One Hundred Years of Activity of the Hague Conference on Private International Law in the Field of Family law

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1 The origins of the Hague Conference —early Japanese participation

It is a great privilege for me to participate in this Commemoration of the Centennial of the enactment in 1898 of the Horei, the Law concerning the Application of Laws in General. The coming into force of the Horei of 1898, of course, formed part of the extraordinary legislative effort which was undertaken in Japan immediately after the Meiji Restoration (1868), and which came to full fruition as from 1890. In less than a decade Japan drew up a series of Codes comparable with the most advanced legislations in Europe, giving Japan a unique positon in Asia. Not only did these Codes lay a foundation for the modernisation of Japanese society, they also helped to build a bridge between Japan and the rest of the world. The Horei, in particular, with its bilateral (or multilateral) conflict rules—rules which delimit the scope of Japanese laws in the same way as foreign laws—on the

one hand, opened the doors for the application of foreign laws by Japanese courts and authorities and, on the other, provided foreign nations with a familiar-looking key to the understanding of Japanese private international law.

It was during the same last decade of the Nineteenth Century, in 1893 to be precise, that the Dutch Government, after several earlier unsuccessful attempts, managed to convene a first conference on private international law in which thirteen States, all from continental Europe and all belonging to the Civil Law (Romano-Germanic) tradition, participated. In its proposals for a programme the Dutch Government, apart from referring to some general aspects such as the form of legal acts, concentrated on family law (marriage, paternity, adoption, parental authority, incapacitated persons, and successions and wills.) At this First Session, an important decision was taken, namely not to draw up a comprehensive code of private international law consisting of rather abstract rules, but to take up the problems in a concrete manner, issue-by-issue. It was, in fact, at this First Session that the idea was born of the "progressive unification of rules of private international law" which, more than half a century later, would find its expression in the Statute of the Hague Conference on Private International Law when, after the Second World War, it was made a permanent organisation. The formula worked, and already in the following year (1894) a Second Session took place, the programme of which dropped the general aspects to which I just referred, but added topics of civil procedure. The Third Session took place in 1900, and completed conventions on marriage, on the effects of marriage and on divorce. Then, at the Fourth Session (1904), as the first State outside continental Europe, before any other Asian State and even before the United Kingdom, the United States or any other common law jurisdiction for that matter, Japan made its entrance.

The Japanese delegation submitted a Memorandum (included in the *Actes* of the 4th Hague Conference 1904) which referred to the Horei promulgated on 15 June 1898, and explained that the general spirit which had guided the drafters of this law had been to follow the views of the learned legal circles in Europe and "above everything else, the work of the Hague Conference on Private International Law which is considered as establishing universally recognised doctrines." The Memorandum explained at great length why, on the one hand, because the Japanese laws were in conformity with European laws, the application of Japanese laws by the courts and authorities of European States would not hurt their public order and, on the other hand, for the same reason, why the Hague Conventions could be easily adhered to by Japan. Clearly, the European legal culture was to the Japanese delegation as it was, no doubt, to the European delegations, the sole standard at the time, universalism simply meant Europeanism.

There was, however, one area where the Memorandum, in a very delicate way, hinted that matters were perhaps not that simple, and that was precisely in the area of family law. Given the differences between Japan and the European Powers in this field—differences which should not be exaggerated, the Memorandum hastens to add—it might take some time, the Memorandum points out, before Japan could accede to the Hague Conventions on family topics. The Memorandum concluded this should not be any obstacle whatsoever to Japan's acceding to the Convention on Civil Procedure.

As it went, Japan did not become a Party to any of the Hague Conventions of this first period of activity of the Hague Conference. It would be interesting to know what in the end prevented Japan from ratifying the 1905 Convention on Civil Procedure; as you know, Japan did of course ratify, but not until 1970, the *Hague Convention of* 1 *March 1954 on Civil Procedure* which, with minor amendments, is a copy of the 1905 Convention.

Whatever the reasons may have been for Japan not becoming a Party to the early Hague Conventions on family law matters, their subsequent history was no unqualified success. It soon turned out that their adherence to the nationality principle, without any safety valve in the form of a public order exception, was based on a naïve belief that the various legal cultures of the Contracting States were, and would remain, equally respectable and easily exchangeable. But, when the Belgian courts felt obliged under the Hague Marriage Convention of 1902 to apply rules of German law prohibiting marriages between Belgian citizens and young draft dodgers or deserters from the German army before the First World War, and when some courts in the Netherlands in the 1930's considered themselves to be obliged under the Convention's provisions to enforce rules of the Nazi regime against racial or ethnic intermarriage, it became clear that the strict adherence to the nationality principle could lead to highly unsatisfactory results. This string of unfortunate case law led to the treaty's denunciation by most of the countries which were Parties to it. Most of the old series of Conventions have followed the Marriage Convention into obsolescence, and indeed all of them have now been revised or are in the process of being revised.

2 After the Second World War—a new start

The frustrating experience with the application of the first generation of Hague Conventions was such that after the Second World War, when the Hague Conference resumed its activities, there was little enthusiasm to turn to family topics at all. With one exception, the focus was on commercial and procedural matters. The exception was the question of international maintenance obligations.

Maintenance or support obligations towards children had already been a preoccupation of the League of Nations before the Second World War.

After 1945, the problem became even more acute, and both the United Nations, which drew up the 1956 *UN Convention on the Recovery of Maintenance*, and the Hague Conference gave priority to this topic. Of the two Hague Conventions on maintenance obligations adopted in 1956, Japan ratified the *Hague Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children* in 1977, but not the *Hague Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children*, just as it did not ratify the New York Convention. Japan has been consistent in this respect, because later on it did ratify the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (in 1986), but not the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*.

It was in this field of maintenance obligations that a breakthrough was made as regards the connecting factors, because the 1956 Convention adopted as its main criterion the habitual residence of the child. There was, of course, an obvious protective element in choosing the habitual residence of the child as the main connecting factor: all other circumstances being equal, should not a foreign child in need of support who has his or her centre of life in a country receive the same support as the girl or boy next door who does happen to be a citizen of that place? The principle was later on, by way of the 1973 Applicable Law Convention, extended to other members of the family than children, where the protective element may be less obvious, but this has not been a reason for Japan not to accept the general principle.

A further push, both to continue the work on family law matters and to review the role of nationality as a connecting factor, was given by the International Court of Justice at The Hague in 1958. A case (the *Boll* case) was brought by the Netherlands against Sweden before the World Court

which concerned one of the Conventions of the first generation, the 1902 Hague Convention governing the guardianship of infants. The International Court of Justice, in its judgment of 28 November 1958, found that the concept of guardianship as used in the 1902 Convention should be interpreted narrowly and therefore the Convention did not prevent the interposition of a public law institution, the Swedish order to take the child into "care".

The Hague Conference reacted promptly and, in 1960, the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors* was drawn up, just like the 1902 Convention in French only. The 1961 Convention (not ratified by Japan) sought to recapture the ground which was lost as a result of the *Boll* decision of the International Court of Justice, which in effect allowed the State to void a guardianship of content by adopting a public care measure. The new concept of "measures directed to the protection of the child's person or property" was coined covering both private law measures, such as custody orders, and public care orders of all kinds.

In yet another way, the 1961 Convention—so it seems in retrospect—sought to recapture lost ground, because in reality the Convention reflects a compromise between the advocates of traditional nationality as the connecting factor for both jurisdiction and applicable law governing child custody and access, and those who favoured the more modern, fact-centred connecting factor of "habitual residence".

As we shall see, the Convention "lacked teeth", which led to the adoption of the Hague Child Abduction Convention in 1980. Moreover, the compromise between nationality and habitual residence upon which it was based did not in all respects work out satisfactorily—and this was a major factor prompting its revision and the adoption of the new Hague Convention on Protection of Children of 1996.

By 1960, then, family law—in particular children's law—topics were

clearly back on the agenda of the Hague Conference. In that same year the decision was taken to draw up a Convention on adoption, which resulted in the 1965 *Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*.

In addition, the related topic of inheritance, succession to the estates of deceased persons, was taken up. Succession and wills (testaments), as we saw, had already been on Asser's agenda for the first Hague Conference in 1893. But it would take until 1960 before the Conference succeeded in successfully dealing with one, but one very important aspect: the form of testamentary dispositions. The *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* was the first Hague Convention ever to be signed and ratified by Japan (1964). It is now in force for thirty-five States, plus Hong Kong, and has virtually eliminated litigation on the formal validity of wills in the States Parties. The secret to its effectiveness is the very liberal rule as to validity (Article 1) which makes it very hard for any party contesting the formal validity of a will to base his claim on an applicable law in support of his claim. A further attempt to deal with succession issues was made when, in 1973, the Conference adopted the *Convention Concerning the International Administration of the Estates of Deceased Persons*. This Convention did not, however, give an answer to the crucial questions as to: *who* should inherit from *whom* and how *much*? It would take until 1988, when the Conference adopted the *Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, before these questions found a framework for their resolution in a private international law Convention. Finally, after one hundred years of preparation, a Convention saw the light which, based as it is upon three fundamental key ideas—(1) unity of the succession, (2) a realistic compromise between nationality and habitual residence as connecting factors, and (3) a limited possibility for the testator to choose the

applicable law—should greatly facilitate the resolution, and indeed prevention, of international disputes on successions. The Convention was incorporated into Dutch law two years ago, and has given satisfactory results. I hope Japan will consider its ratification in a not too distant future.

But let us go back to family law matters in the proper sense. Having worked successfully on the law relating to several children's matters (maintenance, protection through custody and guardianship, adoption), the time was ripe to deal with adults as well. In 1968 the *Convention on the Recognition of Divorces and Legal Separations* was adopted, first signed on 1 June 1970, and now in force for sixteen States plus Hong Kong. This Convention has not been ratified by Japan, and this is in part because it does not cover divorce by consent without a procedure before an authority as widely practised in Japan. One wonders, however, whether the Convention might not render useful services in respect of (1) the recognition of foreign divorces in Japan and (2) the recognition abroad of judicial divorces to the extent that they do occur in Japan. The *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages* has been called a "sleeping beauty". A "beauty" because it has the great attraction of favouring the validity of marriages in a mobile international world and "sleeping" because, although in force among Australia, the Netherlands and Luxembourg, it has not so far found the support that would really cause it "to take off". Is there not a Japanese prince around to kiss the Convention awake? In any event, Japan is to be complimented for having introduced into its Horei in 1989, with effect from 1 January 1990, the key provisions of the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, including party autonomy: the possibility for the parties, within certain limits, to designate the law applicable to their marital property relations.

Let me bring this rapid overview to an end by recalling that the Confer-

ence is presently in the process of revising the last of the old generation of Conventions (the Convention on the Guardianship of Adults) and hopes by October next year to complete a new Convention on the Protection of Adults. This new instrument will serve the interests of the increasing numbers of elderly people living abroad, separated from their families, and who need protection in the event of impairment of their faculties, e.g. in the case of Alzheimer's disease. Since Japan is presently reviewing its internal rules on protection of adults, this topic may be of particular interest to Japan.

Rather than analysing the various Conventions in detail, I propose to deal in the remainder of this talk with four aspects of the post-war Hague Conventions on family law matters which, it seems to me, may be of interest for future study, discussion and activity in Japan. These are:

(1) the role of nationality and habitual residence as objective connecting factors;

(2) the increasing role of party autonomy in family law matters;

(3) the growing significance of judicial and administrative co-operation; and

(4) substantive law influences.

3 In search of balance—the role of nationality and habitual residence in the new Hague Conventions

It would be an over-simplification to say that in the new Hague Conventions nationality has been replaced by habitual residence as the connecting factor. As we shall see, nationality has remained a valid and important criterion both to determine the applicable law and the jurisdiction of the courts—but not in all cases, and it is true that in many instances habitual residence has become the dominant factor. There are several reasons for this. First of all, as we have seen, as far as children are concerned, there

has been an ever growing recognition of the significance of the concrete dimensions of place (as well as of time), of the natual, social cultural and family environment in a child's life, and hence of the importance of these factors in organising the legal protection of the child in international situations. These factors generally outweigh the significance of more formal parameters such as the child's nationality.

This recognition has come only gradually. As we saw, the 1961 Convention on the Protection of Minors went only halfway to replacing the nationality criterion with that of habitual residence. After proclaiming as the basic rule that the authorities of the child's habitual residence have jurisdiction to take measures to protect the child (Article 1) and that they will apply their own internal law (Article 2), it then says that nevertheless the authorities of the State of the child's nationality may, if they consider that the child's interest so requires, take protective measures according to their own laws; moreover, such measures override those taken by the authorities of the State of the child's habitual residence (Article 4). This has not prevented eight of the fifteen States of the European Union and three other continental European States from ratifying the Convention, but it had three important drawbacks. First, the Convention never had any attraction for common law jurisdictions, indeed for any State outside continental Europe. Second, the retention of the nationality criterion was a major reason why the Convention had not been able to deal with the question of international child abduction by one of the parents. An attempt to draw up a rule dealing with this phenomenon had failed because a number of countries who favoured the principle of nationality were unable to conceive that removal of a child from the place of the habitual residence to the country of the nationality by a parent having that same nationality could be considered to be a wrongful act. That was one major reason why in 1976 Canada proposed to the Hague Conference to prepare a convention

on "legal kidnapping"—which became the 1980 Child Abduction Convention.

Third, and most fundamentally, the compromise leads to unsatisfactory results. On the one hand, the national authorities sometimes have taken decisions which are difficult to accept on the part of the authorities of the child's habitual residence, who are by hypothesis closer to the child and frequently better able to assess his or her situation and needs; on the other hand, if the minor has dual nationality, which is increasingly the case, the conflict between the authorities of the two States of the child's nationality tends to cause paralysis in the Convention.

Another difficulty comes from the uncertain meaning of Article 3 on the relationship subjecting the child to authority by operation of law (conflicts rule or rule of recognition?) and from the unsatisfactory interplay between the national law applicable to this relationship and the law of the habitual residence applicable in principle to measures of protection.

These and other reasons explain why it was decided in 1993 to put the revision of the 1961 Convention on the agenda of the Conference. Three and a half years later the 1996 *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* saw the light. The Convention, after almost a century, puts habitual residence as the prime criterion both for jurisdiction and applicable law. It is a primary, but not a totally exclusive, criterion as we shall see, and it finally completes the transition from a system of international legal protection of the child based on his or her formal legal connection with a given State, to one based on the context of the child's social environment, namely habitual residence.

As a matter of fact, the 1996 Convention may be seen as the last, third, panel of a triptych, the Child Abduction Convention of 1980, the 1993 Intercountry Adoption Convention, and the 1996 Convention, which are all based on similar principles. You will find no reference whatsoever to the

nationality either of the child or his/her parents in the 1980 Convention: nationality is completely irrelevant in the determination of what constitutes a wrongful removal and of the grounds for refusal (Articles 13, 20); indeed, the whole philosophy of the Convention is based upon the idea of protecting the child's family environment. Likewise, the 1993 Adoption Convention applies irrespective of the nationality of the child—but it does, of course, in its preamble and in Article 4 (*b*) stress the priority need of finding a family for the child in the country of origin (subsidiarity principle) and, in Article 16(1)(*b*), the need to give attention to the child's ethnic, religious and cultural background. The 1996 Convention refers to nationality in Articles 8 and 9, and recognises that the courts of the national State of the child may be, in exceptional cases, in the best position to protect the child.

There is, of course, another reason that explains, especially in areas of family law concerning adults, why habitual residence has become a very important factor in determining jurisdiction and applicable law. This is the growing importance of the participation of common law countries in the work of the Hague Conference. Nationality never was a relevant criterion in private international law in Britain, although the traditional domicile concept sometimes had a role equivalent to that of nationality. In the other common law countries, being mostly countries of immigration, domicile in the sense of permanent residence, as an assimilating factor, was the determining factor. When, starting in the 1960's, the participation of the US, Canada and Australia took on serious dimensions in the Hague work, this forced the negotiators to reconsider very carefully the merits of nationality and domicile. Under pressure every substance liquefies, and it is perhaps fair to say that the traditional domicile concept, much more than the nationality criterion, has undergone a profound transformation under the influence of the Hague negotiations. The traditional domicile of origin (acquired at birth from a parent) and the domicile of dependence (of the

wife) —see Divorce Convention, Article 3(2)—came under fire. In short, the predominantly *legal* concept of domicile had to give way to the primarily *factual* concept of habitual residence, and with such success, that habitual residence has found its way throughout the common law world, far beyond the scope of the Hague Conventions.

That the Hague Conference has not given up nationality but sought to give it its proper significance, is well illustrated by the 1978 Matrimonial Property Convention and, perhaps, even more by the 1980 Successions Convention. In both Conventions, nationality and habitual residence are given equal significance as far as the choice of the applicable law is concerned (1978 Convention, Article 6; 1980 Convention, Articles 5, 9 and 10). When it comes to the objective connecting factor, in the absence of designation of a law by the parties, the 1978 Convention is based on a very subtle system which in part uses the technique of *renvoi*, and in part an optional cascade in which, as in Article 14 of the Horei, common nationality comes first, next the common habitual residence and, finally, the law of the closest connection. The Successions Convention is more straightforward: if the decedent had lived less than five years in the State in which he died, his national law in principle applies, if more than five years, it is, again, in principle, the law of his habitual residence. In both cases exceptions in favour of the other criterion can be made.

4 The increasing role of party autonomy in family law matters

Party autonomy in family law matters is sometimes seen as another "way out" of the nationality/domicile dilemma. But it is much more. It touches upon a fundamental idea, namely that in international situations where a choice can/must be made between two or more potentially applicable laws, that choice is not necessarily limited to the Legislator, but—to the extent

that rights of others are not adversely affected—a right of the parties themselves. In adopting party autonomy in marital property affairs, the Horei has made a decisive step towards the admission of party autonomy in family law matters.

The need to protect others than the parties imposes certain restrictions. In marital property relations the others are, in particular, creditors of one or both spouses, and this explains why both the 1978 Convention and the Horei have limited the choices open to the parties.

The 1985 Trust Convention, in its Article 6, does not seem to pose any such limits: "a trust shall be governed by the law chosen by the parties". However, a closer look reveals that Article 15 reserves the rights of minors, incapable parties, the other spouse, the heirs and their parties, not just rights protected by the laws of the forum, but also by laws designated by its conflict rules. In fact, this may put severe restrictions on the autonomy of the person wishing to create a trust, notably to the extent that it would affect the rights of persons living in civil law jurisdictions which do not know the trust—and this is precisely what it should not do.

Similar considerations explain the introduction of the freedom of the testator to choose the law that should govern his estate, and the limitations to his choice options in the Successions Convention. Significantly, as a new idea, the autonomy provision (Article 5) follows (instead of precedes) the provisions on the objectively applicable law (Articles 3 and 4). Moreover, the choice for the law of the *situs* of assets is, contrary to the Matrimonial Property Convention, subject to the mandatory rules that would apply, if no choice had been made (Article 6).

The Conventions in the three areas just discussed, matrimonial property regimes, trusts and successions, of course, are dealing with closely related fields. Their rules are compatible, and Japan may wish to study these in their connection. Introduction of the Trust and Succession Conventions, or

their principles, into Japanese law, would add flexibility to its private international law system, to the benefit of both Japanese and foreign citizens.

A new area of party autonomy is presently under review at The Hague in the context of the negotiations on the Convention on Protection of Adults, to be completed next year. In common law countries, adults may organise in advance their protection for the time when they will not be able to protect their interests. They may do so by conferring on a person of their choice powers of representation. It is a type of mandate unknown in most civil law States, where a mandate necessarily comes to an end in the event of incapacity. Hence the interest in having a conflict of laws rule on the subject. The preliminary draft also provides for the possibility of the adult choosing the law applicable to the mandate in case of incapacity. As in the case of marital property, trusts and successions, the proposed choice is limited to a few laws only: the law of the nationality, of a former habitual residence of the adult, and a State in which property of the adult is located.

An area where the question of the admissibility of party autonomy has recently arisen is that of maintenance agreements between relatives, especially divorced spouses. This question is not specially regulated in the 1973 Convention on the law applicable to maintenance obligations. In a recent decision, the Dutch Supreme Court has held that Article 8 of the Convention does not stand in the way of a choice of the applicable law by the (ex-) spouses. This is certainly bound to be an interesting topic for the Special Commission on the Hague and New York Maintenance Conventions that will be held in April 1999.

5 The growing role of judicial and administrative co-operation

The Hague Conference has always had a strong interest in the field of

international judicial and administrative co-operation, and the 1896, 1905 and 1954 Conventions on civil procedure have become classics in their field. The 1954 Convention is in force for 39 States including Japan. Yet there is not a single common law jurisdiction among those States, since the treaty is based upon formal, consular and diplomatic channels of transmission, which reflects the procedural tradition of the civil law systems where service of documents is seen as a formal act, performed by a State official, and the taking of evidence as a judicial function. Not so in the common law tradition, where the service of process is essentially the responsibility of the plaintiff and the taking of evidence a matter for the parties, not for the court.

Since 1960, the Conference has endeavoured to revise the 1954 Convention, in three stages, so as to adapt its mechanisms to the needs of other legal systems, in particular those of the common law. The 1965 Convention on the service abroad (ratified by Japan), the 1970 Convention on the taking of evidence abroad and the 1980 Convention on international access to justice (neither in force for Japan) have been successful by the institutionalisation through the device of Central Authorities of the channels of transmission of documents of requests for the taking of evidence and legal aid and orders for costs of proceedings abroad.

After the US had become a Party to the 1965 and 1970 Conventions in 1969 and 1972, the significance of these treaties expanded enormously, and this was why in 1977 it was decided, for the first time in the Conference's history, to convene a meeting on the practical operation of the Conventions. That meeting, once again, highlighted the role of Central Authorities, and that led to the next step.

The 1980 Child Abduction Convention, as we have seen, fills a gap left by the 1960 Convention on protection of minors, not by a traditional system of recognition and enforcement of judgments but by a mechanism of judicial

and administrative co-operation. This mechanism of judicial co-operation, reinforced by co-operation between Central Authorities, is based upon the idea that it is up to the court of the child's habitual residence and not of the place to which the child has been wrongfully removed to decide on the substantive question, the question of custody, and that this court should apply its own conflict rules. But this principle is only implicit in the Convention, because nowhere does the Convention establish an explicit direct basis of jurisdiction for the custody question nor does it establish conflict rules for that question. So, a judicial and administrative co-operation mechanism has filled in for traditional rules of jurisdiction and applicable law. And this mechanism has been so efficient that the 1996 Convention, which does provide for such rules on jurisdiction and conflict, takes great care not to interfere with the 1980 Convention.

A further step was taken in the early 1990's when the Intercountry Adoption Convention was drawn up. This Convention does not contain any direct or even indirect bases for jurisdiction, but requires as a condition for recognising a foreign adoption that the administrative procedure of the Convention, through the co-operation between Central Authorities, has been respected (Article 23). Likewise, there are no rules on applicable law. So you see, we are here even further away than in the case of the Child Abduction Convention from traditional rules of jurisdiction and applicable law: unification on a worldwide scale would not be achievable on these matters.

The final stage, thus far, of this evolution has been reached with the 1996 Convention on the Protection of Children. For the first time, a chapter on judicial and administrative co-operation comes in to supplement the traditional set of chapters on jurisdiction, applicable law and recognition and enforcement, in order to reinforce and support the classical rules. Thus, for example, Article 35(2) provides that the authorities of the State where

a parent resides may on his or her request make a finding on the suitability of that parent to exercise access to a child in another Contracting State and on the conditions under which access is to be exercised. And the authorities of the State of the habitual residence shall then admit and consider such information or evidence before reaching a decision. So here the co-operation mechanism may help facilitate the application of the traditional rules of jurisdiction and applicable law.

But the idea of co-operation has in the 1996 Convention taken on an additional significance, in that it has influenced the very nature of the jurisdictional rules of the Convention. Article 8 provides that the authority which has jurisdiction to deal with the child's person or property, normally that of the child's habitual residence, may if it considers that the authority, of for example the child's nationality, is better equipped to assess the best interest of the child, either directly or indirectly, transfer the handling of the case to that authority. The two authorities may communicate, and if the other authority also finds that this is in the child's best interests, it may assume jurisdiction.

Of course, this idea of judicial co-operation is well known within many States—it is being extended here to the international sphere. Indeed, in an increasingly integrating world there is no good reason any more why cooperation among judges should stop at the frontiers while families move constantly across State boundaries.

The future Convention on the Protection of Adults is likely to follow in the footsteps of the Protection of Children Convention and to adopt a similar mechanism for judicial and administrative co-operation.

6 Substantive law influences

From the early days on, Hague Conventions in the field of family law have always been drawn up with a view to facilitating international

mobility and justice. In the beginning it was thought that this would be generally achieved by negotiating appropriate conflict rules and rules of jurisdiction. When, after the Second World War, the negotiators of the 1956 Convention on the Law Applicable to Maintenance Obligations were forced to look more closely into the humanitarian needs that the Convention would serve, they recognised the need to provide for the case where the normally applicable conflict rule designated a law that would not provide maintenance to the child, and they came up with the revolutionary idea of creating a subsidiary conflict rule which would provide a remedy (Article 3 of the 1956 Convention). The principle was further developed in the 1973 Convention on the Law Applicable to Maintenance Obligations. Still, until recently, private international law and human rights law were separated fields and scholars in both areas had little or no contact. Yet, whether it is in the area of international civil procedure or the recognition of the validity of marriages or of divorces, there are links with the *UN Covenant on Civil and Political Rights* (Articles 11, 14, 26, 17 and 23) which deserve to be studied and monitored. In recent times, recognition of the connection between private international law and human rights law has increased.

This is mainly the result of the 1989 *UN Convention on the Rights of the Child* (CRC), now in force for over 190 countries, including Japan, and which in several of its articles refers implicitly to private international law instruments. In some articles the reference is to existing agreements. Examples include Article 11(2) CRC which encourages States to accede to existing agreements to combat the illicit transfer and non-return of children abroad. This is a clear reference to the Hague Child Abduction Convention of 1980. Another is Article 27(4), calling upon States to accede to international agreements securing the recovery of maintenance for children from parents living abroad. Here the reference is implicitly to the 1956 *UN Convention on the Recovery of Maintenance Abroad* and to the four Hague

Conventions on Maintenance Obligations.

A special case is Article 21(*e*) dealing with intercountry adoption and encouraging States to conclude "multilateral arrangements or agreements... to ensure that the placement of the child in another country is carried out by competent authorities or organs". When this article was discussed, the Hague Conference had just started negotiations on what was to become the 1993 Hague Convention on Intercountry Adoption, and the negotiators of the CRC were well aware of the negotiations at The Hague. The new Intercountry Adoption Convention has taken great care to include the main principles of the UN Convention, and refers in its preamble explicitly to the CRC.

This is also the case for the 1996 Hague Convention on Protection of Children, which in several of its articles has taken provisions of the CRC into account. Article 16, on the law applicable to parental responsibility, in particular, furthers the principle that both parents have common responsibilities for the upbringing and development of their child—the principle of Article 18 CRC—in an interesting and novel way. The right of the child to be heard in proceedings concerning the child (the principle of Article 12 CRC) has also been taken into account (see Article 23(2)(*b*)).

A very interesting development may be noted in the context of the monitoring of the CRC. The CRC does not provide for a complaints procedure, but requires States Parties to submit from time to time reports on the implementation of the Convention. These reports are examined by a Committee which may make, and usually does make, recommendations to the States Party concerned. It has become a consistent feature of these recommendations to recommend to States Parties that they join the Hague Convention on Intercountry Adoption. An example is the report drawn up in respect of Japan (CRC/C/15/Add. 90 of 24 June 1998), where the Committee recommends that Japan take the necessary steps to ensure that

the rights of the child are fully protected in cases of intercountry adoptions and to consider ratifying the 1993 Hague Intercountry Adoption Convention. The Permanent Bureau maintains excellent contacts with the Human Rights Committee. Members of the CRC Committee attended, in an observing capacity, the negotiations on the 1993 Convention and on the 1996 Convention on Protection of Children.

7 Conclusion

The fact that the Hague Conference has been engaged for more than a century now in the field of international family law is, by itself, revealing. It demonstrates that there is a real, structural need for international cooperation in this area, not by making family laws all uniform, but by enabling different legal cultures to communicate and, above all, to allow individual citizens to move from one country to another without being unduly hindered by these differences. Yet, we are also faced with a paradox which is that while at an abstract level these needs are recognised, this recognition in the abstract is apparently not in all cases sufficient to attract wide support through ratification of the Hague Conventions. Why is that so? One explanation may be that those citizens which could benefit from these rules are usually a small minority and, moreover, not with an organised political force. On the other hand, their number is increasing and the difficulties they are facing are often considerable, especially if they belong to vulnerable categories, such as children.

While this is generally true, and certainly not only for Japan, it is my hope that when we prepare for the centennial of the Japanese participation in the work of the Hague Conference in 2004, the interest for the Hague Conventions-thirty-three since the Second World War, in the preparation of all of which Japan has played a role may further develop. Should the principle not be that Conventions, generally adopted with the unanimous

vote of all experts present, be considered for ratification, unless there are major reasons not to do so ?

In any event, I would hope that Japan will soon join the more than fifty States that are now Parties to Hague Child Abduction Convention. With 700,000 or so Japanese nationals living abroad and double that number of foreigners living in Japan, international child abduction has become more than a rare incident. The appropriate instrument to deal with it is there, generally thought to work well, and the world would benefit from a speedy Japanese ratification. Ideally, the ratification of the 1993 Adoption Convention and, more particularly, the 1996 Protection of Children Convention should not wait long either.

More generally, I would hope that Japan, in view of its pioneering role in the early days of the Hague Conference, as we approach the centennial of its first participation in 2004, would look afresh at its position in the Hague Conference and take on a new leadership role. The interests are there, the talent is there and there is a Permanent Bureau which sees its role as one that serves an increasingly worldwide organisation, in which Japan has a prominent role to play.

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I am pleased to announce here that the Permanent Bureau has opened, the day before I left for Japan, 8 October 1998, a website with full information on all the Hague Conventions. The website may be found at:

http://www.hcch.net/

The website will bring the Hague Conference closer to Japan and I express the hope that this will be for the benefit of many people and companies in and outside Japan.