-the-art technology and taking advantage of the absence or weakness of regulatory measures and political controls"[14].

As far as no limits can be imposed on such *globalization* that consolidates and increases wealth concentration in a few hands in detriment of the majority, the *interest of minors* will be questioned in cases of *abduction*, and the effectiveness of the conventional juridical system will become weaker in spite of any possible and desirable improvement.

7. But, from the private international law perspective, and in order to alleviate the harmful effects of *globalization*, we should not disregard the huge positive content introduced by the overall conventional system of human rights protection, aimed to prevent and avoid *abductions*, as well as to achieve practical juridical solutions that make them fail for the benefit of the *minor's interest* by means of the immediate return of the *abducted* minor[15]. Within such overall conventional framework, it should be enough to quote as an example the *Convention of the Organization of the United Nations on the Rights of the Child*, of 20 November, 1989, currently in force and widely ratified by Member States, particularly as far as its Articles 11[16] y 35[17] are concerned. The *universalization* of human rights, and in this case of minors' rights related to international *abduction*, will facilitate the conventional effectiveness that is the object of this presentation, and will make it possible by far to overcame the juridical-political obstacles being reviewed..

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[13] On globalization and human rights from a *ius privatis* perspective, the work by Evangelos Vassilakakis is of particular relevance, *"Les rapports entre la globalisation et la protection des droits de l´homme"* in the joint work coordinated by Pétros N. Stangos and Panayotis Glavinis, *La formation des professionnels du droit dans le cadre du programme "meda por la démocratie. Approches issues dún séminaire de formation en matière d´État de droit et de libertés fondamentales*, Law School, Aristotle University of Thessalonika, 2001, pp. 5858-63. Among the numerous and varied literature on *globalization*, I suggest the recent but already traditional book by Michael Hardt and Antonio Negri, *Imperio* (English version, *Empire*, Harvard University Press, 2000 and the French version, *Empire*, Exils Éditeur, Paris, 2000), recently published in Spanish by *Ediciones Paidós Ibérica, SA*, Barcelona and *Editorial Paidós, SAICF*, Buenos Aires, 2002 and its enclosed bibliography, as well as the useful work by Jaime Pastor, *Qué son los movimientos antiglobalización*, RBA libros SA, complete version, Barcelona 2002.

[14] José Luis Sampedro and illustrations by Sequeiros, *El mercado y la globalización, Ediciones Destino*, Barcelona, 3rd edition, May 2002, pp. 65 and 66.

[15] On the *minor's interest*, and particularly at The Hague Conference, please refer to the following works and their extensive bibliography: Adair Dyer, *International Child abduction by parents*, R. Des C., t. 168, 1980, pp. 123-268, Mónica Herranz Ballesteros, *El interés del menor en el derecho convencional de la Conferencia de La Haya de Derecho Internacional Privado*, Phd thesis, UNED Law School, Madrid, Spain, 2002 and Marina Vargas Gómez-Urrutia, *"El interés del menor en los Convenios de la Conferencia de La Haya de derecho Internacional Privado"*, Journal on Private Law, National Autonomous University of Mexico – Juridical Research Institute (Mexico), nº 28, 1999.

[16] *Article 11*: "1. State Parties will take measures to struggle against the unlawful child removal abroad and the unlawful child retention abroad.

2. For such purpose, State Parties will promote the execution of bilateral or multilateral agreements, or the accession to existing agreements".

[17] *Article 35*: "State Parties will take all national, bilateral and multilateral measures as required to impede child abduction, sale or traffic for any purpose or in any way".

2.- Avoidable reservations.

8. The scope and juridical nature of reservations in conventional law are well-known[18]. It is a caution, a prevention, and why not, an exception to the normal operation of conventional provisions. Thus, reservations in principle do not match the expected conventional effectiveness, as they reflect the limitations in the agreements between States for preventing and punishing, in this particular case, the international *abduction* of minors. As exceptions, reservations should be avoided as possible, as they may become a juridical-political obstacle hindering the achievement of the intended *anti-abduction* purpose.

9. As far as the two *Inter-American* Conventions is concerned *(on the international return of minors,1989,* CIDIP-V, and *on the international traffic of minors, 1994,* CIDIP-V), their respective Articles 31 (article numbering is a coincidence) provide for the general possibility that States make reservations as far as they are specific and consistent with the purpose and objectives of the Conventions. If the above mentioned Conventions had not included this reservation possibility, States could make them under the terms of the above mentioned law of treaties. I understand that these Articles 31, as unnecessary as they are, could become a sort of encouragement for reservations.

Nevertheless, only Venezuela has made a reservation to Article 34 in the 1989 Convention on the International Return of Minors (this Convention prevails over the 1980 The Hague Convention) and, in connection with the 1994 Convention on the Traffic of Minors, only Ecuador made a reservation on some issues concerning the criminal scope of the Convention[19]. Argentina[20] y Panama[21] made their respective statements (not reservations) under Article 23. The small number of reservations in Inter-American Conventions is a good symptom of the system's effectiveness.

10. On the other hand, there are reservations expressly provided for in the Conventions of The Hague Conference on Private International Law. The *1980 Convention* only provides for, in a specific manner, the possibility of make two reservations (Article 42): one of them results from the subsidiary possibility of translating into English or French the claim, proceedings or any other document conveyed to the Central Authority in their original language (art. 24, paragraph

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[18] According to the *Vienna Convention on the Law of the Treaties*, of 23 May, 1969, "it should be understood as "reservation" any unilateral statement, whatever its wording or denomination, made by a State at the time of signing, ratifying, accepting or approving a treaty or accessing to it, aimed to exclude or modify the juridical effects of applying to that sate some provisions in such treaty" (art.2.1, d); later on, Section 2 in Part I regulates the above in further detail (arts. 19-23) and, in such sense, attention should also be paid to the *Vienna Convention on the Law of the Treaties among States and international organizations, or among international organizations*, dated 21st March, 1986.

[19] Ecuador's reservation: *according to our Political Constitution, Ecuador cannot grant extradition of nationals, and their prosecution will be subject to the legislation in force in our country".*

[20] Argentina made the following formal interpretation: *the Argentine Republic declares that, in accordance with Article 23, criminal sentences issued by other State Party will be recognized and enforced in connection with indemnities resulting from the international traffic of minors.*
Likewise, the Argentine Republic declares that, as provided for in Article 26, no civil action can be filed in areas under its jurisdiction, as well as any exception or advocacy action tending to prove the absence of crime or the lack of responsibility of an individual, whenever that same crime has been the object of a sentence by other State Party.

[21] Panama made the following statement: *1.- The Republic of Panama, in accordance with Article 23 in the referred Convention, declares that "the State of Panama will recognize and enforce criminal sentences issued by other State Party concerning indemnities resulting from the international traffic of minors, according to the guidelines provided for in this Convention and in the domestic Law of Panama".*
2.- The Republic of Panama, in accordance with Article 26 in the Convention, declares that "the State of Panama will neither admit any opposition in a civil trial, nor any exception or advocacy action tending to prove the absence of crime or the lack of responsibility of an individual, whenever that same crime has been the object of a sentence by other State Party".

2); the other provides for the possibility that States may declare that they are not bound to assume the cost-free principle of the proceedings involved in the return of the *abducted* minor (art. 26, paragraph 3).

The *1996 Convention* only provides for, also in a specific manner, two possible reservations (Art. 60): one of them is similar to the above mentioned related to the subsidiary use of English or French languages in proceedings before competent authorities (Art. 54.2), while the other one consistently reserves the competence of its authorities for protection measures on the property of children located within its territory, as well as the right to disregard any parents' responsibility or any measure that would be inconsistent with any other measure adopted by its own authorities in connection with such property (Art. 55).

All reservations provided for in for The Hague Conventions could have been avoided. Those concerning language or idiomatic prejudice, because the required use of the French or English languages –as official as they may be in the Conference- are binding and discriminatory, and the use of original languages by peoples or individuals should not be restricted. I understand that there should be no problem that State Parties in the Conventions assume the obligation of translating, whenever legally necessary or unavoidable, any documentation aimed to further guarantee the *minor's interest*. We should then count on a globalizing possibility with no impositions opposing the preservation of rights. The reservation provided for in Article 55 in the 1996 Convention, more than a reservation, has the effect and intent of a true public order exception.

The juridical-political unsuitability of reservations set forth in these The Hague Conventions becomes evident in the 110 pages that the Conference website must use to report on the full status of signing and ratification, including all stated reservations.

11. In the *1980 Convention of the European Council*, this reservation fever held a strong position, and Title V (Arts. 17 and 18) were devoted to the clear purpose of reducing the effectiveness of the conventional goal of the return of the *abducted* minor.

In the first place, and once again, the unnecessary language problem arises as inconsistent with the *minor's interest*: all communications addressed to the Central Authority in the State of application should be worded in the language of such State (Art. 6.1 a), and that Authority may accept communications in French or English, or accompanied by the translation into one of such languages (Art. 6.1 b). However, in accordance with Article 6.3, any Contracting State may file a reservation that totally or partially excludes the provisions set forth in the above paragraph 1 b) in this article.

In the second place, Article 17.1 establishes the possibility of making a reservation to the recognition and enforcement of resolutions, that is, to the return of the *abducted* minor in all or some of the cases provided for in Articles 8 (list of assumptions under which the immediate return of the minor should be ordered) and 9 (list of possibilities for denying recognition and enforcement in cases other than those provided for in Article 8, where the claim was filed before a central authority within six months after removal). The recognition and enforcement of the resolutions taken in a State that has made such reservation may be denied in any other State Party (Art. 17.2).

Finally, the precise reservation provided for in Article 18 in this Convention, consisting of the possibility that a State Party is not bound by Article 12, which includes within the ambit of conventional application those *abductions* taking place at a time when there was no resolution on the minor's custody, but such resolutions were adopted afterwards, thus establishing the unlawfulness of the removal or retention.

In this case, the European Council should only use 17 pages on its website to inform on the signing and ratification status of the Convention, including the corresponding reservations, although up to date this international instrument has only received 28 ratifications or accessions and 2 signatures not followed yet by any ratification[22].

3.- Unnecessary public order exceptions.

12. Public order exceptions in the conventions on *abduction* are a sort of consecration of the possibility of not returning an internationally and unlawfully removed or retained minor, that is, a juridical mechanism to perform an *abduction* according to the law, under the pretext of acting on the *minor's interest*.

In spite of the changing contents of the public order provision, I think that what M.H. van Hoogstraten stated in the middle of the last 20th century is increasingly closer to become true: after verifying that doctrine in general always assumes the existence of a public order provision in international conventions, he noted that "this doctrine will be left aside sooner or later, for purely pragmatic reasons"[23].

As Didier Opertti Badan accurately said during his address on adoption within the general framework of the relevant codes in Latin America and in The Hague Conference, "a very active presence of public order can be perceived in family law, which forces us to establish some limitations to such public order and to the possibilities of resorting to it"[24].

13. With the exception of the *1996 The Hague Convention*, where Article 22 contains an explicit and moderate public order provision, establishing that "the enforcement of the law provided for in this Chapter could only be excluded if it clearly opposes public order, while taking into account the child's highest interest", neither the Inter-American Conventions nor the 1980 The Hague Convention or the 1980 Convention of the European Council contain any public order provision. Great efforts were made in all those international fora by all the delegations that drafted those texts, in order to avoid the minor's return to fail under the ancient and traditional pretext of the public order exception. The *minor's interest* should prevail over public order.

14. Article 25 in the *1989 Inter-American Convention on the International Return of Minors*, that took Article 20 of the *1980 The Hague Convention* as reference, provides for the possibility of denying the return of the *abducted* minor "when it clearly violates the basic principles of human child's rights in the state of application, as established in instruments of a universal and regional nature".

This is not the right time to suggest a debate, that actually never existed, on the comparison between this provision and Article 20 in the *1980 The Hague Convention*. The latter admits the possibility of a return's denial "whenever not permitted by the basic principles in the State of application on the preservation of human rights and basic freedom".

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[22] *Vid supra* note 8. In connection with the supplementary relationship between the Convention of the European Council and The Hague Convention, both dated 1980, on the international *abduction* of minors, please refer, among many others, to the significant Sentence of the European Court of Human Rights, First Section, 25 January, 2000, issued on appeal nº 31679/96, Ignaccolo-Zenide vs. Roumania, as well as the brief but substantive practical comments of Miguel Gómez Jene in "International Return of Minors. Application of the European Convention on the recognition and enforcement of decisions related to the custody of minors, as well as to the restoration of such custody, Luxembourg, 20 May, 1980 (AP Ourense S, 29 September, 2000)", *Tribunales de Justicia*, nº 3, March 2002, pp. 69-72.

[23] M.H. van Hoogstraten, *"La codification par traités en droit international privé"*, *R. Des C.,* 1967-III, vol 122, p. 415.

[24] Didier Opertti Badan, *L'adoption internationale*, R. Des C., t. 180, 1983, p.351.

Whether we wish it or not, in both cases we are witnessing an important exception to the return of the abducted minor, facing a failure of the convention's purpose that results, as I said a long time ago, in a disguised formula of public order exception with similar effects[25]. Perhaps a better justification for the existence of this provision in The Hague Convention may be found in the *Rapport Explicatif* by Elisa Pérez Vera, where the clearly exceptional nature that its enforcement should always have is explained, together with its restrictive and exceptional interpretation[26].

But the background of these confuse juridical formulae is likely to be found in letter b), Article 10, in the *Convention of the European Council of 20 May, 1980*, the first among those mentioned in this presentation, that provides for the possibility of denying the recognition and enforcement of the resolution on which the determination of the *abduction* existence is based "whenever there is evidence that the effects of such resolution are clearly opposed to the basic principles of law ruling the families and children in the State of application". There is no doubt that this formula of the European Council, by restricting the juridical area of influence on which the exception to the law of the State of application is based, to some extent disregards the overall conventional system for the international protection of human rights and children.

15. Every formulae reviewed in the various above mentioned international instruments is the juridical expression of a concrete political will of facilitating the action of competent authorities to solve abduction cases by deciding not to return the unlawfully removed or retained minor.

We are certainly facing a serious juridical-political obstacle that could have been avoided, because, as jurisprudence has clearly shown on both sides of the Atlantic[27], a greater progress is attained every day to overcome those exceptional provisions that only serve to encourage, as opposed to the *minor's interest*, discriminating and xenophobic attitudes, totalitarian nationalism and ultimately, a reduction of the universal enforcement of human and children's rights[28].

I reiterate, if human rights become universal in a democratically healthy manner, the traditional notion of public order exception that was conceived, as accurately pointed out by Elisa Pérez Vera, as a traditional scheme of essential values for the special protection of each juridical framework[29], should become increasingly weaker.

16.- The international fora that adopted the above mentioned Conventions –CIDIP, The Hague Conference and the European Council- have the necessary juridical and political strength to achieve the gradual disappearance of the public order exception from their international instruments, at least in connection with the international *abduction* of minors, and, why not, to

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[25] Pedro-Pablo Miralles Sangro, *El secuestro internacional de menores y su incidencia en España. Especial consideración del Convenio de La Haya de 1980*, Ministry of Social Affairs, Madrid, Spain, p.201.

[26] Elisa Pérez Vera, "Rapport Explicatif", *Actes et Documents*, t. III, pp. 461-462.

[27] A qualitative and quantitative sample of this statement can be seen in the important jurisprudence collected in the work by Mathilde Sumampouw, *Les nouvelles conventions de La Haye. Leur application par les juges nationaux*, Martinus Nijhoff Publishers, t. I-V.

[28] On the reiterated *universalization* of human rights, please refer, among others, to L. Ferrajoli, *Derechos y garantías. La ley del más débil*, Edit. Trotta, Madrid, 2001 and on the rights of the child in particular, to Marina Vargas Gómez-Urrutia, *La protección internacional de los derechos del niño*, Secretariat of Culture, Government of Jalisco, Pan American University, DIF Jalisco State System, Cabañas Institute, first edition, Mexico 1999 and Pedro-Pablo Miralles Sangro, *"La Declaración Universal de los Derechos Humanos y la protección internacional de los menores: algunas reflexiones y propuestas", A Distancia* Journal, vol. 16, nº2, December 1998, UNED, Madrid, Spain, pp. 118-122.

[29] Elisa Pérez Vera, *"El concepto de orden público en el derecho internacional"*, Spanish-Portuguese Yearbook on International Law, nº 7, 1984.

agree upon the elimination of such exception in the conventions adopted up to date. In any case, the public powers in the States that are parties to these conventions may try to stop applying as soon as possible this increasingly unnecessary exception within their democratic jurisdictions, as it is unsuitable for the *minor's interest*.

4.- The abusive increase of conventional exceptions to the return of the "abducted" minor.

17. In the previous paragraph on the public order exception and its various expressions in these conventions, it has already been said that any action for detecting *abduction* according to their provisions (unlawful international removal or retention), without promoting the immediate return of the minor, involves a bias of the basic purposes of such international instruments, and consequently it is not consistent with the *interest of the abducted minor*. Therefore, these are juridical-political obstacles that may be overcome in order to achieve the effectiveness of the conventions that is intended by means of the order to return the *abducted* minor.

It may be said that exceptions to the return of the *abducted* minor as included in these conventions, besides being the lesser of two evils resulting from the difficulties in achieving a greater point of encounter and agreement among the various interests during the development of these texts, also constitute an option to the traditional public order exception.

18. We should state once again the importance of dealing with the notion of the minor's interest by means of the most refined technique of *undetermined juridical concepts*[30], so as to avoid that *juridical insecurity* prevails, and to know how to solve *in casu*[31] each arising conventional exception to the minor's return.

The *in casu* and *in concreto* determination of an exception to the return of an *abducted* minor, should be conducted precisely by *determining*, according to the concrete elements provided for by the rules that favor the *minor's interest* (conventions on *abduction* and on human/children's rights) the *indetermination* initially shown in the case.

The discretionary margin of the competent authority responsible for a decision on an abduction case, is reduced to its minimal expression due to the obligations underlying the work of determining the *minor's interest* in accordance to conventional and domestic rules.

Finally, it should not be forgotten that, *except* as otherwise provided for, the *conventional interest of a minor* in an *abduction* case is always related to his/her necessary and immediate return. As a response to the traditional proposals of Private International Law, the appearance of methods inspired on the social purpose of laws supported by values of material Law, lead us to detect a trend that favors private international law rules having a material contents that is independent from domestic Law. The Hague Conference and CIDIP are not alien to this trend towards materialization, as shown by the introduction of the *minor's interest* as a material approach. This trend, as stated by Julio D. González Campos, has constantly grown through different channels, resulting into a greater attention paid to material values that not only reflects on state regulations, but also on international conventions[32].

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[30] Pedro-Pablo Miralles Sangro, *El secuestro internacional de menores…*., pp. 96 y ss. , Mónica Herranz Ballesteros, *El interés del menor en el derecho convencional de la Conferencia de La Haya…*, particularly the "Preliminary Notes", pp. 15-46 and Marina Vargas Gómez-Urrutia, *La protección internacional de los derechos del niño…*, particularly pp. 102-109.

[31] In connection with *in casu* resolutions, it is imperative to refer to the traditional work Evangelos Vassilakakis, *Orientations Méthodologiques dans les codifications récents du droit international privé en Europe*, Private Law Library, General Law and Jurisprudence Library, Paris, 1967

[32] Julio D. González Campos, *Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé*, R. Des C., t. 287, 2000, p. 319, related to Article 15 in the 1996 The Hague

19. Article 13 in the 1980 The Hague Convention provides for the following exceptions to return:

- absence of the required features of an *abduction* case: whoever requests return was not actually exercising the custody or access rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;
- return involves a grave risk for the minor and exposes him/her to physical or psychological harm or otherwise places the minor in an intolerable situation;
- the minor's view should be taken in consideration whenever he/she objects return.

Article 11 and paragraph 1 in subsequent Article 13 in the *1989 Inter-American Convention on the Return of Minors* provide for exceptions to return:

- the plaintiff was not actually exercising the custody rights at the time of abduction, or had consented to or subsequently acquiesced in such abduction;
- return involves a grave risk that may expose the minor to physical or psychological harm;
- the minor's objections to return should be taken into account.

Again, any exercise of unnecessary competition between both conventions should be rejected, as they globally respond to the same philosophy and consequently have analog or similar results concerning the regulation of exceptions to return.

20. On the contrary, the *1980 Convention of the European Council*, that applies the technique of recognition and enforcement of decisions, as opposed to the immediate return provided for in the two above mentioned instruments (The Hague of 1980 and Inter-American of 1989), includes a more comprehensive and complex list of exceptions to the recognition and enforcement of a decision for the return of the *abducted* minor, that are reflected in Articles 9 and 10 and summarized as follows:

- the lack of defense possibilities by the defendant in the proceedings giving place to the application for recognition and enforcement;
- unfounded competence (according to the criteria of habitual residence expressly set forth in the convention) of the authority who adopted the resolution the recognition and enforcement of which is applied in the absence of the defendant;
- the resolution should be consistent with a previous one in the State of application;
- the incompatibility of the resolution with the principles of family and children Law in the State of application (Article 10.1 a), already reviewed in a previous paragraph;
- the circumstances on which the minor's interest is based must have changed since the time of *abduction*;
- loss of links or absence of adequate links with the applying State;
- existence of a resolution in the State of application or in a third State that opposes return, and the proceedings of which started before the application for recognition and enforcement under conventional terms;
- the recognition and enforcement procedure may be discontinued whenever the original resolution is the object of an ordinary recourse, or if there is any pending custody proceeding prior to the application in the State of origin and, finally, whenever any resolution on custody is the object of an enforcement procedure or any other procedure arising from such resolution.

There is little to be said on the complexity of the exception system in this *Convention* and on the great number of such exceptions. It is enough to observe their scarce practical effectiveness,

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Convention: [whoever resorts, as an exception to the domestic Law of the competent authority, to another law "to the extent required by the protection of the person and property of the child".

specially when compared, if comparison applies, to the *1980 The Hague Convention* and the *1989 Inter-American Convention*.

21. Article 23.2 in the *1996 The Hague Convention* sets forth a system of assumptions for rejecting the recognition of decisions in the following cases:

- when there is lack of competence of the resolving authority and the minor is not given the chance to be heard;
- when there is evidence that whoever objects recognition was not able to be heard in order to justify that the decision affects parents' responsibility;
- when recognition opposes the public order of the State of application, taking into consideration the highest interest of the minor (already reviewed in a previous paragraph);
- when the decision is not consistent with another decision subsequently adopted in the non Contracting State of habitual residence of the minor, and when this last decision has all necessary conditions to be recognized in the State of application;
- when proceedings provided for in Article 33 have not been complied with.

In accordance with Article 26.3 in the Convention, the *exequatur* declaration or register should not be denied for more than one of the above mentioned reasons.

22. Just for the purpose of verifying the general reluctance to disregard reasons for the rejection of the return of *abducted* minors, Article 15.2 in the *Regulation (EC) 1347/2000* provides for a different and calculated system for the rejection of resolutions on parents' responsibility matters, while Article 23 in the *Draft Regulation of the Council on the competence, recognition and enforcement of judicial decisions on matrimonial matters and parents' responsibility, revoking Regulation (EC)) nº 1347/2000 and amending Regulation (EC) nº 44 on alimony-related issues*, provisional decisions for not returning the *abducted* minor are regulated, and Article 28 establishes in a precise manner the reasons required for rejecting the recognition of resolutions on parents' responsibility.

In connection to developments on this area within the integration process of the European Union, it is also worthwhile noting that *Regulation 1347/2000*, currently in force, provides for its priority enforcement over the 1961 and 1996 The Hague Conventions on the protection of minors, as well as over the 1980 Convention of the Council of Europe (Article 37), while it also sets forth its priority over the 1980 The Hague Convention.

23. Taking into account the above overview of conventional exceptions to the return of *abducted* minors, at least it should be wondered why such accuracy and care at the time of reducing the strength of the basic purpose of the conventional system on the international *abduction* of minors? In my modest view, the answer lies on the lack of political will that legally reflects on the examined conventional law.

While progress has been achieved towards the strengthening of the international conventional system for the protection of human and children's rights, there is a false attitude that maintains a whole complex system in order to avoid the return of abducted minors.

There is a double discourse as to the international protection of minors, and not only of *abducted* minors, that particularly draws attention in the geographical ambit of the wealthier and most developed countries (US, European Union), but which cannot be justified in any of them. *Globalization* imposes discriminating criteria without making any distinction, and the traditional disqualifying discourse of the most important State in the world *Imperio*, although it may apply to the United States, is no longer valid, as well as *Resolution A-3-0172/92 of the European*

Parliament adopting the European Chart of the Rights of the Child and A-3-0051/93 of 9 March on *child abduction*[33].

24. Once again, a generous and respectful approach becomes imperative in connection with the *universalization* of human rights and, consequently, of children's rights. The Member States of the OAS and the EU, The Hague Conference and the European Council have the necessary capability and power to overcome the juridical-political obstacles arising from issues related to the return of an *abducted* minor and, consequently, to achieve the effective enforcement of existing international conventions. It only requires a determined political will without double discourses. It would be enough to start by a gradual and decided reduction of conventional assumptions on the return rejection, as well as of reservations and public order exceptions. This is not an impossible dream but a true possibility. The work accomplished in this meeting, resulting from the efforts made by the IIN and responsible officials, are a good example of it.

5.- Similar miscellaneous obstacles.

25. There are many other juridical-political obstacles to overcome in order to achieve the effectiveness of conventions on the international *abduction* of minors. But once again, the time available for this presentation enables me to mention only a few (not all of them) without a ranking order, but rather selected in an arbitrary manner based on their most immediate nature which, from a practical standpoint, turns them more suitable for promoting debate.

26. ***a) The long path of ratification.*** I still remember the closing of the XIV Session of The Hague Conference, when two members of the Spanish delegation, Elisa Pérez Vera and José María Espinar Vicente, stated their skepticism in envisaging the enforcement of the *1980 Convention* in the United States. Fortunately, such forecast did not apply as we became acquainted of the ratification of the Convention by that State.

A similar prediction was made by many of us who participated in the work of CIDIP-IV and V, in connection with the eventual ratification of the *1989 and 1994 Inter-American Conventions by the United States and Canada*. I dare to say that unfortunately we were unanimously right, including the delegates of those States, our dear Friedrich K. Juenger and Peter Pfund, Louise Lussier and Louis Perret. But, as fanciful as it may sound, we should not disregard the possibility that some day the United States and Canada may surprise us by ratifying *the 1989 and 1994 Inter-American Conventions*. At *global* level, this would be a true worldwide example with significant and healthy consequences on the *minor's interest*.

27. To incur in international obligations due to the ratification of conventions, involves proceedings that are logically regulated by each juridical framework according to the interest governing their respective sovereignty principles. But even though, sometimes due to ignorance, lack of interest, parliamentary slackness and similar reasons, these ratification proceedings extend unnecessarily, particularly after signing.

28. It should be enough to review the charts on the signing and ratification status of OEAS-CIDIP, The Hague Conference or the European Council to verify such assertion. Otherwise, how do we justify that Colombia, Guatemala, Haiti and Peru have signed the 1898 Inter-American Convention on the Return of Minors on the same day of its adoption, and have not ratified it until now? The same applies to the 1994 Inter-American Convention on the International Traffic of Minors, signed on the date of its adoption, 18 March 1994, and still not ratified by Bolivia, Mexico and Venezuela. Once again we face an obstacle of lack of political will that can be easily overcome, which, to some extent, is suggested by the attitude opposing

[33] DOCE nº C 115/34, of 26 April, 1993.

the ratification of those conventions held by two such powerful States in the American continent as the United States and Canada..

How can we justify that a great number of OAS Member States have ratified or accessed the *1980 The Hague Convention* without doing the same vis-à-vis the *1989 and 1994 Inter-American Conventions*? I reiterate: it is due to the lack of political will.

29. Sometimes it has been said, particularly in connection with the *1980 The Hague Convention* and the *1989 Inter-American Convention*, that their supplementary nature would only bring about complications, especially for those States that are already parties to *The Hague Convention*. In my view, this is not only untrue, but it would also expedite significantly any action for *abduction* prevention and punishment. Along the same line of thinking, Joss Luis Squires Pirate is right when he states that "Spaces and the analysis of phenomena in Private International Law cannot remain the exclusive area of one single forum. Matters having an incidence on this juridical discipline may reflect with different features at world, regional or even domestic level. The regulation of the conflicts that they promote may be different, as well as the respective approach. It is true that there will be many coinciding proposals, and that for the benefit of standardization some regional forum –as the Inter-American one- will adopt resolutions that have proven to be adequate at world level, but it is equally true that such world level could take advantage, through the participation of delegates from a given region, of responses that have proven to be adequate in instruments that have not an universal aim"[34].

30. As far as Spain is concerned, and taking into account its capacity as observer to the OAS and its accession to two *Inter-American Conventions* (*on requisitorial letters, Panama, 30 January, 1975, CIDIP-I , and on evidence and information about foreign law, Montevideo, 8 May, 1979, CIDIP-II)*, its accession to the 1989 and 1994 Conventions would be highly positive on the minor's interest, or at least, to the first one concerning the *international return of minors*. It would be positive for the OAS and even more positive with a view to its impact on all the Member States of the European Union. While the supplementary nature of conventions raises no doubts, the current situation can only be explained by political obstacles.

The minor's interest would substantially benefit from the above, both qualitatively and quantitatively. This would be a good example for all the States participating in international fora where international instruments on the *abduction* of minors have been designed.

31. ***b) The non fulfillment of the required appointment of Central Authorities.*** Sometimes, the fact that a State party in a cooperation convention among Central Authorities has not appointed the authorities provided for in such international text, goes unnoticed by doctrine and even by law practitioners. Similarly, once the Central Authority has been appointed, the State often establishes that it will not start operating until some future date.

The non compliance of this basic obligation by States Parties to the conventions (and not only those concerning the *abduction* of minors), is incomprehensible and harmful to the minor's interest in every international juridical ambit, as well as to the interest of OEA-CIDIP.

Although international instruments being reviewed do not include explicitly binding provisions on the appointment of Central Authorities at a given time, their contents allow for assuming that such obligation should be complied with, at the latest, at the very moment of their ratification or accession.

32. As relevantly stated by Mónica Herranz Ballesteros, "the lack of appointment of a Central Authority as the body responsible for enforcing conventional obligations, directly collides with

[34] José Luis Siqueiros Prieto, *"La Conferencia de La Haya y la perspectiva latinoamericana", BDF - UNED, cit.*, p. 218.

the grounds of such Conventions, where cooperation structures are created for their adequate operation and where the minor's interest is the guiding principle"[35].

33. This situation is more than frequent and concerning from both a juridical and political perspective. Ultimately, it means the non fulfillment of an international obligation that might give place to the responsibility of the involved State. Therefore, we face one more juridical-political obstacle that should be overcome in order to achieve the effectiveness of international conventions on the *abduction* of minors.

34. ***c) The limited resources available for international cooperation between authorities and Central Authorities.*** A lot has been said on the importance of international cooperation between administrative and judicial authorities, and Central Authorities on conventional law matters related to the international *abduction* of minors. I make reference to the extensive bibliography included in the website of the Permanent Bureau of The Hague Conference. Thus, the volume, both numerous and important, of obligations, powers and duties within the overall cooperation framework between administrative and judicial authorities and Central Authorities, as included in the conventional law on the protection of minors in *abduction* cases, is far well-known.

Whenever a State becomes a party to an international convention, it commits itself to the compliance with every and each obligation, power and duties by its authorities, which involves significant funding and budgetary provisions that seldom exist.

35. At times, The Hague Conference and the European Council have drawn the attention of their Member States and parties to their respective conventions on *abduction*, on the need of complying with the economic obligations involved in the organization of international cooperation between authorities..

When both conventions entered into force in Spain, the government was the object of serious warnings in connection with the ineffectiveness of a Central Authority that lacked the material resources and adequate personnel to deal with the needs resulting from convention enforcement. Such uncomfortable international situation probably became one of the most relevant elements allowing for a gradually effective organization and operation of our central Authority and, consequently, of all administrative and judicial authorities. There is no doubt that such unfortunate situation, presently solved, was nurtured by the lack of experience on the democratic operation of the State apparatus in a newborn democracy that only dates back to 1978, as well as to the economic difficulties at that time.

36. Taking this obstacle into account, which so frequently and generally arises in OAS, The Hague Conference, the European Council and the European Union, those institutions could be expected to deliver a greater compliance with conventional obligations. This would have an immediate impact on the *minor's interest* within conventional law.

Similarly, it would also be suitable, as a previous step to the formal introduction of an international instrument of such juridical nature (cooperation between authorities and Central Authorities), that the State involved be required to establish economic and organization provisions for the activities of its authorities for convention purposes.

37. ***The need to disclose general information on existing international conventions.*** If it is actually true that "information means power", one of the key elements of the effectiveness of conventions lies on information. I still keep with myself a model of an explanatory brochure on

[35] Mónica Herranz Ballesteros, *El interés del menor en el derecho convencional…*, pp. 278-285.

the 1980 The Hague Convention, that was prepared and widely disseminated by the authorities of that State shortly after its ratification.

38. Information on international conventions, their enforcement and operation, should be given to attorneys, administrative authorities and jurisdictional bodies, to every State institution, trade unions and social and non governmental organizations, particular those acting in connection with the protection of minors, as well as to religious organizations and any other group of interest.

In order to do so, every *mass communication media* should be used, either electronic and data transmission-based, in a periodic and ongoing manner, as it suits best the intended effectiveness: press, radio, TV, periodic publications, websites, etc.

39. Indeed, OAS-CIDIP-IIN, The Hague Conference, the European Council and the European Union have power enough, even economic, to carry out information campaigns of great international effectiveness, both at international level and at domestic level in each State Party, on the existence of anti-*abduction* international conventions.

40. If the above could be accomplished, an uncommon progress would be achieved towards conventional effectiveness as intended in the conventions on the international *abduction* of minors, while alleviating the juridical-political obstacles previously reported. I reiterate once again that this is a matter of true and concrete political will for the benefit of the *minor's interest* in order to face the harmful effects of *abduction*, and shifting from declarations of intent and double discourses to possible realities.

6. Conclusions.

41. ***I.-*** Reservations, public order exceptions, exceptions to return, delay in ratification and appointment of Central Authorities, limited resources (both material and human) made available for the international cooperation between authorities, and the almost non existing information on available juridical instruments, represent serious juridical-political obstacles that should be overcome to achieve the effectiveness of international conventions on the international *abduction* of minors.

OAS-CIDIP-IIN, The Hague Conference, the European Council and the European Union, as well as their Member and non Member States that are parties to their provisions, should try by all means and with true political will, even in gradual manner, to eliminate or withdraw reservations, public order provisions/exceptions, explicit exceptions as to the return of the *abducted* minor, as well as the whole network of similar obstacles (*Vid supra* paragraph ***5***) that reduce the effectiveness of international conventions on *abduction*.

42. ***II.*** OAS-CIDIP-IIN, The Hague Conference, the European Council and the European Union, as well as their Member and non Member States that are parties to their provisions, should try to become parties to the conventions on the international abduction of minors, as well as to conclude agreements and/or bilateral conventions strengthening such provisions.

43. ***III.*** Consistently with the above paragraph, Spain should at least access to the *1989 Inter-American Convention on the International Return of Minors*, and in a later stage, to become a party as soon as possible to the *1994 Inter-American Convention on the International Traffic of Minors*. This could have an expansive effect on the ratification or accession to the Convention, not only in the Americas, but possibly in Europe as well.

44. ***IV.*** Also as stated in the previous paragraph, the positive impact would be greater if the United States and Canada act accordingly.

45. ***V.*** The same international fora should undertake, either individually or jointly and coordinately, general information campaigns on the conventions and provisions in force on the international *abduction* of minors.

Consequently, such fora should establish information offices on this conventional law in those geographical locations deemed to be strategically more adequate, for which they should count on the cooperation of the administrative authorities and judicial powers of all States involved, as well as of non-state and non-governmental organizations of all kinds.

46 ***VI.*** The empowerment and improvement of the conventional system in force on abduction does not involve the need to strengthen criminal repression, except in the cases of *international traffic of minors* provided for in the *1994 Convention*.

47. ***VII.*** *Globalization*, understanding as such the mechanisms used to consolidate and increase wealth concentration in a few hands in detriment of the majority, is the basis for all worldwide imbalance and injustice, and is therefore opposed to the general *minor's interest*. Consequently, the preservation of the minor's interests in cases of *abduction* becomes fruitless, and the effectiveness of the conventional juridical system becomes weaker in spite of any possible and desirable improvement.

48. ***VIII.*** All the instruments available in private international law may alleviate these harmful effects of *globalization*, particularly taking into consideration the huge positive contents provided for in the overall conventional system for preserving human rights and for preventing, avoiding and punishing in an effective manner the international *abduction* of minors through the strengthening of the mechanisms for the immediate return of the *abducted* minor.

The *Convention of the Organization of the United Nations on the Rights of the Child, of 20 November, 1989*, is an adequate instrument to achieve the *universalization* of human rights, and, as far as international *abduction* is concerned, it is a basic juridical reference to ensure the conventional effectiveness that will make it possible the gradual solution of current juridical-political obstacles.

49. ***IX.*** The *minor's interest* requires from OAS-CIDIP-IIN, The Hague Conference on International Private Law, the European Council and the European Union, and ultimately, the whole international community, to use all means available in private international law for the effective prevention and punishment of the international *abduction* of minors.

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