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PERSPECTIVE

## A View from The Hague

By Scott M. Gordon

I had the distinct honor of being a member of the United States delegation to the Special Commission regarding the 1980 Convention on the Civil Aspects of Child Abduction (the Hague Convention) and the 1996 Child Protection Convention, held at the Peace Palace in The Hague, Netherlands.

Delegations from 60 different member states, from Albania to Venezuela, attended the iconic Peace Palace, which opened in August 1913. It houses the Permanent Court of Arbitration, the United Nations International Court of Justice and The Hague Academy of International Law. Since that time, it has served as an international center for the promotion of peace and the rule of law. To be part of a multilateral conference on the rule of law during this time of uncertainty and strife was inspiring.

The Hague Convention deals with the thorny issues of the determination of the proper venue for child custody litigation in circumstances involving the abduction or wrongful retention of a child from their nation of habitual residence. The opening lines of the Convention provide the purpose and intent of the Convention; “[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody, [d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access



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...” (The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.)

The Hague Convention is a dynamic agreement between the contracting parties/states and the Special Commission dealing with the practical application of the Convention. It continues to evolve as the nature of cross-border disputes shift and the membership increases. At the inception of the meeting, the Special Convention welcomed Barbados, Botswana, Cabo Verde, Guyana and Cuba as the newest members of the Convention, bringing the number of contracting parties to The Hague Convention to 103.

The Convention applies to children under the age of 16 and in

order to prove a *prima facie* case for return of a minor child, the petitioner must prove three elements: prior to removal or wrongful retention, the child was a habitual resident in a foreign country; the removal or retention was in breach of custody rights under the foreign country’s law; and the petitioner was actually exercising custody rights at the time of the wrongful removal or retention.

There are affirmative defenses to a petitioner provided for in the Convention and much of the discussion in the Special Commission focused on these issues including domestic violence and human rights issues. Some of the affirmative defenses provided for under the Hague Convention include findings:

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that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; that the child objects to being returned and has attained an age and degree of maturity at which the court can take account of the child's views; and that the return would violate the fundamental principles of human rights and fundamental freedoms in the country where the child is being held.

The Special Commission agenda addressed several issues of import. The issues surrounding the impact of domestic violence and human rights issues are increasingly important in discussions about the Hague Convention. Further, the topic of the use of mediation in Hague Convention cases and cross-border child custody cases was a central topic of discussion. The use of mediation as a tool to resolve

these cases is a growing trend among member states. These mediation efforts include state/judicially sponsored programs, NGO programs and private alternative dispute resolution.

The Special Commission also addressed practical operational issues, including the use of virtual appearances and resources in Hague Convention hearings, reduction of delays in the adjudication of petitions, issues surrounding direct judicial communications, the use of undertakings in orders for the return of a child and methods of hearing the voice of the child in proceedings.

One of the most surprising takeaways from the Special Commission is the similarities of the job we are all facing when dealing with child abduction cases. One evening at a judges' dinner and after days of technical and sensitive discussions, I was seated at

a table with judges from Estonia, Australia, Iceland, Denmark and Scotland. After a few minutes of talking about the differences in our respective systems, the conversation quickly turned to the similarity of issues and challenges we all shared - the lack of resources, conducting the hearings with evidence from at least two different countries, the application and understanding of the laws of different countries, dealing with high conflict cases and the emotional aspects involved in these high stakes cases.

Although The Hague Convention is not a topic we deal with every day, the core values of the Convention are topics that we deal with in nearly every child custody case. Determining the proper jurisdiction for litigation, promoting the best interest of children and providing parents and children with meaningful access to each other are principals that resonated in the

Special Commission and should be forefront in our minds when we are deal with child custody issues.

Every day we hear, watch, and read news stories describing discord, uncivil behavior, and conflict. The Special Commission was a window to a different side of multinational relationships. I walked away from this experience with a continued deep admiration for the professionals serving with the United States Department of State, the dedication to justice and the rule of law the professionals from 60 different countries brought to this meeting and the international commitment to the best interest of children. And for me, I took away a great deal of needed hope.

The Conclusions and Recommendations of the Special Commission will be available on the website of the Hague Conference on Private International Law ([www.hcch.net](http://www.hcch.net)).