

Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States

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FAMILIES ACROSS BORDERS: THE HAGUE CHILDREN'S
CONVENTIONS AND THE CASE FOR INTERNATIONAL
FAMILY LAW IN THE UNITED STATES

*Ann Laquer Estin**

Abstract

In our globalized world, as families form and dissolve across international borders, domestic family law does not adequately address the needs of parents and children with ties to multiple legal systems. For these cases, the Hague Children's Conventions provide a useful legal framework developed and implemented through the cooperative efforts of more than one hundred nations. Currently, the United States participates in the 1980 Child Abduction Convention and the 1993 Inter-country Adoption Convention, and has taken steps toward ratification of the 2007 Family Maintenance Convention and the 1996 Child Protection Convention. The four Children's Conventions offer an important opportunity for the United States to work collaboratively with other nations in building protections for vulnerable children and families in the United States and around the world. This Article surveys the emerging Hague system of international family law, evaluates the United States' participation in the Abduction and Adoption Conventions, and argues for ratification of the remaining conventions.

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I. INTRODUCTION

With the rise of globalization, many families form and extend across national boundaries. For rich and poor, these networks both facilitate and complicate the process of transnational migration. Scholars in many fields, including history, economics, geography, and anthropology, have traced the patterns of migration and family life, teaching us that these two subjects are intimately connected.¹ In law, this connection is mostly evident in our immigration and citizenship law, with its deeply embedded norms of marriage and family relationships.² Family law has been more parochial; within the United States, family law has traditionally been a subject of local or state concern, generating significant conflict of laws problems at even a national level.

Global movement significantly complicates the regulation of family relationships. The United States has a large and mobile population, with an estimated 6.6 million private citizens living abroad, and many of these Americans will face challenging international family law problems. National and local laws are inadequate to manage transnational family issues, especially in cases of international adoption or parental abduction but also in ordinary custody, child support, or child protection matters. The gaps in our laws have significant consequences for families and children. As the scale and frequency of global movement has increased, family and children's issues have also taken on a new relevance in foreign relations.

The Hague Conference on Private International Law has responded to the new realities of globalized families with a series of treaties that foster international cooperation in cases involving children. More than ninety nations now participate in one or more of the four Hague

1. See, e.g., Marjorie Faulstich Orellana et al., *Transnational Childhoods: The Participation of Children in Processes of Family Migration*, 48 *SOCIAL PROBS.* 572, 577 (2001); Jacob Mincer, *Family Migration Decisions*, 86 *J. POL. ECON.* 749, 749 (1978); Suzanne M. Sinke, *Migration for Labor, Migration for Love: Marriage and Family Migration across Borders*, 14 *OAH MAG. HIST.* 17, 17 (1999).

2. See Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 *MINN. L. REV.* 1625 (2007); see also David Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 *OHIO ST. L.J.* 979 (2002).

Children's Conventions.³ The United States has ratified the 1980 Convention on the Civil Aspects of International Child Abduction (Abduction Convention)⁴ and the 1993 Convention on Intercountry Adoption (Adoption Convention).⁵ The United States has also signed the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Maintenance Convention)⁶ and is proceeding toward ratification. In addition, the State Department is preparing to sign and ratify the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Protection Convention).⁷

The Hague Children's Conventions take an innovative approach to international children's law. Conceived as a hybrid of public and private international law, the conventions depend on significant and ongoing cooperation of government authorities in contracting states. In the course of developing these agreements, the Hague Conference has transformed itself, expanding to include a larger and more diverse group of nations as members and observers and taking on a new role in monitoring and supporting implementation of the conventions. This has been a purely cooperative enterprise, with no authoritative international body charged with resolving disputes or disciplining treaty members.⁸ The process is managed through the ongoing work of the Hague Conference Permanent Bureau and periodic meetings of the participating states.⁹ The impressive number of parties to these conventions reflects the broad vision and careful work of the

3. For detailed information on the Hague conventions including the countries in which each convention is in effect and dates of ratification, see Hague Conference on Private International Law, <http://www.hcch.net>.

4. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 19 I.L.M. 1501-05 (1980) [hereinafter Abduction Convention].

5. Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, *reprinted in* 32 I.L.M. 1134-46 (1993) [hereinafter Adoption Convention].

6. Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, *reprinted in* 47 I.L.M. 257 (2008) [hereinafter Maintenance Convention].

7. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *reprinted in* 35 I.L.M. 1391 (1996) [hereinafter Protection Convention].

8. *See infra* Part III.C. *Cf.* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1, 1 (2008) ("Most nations today participate in a dense network of international cooperation that requires them to grant authority to international actors.").

9. Peter H. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, in 249 RECUIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 25-26, 73 (1996).

Conference over the past thirty years.

The United States' participation in the Children's Conventions is notable in contrast with the many other international treaty regimes we have not joined, including the United Nations Convention on the Rights of the Child (CRC).¹⁰ Moreover, family law is a particularly difficult subject for harmonization because it involves divergent normative viewpoints and emotionally and practically complex problems.¹¹ The fit between domestic and international family law in the United States is also complicated by our approach to federalism and the traditional role of state governments in family law.¹² Although these obstacles have slowed the ratification process, the United States has moved steadily over three decades toward implementation of the Children's Conventions.

This Article advocates strong United States participation in the emerging Hague system. Part II presents an overview of the Children's Conventions and considers the transformation of the Hague Conference as it has moved to foster greater global cooperation to serve children's best interests. Part III describes the reception of the Abduction and Adoption Conventions in the United States and considers the prospects for ratification of the Maintenance Convention and the Protection Convention. Part IV makes the broader argument for strong participation in the new international family law. As part of that case, the Article argues that the Children's Conventions do not present serious federalism or sovereignty concerns and that they serve both important domestic purposes and broader foreign relations objectives.

II. THE EMERGENCE OF INTERNATIONAL FAMILY LAW

The Hague Conference on Private International Law is an intergovernmental organization, funded and governed by its members.¹³ Its traditional purpose has been to work for the progressive unification of the rules of private international law, including commercial law, international civil procedure, and family and children's law.¹⁴ More recently, the Conference has emphasized cross-border judicial and

10. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, at 166, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/49 (Dec. 12, 1989), *reprinted at* 28 I.L.M. 1456 (1989) [hereinafter CRC]. The Hague Children's Conventions have an important interface with CRC. *See infra* notes 36–44 and accompanying text.

11. *See* Pfund, *supra* note 9, at 29.

12. *See* Pfund, *supra* note 9, at 51. *See generally* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267 (2009) (discussing the interaction between state and federal laws in American family law).

13. The Conference was founded as a permanent organization in 1955. Statute of the Hague Conference on Private International Law, July 15, 1955, T.I.A.S. No. 5710, 2997 U.N.T.S. 123.

14. On classical private international law, *see* Pfund, *supra* note 9, at 22–23.

administrative cooperation in these areas. From an initial membership of fifteen nations drawn primarily from Western Europe, the Hague Conference has grown to include sixty-nine members from all corners of the globe, representing a significant diversity of legal systems.¹⁵

The contemporary Children's Conventions are successors to earlier agreements, some dating back more than a century,¹⁶ that sought to harmonize the laws applied to family relationships.¹⁷ Between 1956 and 1978, the Hague Conference adopted a series of conventions addressing conflict of laws questions in marriage and divorce, matrimonial property law, child protection, adoption, and child support.¹⁸ These conventions helped to bridge the large differences between national family law traditions, particularly within Europe, but they were less broadly successful than the Hague litigation conventions,¹⁹ which developed new schemes for cooperation between contracting states.²⁰ With the contemporary Children's Conventions, the Hague Conference extended this model. All of the Children's Conventions assign substantial responsibilities to a Central Authority in each contracting state, going far beyond the processing functions incorporated in the earlier litigation conventions.²¹

A. *Inventing the Children's Conventions*

After extensive preparatory work by its Permanent Bureau staff, the Hague Conference convenes Special Commission meetings first to negotiate and draft its conventions and then to review implementation

15. See *infra* notes 93–94 and accompanying text. The United States has been a member since 1964.

16. See Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625 (1997); Kurt Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT'L & COMP. L.Q. 553 (1993).

17. Treaties for this purpose were developed at the end of the nineteenth century and implemented on a regional scale in Latin America and Europe. See Dyer, *supra* note 16, at 627–29; Lipstein, *supra* note 16, at 556–57, 561–70.

18. See Lipstein, *supra* note 16, at 586–99.

19. See Lipstein, *supra* note 16, at 649. The litigation conventions include the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) (1961), the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention) (1965) and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention) (1970).

20. See Dyer, *supra* note 16, at 641–42. The same cooperative approach was taken by the 1956 New York Convention on the Recovery Abroad of Maintenance, June 20, 1956, 268 U.N.T.S. 32–47 (1957).

21. See Dyer, *supra* note 16, at 642 (“[T]he 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 requested directly to the requestor.”).

of them.²² Once completed, each treaty is adopted by the Conference at a diplomatic session and then opened for signature and ratification or accession. For each convention, the Conference maintains a detailed legislative history and prepares an Explanatory Report to aid in interpretation and application of the convention.²³

1. Child Abduction

When the Hague Conference debated the problem of parental kidnapping, it concluded that a convention on cooperation would be more effective than a traditional private international law treaty focused on harmonizing the rules for jurisdiction, recognition, and enforcement of custody judgments.²⁴ The result was the Abduction Convention, which focused on securing the prompt return of a child who had been wrongfully removed from his or her place of habitual residence.²⁵ The assumption behind this remedy was that the authorities in the child's habitual residence are best situated to decide questions of custody and access.²⁶ The drafters agreed that abduction is not in a child's best interest and hoped that an effective return remedy would help to deter parental kidnapping.²⁷ The remedy was designed to prevent an abductor from gaining an advantage by forum shopping or changing the facts on the ground. To be effective, this approach depends on a strong principle of reciprocity between contracting states, the cooperative efforts of Central Authorities to aid in prompting a speedy return, and faithful implementation by judicial authorities when return proceedings are commenced.²⁸

22. These meetings are a unique feature of the Hague Conference. *See* Pfund, *supra* note 9, at 25–26, 73–74.

23. In addition to the Children's Conventions, the same process has produced conventions in other areas that relate to family law, including conventions in 1985 and 1989 on recognition and applicable law in the areas of trusts and estates, and the 2000 Convention on the International Protection of Adults. *See supra* note 3.

24. ELISA PÉREZ-VERA, EXPLANATORY REPORT, CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 426, 435 (1980) (noting the Convention "is above all a convention which seeks to prevent the international removal of children by creating a system of close cooperation among the judicial and administrative authorities of the Contracting States."); *see also* PAUL R. BEAUMONT & PETER MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 16–23 (1999); Dyer, *supra* note 16, at 635–39; Lipstein, *supra* note 16, at 598–99.

25. *See supra* note 3; *see also infra* Part III.A.

26. PÉREZ-VERA, *supra* note 24, at 434–35.

27. PÉREZ-VERA, *supra* note 24, at 430–32.

28. *Id.* As Adair Dyer has noted, the duties designed for Central Authorities under the Abduction Convention were more extensive than those required by the older conventions, particularly because it requires two-way cooperation between contracting states. *See* Dyer, *supra* note 16, at 642.

Determination of a wrongful removal or retention is made with reference to the child's place of habitual residence.²⁹ This concept was already well established in the Hague Conference, which has considered habitual residence to be a question of pure fact, avoiding the legal technicalities that surround a determination of nationality or domicile.³⁰ To resolve questions such as whether a parent has "rights of custody" protected by the Convention, the treaty refers to the law of the child's habitual residence.³¹

The drafters of the Abduction Convention understood that the obligation to order that a child be returned to another country would often run counter to a judge's inclination to address the underlying substantive issues and consider the child's individual best interests. To constrain this inclination, Article 16 expressly prohibits a court that has been notified of a wrongful removal or retention from deciding the merits of a custody dispute until it has been determined that the child should not be returned. Similarly, under Article 17, the fact that a custody decision has been made in the requested state is not a proper ground for refusing the child's return.³²

After the Abduction Convention took effect in 1984, the Permanent Bureau of the Hague Conference began to work closely with Central Authorities in the contracting states to coordinate implementation.³³ The first Special Commission meeting to review the practical operation of the Convention was in 1989, and these meetings have continued about once every four years.³⁴ The meetings have considered projects carried out by the Permanent Bureau such as the development of guides to good practice, a system for maintaining statistics, and an international database of judicial decisions. In addition to Special Commission meetings, the Conference also works with judges in all parts of the

29. The Convention does not require that a child be returned to the country of habitual residence because of the possibility that the applicant may no longer live there. *See* PÉREZ-VERA, *supra* note 24, at 459.

30. PÉREZ-VERA, *supra* note 24, at 445. Because of this view, the term is deliberately not given a more precise definition in the Convention or the Explanatory Report. On the concept of habitual residence, see generally Eric Clive, *The Concept of Habitual Residence*, 1997 JURID. REV. 137 (1997) (analyzing the statutory concept of habitual residence).

31. PÉREZ-VERA, *supra* note 24, at 459.

32. Conversely, Article 19 holds that a decision under Convention "shall not be taken to be a determination on the merits of any custody issue."

33. *See* Dyer, *supra* note 16, at 642-43.

34. Five special commission meetings have been held, in 1989, 1993, 1997, 2002 and 2006. Hague Conference on Private International Law, Publications, http://www.hcch.net/index_en.php?act=conventions.publications&dtid=2&cid=24 (last visited Nov. 16, 2009). Preliminary documents for the meetings, along with conclusions and recommendations of each meeting, are available at the Hague Conference on Private International Law website.

world through special seminars and a newsletter.³⁵

The decade that followed adoption of the Abduction Convention saw completion of the United Nations Convention on the Rights of the Child (CRC).³⁶ Since 1989, the CRC has sustained and reinforced the Hague Conference's project of developing a transnational children's law. Adair Dyer, the former Deputy Secretary General of the Hague Conference, has described the CRC as forming "the essential backdrop for international children's law," articulating general principles without detailing specific mechanisms to accomplish its goals.³⁷ CRC Article 11 encouraged nations to conclude or join international agreements to prevent "illicit transfer and non-return of children abroad"³⁸—language that pointed directly to the 1980 Abduction Convention. Other provisions emphasized the importance of international agreements to regulate intercountry adoption³⁹—and to secure the recovery of child maintenance from the child's parents or other responsible party.⁴⁰

Since 1989, most nations of the world have ratified the CRC,⁴¹ which was framed to permit ratification even by countries that had not yet established strong protections for children's rights. For some of these countries, ratifying or acceding to the Abduction Convention represented an important step toward compliance with the CRC.⁴² These incentives contributed to the broad success of the Abduction Convention, which experienced a surge in accessions after 1989 and now has more than eighty contracting states.⁴³ In addition, there are clear linkages between the provisions of the CRC and the Hague Conventions that have followed it.⁴⁴

35. See William Duncan, *Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau*, 33 N.Y.U. J. INT'L L. & POL. 103, 103–12 (2000). The Conference has undertaken similar efforts in support of the other Children's Conventions. *Id.*

36. See *supra* note 10; see generally Cynthia Price Cohen, *United Nations: Convention on the Rights of the Child, Introductory Note*, 28 I.L.M. 1448, 1448–53 (1989) (describing negotiation and implementation of the CRC).

37. Dyer, *supra* note 16, at 643–44.

38. CRC, *supra* note 10, art. 11.

39. CRC, *supra* note 10, art. 21.

40. CRC, *supra* note 10, art. 27.

41. Treaty information is available at <http://treaties.un.org>. The United States signed the CRC in 1995 but has not ratified it. See Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, Human Rights, Spring 1999, at 27; see also CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (Cynthia Price Cohen & Howard Davidson eds., 1990).

42. States parties to the CRC must report regularly to the U.N. Committee on the Rights of the Child on their progress toward implementation of the treaty. See Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child: Monitoring Children's Rights, <http://www2.ohchr.org/english/bodies/crc/index.htm> (last visited Nov. 16, 2009).

43. See *supra* note 3.

44. See Protection Convention, *supra* note 7, pmb. The Protection Convention and the

2. Intercountry Adoption

The Adoption Convention,⁴⁵ completed in 1993, was drafted to respond to the “worldwide phenomenon involving migration of children over long geographical distances and from one society and culture to a very different environment.”⁴⁶ A previous Hague adoption convention had focused on traditional conflict of laws questions such as jurisdiction, choice of law, and recognition of adoption decrees.⁴⁷ By 1988, however, it was clear that international adoption presented serious problems that could be addressed through a system that structured cooperation between countries of origin and receiving countries. After diplomatic work by its Secretary General, the Hague Conference convened a Special Commission in 1990 to develop a new adoption convention, inviting the participation of non-member states that were frequently countries of origin for intercountry adoption.⁴⁸

International adoption had become controversial in many countries,⁴⁹ not only because of some serious abuses but also because of a belief that it is best for children to remain within their own local communities and cultures and a concern about the implications of poorer nations losing their children to wealthier nations. Against the broader history of

Maintenance Convention make explicit reference to the CRC, particularly emphasizing that the best interests of the child must be a primary consideration in all actions concerning children. The Maintenance Convention preamble refers to CRC Article 27, which recognizes the right of every child to an adequate standard of living and the primary responsibility of parents or others responsible for the child to secure the conditions of living necessary for the child’s development. Maintenance Convention, *supra* note 6. Article 27 also provides: “[W]here 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” to secure the recovery of maintenance. CRC, *supra* note 10, art. 27.

45. *See supra* note 5; *see also infra* Part III.B.

46. G. PARRA-ARANGUREN, EXPLANATORY REPORT, CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, II ACTES ET DOCUMENTS DE LA DIX-SEPTIÈME SESSION 537 (1993).

47. *See* Convention on Jurisdiction, Applicable and Recognition of Decrees Relating to Adoptions, Nov. 15, 1965, *reprinted in* 4 I.L.M. 338 (1965), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=75; *see supra* note 3.

48. PARRA-ARANGUREN, *supra* note 46, paras. 23–29. Thirty non-member states participated, including several major sending countries—India, Korea, and the Russian Federation—which have since become members of the Hague Conference. *See also* Pfund, *supra* note 9, at 28.

49. *See* Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT’L & COMP. L. REV. 121 (1994). Discussion of the Adoption Convention in the Hague Conference began with a comprehensive report prepared by Hans van Loon. *See Report on Intercountry Adoption*, Prel. Doc. No. 1 of April 1990, in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PROCEEDINGS OF THE SEVENTEENTH SESSION 10-119 (1993); *see also* Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW AND PRACTICE 10-1 (Joan Hollinger, ed. 2002).

colonial and post-colonial relations, intercountry adoption seemed to be a form of exploitation or a source of national shame. Particular controversy surrounded adoption practices in nations where there was minimal government regulation, increasing the risk of incompetent intermediaries, fraud and corruption, and practices that amounted to child trafficking.⁵⁰ At the same time, it was also apparent that many children in many countries lived in terrible conditions in institutions or on the streets.

In response to the adoption controversy, Article 21 of the CRC stated that “intercountry adoption may be considered as an alternative means of a child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” This language suggested that “suitable” foster or institutional care in the country of origin was preferable to intercountry adoption, a position that was widely criticized in the United States.⁵¹ The Hague Adoption Convention took a more affirmative approach. While the preamble cited CRC Article 21 and described the Convention’s purpose as “ensur[ing] that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children,”⁵² it went on to affirm that a child, “for the full and harmonious development of her or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” The preamble also recalled that every country “should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin” and recognized “that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.” With this language, the Adoption Convention affirmed that adoption was preferable to institutional care, even when this required that a child move to another country.⁵³ At the same time, the Hague Conference has reaffirmed a principle of subsidiarity, which holds that

50. See Carro, *supra* note 49, at 131–42.

51. See, e.g., Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 204–08 (2003).

52. Adoption Convention, *supra* note 5, pmb. (citing CRC, *supra* note 10, art. 3).

53. PARRA-ARANGUREN, *supra* note 46, paras. 31–35; Pfund, *supra* note 9, at 112–13. Despite this difference in approach, UNICEF eventually endorsed the Adoption Convention with a statement issued in November 2007 which included this assertion: “For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care which should be used only as a last resort and as a temporary measure.” Press Release, UNICEF, UNICEF’s Position on Inter-Country Adoption (Nov. 23, 2007), available at http://www.unicef.org/media/media_41918.html.

intercountry adoption should be pursued only if a suitable family cannot be found in the child's country of origin.⁵⁴

The Adoption Convention applies whenever a child who is habitually resident in one contracting state is moved to another contracting state for purposes of adoption.⁵⁵ It does not dictate where the adoption proceeding will take place, and it assigns responsibilities to the Central Authorities of both the state of origin and the receiving state.⁵⁶ Participating nations may delegate direct adoption services to accredited public authorities or approved individuals.⁵⁷ A child may not be transferred between Convention countries until the treaty requirements are satisfied, and the adoption and transfer cannot take place until both Central Authorities have agreed that it can proceed.⁵⁸ With this approach, either country can veto an adoption on its own public policy grounds. Once an adoption is certified under the Convention, it must be recognized by operation of law in other contracting states.⁵⁹

In comparison with previous conventions, the Adoption Convention, reflecting the central role of child welfare and social workers in the negotiating process and the goal of developing an agreement that would be accepted in many different countries, is less focused on legal questions such as jurisdiction or choice of law.⁶⁰ After its completion in 1993, the Adoption Convention came into effect in 1995. By the end of 2009, it had achieved eighty-one ratifications and accessions.⁶¹ The accessions of several nations drew objections on the basis that the countries did not have an adoption system in place that complied with the treaty norms.⁶² Some important states of origin have not yet joined

54. Cf. Adoption Convention, *supra* note 5, art. 4(b). This principle was reaffirmed by the Special Commission to review the operation of the Adoption Convention during its meetings in 2000 and 2005. See *infra* notes 232–39 and accompanying text.

55. See Adoption Convention, *supra* note 5, art. 2(1). Note that this is not determined by the nationality of the child or parents concerned. See PARRA-ARANGUREN, *supra* note 46, paras. 59, 70. The Adoption Convention “covers only adoptions which create a permanent parent-child relationship.” Adoption Convention, *supra* note 5, art. 2(2). This means it is not applicable to placement for foster care or guardianship or institutions like the Muslim *kafalah*. See PARRA-ARANGUREN, *supra* note 46, paras. 40–41.

56. Adoption Convention, *supra* note 5, arts. 15–16.

57. *Id.* art. 9.

58. *Id.* art. 17(c); see *infra* notes 204–08 and accompanying text.

59. Adoption Convention, *supra* note 5, art. 23(1). Under Article 24, recognition may be refused in a contracting state “only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.” *Id.* art. 24.

60. See Pfund, *supra* note 9, at 110–11; see also *id.* at 39–40 (“[T]he Permanent Bureau and most delegates deliberately sought to make the Convention as understandable as possible to the largely non-lawyers likely to be involved in providing intercountry adoption services.”).

61. See *supra* note 3; see also Pfund, *supra* note 9, at 110.

62. These objections were made concerning Armenia, Cambodia, Guatemala and Guinea. See *infra* note 228 and accompanying text.

the Adoption Convention, partly because of the challenges involved in complying with it.

For countries with only a rudimentary child welfare system, implementing the treaty is a real challenge that involves building basic institutions from the ground up. These particularly complex implementation issues were addressed in Special Commission sessions that began even before the Convention came into effect.⁶³ To assist countries with implementation, the Hague Conference has produced a Guide to Good Practice⁶⁴ and begun its Intercountry Adoption Technical Assistance Programme, funded by contributions from member states, including the United States. This initiative is designed to provide training and assistance to help origin states build adoption systems that comply with the Convention standards.⁶⁵ Hague teams have visited more than a dozen countries to offer advice on adoption and child protection matters and have worked particularly closely with the government of Guatemala.⁶⁶

3. Child Protection

Following the Abduction and Adoption Conventions, the Hague Conference revisited more traditional private international law concerns with its 1996 Child Protection Convention.⁶⁷ This 1996 Child Protection Convention was a revision of an earlier convention, intended to correct problems that had arisen in the earlier convention's application and to harmonize it with the Abduction Convention and the CRC.⁶⁸ The Protection Convention covers a wide range of conflict of laws issues in four major areas: jurisdiction, applicable law, recognition and enforcement, and judicial cooperation.⁶⁹ It applies to a wide range of legal proceedings involving children, including measures dealing with parental responsibility, custody and access rights, guardianship (of the

63. See Pfund, *supra* note 9, at 23. The Special Commission for the Adoption Convention has met in 1994, 2000 and 2005; these meetings have addressed issues including disclosure of medical information and post-adoption reporting requirements.

64. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE (2008), available at http://www.hcch.net/index_en.php?act=publications.details&pid=4388.

65. *Id.*

66. See, e.g., HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT OF A FACT-FINDING MISSION TO GUATEMALA IN RELATION TO INTERCOUNTRY ADOPTION (2007), available at http://www.hcch.net/upload/wop/mission_gt33e.pdf.

67. See Protection Convention, *supra* note 7; see also *infra* Part III.D.

68. See PAUL LAGARDE, EXPLANATORY REPORT, CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 539 (1996), available at http://www.hcch.net/index_en.php?act=publications.details&pid=2943.

69. Protection Convention, *supra* note 7.

child or the child's property), and foster or institutional care.⁷⁰ As with the Abduction and Adoption Conventions, jurisdiction is ordinarily placed in the child's state of habitual residence.⁷¹ In its Preamble, the Protection Convention makes general reference to the CRC,⁷² and a number of its terms implement more specific provisions—for example recognizing the importance of a child having the opportunity to be heard.⁷³

As a result of its breadth, the process of ratification of the Protection Convention has been slow. By June 2010, when the Protection Convention will be in effect throughout the European Union, it will have approximately thirty-five contracting parties.⁷⁴ Part of the difficulty is that, as a more traditional conflict of laws agreement, the Convention demands a much greater level of harmonization between divergent legal systems. While the Convention defines a role for Central Authorities in facilitating communications and transmitting information between countries, most of its rules are designed to be implemented by judges under appropriate national legislation.⁷⁵

Proponents of the Protection Convention stress its potential to address difficulties that states have encountered in some cases under the Abduction Convention, particularly those involving recognition and enforcement of contact or access orders. The Convention should help eliminate jurisdictional competition and ensure that orders made in one country will be enforced in another. It will facilitate protective measures in connection with return orders under the Abduction Convention. In addition, the Protection Convention has special relevance to cases involving internationally displaced or refugee children, children who are

70. *Id.* art. 3. The Protection Convention does not apply to actions concerning parentage, adoption, naming, emancipation, support, trusts or succession, or public measures concerning social security, education, health, penal offenses, or immigration and asylum rights. *Id.* art. 4.

71. *Id.* art. 5(1).

72. *Id.* pmb1.

73. *See id.* art. 23(2)(b); LAGARDE, *supra* note 68, para. 123.

74. In addition to the twenty-seven member countries of the European Union, the Convention is in effect in Albania, Armenia, Australia, Ecuador, Monaco, Morocco, Switzerland, and the Ukraine. *See supra* note 3. Ratification by the European Union was delayed by the dispute between Spain and Britain over the legal status of Gibraltar. *See Britain, Spain Settle a Dispute Over Gibraltar*, REUTERS, Jan. 8, 2008, <http://www.reuters.com/article/newsMaps/idUSL0845118820080108>. Many provisions of the Protection Convention have been incorporated into the European Council Regulation (EC) No. 2201/2003, known as the Brussels II bis Regulation. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS OF THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 3 (2006) [hereinafter HAGUE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS OF THE FIFTH MEETING], *available at* http://www.hcch.net/upload/concl28sc5_e.pdf.

75. This contrasts with the Abduction and Adoption Conventions, which assign more substantial responsibilities to the Central Authorities. *See supra* notes 28 & 55–59.

subjects of trafficking or abduction, and cross-border placements in foster or alternative care. It is also likely to be more broadly accepted in Muslim countries than the Abduction and Adoption Conventions have been, as the prompt ratification by Morocco suggests.⁷⁶ To encourage wider implementation, the Conference has begun to develop a good practice guide⁷⁷ and has included discussion of the Protection Convention during Special Commission meetings reviewing the Abduction Convention. As countries join, the Hague Conference will be able to utilize the judicial education and communication networks it has already established to support better implementation of the Protection Convention.

4. Family Maintenance

Before developing the 2007 Maintenance Convention,⁷⁸ members of the Hague Conference debated whether the existing international agreements on the same subject could be made to operate more effectively.⁷⁹ Eventually, the Conference concluded that it would be better to create a comprehensive new instrument to take advantage of developments in child support enforcement systems and information technology.⁸⁰ Negotiations over the new convention took more than five years and eventually included eighty-two nations.⁸¹ With the Maintenance Convention, the Hague Conference also adopted a Protocol on the Law Applicable to Maintenance Obligations.⁸²

Although the Special Commission debated many difficult questions in developing the Maintenance Convention, there was clear consensus on the goal of improving child support enforcement. The convention's preamble refers to CRC Article 27, which states that "every child has

76. See *infra* notes 180–83, 261–63 and accompanying text.

77. See HAGUE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS, *supra* note 74, at 7.

78. Maintenance Convention, *supra* note 6; see also *infra* Part III.C.

79. See ALEGRIA BORRÁS & JENNIFER DEGELING, DRAFT EXPLANATORY REPORT, CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE, 3–4 (2008). These precedents include two pairs of prior Hague conventions and the 1956 New York Convention on the Recovery Abroad of Maintenance. *Id.* at 3.

80. *Id.* at 4; see also William Duncan, *The New Hague Child Support Convention: Goals and Outcomes of the Negotiations*, 43 FAM. L.Q. 1, 2–5 (2009); Marygold S. Melli, *The United States and the International Enforcement of Family Support*, in FAMILIES ACROSS FRONTIERS 715–31 (Nigel Lowe & Gillian Douglas, eds., 1996).

81. In addition to sixty-eight member states, an additional fourteen states participated as observers. BORRÁS & DEGELING, *supra* note 79, at 3. Negotiations were conducted in Spanish as well as French and English for the first time. *Id.*; see also Duncan, *supra* note 80, at 19–20.

82. The Protocol serves to modernize the 1956 and 1973 Hague conventions on applicable law in this area. See ANDREA BONOMI, REVISED DRAFT EXPLANATORY REPORT, HAGUE PROTOCOL OF 23 NOVEMBER 2007 ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS 5 (2009), available at http://www.hcch.net/upload/maint/draft_expl39e_rev.pdf.

the right to a standard of living adequate to the child's physical, mental, spiritual, moral and social development" and provides that "[s]tates should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child."⁸³

Building on models for administrative support enforcement already in place in the United States and other countries, the new Maintenance Convention, at its core, is a system of administrative cooperation for processing international child support applications designed to handle large volumes of cases. While the previous conventions required participants to recognize foreign support orders, the new convention requires the Central Authorities of participating states to provide "effective access to procedures" for child support enforcement, including free legal assistance in most situations.⁸⁴ In negotiations, the principle of cost-free services was the most difficult and important one for the United States, which has been committed to this principle in its domestic child support enforcement system and in its bilateral agreements with other countries.⁸⁵ The U.S. delegation argued that unless enforcement services were available at low or no cost, the system would not be effective for the vast majority of cases in which applicants do not have sufficient financial resources to retain counsel in a foreign country.⁸⁶

Other difficult issues centered on differences between the jurisdictional rules of participating countries and differences on the range of family relationships that may give rise to support obligations. As finally adopted, the Convention mandates administrative cooperation and cost-free services in all child support cases, extending to all children regardless of their parents' marital status.⁸⁷ Contracting states may also agree on a reciprocal basis to extend the administrative cooperation system to a wider range of family maintenance obligations.⁸⁸ As was possible under the prior support conventions, the

83. Maintenance Convention, *supra* note 6, pmb1.

84. *See* Duncan, *supra* note 80, at 9–11.

85. Maintenance Convention, *supra* note 6, arts. 5–8.

86. *See* Mary Helen Carlson, *United States Perspective on the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 43 FAM. L.Q. 21, 29–31 (2009); Duncan, *supra* note 80, at 14.

87. Maintenance Convention, *supra* note 6, art. 2(4). The prohibition of discrimination based on legitimacy of birth is consistent with CRC Article 2(1). *See* BORRÁS AND DEGELING, *supra* note 79, at 16.

88. Chapters I and II of the Maintenance Convention, which address the process of administrative cooperation by Central Authorities, apply to "maintenance obligations arising from a parent-child relationship towards a person under the age of 21" and to recognition and enforcement of spousal support decisions if the application is made with a claim for child

new Convention also provides for recognition and enforcement of other family maintenance obligations, such as spousal support, by direct request to a tribunal in another contracting state.⁸⁹

Because administrative cooperation is at the core of the Maintenance Convention, work on standard forms and procedures was carried out even as the negotiations on the Convention were ongoing. The Convention was adopted with required transmittal and acknowledgement forms, and work on additional recommended forms, along with an implementation guide and practical handbook, has been ongoing. To facilitate the handling of these cases, the Conference has developed an innovative system of electronic country profiles and a system for international electronic communication and case management. These systems, which allow information to be changed from one language into another with a single computer click, should eliminate much of the need for foreign language translation in child support cases. These implementation measures were presented for approval at a Special Commission meeting in November 2009.⁹⁰

B. *Reinventing the Hague Conference*

As it developed the Children's Conventions, the Hague Conference transformed itself and international family law. The need for strong Central Authorities in contracting states, the expanding membership of the organization, and the broad international participation in the Children's Conventions generated substantial challenges for implementation and provided new work for the Conference. The Conference has become a center for international judicial and administrative cooperation by taking on new roles implementing and monitoring the conventions and providing education and assistance for participants. At the same time, the Conference has substantially expanded its membership and participation in its conventions.⁹¹ These changes are linked: as the number and diversity of participants widens, the need for coordination and assistance has grown as well.

At the time of its founding in 1955 as a permanent intergovernmental organization, the Hague Conference included fifteen

support. Maintenance Convention, *supra* note 6, art. 2(1)(a)–(b). Under Article 2, countries may limit application of the Convention to persons under the age of 18, and may elect to apply the convention to a wider range of family support obligations. *Id.* art. 2(2)–(3).

89. Maintenance Convention, *supra* note 6, art. 2(1)(b).

90. Duncan, *supra* note 80, at 17–19. For the agenda and preliminary documents for the special commission meeting, see http://www.hcch.net/index_en.php?act=progress.listing&cat=3.

91. The Hague Conference Strategic Plan reflects these goals. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, STRATEGIC PLAN UPDATE 3 (2009), available at http://www.hcch.net/index_en.php?act=text.display&tid=31 [hereinafter HAGUE CONFERENCE, STRATEGIC PLAN UPDATE].

Western European nations and Japan.⁹² Between 1980, when the Abduction Convention was adopted, and 2007, when the Maintenance Convention was adopted, Conference membership grew from twenty-six member countries⁹³ to sixty-eight, including more extensive representation from Asia, Africa, and Latin America.⁹⁴ Another group of nations have status as observers, including: Algeria, Burkina Faso, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Indonesia, Iran, the Philippines, the Vatican, and Vietnam. To help increase its global presence, the Conference has moved to make its treaties and proceedings available in a wider range of languages and has provided financial support to enable participation of delegates from less wealthy nations.⁹⁵ The Hague Conference has opened a bureau in Argentina and is considering others in Asia and Africa.⁹⁶

Each of the Children's Conventions is open for signature and ratification by any nation that was a member of the Hague Conference at the time it was adopted.⁹⁷ In addition, the Adoption Convention and the Maintenance Convention are open to signature and ratification by non-member states that participated in the treaty negotiation sessions.⁹⁸ All of the Children's Conventions also allow other nations to accede to the conventions' terms with the limitation that accessions by non-member states take effect only with respect to whichever contracting states accept these accessions.⁹⁹ As described in the Explanatory Report

92. *See supra* note 13.

93. These included Australia, Canada, and the United States as well as Argentina, Egypt, Israel, Turkey, and Venezuela. A list of member countries with dates of membership is available on the Hague conference web site at www.hcch.net/index_en.php?act=states.listing. *See also* PÉREZ-VERA, *supra* note 24, at 426.

94. Current Hague Conference members include the Russian Federation (since 2001) and many countries of Eastern Europe and the former USSR, as well as the People's Republic of China (1987), Korea (1997), Sri Lanka (2001), Malaysia (2002), and India (2008); South Africa (2002); Uruguay (1983), Chile (1986), Mexico (1986), Brazil (2001), Panama (2002), Paraguay (2005), and Ecuador (2007). *See* Hague Conference, *available at* http://www.hcch.net/index_en.php?act=state.listing.

95. *See* Pfund, *supra* note 9, at 29–30 (describing process, beginning in 1989, of translating previously negotiated Hague conventions into Spanish).

96. *See* HAGUE CONFERENCE, STRATEGIC PLAN UPDATE, *supra* note 91, at 4.

97. *See* Abduction Convention, *supra* note 4, art. 37; Adoption Convention, *supra* note 5, art. 43; Protection Convention, *supra* note 7, art. 57; Maintenance Convention, *supra* note 6, art. 58(1).

98. Adoption Convention, *supra* note 5, art. 43; Maintenance Convention, *supra* note 6, art. 58(1).

99. *Compare* Abduction Convention, *supra* note 4, art. 38 (requiring that Contracting State accept accessions before they take effect), *with* Adoption Convention, *supra* note 5, art. 44 (providing that accessions will have effect only between acceding State and those Contracting States that do not object within six months), *and* Protection Convention, *supra* note 7, art. 58 (same), *and* Maintenance Convention, *supra* note 6, art. 58 (providing that accessions will have effect only between acceding State and those Contracting States that do not object within twelve

for the Abduction Convention, this “semi-open” approach is intended to balance the “desire for universality” with the need for “a sufficient degree of mutual confidence” among the participating states.¹⁰⁰

The move to expand participation and membership in the Hague Conference reflects a deep commitment to working with a more diverse and global network of treaty partners. As the economic, legal, and cultural diversity of the membership increases, the project of striking a balance between universality and mutual confidence has become more complicated. This was evident during the negotiation of the Maintenance Convention. More than eighty nations participated as members or observers, almost three times the number of nations present when the Abduction Convention was prepared in 1980.¹⁰¹ Delegates disagreed through the final sessions over whether the new convention should impose relatively few obligations so that it could be more easily ratified by all participants, or whether it was more important to ensure that it would be an effective tool for enforcing support obligations even if some nations would not soon be in a position to ratify it.

The Abduction and Adoption Conventions are among the most widely ratified products of the Hague Conference.¹⁰² Eighty-one nations now participate in the Abduction Convention, and a different group of eighty-one have joined the Adoption Convention.¹⁰³ This is a spectacular record, but some of those states have joined the Conventions without having adequate governmental infrastructure to comply with the treaties, sometimes without having named a Central Authority.¹⁰⁴ In this situation, the Permanent Bureau provides assistance to new treaty members to try to assure that the treaty regime will function

months). The United States has accepted most but not all accessions to the Child Abduction Convention. See Hague Conference on Private International Law, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Status, http://www.hcch.net/upload/abductoverview_e.pdf (last visited Nov. 16, 2009); see also Carol S. Bruch, *Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under the Hague Child Abduction Convention*, 33 N.Y.U. J. INT'L L. & POLITICS 49, 49–51 (2000) (describing process of membership by accession).

100. PÉREZ-VERA, *supra* note 24, at 437.

101. See *supra* note 93 and accompanying text. See also Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 351 (2008) (“The introduction of additional parties to treaty negotiations is hardly ever cost-free. It potentially increases barriers to efficient agreements and exacerbates problems of information asymmetry, strategic barriers, psychological barriers, and institutional constraints.”). Blum also notes the “substitution effect between the depth of the obligations imposed by an international agreement and the number of parties that will agree to accept these obligations.” *Id.* at 350.

102. The only Hague convention with more contracting states is the 1961 Apostille Convention, with ninety-five contracting states. See *supra* note 3.

103. See *id.*

104. See Carol S. Bruch, *The Hague Child Abduction Convention: Past Accomplishments, Future Challenges*, 1 EUR. J. L. REFORM 97, 106–07 (1999); Duncan, *supra* note 35, at 118–21.

appropriately.

The goal of developing a truly global children's law presents enormous challenges in light of the stark differences in the capacities of different nations to implement legal protections for children's welfare. The Hague Conference has instituted developmental and technical assistance projects, including providing support to states in the early stages of implementing the Adoption Convention and assistance for states experiencing difficulties in implementing the Abduction Convention. The Conference sponsors regional programs in Latin America, Africa, and the Asia-Pacific region, as well as regular judicial conferences on cross-frontier child protection and family law issues involving Hague states and non-Hague states from within the Islamic tradition.¹⁰⁵ All of these efforts have required raising funds from sources beyond the annual dues paid by member states.¹⁰⁶ The United States helps to fund this Supplementary Budget,¹⁰⁷ and increased permanent funding for the Hague Conference has been proposed in Congress.¹⁰⁸

Reciprocity is essential to the success of the new Children's Conventions. With no international body to enforce compliance or resolve disputes, this reciprocity can be achieved only through active collaboration of the governments of member countries. For conventions implemented primarily by judges, such as the Abduction Convention and the Protection Convention, the Hague Conference judicial seminars and educational activities help bring about a uniform application and interpretation of the convention and a more consistent and dependable enforcement of its terms. By collecting case law and statistical information and meeting to review how the conventions have been implemented, the Conference members help to assure that participating states take these obligations seriously. For conventions implemented primarily by administrative authorities, such as the Adoption Convention and the Maintenance Convention, there is a different need for training and technical assistance. With all four conventions, international communication is centrally important, including communication between judges or Central Authorities in particular cases and regular meetings of member states to consider how to make

105. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GENERAL AFFAIRS AND POLICY, PROJECTS CONCERNING THE CHILDREN'S CONVENTIONS, MAINTENANCE, ADULTS AND COHABITATION 12-13 (2008), available at http://www.hcch.net/upload/wop/genaff_pdo3e2008.pdf.

106. This is reflected in the Hague Conference Strategic Plan. See HAGUE CONFERENCE, STRATEGIC PLAN UPDATE, *supra* note 91.

107. See, e.g., HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GENERAL AFFAIRS AND POLICY, PROJECTS CONCERNING THE CHILDREN'S CONVENTIONS 16 (Feb. 2004), available at http://www.hcch.net/upload/wop/genaff_pd12e.pdf.

108. See, e.g., The International Assistance to Missing and Exploited Children Act of 2004, H.R. 4347, 108th Cong. (2004).

the conventions operate more effectively.¹⁰⁹

The product of these initiatives is a new model of international law—a different type of foreign relations carried on by judges and bureaucrats as well as diplomats. Under the guidance of the Hague Conference, today's international family law extends far beyond the traditional sphere of conflict of laws. Because of the important role for Central Authorities and the ongoing cooperation of member states working through the Hague Conference, the Children's Conventions have a substantial public law character. And, as the Hague Conference continues to expand to include a large and diverse group of nations in its treaty networks, the new international family law has more substantial foreign relations implications for the United States.

III. THE CHILDREN'S CONVENTIONS IN THE UNITED STATES

Throughout the process of building the new international family law, the United States has participated in the Hague Conference and supported its projects.¹¹⁰ The United States joined the Hague Conference in 1964 and ratified or acceded to the litigation conventions between 1967 and 1980,¹¹¹ but it never joined the early Hague family law treaties or the New York Maintenance Convention.¹¹² Several writers have attributed the United States' failure to participate in these regimes to the traditional allocation of power between the states, which have primary responsibility for family law, and the national government, which has authority over foreign relations and international law. International family law has fallen into this federalism gap because international law lies beyond the competence of the states and family law has not been a foreign relations priority for the national government.¹¹³

109. This cooperative approach is unique within the universe of international law. See Pfund, *supra* note 9, at 73; see also *infra* Part IV.C.

110. One important figure throughout this process was an American, Adair Dyer, who helped to lead the Hague Conference from 1973 until 1997. See GLOBALIZATION OF CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS VII–IX (Sharon Detrick & Paul Vlaardingerbroek, eds., 1999).

111. For a description of these conventions, see *supra* note 19 and accompanying text.

112. See Lipstein, *supra* note 16, at 586–99. See generally Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 273–84 (2002) (discussing earlier Hague family law conventions).

113. Pfund, *supra* note 9, at 51–52; see David F. Cavers, *International Enforcement of Family Support*, 81 COLUM. L. REV. 994, 996–97 (1981). See also Chelsea P. Ferrette, *A Critical Analysis of the International Child Support Enforcement Provisions of the Social Security Act: The (In)ability of States to Enter into Agreements with Foreign Nations*, 6 ILSA J. INT'L & COMP. L. 575 (2000). On similar tensions in other areas of private international law, see Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 105–11 (1994); Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, 304–05 (2005).

For the United States, the process of joining the new Children's Conventions has been slow but steady, backed by a series of different administrations since the late 1970s. In its initial phases, the process focused on international child abduction and adoption, issues regularly handled by consular officials for which there were national advocacy groups and constituent pressures in Congress. The conventions in these areas have provided better tools and remedies in areas of regular international conflict. In its later stages, the process has focused on international conflict of laws and child support enforcement, issues which affect a much larger number of families but do not receive as much international or diplomatic attention. There is little public debate on these issues and a less focused constituency to support these conventions.

To implement the Children's Conventions, the United States has constructed new legislative and administrative structures at the national level, a process which has required addressing constitutional and pragmatic federalism issues and new allocation of authority within the federal government. Unlike many European countries, no national agency is responsible for implementing private international law or international family law. The office of the Assistant Legal Adviser for Private International Law in the State Department coordinates United States participation in the Hague Conference, and the Office of Children's Issues in the Bureau of Consular Affairs of the State Department serves as Central Authority for the Abduction Convention and the Adoption Convention.¹¹⁴ Foreign Service officers in consular and diplomatic positions also get involved in some abduction and adoption cases. For the Maintenance Convention, the Central Authority will be the Office of Child Support Enforcement in the Department of Health and Human Services, which already serves in this role under bilateral agreements.

Peter Pfund, who was Assistant Legal Adviser for Private International Law from 1979 through 1997, has described the State Department's process for consulting important stakeholders, collaborating with other federal agencies, and building private sector support for private international law conventions before they are presented to the President, the Senate, and Congress for approval.¹¹⁵ Federal implementing legislation has sometimes required a further process of developing regulations or passing legislation at the state level

114. See Bureau of Consular Affairs, U.S. Dep't of State, http://www.travel.state.gov/family/family_1732.html (last visited Nov. 16, 2009).

115. See generally Pfund, *supra* note 9, at 61-67. In addition to shepherding the Abduction Convention and the Adoption Convention through Congress, Mr. Pfund chaired the first two Special Commissions in The Hague reviewing implementation of the Abduction Convention in 1989 and 1993.

to implement the treaty. This can be a long process: for the Abduction Convention, seven years passed between the United States' signature in 1981 and its ratification in 1988, and with the Adoption Convention thirteen years passed between the United States' signature in 1994 and its ratification in 2007.¹¹⁶ The Maintenance Convention, signed by the United States immediately after the text was adopted at the Hague Conference Diplomatic Session in 2007, has been on a faster track, but the most optimistic estimates suggest a process of at least three years before ratification will be completed.¹¹⁷

After the initial process of ratification and implementation, the Children's Conventions create ongoing responsibilities for federal and state courts and agencies. Each of these conventions has been progressively broader in scope and more complex to administer. The United States makes several hundred applications for return of a child or access each year under the Abduction Convention,¹¹⁸ and has received comparable numbers of incoming applications.¹¹⁹ The numbers of international adoptions are much greater. For the past decade, more than 15,000 children have come to the United States each year, with numbers peaking at more than 22,000 children in 2004.¹²⁰ Experts predict that there will be much larger numbers of incoming and outgoing requests under the Maintenance Convention.¹²¹ Administratively, these are

116. See *infra* Parts III.A–B.

117. See *infra* Part III.C. As of November 2009, the United States had not yet signed the Protection Convention. See *infra* Part III.D.

118. Hague Conference data show 212 outgoing applications from the United States in 1999 and 106 outgoing applications in 2003. A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF 25 OCT. 1980 ON THE CIVIL ASPECTS OF INT'L CHILD ABDUCTION, (Preliminary Doc. No. 3 2006) [hereinafter HAGUE 2003 DATA], available at http://hcch.e-vision.nl/upload/wop/abd_pd03efs2006.pdf. Recent numbers are much larger; according to the State Department there were 776 outgoing cases under the convention, and another 300 outgoing child abduction cases involving non-convention countries in fiscal year 2008. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 6, 40–41 (2009) [hereinafter DEP'T OF STATE, 2009 REPORT], available at <http://travel.state.gov/pdf/2009HagueAbductionConventionComplianceReport.pdf>.

119. Hague data show 254 incoming applications to the United States in 1999, and 345 incoming applications in 2003. HAGUE 2003 DATA, *supra* note 118, at 627, 629, 631. In fiscal year 2008, State Department statistics showed 344 incoming applications for Convention countries and territories. DEP'T OF STATE, 2009 REPORT, *supra* note 118, at 40. In 2008, the United States handled incoming and outgoing cases involving a total of 2099 children. DEP'T OF STATE, 2009 REPORT, *supra* note 118, at 6.

120. See *infra* notes 185–86 and accompanying text.

121. According to Philippe Lortie of the Hague Conference Permanent Bureau, Australia and Canada are already handling more than 30,000 international support cases, representing one and a half cases for every 1000 Australian residents and one case for every 1000 Canadian residents. Personal communication with Philippe Lortie, Hague Conference Permanent Bureau (June 19, 2009). The United States does not keep these statistics, but estimates from several

clearly substantial responsibilities.¹²²

A. *Abduction Convention*

The problem of interstate parental kidnapping had already drawn considerable attention when the United States sent a delegation to The Hague to participate in discussion of international child abduction in 1979.¹²³ At the time, state and federal legislation had been enacted to regulate jurisdiction and recognition of custody judgments in interstate cases, and Brigitte Bodenheimer, the Reporter for the 1968 Uniform Child Custody Jurisdiction Act, was a member of the U.S. delegation. The new Hague Abduction Convention had a narrower and more specific purpose: to secure the prompt return of children who have been wrongfully removed from or retained outside the state of their habitual residence.¹²⁴ This narrow focus has been both a strength and a source of controversy.¹²⁵

As previously discussed, the Abduction Convention mandates a return order once a petitioner has made the case that a child's removal or retention was wrongful.¹²⁶ Delegates to the treaty negotiations

states suggest that international cases currently comprise about one percent of the total child support enforcement caseload, which would mean at least 150,000 cases each year. Personal communication with Mary Helen Carlson, Washington, D.C. (Oct. 19, 2009). Data from Texas, distributed to the Drafting Committee that prepared revisions to the Uniform Interstate Family Support Act, indicated that the state Attorney General's Office processed about 1000 international child support cases during the first seven months of 2007. *See* Office of the Attorney General, Child Support Enforcement Division (Aug. 2, 2007), http://www.law.upenn.edu/bll/archives/ulc/uifsa/brooks_stats.pdf.

122. The Children's Conventions also benefit many families and children beyond those directly involved in these cases. Awareness of the Child Abduction Convention helps prevent parental kidnapping, and compliance with the Adoption Convention has helped to raise the standards for child welfare systems. Effective child support enforcement systems encourage parents to provide for their children.

123. *See* Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 99 (1980); Pfund, *supra* note 9, at 136.

124. *See* Bodenheimer, *supra* note 123, at 101–03.

125. There is an excellent discussion of these issues in Linda J. Silberman, *Co-Operative Efforts in Private International Law on Behalf of Children: The Hague Children's Conventions*, in 323 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 261, 329–89 (2006).

126. Under Article 12, when a child is wrongfully removed to or retained in a Contracting State, and proceedings under the Abduction Convention are commenced within one year, the authorities in that state "shall order the return of the child forthwith." If return proceedings are commenced more than one year after the child is removed or retained, the authorities "shall also order return of the child, unless it demonstrated that the child is now settled in its new environment." Article 3(a) specifies that a removal or retention is considered wrongful when it is in breach of "rights of custody" under the law of the state in which the child was habitually resident immediately before the removal or retention, and when those rights were actually exercised at the time of the removal or retention. According to Article 5(a), "rights of custody" under the convention "shall include rights relating to the care of the person of the child and, in

devoted significant time and energy to defining the exceptions that would be permitted to this obligation, and rejected the possibility of a broad public policy clause that would give courts wide latitude to refuse a return order.¹²⁷ Instead, they drafted in Article 13 specific defenses to return,¹²⁸ and drafted in Article 20 a narrower public policy clause.¹²⁹ The Explanatory Report emphasized that the exceptions “are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter.”¹³⁰ The scope of these exceptions has been a significant issue in the implementation of the Convention.

The Abduction Convention was concluded in October 1980 and the United States signed it in December 1981, indicating its intention to proceed toward ratification.¹³¹ After the Convention was endorsed by the American Bar Association (ABA) and the State Department’s Advisory Committee on Private International Law, President Ronald Reagan transmitted it to the Senate in October 1985.¹³² The Senate gave its advice and consent to ratification in October 1986.¹³³ During this period, international parental kidnapping was a regular subject of public discussion.¹³⁴ In congressional hearings,¹³⁵ testimony of left-behind

particular, the right to determine the child’s place of residence.”

127. Bodenheimer, *supra* note 123, at 101–02.

128. Under Article 13(a), return is not mandatory if the party opposing return establishes that the party seeking return was not actually exercising custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention. In addition, under Article 13(b), return is not mandatory if the party opposing return establishes that “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Beyond these affirmative defenses, Article 13 also provides that the authorities may refuse to return a child “if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”

129. Article 20 provides that return may be refused “if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.” See PÉREZ-VERA, *supra* note 24, paras. 31–33, 118.

130. PÉREZ-VERA, *supra* note 24, para. 34. “[A] systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child’s residence, would lead to the collapse of the whole structure of the convention by depriving it of the spirit of mutual confidence which is its inspiration.” PÉREZ-VERA, *supra* note 24, para. 34.

131. The treaty went into effect between the first contracting states—Canada, France, and Portugal—in December 1983. See *supra* note 3.

132. See HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, S. TREATY DOC. NO. 99-11 (1985). The State Department provided the Senate Foreign Relations Committee with a legal analysis of the convention in January 1986. See Public Notice 957, 51 Fed. Reg. 10,494-516 (Dep’t of State Mar. 26, 1986) (reprinting transmittal letters, text of convention, and legal analysis).

133. See S. REP. NO. 99-25 (1986) (recommending ratification); see also H.R. REP. NO. 100-525 (1988). The Abduction Convention was among a group of four private international law conventions taken up by the Senate in 1986. See Pfund, *supra* note 9, at 58.

134. In addition to stories in the news media, public attention was drawn to this issue by BETTY MAHMOODY & WILLIAM HOFFER, NOT WITHOUT MY DAUGHTER (1987), which was

parents illustrated the tremendous hardships of unresolved international abduction cases.¹³⁶ After the Senate's action, work continued on federal implementing legislation.¹³⁷

Congress enacted the International Child Abduction Remedies Act (ICARA) to implement the Convention in April 1988.¹³⁸ In Congress, the most contentious issue concerned federal jurisdiction in return proceedings. Despite objections from the Reagan Administration on federalism grounds, the legislation explicitly authorized concurrent jurisdiction in the state and federal courts.¹³⁹ In addition, to help assure that the purposes of the Abduction Convention would be effectuated, ICARA established a heightened standard of proof for several defenses to return orders under Articles 13 and 20.¹⁴⁰ When the United States formally ratified the treaty on April 29, 1988, it made a declaration, permitted by the Convention, that it would not be bound to assume the costs and expenses of legal counsel or court proceedings in connection with efforts to return children from the United States pursuant to the Convention. When the Convention came into effect in the United States on July 1, 1988 there were a total of ten contracting states.¹⁴¹

Implementation of the Abduction Convention in the United States has been largely successful. In order to provide assistance to left-behind parents in international abduction cases, the United States Central Authority entered an agreement with the National Center for Missing

subsequently made into a movie for television.

135. *Problems of Domestic and International Kidnaping and Child Support Enforcement, Hearing Before the Subcomm. on Juvenile Justice of the S. Judiciary Comm.*, 99th Cong. 15–34 (July 19, 1985) [hereinafter *1985 Senate Hearings*]; *International Child Abduction Act Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Judiciary Comm.*, 100th Cong. (Feb. 3, 1988) [hereinafter *1988 House Hearings*]; *International Child Abduction Act, Hearing Before Subcomm. on Courts and Administrative Practice of the S. Judiciary Comm.*, 100th Cong. (Feb. 23, 1988) [hereinafter *1988 Senate Hearings*].

136. See, e.g., *1988 House Hearings*, *supra* note 135, at 80–109; *1985 Senate Hearings*, *supra* note 135, at 5–15.

137. The Abduction Convention is formally self-executing, but ratification was delayed until legislation was in place to assure successful implementation of the treaty. See Peter H. Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 FAM. L.Q. 35, 42–43 (1990).

138. International Child Abduction Remedies Act [hereinafter ICARA], Pub. L. No. 100-300, § 2, 102 Stat. 437 (1988) (codified at 42 U.S.C. § 11601); see also Exec. Order No. 12,648, 22 C.F.R. §§ 94.1–8 (1988) (naming State Department as U.S. Central Authority).

139. See *1988 Senate Hearings*, *supra* note 135, at 6; *1988 House Hearings*, *supra* note 135, at 135. See generally Pfund, *supra* note 9, at 42–43; Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209, 262–63 (1994).

140. See ICARA, 42 U.S.C. § 11603(e)(2) (2006) (imposing burden of proof by clear and convincing evidence of the exceptions to return under Article 13(b) and Article 20).

141. See *supra* note 3.

and Exploited Children (NCMEC) to build a network of private lawyers to handle Hague cases, often on a reduced fee or pro bono basis.¹⁴² For twenty years, NCMEC handled central authority functions in incoming abduction cases and provided technical assistance for lawyers and judges handling these matters.¹⁴³ A number of influential decisions from the federal courts helped to set a tone for compliance with the treaty. In one early case, the Sixth Circuit Court of Appeals ruled that courts should not limit the application of the treaty by narrowly construing key provisions, such as “habitual residence” or the “exercise” of custody rights, and should refrain from making “policy-oriented decisions” about the application of foreign law to particular cases that might border on the “forbidden territory” of deciding the merits of the custody dispute.¹⁴⁴ When the court rejected the respondent’s affirmative defense of grave harm to the child, it framed the question as a matter of international law: “If we are to take the international obligations of American courts with any degree of seriousness, the exception to the Hague Convention for grave harm to the child requires far more than the evidence that [the respondent] provides.”¹⁴⁵

The Abduction Convention has posed difficult interpretive issues, and courts addressing these questions in the United States have attempted to understand United States’ obligations under the Convention in light of the approaches taken by courts in other countries.

142. NCMEC’s national mission has been recognized by Congress. NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 3 (2002), available at http://www.missingkids.com/en_US/training_manual/NCMEC_Training_Manual.pdf.

143. This included development of a manual for litigating abduction cases. See NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 1 (2002), available at http://www.missingkids.com/en_US/training_manual/NCMEC_Training_Manual.pdf. Since 2008, all Central Authority functions have been resumed by the Office of Children’s Issues.

144. *Friedrich v. Friedrich*, 78 F.3d 1060, 1063, 1065–66 (6th Cir. 1996) (noting its earlier reversal of a trial court’s ruling that child’s habitual residence changed when mother and child relocated to the United States; child had lived almost exclusively in Germany with German father and U.S.-citizen mother serving in armed forces). See generally Silberman, *supra* note 139 (surveying early case law under convention).

145. *Friedrich*, 78 F.3d at 1067. The court continued:

[E]ven if the home of Mr. Friedrich were a grim place to raise a child in comparison to the pretty, peaceful streets of Ironton, Ohio, that fact would be irrelevant to a federal court’s obligation under the Convention. We are not to debate the relevant virtues of Batman and *Max und Moritz*, Wheaties and *Milchreis*. The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence.

Id. at 1068.

The Convention terms are intended to be autonomous, in the sense that they have a meaning independent of any of the terms used in different legal systems in the countries in which the Convention is in force. In one influential case, the Ninth Circuit Court of Appeals considered the meaning of “habitual residence” in the context of a dispute regarding Israeli-citizen children who had been living for a time in the United States.¹⁴⁶ The court noted that the issue of habitual residence is outcome-determinative in many cases and reviewed case law from the United States and other Convention countries.¹⁴⁷ The federal appellate courts split on the question of whether a custody decree that includes a non-removal, or *ne exeat* clause, establishes a “right of custody” enforceable under the Abduction Convention.¹⁴⁸ In *Croll v. Croll*,¹⁴⁹ the Second Circuit Court of Appeals refused to apply the Convention to the removal of a child by the child’s custodial parent in violation of a *ne exeat* clause, concluding that the left-behind parent had only visitation rights.¹⁵⁰ There was a strong dissent by then-Judge Sonia Sotomayor, and there has been substantial criticism of the decision for departing from the prevailing international understanding of the treaty.¹⁵¹ When the issue came before the U.S. Supreme Court in *Abbott v. Abbott*, the United States took the position that understanding a *ne exeat* right as a “right of custody” was consistent with the Convention’s text, purposes, and history, as well as the post-ratification understanding of the participating states.¹⁵²

146. *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001). The court concluded that “while a determination of ‘habitual residence’ under the Convention is primarily factual, this has not been understood to mean that it is left entirely within the unreviewed discretion of the trial court.” *Id.* at 1073.

147. *See also* Silberman, *supra* note 139, at 346–55. As *Mozes* and other cases make clear, the obligations and protections of the Convention apply regardless of the citizenship of the child or parents concerned. However, lack of citizenship or residency status may be relevant to a determination of habitual residence.

148. *See, e.g.*, *Croll v. Croll*, 229 F.3d 133, 138–39 (2d Cir. 2000); *see also* *Abbott v. Abbott*, 542 F.3d 1081, 1082 (5th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3702 (U.S. June 29, 2009) (No. 08-645); *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzales v. Gutierrez*, 311 F.3d 942, 948 (9th Cir. 2002). *But see* *Furnes v. Reeves*, 362 F.3d 702, 719 (11th Cir. 2004).

149. 229 F.3d 133 (2d Cir. 2000).

150. *Id.* at 135, 139.

151. *Id.* at 144–54 (Sotomayor, J., dissenting); *see, e.g.*, Silberman, *supra* note 139, at 335–41; *see also* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 280 (2002).

152. Brief for the United States as Amicus Curiae Supporting Petitioner at 7–8, *Abbott v. Abbott*, 129 S. Ct. 1032 (2009) (No. 08-645), 2009 WL 3043970. Before granting certiorari, the Court invited the Solicitor General to file a brief expressing the views of the United States; that Brief urged the Court to take the case and reject the *Croll* approach. Brief for the United States as Amicus Curiae at 1, 8, 11, *Abbott v. Abbott*, 129 S. Ct. 1032 (2009) (No. 08-645), 2009 WL

Statistics collected by the Hague Conference indicate that the United States' performance in incoming abduction cases is close to the global averages.¹⁵³ At the time, the United States received and initiated significantly more return applications under the Abduction Convention than any other country and received many more applications than it initiated.¹⁵⁴ The Hague data do not report success rates on outgoing applications, but U.S. statistics suggest that incoming requests for return have been more successful than outgoing cases under the Convention.¹⁵⁵ Criticisms of the United States have centered on long delays in some cases,¹⁵⁶ and the fact that the United States does not provide legal assistance for applicants seeking return orders.¹⁵⁷

During the Convention's early years, Germany, Sweden, and Austria developed a reputation for a lack of compliance, often because of their courts' expansive interpretations of the exceptions to return and the lack

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153. In 2003, the rate of return in applications made to the U.S. was 46%, compared to a global rate of 50%. See HAGUE 2003 DATA, *supra* note 118, at 111. Of 115 cases that went to court, 68% ended in a judicial return order, above the global norm of 66%. See *id.* at 643. In 1999, the overall return rate from the U.S. was 52% compared to a global rate of 50%, and there were judicial return orders in 83% of litigated cases as compared to a global rate of 74%. See STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 1999, PT. II: USA REPORT at 11 (Preliminary Document No. 3 Nov. 2001) [hereinafter HAGUE 1999 DATA], available at http://hcch.e-vision.nl/upload/stats_us.pdf.

154. In 2003, the United States made 85 return applications representing 13% of the international total, and received 286 return applications, or 23% of the global total. See HAGUE 2003 DATA, *supra* note 118, at 13–15. More recent U.S. data show a substantial increase in outgoing applications; see *infra* note 155. State Department data for 2008 indicated that the largest number of outgoing Convention cases from the United States were with Mexico (316), Canada (57), the United Kingdom (42), Germany (34), the Dominican Republic (25), Brazil (21), Australia (18), and Colombia (17). The largest number of outgoing non-Convention cases were with Japan (37) and India (35). DEP'T OF STATE, 2009 REPORT, *supra* note 118, at 6.

155. For 2008, the State Department reported outgoing applications involving 1160 children and the return of 248 children from Convention countries. DEP'T OF STATE, 2009 REPORT, *supra* note 118, at 6, 40. The Department handled incoming Convention cases involving 486 children and 210 children were returned to their habitual residence. DEP'T OF STATE, 2009 REPORT, *supra* note 118, at 6, 40. For non-Convention countries, the Department handled outgoing cases involving 440 children and 113 children were returned to the United States. DEP'T OF STATE, 2009 REPORT, *supra* note 118, at 6, 41. One problem is the difficulty in many countries of actually enforcing return orders once they are obtained from a court. See Jan Rwers McMillan, *Getting Them Back: The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, 14 J. AMER. ACAD. MATRIM. L. 99, 100 (1997).

156. See BEAUMONT & MCELEAVY, *supra* note 24, at 254–55.

157. Under Article 7(f), states must take all appropriate measures to facilitate institution of judicial or administrative return proceedings, but may make a reservation under Articles 26 and 42 declaring that it will not assume the cost of lawyers' fees incurred by applicants. The United States made this reservation when it ratified the convention. See Pfund, *supra* note 9, at 48–50; BEAUMONT & MCELEAVY, *supra* note 24, at 231–39, 251–53. See also *supra* notes 138–41 and accompanying text.

of mechanisms to enforce return orders.¹⁵⁸ These failures were addressed repeatedly in congressional hearings and resolutions, reports by the Government Accounting Office,¹⁵⁹ and high-level diplomatic meetings, including a visit by President Clinton with Chancellor Gerhard Schroeder in Germany.¹⁶⁰ One notable case resulted in a unanimous ruling by the European Court of Human Rights that Austria had violated the right to family life of a left-behind American father by failing to take reasonable measures to enforce a return order entered against the child's mother.¹⁶¹

Constituent pressure for better results in outgoing child abduction cases and repeated congressional hearings¹⁶² eventually led Congress to

158. No children were returned from Austria in 1999, and in all cases that went to court return orders were refused. HAGUE 1999 DATA, *supra* note 153, pt. II: National Report Austria, at 7–8. Germany had an overall return rate of 35% in 1999 compared to the global rate of 50%, and judicial return orders in just 50% of litigated cases compared to a global rate of 74%. HAGUE 1999 DATA, *supra* note 153, at pt. II: National Report Germany, at 11. The performance of both countries was better in 2003. Austria had an overall return rate of 54% with judicial return orders entered in 50% of litigated cases, and Germany had an overall return rate of 39% with judicial return orders entered in 73% of litigated cases. HAGUE 2003 DATA, *supra* note 118, at 61, 278; see Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125, 147 (2000). See generally Karin Wolfe, Note, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT'L L. & POL. 285 (2000) (considering whether new domestic legislation in the United States and Germany would improve application of the Child Abduction Convention).

159. U.S. GOV'T ACCOUNTING OFFICE, CHANGES TO GERMANY'S IMPLEMENTATION OF THE HAGUE CHILD ABDUCTION CONVENTION 4 (2001); U.S. GOV'T ACCOUNTING OFFICE, STATUS OF U.S. PARENTAL ABDUCTIONS TO GERMANY, SWEDEN AND AUSTRIA 35 (2000); U.S. GOV'T ACCOUNTING OFFICE, SPECIFIC ACTION PLAN NEEDED TO IMPROVE RESPONSE TO PARENTAL CHILD ABDUCTIONS 20 (2000).

160. Elaine Sciolino, *Clinton Finds Germans Critical of U.S. Missile Defense Plan*, N.Y. TIMES, June 2, 2000; see also Roger Cohen, *The World: U.S.-Europe Relations; Tiffs Over Bananas and Child Custody*, N.Y. TIMES, May 28, 2000.

161. Judgment, *Sylvester v. Austria*, 2003 Eur. Ct. H.R. 17 (2003). The court also awarded 22,000 Euros as damages and costs. The judgment is one of several similar rulings based on Article 8 of the European Convention on Human Rights, which guarantees the right to family life. See Andrea Schulz, *The 1980 Hague Child Abduction Convention and the European Convention on Human Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 335, 368 (2002).

162. *United States Responses to International Parental Abduction: Hearing on S. Hrg. 108-845 Before the S. Foreign Relations Comm.*, 105th Cong. (1998) [hereinafter *1998 Senate Hearings*]; *Investigations into Abductions of American Citizen Children to Saudi Arabia: Hearing on Serial No. 107-83 Before the H. Government Reform Comm.*, 107th Cong. (2002) [hereinafter *2002 House Hearings*]; *The Department of State Office of Children's Issues—Responding to International Parental Abduction: Hearing on S. Hrg. 108-200 Before the S. Foreign Relations Comm.*, 108th Cong. (2003) [hereinafter *2003 Senate Hearings*]; *International Child Abduction: The Absence of Rights of Abducted American Citizens in Saudi Arabia Serial: Hearing on No. 108-67 Before the H. Government Reform Comm.*, 108th Cong. (2003) [hereinafter *2003 House Hearings*]; *A Parent's Worst Nightmare: The Heartbreak of*

require annual reports from the State Department on unresolved international abduction cases. The reports must identify countries that are noncompliant or have “demonstrated a pattern of noncompliance” with the Convention and report on unresolved applications.¹⁶³ One recurring problem noted in the reports is the tendency of judges in some countries to deny return based on a determination of the child’s best interests rather than adhering to the narrow defenses established by the Convention.¹⁶⁴ Moreover, non-return cases are made worse for families because the Abduction Convention provides no useful mechanism to enforce access or visitation between a child and his or her left-behind parent.¹⁶⁵

One measure of the success of the Convention is that child abduction cases involving non-Convention countries are significantly more difficult to resolve.¹⁶⁶ Among the non-Convention countries, cases involving Japan are particularly difficult,¹⁶⁷ as are abductions to countries with family law systems based on Islamic law.¹⁶⁸ Congress has made a few tools available to remedy or punish child abduction in non-Hague cases, including prosecution under the 1993 International Parental Kidnapping Crime Act¹⁶⁹ and the threat of denial of a U.S. visa to any non-U.S. citizen who takes or retains a child outside the country

International Child Abductions: Hearing on Serial No. 108-156 Before the H. International Relations Comm., 108th Cong. (2004) [hereinafter *2004 House Hearings*].

163. These reports are mandated by Pub. L. No. 105-277, 112 Stat. 2681, § 2803, as amended. In its 2009 Report, the State Department listed Honduras as not compliant, based on its lack of a functioning Central Authority, its failure to pass implementing legislation, and two long-standing unresolved cases of abductions from the United States. DEP’T OF STATE, 2009 REPORT, *supra* note 118, at 15. The report listed seven countries as demonstrating patterns of noncompliance, including Brazil, Chile, Greece, Mexico, Slovakia, Switzerland, and Venezuela. DEP’T OF STATE, 2009 REPORT, *supra* note 118, at 15–25.

164. See DEP’T OF STATE, 2009 REPORT, *supra* note 118, at 16–25. Several Latin American countries have cited the CRC as their basis for taking a best interests approach. *Id.* On the general problem of reconciling the CRC and the Abduction Convention, see Rona Schuz, *The Hague Child Abduction Convention and Children’s Rights*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 393, 435–47 (2002).

165. See *infra* notes 178–79 and accompanying text.

166. The numbers have varied, but non-Hague cases were about 28% of the abductions reported to the State Department in 2008. See DEP’T OF STATE, 2009 REPORT, *supra* note 118, at 40–41 (listing 1076 outgoing child abduction cases, including 776 to convention countries (representing 1160 children) and 300 to non-convention countries (representing 440 children)).

167. See Justin McCurry, *Custody Battle in Japan Highlights Loophole in Child Abduction Cases*, THE GUARDIAN, Sept. 15, 2008, at 25, available at <http://www.guardian.co.uk/world/2008/sep/15/japan.childprotection>.

168. See Note, *International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court*, 2 NW. J. INT’L HUM. RTS. 7, 3 (2004).

169. Pub. L. No. 103-173, 107 Stat. 1998 (codified at 18 U.S.C. § 1204); see H.R. REP. NO. 103-390 (1993). This law could also be applied in Hague cases, but it includes language indicating Congress’ sense that the remedies under the Abduction Convention are preferred remedy when they are available.

in violation of a custody order.¹⁷⁰ Members of Congress have also encouraged diplomatic initiatives both to obtain return of specific children and to develop bilateral agreements with nations such as Saudi Arabia and Egypt.¹⁷¹

Delegates discuss these and other problems at the periodic Special Commission meetings on the operation of the Abduction Convention,¹⁷² during which they review performance and discuss differences in application of the treaty. The Hague Conference has produced guidelines for implementation of the Convention, and has, on rare occasions, made submissions to appellate courts in different countries to encourage consistent application of Convention principles.¹⁷³

As countries have gained experience with the Abduction Convention, new issues have emerged, which are also addressed at the Special Commission meetings. At the outset, parental kidnapping was primarily understood as the response of a noncustodial parent attempting to avoid a custody order or the prospect of an unfavorable custody order. This is still generally true of non-Hague abduction cases, but a majority of Convention cases involve a custodial parent, usually the mother, who relocated at the end of an international marriage or relationship, often returning to her home country.¹⁷⁴ Many of these

170. 8 U.S.C. § 1182(a)(10)(C) (2006). This applies only when children are located in a foreign state that is not a party to the Abduction Convention. *Id.*

171. *See 2003 Senate Hearings, supra* note 162, at 26–28; *2004 House Hearings, supra* note 162, at 5 (prepared statement of Maura Harty, Assistant Sec’y, Bureau of Consular Affairs, Dep’t of State); *see also* DEP’T OF STATE, 2009 REPORT, *supra* note 118, at 37–38 (describing efforts to expand and strengthen the convention). The United States and Egypt signed a Memorandum of Understanding agreeing to facilitate access between children and a left-behind parent. *See* International Parental Child Abduction: Egypt (Bureau of Consular Affairs, U.S. Dep’t of State, Washington, D.C.), *available at* http://travel.state.gov/family/abduction/country/country_490.html. For Bilateral agreements negotiated between other countries, *see* Preliminary Doc. No. 7, Special Commission of September-October 2002 (including full text versions of bilateral instruments) which is available at http://www.hcch.net/index_en.php?act=publications.details&pid=2255&dtid=2. *See also* Law Library of Congress, Directorate of Legal Research, Report for Congress: Hague Convention on International Child Abduction 1–7 (LL File No. 2004-92, Jan. 2004). Abductions to Saudi Arabia have received extensive attention from Congress and the State Department. *See, e.g., 2002 House Hearings, supra* note 162; *2003 House Hearings, supra* note 162.

172. *See supra* note 34.

173. One example is a legal memorandum submitted in 1995 to the German Constitutional Court, urging the court to uphold the validity of the Child Abduction convention under Germany’s constitution and the CRC. *See* Adair Dyer, *Germany: Constitutional Court Decision in Case concerning the Hague Convention on the Civil Aspects of International Child Abduction, Including Memorandum Prepared by the Permanent Bureau of the Hague Conference on Private International Law for Submission to the Constitutional Court*, 35 I.L.M. 529, 535 (1996). The Hague Conference also filed an amicus brief in the *Abbott* case. *See* Brief of the Permanent Bureau of the Hague Conference on Private International Law as Amicus Curiae in Support of Petitioner, *Abbott v. Abbott*, 2009 WL 3052481.

174. In 2003, 68% of taking persons globally were female, with a higher proportion (76%)

disputes involve allegations of domestic violence, a factor that was not contemplated in the preparation of the Convention.¹⁷⁵ Judicial authorities applying the Convention may enter return orders despite indications of spousal or partner violence, sometimes requiring “undertakings” to provide for protection of the taking parent and the child after their return to the child’s habitual residence.¹⁷⁶ In other cases, courts have been persuaded to deny return orders in these circumstances, particularly when the violence is severe and well-documented.¹⁷⁷ This, however, remains the most troubling and difficult problem with the Abduction Convention.

Over time, the lack of effective tools for organizing and enforcing visitation between a child and a left-behind parent has also become a significant concern. Although Article 21 provides that an application “to make arrangements for organizing or securing the effective exercise of rights of access” may be presented to the Central Authority of a contracting state, the Convention has no remedies that can be implemented to enforce access rights.¹⁷⁸ These difficulties have been heightened by the controversy over whether an order that provides for visitation and includes a requirement that the child must not be taken out of the jurisdiction establishes a right of custody protected by the Convention.¹⁷⁹

in applications coming to the United States. HAGUE 2003 DATA, *supra* note 118, at 627, 632. Of these women, the data indicate that 84% were the primary or joint primary caretakers of their children. *Id.* For men who were the taking person, only 28% were primary or joint primary carers. *Id.*

175. See Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Cases*, 38 FAM. L.Q. 529 (2004); Roxanne Hoegger, *What if She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN’S L.J. 181 (2003); Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four*, 13 INT’L J. L. POL’Y & FAM. 191 (1999); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000).

176. See generally BEAUMONT & McELEVAY, *supra* note 24, at 156–72 (discussing the use of undertakings).

177. See, e.g., *Van de Sande v. Van de Sande*, 431 F.3d 567, 572 (7th Cir. 2005); *Blondin v. Dubois*, 238 F.3d 153, 168 (2d Cir. 2001); *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000). In circumstances of child abuse, the defense to return under Article 13(b) may be more readily established. See, e.g., *Danaipour v. McLarey*, 286 F.3d 1, 26 (1st Cir. 2002). In addition to the sources cited in *supra* note 106, see Silberman, *supra* note 139, at 367–70.

178. See generally BEAUMONT & McELEVAY, *supra* note 24, at 210–15; Silberman, *supra* note 139, at 386; Marguerite C. Walter, Note, *Toward the Recognition and Enforcement of Decisions Concerning Transnational Parent-Child Contact*, 79 N.Y.U. L. REV. 2381, 2394–2400 (2004).

179. See *supra* notes 149–52 and accompanying text.

Although the Special Commissions have debated the possibility of a protocol to the Abduction Convention to address access problems,¹⁸⁰ the Special Commission in 2002 determined that the Conference first should attempt to find other solutions, including developing a good practice guide and judicial education programs.¹⁸¹ In 2006, the Special Commission urged states to ratify or accede to the Protection Convention, which mandates recognition of contact or access orders entered by the child's state of habitual residence and provides a framework in which a court ordering return of a child under the Abduction Convention would have jurisdiction to enter protective orders.¹⁸² The debate and diplomacy of the Special Commission meetings reflect the complexity of these issues and the significant legal and political differences between member nations.¹⁸³

Even with twenty years of experience with the Abduction Convention, these cases are still complex and controversial. Although the deterrent effect of the Convention is impossible to measure, it clearly has had an impact on preventing abduction and encouraging resolution of these disputes. New initiatives in the Hague Conference to promote mediated settlements should also be helpful. The remedies afforded by the Convention obviously cannot repair the many tragedies that still swirl around cases of international family breakdown. The issues in these cases are the same as those that attend purely domestic

180. For a report prepared in preparation of the 2002 Special Commission Meeting, see William Duncan, Final Report: Transfrontier Access/Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Preliminary Document Number 5 (2002), available at http://hcch.e-vision.nl/upload/abd2002_pd05e.pdf [hereinafter Duncan Report]. See also Silberman, *supra* note 139 (advocating a protocol on recognition and enforcement of contact decisions).

181. See REPORT AND CONCLUSIONS OF THE SPECIAL COMMISSION CONCERNING THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 45–46 (2003), available at http://hcch.e-vision.nl/upload/abd2002_rpt_e.pdf. After a preliminary version was circulated and endorsed by the Special Commission at its 2006 meeting, the guide was published in 2008. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, TRANSFRONTIER CONTACT CONCERNING CHILDREN: GENERAL PRINCIPLES AND A GUIDE TO GOOD PRACTICE 37 (2008).

182. This is an important reason why the United States has begun to consider ratification of the Protection Convention. See *infra* Part III.D.

183. In 2006, the U.S. delegation included personnel from the State Department and the Central Authority and a number of judges, lawyers, and law professors from different states. In addition, the meetings have been attended by observers representing nongovernmental organizations. See Pfund, *supra* note 9, at 80 (describing participation of non-governmental organizations). For a strong critique of the United States after the 2006 meetings, see Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 221 UTAH L. REV. 2008 (challenging U.S. delegation's substantive positions on separation of powers and federalism, and disputing a number of the delegation's policy judgments).

family disputes, heightened by distance and significant differences in culture, language, and law. What the Abduction Convention provides is a set of shared international norms and a useful legal and diplomatic framework for addressing these inevitable conflicts.

B. Adoption Convention

In the United States, international adoption began as a humanitarian response to conditions after World War II and the wars in Korea and Vietnam and increased steadily for almost sixty years. The United States has been the largest receiving country during this period, accounting for more than half of all international adoptions.¹⁸⁴ In 1993, when the Adoption Convention was concluded, 7377 internationally adopted children came into the United States.¹⁸⁵ At its peak in 2004, this figure had risen to more than 22,000 children each year.¹⁸⁶ Notwithstanding the growth in adoptions, the long process of ratification in the United States can be attributed to some initial hesitation about the Convention and the difficult project of conceiving and constructing a new adoption system at the national level that could satisfy both domestic and international concerns.

During negotiation of the Adoption Convention in The Hague, the U.S. delegation met regularly with an advisory group of adoption and child welfare experts.¹⁸⁷ At the time, controversy centered on adoptions in which prospective adoptive parents act directly or through an individual intermediary to find a child to adopt. According to Peter Pfund, the delegation “realized that if private adoptions were not explicitly permitted and regulated, the convention might never receive

184. On the broader demographic issues, see Peter Selman, *Intercountry Adoption in the New Millennium; the “Quiet Migration” Revisited*, 21 POPULATION RES. & POL’Y REV. 205 (2002). According to Selman, when population size is taken into account the level of intercountry adoption is substantially higher in Norway and Sweden. *Id.* at 211–12. See also Richard H. Weil, *International Adoptions: The Quiet Migration*, 18 INT’L MIGRATION REV. 276 (1984).

185. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, SIGNIFICANT SOURCE COUNTRIES OF IMMIGRANT ORPHANS 2, available at <http://www.travel.state.gov/pdf/MultiYearTableXIII.pdf>.

186. See Intercountry Adoption, Office of Children’s Issues, United States Department of State, Total Adoptions to the United States, http://adoption.state.gov/news/total_chart.html (last visited Nov. 16, 2009) [hereinafter Total Adoptions to the United States]; see also U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT: AGENCIES HAVE IMPROVED THE INTERCOUNTRY ADOPTION PROCESS, BUT FURTHER ENHANCEMENTS ARE NEEDED (2005) [hereinafter GAO REPORT]; *infra* note 216. When the Adoption Convention was transmitted to the Senate for its advice and consent to ratification in 1998, the report that accompanied it estimated that U.S. citizens adopted as many children from abroad each year as all other countries combined. See Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, June 11, 1998, S. TREATY DOC. NO. 105–51.

187. Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. DAVIS L. REV. 647, 650–52, 654 (1997).

the political support it would need for the United States ultimately to ratify and implement it.”¹⁸⁸ In its final form, the Adoption Convention “permits but regulates private adoptions, setting for them the same substantive norms as for agency-assisted adoptions and imposing notice and other requirements.”¹⁸⁹

After the Adoption Convention was concluded, the ABA and several national adoption organizations endorsed it.¹⁹⁰ Concern shifted to the specifics of how the Convention would be implemented in the United States.¹⁹¹ Legislation was drafted between 1994 and 1998, and in June 1998, the Convention was transmitted by President Bill Clinton to the Senate for its advice and consent to ratification.¹⁹² Congress has a longstanding interest in international adoption that helped prepare the way for the Convention.¹⁹³ The major issue that surfaced during the hearings was the question of where responsibility for these cases would be lodged within the federal government.¹⁹⁴ The initial legislation placed the Central Authority in the Department of Health and Human Services, because of its expertise in domestic adoption and child welfare matters.¹⁹⁵ Based on the strong objections of Senator Jesse Helms, Congress assigned primary responsibility instead to the State Department, because of its experience “on the ground” with

188. *Id.* at 652; see also Pfund, *supra* note 9, at 117–19.

189. Pfund, *supra* note 187, at 653. As Pfund notes, these regulations “no longer leave adoptions really private in the sense” that was seen as problematic by experts participating in the Hague negotiations. *Id.*

190. For the American Bar Association (ABA) Resolution and Report, see James J. Podell, Report to the House of Delegates, 1993 A.B.A. SEC. FAM. L. REP., available at <http://www.abanet.org/intlaw/policy/humanrights/hagueconvention.pdf>.

191. Pfund, *supra* note 187, at 654–55, 657; see also Amy Grillo Kales, *The Intercountry Adoption Act of 2000: Are its Laudable Goals Worth its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT’L L. REV. 477, 487, 490–94 (2004).

192. CONVENTION ON PROTECTION OF CHILDREN AND COOPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, S. TREATY DOC. NO. 105-51 (2d. Sess. 1998).

193. See, e.g., *Sale of Children in Interstate and Foreign Commerce: Hearings on H.R. 2826, Before the Subcomm. on Criminal Justice of the H. Judiciary Comm.*, 95th Cong., (1977); *Anti-Fraudulent Adoption Practices Act: Hearings on S. 2299, Before the Subcomm. on Courts of the S. Judiciary Comm.*, 98th Cong. (1984); *Romanian Adoptions, Before the Subcomm. on International Law, Immigration and Refugees of the H. Judiciary Comm.*, 102d Cong. (1991) [hereinafter 1991 House Hearings].

194. *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: Treaty Doc. 105-51 and its Implementing Legislation: Hearing on S. 682, Before the S. Foreign Relations Committee*, 106th Cong. (Oct. 5, 1999) [hereinafter 1999 Senate Hearings]; *Implementation of the Hague Convention on Intercountry Adoption: Hearing Before the Comm. on International Relations*, 106th Cong. (Oct. 20, 1999) [hereinafter 1999 House Hearings]; *H.R. 2909, The Intercountry Adoption Act of 1999, Markup Before the Comm. on International Relations* (Mar. 22, 2000) [hereinafter 2000 House Hearings].

195. See 1999 Senate Hearings, *supra* note 194, at 4–5, 8–9 (citing statement of Assistant Secretary Mary Ryan).

international adoptions.¹⁹⁶ Beyond the State Department's role as Central Authority, the Bureau of Citizenship and Immigration Services (CIS) in the Department of Homeland Security also has responsibility for implementing the immigration and visa aspects of the law.

Before ratification of the Adoption Convention, the United States regulated international adoption through its immigration laws at the point when parents applied for a visa to bring their child into the country.¹⁹⁷ This procedure still applies to adoptions from countries that have not joined the Convention. Before issuing a visa, the consular or visa official must determine that the adopted child meets the statutory definition of an orphan, conducting an investigation if necessary.¹⁹⁸ In

196. *See id.* at 2 (Opening Statement of Sen. Jesse Helms, Chair); *id.* at 10 (comments of Senator Mary Landrieu) (noting that “the chairman feels very strongly about this”). Senator Helms’ comments also suggested a federalism concern:

Under our bill the States, not the Federal Government, the States, the [fifty] States, and not the bureaucrats in Washington D.C., will continue to oversee domestic adoption. As a result, S.682 puts the State Department in the lead, and does not concede the oversight of international adoption to the Department of Health and Human Services, as the administration has requested that we do.

Id. at 2; *see also* 1999 House Hearings, *supra* note 194 (statements of Asst. Sec. Mary Ryan and Patricia Montoya). In addition, the Act assigns some specific functions to the Attorney General. *See* 42 U.S.C. § 14912 (2006) (listing responsibilities of the Secretary of State); *id.* § 14913 (listing responsibilities of Attorney General). International adoptions have also required participation of CIS, which issues immigrant visas to allow adopted children to enter the United States. *See generally infra* notes 198–214.

197. *See* Immigration and Nationality Act § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F) (2006) (definition of orphan for visa purposes); *see also* 8 C.F.R. § 204.3 (2009).

198. To issue the visa, the officer must confirm that the child “has no parents due to the death of disappearance of, abandonment or desertion by, or separation from or loss of both parents,” or that “the sole or surviving parent is incapable of providing proper care and has, in writing, irrevocably released the child for emigration and adoption.” Immigration and Nationality Act § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F) (2006); *see also* 8 C.F.R. § 204.3(b) (2009). In addition, the adopting parents must demonstrate that they are suitable to adopt; this step may be completed in advance. The process is described in the GAO REPORT, *supra* note 186, at 12–17; *see also* *New Rules Puts Adoption in Limbo*, N.Y. TIMES, Nov. 6, 1994 (discussing requirement to obtain approval of both birth parents unless child is illegitimate). If an adopted child has already resided for two years in the legal custody of an adoptive American citizen parent, a visa may be issued under § 101 (b)(1)(E). A petition for an immigrant visa under either of these provisions must generally be requested before the child reaches the age of sixteen. Because the final visa application cannot be made until an adoption is completed, this process has imposed considerable hardship on adoptive parents who learn after the fact of problems in the process by which their child was made available for adoption. CIS adopted the “Adjudicate Orphan Status First” program in five countries in 2003 to allow for making this determination before a child is placed in the care of the adoptive parents. *See* Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, Bureau of Citizenship & Immigration Servs., Dep’t of Homeland Sec., to Interim Reg’l Dirs., Servs. Acting Dir., Office of Int’l Affairs (June 4, 2003), *available at* <http://www.uscis.gov/files/pressrelease/OrphanPilot060403.pdf>. The agency began similar processing for Vietnam in November 2007. *See* Adopted

some countries, based on particular concerns with fraud and corruption, the State Department and CIS have issued warnings to prospective adoptive parents, moved to require genetic testing of children and relinquishing birth mothers, or taken the extreme step of closing down adoptions from that country by imposing a temporary moratorium on new orphan visas.¹⁹⁹

Congress enacted the Intercountry Adoption Act (IAA) in September 2000, and President Clinton signed the bill on October 6, 2000.²⁰⁰ In the same session, Congress passed the Child Citizenship Act to provide automatic citizenship for children adopted by U.S. citizens.²⁰¹ These milestones were followed by a long period devoted to drafting implementing regulations, punctuated by regular hearings in Congress.²⁰² The State Department published draft regulations on accreditation of adoption service providers in 2003 and final regulations in February 2006.²⁰³ After regulations were issued, the process of

Children Immigrant Visa Unit, Vietnam Adoptions–Fact Sheet, Embassy of the United States: Hanoi–Vietnam, http://vietnam.usembassy.gov/adoption_factsheet0608.html (last visited Nov. 16, 2009).

199. CIS implemented a DNA testing requirement in Vietnam in May 2008. *See* News Release, U.S. Citizenship and Immigration Services, USCIS Implements Required DNA Testing for Vietnamese Adoptions (May 28, 2008), *available at* 2008 WL 5160124. As noted below, these are problems that have also occurred in Convention countries, and the United States has not been the only receiving country to take such measures. *See generally* Philip Cordery, *Suspension by the UK of Intercountry Adoptions*, INT'L FAM. L. 39 (2006) (describing litigation over suspension of adoptions from Cambodia to the United Kingdom in June 2004).

200. 42 U.S.C. § 14901 (2006). The Clinton Administration submitted legislation to Congress in June 1998 and May 1999, and alternative bills were introduced in the House and Senate in September 1999. *See* H.R. REP. NO. 106-691, pt. 1, at 14 (2000); *see also* S. REP. NO. 106-276 (2000).

201. 8 U.S.C. § 1431(b) (2006). On the need to amend the Immigration and Naturalization Act to accommodate the Adoption Convention, *see* Pfund, *supra* note 9, at 130–31.

202. *International Adoptions: Problems and Solutions: Hearing Before the H. Comm. on International Relations*, 107th Cong. (May 22, 2002) [hereinafter *2002 House Hearings*]; *In the Best Interest of the Children? Romania's Ban on Inter-country Adoption: Hearing Before the Comm. on Security and Cooperation in Europe*, 109th Cong. (Sept. 14, 2005), *available at* http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=359&Region_id=0&Issue_id=0&ContentType=H,B&ContentRecordType=H&CFID=18849146&CFTOKEN=53 [hereinafter *2005 Romania Hearings*]; *Romania's Ban on Intercountry Adoptions: Markup Before the Subcomm. on Africa, Global Human Rights and International Operations of the H. Comm. on International Relations*, 109th Cong. (Feb. 28, 2006) [hereinafter *2006 Romania Hearings*]; *Asian Adoptions in the United States: Hearing Before the Subcomm. on East Asian and Pacific Affairs of the the S. Comm. of Foreign Relations*, 109th Cong. (June 8, 2006) [hereinafter *2006 Senate Hearings*]; *Hague Convention on International Adoptions: Status and the Framework for Implementation: Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations of the H. Comm. on International Relations*, 109th Cong. (Nov. 14, 2006) [hereinafter *2006 House Hearings*].

203. *See* 22 C.F.R. § 96 (2009) (providing for accreditation and approval of agencies and persons pursuant to the Intercountry Adoption Act).

approving providers began. By December 2007, the United States deposited its instruments of ratification in The Hague, and the Convention came into effect in the United States on April 1, 2008.

As noted above, the Adoption Convention provides that the country in which an adopted child is habitually resident is responsible for establishing that the child is adoptable, that placements within the state of origin have been considered, and that intercountry adoption is in the child's best interests.²⁰⁴ In addition, the country of origin must ensure that appropriate counseling and consents have been provided and that consents "have not been induced by payment or compensation of any kind."²⁰⁵ The country to which the child will be moved by his or her adoptive parent or parents must determine that the prospective adoptive parents are eligible and suited to adopt, that they have been counseled, and that the child is or will be authorized to enter and reside permanently in the receiving State.²⁰⁶ No adoption or transfer of a child for adoption may take place between countries that participate in the Adoption Convention until the Central Authorities of both states have agreed that the adoption may proceed.²⁰⁷

Within this structure, the Central Authorities have an obligation to oversee the process, but many specific tasks may be carried out by "public authorities or other bodies duly accredited in their State."²⁰⁸ In the United States, the IAA defines a process for accreditation and approval for any person or entity providing adoption services under the Convention.²⁰⁹ Minimum requirements for accreditation were included in the legislation, and other details were hammered out during the lengthy rulemaking process.²¹⁰ When the Adoption Convention came into force, more than 200 providers had been accredited.²¹¹ The

204. Adoption Convention, *supra* note 5, arts. 4a, 4b (1995).

205. *Id.* arts. 4c, 4d.

206. *Id.* art. 5; n.b. art. 41.

207. *Id.* arts. 17, 19. The adoption may be finalized in either the State of origin or the receiving State, so long as both countries agree to this, and an adoption made in accordance with the Convention must be recognized in all Contracting States. *See id.* arts. 23, 26. *But see id.* art. 24. This requires a change to the practice in some U.S. states, which have required that international adoptions be validated by a proceeding in state court. *See, e.g.,* IOWA CODE § 600.15(2) (2009); *see also In re the Marriage of Lunina*, 584 N.W.2d 564, 566 (Iowa 1998) (construing § 600.15(2)).

208. *See, e.g.,* Adoption Convention, *supra* note 5, art. 9.

209. *See* 42 U.S.C. §§ 14921–24 (2006).

210. *See 2006 House Hearings, supra* note 202, at 20–21. Congress' decision to give the State Department responsibility for the accreditation process probably prolonged the implementation process significantly. *See* Mary Eschelbach Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption*, 45 BRANDEIS L.J. 105, 114–17 (2006).

211. In July 2006, the State Department signed agreements with two accrediting entities, and the initial accreditation and approval process was completed in February 2008. The current list of accredited and approved providers is available online. *See* Intercountry Adoption, Office

challenge that this accreditation process presented for smaller agencies or those that do relatively few international adoptions was a source of controversy, but accreditation under the Convention helps to protect both children and prospective adoptive parents.²¹²

In preparing to implement the Adoption Convention, the State Department also had to develop rules for cases in which the United States is the habitual residence of a child who will be taken to live in another Convention country. These outgoing cases include both placements of children from the foster care system and voluntary open adoptions. Such adoptions have not been regulated at the national level in the past, and local courts and agencies must follow the procedures that are detailed in a series of new regulations.²¹³

Despite a consensus in 2000 that ratification of the Adoption Convention was an important and positive development, debates about international adoption have continued.²¹⁴ After the Convention came into effect in the United States in 2008, implementation continued to be a slow process as various participants learned the workings of the new system. This new system has required collaboration between the Office of Children's Issues in the State Department (OCI) and CIS in the Homeland Security Department. The requirement that parents obtain an immigrant visa after completing an adoption under the Convention, and the continuing role of CIS, is an ongoing source of controversy.²¹⁵

of Children's Issues, United States Department of State, http://www.travel.state.gov/family/adoption/convention/convention_4169.html (last visited Nov. 16, 2009). The legislation and regulations provide for temporary accreditation for smaller community-based agencies that provided services in fewer than 100 international adoptions in the prior year. 42 U.S.C. § 14923(c) (2006).

212. A recent adoption scandal prosecuted in federal court in Utah illustrates the harms of fraudulent practices for children, birth families, and prospective adoptive parents. *See* Pamela Manson, *Defendants in Samoan Adoption Case Must Pay \$100,000 to Trust Fund*, SALT LAKE TRIB., July 16, 2009.

213. These regulations provide for issuing Hague adoption certificates, *see* 22 C.F.R. § 97 (2009), for preservation of records, *see* 22 C.F.R. § 98 (2009), and for reporting on outgoing cases, *see* 22 C.F.R. § 99 (2009). The subsidiarity principle of the Convention will significantly complicate private international adoptions originating in the United States.

214. *See* Intercountry Adoption Reform Act of 2005, S. 1934, 108th Cong. § 901 (2003); *see also* Foreign Adopted Children Equality Act, S. 1359, 111th Cong. § 1 (2009). If enacted, the bill would do away with the immigrant visa requirement in adoption cases, and transfer all functions now performed by CIS in intercountry adoption cases to the State Department. A version of the bill was passed as part of the Senate immigration bill in 2006. Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2006) (the Senate enacted this bill on May 25, 2006, but it died in the conference committee with the House of Representatives).

215. *See* Classification of Aliens as Children of United States Citizens Based on Intercountry Adoptions Under the Hague Convention, 72 Fed. Reg. 56,833 (Oct. 4, 2007) (codified at 8 C.F.R. pts. 103, 204, 213a). The GAO reported in October 2005 that performance of the Department of Homeland Security and USCIS in intercountry adoption cases had improved, but also recommended better "quality assurance mechanisms" and better

Recent years have seen a significant decline in the numbers of international adoptions,²¹⁶ and the causes of this decline are hard to establish with any precision. Over time, some countries of origin have reduced or terminated their placements of children for intercountry adoptions, as with South Korea in 1988²¹⁷ or Romania in 1991.²¹⁸ In other cases, U.S. officials have determined that problems in a particular country are so pervasive that the adoption system cannot be trusted, as with Cambodia in 2001²¹⁹ and Vietnam in 2002.²²⁰ More recently, new approaches to intercountry adoption in China²²¹ and Russia²²² have

documentation of specific problems encountered in foreign countries in intercountry adoptions. GAO REPORT, *supra* note 186, at 5.

216. The numbers of orphan visas issued peaked at 22,884 in fiscal year 2004 and declined to 17,438 by fiscal year 2008. *See* Total Adoptions to the United States, *supra* note 186; *see also* Jane Gross, *A Taste of Family Life in U.S., But Adoption Is In Limbo*, N.Y. TIMES, Jan. 13, 2007, at A1; Jane Gross, *U.S. Joins Overseas Adoption Overhaul Plan*, N.Y. TIMES, Dec. 11, 2007, at A29; Mireya Navarro, *To Adopt, Please Press Hold*, N.Y. TIMES, June 5, 2008, at G1; Kirk Semple, *A World Away, New Rules Put an Adoption on Hold*, N.Y. TIMES, June 17, 2008 at B4. As adoption opportunities are reduced in some countries, parents look to others to find children. One newly important sending country is Ethiopia. *See* Jane Gross & Will Connors, *Surge in Adoptions Raises Concern in Ethiopia*, N.Y. TIMES, June 4, 2007, at A1.

217. Susan Chira, *Seoul Journal: Babies for Export: And Now the Painful Questions*, N.Y. TIMES, Apr. 21, 1988, at A4; Tamar Lewin, *South Korea Slows Export of Babies for Adoption*, N.Y. TIMES, Feb. 12, 1990, at B10.

218. *See* 2006 House Hearings, *supra* note 202, 2005 Romania Hearings, *supra* note 202 (statement of Maura Harty, Assistant Sec'y for Consular Affairs, U.S. Dep't of State). For information on the Romanian and South Korean Orphan Crisis after 1991 see Elisabeth Rosenthal, *Romanian Law Backfires, Leaving Orphans in Limbo*, N.Y. TIMES, June 23, 2005, at A6; Craig S. Smith, *Romania's Orphans Face Widespread Abuse, Group Says*, N.Y. TIMES, May 10, 2006, at A3. Earlier phases of the Romanian adoption controversy are described in 1991 House Hearings, *supra* note 193; Carro, *supra* note 49, at 137–40, 143–45; Dillon, *supra* note 51, at 248–51; *see also* David Binder, *U.S. Issues Warning of Obstacles in Adopting Romanian Children*, N.Y. TIMES, May 24, 1991, at A2; Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES, Mar. 24, 1991, at A24; Carol Lawson, *Doctor Acts to Heal Romania's Wound of Baby Trafficking*, N.Y. TIMES, Oct. 3, 1991, at C1; Jane Perlez, *Romanian 'Orphans': Prisoners of Their Cribs*, N.Y. TIMES, Mar. 25, 1996, at A1.

219. *See* 2002 House Hearings, *supra* note 202, at 19 (statement of James W. Ziglar, Comm'r, U.S. Immigration and Naturalization Servs.); *see also* Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES MAG., June 16, 2002, at 42; Seth Mydans, *U.S. Interrupts Cambodian Adoptions*, N.Y. TIMES, Nov. 5, 2001, at A7.

220. *See, e.g.*, Elissa Gootman, *Investigation by I.N.S. Delays Obtaining Visas and Snarls Adoptions in Vietnam*, N.Y. TIMES, Jan. 29, 2002, at B5 (describing a couple's heartbreak and anger with their failed attempt to adopt a Vietnamese child); *see* Elizabeth Olson, *Families Adopting in Vietnam Say they are Caught in a Diplomatic Jam*, N.Y. TIMES, Feb. 11, 2008, at A14; *U.S. Embassy Report Faults Vietnam's Oversight of Adoptions*, N.Y. TIMES, Apr. 26, 2008, at A7.

221. *See* Press Release, U.S. Citizenship and Immigration Services, USCIS Reminds Prospective Adoptive Parents of New Chinese Government Requirements (Feb. 13, 2007), available at http://www.uscis.gov/files/pressrelease/ChineseAdoption_13Feb07PN.pdf. *See generally* Pam Belluck & Jim Yardley, *China Tightens Adoption Rules For Foreigners*, N.Y. TIMES, Dec. 20, 2006, at A1 (“[B]arring people who are single, obese, older than [fifty] or who

decreased the numbers of children made available for adoption, contributing to significant reductions in the overall numbers of intercountry adoptions.

The State Department responds to these developments through diplomatic and consular efforts that require a complicated balancing of domestic political concerns and foreign relations concerns.²²³ In several countries, the United States has partnered with international organizations to help establish the basic infrastructure needed for an ethical adoption system.²²⁴ For example, after suspending adoptions from Vietnam and Cambodia, the State Department made efforts to work with these governments to establish more reliable child welfare and adoption systems.²²⁵ The United States entered into a bilateral adoption agreement with Vietnam that was in effect from 2005 to 2008, but because problems in Vietnam have continued, this agreement was not renewed when it expired.²²⁶

As the United States prepared to ratify the Adoption Convention, adoptions from Guatemala became a particular concern.²²⁷ When Guatemala acceded to the Convention in 2002, five Contracting States objected on the basis that Guatemala did not have a system in place that

fail to meet certain benchmarks"); Andy Newman & Rebecca Cathcart, *In an Adoption Hub, China's New Rules Stir Dismay*, N.Y. TIMES, Dec. 24, 2006, at A23 (detailing the impact of China's adoption rules on Manhattan's Upper West Side).

222. See 2006 House Hearings, *supra* note 202, at 54 (statement of Catherine Barry, Deputy Assistant Sec'y for Overseas Citizens Servs., U.S. Dep't of State); Lynette Clemetson, *Working on Overhaul, Russia Halts Adoption Applications*, N.Y. TIMES, Apr. 12, 2007, at A10; Alessandra Stanley, *Adoption of Russian Children Tied up in Red Tape*, N.Y. TIMES, Aug. 17, 1995, at A3; Alessandra Stanley, *Nationalism Slows Foreign Adoptions in Russia*, N.Y. TIMES, Dec. 8, 1994, at A1; Alessandra Stanley, *U.S. Adoption Agencies Fear Tightening of Russian Laws*, N.Y. TIMES, Dec. 4, 1997, at A5.

223. The State Department posts detailed information about intercountry adoption on its website. See U.S. Dep't of State, <http://adoption.state.gov/> (last visited Nov. 16, 2009).

224. See *infra* notes 227–31 and accompanying text (discussing Guatemala). United States Agency for International Development has funded projects including family preservation programs in Vietnam and Romania and an orphanage survey in Cambodia in collaboration with Holt International Children's Services. See, e.g., <http://www.ccaoinstitute.org/CambodiaFinalReport.pdf>.

225. See 2002 House Hearings, *supra* note 162, at 19–20 (statement of James W. Ziglar, Commissioner U.S. Immigration and Naturalization Services).

226. Agreement Between the United States of America and the Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children, U.S. -Vietnam, June 21, 2005, available at http://travel.state.gov/pdf/vn_final_agreement.pdf. On the problems in Vietnam, see http://vietnam.usembassy.gov/irreg_adoptions042508.html.

227. Lynette Clemetson, *Adoptions from Guatemala Face an Uncertain Future*, N.Y. TIMES, May 16, 2007, at A12; Marc Lacey, *Guatemala System Is Scrutinized As Americans Rush in to Adopt*, N.Y. TIMES, Nov. 5, 2006, at 1. The problems in Guatemala have been addressed by UNICEF and the Hague Conference Special Commission meetings. See D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U.L. REV. 349, 366–71 (2005).

would allow it to meet its treaty obligations.²²⁸ The State Department concluded that, once the Convention came into effect for the United States in 2008, it would not be able to approve further adoptions from Guatemala.²²⁹ The Hague Conference, UNICEF, and the State Department have worked over several years to help the government of Guatemala develop a Hague-compliant adoption system.²³⁰ By the end of 2007, the Guatemalan Congress had enacted national adoption legislation, which was still being implemented two years later.²³¹

The Adoption Convention affirms the importance of children growing up in a family environment, but it also affirms a principle of subsidiarity, meaning that intercountry adoption should be pursued only if a suitable family cannot be found in the child's country of origin.²³² The task of assuring that children are not taken improperly from their families is therefore at the heart of the Convention. Achieving these goals requires some system in the country of origin to explore alternatives to intercountry adoption. As the experience in Guatemala demonstrates, building an ethical and reliable child welfare system is a much greater challenge than the relatively simple act of ratifying a treaty. In order to implement the vision of the CRC and the Adoption Convention, however, it is essential to build protections against profiteering and corruption and minimize the risk that the large sums of money involved will pull children away from their families and into the adoption system.²³³

228. Canada, Germany, Netherlands, Spain and the United Kingdom raised objections. Hague Conference on Private International Law, Adoption Convention Status Table, www.hcch.net/index_en.php?act=conventions.statusprint&cid=69; see also Laura Beth Daly, *To Regulate or not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation by the United States in Order to Maintain Intercountry Adoptions*, 45 FAM. CT. REV. 620, 626 (2007).

229. For current information for Guatemala, see Guatemala: Country Information, Intercountry Adoption, Office of Children's Issues, U.S. Dep't of State, <http://adoption.state.gov/country/guatemala.html> (last visited Nov. 16, 2009).

230. See *2006 House Hearings*, *supra* note 202, at 24 (statement of Catherine Barry, Deputy Assistant Sec'y for Overseas Citizen Servs., U.S. Dep't of State); see also HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT AND CONCLUSIONS OF THE SECOND SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION (Sept. 17–23, 2005), available at http://www.hcch.net/upload/wap/adopt2005_rpt-e.pdf; Ignacio Goicoechea, *Report of a Fact-Finding Mission to Guatemala in Relation to Intercountry Adoption* (May 2007), available at http://www.hcch.net/upload/wap/adopt2005_rpt-e.pdf.

231. See Press Release, U.S. Citizenship and Immigration Services, USCIS Announces New Guatemalan Adoption Legislation (Jan. 25, 2008), available at http://www.uscis.gov/files/pressrelease/Guatemala_Adoption_Law_Update_01.25.08.pdf.

232. See *supra* notes 51–54 and accompanying text.

233. See Blair, *supra* note 227, at 383–84; Dillon, *supra* note 51, at 188, 197–99; see, e.g., Scott Carney, *Meet the Parents*, MOTHER JONES, Mar.–Apr. 2009, at 60 (chronicling South Indian parents quest to reunite with their child who was stolen out of the slums of Chennai and

Public opinion in the United States is strongly divided on these issues, with some critics concerned that the Adoption Convention may not do enough to prevent potential abuses, and others concerned that implementation of the Convention has overly complicated the process and contributed to the decline in the numbers of intercountry adoptions. In 2008, the ABA approved a Recommendation supporting implementation of the Adoption Convention “so as to advance the responsible practice of intercountry adoption as an integral part of a comprehensive, concurrent strategy to address the problem of children around the world who are without permanent homes.”²³⁴ In addition to calling for policies that “make the process of international adoption more timely, less costly, and less burdensome, while insuring that international adoption practices are ethical and legal,”²³⁵ the Recommendation urged the United States to provide resources and technical assistance to support efforts in countries of origin to provide “comprehensive social services, economic support and other family preservation resources” to parents and other relatives who have assumed a parental role.²³⁶

Intercountry adoption has also remained controversial on an international level. The more restrictive approach reflected in the CRC is still evident in the positions taken by UNICEF and some sending nations.²³⁷ When it meets to review operation of the Adoption Convention, the Hague Conference Special Commission has reaffirmed

adopted by Americans); E.J. Graff, *The Lie We Love*, FOR. POL’Y, Nov.–Dec. 2008, at 59 (arguing that demand, drives the international adoption market). See generally Ethan B. Kapstein, *The Baby Trade*, 82 FOREIGN AFF., Nov.–Dec. 2003, at 115 (2003) (arguing that the United States should extend and enforce the Hague convention to prevent the international baby trade). Americans have been involved in this adoption fraud and profiteering. See, e.g., Blair, *supra* note 227, at 355–62 (describing federal prosecution of defendants in connection with adoptions in Cambodia); Press Release, U.S. Immigration and Customs Enforcement, Defendants Sentenced in Samoan Adoption Scam (Feb. 25, 2009), available at <http://www.ice.gov/pi/nr/0902/090225saltlakecity.htm> (describing federal prosecution of defendants in connection with adoptions in Samoa).

234. ABA Center on Human Rights, Recommendation 08A102 (approved Aug. 11, 2008), available at http://www.law.harvard.edu/faculty/bartholet/ABA_APPROVED-AUG11.pdf.

235. *Id.*

236. *Id.*

237. See *supra* notes 49–54 and accompanying text; Silberman, *supra* note 139, at 462–63. UNICEF and the Hague Conference reaffirmed the subsidiarity principle in the wake of the tsunami disaster in December 2004, asserting that efforts to reunify displaced children with their parents or family members must take priority, and that “premature and unregulated attempts to organise the adoption of such [children] abroad should be avoided and resisted.” See Press Release, Hague Conference on Private International Law, Asian-African Tsunami: Disaster and the Legal Protection of Children (Jan. 10, 2005), available at http://hcch.e-vision.nl/upload/tsunami_e.pdf; UNICEF, UNICEF’s Position on Inter-country Adoption (2007), available at http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=4135&tid=28.

the subsidiarity principle and has taken steps to improve the operation of the Convention, including publishing a guide to implementation²³⁸ and instituting a pilot program to provide information, training, and support to several countries in the early stages of implementation.²³⁹ In this work, the Conference has also encouraged receiving states to accept more responsibility for improving the situation in states of origin by providing development aid for child protection that is not directly linked to intercountry adoption, by controlling the numbers of applications from adoptive parents and the amount of money that flows into the system, and by applying the standards of the Convention to adoptions from non-Convention countries.²⁴⁰

The United States provides financial support to the Hague Conference for its technical assistance work and funds some child welfare projects in a number of countries through the Displaced Children and Orphan's Fund at USAID in partnership with UNICEF and various nongovernmental organizations.²⁴¹ This should be a point on which all sides can agree: Foreign aid and development programs for children's welfare serve important needs of children abroad and the humanitarian goals of the United States. As is true of the Abduction Convention, the Adoption Convention has not resolved our domestic controversies over international adoption practices. However, it has provided a framework for addressing these problems, at home and abroad, and a forum for diplomatic engagement with the issues.

C. Maintenance Convention

Over several decades, the United States built a strong program for interstate child support enforcement, but it did not join existing multilateral conventions on international child support. Instead, individual states began to enter reciprocal arrangements with foreign governments to establish, recognize, and enforce child support orders, following a trail blazed by Gloria DeHart, who negotiated many of

238. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GUIDE TO GOOD PRACTICE: THE IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION (2008).

239. This is now referred to as the Intercountry Adoption Technical Assistance Programme (ICATAP). Guatemala is one of these countries. See Hague Conference on Private International Law, Permanent Bureau Team Assists Guatemala with the Implementation of the 1993 Hague Convention (July 19, 2007), available at http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=132.

240. Personal communication with Jennifer Degeling, Principal Legal Officer, Hague Conference on Private International Law (June 19, 2009). On the distinction between regulating and facilitating international adoptions, see Silberman, *supra* note 139, at 462–63.

241. See USAID From the American People, Humanitarian Assistance, Displaced Children and Orphans Fund, http://www.usaid.gov/our_work/humanitarian_assistance/the_funds/dcof/ (last visited Nov. 16, 2009) (describing programs in Azerbaijan, Belarus, Democratic Republic of Congo, Sri Lanka, Sudan, Thailand, Uganda, Ukraine, and Zambia).

these agreements as Deputy Attorney General in California.²⁴² This device was eventually incorporated into the framework of the Uniform Interstate Family Support Act (UIFSA)²⁴³ and the federal child support enforcement program under Title IV-D of the Social Security Act.²⁴⁴ Since 1996, the federal Office of Child Support Enforcement (OCSE) in the Department of Health and Human Services has entered bilateral agreements with “foreign reciprocating countries” to establish procedures for establishment and enforcement of support orders. By 2008, these federal declarations of reciprocity extended to thirteen foreign countries and eleven Canadian provinces or territories,²⁴⁵ with an additional group of countries covered by state-level declarations.²⁴⁶

With these initial experiences in the international arena, representatives of OCSE and the State Department joined in negotiations for a new Hague Maintenance Convention.²⁴⁷ During the negotiations, the U.S. delegation made great efforts to assure that the

242. See GLORIA F. DEHART, *INTERNATIONAL ENFORCEMENT OF CHILD SUPPORT AND CUSTODY: RECIPROCITY AND OTHER STRATEGIES* 14–21, 51–54 (1986). See generally Gloria Folger Dehart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 *FAM. L.Q.* 89 (1994) (naming a “parallel unilateral policy declaration” because states have no constitutional authority to enter into treaties).

243. See UNIF. INTERSTATE FAMILY SUPPORT ACT § 102(21)(B) (2001). The initial 1992 version of UIFSA defined the term “state” in § 101(19) to include “a foreign jurisdiction that has established procedures for issuance and enforcement and enforcement of support orders which are substantially similar to the procedures under [UIFSA].” This definition was amended in 1996 to emphasize the importance of reciprocity. See National Conference of Commissioners on Uniform State Laws, *Uniform Interstate Family Support Act (1996) Statutory Text, Prefatory Note and Commissioners Comments*, 32 *FAM. L.Q.* 385, 415–16 (1998). In 2001, the definition was amended again to make specific reference to foreign reciprocating countries under federal law and foreign countries that have reciprocal arrangements with a state. See John J. Sampson & Barry J. Brooks, *Uniform Interstate Family Support Act (2001) With Prefatory Note and Comments (With Still More Unofficial Annotations)*, 36 *FAM. L.Q.* 329, 353–54 (2002).

244. See 42 U.S.C. § 659(a) (2006).

245. See Dep’t of State, *Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations*, 73 *Fed. Reg.* 72555 (Nov. 28, 2008) (listing Australia, Czech Republic, El Salvador, Finland, Hungary, Ireland, Netherlands, Norway, Poland, Portugal, Slovak Republic, Switzerland, the United Kingdom, and these Canadian jurisdictions: Alberta, British Columbia, Manitoba, New Brunswick, Northwest Territories, Nunavut, Newfoundland/Labrador, Nova Scotia, Ontario, Saskatchewan, and Yukon).

246. Many states have agreements with Austria, France, Germany, Ireland, Mexico, Quebec, South Africa, and Sweden. See U.S. Dep’t of State, *Individual U.S. State Child Support Arrangements*, available at http://travel.state.gov/family/services/support/support_2600.html (last visited Nov. 16, 2009).

247. Representatives of the broader child support enforcement community, including directors of several state IV-D offices, also participated in this process. See generally Carlson, *supra* note 86 (detailing the Hague Maintenance Convention negotiations); Marilyn Ray Smith, *Child Support at Home and Abroad: Road to The Hague*, 43 *FAM. L.Q.* 37 (2009) (detailing the history of the interstate and international enforcement of child support obligations).

final product would be a convention that the United States could join—an agreement that could work with our existing system of interstate child support enforcement and the constitutional constraints on jurisdiction in child support cases. It was important to the delegation that the Maintenance Convention address establishment of new child support orders as well as recognition and enforcement of existing orders, and that the Central Authority’s services in child support cases should be available at low or no cost.²⁴⁸

While recognizing that many countries do not have child support systems in place that provide the level of services available in the United States, the delegation took the position that a new convention “needed to set a high standard that represented the best of current practices, which developing countries could gradually adopt.”²⁴⁹ Other participants argued in the negotiation that services should not be mandatory, or should not have to be provided without cost, so that a larger number of countries would be able to join the new Convention. The U.S. delegation argued that without these provisions, the promises of the new agreement would remain out of reach for the vast majority of support applicants.

As finally agreed, the 2007 Maintenance Convention requires “effective access to procedures” including cost-free services, reflecting “the strong wish of negotiating parties to put in place international procedures which are genuinely accessible to a disadvantaged sector of the community.”²⁵⁰ In order to assure that Central Authorities could handle a potentially large volume of international cases in an efficient manner, the Convention also includes detailed provisions for practical matters such as forms and procedures.

Because of its careful groundwork at home and because the final agreement included the terms that were most important to the delegation, the United States was able to sign the treaty at the conclusion of the Diplomatic Session that adopted the Maintenance Convention in November 2007.²⁵¹ This was a highly unusual step for the United States,²⁵² intended to send a strong signal of support for the

248. This is the approach taken in the current United States bilateral agreements, and in our child support enforcement system. *See* 42 U.S.C. § 659(a) (2006).

249. Carlson, *supra* note 86, at 31.

250. Duncan, *supra* note 80, at 14.

251. *See* Carlson, *supra* note 86, at 21, 24–31.

252. *See* Pfund, *supra* note 9, at 61 (“The United States signs private international law conventions once there is some likelihood that the United States will be able to ratify. The United States delegation does not sign a PIL convention at the conclusion of the diplomatic text at which its final text is adopted.”). This willingness to sign the Convention in 2007 reflects the care with which the delegation conducted negotiations in the Hague and laid groundwork for ratification at home. *See also id.* at 80 (describing how U.S. delegations sought in negotiations to avoid requirements in a proposed convention that would be unconstitutional or overly

Convention and to encourage other countries to join. The existing infrastructure of child support enforcement agencies should make it possible for the United States to move relatively quickly toward ratification and implementation. For countries without this type of system in place, ratification of the new Maintenance Convention will be more difficult.²⁵³ Given its experience with child support enforcement, the United States will be in a position to help countries that may wish to develop support enforcement systems. An important incentive for these countries to join the new Convention is the promise of access to free child support services in other contracting states, which will likely include at a minimum, the European Union, Australia, Canada, and New Zealand.²⁵⁴

Preparation to implement the Maintenance Convention in the United States began before the treaty was completed in a drafting committee charged with preparing amendments to UIFSA. Those amendments were approved in July 2008,²⁵⁵ and the ABA endorsed the new Convention in August 2008. President George W. Bush transmitted the treaty to Congress in September 2008.²⁵⁶ In comparison with the Abduction and Adoption Conventions, implementation of this treaty is made much easier by its interface with the existing national child support enforcement program. All states have enacted earlier versions of UIFSA and have offices subsidized by the federal government that provide child support enforcement services in interstate and international cases.²⁵⁷ Federal implementing legislation, tied to the IV-D program, can relatively easily incorporate international cases into this existing system. Political support for the Maintenance Convention in the United States comes from the network of child support enforcement professionals across the country, which was consulted and represented during the negotiation process. Congress legislates frequently in this area and began the process of extending the system to international cases when it authorized federal bilateral agreements during the 1990s.

intrusive on state laws).

253. The United States made compromises in the negotiations in the interest of having a convention that could be widely accepted. *See, e.g.*, Maintenance Convention, *supra* note 6, art. 24 (authorizing Contracting States to declare that they will apply an alternative procedure to applications for recognition and enforcement).

254. *See* Carlson, *supra* note 86, at 34.

255. Battle Rankin Robinson, *Integrating an International Convention into State Law: The UIFSA Experience*, 43 FAM. L.Q. 61, 67–68 (2009). The ABA has also endorsed the Maintenance Convention. Gregg M. Herman, *Report*, A.B.A. SEC. FAM. L. (2008), available at http://www.abanet.org/family/reports/haguechildsup_report.pdf.

256. HAGUE CONVENTION ON INTERNATIONAL RECOVERY OF CHILD SUPPORT AND FAMILY MAINTENANCE, S. TREATY DOC. NO. 110–21 (2008).

257. Under Title IV-D of the Social Security Act, states were required to enact the version of UIFSA that was in effect in 1996. *See* 42 U.S.C. § 666(f) (2006).

In comparison with the Abduction and Adoption Conventions, the Maintenance Convention is much less tied to traditional consular or foreign relations concerns. However, it affords an opportunity for the United States to work with other countries to develop systems to channel parental financial support to their children. In the context of globalization, when many children living in one country have parents living and working in another, reciprocity in child support enforcement will be particularly important for nations that send large numbers of workers abroad. Because of the free legal assistance mandated by the Convention, once these procedures are available they should be useful for families in all economic sectors. As with the remittances that family members send voluntarily in these circumstances, regular flows of child support across international borders should contribute substantially to household income and child welfare.

D. *Protection Convention*

For the United States, the most problematic of the Hague Children's Conventions is also the most traditional. The 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children²⁵⁸ addresses conflict of laws questions that will have to be coordinated with our wide diversity of state family laws. The Protection Convention was endorsed by the ABA in 1997,²⁵⁹ but the ratification process is still at an early stage in the United States.²⁶⁰ In comparison with the other Children's Conventions, the Protection Convention has no obvious constituency or base of political support. In the states, and among the public, the many children and families that would benefit from it are a diffuse group: hard to identify, unlikely to be aware of the existence of the Convention, and not looking for help from the federal government.

From the perspective of the Hague Conference, the Protection Convention is an important supplement to the other three conventions. The Abduction Convention does not address litigation or enforcement of custody and access rights or provide a framework to formulate undertakings or measures to protect a child that are sometimes incorporated into return orders.²⁶¹ The Adoption Convention does not

258. See *supra* note 7; see generally Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239 (2000) (discussing the international effort to provide a system of jurisdiction and private law judgment enforcement).

259. See Harold S. Burman, *Private International Law*, 32 INT'L LAW. 591, 596 (1998).

260. The process has also moved slowly in other countries, see *infra* note 275 and accompanying text.

261. See *supra* notes 176–78 and accompanying text. See generally Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection*

address foster care or guardianship or alternative institutions such as *kafalah* under Islamic law. The Maintenance Convention addresses maintenance obligations but not administration or guardianship of a child's property. None of the other conventions applies to circumstances of dependency and neglect, to children otherwise in need of court supervision or assistance, or to children displaced internationally by wars or natural disasters.²⁶² The Protection Convention stitches the other three conventions together and fills these important gaps. In addition, because the Protection Convention may prove more acceptable to countries with Islamic family law systems, it could provide important alternative remedies for disputes involving nations that do not participate in the Abduction or Adoption Conventions.²⁶³

In the United States, foreign custody or child protection orders are now frequently recognized and enforced under the doctrine of comity. State courts consider foreign countries as if they were states of the United States for jurisdictional purposes under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).²⁶⁴ The UCCJEA requires recognition and enforcement of foreign orders made "under factual circumstances in substantial conformity with the jurisdictional standards" of the Act.²⁶⁵ These provisions allow substantial enforcement of incoming custody or access orders, but without ratification of the Protection Convention, there is no mechanism to achieve equivalent recognition and enforcement of U.S. orders abroad.

While the goal of obtaining recognition for U.S. orders provides the most important incentive for ratification of the Protection Convention, integrating the Convention with the UCCJEA will not be simple. The most substantial difference between the two frameworks is that the UCCJEA gives "exclusive, continuing jurisdiction" to a court that has made a child custody determination that is consistent with UCCJEA standards.²⁶⁶ By contrast, the Protection Convention provides that

Convention, 33 N.Y.U. J. INT'L L. & POL. 83 (2000) (discussing the characteristics of the 1980 Child Abduction Convention); Duncan, *supra* note 80, at 112–13, 115–17.

262. These cases would include children who are refugees, displaced as a matter of war or natural disaster, or who otherwise cross borders as unaccompanied minors. A well-known illustration in the United States is the 1999 controversy over returning six-year-old Elián Gonzalez to his father in Cuba.

263. Morocco was among the first nations to ratify the Protection Convention, but it has not joined any of the other Children's Conventions. *See supra* note 3.

264. As of September 2009, the UCCJEA had been adopted in all of the United States except Massachusetts and Vermont, as well as the District of Columbia and the U.S. Virgin Islands. The National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org/DesktopDefault.aspx?tabindex=2&tabid=60>; then follow the UCCSEA.

265. UCCJEA § 104 (1997).

266. UCCJEA §§ 202 & 203 (1997); *see also* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2006).

jurisdiction shifts when the child's habitual residence changes.²⁶⁷ These differences could be managed for purposes of international cases, but they raise a significant and troubling policy problem in the context of child abduction cases, where the opportunity to obtain a new forum would give parents an additional incentive to move to another jurisdiction.²⁶⁸

The breadth of the Protection Convention also presents challenges. In addition to private law custody and access disputes, the Convention applies to the kinds of public family law carried out by state child welfare agencies. Jurisdiction in these matters is governed by the UCCJEA,²⁶⁹ but state agencies utilize a wide range of administrative structures and terminology. Although child welfare agencies participate in federal reimbursement programs, analogous to the child support enforcement program under Title IV-D, the administration of these programs is much more diffuse at the state and national level.²⁷⁰ In the child support context, state agencies routinely cooperate in interstate cases within a structure established by federal law. This type of interstate cooperation has been much harder to accomplish in child welfare cases.²⁷¹ Implementation in the United States will also be complicated by the fact that there is no federal agency with the kind of direct international experience in these matters that the State Department brings to abduction and adoption cases and the Health and Human Services Department brings to child support.

Of the four Children's Conventions, the Protection Convention has the greatest resemblance to older generations of private international law. In many respects, this type of convention is more ambitious than the others, which only have a few key substantive norms and focus

267. In addition, the UCCJEA uses a bright line test to determine the child's "home state" for jurisdictional purposes, which looks to the child's place of residence in the six months immediately before the commencement of a child custody proceeding. UCCJEA § 201 (1997). This will often but not always be the same as the child's habitual residence, which is the basis for jurisdiction under the Protection Convention. See Protection Convention, *supra* note 7, art. 5.

268. See Linda Silberman, *A United States Perspective on the 1996 Hague Protection of Children Convention*, 10 Hague Judges' Newsletter 30, 35 (2005). This problem has a long history in the United States, leading to the rules of the UCCJEA, and has also been the subject of recent regulation in the European Union. See generally *supra* note 74 (discussing Brussels II bis regulation); Peter McEleavy, *Brussels II Bis: Matrimonial Matters, Parental Responsibility, Child Abduction and Mutual Recognition*, 53 INT'L & COMP. L.Q. 503 (2004) (discussing Brussels II bis regulation).

269. See UCCJEA § 102(4) (1997) (defining "child-custody proceeding").

270. These are regulated by Title IV-B and Title IV-E of the Social Security Act. See generally Estin, *supra* note 12, at 287-90.

271. See generally Vivek Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435 (2006) (discussing the complexities of the interstate foster care system).

primarily on facilitating cooperation through Central Authorities.²⁷² The Protection Convention assigns fewer duties to Central Authorities,²⁷³ but envisions more harmonization among the legal systems of participating nations.²⁷⁴ Because of the difficulty of achieving this type of harmonization, the traditional conflict of laws agreements have drawn smaller numbers of contracting states. Other nations have also been slow to ratify, but as of June 2010 there will be at least thirty-five contracting states, including Australia and most of Europe.²⁷⁵ Because of the slow pace of ratification, there is not yet much experience to indicate how the Protection Convention will be interpreted and applied. The Permanent Bureau has begun work on an implementation guide,²⁷⁶ and has paired the Protection Convention with the Abduction Convention for purposes of Special Commission meetings.²⁷⁷

Despite these obstacles, the United States should continue to work toward ratification and implementation. The Protection Convention is an integral part of the Hague vision with important applications in a wide range of cases.²⁷⁸ The issues it covers have become more important and more commonplace over time, and families in the United States currently have no useful tools to assist in resolving these problems. It has particular value as the connective tissue that can transform the other conventions into a system of international children's law.

Linda Silberman has described the Hague Children's Conventions as a "comprehensive international effort to develop transnational norms—both procedural and substantive—to resolve child-centred disputes."²⁷⁹ She identifies a series of specific procedural and substantive norms developed in the conventions, beginning with "the allocation of primary

272. See Pfund, *supra* note 9, at 44–45.

273. Within the United States, there is no obvious administrative home for the Child Protection Convention, which touches topics now regulated by both the State Department and Health and Human Services.

274. The Convention is a semi-open one, like the Child Abduction Convention, *see supra* notes 97–100 and accompanying text, which is open to signature and ratification by any of the countries that were members of the Hague Conference at the time of its Eighteenth Session in 1996. The prior Hague convention on this subject, adopted in 1961, had only 11 Contracting States when it was replaced in 1996.

275. See Duncan, *supra* note 80, at 19. This includes countries that represent a substantial proportion of the United States abduction cases. *See supra* note 154.

276. HAGUE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS OF THE FIFTH MEETING, *supra* note 74, at 13.

277. HAGUE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS OF THE FIFTH MEETING, *supra* note 74, at 13.

278. The Protection Convention has important applications in the context of unaccompanied minors and refugee children, which have been explored by the Hague Conference in collaboration with UNICEF and the UNHCR. *See also supra* note 24.

279. Silberman, *supra* note 139, at 465.

decision-making authority with respect to children to the State of the child's habitual residence," and concluding with "the recognition of the importance of mutual assistance and cooperation by States in order to protect children on a world-wide scale."²⁸⁰ By joining the Protection Convention, the United States can play a central role in helping to implement this vision.

IV. THE CASE FOR INTERNATIONAL FAMILY LAW

In the new world of globalized families, the Children's Conventions facilitate cross-border movement and provide greater legal security for children and parents. Recognizing the practical and diplomatic value of these new tools, the United States has ratified the Abduction Convention and the Adoption Convention and worked to implement them at home and abroad. Participation in the other conventions would extend the protections of this innovative system to a wider range of global family and children's issues, benefiting many individual families and positioning the United States to help shape the emerging practices of international family law.

A. *Transnational Families and the Law*

Global movement of individuals and families often undermines the stability of jurisdictional and membership ties between individuals and national governments. Citizenship or nationality once provided a relatively clear basis for assigning families to the protective and regulatory authority of different nations, but nationality has become less useful as a connecting factor for family law. Rules that assigned all family members the nationality of the husband and father have been replaced by rules that recognize a wife's right to an independent nationality.²⁸¹ Children may have a right to citizenship based on their birth within the boundaries of a nation even if neither parent is a citizen.²⁸² The modern trend toward dual or plural nationality has been accelerated by the formation of international families.²⁸³ Even as

280. *Id.* The others are: "the acceptance of broad protective measures that may be taken with respect to children," "a commitment to deter and remedy international child abduction and the introduction of an innovative remedy in the form of an obligation to return the child," and "a preference for a child to have a family even if that family is not in the State of origin and a concomitant effort to effectuate intercountry adoptions according to sound and ethical adoption practices." *Id.*

281. See generally Karen Knop & Christine Chinkin, *Remembering Chrystal Macmillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523 (2001) (examining campaign for married women's right to choose their nationality).

282. For children born within the United States, see 8 U.S.C. § 1401(a) (2006).

283. On the phenomenon of dual nationality, see Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 22 (2006); Nancy Foner, *Engagements Across National Borders, Then and Now*, 75 FORDHAM L. REV. 2483, 2489 (2007). See generally Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46

members of one family may have different nationalities, close family relationships between citizens of different countries provide a basis for family members to acquire additional nationality through naturalization. These possibilities offer certain strategic advantages to globalized families, yet national borders are still salient, and multiple or conflicting nationalities can put individuals at risk of not receiving protections they might otherwise enjoy.²⁸⁴

Members of globally-formed or located families may find that important family interests are subject to the laws and jurisdiction of a foreign government. Resolving family disputes in this setting may present special problems, such as the need to deal with an unfamiliar legal system, cultural and language barriers, a risk of bias in the foreign forum, and geographic distance. These problems compound the ordinary difficulties of family disputes, including domestic violence and problems obtaining legal assistance.²⁸⁵

If they turn to their national governments, individuals facing these circumstances discover that the possibilities for consular assistance are quite limited.²⁸⁶ To the extent that problems do fall within the scope of consular affairs, and as these controversies become more common and requests for assistance more frequent, family conflict demands more substantial resources and attention from the governments concerned. The pressure of these demands has helped propel the search for more effective tools to regulate cross-border family matters.

The Children's Conventions are designed to operate effectively in the context of the new global families. Each one is built on the foundation of habitual residence, which is particularly useful in the context of transnational families with multiple homes and multiple citizenships.²⁸⁷ As a basis for jurisdiction, this standard helps to assure that the government where the pertinent family members are actually located will have the authority and ability to act. It is also neutral, giving effect to the choices and lived experience of individuals who

EMORY L.J. 1411 (1997) (discussing the increasing importance of citizenship).

284. *See generally* Alison Symington, *Dual Citizenship and Forced Marriages*, 10 DALHOUSIE J. LEG. STUD. 1 (2001) (discussing how dual nationality inhibits some individuals from receiving help).

285. Conflict of laws principles are largely passive, and offer very limited assistance in these cases. In the Anglo-American world, the fact that a family has a global existence is commonly addressed only at the point of determining jurisdiction, or through discretionary and open-ended principles of comity or forum non conveniens. In civil law countries, there is often an initial choice of law determination in cross-border family litigation, while common law countries generally apply the law of the forum in these cases.

286. *See generally* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 (providing rules on consular relations). Steps that consular officers may take are outlined in the U.S. Department of State Foreign Affairs Manual. *See* U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL Vol. 7 (2009).

287. *See supra* note 30 and accompanying text.

have exercised their freedom of movement across borders. It eliminates the problem of determining which nationality should be treated as dominant in situations of conflict, and shifts the role of national governments. Rather than acting on behalf of citizens, Central Authorities under the Children's Conventions are charged with acting on behalf of any habitual resident.

For global families, the new international family law serves an important facilitative or channeling function. As in other areas of law, family law rules that define a basis for jurisdiction and foster respect for judgments entered in other countries should help families to plan more securely, particularly when those rules are backed by a serious commitment to cooperation between governments. To the extent that these rules can be made clear and dependable, they can help to shape behavior of family members in potential conflict situations. With greater legal security, individuals will be better able to participate in the networks of the global economy, with less risk that an international move will have serious and detrimental family consequences.

For dependent family members, family law serves protective purposes. These purposes are thwarted when local authorities cannot acquire jurisdiction to act and to enter orders that will be recognized across borders. In the United States, several generations of uniform state laws attest to the complexity of these problems at the national level.²⁸⁸ Internationally, these problems are still more difficult.²⁸⁹ As it becomes easier for individuals to move and be moved across borders, the need for coordination increases, particularly where children are involved. This is now well recognized in the context of child trafficking, but it is also problematic when global movement facilitates the abandonment of children by their parents.

For the United States, international child protection has become an important public policy.²⁹⁰ In addition to the Abduction and Adoption Conventions, the United States has joined other treaties designed to

288. Despite the command of the Full Faith and Credit Clause, harmonizing the rules for jurisdiction and enforcement of family law judgments took more than a century. *See generally* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & M. BILL RTS. J. 381 (2007) (discussing the conflict of law problems in the area of divorce and child custody and their resolutions); *see also* Estin, *supra* note 12, at 305–06.

289. This has been a significant challenge in the context of greater economic integration of the European Community. *See supra* note 74.

290. It has become an important public policy despite our often-criticized failure to ratify the CRC. *See* Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, HUM. RTS. 27, 30–31 (1999). Given the aspirational nature of the CRC, ratification could be largely symbolic, with none of the practical implementation challenges faced with the Hague conventions. The most contentious issue under the CRC, in terms of U.S. practices, was addressed indirectly when the U.S. Supreme Court found capital punishment for defendants who committed crimes as juveniles to be unconstitutional. *See Roper v. Simmons*, 543 U.S. 551, 578–79 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 833–38 (1988).

protect children. These include optional protocols to the CRC concerning the involvement of children in armed conflict and the sale of children, child prostitution, and child pornography;²⁹¹ and a child labor convention.²⁹² To carry out its treaty obligations, the United States has enacted criminal legislation to punish trafficking in persons and child sex tourism by Americans traveling abroad.²⁹³ Child protection concerns are now incorporated in the State Department's annual country reports on human rights practices. In addition, the State Department has begun to assist other nations in building adoption and child welfare systems in the context of problems with international adoption.

B. *Federalism and the States*

In the United States, participation in multilateral treaty regimes has been a source of political and legal controversy, often framed in terms of federalism. In constitutional terms, Article II, Section 2, assigns to the President and the Senate responsibility for conducting foreign affairs and determining the nation's obligations under international law.²⁹⁴ Beyond these treaty powers, Congress has authority to legislate under the Foreign Commerce Clause in Article I, Section 8.²⁹⁵ Once ratified, treaties have the force of law and are binding on the states under the Supremacy Clause in Article IV, Section 2.²⁹⁶ Traditionally, under

291. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54-263, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (Mar. 16, 2001) and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (May 25, 2000). *See generally* Michael J. Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 AM. J. INT'L L. 789 (2000) (discussing the Children in Armed Conflict Protocol and Sale of Children Protocol).

292. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, Int'l Labour Org. No. 182. *See generally* Michael J. Dennis, *The ILO Convention on the Worst Forms of Child Labor*, 93 AM. J. INT'L L. 943 (1999) (examining the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor).

293. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, tit. I, § 105, Pub. L. No. 108-21, 117 Stat. 653 (2003) (codified at 18 U.S.C. § 2423 (2006)) [hereinafter PROTECT Act]; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1487 (codified as amended at 18 U.S.C. §§ 1591, 2421-23). Federal courts have upheld the PROTECT Act in the face of claims that it exceeded Congress' powers. *See United States v. Clark*, 435 F.3d 1100, 1116-17 (9th Cir. 2006) (holding that legislation fell within the foreign commerce power); *United States v. Frank*, 486 F. Supp. 2d 1353, 1355 (S.D. Fla. 2007) (concluding that Congress had authority under the Necessary and Proper Clause to enact statute to implement treaty obligations).

294. U.S. CONST. art. II, § 2.

295. The U.S. Supreme Court has also described an implicit general foreign relations power. *See, e.g., Perez v. Brownell*, 356 U.S. 44, 57 (1958).

296. U.S. CONST. art. IV, § 2.

Missouri v. Holland,²⁹⁷ the federalism considerations that apply to other federal legislation do not limit the scope of the treaty power.

Scholars have debated whether the broad approach of *Missouri* remains appropriate in light of more recent federalism decisions from the U.S. Supreme Court.²⁹⁸ Although the Court has never struck down a treaty on the basis that it exceeded Congress' powers,²⁹⁹ its 2008 decision in *Medellin v. Texas*³⁰⁰ concluded that international law obligations are not binding in U.S. courts "unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms."³⁰¹ *Medellin* should not present an obstacle for the Children's Conventions, which have been ratified with accompanying national legislation.

If the U.S. Supreme Court began to articulate new federalism constraints on the treaty power, the Children's Conventions might seem to raise particular concerns, because family law has traditionally been characterized as a subject of state authority. This tradition should not be overstated, however, in light of the extensive program of national family law already in existence in the United States, which has been particularly important in the contexts of child protection and inter-jurisdictional conflict of laws.³⁰² The parallel between national and international law here is important. For the same reasons that these problems have proved to be beyond the regulatory capacity of the states acting alone, they go beyond the scope of what the United States can address acting alone. Because international family law treaties focus narrowly on cross-border family law issues, with no application to purely domestic cases, they fall easily within the traditional understanding of the foreign relations powers.

In terms of the commerce power, there has been no dispute that Congress has authority to regulate "the use of the channels of interstate commerce" and to "regulate and protect . . . persons or things in interstate commerce."³⁰³ For more than a century, Congress has

297. 252 U.S. 416, 435 (1920) (upholding federal statute implementing migratory bird treaty challenged under the Tenth Amendment, concluding that the treaty involved a national interest that could "be protected only by national action in concert with that of another power").

298. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 411 (1998). The debate is surveyed in Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1333–39 (2006).

299. See Hollis, *supra* note 298, at 1352–60; see also David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1292 (2000).

300. 128 S.Ct. 1346 (2008).

301. *Id.* at 1356 (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

302. See Estin, *supra* note 12, at 279–313.

303. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

utilized this power to legislate against human trafficking, despite the potential overlap with state marriage and family law, and the federal courts have consistently sustained these laws.³⁰⁴ Moreover, the courts have considered Congress' authority under the Foreign Commerce Clause to be broader than its authority under the Interstate Commerce Clause,³⁰⁵ suggesting that Congress has particularly broad power to regulate the movement of "persons or things" across international borders. All of the Children's Conventions could be implemented on this basis: the Abduction and Adoption Conventions apply to children brought into or out of the United States, and the Maintenance and Protection Conventions³⁰⁶ also involve the cross-border movement of people or money.

Moreover, federalism values in this context are protected by the political process. The determination to enter into a treaty or international agreement requires either a two-thirds vote of the Senate giving advice and consent to ratification or legislation enacted by at least a majority of both houses of Congress. The Children's Conventions have been presented to Congress for both sorts of approval, and implemented through bipartisan efforts of a series of Presidents and Congresses over the past thirty years. Whatever the outer limits of the foreign commerce and foreign relations powers, both Congress and the Executive Branch evaluate federalism concerns before enacting legislation of this nature, and both branches have clearly understood the importance of coordinating our treaty obligations with the family law systems that exist in the states.

For the Abduction and Adoption Conventions, federal implementing legislation and regulations establish rules that preempt some aspects of state family law in international cases. In addition, these conventions assign some new responsibilities to federal courts and agencies to carry out treaty responsibilities. The overlap is fairly limited and has not required significant changes to state family law. The challenge of coordinating treaty obligations with state family law will be more complex with the Maintenance Convention and the Protection

304. White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24 (2006)); see Act of March 3, 1875, ch. 141, 18 Stat. 477, 478 (1875); *Caminetti v. United States*, 242 U.S. 470, 489–99 (1917); *Cleveland v. United States*, 329 U.S. 14, 16–18 (1946); see also *United States v. Bitty*, 208 U.S. 393, 398 (1908). On the intersection between the Page Law and state marriage laws, see generally Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (arguing that the law was an attempt to keep Chinese women from immigrating to the United States).

305. See, e.g., *Japan Line, Ltd. v. L.A. County*, 441 U.S. 434, 444–47 (1979).

306. Congress' authority to enact interstate child support enforcement laws on this basis was recognized in cases including *United States v. Mussari*, 95 F.3d 787, 790 (9th Cir. 1996), and *United States v. Sage*, 92 F.3d 101, 105 (2d Cir. 1996).

Convention, because these agreements apply to many more cases and overlap more significantly with areas of state jurisdiction. The states have already taken the initiative on these issues, however, acting through the Uniform Laws Commission. Every state has laws in effect that extend recognition to foreign child support and custody orders, and these statutes are the obvious starting point for harmonizing state laws with the new international family law system.³⁰⁷

Coordinating state laws and international law will be relatively simple in the case of the Maintenance Convention because the United States was able to negotiate terms that are largely consistent with the existing national child support system. Building this interface was, in turn, made easier by the relationships and experience gained from bilateral reciprocal child support agreements over a period of twenty years before the new Convention was finalized. The process will be more difficult with the Protection Convention, which covers subjects where the United States has no direct international history or experience, and which takes an approach to several key questions that is significantly different from our current state law.

Although existing state laws allow enforcement of many foreign orders in state courts, the states have no practicable means of securing comparable respect and enforcement for their orders in foreign courts without access to the private international law system established by the Hague conventions.³⁰⁸ By ratifying the remaining Children's Conventions, the United States would be providing a vehicle for the states to extend their reach to families and family members outside our national borders.

C. *Sovereignty and Cooperation*

Sovereignty concerns present another potential objection to international family law. By ratifying the Abduction Convention and the Adoption Convention, and participating in the ongoing work of the Hague Conference, the United States has already taken important steps toward embracing the new international family law. Congress' initial determination to join these treaties can be understood as an effort to pursue the global interests of American citizens. In both settings,

307. Congress has also used its authority under the Full Faith and Credit Clause to outline terms of interstate recognition and enforcement of child custody and child support orders. *See* Estin, *supra* note 12, at 308–09. Legislation to implement the Maintenance Convention will be tied to the federal spending program for child support enforcement under Title IV-D of the Social Security Act, which includes the mandate that every state enact the Uniform Interstate Family Support Act. *See* 42 U.S.C. § 659(a) (2006). Implementation of the Protection Convention might be similarly tied to the child welfare and foster care programs in other titles of the same act, but those programs do not presently mandate a particular uniform state law that could be amended to accommodate the obligations of the Convention.

308. *But see supra* note 242.

Congress and the State Department became familiar with the needs of parents confronting the complexities of international abduction and adoption. The priority of protecting these parents' interests is evident in congressional testimony and hearing reports. Ratifying and implementing the conventions made new tools and remedies available to help address difficult international problems. The foreign affairs purpose of these treaties is reflected in the collaboration within the State Department on these issues between the Office of the Assistant Legal Adviser for Private International Law (L/PIL), which has responsibility for negotiating the treaties, and the Office of Children's Issues in the Bureau of Consular Affairs, which has assisted American citizens with international adoption and child abduction matters. In many individual cases, resolving problems also involves the efforts of State Department personnel posted abroad.³⁰⁹

Beyond providing protection for the interests of U.S. citizens and residents, the Children's Conventions serve a wider set of diplomatic and strategic concerns. The global effort to protect vulnerable children has come to include two prongs: fostering international cooperation in particular cases, and building capacity in less wealthy nations for basic child welfare services. This is most evident with the Adoption Convention, where the Hague Conference and the State Department have begun to work with countries of origin to assure that the standards of the Convention are observed.³¹⁰ United States participation in the Children's Conventions may also help induce other nations to join these treaties, since a large percentage of cross-border family cases involve the United States.

Those with an internationalist viewpoint are likely to conclude that these are worthy and important purposes, and those with a more sovereigntist perspective are more likely to be skeptical.³¹¹ From a sovereigntist perspective, however, the Hague Children's Conventions have the strong virtue of being purely cooperative, with no international tribunal charged with making authoritative interpretations of treaty provisions or ruling on contested cases.³¹² This has sometimes been a source of frustration and anger in the United States, when our treaty partners have not lived up to what we believe the Abduction Convention

309. See ICARA, 42 U.S.C. § 11608a(c) (2006) (requiring Secretary of State to "designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents").

310. See *supra* Part III.B.

311. See Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOR. AFFAIRS, Nov.–Dec. 2000, at 9–10; see also Blum, *supra* note 101, at 324–25, 345.

312. See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 93–112 (2000) (giving examples of international delegations).

requires in particular cases, and it clearly reduces the level of legal security the Conventions can provide. At the same time, this factor helps to explain the wide range of political support the Children's Conventions have gained in the United States and the wide acceptance they have gained around the world.

Recent academic writing explores the constitutional issues for the United States surrounding delegations of authority to international organizations.³¹³ These questions have particularly concerned sovereigntists. From the delegation perspective, the Children's Conventions are not problematic. Because they establish a cooperative enterprise, with no authoritative body to oversee treaty operation, there is no delegation to consider. Oversight is carried out collectively by Hague Conference members meeting in Special Commissions, with the guidance of a small professional Permanent Bureau. This democratic structure is both a benefit and a weakness because it places great emphasis on the cooperative efforts of member countries to negotiate and resolve controversies as they arise. In the place of a transnational regulatory body, there is a common, ongoing diplomatic project. Over time, those negotiations reflect the participants' accumulated experience with the treaty and test for consensus on possible refinements.³¹⁴

In contrast to the Hague Children's Conventions, the Convention on the Rights of the Child includes a reporting requirement and an international committee charged with monitoring participants' progress in realizing their obligations under the convention. States' parties undertake to submit reports to the committee within two years after the treaty enters into force and then at five-year intervals.³¹⁵ This is an extremely modest obligation, however, particularly in light of the aspirational and open-ended terms of the CRC and its lack of serious sanctions for treaty violations, if they could be determined.³¹⁶ The United States has already participated in this process, appearing before the Committee on the Rights of the Child in 2008 to report on its progress in implementing the two CRC Protocols.³¹⁷ Opponents of ratification have raised other sovereignty and federalism concerns,

313. *Id.* at 93–112; Bradley & Kelley, *supra* note 8, at 76.

314. The stance taken by each delegation will also reflect domestic political or policy considerations. *Cf.* Weiner, *supra* note 183, at 222 (disputing positions taken by U.S. delegation during 2006 Special Commission meetings).

315. CRC, *supra* note 10, at art. 43 (establishing committee), *id.* at art. 44 (reporting requirement).

316. This falls far short of the kind of delegation debated in the recent literature. *See* Bradley & Kelley, *supra* note 8, at 10–17 (describing types of delegated authority).

317. The United States reports to the Committee and the Committee's Concluding Observations are available online. *See* Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child, <http://www2.ohchr.org/english/bodies/crc/crcs48.htm> (last visited Nov. 16, 2009).

which could be addressed with appropriate reservations, understandings, and declarations. Ultimately, the question of ratification of the CRC has become largely political and symbolic in the United States.³¹⁸ Ratification is not necessary in order to participate in the Hague Children's Conventions, but the United States' continued failure to ratify the CRC undermines its credibility on human rights issues and its ability to take a leadership role on global children's issues.

V. CONCLUSION

The Hague Children's Conventions emerged from the landscape of private international law, but they have blossomed into something new—a hybrid species with a strong public law character and a unique structure. Each of the conventions addresses an important problem in family law, and responds to the limitations of traditional conflict of laws principles by establishing new channels and forms of international cooperation. The conventions take a pragmatic approach to problems regularly confronted by national governments and global families, providing a useful basis on which nations can work together to manage the inevitable frictions of global family life. This framework allows individuals to predict and plan more effectively and provides national governments with tools for education, advocacy, and policy reform. Beyond these justifications, the Children's Conventions also help to protect the best interests of children and implement the vision of the Convention on the Rights of the Child.

For the United States, participation in the Hague Children's Conventions is important on several levels. For citizens and residents of the United States, the Conventions offer significant assistance in navigating the international aspects of family formation and dissolution. As a matter of international law, these systems are more likely to be effective with broad participation and support. The United States has a particularly important role to play, as a result of its historic pull as a destination for immigration; the mobility of its population; and its relative size, population, and wealth.

In a world of transnational family life, national borders have taken on new meanings. No nation can act unilaterally to define its interests in the family, and no nation can extend its jurisdiction or protection to all members of its community as they move across the globe. Against the pull of globalization, differences in language, culture, legal systems, and material circumstances still play a powerful and significant role. Attempting to reconcile these opposing forces is not easy. In

318. This is true of other international human rights treaties, particularly the U.N. Convention on the Elimination of All Forms of Discrimination Against Women. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 62/218, U.N. Doc. A/RES/62/218 (Feb. 12, 2008).

international family law, as in domestic family law, there are substantial policy conflicts and strongly competing norms and values. In this context, the creation of a flexible and pragmatic framework to build international cooperation represents a considerable achievement.