CHAPTER ONE
A REVIEW OF THE EXISTING CONVENTIONS

2. For a proper understanding of the way the instruments under consideration operate, a distinction needs to be drawn between their scope and their purpose. Before the discussion proper, there is a list of these instruments, showing which countries are bound by them.

The term "purpose" refers to the provisions which supply a legal response to a given problem. In private international law, such provisions may be rules governing jurisdiction, rules on the effectiveness of foreign decisions, rules for dealing with conflicts of laws or rules establishing administrative or judicial cooperation between the authorities of different countries.

The "scope" of a rule refers to any provision determining the field of application of a convention in terms of its territorial or material scope. "Material scope" is defined as the legal situation or relationship addressed by the instrument. The point of determining the territorial scope is to give practical effect to the premise that a treaty is applicable only between the contracting states; for this purpose, it is up to the treaty to use an appropriate test of applicability to identify those international situations which it proposes to embrace.

The field of application of an international convention may be affected by a third factor distinct from the material but connected to the territorial scope: the existence of a competing convention between contracting states is likely to intrude on the applicability of a convention.

SECTION 1: THE CONVENTIONS

§1. Multilateral conventions

3. The multilateral conventions with a bearing on family matters are as follows:

(a) under the aegis of the Hague Conference:

- the Convention of 5 October 1961 concerning the Powers of Authorities and the Law applicable in respect of the Protection of Infants;

- the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction;

- the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
(b) on the initiative of the Council of Europe:
- the European Convention concluded in Luxembourg on 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;
(c) within the International Commission on Civil Status:
- the Convention signed in Luxembourg on 8 September 1967 on the Recognition of Decisions relating to the Validity of Marriages.

The conventions on maintenance obligations are not considered in this report, principally because the European Union does not propose at this stage in the proceedings to extend the Brussels II Convention to cover that matter. As regards the effectiveness of decisions, the conventions likely to be considered are the Hague Conventions of 15 April 1958 and 2 October 1973 and, as regards direct jurisdiction and the effectiveness of decisions, the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

As it happens, conflicts between instruments are by no means acute as regards the effectiveness of judgments, as the Brussels Convention waives priority to conventions governing particular matters. When it comes to jurisdiction, this study looks to Article 5(2), which provides that the competent courts are those of the place where the maintenance creditor is habitually resident, in so far as that provision throws light on the discussion of ancillary measures. Where appropriate, other aspects of the matter are discussed in the second part of the study.

4. The ratification table below refers only to contracting states which are members of the European Union. The conventions have, however, been ratified by other countries:
- the Convention of 5 October 1961 concerning the Powers of Authorities and the Law applicable in respect of the Protection of Infants: by Poland, Switzerland and Turkey;
- the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations: by Australia, Cyprus, the Czech Republic, Egypt, Norway, Slovakia and Switzerland;
- the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: by Argentina, Australia, the Bahamas, Belize, Bosnia-Herzegovina, Burkina Faso, Canada, Chile, Croatia, Ecuador, Honduras, Hungary, Israel, Macedonia, Mauritius, Mexico, Monaco, New Zealand, Norway, Panama, Poland, Romania, Switzerland and the United States;

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The first concerns the maintenance of children and the second that of adults and children. They have been ratified by eleven Member States of the European Union, the first by Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal, Spain and Sweden, and the second by Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.
the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, concluded in Luxembourg: by Cyprus, Norway and Switzerland;

- the Convention signed in Luxembourg on 8 September 1967 on the Recognition of Decisions relating to the Validity of Marriages: by Turkey.

### Ratification by Union members

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As can be seen, the conventions on divorce have had little success, the 1961 Convention has been a partial success and the two agreements on custody and abduction of children have done extremely well, notably the Luxembourg Convention. However, the 1980 Hague Convention is often preferred to it, as it is less cumbersome and complicated.

Where custody is concerned, the Hague and Luxembourg Conventions are supposed to complement one another. Only seven European Union countries have ratified all three conventions, however.
§2. Regional conventions

5. On dissolution of the marital and custody relationship, there are Nordic conventions between Denmark, Finland, Iceland, Norway and Sweden (1932 and 1977 Conventions on Recognition and Enforcement of Judgments in Civil and Commercial Matters). They lay down very liberal rules on recognition, stipulating merely that final judgments and administrative decisions given in one Nordic country in accordance with the prescribed rules on jurisdiction are to be valid in the others, without it being necessary to institute enforcement proceedings or ascertain whether the decision is correct or whether grounds for jurisdiction, such as domicile or nationality, actually existed in the originating country. The condition on which they become applicable is possession of the nationality of, or habitual residence in, one of the contracting states.

§3. Bilateral conventions

6. European countries have put together a complex network of "one-way" conventions on civil and commercial matters designed in most cases merely to establish recognition and enforcement of decisions, not direct jurisdiction. Only Belgium has concluded two-way conventions, with France and the Netherlands. They frequently contain provisions on family disputes which are fairly restrictive, mainly because they lay down stricter conditions governing indirect jurisdiction. For example, the 1959 convention between Belgium and Switzerland\(^2\) provides that, where the status and legal capacity of persons are concerned, if the request concerns one person only, that person must be a national of the requesting state, or be domiciled or habitually resident in the requesting state if he is a national of the requested state; if two or more persons are concerned, one of them must be a national of the requesting state or all of them must be domiciled or habitually resident in that state if they are all nationals of the requested state.

These conventions are fairly old and can be awkward to apply. As it happens, they have no particular bearing on family matters. In practice, it would be enough to insert in the Brussels II Convention a provision similar to Article 55 of the Brussels Convention of 27 September 1968, which provides that, for the states parties to it, the Convention supercedes existing bilateral conventions.

§4. Cooperation agreements

7. An interesting case is the agreement on judicial cooperation in respect of the protection of infants concluded between the French and Portuguese Governments in Lisbon on 20 July 1983. This agreement is an example of the type of cooperation which can occur in these areas, particularly since it refers to the Hague Convention of 1961, which it appears to be intended to implement.

The title of the agreement suggests that it merely sets up cooperation machinery, but the title does not accurately convey its content. The scope of the agreement is much wider, taking in judicial cooperation, the jurisdiction of the authorities and the applicable law, the right of custody of infants, rights of access and maintenance obligations.

\(^2\) Convention of 29 April 1959 on the Reciprocal Recognition and Enforcement of Court Decisions and Arbitration Awards.
§5. New York Convention on the Rights of the Child

8. The New York Convention on the Rights of the Child was adopted by the United Nations General Assembly on 20 November 1989 and has been ratified by all the European Union Member States.

The Convention sets out a series of rights some of which concern the matters covered by the conventions discussed in this paper.

For the purposes of the Convention, "child" means "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

A. Rights protected

9. The Convention gives prominence to a prohibition on separating a child from his or her parents, except when competent authorities determine that separation is necessary for the best interests of the child (Article 9). It recognizes the child's right to maintain personal relations and regular contact with both parents when they reside in different states. For this purpose, states are required to take measures to combat the illicit transfer of children abroad and promote the conclusion of bilateral or multilateral agreements to that effect.

The Convention states the principle that both parents have common responsibilities for the child's upbringing and that states are therefore under an obligation to help them discharge that duty.

A child temporarily or permanently deprived of his or her family environment is entitled to special protection provided by the state.

A child is also entitled to an adequate standard of living, which his or her parents have primary responsibility for providing. The state must make sure this is done by ensuring that the principle is respected and put into effect, particularly as regards the recovery of maintenance.

Lastly, a child who is capable of forming his or her own views has the right to express them freely on all matters affecting the child and to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds (Article 12). These rights are being exercised more and more in relation to matrimonial disputes, where the children concerned are increasingly being recognized as having a right to be present and to have their say.

B. Direct effect

10. The question whether the Convention has direct effect is a hotly disputed one. As a result, parties to legal proceedings cannot rely on being able to invoke it before the national courts.

For an international instrument to be directly applicable in domestic law, that must be the effect intended by those who drafted it, which can be presumed to be the case where the obligations laid down in it are clear, precise and unconditional. Here, a distinction has, where necessary, to be made between the various rights enshrined in a single text,
where the wording of some of them is such as apparently to require no further explanation, while others have to be gone into in more detail.

When it comes to the provisions which affect the conventions under discussion here, neither Article 9 nor Article 12 seems to meet the stated requirements adequately and would certainly have to be implemented in national law in such a way as to make their practical implications and scope more clear. The French Court of Cessation has held that the New York Convention has no direct effect.\(^3\)

**SECTION 2 - THE PURPOSE OF INTERNATIONAL CONVENTIONS**

**§1. Jurisdiction**

**A. Direct jurisdiction**

11. Rules on direct jurisdiction are still unusual. The only place they can be found expressly set out is in the 1961 Hague Convention, in relation to the protection of infants.

   The absence of rules on direct jurisdiction with regard to dissolution of the marital relationship is a major shortcoming which several states highly regret. If such rules were issued, the terms for the recognition and enforcement of foreign decisions could be made less strict by removing the rules on indirect jurisdiction.

1. Measures affecting children

12. In the 1961 Hague Convention there are two principles for assigning jurisdiction in respect of the protection of infants, viz:

   - jurisdiction in principle of the authorities of the state where the infant has his or her *habitual residence*;

   - jurisdiction of the authorities of the state of the infant's *nationality*, though *after* authorities of the state of habitual residence have been informed and only if "the interests of the infant so require".

   These principles may be departed from:

   - in favour of the authorities of the *state on whose territory the infant or his or her property is*, to enable them to take *measures in cases of urgency*;

   - in favour of the authorities of the state where the infant *habitually resides*, so that they may adopt protection measures when the infant is threatened by *serious danger* to his or her person or property;

   - through a reservation permitted by the Convention, in favour of the *authorities empowered to decide on a petition for annulment, dissolution or modification of the marital relationship of the parents of an infant*.\(^4\)

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\(^4\) Of the European Union Member States, only Luxembourg and Spain still avail themselves of this
The precise link between the national authorities' jurisdiction and that of the place of habitual residence, between which the authors of the Convention did not really venture to decide, raises several as yet unresolved difficulties of interpretation. But quite clearly, the spirit of the Convention is to establish a new principle of proximity in this regard, a forerunner of the rights later enshrined in the New York Convention of 1989.

There are two schools of thought here. The "Germanic school" (the Netherlands, Germany and Austria) considers that the jurisdiction of the national authorities is subordinate to the jurisdiction of the authorities in the place of habitual residence, the former being able to act only if the interests of the child are better served thereby. The "French school" contends that the French authorities have jurisdiction in respect of an infant of French nationality in all cases.

The difficulties to which this conflict gives rise are exacerbated by the increasingly frequent cases of double nationality (for example, a French-German child residing in Germany), where two courts regard themselves as having jurisdiction and each takes measures which will not be recognized in the other state, leading to deadlock.

13. This ambiguity as between the principles of nationality and habitual residence can be seen very clearly in the enshrinement of recognition of the relationship subjecting an infant to authority which arises directly from the domestic law of the state of the infant's nationality.

This principle has caused problems of interpretation, as it is uncertain whether or not it can be a means of impeding jurisdiction of the authorities in the State of habitual residence.

It has also been wondered whether this is a rule of conflict with general application or a rule peculiar to the implementation of the Convention which yields to the principle of habitual residence in other cases. Once again, legal opinion is divided.

This parallel relationship between the authorities of the state of nationality and those of the state of residence which the Convention seems to have been unable to remove is to some extent exacerbated by the premise that in respect of protection measures - a notion interpreted very broadly in the Convention, in that it includes custody measures - the authority addressed cannot conveniently, or indeed reasonably, apply any law other than its own. This kind of rivalry would no doubt have been reduced by an agreement on the law applicable such that the authority addressed would have been able to apply a foreign law, probably the law of the state of habitual residence where protection measures, at least in the narrow sense, were concerned. In that context, recognizing the jurisdiction of the court which granted the divorce does not seem to break any new ground when compared with the position of the authorities of the state of nationality, since both sit in a country other than that of residence.

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5 reservation, and Spain is about to withdraw it.

See below, the point relating to conflict rules.
14. In view of difficulties such as these, the Hague Conference undertook a review of the 1961 Convention. The reform was to place the emphasis on the part played by a child's habitual residence, which would be the criterion for determining whether there was an automatic relationship of authority. It would also serve as a basis for competence to act. Other states' authorities would only have jurisdiction in the alternative, in the sense that it would only come into play if the authorities of the state of residence failed to act. The question of whether to recognize that the court granting the divorce has jurisdiction in the alternative is a matter of debate.

2. Other rules of direct jurisdiction

15. The bilateral conventions between Belgium and France and between Belgium and the Netherlands dispose of the foreign origin element arising from nationality by applying the principle that aliens are treated as if they were nationals, thereby relegating questions of jurisdiction to domestic law. The Convention with France also contains a special provision on guardianship arrangements whereby the authorities of the place where these are set up have jurisdiction. Lastly, these conventions leave it to national law to regulate jurisdiction in relation to interim measures.

The rules on *lis pendens* and related actions are set out in the various international instruments under discussion.

The 1970 Convention deals with these issues somewhat vaguely, stipulating that proceedings for divorce or legal separation may be suspended if proceedings are already pending in another contracting state. This is merely an option which does not guarantee that incompatible decisions can always be avoided.

More or less as a matter of course, bilateral conventions contain rules which require an action taken before the court applied to in the second instance to be either withdrawn or suspended.

B. Indirect jurisdiction

16. All the conventions on recognition contain rules on indirect jurisdiction worded in more or less restrictive terms. It is fairly logical that the court addressed should check the criteria used by the court of origin to found its jurisdiction where there are no rules on direct jurisdiction which ensure that common principles are observed.

Of themselves, the conditions attaching to indirect jurisdiction may constitute a serious obstacle to the free movement of judgments and to the legal certainty which is vital when it comes to the status of persons and to measures affecting children. The way the conditions are formulated does, as it happens, make it more complicated to rely on the conventions concerned.

These rules on indirect jurisdiction are presented as a list of alternative tests of jurisdiction. As such, they are not necessarily capable of being transposed into a convention on direct jurisdiction. Their purpose is to make it possible to deny a status validly acquired abroad, unlike the rules on direct jurisdiction.

1. Divorce and separation
17. The 1970 Hague Convention applies the traditional test of the habitual residence of the respondent at the date of the institution of proceedings. The habitual residence of the petitioner or his or her nationality will also come into play provided they are corroborated by other evidence pointing to a degree of proximity, such as the last common residence or the duration of habitual residence. Shared nationality of the husband and wife can also be grounds for assigning jurisdiction to the court of origin.

2. Custody

18. The 1980 Luxembourg Convention lays down a complicated system for determining indirect jurisdiction by applying a parameter related to the circumstances - the facts of the case and the time - in which the application for recognition is lodged. The rules, what is more, are formulated differently depending on whether indirect jurisdiction requires recognition or allows it to be refused.

- In the event of improper removal and where such removal is reported within six months, the child is immediately returned by decision of the courts in the state of:
  shared nationality of the parents and residence of the child in the state of origin (natural jurisdiction);
  habitual residence of the defendant parent (actor sequitur forum rei);
  the last common habitual residence of the parents provided that one of them still habitually resides there (the proximity principle);
  habitual residence of the child (the proximity principle),
  these criteria being evaluated as at the date of the improper removal.

- In all other cases (no improper removal of the child, or failure to report within six months), recognition may be refused if:
  the child was a national of the state addressed or was habitually resident there and neither of these ties existed with the state of origin (the proximity principle);
  the child was a national both of the state of origin and of the state addressed but was habitually resident in the latter (the proximity principle).

Proximity is clearly the principle underlying the list of indirect jurisdictions. It leads to a preference for the habitual residence of the child, though that test is not the only one applied. The child's nationality plays a secondary role, while the last matrimonial residence is clearly a determining factor too, since it can be sufficient grounds on its own for ordering the immediate return of the child.

The same preference can be seen, albeit only by implication, in the 1980 Hague Convention, which states that "removal ... is to be considered wrongful where it is in breach of rights of custody attributed ... under the law of the State in which the child was habitually resident immediately before the removal or retention". In this Convention, however, residence is apparently seen as the exclusive test, as it is not challenged by any other criteria for determining whereabouts.

A comparison of the Luxembourg and Hague Conventions of 1980 therefore shows that there is some discrepancy as regards the importance to be attached to where the child habitually resided.

C. Translating habitual residence and nationality into practical terms

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19. The residence and nationality tests raise two types of questions of interpretation as regards how they are defined.

Where nationality is concerned, it is common knowledge how many difficulties this test can cause when the person concerned has several. Experience of the 1961 Hague Convention shows that each state will generally choose its own nationality out of all those an individual may hold. Though that is not improper in national law, it does affect the operation of an international treaty where that treaty sets out to establish uniform practice in relation to the measures to be taken in respect of an individual.

On the other hand, nationality and residence are selected by the instruments under consideration here only if they rely on a property from which a degree of proximity can be inferred. Sometimes that property affects a separate criterion, e.g. shared nationality of the parents plus residence of the child. Sometimes it concerns the criterion itself. Here, two qualifications come into play, the duration of residence and whether it is habitual.

20. Experience of the conventions under consideration suggests that the debate over translating the notion of "habitual" residence into practical terms is an important one. Part of the explanation is that a measure in respect of a child is often applied for at the same time as the child is being unlawfully removed.

The 1961 Hague Convention has been applied in a way which suggests a flexible approach to the notion of "habitual residence" as a test of whether the court applied to has jurisdiction. Legal opinion is in agreement on looking for the actual focal point of the child's life, which entails assessing how far he or she is integrated and allowing for a certain passage of time.

Generally speaking, in seeking for a proximity factor, an appraisal of the facts seems to be preferred to a formal definition. The search is sometimes carried out subjectively, by ascertaining whether some degree of intention has been involved, and sometimes more objectively. The interpretation of the concept of habitual residence by the German courts points to the latter tendency at work, in that they take the view that the removal of a child, even if unlawful, has no effect on the decision as to where he or she resides.

But it is still not clear whether a child's habitual residence must necessarily be interpreted in the same way depending on whether the test is to be applied to determine competence to decide on an application for custody or to secure the immediate return of the child. This uncertainty is an argument in favour of a flexible definition of the residence test.

§2. Effectiveness of foreign decisions

21. All the conventions set out to facilitate recognition or, to put it another way, the free movement of judgments. However, the rules to that effect, especially as regards divorce (the 1970 Hague Convention) and custody (the 1980 Luxembourg Convention), are comparatively complicated, which makes them awkward to apply.

Only the two 1980 conventions also regulate enforcement. The 1961 and 1970 conventions are silent on the subject. Where the 1970 convention is concerned, this limitation is warranted in view of its purpose, which is to secure recognition of dissolution of marriage solely, to the exclusion of all ancillary matters.
A. Recognition

1. Decisions on divorce and separation

22. As national experience shows, the 1970 Hague Convention is much more restrictive in this area than the relevant national laws.

On the one hand, recognition is subject to the ordinary conditions set in national laws, in other words due regard for public policy and for the right to present one's case, and the absence of any incompatible previous decision.

On the other hand, the Convention remains very unprogressive on certain points. It provides for the carrying out of checks, albeit in a very loose form, into the assumption of jurisdiction by the court of origin. It also authorizes the court addressed to scrutinize the findings of fact on which jurisdiction was assumed by the court of origin if the decision was given by default. And, lastly, it allows for a mitigated form of inquiry into the merits of a case, in the sense that the court addressed has the option of refusing recognition if the spouses, at the time the divorce was obtained, were nationals of states whose law does not provide for divorce, and of no other state, and allows states the right to review the law applied where equivalent results are not achieved.

2. Child abduction

23. The machinery established by the 1980 Hague Convention does not, in the strict sense, constitute machinery for the recognition and enforcement of foreign decisions. Basically, it sets up central authorities responsible for various functions whose object is to secure, on an urgent, provisional basis and without prejudice to the merits of the case, the prompt return of an abducted child, even where there has been no decision as to custody so long as a right of custody founded on the law of the state of habitual residence of the child has been breached.

Where friendly approaches by the central authority fail, the judicial and administrative authorities may act. As the guiding principle is to secure prompt return, they must act urgently, with due regard, where appropriate, for foreign law and decisions awarding custody "without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable".

In certain circumstances, the judicial and administrative authorities may refuse to order the return of a child. The existence of this option has provoked fears that the principle

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5 See the rules of indirect jurisdiction supra.
6 Of the European Union Member States, only Luxembourg and Italy have given effect to this reservation.
8 - Failure actually to exercise custody rights at the time of removal;
- acquiescence in the removal;
- a grave risk that the child's return would expose him or her to physical or psychological harm;
- objection by the child where he or she has attained the age of reason or an adequate degree of maturity;
- compliance with the fundamental principles regarding the protection of human rights and fundamental freedoms.
of voluntary return is jeopardized, but states seem to have availed themselves of it with extreme caution.

The 1980 Luxembourg Convention is also designed to secure the prompt return of a child, though on terms which are more restrictive than those of the Hague Convention. Whereas it, too, provides for action by central authorities, it adds, apart from a time limit of six months, constraints as to the method chosen, which falls within the scope of the effectiveness of foreign decisions.

3. Child protection and custody

24. Recognition is automatic if two traditional conditions are met, relating to the jurisdiction of the authority of the state of origin under the relevant convention and to due regard for public policy, including respect for the right of defence (implied in the 1961 Hague Convention and expressed in the 1980 Luxembourg Convention).

Departures from the principle of recognition are, however, allowed for; these vary from one convention to another.

Under the 1961 Hague Convention, recognition may be refused if:

- the foreign measure emanates from an authority in the state of habitual residence where "the infant is threatened by serious danger to his person or property", at the expense of powers conferred on the authorities in the state of nationality;

- the foreign measure emanates from authorities empowered to decide on a petition for annulment, dissolution or modification of the marital relationship of the parents of an infant, when the state of origin has made use of the reservation concerning the jurisdiction of those authorities.

There are no provisions relating to incompatibility between decisions apart from those in Articles 4 and 5 which provide for measures taken by the authority in the state of residence to be replaced by measures taken by the authority in the state of nationality, and for measures taken by the national authority to be upheld by the authorities in the new state of residence in the event of a change of residence.

The 1980 Luxembourg Convention provides for more fundamental exemptions, in that it authorizes more thorough checks as to indirect jurisdiction and adds further grounds for refusal. These, apart from the traditional ground that decisions are incompatible, include a very vague reference to the fundamental principles of family law and, in particular, an assessment of the interests of the child, which opens the door to a thoroughgoing review of the merits of a case, although that is forbidden. However, in the European Union countries this notion seems to have been applied in a comparatively sensible and unbiased manner.

B. Enforcement

25. The Hague Conventions of 1961 (protection of infants) and 1971 (divorce) make no provision for any ad hoc procedure similar to that laid down in the Brussels Convention of 1968. In contrast, the Hague Convention (child abduction) and the Luxembourg Convention (custody of children), both of 1980, set up a specific procedure
and provide for the destination of specific authorities. Only the Luxembourg Convention, however, sets up an enforcement procedure as precise as that laid down in the Brussels Convention.

The gap left by the 1961 Hague Convention was formally closed by the 1980 Conventions, each in relation to the type of situation which it covers, so that one might expect the conventions to complement each other.

That is far from being the case, however. The fields of application of the two instruments diverge, in terms of both territorial and material scope (particularly as regards the definition of an "infant" in the 1961 Hague Convention and the upper age limit of 16 years set by the Luxembourg Convention). Nor do the rules on direct jurisdiction in the 1961 Hague Convention precisely match those on indirect jurisdiction in the Luxembourg Convention: the former, in a general sense, recognize the jurisdiction of the court of the place where the child habitually resides or of which he or she is a national, while the latter, in certain circumstances (where more than six months have passed since the removal without any application for the child's return), allow the court addressed to refuse recognition and enforcement of a decision taken by the court of origin, even where that court has valid jurisdiction within the meaning of the Hague Convention.

It will be appreciated, then, why the review of the 1961 Convention now under way is moving towards the idea of introducing common rules on enforcement.

The 1980 Hague Convention makes it pointless to go through an enforcement procedure abroad in that it neutralizes the effects of wrongful removal, the only potential situation which it covers, in order to encourage the conducting of all proceedings in the child's country of habitual residence.

§3. Rules on conflict of laws

26. Even though the problems associated with identifying the law to be applied to the merits of a disputed case are not the subject of this study, since they are not covered by the draft Brussels II Convention, it may be worth while summarizing the rules on conflict of laws set out in the instruments under discussion, the salient feature of which is that they all concern conflicts of jurisdiction.

These conflict rules are not actually explicit, which causes difficulties of interpretation. We have seen what happens in relation to the duality between national law and the law of the state of habitual residence in the 1961 Hague Convention, in relation to recognition of a relationship subjecting an infant to authority arising directly from the national law applying to the infant. At all events, the underlying assumption made by the authors of the Hague Convention was that in this area the authority applied to would only willingly apply its own law, to the exclusion of any foreign law. Such an assumption is nowadays open to challenge. Although it is, of course, understandable that preference would be given to the authorities in the state of residence under the proximity principle, it would appear that a measure affecting a child can just as well be determined under foreign law, at least within a well-defined community of states embracing common principles as regards the protection of infants. What is apparently essential is that measures decided on should not be open to challenge abroad.
It would also be worth lifting the shroud of mystery which cloaks the real importance of identifying the body of law applicable to the substantive issue of custody rights by making a comparative study of the domestic law of the Member States of the Union. The test of the interests of the child, as assessed by the court alone, is probably the deciding factor. The observation might be less relevant when it comes to protection measures in the strict sense, since, although these too require an assessment of the interests of the child, the practical arrangements for carrying them out are likely to vary from one state to another. Where these measures are concerned, reasons of effectiveness suggest that there is no solution but to apply the law of the state where the child resides.

There is also an indirect conflict rule in the 1970 Hague Convention, which allows recognition to be refused in the fairly exceptional event of husband and wife being nationals of a state where there is no provision for divorce.

§4. International cooperation

27. A distinction has to be made here between the exchange of general information between central authorities and the notification of specific facts in a particular set of proceedings, or indeed the establishment of more far-reaching forms of cooperation. It is also important not to confuse purely administrative cooperation with judicial cooperation.

The 1961 Hague Convention contains various rules which set up "embryonic" forms of mutual assistance in the judicial sphere, though without specifying the practicalities of implementing them. The first such rules authorize the authorities of a state which order a protection measure to make the authorities of another state, with their agreement, responsible for carrying it out. Secondly, the requirement to provide information is placed on the contracting states; this comprises both a general obligation to keep the authorities of the state whose nationality the child holds informed of any measures taken and a requirement to send prior notice to the authorities of the state of present or former habitual residence if certain measures are taken or superseded in another contracting state. Lastly, where decisions are still in force, the authorities with jurisdiction to take new protection measures must exchange views with the authorities that took the decisions.

These measures have not been put into practice in any real sense, however, probably because of the discrepancies between different legal traditions as to the penalties for infringing them, though also because of the excessive burden of work which they would represent. The call for cooperation in the 1961 Hague Convention, however, prompted the French and Portuguese Governments to sign an agreement on judicial cooperation in the protection of infants in Lisbon on 20 July 1983. As well as the exchange of general information, the two states undertake to act on applications for information in civil or administrative proceedings before the judicial authorities.

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10 Ibid., p. 117.
The *Luxembourg and Hague Conventions of 1980* on custody and child abduction rely on cooperation between the central administrative authorities which they establish. This cooperation takes place in individual cases where preference is given to finding amicable solutions, and is not confined to general exchanges of information. The authorities concerned are, however, also required to pass information on to the courts and, where appropriate, ask them to intervene. Even so, the conventions establish no particular machinery to do this, and each state is to set up its central authorities by its own methods. Whether these instruments have any practical effect depends, obviously, on how well and how quickly these authorities act. The Council of Europe has done its best to improve the system by producing documentation and recommendations for the central authorities.

28. It is regrettable that there is no comprehensive form of judicial cooperation on family matters.

However, under the auspices of the Hague Conference, a *Convention on Civil Procedure* was concluded on 1 March 1954. It confines itself, though, to the use of diplomatic and consular channels and, these days, seems very out of touch with the internationalization of family ties and the rapid transmission of information which this requires. But there are some forms of machinery set up by the Convention which merit attention.

The Convention allows the judicial authorities of a contracting state to communicate by letters rogatory with the competent authority in another contracting state to ask it, within its sphere of jurisdiction, to order an inquiry or carry out other judicial acts. The letters are, however, to be transmitted by the consul of the requesting state to the authority designated by the requested State, and any difficulties which arise at this stage are to be settled through diplomatic channels. The Convention states, however, that there is nothing to prevent two contracting states from agreeing to permit direct transmission of letters rogatory between their respective authorities.

In a future Brussels II Convention, there could be provision for the use of letters rogatory in two senses. First, in the event of a court which granted a divorce taking measures relating to children residing abroad, it could be a means of organizing a hearing of a child, while acknowledging that, from the point of view of the actual child, the courts in the state of residence would be the best qualified to take any decision concerning him or her. Second, it could be a means of compiling information about either or both of the spouses (e.g. by securing a report establishing adultery or organizing a hearing of the holder of custody rights), particularly where they are resident abroad.

It should be possible to establish direct communication between the judicial authorities in the European Union Member States, as has been done in the Brussels Convention with respect to the service of writs between law officers.

**SECTION 3 - THE SCOPE OF INTERNATIONAL CONVENTIONS**

§1. **Material scope**

A. **Divorce and separation**
29. The 1970 Hague Convention concerns all divorces and separations "which follow judicial or other proceedings officially recognized".

This form of words is flexible enough to include any proceeding, even of an administrative, legislative or religious character, provided it is recognized by the authorities of a state. The requirement for "proceedings officially recognized" must be understood as expressing the need for compliance with a minimum number of acts or formalities prescribed by rules and laid down by an authority or at least with its help or in its presence, and for the proceedings to be prescribed or authorized by the contracting state as the means of securing a divorce. Article 1 stipulates that the proceedings must be "legally effective". This stipulation limits recognition to procedures which have achieved the desired result, thereby excluding decisions to refuse a petition for divorce or legal separation and thus enabling a fresh petition to be submitted in another state.

The interpretation of these terms and the application of the Convention to repudiation has given rise to substantial divergences in court practice, primarily in states which have incorporated the Convention into their internal law. The difficulty could probably have been avoided if the wording had referred to decisions taken "by authorities in the Contracting States".

There are other major exclusions from the scope of the Convention. It does not cover either nullity proceedings or decisions to refuse a petition for divorce or legal separation. It does not apply to "findings of fault or to ancillary orders pronounced on the making of a decree of divorce or legal separation: in particular, it does not apply to orders relating to pecuniary obligations or to the custody of children". The main reason for this is to avoid encroaching on instruments which already govern matters associated with the dissolving of the marital relationship and, in particular, to ensure that the dissolving of the marital relationship and the freedom to contract another marriage are duly recognized as the principal features of divorce. The Convention, that is, automatically infers capacity to contract a marriage from recognition of the divorce of the parties involved.

B. Protection, custody and abduction of children

30. Regulating measures affecting children involves bringing into play a range of legal concepts which it can be a sensitive matter to interpret. The conventions under consideration are not fully consistent with each other.

For the definition of the person concerned, the 1961 Hague Convention refers to the legal concept of an infant, while the other instruments refer to "child", which each defines separately. According to the 1980 Hague Convention, a child is someone who was less than 16 years old when a breach of custody rights occurred. Under the 1980 Luxembourg Convention, child means "a person of any nationality, so long as he is under 16 years of age and has not the right to decide on his own place of residence under the law of his habitual residence, the law of his nationality or the internal law of the State addressed".

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11 The United Kingdom, for example, places repudiation within the material scope of the Convention, subject to compliance with certain conditions, while the courts in the Netherlands have decided that the Convention does not cover such acts.
As far as the measures covered are concerned, the 1961 Hague Convention refers to "measures of protection" without defining the expression. The courts have done this empirically, sometimes including particular measures under these terms, sometimes excluding others. Judicial practice in all the states concerned - apart from those which retain the reservation under Article 15 - now concedes that the Convention applies to measures of protection decided on as part of a divorce settlement, such as the allocating of parental authority and custody and access rights.

The concept of custody rights is covered by the 1980 Luxembourg and Hague Conventions. The former assigns it to any decision, whether judicial or administrative, which relates to the care of the person of the child, as well as any decision relating to the right of access to him or her. The latter stipulates that it covers "rights relating to the care of the person of the child".

Both 1980 Conventions state that custody rights include the right to determine the child's place of residence. This raises the question of the applicability of the Convention to a breach of a decision granting custody rights plus an order forbidding a child to leave the relevant territory without the consent of the court or of the parent without custody rights. The courts have given a positive response where the Hague Convention is concerned, as it also covers custody rights held by the courts and the right to determine the child's place of residence as included in the definition of custody rights. The courts have interpreted this notion very flexibly thanks to the inclusion of the right to determine the place of residence in the definition and the reference to the concept of "joint custody".

The Hague Convention of 1980, like that of 1961, also conceives of custody rights by reference to national law. The 1980 text regards them as conferred directly by the operation of the law or of a decision taken according to the law of the state of residence, the term "law" both referring to the private international law of that state and covering foreign decisions recognized in that state. The 1961 text refers to the automatic relationship subjecting an infant to authority as recognized by the law of the state of nationality, or to a decision emanating from an authority in the state of nationality or residence.

31. A discussion of the special question of child abduction, too, requires a definition of the situation covered by the term.

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12 - Exercise of parental authority, especially over children born outside wedlock;
- custody and access rights in respect of children whose parents are de facto separated;
- administration of an infant's property by the parents or parent with custody rights;
- guardianship and appointment of the guardian, ad hoc guardian and second guardian;
- educational assistance provided by a youth protection board to pay for residence in a hostel during vocational training or with a foster family;
- permission from a judge supervising a wardship for a disabled child to be committed to a hospital education centre.

13 - Proceedings to establish affiliation in respect of an infant;
- proceedings to secure or exercise on behalf of an infant the right to choose a nationality;
- measures provided for under criminal law and general prescriptions under social legislation (such as laws on child labour), compulsory schooling and prohibitions on visiting public houses and cinemas.
Under the 1980 Hague Convention, "wrongful" removal or retention of a child means removal or retention in breach "of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention", provided that "at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention".

According to the 1980 Luxembourg Convention, "improper" removal covers several situations and may involve:
- removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a contracting state and which is enforceable in such a state;
- failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised; or
- a removal which is subsequently declared unlawful within the meaning of the Convention.

C. Interim measures

32. Interim measures are particularly important in crisis situations, either during a marriage or when a marriage is being dissolved or modified, and are a way of dealing with the urgency there and then. But any protection measure, if it affects custody, must necessarily be to provide interim relief: in that sense, it can be modified if circumstances change.

The conventions discussed here deal with the question of interim measures at varying levels.

The more traditional instruments deal with the temporary aspect of emergency situations by leaving it up to national law to settle the question of international jurisdiction. The Brussels Convention is a case in point. Only the 1961 Hague Convention on the protection of infants places time limits on the effect of such measures once the authorities with jurisdiction under the Convention have taken the necessary steps.

To some extent it can be said that the 1980 Hague Convention, basically, regulates the temporary aspect in that it neutralizes the effects of a wrongful removal by means of an urgent measure to safeguard the existing situation, since it requires the child to be returned without any determination on the merits of any custody issue.

As to the effectiveness of foreign decisions, the 1980 Luxembourg Convention makes no distinction as to whether the decision contains interim or final measures. In fact the distinction seems less relevant in this connection than the distinction which depends on the actual procedural status of the decision, i.e. on whether it is final or not. Here the Convention stipulates that if the foreign decision is not final - i.e. if an ordinary form of review has been commenced - proceedings for enforcement before the court addressed may be adjourned.

33. The essentially provisional nature of any protection measure has not been entirely overlooked by the international conventions. While the 1961 Hague Convention is somewhat rigid on this matter, because it tries to strike a balance between the authorities
of the states of residence and nationality, the 1980 Hague Convention allows the court hearing a case, where proceedings have been commenced more than a year after removal, to refuse to return the child if "the child is now settled in its new environment". More broadly, the 1980 Luxembourg Convention allows the court addressed, where proceedings have commenced more than six months after removal, to take "a change in circumstances" into account in the interests of the child.

The danger is that the end-result of the partitioning effect which the very specific focus of the various conventions under discussion produces may be to preclude a harmonized response to counter-claims. Quite often, in response to proceedings, especially divorce proceedings, against him or her, a spouse will commence proceedings abroad, in the country to which he or she has moved or where he or she resides, for interim measures in respect of the marriage, or vice versa.

§2. Territorial scope

A. The 1961 Hague Convention

34. The test for territorial scope is where, in the territory of the contracting states, the infant habitually resides. The infant's nationality, however, comes into play in two cases:

- the rules conferring jurisdiction on the authorities of the state of the infant's nationality are applicable only where the infant is a national of one of the contracting states;

- contracting states are free to reserve the right to limit application of the Convention to infants who are nationals of one of the contracting states, an option of which Spain and Luxembourg have availed themselves.

B. The 1970 Hague Convention

35. The Convention in principle applies in any contracting state to a divorce obtained in another contracting state. The United Kingdom, Sweden and the Netherlands, however, have incorporated the Convention into their ordinary law, thereby extending application of the principles set out in it to decisions given in countries which are not parties to the Convention. As national experience shows, most notably in the United Kingdom, this technique can lead to an interpretation which is a travesty of the original text, in that it has to take cognizance of unusual practices or institutions in states parties to which the wording of the text is inappropriate and gradually moves away from the agreed text through succeeding amendments to domestic law.

C. The 1980 Hague Convention

36. The Convention applies whenever a child who habitually resides in a contracting state is wrongfully removed or retained in another contracting state. It covers "any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights" and states that its objects are to secure the prompt return of children wrongfully removed to or retained in any contracting state and to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the others.
The courts, to varying degrees, do nevertheless generally rely on this Convention in the event of removal from a non-contracting state.

D. **The 1980 Luxembourg Convention**

37. The Convention applies to the recognition and enforcement in a contracting state of a decision on custody given in another contracting state.

§3. **Resolving conflicts of conventions**

A. **Applying the principle of maximum effectiveness**

38. Most of the instruments under examination do not prevent contracting states from concluding new agreements between themselves or between themselves and other countries. The 1980 Hague Convention, however, states specifically that it prevails over that of 1961.

The **1961 Hague Convention** does not exclude the conclusion of subsequent agreements. Even though the text is not clear on the matter, the explanatory report acknowledges that such derogations are not excluded in any way.\(^\text{14}\) The Nordic states, for example, intend that the conventions agreed in the Nordic Council shall prevail as between themselves.

The Convention expressly yields to bilateral conventions to which contracting states are parties. It is generally thought that a bilateral convention between country A and country B applies only to infants having the nationality of country A, and no other nationality, and residing in country B, or vice versa, leaving the Hague Convention to govern cases involving dual country A/country B nationality.

The **1980 Hague Convention** does "not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights".

It also allows two or more contracting states, in order to limit the restrictions to which the return of the child may be subject, from agreeing between themselves to derogate from any provisions which may imply such a restriction.

The **1980 Luxembourg Convention** does "not exclude the possibility of relying on any other international instrument in force between the State of origin and the State addressed ... for the purpose of obtaining recognition or enforcement of a decision".

Furthermore, it does not affect "any obligations which a Contracting State may have towards a non-contracting State under an international instrument dealing with matters governed by this Convention".

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It stipulates, lastly, that when two or more contracting states have enacted uniform laws in relation to custody of children or created a special system of recognition or enforcement of decisions in this field, or if they do so in the future, they are free to apply, between themselves, those laws or that system in place of the Convention or any part of it.

As far as the relationship between the 1980 Luxembourg Convention and the 1980 Hague Convention is concerned, the reason why there is so little in the way of reported cases on the former may be that applicants prefer the Hague Convention, which can be applied flexibly and quickly, whereas the Luxembourg Convention is slow and complicated to apply.

The 1970 Hague Convention authorizes the application of other conventions to which one or more contracting states are or may in the future become parties and which relate to the same matters.

It urges the states bound by it, however, not to conclude any agreement incompatible with it unless they are able to invoke special circumstances based on regional or other ties. Notwithstanding any such agreements, the contracting states are required to apply the Convention in relations with the states parties to it and to recognize divorces and legal separations granted in any one of them, even if it is not a party to the other agreements.

B. Overlaps between conventions in relation to measures affecting children

39. The 1970 Hague Convention does not conflict with the other conventions discussed in this study, since it excludes from its scope orders relating to child custody made in connection with a matrimonial cause.

The prospect of a Brussels II Convention which might concern ancillary measures involving children should make us think very carefully about the risks of the system breaking down because several instruments exist side by side.

Custody rights granted and organized during divorce proceedings in a state other than that of the child's habitual residence will not necessarily be protected under the 1980 Hague Convention, as the decisions might well not be recognized in the state of residence on the ground that the court granting the divorce was unable to decide on the merits of rights of custody in the event of wrongful removal (Article 16). Where that happens, the authorities of the state where the child is should have allowed him or her to be returned to the state of residence (similarly if the child is removed during divorce proceedings to the state where the proceedings are taking place), which would thus give priority to any decision given in the state of residence. The Brussels II Convention ought therefore to exclude jurisdiction by the court hearing a divorce case when the fact that the child is in the state where the case is being heard is connected with a wrongful removal within the meaning of the Hague Convention.

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15 The Nordic conventions, for example, resolve conflicts by providing that other conventions, particularly the Hague Convention, are not to apply in relations with countries which are parties to the Nordic conventions.

16 *Infra*, paragraph 115.
Similarly, a custody measure taken by the authorities in the state granting a divorce in respect of a foreign child residing in a state party to the 1961 Hague Convention could well be refused recognition pursuant to that Convention. Recognition would then have to be applied for on the basis of the Brussels II Convention itself.

In other words, the simultaneous existence of other international conventions could affect the effectiveness of the Brussels II Convention, even where there was no formal conflict of instruments.

In a more fundamental sense, it would then be necessary to look for methods of reconciling the conventions in such a way as to forestall any risk of breakdown, by relying on the actual content of the jurisdiction rules. Such methods are discussed in Chapter 3.