AUTORES

Abarca Junco, A. P.
Abellán Honrubia, V.
Álvarez González, S.
Álvarez Rubio, J.
Álvarez Torné, M.
Añoveros Terradas, B.
Arenas García, R.
Badía Martí, A.
Bariatti, S.
Basedow, J.
Beaumont, P.
Bernasconi, Ch.
Bogdan, M.
Bonet Pérez, J.
Bonomi, A.
Bouza, N.
Brand, R.
Bucher, A.
De Miguel Asensio, P. A.
Duintjer Tebberns, J.
Duncan, W.
Espinar Vicente, J. M.
Esplugues Mota, C.
Fernández-Tresguerres, A.
Font i Mas, M.
Fontanellas Morell, J. M.
Forner Delaygua, J. J.
Garau Sobrino, F.
Garcimartín Alférez, F. J.
Garriga Suau, G.
Gaudemet-Tallon, H.
González Beilfuss, C.
Guzmán Zapater, M.
Hartley, T.
Iglesias Buhigues, J. L.
Iriarte Ángel, J. L.
Kohler, Ch.
Lagarde, P.-
Loon, H. van
Marin Consarnau, D.
Morse, CGJ
Moura Ramos, R. M.
Olesti Rayo, A.
Palao, G.
Paredes Pérez, J. I.
Parra Rodríguez, C.
Pauknerová, M.
Pellisé de Urquiza, C.
Pereira, F. P.
Pérez Vera, E.
Pertegas, M.
Pocar, F.
Pons Ràfols, X.
Rigaux, F.
Roca i Trias, E.
Rodríguez Mateos, P.
Sánchez Jiménez, M. A.
Sánchez Lorenzo, S.
Torralba Mendiola, E.
Viñas Farré, R.
Virgós Soriano, M.
Vrellis, S.
Walker, L.
Zabalo, E.
Zamora Cabot, F. J.

JOAQUIM FORNER DELAYGUA
CRISTINA GONZÁLEZ BEILFUSS
RAMÓN VIÑAS FARRÉ
(coords.)

ENTRE BRUSELAS Y LA HAYA

Estudios sobre la unificación internacional y regional del Derecho internacional privado

***Liber Amicorum* Alegría Borrás**

Marcial Pons
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parallel of 1988. In spite of the declaration of the EU Member States, the case law of the EFTA-Lugano States has not played any visible role in the ECJ's decisions on the Brussels Convention. There has been no dialogue, but a monologue of the ECJ. As the latter's position has been further enhanced by the 2007 Lugano Convention the obligation to pay due account to «any relevant decision» on the interpretation of the convention and the Brussels instruments is about to become a one-way street.

This lack of balance is prejudicial to the overall objective of Protocol 2. Although practical experience with the ECJ's approach under the new Lugano Convention is still scarce, the point of counterbalancing the predominant position of the ECJ calls for attention already today. A common court for the EFTA-Lugano States with jurisdiction to interpret the 2007 LC would be a means to enable these States to speak with one voice. The EFTA Court might fulfil this function. The dialogue that already exists between the ECJ and the EFTA Court in the field of EEA law proper would be extended to the field of judicial cooperation. This would be entirely in line with the EFTA Court's mission as the Lugano Convention, despite its formal autonomy, is an essential component of the law in the greater economic area in Europe of which also Switzerland forms a part. Of course, any institutional development in this respect will take time. The forthcoming revisions of the Lugano Convention might offer an opportunity. The adaptation of the convention to the EU Maintenance Regulation is due in the near future. Moreover, a thorough revision of Regulation Brussels I is under way. This perspective might encourage reflection on how to adapt the present jurisdictional structures for the benefit of a homogeneous development of the law in the European judicial area.

ALLEGRO SOSTENUTO CON BRIO, OR: ALEGRÍA BORRÁS' TWENTY-FIVE YEARS OF DEDICATED WORK AT THE HAGUE CONFERENCE

Hans VAN LOON *

SUMMARY: 1. A BIRD'S EYE VIEW OF ALEGRÍA BORRÁS' CONTRIBUTION TO THE WORK OF THE HAGUE CONFERENCE: 1.1. The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. 1.2. The 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. 1.3. A recurrent drafting challenge: plurilegal systems. 1.4. Explanation, promotion and advocacy. 1.5. General affairs and policy.—2. RESPONDING TO THE COMMUNITARISATION OF PRIVATE INTERNATIONAL LAW IN EUROPE.—3. THE EXPANSION IN LATIN AMERICA, AND THE INCREASING ROLE OF THE SPANISH LANGUAGE IN THE WORK OF THE HAGUE CONFERENCE: 3.1. Expansion of the Conference and its work in Latin America. 3.2. The role of the Spanish language.

During its annual session in April 2012, the Council on General Affairs and Policy of the Hague Conference on Private International Law paid homage to Professor Alegría Borrás, expert from Spain, for her twenty-five years of dedicated service to the Hague Conference. Due to the austere traditions of the Conference and the heavy agenda of the Council, it was a sober tribute to someone who, as only a few has invested herself, with her mind, her heart and with unfailing assiduity, in the work of the Conference. In fact, a full account of her dedicated association with the Conference over the past quarter of a century —quite apart from her scientific, diplomatic and further efforts in so many other organisations and contexts— would go far beyond the word-limit permitted for this contribution! Instead, just a few aspects of her work will be highlighted in order to illustrate the multiple ways in which Alegría Borrás has served her country, Spain, as its expert and delegate to the Hague Conference. These examples will also demonstrate why she may be considered,

* Secretary General of The Hague Conference on Private International Law.

without reserve, one of the primary contributors to the Hague Conference as we presently know it.

Alegría first came to the Hague Conference in April 1987 on the occasion of the Special Commission meeting of experts in charge of the preparations for what was to become the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* («the Successions Convention»). This was also *our* first encounter and the beginning of a long-standing working relationship which included a bond of many shared ideals, values and concerns and, indeed, one of friendship.

Until his regretted passing in November 2007, Professor Julio González Campos, who had been the leading Spanish expert at the Conference since the early 1970s and who introduced Alegría to the Conference, was the *Dritte im Bunde*. One of the ideas which the three of us shared from early on, was the conviction that the Hague Conference had to intensify its efforts beyond the boundaries of Europe, particularly in Latin America. This was a mission that could only be fulfilled if a «bridge» was built to the region. This «bridge» had to be based on respect for the region's culture and its venerable tradition of multilateral unification of private international law, a tradition which went back to before the first session of the Hague Conference in 1893[1]. Paradoxically, we would soon be confronted with a dramatic development in Europe itself: the communitarisation of private international law as a result of the Treaty of Amsterdam.

The negotiations on the Successions Convention[2] offered Alegría a first occasion to contribute to what was to become one of her acclaimed academic specialties, sometimes loosely referred to as the issue of «federal clauses». She would later, in 1994, teach a course at the Hague Academy of International Law on this subject[3]. Her work in this respect, in the context of the Hague Conference, has not only set the standard for recent Hague Conventions, it has also been a model for legislative work by other organisations. As one of the highlights of her contribution to the architecture of modern instruments on private international law, it deserves to be emphasised as part of a short sketch of her many activities as an expert and negotiator in the framework of the Conference (1).

The second part of this article will deal with Alegría's important role in the way the Conference has responded to what initially appeared to be a very challenging «tectonic shift»: the communitarisation of private international law (2).

In the third part, we will discuss Alegría's huge efforts to facilitate the involvement of Latin America in the work of the Conference and indeed the

[1] See *Conférence de La Haye de droit international privé, Actes, Première session* I-II (1893), The Hague (1893). There is an explicit reference to the Montevideo Treaties —as a source of inspiration but not necessarily as regards their broad scope and method— in the Government's (*sc.* Tobias Asser's) Introductory *Mémoire* to «Messieurs les Délégués» (at p. 6).

[2] On which, A. Borrás, «La Convention de La Haye de 1989 sur la loi applicable aux successions à cause de mort et l'Espagne», in A. Borrás, A. Bucher, A. V. M. Struycken and M. Verwilghen (eds.), *E Pluribus Unum, Liber Amicorum Georges A. L. Droz*, The Hague (1996), pp. 2-23.

[3] «Les ordres plurilégislatifs dans le droit international privé actuel», *Recueil des Cours de l'Académie de Droit International de La Haye/Collected Courses of the Hague Academy of International Law*, vol. 249 (1994-1995), The Hague, 1996.

development of the Hague Conference into an increasingly global organisation (3).

1. A BIRD'S EYE VIEW OF ALEGRÍA BORRÁS' CONTRIBUTION TO THE WORK OF THE HAGUE CONFERENCE

Initially together with Julio González Campos, and later as the principal Spanish expert and delegate, Alegría Borrás has contributed to all the Hague Conventions adopted since her first appearance at the Conference in 1987: the *1989 Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, the 1993 *Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, the 1996 *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, the 2000 *Convention on the International Protection of Adults*, the 2006 *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*, the 2005 *Convention on Choice of Court Agreements* (including all the preparatory work on a draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters), the 2007 *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, and the 2007 *Protocol on the Law Applicable to Maintenance Obligations*. Not only did she attend the Diplomatic Sessions, but she also took part in the preparatory Special Commission meetings, and, on some occasions, in special preparatory meetings. She is currently involved, among other projects, in the work on the Hague Principles on Choice of Law in International Contracts.

The recipient of this *liber amicorum* is, above all, an academic who attaches great importance to maintaining high levels of scholarship and who can be a demanding professor for her students. That said, she has always demonstrated a keen interest in the *practice* of law, eager to see results and to make sure that the legislative work in which she has taken part delivers practical outcomes for the end-users of the legal instruments. From the beginning, she recognised the increasingly important role of direct cross-border co-operation through Central and other competent authorities, in addition to, and sometimes in place of, traditional private international law rules[4]. She recognised that this was a practical technique to achieve the purposes of Hague Conventions in modern, mobile societies. Furthermore, she has not considered it below her to participate actively in, and whenever possible to support, including as vice-chair or chair, Special Commission meetings on the practical operation of existing co-operation-based Hague Conventions. She has taken part in all the Special Commission meetings on the practical operation of the different Hague Conventions since 1989: this includes the Special Commissions on the practical operation of the Apostille, Service, Evidence, Access to Justice, Child Abduction and Child Protection, Adoption and Maintenance Conventions![5].

[4] See, *e. g.*, A. Borrás, «El papel de la "autoridad central": los convenios de La Haya y España», *Revista Española de Derecho Internacional*, 1993, 1, pp. 63-79.

[5] These Special Commission meetings —varying from a few days to two full weeks— took place in 1989, 1993, 1995, 1997, 1999, 2000, 2001, 2002, 2003, 2005, 2006, 2009, 2011 and 2012.

On several occasions she served as vice-chair at a Hague Diplomatic Session. Particularly important, however, was her leading role, either informally or formally, in the actual preparation of a number of instruments.

1.1. The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

I will always remain particularly grateful to Professor Borrás for her tremendous support during the negotiations on the 1993 Hague Intercountry Adoption Convention, for which, as a member of the Permanent Bureau, I had primary responsibility. That responsibility weighed heavily because this was *the* topic of the Centennial Session of the Hague Conference in 1993[6]. As a result, the Convention, and thereby the Diplomatic Session, depended for its success greatly on consensus-building. This consensus-building had to take place not just among the traditional Members of the Conference, but also among a large number of non-Member States from which children were adopted by the established Members. These non-Member States were specially invited to participate in the negotiations on the same footing as the ordinary Members. At that time, a large number of these non-Member States were countries in Latin America. From the beginning, Alegría was very sensitive to this aspect of the negotiations and she offered, spontaneously, to prepare a Spanish translation of the scientific report that served as a basis for the discussions[7]. This translation was an invaluable tool to bring the Latin American participants, many of whom had difficulties with the official languages of the Conference, onto the same page as their English and French-speaking colleagues.

Alegría was also heavily involved in the efforts to find a solution for the particularly delicate question of the recognition and effects of the adoption. One of the main benefits of the Convention is that it ensures the recognition, by operation of law, in all Contracting States, of adoptions made under the Convention. It therefore avoids the previous practice whereby an adoption granted in the country of origin was to be made anew in the country receiving the child, including through a probationary period in the latter country. This important principle raises considerable legal challenges, however, because the Convention covers a broad range of adoptions with a large variety of effects, from adoptions that fully terminate the legal relationship between the child and the original parent(s) to those that leave such a relationship wholly or partly in tact. The Special Commission preparing the Diplomatic Session had not been able, after three extensive meetings, to resolve the issue which became, therefore, a pressing question. Informally, Alegría, and a number of other friends of the Conference, engaged in a special effort to find a solution. Alegría then tabled this proposal on behalf of Spain at the Diplomatic Session[8]. This proposal served as a basis for the suggestion made by the Special Recognition Committee, chaired by Professor Andreas Bucher (from Switzerland)[9], and enabled the Diplomatic Session to reach agreement on a provision that deals with, not all, but the most vital aspects of the issue[10].

Alegría's special affinity with this Convention, on which she also advised her government and organisations within Spain and wrote extensively[11], destined her to act as the Chair of the Special Commission meetings convened in 2000 and 2005 on the practical operation of the Convention. These meetings attracted up to 250 participants from a large number of countries, including countries with very different views on (transnational) adoption and, as has become increasingly apparent during the past decade, very diverse stages of legal development[12]. It was in no small part thanks to Alegría's talents as a Chair and her mastery of the subject that it was possible to achieve consensus on meaningful conclusions and recommendations[13].

1.2. The 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

Already in 1995 and 1999, Alegría had represented Spain at the Special Commission meetings on the practical operation of the Hague Conventions of 1973 (and their predecessors of 1956 and 1958) on maintenance obligations and of the 1956 *New York Convention on the Recovery Abroad of Maintenance* («1956 UN Convention»). The 1999 Special Commission meeting had concluded that there was a need to modernise and improve the international system for the recovery of maintenance for children and other dependent persons, and for a new comprehensive global instrument that would also integrate and modernise the machinery for administrative co-operation as provided by the 1956 UN Convention. Given Alegría's familiarity with the subject and with the Hague

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[6] See *Actes et documents de la Dix-septième session/Proceedings of the Seventeenth Session*, t. I, t. II, The Hague (1995, 1994); and see A. Borrás: «Cien años de participación de España en la Conferencia de La Haya de Derecho internacional privado (dirección y coordinación)», *Revista Española de Derecho Internacional*, 1993, 1, pp. 149-201.

[7] «Informe sobre la adopción de niños procedentes del extranjero, Doc. Prel. No 1 abril 1990»,

[8] See *Actes et documents de la Dix-septième session/Proceedings of the Seventeenth Session*, tome II (*supra* fn 6), p. 310.

[9] *Ibid.*, p. 322.

[10] According to Art. 26 of the 1993 Convention:

(1) The recognition of an adoption includes recognition of
a) the legal parent-child relationship between the child and his or her adoptive parents;
b) parental responsibility of the adoptive parents for the child;
c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.
(2) In the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognised, rights equivalent to those resulting from adoptions having this effect in each such State.
(3) The preceding paragraphs shall not prejudice the application of any provision more favourable for the child, in force in the Contracting State which recognises the adoption.

Cf. also Art. 27, which provides for the possibility to convert a «simple» into a «full» adoption.

[11] For a list of her publications on the Convention see the Conference's website, *supra*, fn. 7, under «Publications» on the 1993 Convention.

[12] This has prompted the Conference to intensify its «Post-Convention» services, including a programme for technical assistance co-operation co-ordinated by a Centre for Judicial Studies and Technical Assistance

Conventions generally, electing her, along with Jennifer Degeling, as co-*Rapporteur* for the new, ambitious 2007 Convention on the International Recovery of Child Support and Other Family Maintenance, was the obvious thing to do.

More than in any previous international instrument of this kind[14], the 2007 Convention goes to great lengths to ensure effective access to procedures for the establishment, modification, and recognition and enforcement of maintenance decisions. It is also innovative in the sense that it acknowledges, as a given, the existence on the planet of different policies and levels of legal development with regard to both free legal assistance and procedures for the recognition and enforcement of decisions on maintenance. Through so-called «declarations», Contracting States may subject the provision of free legal assistance to a child-centred means test[15] and/or opt for a stricter procedure for recognition and enforcement[16]. This reflects, again, the increasing diversity of approach and the differing stage of development of legal systems represented in the increasingly globalised Hague Conference. The clarity of the Explanatory Report and its extensive reference notes will be of great assistance for those who will, in the near future, be called upon to apply this ground-breaking instrument, which has just entered into force on the international plane (on 1 January 2013)[17].

1.3. A recurrent drafting challenge: plurilegal systems

As mentioned before, a recurrent contribution of Alegría to the legislative endeavours of the Conference has been her work on «federal clauses». In reality, a number of very different issues are encapsulated within this term, which has not prevented the Conference from continuing its «wobbly» use of the expression, nor —fortunately!— Alegría herself from chairing, since 1992, the «Committee on Federal Clauses». This Committee has become a traditional feature of the Diplomatic Session of the Conference and has, over the years, greatly helped to bring clarity and uniformity to this area.

As Professor Borrás explains in her 1994 Academy Course, in the proper sense, the «federal clause» is a clause permitting a federal State (or another State with two or more territorial units in which different systems of law apply in relation to matters dealt with in the Convention) to declare that the Convention will extend to all, only one, or some of its territorial units[18]. In a broader sense, the term is used to deal with the application of the rules of a specific Convention to the conflicts of laws *within* a State having such a territorial

[14] Notably the 1980 Hague Child Abduction Convention, whose effectiveness is limited by the reservation allowed by its Art. 26(4) *juncto* Art. 42.

[15] Art. 16 *juncto* Art. 63

[16] Art. 24 *juncto* Art. 63

[17] For the Explanatory Report by A. Borrás and J. Degeling, which will ultimately be published in the Hague Conference's *Proceedings* see the Conference's website under «Conventions» there «Convention of 23 November 2007...», «Publications» then «Explanatory reports».

[18] Although introduced at the request of the United States of America, this State has never made use of it. It has been applied, however, by Canada in respect of the 1980 Child Abduction and 1993 Adoption Conventions, and, most recently, by the United Kingdom in respect of the 2000 Protection of Adults Convention (currently ratified for Scotland only).

multi-unit system[19], as well as to the other situations where the foreign State whose law is designated by the Convention rules has two or more systems of law that apply, either to different territorial units or to different categories of persons (*e. g.*, persons belonging to different religions).

These latter situations are really matters of interpretation of the Convention rules. However, they arise with ever more frequency as more States with such multi-legal systems join the Hague Conventions and as the Conventions are more frequently applied in relation to such States. In light of this, the need for precision as to which State's (or province's, or autonomous region's) rules apply (or which authorities have competence) when the Convention points to a multi-legal State has also increased. Alegría's first effort to rationalise the system at the Hague Conference's Sixteenth Diplomatic Session in 1988 fell on deaf ears[20]. But she came back and made her point successfully in later Sessions and established her authority in this rather technical but significant area. This led to the progressive standardisation of these provisions at the Hague Conference and, in turn, these provisions also became a model for legislative work done by others, *e. g.*, by the European Union.

1.4. Explanation, promotion and advocacy

Once a Convention was adopted, Alegría did not consider her job done. She faithfully reported on the results of the Diplomatic Sessions in numerous learned Spanish publications, explaining the genesis, purpose and structure of the Convention, and analysing its provisions. She advocated for the ratification of the Conventions with the Spanish Government and followed closely the application of the instruments in Spain and elsewhere.

1.5. General affairs and policy

In addition to her contributions to the negotiations on, and the review of the operation of Hague Conventions, Alegría Borrás has participated in all the meetings on general affairs and policy of the Conference since 1987. Her institutional memory has been a great asset to the organisation and her authority as a leading expert and delegate has helped in many ways to keep the Conference on the right track. This was particularly important in relation to the major changes which took place in the life of the Conference as a result of the communitarisation of private international law and the expansion of the Conference in Latin America and around the globe.

[19] Notwithstanding such a clause, through implementing legislation the rules of a Convention may be made applicable to such internal conflicts, see, *e. g.*, the UK Recognition of Trusts Act 1987.

[20] See *Actes et documents de la Seizième session/Proceedings of the Sixteenth Session* (1988), tome II, *Successions —loi applicable/Succession to estates— applicable law*, p. 477, pp. 486 *et seq.*

2. RESPONDING TO THE COMMUNITARISATION OF PRIVATE INTERNATIONAL LAW IN EUROPE[21]

Although the Treaty of Amsterdam, Chapter IV of which conferred upon the European Community legislative powers in the field of private international law, was only signed in October 1997 and entered into force on 1 May 1999[22], its impact on the work of the Hague Conference was foreshadowed by the increased activity of the European Community in the field of private international law before this time. This activity was demonstrated during the negotiations which led to the 1996 Protection of Children Convention, as well as during the negotiations concerning a global instrument on jurisdiction and recognition and enforcement of judgments.

For some time, negotiations on the future 1996 Hague Convention took place in parallel to the negotiations in Brussels concerning a treaty based on Article K.3 of the Maastricht Treaty (the predecessor of the Treaty of Amsterdam), covering, in part, similar matters of child protection. Not only was Alegría Borrás involved in both negotiations, she also acted as *Rapporteur* for what was to become the *Convention of 28 May 1998 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*[23].

A difficult situation arose during the final negotiations on the 1996 Convention with regard to its relationship to the future European Convention. Although Hague Conventions have always made provision for their relationship to other instruments dealing with similar matters, the question now became particularly sensitive given that there was an overlap between the proposed jurisdiction provisions in the 1996 Convention and those in the European instrument.

A very tense, and partly confused, discussion took place in the final days of the Eighteenth Diplomatic Session of the Conference in October 1996. Two proposals dealing with what was, by now, called «the disconnection question», were in competition. One proposal, by Spain, Greece, Ireland, the United Kingdom and Sweden, had, as its main purpose, the creation of a legal space for the European Convention in respect of children habitually resident in one of the States Parties to it. The other proposal, by the *Rapporteur*, Professor Paul Lagarde, primarily sought to protect the integrity of the Hague Convention. In response to a direct question put by Alegría on the merits of both proposals, I

[21] On the communitarisation of private international law, see A. Borrás' extensive analysis «Le droit international privé communautaire: réalités, problèmes et perspectives de l'avenir»; *Recueil des Cours de l'Académie de Droit International de La Haye/Collected Courses of the Hague Academy of International Law*, vol. 317 (2005), pp. 313-536.

[22] See A. Borrás, «Derecho internacional privado y Tratado de Ámsterdam», in *Revista Española de Derecho Internacional*, vol. LI-1999, no 2, pp. 383-426.

[23] The Report prepared by Dr Alegría Borrás was published in the *Official Journal* C 221, 16.7.1998, pp. 27-64. Although the 1998 Convention never entered into force, since it was overtaken by *Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (repealing Regulation (EC) No 1347/2000) ...

sided, too quickly, with the *Rapporteur*, instead of requesting a pause for consultations, which would, in retrospect, have been the wiser course of action[24]. By a narrow vote the proposal made by the European Governments was rejected. The clear general frustration after the vote forced me, on the last working morning of the Session, to request a re-opening of the debate in order to table a proposal, prepared in consultation with various delegations, which sought to combine the best of the competing proposals. Fortunately, this proposal met with general approval. I will not forget Alegría's gracious reaction[25] and her co-operation despite her initial disappointment after my first response. Alegría has been a staunch advocate for the 1996 Convention which, following the ratification by 25 EU States, will soon be in force for all EU Member States, co-existing with Regulation (EC) 2201/2003 («Brussels II a» —«*Bruxelles IIbis*», according to the French custom).

This episode was, however, only one in a series which reflected the «tectonic shift» that was coming as a result of the Treaty of Amsterdam. Negotiations on a global instrument on jurisdiction and recognition and enforcement of judgments in The Hague had started in 1996[26]. In May 1999, a few weeks after the entry into force of the Treaty of Amsterdam, negotiations on a revision of the Brussels Convention, in which Alegría had taken part, were successfully completed in Brussels. The results were now, as a consequence of the Treaty of Amsterdam, to be included in an EU Regulation. This, in turn, caused the European Commission to encourage the EU Member States —of which Spain was represented by Alegría— to co-ordinate their negotiation positions. This created a new situation for EU experts, who were accustomed to negotiating in their own right, and it led to a perception, rightly or wrongly, by some other Member States of the Hague Conference, that such co-ordination resulted in «block-voting»[27].

With hindsight it may look as if there is a logical sequence to what followed: that is, insistence within the Hague Conference on a switch from voting to consensus as the principal *modus operandi*[28], an Interim Text on Judgments (2001) which was negotiated on this basis and which resulted in so many issues on which no consensus could be achieved that there was no prospect for continuation; a decision to limit the project to a Convention on Choice of Court Agreements (2005); the start of a procedure to amend the Statute of the Conference to enable the EU to join the organisation as a full Member and to formally include the consensus principle as the working method (2005); the admission of the EU as a Member in addition to the EU Member States; and,

[24] *Actes et documents de la Dix-huitième session/Proceedings of the Eighteenth Session*, t. II, *Protection des Enfants/Protection of Children, Procès-verbal*/Minutes No 21, pp. 440-448.

[25] *Ibid.*, p. 483.

[26] See A. Borrás, «The 1999 Preliminary Draft Hague Convention on jurisdiction, recognition and enforcement of judgments: agreements and disagreements», in *Rivista di Diritto Internazionale privato e processuale*, 2004, vol. 1, pp. 5-30.

[27] See H. van Loon and A. Schulz, «The European Community and the Hague Conference on Private International Law», in B. Martenczuk and S. van Thiel (eds.), *Justice, Liberty, Security*, Vupress Brussels (2008), pp. 257-299.

lastly, negotiations and decisions in which the EU participated as a Member of the Conference and the EU Members spoke, in principle, with one voice. However, things were initially not that clear and there was a real concern that the EU would «go its own way» without consideration for the Hague Conference. Witness, for example, the calls for greater co-operation between the EU and the Hague Conference made by the *Group européen de droit international privé* (GEDIP), first in its Geneva session in 1995 and then, again, in its Oslo session in 1999, in both of which Alegría took part[29].

Notwithstanding the impact of the communitarisation of private international law on the margin of manoeuvre of EU experts, Alegría has unremittingly continued her participation and contribution to the Conference[30]. Since the turn of the century, the membership of the Conference has increased spectacularly, as has the range of States Parties to its Conventions. This was certainly, and most remarkably, the case for the countries in Latin America and, in this, Alegría played an essential role.

3. THE EXPANSION IN LATIN AMERICA, AND THE INCREASING ROLE OF THE SPANISH LANGUAGE IN THE WORK OF THE HAGUE CONFERENCE

3.1. Expansion of the Conference and its work in Latin America

At the time of Alegría Borrás' first appearance at the Hague Conference in 1987, Argentina, Venezuela and Uruguay had been Members for some years. Brazil, having joined the Conference in 1972, had left the Organisation in 1978, and Mexico and Chile had just joined the year before. This modest presence of Latin America in the work of the Conference was soon to change as a result of the massive, enthusiastic and effective participation of these and many specially invited Latin American States in the negotiations on what became the 1993 Intercountry Adoption Convention. Alegría's role in these negotiations has already been mentioned above. Prominent representatives of Latin America in the negotiations included Didier Opertti Badan from Uruguay, José Louis Siqueiros from Mexico and *Rapporteur* Gonzalo Parra-Aranguren from Venezuela.

The 1993 Convention found an immediate resonance in Latin America. It was seen not as an instrument imported «from far away in The Hague», but as the result of profound engagement and involvement of Latin America in the

[29] See the «Declaration on cooperation between the European Union and other International Organisations in matters of civil law», adopted at GEDIP's 1995 session in Geneva, in: M. Fallon, P. Kinsch & C. Kohler (eds.) *Le droit international privé européen en construction, vingt ans de travaux du GEDIP/Building European Private International Law, Twenty Years' Work by GEDIP* (Cambridge Antwerp, Portland, Intersentia, 2012, pp. 84-86), and the «Declaration on the use of the European Community's powers in the field of private international law» adopted at GEDIP's 1999 session in Oslo, *ibid.*, pp. 226-227. Alegría Borrás has been a member of GEDIP since its conception in 1991 and was its Chair from 2003 to 2005.

[30] On the important changes in the Hague Conference since the turn of the century generally, see A. Borrás, «El cambio de tiempos en la Conferencia de La Haya de Derecho internacional privado (2001-2004)»; *Anuario Español de Derecho internacional*, 1993, I, pp. 1199-1216.

negotiations, and in preparatory work such as the intergovernmental seminar held in Quito in 1991, organised jointly with the *Instituto Interamericano del Niño* (INN). Mexico was the first State to ratify this Convention, and within five to six years, Ecuador, Peru, Costa Rica, Paraguay, Brazil, Colombia, El Salvador, Chile and Panama followed. In the case of Peru, Costa Rica, Brazil and El Salvador, this may have accelerated their accession to the 1980 Hague Child Abduction Convention, which followed their ratification of the 1993 Convention. In any event, these two Hague Child Protection Conventions mobilised an enormous amount of interest throughout the Americas, among governments, administrations, courts, professionals, and increasingly the press and the public at large.

After a very successful seminar organised in 2004 in Monterrey, Mexico, on the practical operation of the 1980 Hague Child Abduction Convention, in which dozens of Judges and Central Authorities from Latin America took part, the desirability of a permanent presence of the Conference in Latin America became evident. A young and very talented official of the Argentinean Central Authority for the Abduction Convention, Ignacio Goicoechea, was an obvious choice as the Liaison Legal Officer for the Hague Conference in Latin America. Alegría and he have worked very well together.

Since the turn of the century, the Latin American presence in the Conference has grown rapidly: Peru joined and Brazil re-joined in 2001, Panama joined in 2002, Paraguay in 2005, Ecuador in 2007, and Costa Rica in 2011. Colombia, admitted in 2006, is expected to accept the Statute soon. Equally impressive is the extent to which the Hague Conventions have found their way into Latin America, as well as improvements in their application.

A very interesting development, not just from a legal but also from a cultural point of view, is the growing acceptance, throughout Latin America, of the 1961 Hague Apostille Convention. When the Adoption Convention was negotiated, in the early 1990s, Latin American delegations, for all their enthusiasm about the Convention itself, were firmly opposed to the idea of abolishing formalities such as legalisation, even in the context of this Convention. Recently, an amazing change has occurred, and many Latin American countries have now joined the Apostille Convention or are in the process of doing so, including by embracing the electronic Apostille Program[31].

3.2. The role of the Spanish language

From early on in her involvement with the work of the Hague Conference, Alegría Borrás has been particularly attentive to the role of the Spanish language in the Conference[32]. The official languages of the Conference are French and English, but for the spreading of the Hague Conventions in Latin America, their accessibility in Spanish was an essential condition. The importance of

[31] See the Apostille Section (including the e-APP) on the Conference's website, *supra*, fn 7.

[32] See also A. Borrás, «El cambio de los tiempos en la Conferencia de La Haya de Derecho Internacional Privado», *Liber Amicorum en homenaje al Profesor Dr. Didier Opertti Badán*, Montevideo (2005), pp. 79-95.

the matter was first highlighted at a meeting on general affairs and policy of the Hague Conference during the Sixteenth Diplomatic Session in October 1988 chaired by Julio González Campos. On this occasion, both he and Alegría intervened in response to concerns about the quality, consistency and uniformity of translations made by multiple Spanish-speaking countries[33]. An initiative was launched to develop a common Spanish translation first concerning a few and, on the occasion of the Centennial of the Conference, of *all* the Hague Conventions adopted since the Second World War by a team of Hague Conference experts from several Spanish-speaking countries. This led to the magnificent *Recopilación de los Convenios de la Conferencia de La Haya de Derecho internacional privado*, edited by Julio González Campos and Alegría Borrás, first published in 1996, with a second edition that came out in 2006[34]. In addition to the uniform translations, the book provides explanatory notes, bibliographies, documentation, and a very thorough introduction. It has become an essential tool for the work of the Permanent Bureau, including its Latin American Liaison Office.

During the negotiations on the Intercountry Adoption Convention, it had become clear that the experts from many Spanish-speaking countries had great difficulties in expressing themselves in English or French. This led, for the first time, to an initiative to provide for interpretation facilities during the negotiations, initially only from Spanish into English and French. It soon turned out, however, that this was not enough, and that a full two-way interpretation was needed. As a result, in many respects, Spanish has become a working language of the Conference.

Professor Borrás has been invaluable as an advisor to the Permanent Bureau with regard to the special needs of the Spanish-speaking countries. On many occasions she has acted as a «friend of the Permanent Bureau» in talks with the Government of Spain. She has also prepared translations herself of documents into Spanish or arranged for Spanish translations to be made. Further, she was instrumental in many ways in ensuring the widespread dissemination of the work of the Conference throughout the Spanish-speaking world. A highlight was the launch, by Alegría, of the Spanish website of the Conference at the meeting of the Council on General Affairs and Policy in April 2009.

Like the building of the Sagrada Familia in Alegría's hometown, the building of the *corpus iuris* of the Hague Conventions and of the networks of co-operation based on these instruments is a continuing, collective effort. But there is no doubt that Alegría Borrás has played a historical role in the building of the Conference during the last twenty-five years. My colleagues at the Permanent Bureau, present and past, and I are deeply indebted to her for her support over a quarter of a century, which has been so precious to the Organisation, its Members, and ultimately to the countless citizens of our shrinking world who benefit from the Hague Conventions and the services provided by the Hague Conference.

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[33] See *Acts et documents de la Seizième session/Proceedings of the Sixteenth Session* (1988),

LA EVOLUCIÓN DE LA PROTECCIÓN QUE BRINDA EL ESTATUTO DE CIUDADANÍA DE LA UNIÓN *VS*. EL FENÓMENO DE LA DISCRIMINACIÓN INVERSA *

Diana Marín Consarnau **

SUMARIO: 1. INTRODUCCIÓN.—2. DISCRIMINACIÓN INVERSA, REAGRUPACIÓN FAMILIAR Y CIUDADANÍA DE LA UNIÓN.—3. LOS MATICES A LA PROTECCIÓN QUE OFRECE EL ESTATUTO DE CIUDADANÍA DE LA UNIÓN PARA ESTOS SUPUESTOS.—4. LA NECESIDAD DE ABORDAR EL FENÓMENO DE LA DISCRIMINACIÓN INVERSA.

1. INTRODUCCIÓN

Es un honor participar en esta obra homenaje a la profesora Alegría Borrás por lo que representa como referente en el Derecho internacional privado y por el profundo respeto y admiración de tener la gran oportunidad de conocerla personalmente y poder disfrutar y aprender de su trabajo, obra y persona. Es por ello que, en agradecimiento, he querido introducir en este estudio unas reflexiones sobre un tema en el que la profesora Borrás me ha aportado especialmente, fruto de su trabajo en el *Recueil des cours* «Le Droit international privé communautaire: Réalités, problèmes et perspectives d'avenir», y que es la evolución del concepto de la ciudadanía de la Unión y la problemática de la discriminación inversa, la inquietud ante este fenómeno y las dificultades de compatibilidad que genera en un contexto de derechos fundamentales y de ciudadanía[1].

Tomando como referencia esta cuestión, el presente trabajo aborda la problemática de la reagrupación familiar de los nacionales de la Unión pasivos.

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** Profesora ayudante doctor. Derecho internacional privado. Universidad Rovira i Virgili