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Legal diversity in a flat crowded world: the role of the Hague Conference

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Introduction: a flat crowded world

In the beginning of this month we commemorated the collapse of the Berlin Wall. The 9th of November 1989 not only marked the end of the Cold War but also the opening up of the possibility of joining global, and regional, economic activities and institutions for millions of people east of the wall – and indeed elsewhere in the world, from India to Latin America. This has levelled the global economic playing field¹. It has “flattened” our world. For some, this marked the beginning of the globalization process. But our world has become “horizontal” in a more fundamental sense and over a longer period of time. Human relationships are now far more than in the past determined by horizontal connections with like-minded others across borders, including virtual connections through cyberspace and mass-media, and much less by vertical lines of authority within a closed society².

Transnational relationships and transactions, and mass movements of people across the planet will continue to grow. Not just technology, also demography will play its part here. In many developed countries the population has started both aging and declining. But in the developing countries the population will grow by as much as 2.3 billion people in the next forty years – not much below the total number of people that lived on the planet in 1950 (2.5 billion)³. Important population movements may be expected, likely to be reinforced by the effects of climate change⁴.

So: a flat, crowded world – but still functioning within a largely decentralised world governance structure, characterised by a diversity of legal systems. In the face of this diversity, it is a key role of both public and private international law to develop coordination among different legal systems⁵. Treaty-based techniques and machinery

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¹ Cf. Th. L. Friedman, *The World Is Flat* (2005); while the leveling of the economic playing field has ushered in a new phase of globalisation it should be remembered, as Friedman recognizes that it has not yet reached hundreds of millions of people in certain parts of the world. They are particularly vulnerable to the challenges of population growth and climate change, cf. *idem*, *Hot, Flat and Crowded* (2008).

² See L.M. Friedman, *The Horizontal Society* (1999), and cf. the contribution by J. Basedow “Multiculturalism, Globalisation and the Law of the Open Society”, (in particular par.2).

³ See United Nations Department of Economic and Social Affairs, World Population Prospects: the 2008 Revision, www.un.org/esa/population/publications/wpp2008/wpp2008_highlights.pdf

⁴ In the Stockholm Programme 17024/09, Annex (p.63), adopted on 2 December 2009, the Council of the European Union (Justice and Home Affairs) requested the Commission to present an analysis of the effects of climate change on international migration, “including its potential effects on immigration to the European Union”, see

www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf.

⁵ Cf. Hunt v. T&N plc, [1993] 4 S.C.R.289, *infra* footnote 23.

for cross-border cooperation between authorities⁶ and courts⁷ of different jurisdictions, such as developed by the Hague Conference on Private International Law may well lend themselves to application to areas seen as belonging to the field of public international law⁸.

1. Legal diversity in the Hague Conference

The Hague Conference, over the past 116 years, has offered a forum to the emerging international community to deepen its understanding of the diversity of civil and commercial legal systems and to develop coordination to resolve these cross-border legal issues.

The efforts started in the late nineteenth century, within a small community of continental European civil law states⁹. Mancini's cosmopolitan nationality concept offered the cornerstone for an ambitious programme for the unification of private international law. Nationality as the principal connecting factor left maximum scope to diversity at the level of substantive law. Italian authorities would, as a firm rule, apply French law to the marriage of a French couple and vice versa.

But already during the run-up to the First World War it appeared that this theory was far too naive. In the interbellum period some dreadful court decisions were rendered, which applied German law, including the Nuremberg laws, with the argument that the 1902 Hague Marriage Convention did not allow the refusal to apply foreign law¹⁰. In retrospect such decisions clearly violated human rights¹¹.

⁶ See G.A.L. Droz, « Évolution du rôle des autorités administratives dans les Conventions de droit international privé au cours du premier siècle de la Conférence de La Haye », in *Études offertes à Pierre Bellet* (1991), pp.129-147.

⁷ Prime examples of direct judicial cooperation across borders are to be found in the areas of insolvency (cf. the UNCITRAL Model Law on Cross-Border Insolvency, see http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html) and child protection, (see for the work of the Hague Conference on judicial communications and the emerging Hague global network of judges http://www.hcch.net/index_en.php?act=text.display&tid=21).

⁸ Cf. *Some reflections on the utility of applying certain techniques for international co-operation developed by the Hague Conference on Private International Law to issues of international migration*, Note drawn up by the Permanent Bureau of the Hague Conference in 2006, with updates published 2007-2009, see most recently <http://www.hcch.net/upload/wop/genaff2009pd08e.pdf>. See also H. van Loon, « Vers un nouveau modèle de gouvernance multilatérale de la migration internationale, in *Vers de nouveaux équilibres entre ordres juridiques*, Liber Amicorum Hélène Gaudemet-Tallon (2008), pp. 419-434.

⁹ As is well known, these efforts were preceded by the successful multilateral negotiations on the unification of private international law undertaken in Latin America, in particular the Treaty of Lima (1878) and the Treaties of Montevideo (1889), see D.P. Fernández Arroyo, *La Codificación del Derecho Internacional Privado en América Latina* (1994).

¹⁰ The [Convention of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage](#) strictly limited the grounds upon which a Contracting State could refuse to celebrate a marriage of foreigners and permitted the celebration of a marriage of foreigners despite the marriage prohibitions of the designated law only “lorsque ces prohibitions sont exclusivement fondées sur des motifs d'ordre religieux” (Articles 2 and 3). See J. Wiarda, “Nederlands international personen- en familierecht en de openbare orde,” in *'t Exempel dwinght, Liber Amicorum I. Kisch* (1975), pp. 389-408, with several arguments contra these (Dutch) court decisions.

¹¹ See e.g. Article 12 of the *European Convention of 4 November 1950 on Human Rights and Fundamental Freedoms*: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”, to be read in conjunction

A lesson wiser, the Hague Conventions negotiated after the Second World War initially allowed the setting aside of the designated law simply “*pour un motif d’ordre public*”¹². This of course moved the pendulum too far to the other side, because if *any* public policy consideration is sufficient to set aside the foreign law or decision, then respect for diversity will be at risk.

It was the 1956 Hague Convention on the law applicable to maintenance obligations for children which introduced the now famous formula, according to which the application of the foreign law, or the recognition of the foreign decision, may be refused if this is *manifestly* incompatible with the public policy of the forum. The formula is intentionally vague¹³ but it has done wonders in practice: it has helped to keep the refusal to apply foreign laws or to recognize foreign decisions to a bare minimum. In this sense it stands as a marker of respect for legal diversity, while reserving the application of fundamental values embraced by the forum.

The States that in the 1950’s gave the Hague Conference a permanent structure were, as in the early period, largely continental European civil law countries, plus Japan and the UK. As in the case of the European Union, the basis for the unification efforts on private international law was therefore laid by civil law systems. Both the early Hague Conventions and the 1968 Brussels and 1980 Rome Conventions benefitted from this civil law predominance. The relative uniformity made it possible to lay a sound basis for the unification process. In the EU context of work on private international law the civil law continues to dominate, and the common law family is bound to remain a minority. The Hague Conference, on the other hand, has gradually included an ever widening circle of legal systems¹⁴.

In the sixties, the US, Canada and other common law countries joined¹⁵. A development began which continues until today, aimed at bridging not only civil law and common law systems, but also the varieties *within* each of these two families (including notable differences in civil procedures between the US and other common law jurisdictions, such as the extent of pre-trial discovery of documents¹⁶); and bridging unitary and federal

with Article 14: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”.

¹² See e.g. [Convention of 15 June 1955 on the law applicable to international sales of goods](#), Article 6 « *Dans chacun des Etats contractants, l’application de la loi déterminée peut être écarté pour un motif d’ordre public* ».

¹³ A deliberate choice was made out of five options, see « *Rapport de la Commission Spéciale* », by L.I. De Winter, in *Documents relatifs à la Huitième Session de la Conférence de La Haye, 3-24 octobre 1956* (1957), pp.124-133 (at p.130).

¹⁴ See overview at www.hcch.net under HCCH Members.

¹⁵ The participation of large countries of immigration has significantly reinforced the role of habitual residence as a connecting factor both to determine adjudicatory jurisdiction and applicable law in the post-1951 Hague Conventions. As a result, it may be said that modern Hague Conventions favour assimilation more than the Conventions drawn up in the beginning of the 20th century. However, this is balanced to a certain extent by the introduction in many modern Hague Conventions of the option of party autonomy, and by a continuing but reduced role of the nationality factor. Cf. J. Basedow (supra, fn.2, in particular par.5).

¹⁶ See D. McClean, “*Common lawyers and The Hague Conference*”, in *E Pluribus Unum, Liber Amicorum Georges A.L. Droz* (1996), pp. 205-218, who points out that the reservation permitted by Article 23 of the Hague [Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters](#) (hereinafter: the Hague Evidence Convention), included at the request of the

States *within* and in some cases *across* these families (e.g. Quebec within the Canadian federal system). Next, the Conference included China, other Asian countries – most recently India – and a large number of Latin American States. In this century the dialogue with the Islamic systems has become a focal point.

With each new aspect, the Members of the Hague Conference have been invited to further develop a common international perspective on how to handle legal diversity, and to work together on instruments to permit coordination of legal systems, and increasingly also direct cross-border communication and cooperation among administrative authorities and courts. Of the many aspects of legal diversity that present a challenge to the Conference, I propose to concentrate briefly on two: first, the role of federal and quasi-federal systems as opposed to unitary states in the Conference, and, second, the dialogue with legal systems based on Sharia law¹⁷. I will then make some concluding remarks on the importance of inclusiveness as a working method, and also on the relevance of the global human rights framework.

2. Federal and quasi-federal v. unitary States.

First, the role of federalism in the Conference. When the United States first attended a Session of the Hague Conference, in an observing capacity, in 1956, Kurt Nadelmann argued that, given the prerogatives of the states within the federal system, it would be very difficult for the US to bind itself to international treaties. The Americans proposed to broaden the working methods of the Conference, and to move, in particular for certain topics of global interest, towards the adoption of non-binding model laws, the practice widely used within the US¹⁸. Although this proposal was not rejected, the Conference has during the past almost fifty years quietly continued to work on binding multilateral treaties. But three points are interesting to note. First, the evolution of the US position in the Conference. Second, the expansion of federalism and quasi-federalism within the Conference. And third, the fact that in part as a result of this development, ironically, non-binding instruments are now back on the agenda.

a) *The evolution of the US position in the Conference*

The US is now a Party to five Hague Conventions¹⁹, and is actively preparing joining four more (the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter: the “1996 Convention”), the

United Kingdom reflects “a misunderstanding as to the radically differing nature of “discovery” as between England and the United States” (at p. 216).

¹⁷ It will be seen (*infra*, par.3), that this is a *true* dialogue, to be distinguished from the quasi-dialogue criticized by S. Vrellis in his contribution “La loi et la culture” (ch. II *in fine*).

¹⁸ See *Actes de la Huitième Session de la Conférence de La Haye, 3-24 octobre 1956 (1957)*, Quatrième Commission, Procès-verbal No 7, pp. 267-269, and p.273. See also the Decision taken by the IXth Session, Final Act, under V, in *Actes et Documents de la Neuvième Session de la Conférence de La Haye, 5-26 octobre 1960, Tome I (Matières diverses), (1961)*, pp.314.-315, and the study, comments and discussion on the elaboration of Conventions or Model Laws, *ibidem*, pp.207-250. The question came up again, under a slightly different angle, in the context of the XIVth Session, see *Actes et Documents de la Quatorzième Session, 6-25 octobre 1980, Tome I (Matières diverses), (1982)*, pp. I-63, I-191, and I-200-201.

¹⁹ See http://www.hcch.net/index_en.php?act=states.details&sid=76 .

Convention of 30 June 2005 on Choice of Court Agreements (“Choice of Court Convention”), the *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (“Securities Convention”) and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (“Child Support Convention”). Within the US, ways have been found or are being explored to combine the model law technique with the treaty engagements. With “conditional spending”, the federal government uses its purse to encourage the state legislator to act; if it does not, it will lose federal subsidies. This is an effective means to ensure the implementation of the Child Support Convention. With “cooperative federalism”, Congress takes over the regulation of an activity at the state level, unless the state itself implements its own program within, say, two or three years²⁰. This technique is now being studied with a view to the ratification of the Choice of Court Convention.

b) The expansion of federalism and quasi-federalism

In addition to the US, the number of federal systems or quasi-federal systems within the Conference has grown steadily. Techniques have been developed to allow ratification of Conventions only for the benefit of one or more sub-units, thus respecting federal diversity, which has been very important to Canada, but has recently been also been used by the UK for Scotland (for the *Convention of 13 January 2000 on the International Protection of Adults* (“Protection of Adults Convention”). Moreover, the Hague Conference has developed a quite sophisticated system to allocate the competence of courts and to determine the applicable law within a federal system. The challenges lie in the implementation, particularly in vast federations such as Brazil and Mexico²¹.

In constitutional terms the European Union is not a federation. Yet, since the entry into force of the Amsterdam treaty 10 years ago, the Community is leading the negotiations for its Members in the Conference. Legal diversity within the EU is channelled, so to speak, through Community consultations, and expressed by one voice. The transfer of legislative powers from EU Member States to the Community in the field of private international law as a result of the Amsterdam Treaty²², has had some effects within the Hague Conference analogous to federal systems. For one thing, it has made the EU more receptive for certain ideas developed within federal systems (such as the device of transfer of jurisdiction, known in the US and Canada and which, via the 1996 Convention, has now found its place in the Brussels II bis Regulation 2201/2003 (EC)).

As the Supreme Court of Canada pointed out in a case known as *Hunt v. T&N* of 18 November 1993, federal systems face a *double* challenge of coordination of diversity. On the one hand, the challenge for a federation is to ensure the coordination of the values and norms of its own society with that of foreign legal systems. On the other hand it needs to ensure the coordination of the diversity of its federal system and its sub-units (in

²⁰ See also the remarks on “categories of conflicts” by Symeon Symeonides in his contribution “American Federalism, Plurijuralism and Private International Law”.

²¹ In terms both of adopting legislative measures to ensure uniform interpretation and application, and of establishing effective cooperation between Central administrative and judicial authorities, crucial for the operation of the Hague Conventions in the field of legal cooperation and child protection.

²² See H. van Loon and A. Schulz, “*The European Community and the Hague Conference on Private International Law*”, in B. Martenczuk and S. van Thiel, eds. *Justice, Liberty, Security* (2008), pp. 257-299.

Canada, the provinces)²³. This second task may be at least as demanding as the first, and there is a risk, therefore, that federal systems develop an inward-looking attitude, focussing only on the federal diversity balance and losing sight of the need for transnational balancing. Harold Koh, now the new legal adviser to the State Dept., in his recent book *Transnational Litigation in United States Courts*, identifies in the US Supreme Court's decisions sometimes a parochial "nationalist" and sometimes a "transnationalist" tendency. The *Aerospatiale* case concerning the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, where the majority chose an inward-looking approach at the expense of the Convention, and where the minority showed more understanding of the international dimension, is a case in point²⁴.

The complex EU system is not immune to this inward-looking trend. This is one of the reasons why it is so important that the Community has itself become a Member of the Conference in addition to its Members²⁵, and that both the Community and its Members work with a wide range of other Members of the Conference towards global solutions for global issues²⁶. It is a fact that several EU Members have strong cultural links with third countries, and a balance must be found between reinforcing community integration and maintaining multiculturalism beyond Community borders²⁷.

c) Non-binding instruments back on the table

One of the effects of increased regional activity on private international law within the Conference is that, fifty years after Kurt Nadelmann's plea for non-binding instruments, the topic is back on the agenda. Next January a global working group of experts will convene in The Hague to start drafting a non-binding text with a view to promoting party autonomy in the field of international contracts²⁸. That this text should be non-binding has much to do with the fact that the Rome I Regulation on the Law Applicable to

²³ See *Hunt v. T&N plc*, [1993] 4 S.C.R.289 (Judgment of the Court delivered by La Forest J.): "Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems... Developing such coordination in the face of diversity is a common function of both public and private international law. It is also one of the major objectives of the division of powers among federal and provincial governments in a federation. This appeal raises issues that lie at the confluence of private international law and constitutional law. In seeking to find a workable balance between diversity and uniformity, one must be aware of the similarities but also the differences that exist in the balances represented in the rules in these two areas of law...".

²⁴ H.H. Koh, *Transnational Litigation in United States Courts* (2008), pp 247-258.

²⁵ The European Community became a Member of the Hague Conference on 3 April 2007. With the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union replaces and succeeds the European Community as from that date. See also "The European Community and the Hague Conference on Private International Law", *supra* fn. 22.

²⁶ On the question of determining the appropriate level of regulating private international law issues against the backdrop of globalization, see H. van Loon, "Remarks on the needs and methods for governance in the field of private international law - at the global and the regional levels", in *Cafaggi, F., Muir-Watt, H., eds., Making European Private Law – Governance Design*, (2008), pp.197-208.

²⁷ Two recent EU Council regulations establish procedures Member States for the negotiation and conclusion of agreements with third countries in the areas of jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations (see Council Regulation (EC) No 664/2009, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:200:0046:0051:EN:PDF>) and in the area of applicable law in contractual and non-contractual obligations (see EC Regulation No 662/2009 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:200:0025:0030:EN:PDF>).

²⁸ See http://www.hcch.net/index_en.php?act=text.display&tid=49.

Contractual Obligations (which *is* of course a binding text) has a *universal* scope of application. The Hague project will not seek to replace or double Rome I but to provide parties in States that are not yet familiar with party autonomy, with guiding principles on the possibility of choosing the law applicable to their international dealings. In a globalizing world economy, this is also in the interest of businesses in systems, such as the EU, that have long known the concept, with a view to their dealings with companies in third countries who are not familiar with party autonomy – after all these transactions may lead to litigation in these third countries. The challenge will be to ensure that the non-binding principles will be sufficiently authoritative to provide the necessary level of certainty and predictability (comparable to the UNIDROIT principles on substantive contract law).

3. Secular v. Religious systems

An important contemporary aspect of legal diversity that the Hague Conference is facing relates to cross-border issues with countries whose legal system is based on religious law, in particular Jewish and Sharia law²⁹. In the 1960's when Egypt and Israel joined the organisation, the Conference started to make provision in the Conventions for the fact that these countries have a legal system based upon *personal* laws, so that different laws apply to Christians, Muslims, and Jews, for example³⁰. Already the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*³¹ provides a framework for accommodating religious divorces, repudiations in particular. Repudiations, provided they are subject to a procedure before or in the presence of an authority and prescribed or permitted by the law of the State where they are made, are to be recognized under the Convention³². The Convention links Egypt with seventeen Western States³³. Another example: the 1996 Convention expressly provides for cross-border Kafala arrangements, a form of foster care that is structurally different from adoption, but that may offer a functional substitute³⁴. Islamic securities were taken into account in the negotiations on the 2006 Securities Convention³⁵.

The aftermath of 9/11 2001 has greatly increased the role of the religious factor in international relations, and has complicated respect for diversity by the international

²⁹ On the more general question of the role of private international law (including Hague Conventions on private international law) with regard to the “conflict of civilizations” (which may also arise *within* State borders), see J. Basedow (supra fn. 2) and *cf.* also fn.15 *supra*.

³⁰ See also the Introduction to the contribution of M-C. Najm, “*Dévolution successorale et système multicommunautaire – L'exemple libanais*”.

³¹ The first Hague Convention to make provision for legal systems applying different laws to different categories of persons. See Articles 15 and 16, and the Explanatory Report by P. Bellet and B. Goldman, in *Actes et Documents de la Onzième Session, 7-26 October 1968, Tome II Divorce (1970)*, pp. 210-223 (at p. 222).

³² See Article 1, paragraph 1; see also Bellet/Goldman, *ibid.*, p.212.

³³ Australia, China (Hong Kong), Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

³⁴ See Articles 3, subparagraph e), and 33; see also the Explanatory Report by P. Lagarde, *Proceedings of the Eighteenth Session, 30 September-19 October 1996, Tome II Protection of Children, (1998)* pp. 533-605 (at pp. 546/547 and 592/593, see also pp. 230-231).

³⁵ See Explanatory Report by R. Goode, H. Kanda, K. Kreuzer, *Proceedings of the Nineteenth Session 2-13 December 2002, Tome II Securities, (2006)*, pp 576-741 (at pp. 606/607).

community³⁶. Yet, family contacts and relationships across the Mediterranean and beyond (the Gulf States, Pakistan, India, Malaysia, Indonesia, for example, may be concerned) continue to increase. The human pain involved in separations and divorces of mixed couples is considerable, and children may suffer as a result of their wrongful removal and the loss of contact with one of their parents.

There are bilateral arrangements between some Western countries and Egypt, Tunisia, Algeria, Morocco and Lebanon³⁷. However, their success has been very limited. Why is this so? Because they seek to achieve a solution through voluntary settlements, but they lack clear rules on jurisdiction and on cooperation, which the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter: the “1980 Convention”) and the 1996 Child Protection Convention do provide. Unfortunately, the post 9/11 political climate has not made it easier to persuade countries whose laws are based on Sharia to join these Conventions.

Faced with this dilemma, and building on the good will and enthusiasm of affected States, the Hague Conference has chosen a novel approach. A series of judicial conferences has been organized to discuss how to secure better protection for cross-frontier rights of contact of parents and their children and solutions for the problems posed by international abduction. Judges from almost 30 countries, many of which are neither a Party to the Hague Conventions, nor a Member of the Conference, have taken part in these judicial conferences. Starting from the United Nations Convention on the Rights of the Child as a general normative framework, these meetings have enabled the participating judges to better understand each other’s system. They also agreed that common rules were needed to specify which country’s courts are competent to make decisions concerning custody and contact, and that such decisions made by a competent court in one country should be respected in other countries.

This initiative, known as the Malta process, has led to an increasing interest among the participants, in the course of the three conferences, for the solutions of the 1996 Convention, and to a certain extent, the 1980 Convention³⁸. The collective ratification by the EU States of the 1996 Convention in 2010³⁹ will give a further impetus to this growing interest. And so will a judicial conference also to be held in 2010 for which the *Cour de Cassation* of Morocco has offered hospitality.

³⁶ Cf. the contribution by K. Kreuzer “*Clash of Civilizations and Conflict of Laws*” to this colloquium.

³⁷ See Prel. Doc. No 7, of August 2002, drawn up by C. Harnois for the Permanent Bureau, “*Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States - a Research Paper*”, at http://www.hcch.net/index_en.php?act=publications.details&pid=2255&dtid=2.

³⁸ See the declarations of the First, Second and Third Malta Judicial Conference on Cross-Frontier Family Law Issues, hosted by the Government of Malta in collaboration with the Hague Conference on Private International Law St. Julian’s (Malta), 14-17 March 2004, 19-22 March 2006, and 24-26 March 2009, at http://www.hcch.net/upload/maltadecl_e.pdf, http://www.hcch.net/upload/maltadecl2_e.pdf, and http://www.hcch.net/index_en?act=events.details&year=2009&varevent=161.

³⁹ See Council Decision [2008/431/EC](#) of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interests of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law [Official Journal L 151 of 11.6.2008]. This Decision authorises Member States that have not yet ratified or acceded to the Convention to do so. This concerns Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Finland, Sweden and the United Kingdom.

4. Meeting the challenge of diversity. Inclusiveness. The unifying force of global human rights

As these examples show, in the face of growing diversity a variety of approaches and techniques are needed, not so much to substitute the traditional Convention-negotiation method, but to support it and to adapt the result to new environments. Overall inclusiveness is critical to this. At the same time, fortunately, there are unifying forces, in particular the steadily increasing global human rights framework. I will say a word on both, and then conclude.

a) Inclusiveness

Regarding inclusiveness, the emergence of the European Community in the Conference has given an impetus to a switch from the traditional voting procedure to the consensus principle, which is now also enshrined in the Statute⁴⁰. Consensus has its price in terms of negotiation time, but recent experience tends to show its benefits in terms of greater inclusiveness. The negotiations on the Hague Child Support Convention offer an example. Western countries wanted a high level of legal assistance in matters of cross-border child support, and minimal checks regarding the recognition and enforcement of foreign decisions. China and other countries felt that they were unable to meet the Western standards. Applying the voting system would not have brought relief, because it would have favoured one solution, leaving the loosing side only with a reservation option. But consensus has made it possible to achieve a system, with two variants for both legal assistance and enforcement of decisions, acceptable to all⁴¹.

b) The unifying force of global human rights

The Child support Convention not only provides coordination and cooperation between legal systems, it also implements a human rights imperative. The Convention is a response to the call made by the *United Nations Convention of 20 November 1989 on the Rights of the Child* (CRC) to its States Parties to secure the international recovery of child support⁴². The UN Convention sets the principle and exhorts States to promote the accession to our conclusion of international agreements - dealing itself with the private international law aspects would be beyond its reach. The Hague Convention implements the principle, “vertically”⁴³, and at the same time ensures

⁴⁰ See Article 8, paragraph 2 of the Statute as amended: “The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus.”

⁴¹ See W. Duncan, “The New Hague Child Support Conventions: Goals and Outcomes of the Negotiations”, in *43 Family Law Quarterly, No 1 (2009)*, pp. 1-20.

⁴² See Article 27, paragraph 4: “States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”

⁴³ The image of the two dimensions of the global legal ordering effectuated by private international law, the “horizontal dimension” of regulating overlapping and competing legal cultures, and the “vertical dimension” of international rights as part of the formulation and application of private

respect and coordination of the differences between legal systems, “horizontally”. In varying degrees the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and 1993 Hague Intercountry Adoption Convention⁴⁴ perform a similar function towards the CRC. The CRC provides the general framework⁴⁵; the Hague Conventions implement the framework’s principles, and provide coordination of the diversity of legal systems. As a result, the need to have resort to the public policy exception to safeguard fundamental values of the forum is strongly reduced.

In a similar way, the *Hague Convention of 13 January 2000 on the International Protection of Adults* may complement the recent *United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities*, in particular its provisions of Article 12 on equal recognition before the law, and Article 32 on international co-operation. There is a potential for more complementarity, for example between the *United Nations Covenant of 27 January 1997 on Civil and Political rights* and various Hague instruments⁴⁶, following the example which has been set by the European Court of Human Rights in its interpretation the European Convention, Articles, 6, 8 and 14 in particular, in the light of the Hague Child Abduction Convention⁴⁷. Provisions of the UN Covenant might likewise be interpreted by the Human Rights Committee, under the (first) Optional Protocol to the Covenant, in the light of relevant Hague Conventions.

Conclusion

In this way the “vertical” human rights dimension and the “horizontal “ dimension of coordination of diversity come together and reinforce each other. Private international law, informed by globally established fundamental rights, transcends national and even regional borders and becomes an essential building block in the global legal ordering of the emerging multicultural world society⁴⁸. In this global legal ordering, private international law has a vital role in ensuring coordination and respect for legal diversity in our flat crowded world.

international law rules is a major theme in A. Mills, *The Confluence of Public and Private International Law* (2009).

⁴⁴ [Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption](#)

⁴⁵ See Articles 11 and 35, on international child abduction; Articles 9, 10, 12, 18, 20, 22, among others, on the international legal protection of children; and Articles 20 and 21 on international adoption.

⁴⁶ Cf. e.g. Covenant, Articles 14 (on access to justice) and 17 (on respect for family life), 23 (on marriage and divorce) and 24 (on protection of children), and the Hague Conventions on the Recognition of the Validity of Marriage, on Divorce, and on Children.

⁴⁷ See Beaumont, P., “The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction”, in *Hague Academy Recueil des cours*, 335 (2008).

⁴⁸ See also, generally, A. Mills, *op. cit* (*supra*, fn 43).