

Brazilian Supreme Court on the Hague Child Abduction Convention

Guest post by Janaína Albuquerque, International Family Lawyer; Research Associate at the NOVA Centre for the Study of Gender, Family and the Law; Legal Coordinator at Revibra Europa. Janaína represented Revibra, Instituto Maria da Penha and Instituto Superação da Violência Doméstica as amici curiae in the cases discussed below.

The Brazilian Supreme Court has recently delivered a landmark judgment in two Direct Actions of Unconstitutionality (*Ações Diretas de Inconstitucionalidade*, or ADIs), namely ADI 4245 and ADI 7686, concerning the application of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (1980HC). Despite their denomination, these actions did not aim to invalidate the Convention, but rather to harmonize its interpretation with the principles enshrined in the Brazilian Federal Constitution.[1]

The full written judgment has not yet been published. What follows is the official summary, which consolidates the main points reached by the Justices:[2]

“The Court unanimously ruled partially in favor of the requests made in ADI 4.245 and, by majority vote, ruled partially in favor of the requests made in ADI 7.686, on the following grounds:

1. To interpret Art. 13(1)(b) of the 1980 Hague Convention in conformity with the Constitution, recognizing that the exception to the immediate return of the child due to grave risk to his or her physical or psychological integrity or intolerable situation applies in cases of domestic violence, even if the child is not a direct victim, provided that objective and concrete indications of the risk situation are demonstrated, in accordance with the principle of the best interests of the child (Art. 227, CF/1988) and under a gender-based perspective (Arts. 1, III, and 226, § 8, CF/1988);
2. To determine that the National Council of Justice (CNJ) should establish an inter-institutional working group to prepare, within 60 (sixty) days, a proposed resolution aimed at increasing the speed and efficiency of

international child abduction return proceedings, ensuring, through adversarial proceedings and full defense, that the final decision on the return of the child is made within a period not exceeding 1 (one) year;

3. The resolution, which will bring CNJ Resolution No. 449/2022 into line with the terms of this decision, will establish the duty of the respondent to report the existence of any ongoing child custody proceedings in the national territory and will assign the management of such proceedings in the country to the CNJ's National Forum for Children and Youth (Foninj). The requirement for adversarial proceedings and full defense applies both in the cases of Art. 1 and Art. 12 of the Convention. Public and notorious facts and rules of experience (Civil Procedure Code, Arts. 374 and 375) will also serve as elements of conviction;
4. To determine that the Federal Regional Courts issue normative acts to promote the concentration of jurisdiction to process and judge actions related to the 1980 Hague Convention, with regard to restitution proceedings, in one or more courts in the capital and judging chambers, based on Art. 96, I, "d," CF/1988, aiming at procedural uniformity and celerity;
5. To determine the establishment of specialized support centers within the Federal Regional Courts to encourage conciliation, the adoption of restorative practices and methodologies, to qualify and coordinate the performance of psychosocial assessments, and to act as a source of technical and methodological support for judges;
6. To determine that the bodies of the Judiciary Branch, with the support of the CNJ, adjust the electronic case management systems to enable the inclusion of preferential processing tags for all cases that receive the subject code "10921 Child Restitution, 1980 Hague Convention," as established in Art. 27 of CNJ Resolution No. 449/2022;
7. To determine that the Executive Branch adopt structural and administrative measures to strengthen the work of the Federal Central Administrative Authority (ACAF), with the definition of goals, timelines, and performance indicators;
8. To determine that the Executive Branch evaluates the convenience of Brazil's accession to the 1996 Hague Convention (on jurisdiction, applicable law, recognition, enforcement, and cooperation in matters of parental responsibility and protection measures for children), with the preparation of a technical report to be forwarded to the heads of the three

branches of the government;

9. To determine that the Executive Branch, through the Ministry of Foreign Affairs, shall prepare, within six months, a protocol for assisting women and children who are victims of domestic violence, to be adopted in all Brazilian consular units abroad, taking as a reference the pilot project developed by the Consulate General of Brazil in Rome;
10. To call on the Legislative Branch, in dialogue with the Executive Branch, to assess the need for specific legislation to regulate the 1980 Hague Convention, particularly with regard to the procedural and evidentiary aspects of its application;
11. To determine that Federal Regional Courts and Courts of Justice enter into judicial cooperation agreements to establish protocols for coordinated action in cases of international child abduction, including, among other measures, the sharing of information relating to custody actions and actions based on the 1980 Hague Convention and the joint use of multidisciplinary structures and teams, especially for the production of expert reports;
12. Once it is recognized that the conditions set forth in the Convention for determining return are not met, that the Brazilian courts' jurisdiction, as the forum of the taking parent's domicile, is established to decide on the substantive issues involved in the case, including the custody of the child.

Finally, the following judgment thesis[3] was established:

1. *The 1980 Hague Convention on the Civil Aspects of International Child Abduction is compatible with the Federal Constitution and has supra-legal status in the Brazilian legal system due to its nature as an international treaty for the protection of children's rights.*
2. *The application of the Convention in Brazil, in light of the principle of the best interests of the child (Art. 227, CF), requires the adoption of structural and procedural measures to ensure the swift and effective processing of actions for the international restitution of children.*
3. *The exception of grave risk to the child, provided for in Art. 13 (1)(b) of the 1980 Hague Convention, must be interpreted in a manner consistent with the principle of the best interests of the child (Art. 227, CF) and under a gender-based perspective, so as to allow its application when there are objective and concrete indications of domestic violence, even if*

the child is not a direct victim.

All in accordance with the vote of Justice Luís Roberto Barroso (President and Rapporteur). Justice Dias Toffoli was partially defeated in ADI 7.686, as he considered the action to be entirely well founded. Plenary session, August 27, 2025.”

The judgment introduced three important innovations that will standardize and shape the interpretation of the Convention going forward. First, by recognizing domestic violence as an arguable exception under Art. 13(1)(b), the Court established that this ground can no longer be dismissed on the basis that it is not expressly mentioned in the Convention. Second, the clarification that children need not be the primary victims ensures that courts cannot disregard evidence showing that they merely witnessed the violence, since such exposure also constitutes harm. Third, the instruction to evaluate abduction cases through a gender-based lens acknowledges the multiple and intersecting vulnerabilities faced by migrant women and requires a contextual assessment of each situation.

Nevertheless, the central unresolved issue concerns the evidentiary threshold. While the Court established that proof is required, it also indicated that the standard should be lower, without clarifying what qualifies as objective and concrete indications of violence sufficient to configure grave risk. Given the repeated acknowledgment of the obstacles faced by migrant mothers, it seems evident that demanding criminal convictions would set the bar far too high. What remains uncertain is whether police complaints, medical records, social service evaluations, psychological reports, or even documented but unsuccessful attempts to obtain assistance in the State of origin will suffice. This definition can only be built with time and through the practical application by domestic federal courts.

The timing of the judgment coincides with the organization of the Second Forum on Domestic Violence and the 1980 Child Abduction Convention, scheduled for October 2025 in Fortaleza, Brazil. Building on the discussions initiated at the first meeting in Sandton, South Africa, in 2024, the Forum will once again convene experts from around the world to reflect on the persistent challenges posed by cases involving allegations of domestic and family violence. In this setting, the recent decision of the Brazilian Supreme Court will likely serve as a point of reference for its methodological contribution to advancing a gender-sensitive and human rights-based approach.

Background of the Actions

ADIs are a special kind of proceedings that may only be introduced by the President of the Republic; the President of the Senate, the Chamber of Deputies, or state legislative assemblies; the Brazilian Bar Association; the Attorney General; political parties; or national unions. Unlike ordinary judicial proceedings, whose effects only extend to the parties, ADI rulings have *erga omnes* effect and are endowed with binding force, compelling compliance by the Judiciary, the Legislature, and the Executive at all levels.

The first ADI (4245) was filed in 2009 by the now-dissolved Democratas party (DEM), less than a decade after Brazil's ratification of the Convention and against the backdrop of the *Sean Goldman case*.^[4] The dispute concerned the wrongful retention in Brazil of a 4 year-old child habitually resident in the United States, leading to lengthy proceedings under the 1980HC. Although lower courts initially concluded that Sean had become settled in the new environment, the Supreme Court ultimately ordered his return 5 years later following the death of the taking parent. The litigation attracted intense media scrutiny and sustained significant political and diplomatic pressure. Its repercussions also contributed to the enactment of the *Sean and David Goldman International Child Abduction Prevention and Return Act of 2014*^[5] in the United States, a statute designed to strengthen governmental responses to abduction cases and to oversee compliance by other Contracting States.

Prompted by these circumstances, the DEM party brought the matter before the Supreme Court to assess whether the manner in which the Convention was being applied was compatible with the constitutional framework. Their concern was that, following the damaging repercussions of the Goldman case, domestic authorities had adopted an automatic-return approach without sufficient consideration of the specific circumstances of each case, thereby infringing fundamental principles such as human dignity and the best interests of the child.

The initiating application requested that return orders and urgent measures be issued only after due process and a case-specific assessment; that the one-year time limit not prevail over the best interests of the child; and that the grave risk exception be interpreted broadly. It further sought to limit the Attorney General's

Office's legitimacy to initiate return proceedings, to condition the effectiveness of foreign custody decisions on recognition by the Superior Court of Justice, and to preserve the validity of domestic custody rulings. The main legal basis invoked was Art. 227 of the Constitution, which enshrines the principle of 'integral protection' and imposes on the family, society, and the State the duty to ensure, as an absolute priority, children's rights to life, health, education, dignity, and protection against neglect, exploitation, and violence.

ADI 4245 remained without significant developments for 15 years, until a hearing was scheduled for the presentation of oral arguments in May 2024. The judgment was set to take place in August 2024, yet, the Socialism and Liberty party (PSOL) filed another ADI (7686) in July of the same year, which led to the suspension of the first so that both could eventually be judged together.

The circumstances surrounding the second ADI differed, despite being similarly propelled by not one, but numerous widely covered cases, which were further amplified through social media. Most involved mothers who had fled to Brazil after experiencing discrimination and domestic violence abroad, yet, whose children were nevertheless ordered to return. Public pressure and social mobilization were decisive in bringing these issues to the forefront and making them the central focus of the proceedings.

As regards the merits, ADI 7686 contained only one request: that suspicion or indications of domestic violence in the foreign country be taken into account when assessing the grave risk standard and the applicability of the exception under Art. 13(1)(b) of the 1980HC, so that children would not have to be returned.

The legal basis rested primarily on Art. 226 (8) of the Constitution, which explicitly establishes the State's positive obligation to 'ensure assistance to the family in the person of each of its members, creating mechanisms to suppress violence within the family'.

Oral arguments in ADI 7686 were presented in February 2025, but the rendering of the Justices' votes only began in August. The case was considered by the Plenary of the Supreme Federal Court, composed of eleven Justices, of whom a single member is a woman. Three sessions were needed to conclude, and a decision was finally reached on 27 August 2025. Although the written judgment has not yet been released, the hearings were televised, and each Justice presented at least a summary of their vote. For clarity, the following account is

organized thematically rather than chronologically, highlighting the main strands of reasoning that emerged.

(i) Gender, domestic violence and the reframing of the best interests principle

The deliberations revealed a broad consensus that gender inequalities are central to the evaluation of return requests under the Convention, particularly where domestic violence is raised. Justice Barroso, rapporteur of the case, underscored that most taking parents are mothers fleeing from abandonment or abuse, cautioning that automatic returns in such circumstances risk perpetuating cycles of violence. Justices Mendonça and Cármen Lúcia echoed this concern, stressing that intimate-partner violence destabilizes the family environment and thereby places the child in danger.

Justice Moraes added that the prevalence of taking mothers reflects structural patriarchy, requiring an interpretation of the Convention consistent not only with the standards inscribed in domestic law but also with international human rights instruments such as the UNCRC and the Convention of Belém do Pará. Justice Dias Toffoli supported this approach by grounding it in the Convention's own architecture, highlighting a combined interpretation of Arts. 13(1)(b) and 20, insofar as the latter provides that courts may refuse the return when such an order would conflict with the fundamental principles and freedoms of the requested State.

Taken together, these positions signalled a jurisprudential shift: the Convention's effectiveness in Brazil will henceforth be measured not solely by the speed of returns but by its capacity to reconcile international cooperation with the substantive protection of women and children.

(ii) Procedural and evidentiary standards

A central aspect of the debate revolved around the difficulties faced by migrant women and their intersecting vulnerabilities. Justice Barroso argued that imposing a standard of irrefutable proof in cases involving domestic violence is both inconsistent with the Convention's requirement of urgency and detrimental to the best interests of the child. He stressed that migrant mothers are frequently cut off from institutional resources and isolated from their support networks, which, compounded by linguistic and cultural obstacles, place them at a

significant disadvantage in producing evidence. Justice Toffoli further developed this argument, insisting that courts must apply a gender-based perspective and give decisive weight to victims' testimonies, precisely because these structural barriers cannot be overcome through procedural formalities.

Alongside evidentiary issues, the Justices devoted close attention to procedural safeguards. Justice Flávio Dino criticised the privileged role of the Attorney General's Office, noting that its authority to initiate proceedings produces inequality of arms. While the interests of left-behind parents are defended, even if representation is for the State, taking parents are not ensured access to legal aid. Building on this concern, Justice Cristiano Zanin drew attention to the absence of a specific law governing Hague cases in Brazil. In his view, this vacuum not only generates procedural uncertainty but also creates room for jurisdictional conflicts, especially when custody proceedings are initiated domestically in parallel with return requests.

Other votes highlighted the persistent tension between efficiency and fairness. Justice Nunes Marques stressed that the Convention's effectiveness depends on swift decisions and suggested technology and mediation as tools to accelerate outcomes. Justice Barroso, however, set this pursuit for speed against the structural reality of Brazil's civil procedure, which, though intended to protect due process, is overly complex and has become a recurrent source of delay. Justice Dino noted that, as a result, courts frequently resort to urgent measures, granting return orders without analysing the case in depth and even without hearing the taking parents, a practice he considered incompatible with constitutional guarantees. Justice Luiz Fux disagreed with Dino on this point, resisting the view that judicial discretion should be in any way limited.

(iii) Measures to strengthen the application of the Convention

Apart from the interpretative parameters and procedural elucidations, a series of proposals were advanced to reinforce the Convention's operation through systemic measures and reforms. Consensus emerged around the need for standardized protocols in embassies and consulates to ensure consistent assistance and reliable mechanisms for processing reports of abuse. In addition, the Justices addressed the domestic judicial structure, calling for stronger coordination between federal and family courts and for the use of liaison judges to improve communication with foreign authorities. The Court also encouraged

studies to support legislative initiatives, including the prospect of Brazil's accession to the 1996 HCCH Child Protection Convention as part of a broader effort to align institutional practice with international standards.

A final strand of discussion was dedicated to the participation of children. Justice Cármen Lúcia stressed that they must be recognised as rights-bearing subjects and that procedural mechanisms should be developed to secure their direct involvement in return proceedings. At present, the law provides only for the hearing of children from the age of 12 and contains no guidance on the manner in which their statements are to be obtained. Ensuring that children's perspectives are effectively taken into account was thus deemed essential to aligning the Convention's operation with the principle of integral protection enshrined in the Constitution.

[1] Available in English at: <https://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_b_1_en.pdf>.

[2] Available, only in Portuguese, at: <<https://portal.stf.jus.br/processos/detalhe.asp?incidente=2679600>>.

[3] In the context of Direct Actions for the Declaration of Unconstitutionality (ADIs) before the Brazilian Supreme Federal Court, the term 'thesis' refers to the authoritative interpretative statement of the Constitution that distills the complex reasoning into a concise and binding formula. Arising from the abstract constitutional review of statutes, such theses clarify the constitutional meaning of contested provisions and ensure that the decision extends beyond the specific case at hand. By consolidating the practice of formulating theses at the end of landmark rulings, the Court provides clarity, consistency, and general applicability, thereby guiding judges, public administration, and society as a whole while establishing constitutional standards for future cases.

[4] Brazilian Supreme Federal Court, 2009 Activities Report. Available in Portuguese at: <https://www.stf.jus.br/arquivo/cms/principaldestaque/anexo/relatorio_stf_2009__18032010__qualidade_web__orcamento.pdf>.

[5] Available at: <<https://www.congress.gov/bill/113th-congress/house-bill/3212>>.