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EDITORIAL

3rd Special Commission: progress in the midst of missed opportunities

The Hague Conference on Private International Law hosted the 3rd Special Commission last June resulting in clear advances, yet much work remains for subsequent Commission meetings.

Without a doubt, there were great expectations for the record gathering of over 200 high level adoption experts from about 85 countries and 15 international non government organisations at the 3rd Special Commission (see Review 5/2010). To some extent these expectations were fulfilled, but in other areas, they were left somewhat wanting.

Risks and abuses

A day dedicated to the abduction, sale and traffic of children for adoption provided an unprecedented opportunity to consider the 'grey zones' of intercountry adoptions. It was refreshing to see the openness with which this sensitive topic was broached and the common resolve to tackle the problem. The conclusions and recommendations drawing the attention of States to the essential features of a well regulated system provide a very useful lobbying tool calling for necessary reforms. The establishment of an informal working group to examine practical ways of combating abuses is also a step in the right direction, even if the question of adequate resources

to establish and ensure the viability of such a working group remains open.

Guide to Good Practice for Accredited Bodies

With the help of 46 States who responded to its questionnaire and a small working group of experts, the Permanent Bureau managed to prepare a comprehensive draft Guide to Good Practice on accredited bodies. ISS/IRC believes that the Guide will prove to be an excellent resource for practitioners, with many advances relating, for example, to the storage of data and the separation of costs from contributions and donations. It is however unfortunate that, discussions on many pertinent issues relating to accredited bodies – such as use of the internet and provision of development aid – were confined to the review of the Guide and thus found little reflection in the final conclusions and recommendations.

Information sharing opportunity

The 3rd Special Commission provided a unique occasion for countries to share updates on their intercountry adoption laws, policies and good practices. There was an abundance of information shared, which

was in general new and helpful but occasionally repetitive, covering well trodden ground. This was no doubt partly due to the wide-ranging agenda. While account must clearly be taken of agreed principles in setting the framework for discussions, it could have been of further use to focus more especially on the major difficult issues that have emerged since the last Commission. Thus, extra time might have been devoted to questions such as habitual residence in the light of increased mobility, and recognition of adoptions where THC-93 has not been complied with.

Conclusions and recommendations

Whilst there is room for improvement, ISS/IRC is pleased to see some major advances in the conclusions and recommendations (hereafter conclusions) such as the need to establish, in all cases, a clear separation of intercountry adoption from contributions, donations and development aid, as well as an unequivocal declaration that private and independent adoptions are not compatible with the Convention and should be prohibited. The need for a study on the relationship between international surrogacy and intercountry adoption was also usefully recognised.

Acknowledging that the Permanent Bureau has its own diplomatic rules that must be observed when managing such an important gathering, the way in which the draft conclusions were prepared – by a small drafting group on the final evening (and into the early hours...) of the meeting – had however some regrettable consequences.

First, it meant that substantive discussion on the final morning, based on working documents that had not been previously reviewed, was not reflected in the draft.

Second, the results of the different discussions figured unevenly in the draft conclusions. For example, general agreement on the need to “reverse the flow of files”, to avoid receiving countries essentially soliciting adoptable children from countries of origin, found no mention. Similarly, although there had been support

for the idea that applying the subsidiarity rule would require a minimum timeframe, and therefore might imply *inter alia* a minimum age for children to be considered as adoptable abroad, it did not figure in the draft conclusions. Even more surprisingly, perhaps, the many very serious concerns evoked by States and others regarding responses in emergency situations, often with specific reference to Haiti (and including by the Haiti delegation itself), were virtually disregarded in the official outcome.

Third, and particularly importantly, the draft conclusions were consequently distributed just two hours before the meeting was scheduled to end. This left precious little time for experts to review the text to ensure that all the issues were appropriately covered. As a result, while some amendments to the wording of individual conclusions were proposed orally, it proved impossible to suggest the inclusion of additional points at that late stage.

In the future, it may be more opportune to address all relevant conclusions and recommendations at the end of each day (or first thing the following morning) of the Commission. By doing so, all issues could be exhaustively addressed and persons only attending the Commission for part of the time could ensure that their views are considered. Moreover, this alternative would mean that the working group at the end of the Commission would only have the task to ensure that the conclusions are coherent and not repetitive.

The Hague Conference is to be congratulated for its enormous efforts in hosting the 3rd Special Commission dealing with the complex issues linked to intercountry adoptions and we hope that States will take on board the conclusions, especially with regard to supporting the technical assistance programme of the Permanent Bureau. ISS/IRC looks forward to continued collaboration with The Hague Conference and others, working towards better protections for all involved in intercountry adoption and dealing with unaddressed issues.

ISS/IRC team
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