

A COMMITMENT TO PRIVATE
INTERNATIONAL LAW

Essays in honour of Hans van Loon

UN ENGAGEMENT AU SERVICE DU
DROIT INTERNATIONAL PRIVÉ

Mélanges en l'honneur de Hans van Loon

The Permanent Bureau of the Hague Conference
on Private International Law

Le Bureau Permanent de la Conférence de La Haye
de droit international privé



Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.

Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | email: mail@intersentia.co.uk

Distribution for the UK:

NBN International
Airport Business Centre, 10 Thornbury Road
Plymouth, PL6 7PP
United Kingdom
Tel.: +44 1752 202 301
Email: orders@nbninternational.com

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Email: info@isbs.com

Distribution for Austria:

Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:

Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

A Commitment to Private International Law – Essays in honour of Hans van Loon.
Un engagement au service du droit international privé – Mélanges en l'honneur de
Hans van Loon.

The Permanent Bureau of the Hague Conference on Private International Law
Le Bureau Permanent de la Conférence de La Haye de droit international privé

© 2013 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

ISBN 978-1-78068-150-4
D/2013/7849/49
NUR 822

British Library Cataloguing in Publication Data. A catalogue record for this book is available
from the British Library.

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any
other means, without written permission from the publisher.

BUILDING AN INTERNATIONAL COOPERATION SYSTEM FOR THE CIVIL PROTECTION OF CHILDREN

Ignacio GOICOECHEA
Liaison Legal Officer for Latin America
Hague Conference on Private International Law

Florencia CASTRO
Legal Assistant to the Liaison Legal Officer for Latin America
Hague Conference on Private International Law

1. WHY SHOULD AN INTERNATIONAL COOPERATION SYSTEM FOR THE CIVIL PROTECTION OF CHILDREN BE BUILT?

A. BACKGROUND

The phenomenon of globalisation has led to an exponential increase in migration and a rise in cases of vulnerable children whose needs cannot be met by a single child protection system. In turn, distance, language and cultural differences and economic constraints often place hurdles in the way of effective access to justice for children and families abroad.

Today, there are countless situations which require the coordinated action of two national child protection systems in order to ensure the effective protection of children. We can mention, *inter alia*, the following:

International family disputes (custody, contact, relocation abroad, child abduction, parent-child relationships, child support)

In all these situations, it is important to determine which country's child protection system should deal with the dispute; which law should be applied to

the case; where necessary, how evidence should be obtained abroad; what sort of cooperation could be expected from the other child protection system (e.g., the recognition of an interim order or the recognition and enforcement of a protective order). It is also important to prevent conflicting court orders being made in two different jurisdictions (e.g., regarding the custody of a child), because, if court orders differ, difficult situations may arise. For example, if two jurisdictions grant physical custody of a child to different persons, contact rights between the parent who does not live with the child and the child might be blocked in practice since, if the child were sent for visitation abroad, the other parent might not return the child and would have a court decision – a custody order – that would entitle him to do so. In turn, if relocation abroad with a child were granted to a parent wishing to relocate, together with contact rights to the non-relocating parent, the non-recognition of such contact rights abroad might hinder the original relocation order. These situations might inadvertently encourage child abductions.

Children found abroad (out of their country of origin or habitual residence) – victims of abandonment, domestic violence, sexual exploitation and sale; non-accompanied, deported, institutionalised, etc.

There are currently many international conventions in criminal matters that deal with the trafficking, sale and sexual exploitation of children. However, children who fall victim to these crimes are quite often simply treated as illegal immigrants and deported. Instead, the child protection system of the country where they have been found should provide them with the immediate necessary protection and then arrange their reintegration into their family or community, in cooperation with the child protection system of their country of origin (or habitual residence). Appropriate assistance to victims of such offences should be ensured, including the adoption of such measures as may be necessary for their social reintegration and their full physical and psychological recovery (as prescribed by the “*Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*”, Article 9, para. 3).

Another example is the situation of children institutionalised abroad in circumstances where their relatives have been denied, for different reasons, their right of access to justice to attempt to recover their children and where the children have been denied their right to be raised by their family or community of origin. In some cases, these children may even be given up for adoption in the country where they have been found, without a proper investigation of the whereabouts of their families and the due consideration of their possible reintegration into their country of origin (e.g., children of deported parents or parents deprived of their liberty).

Placement of children abroad and intercountry adoption

In order to place children for care or adoption abroad, there is a need for effective coordination between the two relevant child protection systems; otherwise, children might be placed in a vulnerable position (e.g., if guardians do not meet the conditions laid down by the authority who placed the child under their care or refuse to return the child; intercountry adoptions which are not recognised in the country of residence of adoptive parents, or children who are abandoned or discriminated against in the country to which they have been taken by their adoptive parents).

B. LIMITATIONS OF NATIONAL CHILD PROTECTION SYSTEMS

We should ask ourselves why national child protection systems cannot deal with the situations described above properly. The answer to this question has to do with different limitations that they have, some of which will be briefly described below:

- (i) *Procedural limitations*: in some cases, child protection authorities do not have international jurisdiction to take action. In other situations, due process cannot be granted to all the parties, in particular to those that reside abroad, or the recognition and enforcement of protective orders cannot be granted in the foreign jurisdiction relevant to the case.
- (ii) *Lack of co-operation from the relevant operators of the foreign child protection system*: in many cases, there is a need to rely on the co-operation of the foreign child protection system in order to provide effective protection to the child. However, the mechanisms necessary to implement such co-operation are not in place (e.g., to locate the child, produce evidence, implement protective measures, secure access to justice, provide social assistance, etc.).
- (iii) *Lack of knowledge of operators*: in many cases, the operators of the child protection system are not cognisant of the proper application of international conventions or such other tools as may help them to address international child protection situations (e.g., to secure co-operation from another child protection system).
- (iv) *Lack of resources*: in the child protection field, it is quite common to find institutions which are overburdened with work and lack the necessary

human and material resources for the proper operation of the national child protection system. Naturally, this lack of resources has a negative impact on the time taken to address international child protection situations (e.g., long delays due to the lack of human resources and/or suitable means of communication, language barriers, etc.).

C. THE MANDATE OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (“CRC” OR “CONVENTION”)

The CRC establishes that States are responsible for securing the rights recognised by the Convention and that they must put in place all such cooperation instruments and mechanisms as may be deemed necessary in order to safeguard those rights. The key role of international co-operation for the international protection of children has been highlighted in the very Preamble of the Convention. This co-operation requires coordinated action among the child protection systems of the States involved and, where necessary, the conclusion of agreements in the context of different situations and cross-border disputes.

The need to develop international co-operation for the protection of children can be observed in countless situations enshrined in the CRC. For example, there could be situations linked with compliance with jurisdictional rules, rights of defence and due process. These are the situations which may arise under Articles 9, 10, and 11 of the CRC, where the separation of a child from his parents should only be ordered by “competent” authorities, subject not only to judicial review, but also to the rules of due process. In an international child abduction case, the judge seized to decide on the return might lose sight of his/her field of competence and decide on the merits of a custody case, a matter which falls within the jurisdiction of the Court of the State of habitual residence of the child. In this case, there might be two conflicting custody decisions, which could also jeopardise the exercise of access rights. In these circumstances, we should also be aware of the risk of falling into “parochial” interpretations, in particular, in relation to the interpretation of the notion of the best interests of the child, which calls for a responsible attitude on the part of the systems involved.

In custody, *patria potestas*, relocation or contact cases, the national systems involved should be developed so as to secure due process for the parties and to prevent the existence of detrimental decisions abroad. In particular, where parents do not reside in the same State, this factor should be taken into account and measures should be taken to secure the effective implementation of the order concerning the upbringing of the child (custody, contact, relocation, etc.) in both countries.

In the case provided for under Article 19 of the CRC (protection from all forms of abuse), co-ordination among the relevant child protection systems is required in order to prevent such situations and to provide necessary support for the child and for those who have care of the child.

Migrant children should be protected despite their nationality or migratory status. In turn, when taking protective measures for these children, as appropriate, due consideration should be given to any family available to care for them in their country of origin, for which purpose the coordinated action of the relevant competent authorities of both States involved in the case will be necessary.

In the case of unaccompanied children (refugees, asylum seekers, displaced children or fugitives) or children abandoned abroad, the relevant child protection systems involved should strive to find family who can care for the child in the country of origin and contribute to their safe reintegration into such a country.

Addressing the scourge of sexual exploitation and abuse, and the sale and trafficking of children, calls for the effective co-operation of child protection systems (as is also required by the “*Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*” (Article 10, para. 2)).

Intercountry adoption and the recovery of child support abroad are other clear examples of situations where the co-ordination among child protection systems and the conclusion of international agreements are needed to secure the effective protection of children. As we will discuss below, these situations have already been regulated by the relevant international instruments prepared within the framework of the Hague Conference on Private International Law.

All the different situations described above are just some examples of the multiple occasions where the coordinated action of the different child protection systems involved may be needed in order to secure the international protection of children. Such co-ordination may be required at the administrative or judicial level or simultaneously at both levels.

Furthermore, in addition to the general coordination of the operation of child protection systems, there are specific situations where the CRC mandates States to promote the conclusion of bilateral or multilateral agreements or accession to existing agreements as an effective means to protect children in specific situations (e.g., international child abduction (Article 11), intercountry adoption (Article 21), international recovery of child support (Article 27), abuse and sexual exploitation (Article 34) and kidnapping, sale and trafficking of children (Article 35)). Fortunately, these situations have already been addressed by several international instruments which have developed specific international legal co-operation mechanisms between child protection systems. The ratification of or the accession to these instruments has been recommended by the Committee on the Rights of the Child, through General Comment No 5 (2003) on “*General*

Measures of Implementation for the CRC” (i.e., the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*, the 1993 *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, and the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*); and General Comment No 6 (2005) on “*Treatment of unaccompanied and separated children outside their country of origin*” (i.e., the 1993 *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, and the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*).

In light of the foregoing considerations, we can conclude that both the text of the CRC and its practical implementation mandate the development by States of international legal co-operation schemes as a means to secure the effective international protection of children. Consequently, States should bear this in mind when considering developing the necessary implementing measures which need to be taken to secure the effective implementation of the Convention.

2. “INTERNATIONAL LEGAL COOPERATION” AS A BASIS FOR AN “INTERNATIONAL COOPERATION SYSTEM FOR THE CIVIL PROTECTION OF CHILDREN”

A. INTERNATIONAL LEGAL COOPERATION AND INTERNATIONAL CHILD PROTECTION CONVENTIONS

In order to provide effective protection to children in situations which require the participation of more than one national protection system, it is necessary to put in place efficient cooperation mechanisms between the different protection systems involved in the case. Basically, we should determine when, and to what extent, a national protection system should participate in a case and how it is supplemented or assisted by the other protection system involved.

This framework should be developed within the scope of the so-called “International Legal Cooperation”, which refers to the procedures or mechanisms available to facilitate the force and effect of legal acts or proceedings that must be pursued in a foreign jurisdiction.

In this regard, we consider that the international instruments of legal cooperation intended to facilitate coordination among the different national

child protection systems, with the purpose of providing children with effective protection in international situations, are the ones that will constitute the basis of a true “International Cooperation System for Child Protection”.

Following the previous terminological clarifications, we can now go on to analyse how this “International Cooperation System for the Protection of Children” is being developed.

First of all, it is worth taking into account that international legal cooperation takes place primarily through international agreements, at the global, regional, sub-regional or bilateral levels. With regard to the international protection of children, international agreements on diverse topics have been developed in different fora. In Latin America, there are several international instruments in force in this field which have been adopted by the United Nations (New York Convention on the Recovery Abroad of Maintenance), the Hague Conference on Private International Law (*Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*; *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*; *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*; and *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*), and the Organisation of American States (*Inter-American Convention on the Return of Children*, *Inter-American Convention on Support Obligations*, *Inter-American Convention on International Traffic in Minors*). Moreover, some States have developed bilateral agreements in order to address specific topics for the protection of children (*Convention on International Return of Children between the Oriental Republic of Uruguay and the Chile Republic (1982)*, *Convention on International Protection of Children between the Oriental Republic of Uruguay and the Argentine Republic (1982)*, *Convention on international return of children between the government of the Oriental Republic of Uruguay and the Peru Republic (1989)*). All these international instruments constitute the basis of the International Cooperation System for the Protection of Children.

In addition to the texts of the above-mentioned Conventions, a second level of tools for international cooperation, such as handbooks, guides to good practice, and networks of Central Authorities, Judges and contact points, have been developed in a progressive and sustained manner during the past few decades, with the aim of facilitating the effective development of legal cooperation, and consequently, the operation of the International Cooperation System for the Protection of Children.

This second level of tools, mainly networking, facilitates the development of legal cooperation for the international protection of children, both on a horizontal level between the same actors in different States (e.g., Central authorities with

Central Authorities and Judges with Judges), as well as between different actors within the same State (e.g., Central Authorities with Judges and other contact points or actors within the system).

B. THE 1996 HAGUE CONVENTION ON INTERNATIONAL CHILD PROTECTION: GENERAL ARTICULATING MECHANISM

Among the instruments mentioned above, it is worth making special reference to the 1996 Hague Convention on the Protection of Children, owing to its general and broad scope. This instrument was drafted with the aim of providing a practical mechanism of cooperation among States to secure the effective protection of children internationally and, more specifically, to avert conflicts of jurisdiction and applicable law, and to facilitate cooperation and the recognition and enforcement of protective orders among the legal systems involved in situations of international child protection.

The Convention on International Child Protection in a way constitutes the main basis of the International Cooperation System for the Protection of Children and applies to a wide array of situations, such as, *inter alia*, cross-border disputes on custody rights, contact, relocation and parental responsibility; international trafficking in children, child abuse, civil protection of child victims of sale and sexual exploitation; children without parental care (unaccompanied children or children separated from their parents); and the placement of children in institutional or foster care abroad.

The Convention also acts as a supplement to the 1980 Hague Convention on Child Abduction and the 1989 Inter-American Convention on the international return of children, as well as a supplement to the 1993 Hague Convention on Intercountry Adoption.

The rules on jurisdiction included in the Convention provide, as a general principle, that the courts of the country of habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. However, the Convention establishes some exceptions to this principle, such as: in cases of urgency, jurisdiction based on the place where the child or property belonging to the child is present; in cases of wrongful removal or retention of a child, the temporary retention of the jurisdiction of the State in which the child was habitually resident before the wrongful removal or retention; if certain conditions are fulfilled, the jurisdiction of the authorities of the State deciding on an application for divorce; or, by way of exception, the possibility of a transfer of jurisdiction to a court that is better placed to hear the case. All of these exceptions have been established with a view to the paramount consideration of

the best interests of the child, which should be assessed by the authority with jurisdiction to order the protective measure in relation to the child.

Furthermore, the Convention also determines the law applicable to the case at issue, adopting as a general principle the application of the *lex fori*. This is clearly convenient as it simplifies the task of operators who will apply their own law rather than a foreign law in order to protect the child. As in the case of jurisdiction, there are certain exceptions to the general principle, all of which are aimed at the more effective protection of the child.

The cooperation mechanism set forth in the Convention focuses on the action of Central Authorities, who are in charge of cooperating – in the broadest sense – with the national authorities with jurisdiction in relation to child protection matters, as well as with the Central Authorities of the other State Parties involved.

Lastly, the Convention establishes a method of recognising and enforcing the measures of protection taken under the Convention. This involves the recognition of measures of protection taken in one Contracting State in all other Contracting States by operation of law. This enables effective coordination to take place between the different protection systems involved.

The advantages of the 1996 Convention have been recognised in different international fora, which have recommended the ratification thereof or accession thereto (the Committee on the Rights of the Child, under General Comments No 5 and 6 mentioned *supra*; the “United Nations Guidelines for the Alternative Care of Children” (para. 138); and the Special Commissions of the Hague Conference on the 1980 Hague Convention on Child Abduction and the 1993 Hague Convention on Intercountry Adoption, which recommend it as a supplement to the instruments mentioned above).

3. CHALLENGES FACING THE BUILDING OF AN INTERNATIONAL COOPERATION SYSTEM FOR THE PROTECTION OF CHILDREN

As has been previously stated, nowadays there are a variety of international instruments on child protection which cover a wide range of dangerous situations for children. This could lead us to conclude that we already have an International Cooperation System for the Protection of Children. However, we believe that we are still at an early stage and, although some of the international instruments on child protection have gradually penetrated into national systems, there are still important challenges to overcome in order to achieve efficient coordination between the different national systems of protection so that the effective protection of children at risk can be ensured.

The different challenges identified could be classified as: (i) policy challenges, related to the development and implementation of conventions or to the creation of such mechanisms as may be necessary for cooperation to be promoted, and (ii) operative challenges, related to the actual operation of the international protection system (this refers to the coordinated operation of national protection systems in international cases).

i. Policy challenges

First, the challenge might appear in the process of selecting the topics that need to be addressed by an international convention or in the drafting stage, which might take years of discussions and analysis. What is more, the process of incorporating a particular Convention into the different national legal systems and its implementation might also constitute a great challenge to the international community.

In order to face the first challenge, both States and international organizations should be mindful of the needs constantly emerging from reality. Communications and migration movements have certainly given rise to new issues in matters related to children which have gradually been addressed by the international legal community. In this regard, a thorough analysis of the new issues arising in the field of international child protection will lead us to determine whether there is a need to develop new instruments of protection in different areas of the protection of children.

The process of State incorporation of an international Convention must be analyzed from different standpoints. On the one hand, there is an international community willing to afford additional protection to their children; on the other hand, practice shows us that it takes years or decades to incorporate and implement international conventions on child protection in national legal systems. Accordingly, the promotion of International Conventions is of utmost importance and can undoubtedly facilitate a State's process of ratifying or acceding to a treaty. The active participation of those who operate the system, who can visualize more clearly the benefits of the new tool, as well as the participation of the academics who might carry out the scientific analyses necessary for the study and implementation stages, constitutes a best practice that has proved to be really useful to facilitate and speed up this process. In effect, the authority having jurisdiction to analyze a convention (generally, the Ministry of Foreign Affairs) is not usually the authority responsible for the protection of children in a given country. In addition, this authority is generally overburdened with work and urgencies to be dealt with on a daily basis, which makes it postpone the analysis of child protection conventions until quieter times that will probably never come. That is why having the assistance of the operators of the child protection system

and academia could be extremely useful to facilitate the process of incorporating new International Conventions into the local legal system (e.g., drafting of reports on the legal relevance of the convention, explanation of the importance of ratifying or acceding to a convention to members of Parliament, etc.).

Furthermore, it should be noted that political commitment to becoming a Party to a treaty is not enough. The interested State should also undertake to duly implement the treaty so as to ensure its effective operation. Only then will its status as Party to the Convention make sense. This task may require the adoption of local regulations, the coordination of actions among the different operators of the child protection system and, particularly, solid promotional work and training for both those who will operate the mechanism and those who might provide assistance to users, as well as to the users themselves.

ii. Operative challenges

Not only should States incorporate and implement conventions, but they should also implement them correctly, so that their objectives can be realized.

The first hurdle to overcome in this regard is cultural barriers. For instance, some operators of the child protection system might believe that they can address any situation of a vulnerable child and that they do not need the assistance of any other protection system. Judges may sometimes be an example of this. As they are used to working alone, they may find it difficult to comprehend and accept that there are judges and operators of the other protection system engaged in children issues who are willing to assist them in order to protect children in an effective manner. Sometimes it is necessary to ask the other jurisdiction for information; in other situations, it is simply a matter of accepting that the other protection system has competence to address and determine a particular situation.

In addition, there are preconceptions about other cultures or child protection systems which often lead us to believe that our system is better than others and that our way of analyzing and addressing a problem is the only one possible or the best. When interpreting international conventions, operators tend to rely on their cultural background, running the risk of turning an international case into a local one, which would be contrary to the objectives and premise of the international instrument applicable to the case.

Becoming aware of the international dimension of the cases covered by the conventions and developing trust among the different national protection systems are key factors to the effective operation of the International Cooperation System for the Protection of Children.

One of the main achievements over the past few years in connection with the operation of Child Protection Conventions and the promotion of trust among

different legal systems might be the development of networking among the key operators of the conventions, that is to say, Central Authorities and Judges.

The establishment of the International Hague Network of Judges has simplified the development of such trust. These judges are experts trained both to act as role models to their own colleagues in their own countries and to assist their colleagues abroad. In particular, the development of direct judicial communications has added another excellent tool to facilitate legal cooperation for the effective protection of children.

Consequently, we may conclude that the development and use of these Networks of Judges and Central Authorities is a further challenge to be addressed by the operators of the national protection systems in the coming years.

On the other hand, it is essential that States provide the operators of the child protection system with the necessary material and human resources to fulfil the objectives of the Conventions. It might seem obvious but, unfortunately, this is not often the case and sometimes results in non-compliance with the convention by the State involved and the ensuing lack of protection for children whose rights should be guaranteed by that very instrument in force and effect.

4. CONCLUSION

In light of the ideas expressed above, we may conclude that it is necessary to continue working on the development of an International Cooperation System for the Protection of Children which allows the coordinated and efficient participation of the different national child protection systems. For such a purpose, we should not only promote the accession to or ratification of the existing Child Protection Conventions which constitute the basis of that protection system, but we should also be mindful of the new issues which may arise in connection with the international protection of children in order to address them properly.

Furthermore, we should work towards ensuring the effective application of the Conventions in force in the different States, since only the correct implementation of the existing instruments will afford real protection to all children. To that end, intense and thorough work regarding coordination, training and promotion of the Conventions should be undertaken by all the operators engaged in the international protection of children.

The political commitment of every State involved will be of utmost importance in order to achieve the cooperation required by the Conventions, to promote further accessions to or ratifications of the Conventions, as well as to ensure the proper implementation of the Conventions. In particular, the active participation of the relevant operators of the child protection system will also be important so

as to overcome the different challenges resulting from the processes of creation, accession / ratification and implementation of the Conventions.

We consider that although we have come a long way in the field of the international protection of children, we still have a long way to go. To this end, the incorporation and implementation of the 1996 Hague Convention in a considerable number of States will entail an unprecedented development as it will lay a solid foundation for the operation of an International Cooperation System for the Protection of Children. Many international operators seek to protect the rights of the child in international situations. However, it is only through the coordinated commitment and work of these operators (administrative authorities and courts, non-governmental organizations and international bodies) that we will be able to build an effective International Cooperation System for the Civil Protection of Children.

