The interplay between the United Nations Convention on the Rights of the Child and the Hague Conventions on child protection, against the backdrop of globalisation, by Hans van Loon, Secretary General of the Hague Conference on Private International Law, Conference on children's rights in theory and practice in honour of Philip Veerman, Amsterdam 16 April 2013

Introduction

It is a great privilege and pleasure for me to contribute to this colloquium in honour of Philip Veerman. Philip and I have known each other for many years, and I have great admiration for his tremendous efforts to ensure a better life for children around the world. Philip is a man of action, but he is also a scholar, indeed a scholar in multiple disciplines. Over the years we have had the opportunity to exchange our practical experiences and theoretical reflections, for instance, whenever Philip visited from Israel where he did such wonderful work in particular for Palestinian children. We discussed, among other matters, the application of the *1980 Hague Child Abduction Convention*. Our conversations gave me very interesting and important insights into the reality of cross-border child protection in complex situations in Israel and its surroundings.

In my contribution I would first like to share some thoughts on the four modern Hague Children's Conventions, in chronological order, the *1980 Child Abduction Convention*, the *1993 Intercountry Adoption Conventi*on, the *1996 Child Protection Convention* and the *2007 Child Support Convention.*

After having shared my perspectives on the four Conventions, I will discuss how these global multilateral Hague instruments operate as important tools to give effect to the *UN Convention on the Rights of the Child* (*"CRC"*), how they articulate two important principles of the *CRC*, the "best interest principle" and the right of the child to preserve his or her identity, and, finally, how they interact with the reporting system under the *CRC*.

I will conclude with some remarks on the impact of globalisation on the work of the Hague Conference in relation to the *CRC*.

I. Development of the four modern Hague Children's Conventions

In an early chapter of his thesis *The Rights of the Child and the Changing Image of Childhood*, Philip discusses *The Century of the Child* by Swedish author Ellen Key. Ellen Key was one of the first authors to phrase basic children's *needs* in terms of children's *rights* when this book was published in 1900.

The year of publication of *The Century of the Child* coincided with the year of the adoption at the third session of the Hague Conference on Private International Law chaired by 1911 Nobel Peace Prize laureate, Tobias Asser, of the Hague Convention on Guardianship of Minors, first signed in 1902. To the best of my knowledge, this was the first multilateral treaty ever that exclusively dealt with children and families.

The *1902 Convention* laid the foundation for the development of a dozen Hague Conventions on the international protection of children and families. The development of these Hague Conventions culminated into the four modern Hague Children's Conventions I mentioned earlier and as we know them today. Close observation of these developments evince three key features:

- First, a *decreasing* emphasis on coordination of *State powers,* on *sovereignty*, in relation to children, and a *growing* emphasis on effectively organising the *protection of children* through international legal means;
- Second, an ongoing development of *direct legal and administrative cross-border co-operation.* in particular through Central Authorities designated by each Contracting State. This exemplifies a more general trend in international law, identified by Wolfgang Friedman as a move from the "law of coexistence" to the "law of co-operation" in his seminal work *The Changing Structure of International Law*; and
- Third, a change in the perspective, from an image of the child as an *object* of the law towards an acknowledgment of children as *legal subjects.* This idea stands at the core of the *CRC*.

The *1902 Convention* would tell you which court or authorities to approach to resolve an issue of guardianship in an international situation involving Contracting States to the Convention. The Convention would also indicate which law the authorities should then apply. This was, and still is, of course, an important issue from the perspective of the international *protection of children*. But the Treaty was also very much concerned with the *sovereignty concerns of States* with regard to their respective powers in parental responsibility and custody disputes which it firmly founded on the *nationality principle*. The child was the *object* of these powers. There was no trace in the Convention of a system for direct international legal or administrative co-operation across borders servicing citizens.

This tension between *sovereignty* and *protection* became particularly evident in the *Boll* case before the International Court of Justice in 1958. The question in this case was whether Sweden had the right to place a young Dutch girl, Elisabeth Boll –daughter of a Dutch sailor and a Swedish mother who lived with her mother in Sweden – under a Swedish regime of *protective upbringing* following the death of her mother. The Dutch government viewed that based on the *nationality*

principle; it was for the courts in the Netherlands and not in Sweden to take such a measure. But the ICJ sided with Sweden and ruled that under the *1902 Convention* Sweden was entitled to take this measure in its own territory, in the social interest, and saw, thus, no violation of the Convention.

Does this case sound familiar? What if you substitute "*Yunus*" for "Boll" and "*Turkey*" for Sweden? In the *Yunus* case you have the ongoing dispute between the Netherlands and Turkey concerning Yunus – a Dutch/Turkish child who lives in the Netherlands and was taken away by the Dutch authorities from his biological mother and placed in care with a lesbian couple. There is, again, a Hague Convention that applies to this case. But it is no longer the *1902 Convention*, but its successor, the *1961 Convention on the Protection of Minors* (*1961 Convention*), which binds the Netherlands and Turkey. Influenced by the *Boll Court's* decision, the *1961 Convention* modernised the system of the *1902 Convention*, and reduced the powers of the authorities of the State of the nationality of the child in favour of those of his or her habitual residence. Yet, it did not go as far as replacing nationality by habitual residence, but attempted to strike a *balance* between the powers of the State of nationality and that of the State of the habitual residence. It also set up a rudimentary system of co-operation, or rather, of just communication, between authorities of countries involved. The Turkish/Dutch dispute in the *Yunus* case can be framed as a difference of interpretation of this balance, and also as a dispute about the issue of whether the Dutch side should have informed the Turkish authorities.

The nationality – allegiance, sovereignty – factor was also the reason why the negotiators of the *1961 Convention* were unsuccessful in their attempt to deal with an increasingly acute problem, namely the international removal of children by one of their parents. The minds were not yet ripe to accept that, if children had to be protected from the harmful effects of a parental abduction, then this protection should also be given to children who were nationals of the state of refuge: these children should, in principle, also be returned to the country from where they were abducted. The *1980 Child Abduction Convention* resolves this problem. It provides for their return of wrongfully removed children, subject to the so called "grave risk" exception, to the country of their habitual residence, so that the authorities of that country may take measures regarding the long term custody of the child. The *1980 Child Abduction Convention* has eliminated any reference to the child's nationality and is exclusively based on the habitual residence principle.

To support the return mechanism the Convention introduced another novelty: a *system of international cooperation through Central Authorities* designated by each Contracting State*,* which assists *the left behind parent* to obtain the return of the child.

The *1996 Child Protection Convention* revised the *1961 Convention* and it also incorporates essential features of the *1980 Child Abduction Convention*. It deals with parental responsibility and measures of protection and is resolutely based on the idea that the *authorities and the law of the habitual residence* of the child and not those of the child's nationality are competent for those matters. Whether the child is a refugee, an asylum seeker, a displaced person or simply a teenage runaway, the *1996 Convention* assists by providing for co-operation between the authorities in the receiving country and country of origin in exchanging information and in the institution of any necessary protective measures. It also safeguards specifically the right of the child to be heard and, thus, acknowledges the child as a *subject* of the law.

The Convention also provides for *co-operation* between States in relation to the growing number of cases in which children are being placed in *alternative care* across borders, short of adoption. This interestingly includes the Islamic law institution of kafala, which the Convention specifically mentions. As you may know, most Islamic States prohibit or do not provide for the adoption of children.

International adoption of children is the object of a special Hague instrument, the *1993 Convention on Protection of Children and cooperation in respect of Intercountry Adoption* (*1993 Intercountry Adoption Convention*). Through this Convention States work together through an administrative system to combat poorly prepared adoptions and abuses which are *not*, and to facilitate adoptions which *are* in the best interests of children. The Convention applies when a child and the prospective parents have their *habitual residence* in different Contracting States, regardless of their nationality.

Finally a word on the fourth modern Hague Children's Convention, the *2007 Convention on the International Recovery of Child Support and other Forms of Family Maintenance* (the *Child Support Convention*). This Convention came into force on 1 January of this year.

Like the *1996 Convention*, the *Child Support Convention* integrates the approaches of two preceding Treaties: the administrative cooperation approach of the 1956 *UN Convention on the Recovery of Maintenance Abroad*, and the private international law approach of several Hague Conventions on applicable law (1956, 1973) and enforcement of foreign decisions on child support and other forms of family maintenance (1958, 1973). Like the other modern Hague Child Protection Conventions, the *Child Support Convention* is based on the *habitual residence of* the child, irrespective of the child's nationality.

So, we see a clear evolution through the successive Hague Conventions. We can identify a move away from the old nationality and sovereignty interest of the State towards the increased emphasis on the most efficient way to protect children. The emphasis now rests on

legal and administrative cross-border co-operation while positioning the child at the centre of the law. Needles to say, this development is in the best interest of children.

II. Interplay with the CRC

The support that all four Hague Conventions, on *Child Abduction, Adoption, Protection* and *Child Support*, provide in this way to the *CRC* in cross-border situations is significant.

In its Article 11 the *CRC* implicitly refers to the Hague *Child Abduction Convention* where it calls upon States to combat the illicit transfer and failure to return children. The three other modern Hague Children's Conventions came after the *CRC*. As a result, there is no reference to them in the *CRC*. But the *CRC* did anticipate the need for *practical international co-operation* and that is what the *Adoption, Child Protection* and *Child Support Convention* do.

The *1993 Intercountry Adoption Convention* implements the principles of Article 21 of the *CRC* in respect of States which recognise or permit the system of adoption. There is a slight nuance between the approach of the *CRC* and the Hague Convention. According to the *CRC*, intercountry adoption may be considered as an alternative means of child care when the child cannot be placed in a foster or adoptive family or cannot be cared for in the child's country of origin. This could be read as meaning that the *CRC* would prefer institutional care over intercountry adoption. The Hague Convention is firmly based on the idea, which also expressed in the *CRC*'s preamble, that a *"child should grow up in a family environment"* and makes it clear that intercountry adoption may be considered "*if no suitable family can be found in the child's country of origin.*"

The *1996 Convention on Protection of Children* assists in implementing several articles of the *CRC* in international situations. Examples of these are articles that deal with separation from parents (Art. 9), family reunifications (Art. 10), the child's own opinion in procedures affecting the child (Art. 12), parental responsibilities (Art.18), refugee children (Art 22), and others. The *1996 Convention* is also referred to in the *second Optional Protocol* to the *CRC on the Sale of Children, Child Prostitution and Child Pornography*.

Finally, Art 27 (4) of the *CRC* calls upon States to take all appropriate measures to secure the recovery of maintenance - domestically and from abroad - for the child from the parents or other persons with financial responsibility for the child. The *Child Support Convention* has huge a potential to assist in implementing this article.

The best interests principle (*CRC* Art 3)

Through all the four Hague Children's Conventions runs the notion of the best interests of the child. Article 3 of the CRC provides that in all actions concerning children, whether undertaken by the legislative judicial and administrative branches of government or otherwise, the *"best interests of the child shall be a primary consideration"*. To emphasise, not the sole but a primary consideration. The second paragraph of Article 3 stresses the default role of the State, which should *only step in when the parents fail in their duties*.

This latter aspect is illustrated by Art 21 of the *CRC* and the *1993 Hague Intercountry Adoption Convention*. Both highlight the requirement of consent – informed consent – that birth parents must give to the adoption of their child.

The "best interest" notion is sometimes invoked against the *1980 Child Abduction Convention*. It is said that the "grave risk" exception to the return order mechanism, the exception that the child should not be returned if that would result in a grave risk for the child's physical or psychological health is too narrow or should be interpreted more broadly. It has also been said that any decision on the return of the child should be made only after a full examination of the situation of the child and the family including the long term effects of the return has been established. Some recent decisions of the European Court of Human Rights ("ECrtHR") (including the Neulinger/Switzerland and Raban/Romania cases) seem to point into that direction. It is therefore with great interest and some concern that we are now awaiting a new decision of the ECrtHR in the case of X v. Latvia concerning the return of a child by the authorities of Latvia to Australia. All these cases are under Art. 8 of the ECHR on the protection of family life read in combination with the *Child Abduction Convention.*

Of course the concern is that if this line of thought would continue, the whole idea of the *Child Abduction Convention* –providing a speedy return system for the child to the country of origin and to enable the courts of the country of origin to decide on the long term issue of custody - would be undermined. Interestingly, the case law of the European Court of Justice, in connection with the Brussels II Regulation tends to point in the opposite direction, *i.e.* the expeditious return to the home country.

In any event, from the point of view of the *CRC*, the best interests principle of Article 3 must be interpreted in the broader framework of the Convention, and in particular its Art. 11 that implicitly refers to the Hague *Child Abduction Convention*.

Preservation of identity (*CRC* Art 8)

Another fundamental principle of the *CRC* is the respect for the child's identity (Art. 8). The *1993 Intercountry Adoption Convention* and *1996 Child Protection Convention* are quite significant with respect to

this issue. The *1993 Intercountry Adoption Convention*, first, ensures that in the cross-border procedure preceding the move of the child to a different country, full consideration is given to *the child's needs, upbringing, and ethnic, religious and cultural background*. The purpose is to promote the best possible match of the child and future adoptive parents. Moreover, the Convention specifically provides that *information concerning the child's origin, the identity of the parents and the medical history* is preserved, and that *the child has access to this information*. Of course this facilitates the search for the roots which has become so important to many adoptees. Last but not least, the Convention provides for the *recognition* of adoptions made under the Convention in all Contracting States.

If identity is taken in a slightly wider sense, by including preservation of the child's family relations, the *1996 Convention* is important because it provides the legal framework for the attribution, modification and extinction of parental responsibility. One very interesting provision of the *1996 Convention* is Article 16. This Article deals with the consequences for parental responsibility of a move of habitual residence of the child from one country to another. If under the laws of the first State, both the unmarried mother and the unmarried father have parental responsibility, but the child then moves to a State where only the mother has parental responsibility, what does this effectively mean for the child's legal position given that in principle the new law, as the law of the new habitual residence, shall apply? Does the father's parental responsibility end as a result of the move? The answer to this question is: no. The Convention provides that the father retains his rights and responsibilities regardless of the move of the child.

The role of the UN Committee on the Rights of the Child

Interestingly, the *UN Committee on the Rights of the Child* has played a major role in making the connection between the Hague Children Conventions and encouraging States to join them as a way of implementing their treaty obligations under the *CRC*. In its review of the periodic national reports on implementation of the *CRC*, the Committee has often enjoined States parties in particular to join the 1993 Intercountry Adoption Convention. This gave the Convention a huge boost. The Convention has now 90 States Parties. The Committee has been quite emphatic about the need to join this Hague Convention, and stepped up its tone in successive reviews when States did not follow up on an earlier recommendation. More recently, the *Committee* has made a further step by encouraging States parties to call on the secretariat ("Permanent Bureau") of the Hague Conference for assistance in implementing the *Intercountry Adoption Convention*. The Permanent Bureau has not only developed tools such as Guides to Good Practice, but has also provided customised assistance to developing countries in particular with respect to implementation. In this, the Permanent Bureau often worked in collaboration with UNICEF. Very important work has been done. For example, in Guatemala the

Conference and State Parties to the *1993 Intercountry Adoption Convention* have been able to stop the massive “production” of indigenous children for adoption abroad. In Cambodia we have been able to reduce corruption and establish a proper system for intercountry adoption. Since the earthquake in Haiti we have been providing technical assistance and are currently working on a plan for the implementation of the Convention.

III. The impact of globalisation

Since the turn of the Century, the Hague Conference on Private International Law has experienced a strong growth. This growth is evident in terms of membership of the organisation and in terms of growth of the number of State Parties to Hague Conventions. Currently, 140 States are connected, either as Members of the organisation or as State Party to the Organisation. The *CRC* is the most widely ratified Convention of all international treaties. With the exception of Somalia, South Sudan and the United States, all States, 193 in total, are parties to it, albeit sometimes with fairly general reservations. The CRC has definitely contributed to the global ratification of the Hague Children’s Conventions, in particular the *Child Abduction* and *Intercountry Adoption Conventions*.

But what impact does globalisation have on the content and the acceptance of Conventions? I would highlight two aspects in this respect. First, the most important factor in my opinion is differences in *levels of development of the legal infrastructure,* which very often is connected with the degree of economic development of a State. Second, *cross-cultural* factors have become more prominent in our work, and, have in particular given rise to an interesting dialogue between religious and secular systems across and beyond the Mediterranean, the so-called *Malta process*.

As an illustration of the impact of different *levels of development*, I would mention the 2007 *Child Support Convention*. This Convention provides for *free legal assistance for child support applications*. But China and other States which are new to international co-operation in this field felt that they could not go so far in this. Therefore, the Convention makes it possible for States with less developed legal systems to select a procedure which subjects the provision of legal aid to a test based on the means of the child. Similarly, there is *a strict procedure for recognition and enforcement of foreign decisions*, but States which are not so familiar with such procedures, may opt for more controls in procedure. In this way, it has been possible to take into account different levels of development of legal systems without compromising the Convention’s essence.

With regard to *cross-cultural* factors, I already mentioned that the *1996 Convention* specifically takes into account the kafala system. Following “9/11”, in 2001, we felt that it was very important to step

up our efforts to assist in overcoming the difficulties of trans-frontier family relations and abductions between secular legal systems and religious systems, based on Shariah, across the Mediterranean and beyond. The Malta process started in 2004, and led to three judicial seminars that convened in St. Julian's in Malta. There, we invited judges and other authorities from across the Mediterranean and beyond (including Canada, USA, Pakistan, Indonesia), to discuss these issues, and resolve cases drawn from practice. Of course, the ultimate idea is to facilitate the accession by Shariah countries of the 1980 and 1996 Conventions. Morocco has already done so. The Pakistani courts and the British courts have concluded an agreement which has worked well and led to the return of children. Presently, we are working on contact points in various Shariah countries to facilitate access to information and mediation in particular among couples of mixed religions.

In conclusion, globalisation presents its challenges, but with creative approaches, I believe very much in Philip's spirit, we try to meet them.

I will end by extending my heartfelt congratulations to Philip and by expressing the hope that Philip will have many years before him to continue his important practical and theoretical work in the interests of children and families.