

The Internationalization of Family Law

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INTRODUCTION

The internationalization of family law has been a visible phenomenon on the continent of Europe much longer than it has been in the Western Hemisphere, and particularly in the United States. In any family law dispute involving parties of different nationalities, an important question will be what law should be applied to the dispute. This question is complicated by the different connecting factors used worldwide to determine jurisdiction, and the multitude of applicable laws for the resolution of family law problems. This Paper describes the development of truly international norms for resolving family law disputes, through the preparation of international treaties. First, it describes the historical development of these connecting factors, and their influence on the first set of family law treaties created at the beginning of this century. This Paper then describes how these treaties were revised and expanded during the middle part of this century into the basis for the new international family law norms we are using today. This Paper concludes with a discussion of how these new norms are being refined today, and what must be done to develop them further.

I. HISTORICAL DEVELOPMENT OF INTERNATIONAL FAMILY LAW CONCEPTS

On the international level, today's language of family law norms was heavily influenced by the concepts of nationality and domicile, which were refined at the end of the nineteenth century. The ideas of the Italian politician and theorist, Pasquale

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Mancini,¹ who posited that matters of personal status were to be governed by the nationality of the person, became broadly established on the European continent in the second half of the nineteenth century. During this time, the United States and most Latin American countries broadly applied the principle that jurisdiction over personal matters was determined by domicile, and having established jurisdiction, the courts should apply the law of that person's domicile.

For personal status purposes, the traditional definition of domicile in England differed greatly from the American usage. In practice, English domicile came closer to the European concept of nationality, since upon departing from an acquired domicile the person automatically reacquired her or his original domicile. Moreover, the children of a person living abroad who had not acquired a foreign domicile, such as a British officer serving in India, acquired and held British domicile even though those children had been born and reared, up to a certain age at least, in India.²

On the other hand, the United States and the Latin American countries were countries of immigration, and new immigrants were integrated as quickly as possible. Thus, an Italian immigrating to the United States at the end of the nineteenth century acquired United States domicile immediately, even though it might take some time before acquiring United States nationality. Personal status matters in the United States courts were therefore governed almost entirely by local law, partly because a court would not normally take jurisdiction in a family matter unless the person invoking its jurisdiction was domiciled there. For example, the United States had no ecclesiastical courts, and marriage was a civil contract. Indeed, the informal contractual status known as "common law marriage" may have been an American innovation. Common law marriage was originally de-

¹ Mancini was also the early prophet of international unification of conflict rules. See G. Parra-Aranguren, *General Course of Private International Law: Selected Problems*, in 210 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 43 (1989).

² See R.H. GRAVESON, *THE CONFLICT OF LAWS* 199-204, 208-09 (6th ed. 1969); LAW COMMISSION, WORKING PAPER NO. 88, *PRIVATE INTERNATIONAL LAW: THE LAW OF DOMICILE* 17-18 (1985); SCOTTISH LAW COMMISSION, CONSULTATIVE MEMORANDUM NO. 63, *PRIVATE INTERNATIONAL LAW: THE LAW OF DOMICILE* 51-53 (1985).

signed to permit the recognition of uncelebrated marriages contracted in loosely-organized frontier areas. It was practical because it often brought marriages entered abroad into validity under the local law of the couple's new domicile. The question of the validity or invalidity of a marriage celebrated in a foreign country would normally be moot if both purported spouses were domiciled in a state which recognized common law marriages, and they had lived there as husband and wife at a time when there was no impediment to their marriage in that state.³

The Latin American countries attempted to join together and create international treaties on the conflict of laws for, among other topics, families and personal status, in Lima, Peru, in 1877-78. The draft on family matters that emerged was inspired by the nationality principle of Mancini. Partly because of the use of the nationality principle, the treaty was ratified only by Peru.⁴

In contrast, a decade later a group of Latin American countries gathered together at Montevideo and drew up a series of international treaties on private international law.⁵ The treaties that dealt with personal status were primarily based on the domicile of the person as the connecting factor both for jurisdiction and the applicable law. This series of Montevideo Conventions was widely ratified.

Four years afterwards, with inspiration from the success of the Montevideo Conference, the first meeting of the Hague Conference was held and an ambitious program of family law was put forward, along with drafts of treaties on civil procedure questions.⁶ The family law work undertaken at The Hague resulted

³ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 202 (2d ed. 1985). *But see* ERIC M. CLIVE & JOHN G. WILSON, *THE LAW OF HUSBAND AND WIFE IN SCOTLAND* 116-18 (1974). The persistence of this legal institution in a number of the states in the United States is attested by the *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS* 192 (1970).

⁴ See Parra-Aranguren, *supra* note 1, at 40-41.

⁵ See *id.* at 41.

⁶ For a brief history of the developments leading to the Latin American and European initiatives, see K. Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 *INT'L & COMP. L.Q.* 553, 554-57 (1993). For a more extensive history, see generally Kurt H. Nadelmann, *Multilateral Conventions in the Conflicts Field*, 19 *NETH. INT'L L. REV.* 107 (1972).

in five international conventions,⁷ adopted at the Third and Fourth Sessions of the Conference in 1900 and 1904, respectively.

All of these conventions based the applicable law and jurisdiction over personal status primarily on the national law of the persons in question. These treaties were ratified rather broadly. However, growing difficulties in the operation of the nationality principle, which became apparent in the period leading up to World War I, caused a number of denunciations of these treaties. Gradually over the years, most of the parties to these treaties have denounced them.⁸

During this time, the United States and United Kingdom had stayed apart from both the South American work and the European work. The U.S. indicated it was not participating in the inter-American work because of basic differences between the common law and civil law systems.⁹ Further, the U.S. stated that most private law, including family law, was governed by the laws of the various states, and that the federal government should not, for constitutional reasons, enter into negotiations that might lead to binding treaties establishing uniform conflict of laws principles for application in private law matters. The United Kingdom was also invited to the work in The Hague but declined to participate, apparently because the principle of nationality, which was expected to dominate in the family law treaties, was not acceptable in the English tradition.

The Hague Conference met again in the 1920s in an attempt to salvage the old family law treaties by preparing protocols,¹⁰ but to no avail. These old Hague treaties eventually died on the vine or were replaced. However, the inter-American system produced the Bustamante Code of 1928,¹¹ as well as a revised series of Montevideo Conventions in 1939 and 1940. These latter Conventions were notable because the drafters tried to create a

⁷ See Lipstein, *supra* note 6, at 561-70.

⁸ See L.I. de Winter, *Nationality or Domicile? The Present State of Affairs*, in 128 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 347, 378-79 & nn.1-4 (1969).

⁹ See Nadelmann, *supra* note 6, at 117, 122, 126-27.

¹⁰ The United Kingdom sent a delegation in 1925 for work on bankruptcy, while the United States declined the invitation. See *id.* at 139.

¹¹ Bustamante Code of 1928, 86 L.N.T.S. 111.

definition of "domicile" for purposes of the conventions on civil status. This new definition of domicile started with a reference to "habitual residence."

II. THE NEW SERIES OF FAMILY LAW CONVENTIONS

In Europe, the preparation of international family law instruments had taken a twenty-year pause during the 1930s and 1940s. The lessons learned from older treaties and concepts influenced a series of mid-century treaties, from which today's international family law norms are drawn. These developments culminated in the 1961 Convention on the Protection of Minors.¹² A difficult problem of the post World War II years was the dislocation and separation of families, which resulted in the person obligated to pay child support often living in a country different from that in which the child was living. This matter had been addressed by UNIDROIT (the Rome Institute), and in 1956 three treaties on the international collection of child support were drafted. One of these was the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, drafted under the auspices of the United Nations. This treaty is still in force among fifty-two countries and was studied in a meeting at The Hague last year.¹³ It is basically a cooperation treaty that provides for two party countries to cooperate in obtaining a judgment. The second of the conventions was on the law applicable to child support.¹⁴ The third convention was on the recognition and enforcement of child support orders.¹⁵ All of

¹² Convention Concernant la Compétence des Autorités et la Loi Applicable en Matière de Protection des Mineurs [Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants], *opened for signature* Oct. 5, 1961, 658 U.N.T.S. 143 [hereinafter 1961 Convention].

¹³ See Hague Conference on Private International Law: Maintenance Obligations: Note on the Operation of the Hague Conventions Relating to Maintenance Obligations and of the New York Convention on the Recovery Abroad of Maintenance, Prel. Doc. No. 1 (drawn up by Michel Pelichet, Sept. 1995). The term "maintenance" is used in British English where the term "support" would be used in the United States.

¹⁴ Convention on the Law Applicable to Maintenance Obligations Towards Children, Oct. 24, 1956, 510 U.N.T.S. 161.

¹⁵ Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, *opened for signature* Apr. 15, 1958, 539 U.N.T.S. 27.

these have been widely ratified on the continent of Europe, but not very much beyond.

By the 1930s, the 1902 Convention on Guardianship was the only one of this old series of family law treaties that had retained a certain amount of currency. It was the only family law convention that was expressly preserved and resuscitated in the Treaty of Versailles¹⁶ and other peace treaties after World War I.¹⁷

The aftermath of World War I brought a number of changes in children's law and in the context which surrounded children's law. Child protection legislation was passed in some of the European states and in some of the states of the United States.¹⁸ With the creation of the International Labor Organization (ILO) came certain treaties intended to protect children from exploitation for purposes of labor. These treaties set the minimum ages for the admission of children to industrial employment.¹⁹ Additionally, on September 24, 1924, at Geneva, the League of Nations adopted a declaration on the rights of the child.²⁰

Also in 1924, Sweden adopted modern legislation providing for public intervention to protect endangered children. This legislation has its own place in the internationalization of family law during the twentieth century. This legislation provided, among other things, for an institution known as the "protective upbringing" (*skyddsuppfostran*) of a child. Reflecting, as it did, the idea of state intervention to protect children, even from their own families (which had inspired the ILO convention limiting industrial work by children), the Swedish legislation brought new public law remedies to bear on the old-styled parental, and even paternal, authority.²¹

¹⁶ Treaty of Versailles, art. 282, June 28, 1919, 225 L.N.T.S. 317-18.

¹⁷ See, e.g., Treaty of Trianon, art. 217, June 4, 1920, 6 L.N.T.S. 188; Treaty of Saint-Germain, art. 234, Sept. 10, 1919, 226 L.N.T.S. 98-100.

¹⁸ See FRIEDMAN, *supra* note 3, at 351, 560-62; C.B. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 584-88 (2d ed. 1954).

¹⁹ The Minimum Age (Industry) Convention of 1919 entered into force on June 13, 1921. See INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1981, at 713 (1982). The Convention was revised in 1937 and 1973. *Id.* at 713 & n.1.

²⁰ See PHILIP E. VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD 155-59 (1992).

²¹ Swedish Law of 6 June 1924 on the Protection of Children and Young Persons

This legislation is particularly important because, thirty years later, it resulted in the famous *Boll* case.²² This is the only case in which a convention drafted by the Hague Conference on Private International Law was the principal subject of interpretation before a court with worldwide jurisdiction.²³ In *Boll*, the Netherlands sued Sweden concerning the guardianship of a young girl, Marie Elizabeth Boll. Marie was the child of a Dutch seaman and his deceased Swedish wife. The child had lived in Sweden with her mother before her mother's death but, under the prevailing rules of nationality at the time, had only the nationality of her father, Dutch nationality. Despite Marie's residence in Sweden, the Dutch authorities assigned guardianship of the child according to their procedures. The Swedish authorities overrode this guardianship. They placed the child under a protective public care order pursuant to the 1924 legislation, basing jurisdiction on the fact that Marie was residing in Sweden with her maternal grandparents.

The International Court of Justice construed the 1902 Hague Convention, which had been written only in French and dealt with conflict of laws as to guardianship (*tutelle*), and found that the concept of guardianship should be interpreted narrowly. Therefore, the 1902 Convention did not prevent the interposition of a completely different legal institution of public law, here the Swedish order to take the child into "care" or "protective upbringing." This decision in effect allowed a state to void a guardianship established by another state with presumed jurisdiction by adopting a domestic public law measure voiding it of content.

The Hague Conference, which had created a permanent organization with a small Permanent Bureau three years before the *Boll* decision, responded immediately to this new phenomenon of the International Court of Justice interpreting a Hague Conference Convention. The result was the convention drafted at the Conference's Ninth Diplomatic Session in 1960, first signed

(1924).

²² *Boll Case* (Neth. v. Swed.), 1958 I.C.J. 55 (Nov. 28).

²³ I.C.J. STATUTE art. 36. The International Court of Justice was created in 1946 by the United Nations to succeed the Permanent Court of International Justice, which had been created under the League of Nations.

on 5 October 1961 (also drafted only in French) and known in the English language as the Convention of October 5, 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors ("1961 Convention").²⁴

The 1961 Convention reflects a compromise between the advocates of "nationality" as the connecting factor for jurisdiction, as well as for the applicable internal state law governing child custody and access, and the advocates who favored the more modern fact-centered connecting factor of "habitual residence" (which bears a resemblance to domicile, but softens the subjective and intent-based content of most concepts of domicile). In reaching this compromise, the 1961 Convention brought an innovation in terminology.²⁵

First, in order to correct the result of the *Boll* decision in the International Court of Justice, the 1961 Convention recognized a new concept referred to as "measures directed to the protection of [the child's] person or property."²⁶ This concept was expressly intended to be broad enough to apply not only to a state's own private law measures, such as custody orders, but also to public care orders of all kinds. The 1961 Convention applies to measures protecting the child's property as well as to those protecting the child's person.

Second, the 1961 Convention covers both types of protective measures, whether they are taken by judicial or administrative authorities, and specifies that such authorities are "*compétentes*" to take such measures. The 1961 Convention employs the French word "*compétent*," which covers both the *powers* of administrative

²⁴ 1961 Convention, *supra* note 12. The text of this Convention in the official French version and in an English translation was published in the United Nations Treaty Series in 1969. *Id.* When the Convention on the Civil Aspects of International Child Abduction was drawn up at the Conference's Fourteenth Session in 1980, this Convention was expressly given priority over the 1961 Convention as between parties to both Conventions. Hague Conference on Private International Law: Final Act of the Fourteenth Session, Including the Convention on the Civil Aspects of International Child Abduction, *concluded* Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter 1980 Convention]. The reference to the 1961 Convention in Article 34 of the 1980 Convention followed the translation of the title as published in the United Nations Treaty Series but substituted the term "minors" for the term "infants."

²⁵ See de Winter, *supra* note 8, at 441-44; René Cassin, *La Nouvelle Conception du Domicile dans le Règlement des Conflits de Lois*, in 34 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 659 (1930).

²⁶ 1961 Convention, *supra* note 12, at 145.

authorities and the *jurisdiction* of judicial authorities. The idea of "*compétence*" in French was initially translated in English as "powers." However, during the pending revision of the 1961 Convention the English version utilized the word "jurisdiction," so to encompass the powers of both administrative and judicial authorities.²⁷

Third, the 1961 Convention emphasizes the concept of the "interests of the child"²⁸ as the basis upon which the authorities of the child's nationality might take measures that would override those taken by the authorities with initial jurisdiction, usually the authorities of the child's habitual residence. This was to be done only after notice had been given to the authorities of the child's habitual residence, a requirement of cooperation that in practice has been largely ignored.

This emphasis upon the interest of the child, a concept that appeared only for emergency measures in the 1902 Convention, reflected the intervening shift of attitudes that had been internationally expressed in the 1924 Declaration of the Rights of the Child and in the 1959 United Nations Declaration on the Rights of the Child. This was a recognition at the international level of a shift taking place in the domestic laws of many countries, from an emphasis on paternal or parental authority towards an emphasis on protecting the child, even from the child's parents. This concept foreshadowed the ideas reflected in the later 1989 Convention on the Rights of the Child,²⁹ that a child should be viewed as a subject of rights and not merely as an object of rights or of protective action.

²⁷ *Id.* French had been adopted as the sole language of the Hague Conference on Private International Law at the Conference's First Session in 1893, when it was still considered to be the traditional diplomatic language of Europe. In 1964, when the United States joined the Conference, English was brought in as a second official and working language. The revision of the 1961 Convention was completed and signed, in English and French texts of equal authenticity, on October 19, 1996. Hague Conference on Private International Law: Final Act of the Eighteenth Session with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference, Oct. 19, 1996, 35 I.L.M. 1391 [hereinafter 1996 Convention on Protection of Children].

²⁸ 1961 Convention, *supra* note 12, at 147.

²⁹ *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR 3d Comm., 44th Sess., U.N. Doc. A/44/736 (1989). As of September 1, 1996, 187 nations had ratified this treaty. The United States signed in February 1995, but has not yet ratified.

III. INTERNATIONAL CONCEPTS

In the 1961 Convention and subsequent conventions, two new concepts were established that influenced further efforts to create international family law norms. The first of these is "measures directed to the protection of [the child's] person or property." The second is "international child abduction."

A. *Measures Directed to the Protection of Child's Person or Property*

The Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors introduced the phrase "measures directed to the protection of [the child's] person or property."³⁰ The concept embodied within this new phrase was specifically intended to be broader than the terminology used in any country's domestic law, and to straddle the difference between *private* law measures, such as the attribution of custody rights, and the taking of a child into *public* care. However, this new concept was not intended to extend to adoption.

The institution of the adoption of children as known in Europe was implicitly excluded from the 1961 Convention. Adoption was excluded because the Hague Conference was already working on another convention on the conflict of laws and jurisdiction in cases of adoption. This exclusion is evidenced by the linguistic phrases that still framed the Hague Conference's conventions at the time. Adoption would not have been characterized as "protection" of a child, as in the 1961 Convention, but rather as another form of "*filiation*." *Filiation adoptive* is the creation of a parent-child relationship by adoption. The protective aspect of filiation, at least in the context of the 1950s and 1960s in Europe, would have taken a secondary role to its primary purpose and effect, which was to establish a parent-child relationship. Therefore, "adoption" would not have been encompassed in "measures directed to the protection of [the child's] person or property."³¹

³⁰ 1961 Convention, *supra* note 12, at 145.

³¹ Cf. Hague Conference on Private International Law: Final Act of the Seventeenth Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 2, para. 2, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter

However, when the Conference undertook the revision of the 1961 Convention, some three decades after it had been drafted, the common law countries (which had never become parties to the 1961 Convention) found themselves confused by the phrase "measures directed to the protection of [the child's person or property]." Since one of the purposes of the revision was to broaden the attractiveness of the 1961 Convention (which had been ratified by only ten states on the continent of Europe, including Turkey), an effort was made to clarify, at least in illustrative form, the content of this expression. Therefore, this expression appears in Article 1 of the 1996 Convention on Protection of Children, and the measures encompassed by the expression are set out in detail in Article 3(a)-(g).³² This clarification was assisted by the fact that a few courts had addressed the meaning of this phrase. For example, the States Parties' courts had addressed whether suits involving visitation rights concerned such "measures." As a result, Article 3 of the 1996 Convention is a truly international concept that is independent of any country's particular legal concepts and institutions, and encompasses a wide variety of those institutions, including even the *kafala* known to the countries of North Africa.³³

B. International Child Abduction

The drafters of the 1961 Convention expressly considered including a provision addressing the removal of a child's habitual residence from one country to another with the intent to evade the competent authorities, a concept mainly applicable to custody disputes. However, the drafters were unable to agree on a definition or a manner of describing this phenomenon, so the delegates to the Ninth Session omitted the proposed provision.³⁴ A number of countries that adhere to the principle of nationality as governing the personal law of a child or a family

Intercountry Adoption Convention].

³² 1996 Convention on Protection of Children, *supra* note 27, art. 3(a)-(g).

³³ *Id.*, art. 3(e). Morocco, incidentally, became the first country to sign the 1996 Convention, on October 19, 1996.

³⁴ Preliminary Draft Convention of 30 March 1960, art. 6, in 4 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION 14-17 (1961).

were unable to concede that removal of a child from her domicile or habitual residence to the country of her nationality by a parent having that same nationality was fraudulent evasion. Further, we have found in our international negotiations that referencing concepts such as "fraud," "evasion," "good faith," or "bad faith" is undesirable in an international convention, because of the great cultural disparity between different legal systems' interpretation of such concepts.

The 1961 Convention used the factually-based term "habitual residence" instead of the term "domicile," because "domicile" had taken on different connotations in different countries. Nonetheless, courts regularly found that children who were abducted by a parent, particularly a parent having the nationality of the state to which the child was taken, had properly acquired habitual residence in the new state. This finding conferred jurisdiction over the child's protection on the courts and other authorities of that state.

By the 1970s, dissatisfaction with this result led the Council of Europe in Strasbourg to work on a convention on the recognition and enforcement of judgments, which would purportedly make it more difficult for a court to favor a parent solely because the parent was a national suing in her or his home state. The United States had already drawn up the Uniform Child Custody Jurisdiction Act in 1969, although by the mid-1970s it had not yet achieved its current universality of acceptance among sister states. Then, in 1976, Canada, which had previously adopted a uniform act recognizing extra-provincial custody orders, proposed that the Hague Conference prepare a convention on "legal kidnapping."

Despite the Council of Europe's work, the Canadian proposal was received enthusiastically at The Hague, since by that time the Hague Conference had a much broader geographical base, extending far beyond Europe to North America, South America, and Australia. In fact, the Conference's work took a different tack from that of the Council of Europe. The Hague Conference eschewed the preparation of a convention on recognition and enforcement of custody orders. Instead, inspired by a Swiss proposal first made at the Council of Europe in September 1976, the conference coined a new term in international family law — "international child abduction."

The term "legal kidnapping" or "legalized kidnapping" had been used in some of the literature discussing this phenomenon, as it was becoming increasingly common in the federal countries of Canada and the United States. However, this concept had no counterpart at the international level. In fact, our French-speaking colleagues at The Hague correctly noted that legal kidnapping was an oxymoron: That what was legal could not be kidnapping, and that what was kidnapping could not be legal.

In response to these concerns, the term "international child abduction" was launched. This term finds its place only in the title of the 1980 Hague Convention, since more technical terms such as "wrongful removal" and "wrongful retention" were necessary for the mechanics of the Convention's system. In 1980, when the final version of the treaty was adopted with this title, the term was not found in the index of any treatise. Now, sixteen years later, it would be difficult to find a new treatise on family law, private international law, or conflict of laws, that would not have in its index, if not in its table of contents, the terms "child abduction," "international child abduction,"³⁵ or "Hague Convention."³⁶ This is not only a triumph for the Hague Conference's terminology, it is an indicator of the prevalence of the phenomenon that forms the title of this Paper — "The Internationalization of Family Law."

IV. NOVEL TECHNIQUES

In 1976, the Swiss had a proposal that was elegant in its simplicity. Why not simply restore the status quo ante? The idea, which was tacked on to the European Convention on Recognition and Enforcement of Custody Orders,³⁷ became the main-

³⁵ The topic is even beginning to make inroads into works on international litigation and international civil procedure. *E.g.*, RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING* 409-29 (1994); Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, L. & CONTEMP. PROBS., Summer 1994, at 209 (included in an issue devoted to the Hague Conventions on Civil Procedure); *see also* BRUNO A. RISTAU, *1 INTERNATIONAL JUDICIAL ASSISTANCE* 281-318 (1990 & Supp. 1995).

³⁶ *E.g.*, LINDA ELROD, *CHILD CUSTODY, PRACTICE AND PROCEDURE* ch. 15 (1993 & Supp. 1996) (devoting a major part of chapter 15 to the Hague Child Abduction Convention); *see also* TEX. FAM. CODE ANN. 868-85 (Sampson & Tindall 1995) (devoting significant space to the Hague Convention and its implementing legislation).

³⁷ European Convention on Recognition and Enforcement of Decisions Concerning

spring of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("1980 Convention"). The latter treaty did not require a court order before its mechanisms were triggered. An application could be made for the return of a "wrongfully removed" or "wrongfully retained" child based merely on joint parental custody, even if granted by operation of law in the country where the child habitually resided before removal or retention. However, the person seeking return of the child must have been actually exercising custodial rights at the time of retention or removal, unless the removal or retention itself prevented the exercise of such rights. The term "actually exercised" in reference to rights of custody was itself an innovation in terminology. It brought about an innovation in techniques. The new technique of a return "forthwith" order could not reasonably be applied in favor of rights which existed in law but were not being used.³⁸

This new technique of restoring custody to its status quo ante after a "wrongful" removal or retention also required some novel linguistic techniques. The custody rights in question needed to include the right to determine the child's place of residence. Thus, Article 5 of the 1980 Convention offered a non-comprehensive definition of the term "rights of custody." For the purposes of the treaty, it specified that such rights "shall include rights relating to the care of the person of the child and, in particular, *the right to determine the child's place of residence.*"³⁹ This partial definition put the emphasis on the key right that was being violated by a wrongful removal or retention, the right to determine the child's place of residence. Coupled with the fact that either sole or joint custody could be granted, this redefinition assured that the concept of custody rights in the 1980 Convention would be international in nature and not strictly tied to any particular concept of custody embodied in a particular state's laws.

The complex definitional framework between Articles 3 and 5 of the 1980 Convention ensured that this new international

Custody of Children and on Restoration of Custody of Children, May 20, 1980, Europ. T.S. No. 105.

³⁸ 1980 Convention, *supra* note 24, art. 12.

³⁹ *Id.*, art. 5 (emphasis added).

concept would be independent of any state's domestic family law concepts. This was fortunate because of two developments that took place on the international plane in the past fifteen years. The first was the widespread tendency toward the use of joint custody awards, both after divorce and before marriage. The second was the blurring or even scrapping of the traditional concepts of custody and access or visitation.

The internationalization of the terminology in the 1980 Convention was begun by the courts in the different countries that interpreted these terms. This international development was continued by the two special commissions that met in 1989 and 1993 at The Hague to study the operation of these Conventions. At least one expert in the field expressed the opinion that "autonomous" interpretation of terms in an international treaty is only possible if there is an international tribunal to pronounce such an interpretation.⁴⁰ For example, the Court of Justice of the European Union has the power under Article 177 of the Treaty of Rome and under provisions of certain other European Union conventions to answer questions certified by national courts.⁴¹ Additionally, decisions of the European Court of Human Rights, when applying the European Convention on the Protection of Human Rights and Fundamental Freedoms, are accepted as authoritative by the national courts in countries where the Convention's provisions have been incorporated into domestic law.⁴²

In contrast, it seems more problematic to attempt to extract "autonomous" — international — interpretations of terms in one of the Hague Conventions when no judicial body has the power to make authoritative interpretations of such Conventions. As has been seen, only once in this century, in the *Boll* case, has the question of interpretation and application of one of the Hague Conference's Conventions been brought before an international court for decision. This is in part because the jurisdiction of the International Court of Justice depends either on the

⁴⁰ See K. Lipstein, *The Evidence (Proceedings in Other Jurisdictions) Act 1975: An Interpretation*, 39 INT'L & COMP. L.Q. 120, 128-29 (1990).

⁴¹ See, e.g., Treaty of Rome, art. 177, Mar. 25, 1957, 298 U.N.T.S. 11.

⁴² See T. Koopmans, *The Legitimacy of the Constitutional Judge and the Theory of Interpretation*, in NETHERLANDS REPORTS TO THE FOURTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 231, 235-36 (J.H.M. van Erp & E.H. Hondius eds., 1995).

consent of the parties in the individual case, or on general acceptance by two states of that court's jurisdiction — a situation which is far from widespread at this time. Thus, we must extrude “autonomous” interpretations from the mass of different states' case law, assisted by the conclusions of those occasional meetings which are held to study the operation of a particular convention.⁴³ Therefore, it is remarkable that in the case of the 1980 Convention on the Civil Aspects of International Child Abduction, such “autonomous” interpretations have become commonplace and show a remarkable amount of uniformity in practice.⁴⁴

This growing recognition of international family law concepts can be seen in one United States case, *Friedrich v. Friedrich*.⁴⁵ In *Friedrich*, the United States Court of Appeals for the Sixth Circuit took an international approach when it interpreted the term “habitual residence” as it is used in the 1980 Hague Child Abduction Convention.⁴⁶ Conversely, the *Friedrich* court remanded the question of whether the father had actually been “exercising” his rights of custody at the time of removal to the trial court with instructions to consider this question under German law. As I have indicated above, my own belief is that the concept of “actual exercise” probably does not exist in the domestic laws of most states. Therefore it is, almost by necessity, a concept that is subject to an autonomous international interpretation. Thus, the express reference to German law was troubling. However, the same court seems to have been less clear about this reference to German law when the case went back up on

⁴³ See, e.g., Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, Apr. 17-20, 1989, 28 I.L.M. 1556; Hague Conference on Private International Law: Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Oct. 23-26, 1989, 29 I.L.M. 219; Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Jan. 18-21, 1993, 33 I.L.M. 225.

⁴⁴ See Adair Dyer, *Case Law and Co-operation as the Building Blocks for Protection of International Families*, in *FAMILIES ACROSS FRONTIERS* 27 (Nigel Lowe & Gillian Douglas eds. 1996).

⁴⁵ 983 F.2d 1396 (6th Cir. 1993).

⁴⁶ See *id.* at 1401-02.

appeal,⁴⁷ following the trial court's decision that the father had actually been exercising custody rights under German law. I think that the appellate court may have realized the relative impracticability of referring to the domestic law of any country for interpretation of an international concept, which would normally have no use in domestic law.

V. INTERNATIONAL COOPERATION

Apart from the first real worldwide spread of family law, which was carried out through the United Nation's New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance ("1956 New York Convention") (which, regrettably, the United States has still not ratified), the Hague Child Abduction Convention, now in force in forty-four countries, was a pioneer. Both of these treaties are based on a system of cooperation, even though the subject-matter and the methodologies are different. The 1956 New York Convention depends on each contracting state to designate both a receiving agency and transmitting agency, which may be different. In contrast, in The Hague in the 1960s, the idea of a single transmitting agency was discarded during the piecemeal revision of the venerable Hague Conventions on civil procedure. In particular, this was done in preparation for the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Service Convention")⁴⁸ at the Tenth Session in 1964, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Evidence Convention")⁴⁹ at the Eleventh Session in 1968.

The mainspring of these Conventions was the designation of a "Central Authority" in each Contracting State that would receive requests sent from abroad and, as the case might be, either return service or administer the taking of evidence for use abroad. These two treaties, both of which are widespread in their geographical coverage, apply in legal proceedings concern-

⁴⁷ *Friedrich v. Friedrich*, 78 F.3d 1060, 1064-66 (6th Cir. 1996).

⁴⁸ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 658 U.N.T.S. 163.

⁴⁹ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 847 U.N.T.S. 231.

ing family matters, just as they more generally apply to civil and commercial matters. The United States is a party to both of these Conventions, but unfortunately most family law practitioners are unaware of their existence and operation.

The Central Authorities created under the Hague Service and Evidence Conventions were the direct inspiration for the Central Authorities created under the Hague Child Abduction Convention in 1980. However, the Central Authorities under these older Conventions did not normally communicate with each other; they would receive requests directly from a court, or even an attorney abroad, and then make a return of service, or send the evidence they collected directly to the requestor.

In France, however, the head of the Central Authorities created under these two Conventions — a magistrate named Louis Chatin — found that sometimes the requests being sent abroad were not prepared in strict accordance with the terms of the Conventions, which caused difficulties in the Conventions' application. As a result, Chatin centralized not only the receipt and execution of requests, but also the process of sending requests abroad, thus creating a de facto "two-way" Central Authority in France. It was this model of two-way cooperation which was to be the direct inspiration for the Central Authorities described in Article 7 of the 1980 Hague Child Abduction Convention.⁵⁰

The Central Authorities in the 1980 Convention are given a whole laundry list of duties and authorizations regarding the wrongful removal or retention of children abroad, or arranging for international visitation. Louis Chatin also, as French delegate to the Hague Conference's discussions on future work at its Fifteenth Session in 1984,⁵¹ suggested that the Conference's Permanent Bureau organize meetings and facilitate communications among the new "two-way" Central Authorities. These new two-way Central Authorities had been put into effect the previ-

⁵⁰ See Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35, 37-38 (1994).

⁵¹ See *Note on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, in 1 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PROCEEDINGS OF THE FIFTEENTH SESSION 134-35 (1986) (drawn up by the French Delegation); *Procès-verbal No. 5*, in 1 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PROCEEDINGS OF THE FIFTEENTH SESSION 213-17 (containing discussions and proposals by the delegations from Belgium, France, Switzerland, and the United States).

ous year between Canada, France, and Portugal, and Switzerland became a Party on January 1, 1984.

From these four countries the number of parties to the 1980 Convention grew to forty-four.⁵² The Permanent Bureau is still carrying out these coordination efforts with great enthusiasm, sending circulars to the Central Authorities five or six times a year and on occasion sending them changes immediately by telefax. The Third Special Commission meeting to study the operation of the 1980 Convention was held on March 17-21, 1997.

International cooperation does not simply happen, it must be consciously nurtured. In particular, the Hague Conventions that deal with the protection of children have been consciously nurtured by the Permanent Bureau. My colleague, Peter Pfund, has referred to the Permanent Bureau's role as a "stewardship" and we at the Permanent Bureau proudly accept this designation.⁵³ In the intervening sixteen years, the field of family law has evolved under this mark of cooperation. For example, the United Nations Convention on the Rights of the Child (CRC),⁵⁴ which was only a gleam in the eye of the Polish delegate Adam Lopatka at Geneva in 1978, took shape and came to fruition on November 20, 1989. It roused an almost unbelievable response: 187 countries ratified it in a period of less than seven years.

Yet, in many areas the CRC, which forms the essential backdrop for international children's law, itself envisages the need for cooperation on a multilateral or bilateral level in creating and applying agreements that are more specific than the general rights or exhortations contained in that basic document. Thus, international child abduction found its very short response in the first paragraph of Article 11 of the CRC, which requires States Parties to combat the illicit transfer and nonreturn of children. This provision was followed, in the second paragraph of Article 11, by an exhortation encouraging States Parties to conclude or join agreements that would fight against the illicit

⁵² Venezuela, for which the treaty entered into force on January 1, 1997, brought the number to 45.

⁵³ See Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. DAVIS L. REV. 647 (1997).

⁵⁴ See *Convention on Rights of the Child*, *supra* note 29.

transfer and nonreturn of children abroad. Although the CRC forms the backdrop, it relies upon the 1980 Convention to form the mechanisms of cooperation.

Similarly, Article 27 of the CRC encourages party states to join conventions that facilitate the international collection of child support. A number of these topical agreements have been initiated at The Hague, complementing the 1956 New York Convention.⁵⁵ The CRC also encourages party states to carry out the objectives of its Article 21 on adoption, and to facilitate the implementation of Article 21 through bilateral or multilateral arrangements or agreements. In 1993, at its Seventeenth Session, the Hague Conference responded to the CRC's invitation by promulgating the Hague Intercountry Adoption Convention ("Adoption Convention").⁵⁶ This convention has already received a remarkable response and seems destined to become a very important instrument for protecting children on a worldwide scale.

Peter Pfund's Paper discusses the importance of the Adoption Convention for the United States.⁵⁷ However, the Permanent Bureau has already held an international meeting to work on implementing the Adoption Convention. This meeting was held in October 1994 and resulted in the preparation of forms for parents' consent to adoption and for the certification of an adoption as being in conformity with the Adoption Convention. In time, the form for certifying that an adoption has been done in conformity with the Adoption Convention will become the international passport for adopted children, entitling them to have their adoptions recognized throughout broad areas of the world.

The Special Commission also adopted a recommendation concerning the application of the principles of the Adoption Convention for refugee and other internationally displaced children. The desire to protect the interests of these particularly vulnerable children also led to the inclusion of Article 6 in the 1996 Convention on Protection of Children, bringing them under its coverage. Therefore, the 1996 Convention applies to

⁵⁵ See *supra* notes 13-15 and accompanying text.

⁵⁶ Intercountry Adoption Convention, *supra* note 31.

⁵⁷ See Pfund, *supra* note 53.

refugee and other internationally displaced children, as do its provisions on jurisdiction, applicable law, and recognition and enforcement of measures.⁵⁸

CONCLUSION

This new international language and these new legal norms depend upon cooperation. The 1996 Convention on the Protection of Children is the indicator of this new cooperation. If this Convention enters into force widely by the early years of the next millennium, it will affect many thousands more children than have the 1980 Hague Child Abduction and the 1993 Hague Intercountry Adoption Conventions, combined. The Convention has a fully developed chapter on cooperation, consisting of eleven Articles.⁵⁹ While the United Nations Convention on the Rights of the Child will remain the essential backdrop for legislation on children, these topical treaties will continue to provide the indispensable basis for dealing with children's problems when more than one state is involved. Given the multinational trends in transport, communication, and marriages, the process of internationalization of family law can only continue to develop.

⁵⁸ See 1996 Convention on Protection of Children, *supra* note 27, art. 6.

⁵⁹ See *id.*, art. 29-39.

