

TESTIMONY OF JUDGE PETER J. MESSITTE

Before The
Tom Lantos Human Rights Commission
Of The
United States House of Representatives
December 2, 2009

My name is Peter J. Messitte. I am a United States District Judge for the District of Maryland, where I have served since 1993. For eight years before that I was a Judge on the Circuit Court for Montgomery County, Maryland

Please bear with me while I recite some of my qualifications, which I think you will find give me something of a unique perspective on today's hearing.

Currently I am one of 4 American Judges (the only Federal Judge) who has been designated by the U.S. State Department as an International Network Judge under the Hague Convention on Child Abduction. I'll say more about this in a moment.

Although federal judges do not ordinarily deal with cases involving domestic relations, it happens that under the Hague Convention federal and state judges have concurrent jurisdiction. That is, a federal judge may as easily hear a case under the Convention as a state judge can.

Beyond that, for the past 25 years I have been very much involved in Rule of Law activities around the world, principally in Latin America and Africa, but also in Europe and Turkey. From 1997 to 2003, I was a member of the International Judicial Relations Committee of the U.S. Judicial Conference, where I chaired the Working Group on Latin America and the Caribbean. But Brazil has always been my principal focus. My wife and

I were Peace Corps volunteers in São Paulo in 1967-68 and both as a lawyer and judge I have maintained extensive contacts with Brazil and the Brazilian Judiciary since then.

I am proud to say that my work in bringing together the Brazilian and American Judiciaries has been widely recognized in Brazil and last year, on account of that, I was made an Honorary Citizen of the City of São Paulo. I speak fluent Portuguese.

I am also quite familiar with the Goldman case, having met with David Goldman and his attorney, Patricia Apy. I have spoken with a number of Judges in Brazil about the case and have helped keep the State Department apprised of the significance of various court rulings from Brazil in connection with it.

But let me come back to my role as a Judicial Network Judge under the Hague Convention where I serve as one of the American designees, along with Judge James Garbolino of California, Judge Mary Sheffield of Missouri, and Judge Judith Kreeger of Florida.

The Hague International Judicial Network is a fairly recent innovation of the Hague Convention which operates pursuant to a draft protocol under the Convention, by which each of the signatory countries designates one or more judges to represent their judiciary in international contacts involving the Hague Convention. Since all Hague Convention cases by definition involve international contacts, having specifically designated judges in each country in terms of facilitating the cases is extremely helpful.

As stated in the draft protocol:

“the role of a member of the International Hague Network of Judges is to be a link between his or her colleagues at the domestic level and other members of the Network at the international level. There are two main communication functions exercised by members of the Network. The first communication function is of a general nature (*i.e.*, not case specific). It includes the sharing of general information from the International Hague Network or the Permanent Bureau to his or her colleagues in the jurisdiction and the reverse flow of information. It may also encompass participation in international judicial seminars. The second communication function consists of direct judicial communications with regard to specific cases. For example, members of the Network may be involved in facilitating arrangements for the safe return of the child, including the establishment of provisional protective measures and the provision of information about custody or access issues or possible measures for addressing domestic violence or abuse allegations. The objective of these communications is to favour the prompt return of the child and address any lack of information that the competent judge has about the situation and legal implications in the State of the habitual residence of the child.”

International judicial contacts are always initiated with appropriate safeguards, being limited primarily to logistical issues and the exchange of information as opposed to the merits of particular cases; characterized by prior notice to the affected parties; recordkeeping of all communications; written confirmation of all arrangements reached; and, where appropriate, the presence of the parties and their counsel during the communications.

It is fair to say that, in the 18 months or so that the Network has been up and running, significant channels of communication have opened up among and between judges from all over the world. Not only are we increasing our knowledge and understanding of one another's legal and judicial systems, we are increasing our mutual respect for other systems. We, as American Judges, have already fielded a number of questions from foreign judges in terms of how to connect with American counterparts who are handling a particular problem under the Convention. For example, Judge Judith Kreeger, one of our four U.S. Network

Judges, reports a recent contact with an Australian Judge whom she met at the Hague last year who, after being put in touch with the Iowa Judge who had the other side of her case, expressed real satisfaction with Judge Kreeger's assistance in the matter. Judge Kreeger says, "This may sound immodest, but the e-mail messages tell the story."

You might also be interested in learning that the Permanent Bureau of the Hague Conference publishes The Judges' Letter on the International Protection of Children, a bi-annual publication available on the website of the Hague Conference, the objective of which is to provide a mechanism for the exchange of information concerning judicial co-operation in international child protection. The Permanent Bureau also maintains an International Child Abduction Database (INCADAT), which provides information on the Convention as well as links to other information on the subject, the central components of which are the summaries of significant judicial decisions from around the world relating to child abduction. These summaries, which are set out on a standard form in English and French, provide the basis for any search of the database.

There is, by the way, a very important parallel to our work with foreign judges and that is our work as Network Judges with American Judges. Because of our particular experience with the Hague Convention, we are in a position to field questions from American Judges on how to handle Hague Convention cases, even if there is not an immediate need for direct contact with the foreign judge. We are often able to assist the judge in providing appropriate information, urging the importance of prompt resolution of the cases and we can do so without intervening directly in the particular case. Most American Judges have not had

direct contact with the foreign judge. We are often able to assist the judge in providing appropriate information, urging the importance of prompt resolution of the cases and we can do so without intervening directly in the particular case. Most American Judges have not had experience with Hague Convention cases and this sort of recourse to judges who have more experience has provided great reassurance to our judges who get these cases now and again.

But it is our international role as Hague Judicial Network Judges that is most relevant to today's proceedings. Beginning approximately 2 years ago and most recently in January of this year in Brussels, my three colleagues and I have already attended several international conferences held especially for the Network Judges. The results have been very promising.

What I am talking about, to coin a term, is Judicial Diplomacy of the highest order, a level of interaction that is not so well known as the traditional channels of diplomacy. It is bearing fruit as the network begins to expand.

Let me turn to Brazil and the Goldman case.

It is of course a very unfortunate case and one can only feel the greatest compassion for what David Goldman has had to go through. I also feel badly for the Brazilian Judiciary, which I know to be much better than it has shown in this case. The case should have been resolved years ago and Sean Goldman should have been returned to his father in New Jersey.

But this much needs to be said. Brazil only acceded to the Hague Convention in 2000. (We acceded in 1988, eight years after the Convention was negotiated.) Before the Goldman case, Brazil's judges – particularly its state court judges – had little familiarity with the

courts there, where the most recent decision by the Federal Trial Court in Rio de Janeiro was that Sean should be returned to David Goldman. That decision is now on appeal to the Federal Regional Tribunal in Rio whose decision on appeal is expected literally any day and which, I strongly believe, will affirm the decision to send Sean home.

I wish I could say that things will happen quickly thereafter and that Sean will be returned right away. But one needs to note the possibility, even likelihood, of further appeals to the Superior Tribunal of Justice and then to the Supreme Federal Tribunal in Brasília, during which time the order of return may be stayed. That, realistically speaking, could take months and so long as the Brazilian Appeals Courts continue to suspend the effect of the return order of the Federal Trial Court, that much time will have to pass, even if (as I seriously believe) both higher courts will ultimately order the return of the child to his natural father.

Now what does all this say? To me, it makes the point that while Brazilian justice may be unduly slow, it is also a justice characterized by an independent judiciary, precisely as the Brazilian Executive (President Lula and Brazilian diplomats, among others) have maintained. The Brazilian Judiciary does not take its marching orders from the Executive or from anyone else; as indeed is the case of judiciaries in most countries of the world.

But in my view there is at least one bright spot, if one can be permitted to say that at all. The Goldman case has raised the profile of the Hague Convention to its highest profile ever. Brazilians and Brazilian Judges have become and every day are becoming increasingly aware of the Convention and here I speak from personal knowledge. The Supreme Federal

Tribunal, in particular, has on its website and has had for some time, an elaborate explanation of the way the Hague Convention is supposed to operate, including its emphasis on the prompt return of a child to his or her jurisdiction of habitual residence. Judicial seminars have been held in Brazil on the topic of the Convention and continue to be held. Indeed, in March of 2010, the Supreme Federal Tribunal is planning a seminar on the topic in Brasília, at which, as I understand it, representatives of various countries of Latin America will be brought together to discuss the Hague Convention. I anticipate that I and my American Judicial Network colleagues will be invited to participate and make presentations at that program.

Thus you have Judicial Diplomacy going forward, not only in the Goldman case in Brazil, but Judicial Diplomacy which is beginning to reach around the world.

I and my American Judicial Network colleagues know there may be certain policy decisions which Congress will take that would involve tightening the enforcement mechanisms under the Convention. We do not wish to enter into that realm.

But a very interesting point, apropos of the international conference that Brazil proposes to hold in March, is a project that my colleagues and I have been discussing for many months.

We strongly believe that a Western Hemisphere conference of Hague Convention Network Judges and Central Authority representatives ought to be convened by the United States, specifically in Washington. (Non-signatory countries such as Japan could certainly be invited too.) We have been talking about this because there is a growing network of

judges throughout Latin America, independent as they and their judicial colleagues may be, which is engaging in serious talk about the need for regional efforts to make sure that the Hague Convention is properly implemented. Just to show you how topical these matters are, on Friday of this week – the day after tomorrow – there will be a video conference originating in Montevideo at which a number of Latin American Network Judges will be gathering. The American Embassy in Montevideo is the venue for the meeting. I will be patching in and participating in the Conference by video from my Courthouse in Greenbelt.

And on another point, just to demonstrate how remarkably topical these matters are, this very afternoon I have a meeting which was set weeks ago, with the Central Authority representatives from Brazil under the Hague Convention to talk about any number of issues, including the Goldman case. Under the International Judicial Network protocol, judges are urged to develop just such contacts with Central Authorities from other countries.

The Hague International Judicial Network, in sum, is a critical new enterprise and we have only the highest expectations for its increasing success.

So, I hope it is not out of turn for me to suggest that if Congress is prepared to fund a hemispheric conference on the Convention (and we may be talking about half a million dollars to do so), such a conference would literally make a world of difference. Congress could certainly count on the collaboration of all the American Judicial Network Judges, as well as the State Department and other experts to participate. We would certainly anticipate inviting Secretary of State Clinton, Congressman Smith, and other of his colleagues to participate in such a conference.

Let me close by citing one example of the sort of innovations that have been emerging from the collaborative efforts of our Network Judges, a suggestion we recently proposed to the State Department. It is this: In each of the jurisdictions where a major American airport exists (e.g. JFK, LAX, Miami), a 24/7 duty judge should be designated by that jurisdiction to be available for emergency contact in the event that a parent is seeking to depart precipitously from the United States in violation of the custody order of an American Court. If that local judge can put a hold on the case for up to 24 hours, just enough time to hear from the State that has custody jurisdiction over the child, it is quite possible that a number of inappropriate abductions could be prevented.

That is the kind of contribution that is emerging from our judicial networking.

If we could share ideas such as these, as well as other important concerns under the Hague Convention, with our colleagues from around the Hemisphere – something never before done – we believe we could make a serious long term contribution to the handling of the very difficult issue of international child abduction.