Strategies for the Unification of Private International Family Law

*Hans van Loon**

1 Introduction

Family law varies from one legal system to another for reasons that are often deeply rooted in society and culture. These differences may enrich the lives of mobile cross-border citizens, but also complicate them, hence the need to address such difficulties. Early on, both Mancini and Asser recognised that harmonising substantive law on culturally determined matters such as family law would be difficult and they argued that efforts to harmonise private international law rules would be more likely to succeed. Although these rules also differ between legal systems, they are generally less strongly culturally determined.[1] Katharina Boele-Woelki has extensively researched this relationship between (comparative) substantive and private international law.

Such efforts are undertaken at multiple levels: global, regional, in bilateral relations, and within federal and other non-unified legal systems. Here, we will only deal with the unification of private international law at the global and regional levels, focusing on persons and families.

Can it be said that global and regional unification efforts in this field develop according to a specific strategy, i.e. "a plan of action or policy designed to achieve a major or overall aim"? (Oxford Dictionary). This question can be framed both in terms of a "corporate" or institutional strategy, an overarching plan of the law-unifying organisation to achieve its long-term goals, and in terms of the projects which it develops, which are also generally aimed at achieving long-term objectives to promote the overarching strategic direction.

2 Institutional Strategies

We begin with the institutions. A distinction can be made between organisations that have the unification of private international law as part of broader objectives, and those for which this is their main task. Examples of the former are the United Nations at the global, and the European Union at the regional level. The unification work in the Americas, in particular the Inter-American Specialized Conferences on Private International Law (CIDIP), and the Hague Conference on Private International Law (hereinafter also HCCH), exemplify the latter.

* Former Secretary General of the Hague Conference on Private International Law; Member of the *Institut de Droit International*.

[1] See Hans van Loon "The Hague Conference on Private International Law: Asser's vision and an evolving mission", in *NIPR (The Netherlands journal of private international law)*, 2012, no 3, pp. 358-361.

2.1 Unification as Part of the Institutional Strategies

2.1.1 The United Nations

The UN does have, of course, a very wide global mandate, which led it, in the aftermath of the Second World War, to adopt an instrument of private international family law: the 1956 New York Convention on the Recovery Abroad of Maintenance. To date, this remains the only instrument developed by the UN in the field of private international family law.[2] The UN and the HCCH then agreed that the HCCH would provide ongoing information on the status of this Convention on its website, and subsequently, that it would include a modernised system of administrative cooperation in its 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (the Child Support Convention) to replace that of the 1956 New York Convention.[3]

A chapter in its own right is the interaction between the UN's work in the field of human rights and private international family law. This appears most clearly in the impact of the 1989 UN Convention on the Rights of the Child (CRC) on the Hague Children's Conventions, the 1980 Child Abduction Convention[4], the 1993 Adoption Convention, the 1996 Child Protection Convention, and the 2007 Child Support Convention. Likewise, the CRC has impacted on the work of the EU, e.g., the Brussels II Regulation. The long-term objectives of the CRC to protect children have thus contributed to giving strategic direction to unification work in the field of private international family law and continues to do so.[5] However, as we shall see, there is potentially more scope in terms of strategic direction for linking the work of the UN in the field of human rights and that of the HCCH.

2.1.2 UNIDROIT

Returning to the 1956 UN Convention on the recovery abroad of maintenance: the preparatory work for this instrument had in fact been carried out by UNIDROIT, work that also formed the basis for the1958 Hague Convention on the recognition and enforcement of maintenance obligations towards children.[6] UNIDROIT's "purposes ...are to examine ways of harmonising and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law". While this mandate is broad enough to cover rules on private international law, UNIDROIT has mostly worked on the harmonization of private substantive law including civil procedure, and generally in the commercial field. When, in the early 1990s, the possibility arose that

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[2] In the commercial sphere, the UN has, of course, adopted the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which has been monitored by UNCITRAL since its creation in 1966.

[3] See the Child Support Convention, Article 49.

[4] The Child Abduction Convention inspired Art 11 of the CRC; conversely, Art 13 of the CRC has influenced the interpretation and application of Art 13 (2) of the Child Abduction Convention.

[5] See, e.g., Hans van Loon, "Protecting Children across Borders: The Interaction between the CRC and the Hague Children's Conventions" in Ton Liefaard, Julia Sloth-Nielsen (Eds) The United Nations Convention on the Rights of the Child, 2017, 31-46.

[6] See the Report by Louis De Winter, Conférence de La Haye, *Documents relatifs à la VIIIème session*, 1956, 133.

UNIDROIT would start working on an instrument on the international adoption of children, a topic that the HCCH also contemplated, it was agreed that UNIDROIT would leave this to the Conference, and the HCCH, in turn, would leave to UNIDROIT the negotiations on what became the 1995 Convention on Stolen or Illegally exported cultural objects – an interesting example of strategic cooperation between international organisations.[7]

2.1.3 The European Union

Since the Treaty of Amsterdam (1999), the EU's mandate also extends to the area of private international law, including – with some restrictions – to family law, as part of its "objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured". This objective gives a general strategic orientation to the EU's work on private international (family) law, and led it to seek membership of the HCCH, in addition to that of its member States (see below 2.2.2.).

2.1.4 The Council of Europe

The Council of Europe (CoE) strives for "greater unity between its members for the purpose of safeguarding … their common heritage and facilitating their economic and social progress(…)" This aim "shall be pursued [inter alia] by agreements (…) in legal and administrative matters", which, in principle, is broad enough to cover the unification of private international (family) law. However, under its agreement with the HCCH, topics of private international law proposed to the CoE will in principle be relayed by it to the HCCH.[8] The Hague Apostille Convention (originally a proposal by the UK to the CoE) owes its origin to this agreement.[9] On the other hand, the agreement did not prevent the CoE from negotiating an instrument to combat international parental child abduction, which, however, proved less effective than the Hague Convention with its innovative return system.

2.2 Unification at the Heart of the Organisation's Strategy

2.2.1 The Americas

Regarding institutions specifically focused on the harmonization of private international law, including family law, it is striking that their history goes back much further than that of the organisations mentioned above. Latin America came first. As early as 1878, the Treaty of Lima was concluded, followed by the 1889 Montevideo Conventions and the Bustamante Code in 1928. It then took until 1975 for the Inter-American Specialised Conferences on Private International Law (CIDIP) to get underway, resulting in five treaties in the field of international

[7] Moreover, with an interesting cross-fertilisation effect: the 1995 Convention's mechanism for the return of illegally exported cultural objects (Chapter III) was derived from the return device of the 1980 Child Abduction Convention.

[8] *Accord entre La Conférence de La Haye de Droit International Privé et le Conseil de l'Europe* (1955), c53f589c-b6d8-4307-8649-50ddaf06bb28.pdf.

[9] Conférence de La Haye, *Actes de la VIIIème session*, 1951, 274.

family law: the 1979 Inter-American Convention on Domicile of Natural Persons in Private International Law; the 1984 Inter-American Convention on Conflict of Laws concerning the Adoption of Minors; the 1989 Inter-American Convention on Support Obligations; the 1989 Inter-American Convention on the International Return of Children; and the 1994 Inter-American Convention on the International Traffic in Minors

As "Specialised Conferences", the CIDIP Conferences are an "Organ" of the Organisation of American States (OAS).[10] However, the Organ lacks a permanent functioning framework, which has led to periods of inactivity of variable duration, reminiscent of the history of the first six Hague Conferences on private international law (1893-1928).

2.2.2 The Hague Conference on Private International Law

It would take until 1955 before the HCCH's 1951 Statute entered into force and the Conference became a permanent intergovernmental organisation. However, the Statute did not specify, and still does not specify its purpose other than "to work for the progressive unification of the rules of private international law", adding that the "Ordinary Sessions of the Conference shall, in principle, be held every four years". Surprisingly, the Statute is silent on the instrument(s) for its "progressive unification" purpose. In fact, the new intergovernmental organisation was largely set up as a continuation of the past, hence its name and implicit assumptions about its work.[11]

During its first decades, its unification efforts proceeded with the same rhythm as the Olympics, with diplomatic meetings held every four years. An important source of inspiration was the programme that Asser already had in mind for the first Hague Conference in 1893, which had provided most of the topics for the meetings held before the Second World War: the status and capacity of persons, family relationships, property law, inheritance, the law applicable to contracts and non-contractual obligations, the form of legal acts, international judicial cooperation, the enforcement of judgments and legal aid.[12]

However, the resulting Hague Conventions of 1902 and 1905 in the field of family law, which were strongly based on the principle of nationality, had become problematic in an era of perverse nationalism. The decision to revise these Hague Conventions of 1902-1905 gave an important and lasting strategic direction to the work of the new permanent Hague Conference, which fitted in well with the four-year cycle. The 1902 Convention had already been revised by the 1961 Child Protection Convention, which in turn was complemented by the 1980 Child Abduction Convention and revised by the 1996 Convention. Then came the 1970 Divorce Convention, the 1978 Marriage Convention and the Matrimonial Property Convention and, finally, the 2000 Convention on the International Protection of Adults, all revising old 1902-1905 Conventions.

The transfer of legislative authority in the field of private international law by the EU Member States made possible by the Amsterdam Treaty (1999), including in the family law field, forced

[10] Art 53 (g) OAS Charter.

[11] See Hans van Loon, "Quelques réflexions sur l'unification progressive du droit international privé dans le cadre de La Conrérence de La Haye »in Johan Erauw et al. (eds) *Liber Memorialis François Laurent*, 1989, 1133-1149.

[12] See Van Loon (n 1).

the HCCH to think more systematically about its future.[13] A thorough reflection took place, that led to its first strategic plan.[14] In 2005 the EU, for its part, drew up its Hague (!) programme[15,] which included the aims of drafting instruments on private international law in the field of maintenance, succession, matrimonial property regimes and divorce – as well as in other areas where the HCCH was active, without coordinating with, or consulting the HCCH.

However, following a revision of the Hague Conference's Statute in 2006, the EU joined the HCCH alongside its Member States, thereby gaining a forum to act as a global player in the field of private international law. This has created a new political and institutional configuration that has laid the foundation for the emergence of a common principle of governance shared by the European Union, its Member States and the HCCH. Put simply: global issues in the field of private international law should preferably be dealt with at the global level, regional issues at the regional level, while certain issues are best dealt with at the national level.[16]

This emerging principle can be seen at work in the family area, e.g. in the leading role that the EU has played in the negotiations on the 2007 Child Support Convention and its Protocol on the Law Applicable to Maintenance Obligations, and the fact that the 2009 EU Maintenance Regulation, first, does not address the issue of applicable law, but incorporates by reference the Hague Protocol, and secondly, does not provide for the unilateral recognition and enforcement, at Union level, of maintenance decisions made in third States, an implicit invitation to those third States to join the 2007 Child Support Convention. Other examples are the closer alignment of the Brussels IIb/ter Regulation with the 1980 and 1996 Hague Conventions compared to the Brussels IIa/bis Regulation, and the EU Commission's proposal for a Regulation on the private international law aspects of the protection of adults,[17] which explicitly aims to supplement the 2000 Hague Protection of Adults Convention.

The implementation of the emerging principle that private international law issues should preferably be dealt with at the appropriate level of governance has drafting implications as well as policy consequences for both the Hague Conference and the EU.[18] For the HCCH, this means that, in terms of policy, the organization will have to ask itself even more explicitly what global private international law problems it can help to solve in the light of the overarching normative objectives of the global community. This is what the HCCH may already be doing where in the Preamble to its latest multilateral treaty, the 2019 Judgments Convention, it appears to be orienting itself towards some of the UN 2030 Agenda's Strategic Development

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[13] See Jürgen Basedow "Was wird aus der Haager Konferenz für Internationales Privatrecht?" *in Festschrift für Werner Lorenz zum 80. Geburtstag*, 2001, 463.

[14] The Hague Conference on Private International Law – Strategic Plan, drawn up by the Permanent Bureau, Prel. Doc.21 B, March 2002 (rev.), Hague Conference on Private International Law, *Proceedings of the XIXth Session, Tome I Miscellaneous Matters*, 164-211.

[15] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005, Programme: (2005/C 53/01).

[16] See Hans van Loon, "Quelques remarques sur la complémentarité des efforts mondiaux et européens pour unifier le droit international privé", Ch 21, in Jean Yves Carlier et Stéphanie Francq (eds), *Vers un code européen de droit international privé, Liber amicorum Marc Fallon*, 2025,307.

[17] *COM (2023) 280 final*, 31 May 2023.

[18] "Quelques remarques…" (fn 16), 403.

Goals.[19] However, the Preamble does not explicitly refer to the SDGs, and the explanatory report also remains silent.[20]

By contrast, as we have seen, in the family law field, the HCCH has clearly aligned itself with global standards where the Hague Children's Conventions refer to and interact with the global UN CRC. However, there is scope for a broader alignment with global human rights norms. The CRC stands somewhat apart from other human rights instruments in that it explicitly takes several cross-border issues into account, contrary to most other UN human rights instruments, including the 1966 International Covenant on Civil and Political Rights (ICCPR), which focus on internal law. But in a mobile world the right to marry and found a family (Art. 23 ICCPR) frequently has implications across borders and thereby raises issues such as the recognition of the validity of marriages (and divorces) abroad, and other effects of marriage, addressed by the Hague Conventions. Likewise, cross-border implications of the protection of vulnerable children and adults offered by the 2006 UN Convention on the Rights of Persons with Disabilities find an answer in the 1996 and 2000 Hague Conventions. As the membership of the Hague Conference grows, so will the awareness of the global perspective on private international family law issues and of the global (public international law) normative frameworks that require effective private international law solutions.

3 Strategies for Legislative Projects

Institutional strategy has an overarching character. The planning of the tools to deliver that strategy also requires strategies at the project level. This applies a fortiori where the overarching strategy is absent or kept very general. Regarding the unification of private international family law, strategic choices must be made regarding the treaty-making process, strategic components of the treaty and methodology, its form, and its follow-up.

3.1 The treaty-making process

Since the 1950s the Hague Conference developed a treaty-making cycle of about four years, consisting of (i) topic selection often prepared by a feasibility study by the secretariat, (ii) research by the secretariat resulting in a scientific report, (iii) discussion at expert level resulting in a set of conclusions, (iv) two or more rounds of negotiations, culminating in (v) the adoption of a multilateral treaty at a diplomatic conference. Following the adoption of the Child Support Convention and its Protocol in 2007, it became apparent that in practice it was no longer possible to stick to the rhythm of the Olympics. The rapid growth of the Conference's Membership and the attention EU Members States had to give to the dynamic new EU legislative process in the field of private international law were among the main reasons for this development. Does this mean that the traditional working methods are no longer fit for purpose?

[19] Where it refers to "promote effective access of justice for all" (cf. SDG 16), and "facilitate rule-based multilateral trade and investment, and mobility" (cf. SDGs 17 and 10).

[20] See Hans van Loon, "General Synthesis and Future Perspectives" in Matthias Weller et al. (eds) The HCCH 2019 Judgments Convention, 2023, 355 at 371.

While the admittedly "somewhat rigid"[21] four-year cycle – although still mandated by the HCCH Statute[22] – now generally exceeds the organisation's capabilities, it enabled a periodic evaluation of work over a longer period than the current annual stocktaking at the Council on General Affairs and Policy. The explicit recognition of the governance role of this Council in the revised Statute was necessary, but a review by the Council, every year, of ongoing legislative work that is often complex and time-consuming may lead to a protracted process without a clear horizon, whereas an effective evaluation would benefit from a longer period, e.g. two or three years, for the assessment of projects, allowing for the necessary distance for evaluation and more space and freedom for projects to mature.

In the area of family law, for example, since 2015 an "expert group" has been exploring the feasibility of advancing work on legal parentage, including where it results from an international surrogacy arrangement. Reporting year after year to the Council, which has extended the mandate every year, this group needed twelve meetings to submit its conclusions on a possible convention on legal parentage and a protocol on legal parentage resulting from an international surrogacy arrangement. This subsequently led to the establishment of a "working group" which, again, has held several meetings since 2023 to study the possibility of provisions for a new instrument.

Of course, the subject matter is highly complex.[23] But it is now broadly seen as being very urgent, an issue of international interest with human rights implications, which is difficult to reconcile with such a lengthy open-ended process, with the risk that other organisations will take up the topic – which in fact the EU has done in a somewhat worrying departure from the emerging principle posited above.[24] Perhaps a new evaluation strategy is needed, possibly somewhere between current practice and the traditional four-year cycle. Another solution could be to scale back the ambition to a non-binding instrument (see 3.3. below).

Other aspects of the traditional working method that have not lost their relevance are the feasibility studies by the secretariat and its in-depth reports, signed by the author, which may give valuable strategic direction to the legislative work, including the selection of topics. In the family law area including succession, one possible strategy for future work that might be explored is a continuation of the "stepping-stone" process whereby the EU has used Hague Conventions as inspiration for its unification work, e.g., in the field of marital property and succession, even where the Hague Conventions had not been widely ratified. It may be worth investigating whether the HCCH, building on the experience with these EU instruments, might revisit these issues at the global level, taking a fresh look at its Conventions on Marriage, Divorce, Matrimonial Property Regimes and its 1961, 1973 and 1989 Conventions in the field of succession in light of global needs.

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[21] Qualification found in the UN Secretary-General's report, *Review of the Multilateral Treaty-Making Process* A/35/312 (1980).

[22] Art 4(6): "The Ordinary Sessions of the Conference shall, in principle, be held every year". The Statute also ensures that the Netherlands government provides funding for these diplomatic conferences (Art.11).

[23] The subject of "filiation" already appeared on the Hague Conference's Agenda for its XIIth session (1972).

[24] See "Quelques remarques…" (n 16), 409.

3.2 Methodology

The Conference's more than a century-old treaty-making history has been an ongoing process of experimenting and learning that has step by step crystallized into a whole range of now well established concepts and techniques. The introduction and development of habitual residence as the core connecting factor both for jurisdiction and applicable law; of party autonomy, first in the commercial, then also in the family law field; of the restricted public policy exception later complemented by the mechanism of overriding mandatory rules; and of direct channels of administrative and judicial cooperation, among many others, have resulted in a toolbox of strategic building blocks, not only for Hague instruments, but also for Inter-American and EU instruments, and beyond.

A similar comment applies to the structure of instruments. In the 1996 Convention one sees the culmination of a development that began with the 1902 Guardianship Treaty, drafted in terms of applicable law with rudimentary provisions on the mutual exchange of information between authorities, through the 1961 Protection of Minors Convention, which introduced the distinction between jurisdiction and applicable law, and the added (partly ambiguous) provisions on the recognition of decisions (but not their enforcement) as well as embryonic provisions on administrative cooperation, resulting in a fully-fledged system of rules on jurisdiction, applicable law, recognition and enforcement, and administrative cooperation. This mature system with four strategic components now offers a template for private international law unification in other areas and beyond the HCCH. It can be found, for example, in the 2008 EU Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

The 1993 Convention, which focuses on the safe movement of children across borders, including migration aspects (the right to leave the state of origin and to enter and reside permanently in the receiving country), offers perspectives for strategic work in other fields of migration, e.g., of migrant workers.

3.3 Form

Binding instruments have the advantage of offering certainty, security and predictability in cross-border relations. That is why not only the HCCH, but also the CIDIP process and the EU favour this format. The downside of binding instruments is, of course, the limitations of their adaptability to different situations and new circumstances. This is less of an issue in the EU, as it has developed mechanisms that provide for such adaptability. The HCCH, on the other hand, has resorted to a range of non-binding techniques to monitor, review, and guide the practical operation of its Conventions. This allows for a certain degree of adaptation to changing circumstances that may influence the interpretation of the treaty.[25] Beyond that, a formal revision may be considered, but given the rigid treaty form, this remains a laborious process. Repeated calls for a review of the Child Abduction Convention, notably considering the pervasive problem of domestic abuse, have so far been unsuccessful.

[25] Cf. Art. 31(3) (b) of the Vienna Convention on the Law of Treaties.

To date, the only case in which the HCCH has preferred to negotiate a stand-alone non-binding instrument is the 2015 Hague Choice of Law Principles in Commercial Contracts.[26] One of the reasons for resorting to the non-binding format was that this made it possible to draft rules that are aspirational and may inspire continued law development and refinement.

Could this last reason also apply to family matters? Not without further consideration: the certainty, security and predictability offered by binding rules are very important to mobile people in a multicultural world. It is therefore understandable that the HCCH has so far chosen this format for its work on parental relationships, in particular because it ensures the recognition of legal parentage. However, this is an area where major fundamental differences remain, undergoing rapid change, and where an overarching global normativity is lacking. In such a situation, one may ask whether, as a fall-back option, the development of a non-binding instrument, adaptable to a diverse and constantly changing environment, would offer more prospects. While this would imply a change of strategy, the work already done, far from being lost, would underpin this new attempt.

3.4 Follow-Up

Different international institutions have developed different ways to promote and support their work. The HCCH has been a pioneer in developing support techniques, including Practical Handbooks, Guides to Good Practice, and much more, driven by periodic meetings to review the practical operation of its instruments, notably in the field of family law. This has developed, bottom-up so to speak, as an integral strategy, "post-Convention services", of the HCCH's work.[27] The EU has followed suit and developed similar tools.

As the HCCH grows, so will the challenge of promoting and supporting its work. Whereas an organisation like UNCITRAL, which explicitly endorses the UN 2030 Agenda, has the advantage of integrating its work with the UN operations on development, this is more difficult for the HCCH, although it has succeeded in developing close cooperation with UNICEF and to some extent UNHCR. Due to budgetary constraints, combining the legislative strategy with the follow-up strategy is a constant balancing act. A sustainable solution for this conundrum is needed.

4 Conclusion

The question of whether global and regional efforts to harmonise private international law in the field of family law are being pursued according to a specific strategy concerns both the overall planning of the organisations that are active in this field and the planning of their projects. Normally, an organisation will have its institutional strategy, from which the planning of its projects derives. This was not the case with the groundbreaking unification efforts in Latin America and the Hague Conference. Here the development went step by step, "progressively" in The Hague, inspired by Asser's vision, without an explicit overarching

[26] This is important: a non-binding instrument need not but may, like a binding treaty, be based on negotiations between government representatives, and derive authority from this.

[27] See HCCH | Strategic Framework for Post-Convention Assistance.

institutional plan. However, when the EU acquired legislative powers in the field of private international law, the HCCH had to develop its first strategic plan.

Increasingly, such planning is called to align itself with global normative developments, as already illustrated by the interaction of instruments on child protection and the UN CRC. However, the interface between private international (family) law and broader human rights invites a further mutual alignment of the two fields.[28] Meanwhile, the EU should generally focus on private international (family) law issues specific to its region.

The initial lack of a clear institutional strategy has not prevented, indeed enabled, the HCCH to develop a whole arsenal of concepts, techniques and methods at the level of its products, principally the Hague Conventions, and thereby strategies for their preparation. They also became models for other organisations, such as CIDIP and the EU. The expanding reach of the HCCH poses a challenge to its working methods, including the balance between its legislative role and the follow-up on its instruments, which may call for a fresh look in the interest of the much desired and needed sustainability of its work.

[28] Cf. *Institut de Droit International*, Resolution "*Human Rights and Private International Law*" (2021), https://www.idi-iil.org/en/.