# THE UNITED STATES JOINS THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

## A "HISTORY" WITH COMMENTS

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On the basis of enabling legislation passed at the end of 1963,[1] the United States has joined as a full member two noted international institutions dedicated to work on unification of private law: the Hague Conference on Private International Law whose origins go back to the end of the last century, and the International Institute for the Unification of Private Law in Rome which Italy set up in the nineteen-thirties to assist the League of Nations in work on unification of law. Participation by the United States as a member constitutes a major development, domestically and internationally. A long policy of not collaborating in this kind of endeavor came, finally, to an end, though too late to have an immediate impact on an ambitious project in course, unification of the law on the international sale of goods. We shall revert to this project in due course.

## I

### ABSTAINING

Efforts in modern times to do something about unification of law internationally are at least a century old. In 1874, the Government of the Netherlands made an attempt to bring governments together to work on unification of conflicts rules. Following a suggestion made by T. M. C. Asser,[2] it proposed that the rules on recognition of foreign judgments be made uniform.[3] The United States was among the governments approached.[4] Secretary of State Hamilton Fish declined the invitation. The complications arising from the American federal system were emphasized in the reply.[5] No machinery existed at that time for work even within

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The views expressed in this article are those of the author, and do not necessarily reflect the views of other members of the United States Delegations to the Sessions of the Hague Conference.

[1] In the form of a Joint Resolution, Pub. L. No. 244, 88th Cong., 1st Sess. (Dec. 30, 1963), 77 Stat. 775, 22 U.S.C. § 269g (1964).

[2] Asser, *De l'effet ou de l'exécution des jugements rendus à l'étranger en matière civile et commerciale*, 1 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 82, 409, 473 (1869). On Asser see Offerhaus, *l'Université d'Amsterdam et le Droit International Privé*, in IUS ET LEX—FESTGABE FÜR MAX GUTZWILLER 283 (1959).

[3] See [1873-1874] HANDELINGEN DER TWEEDE KAMER DER STATEN GENERAL, Bijlagen No. 117, at 31, No. 113, A, at 10.

[4] See [1874] FOREIGN REL. U.S. 791.

[5] *Id.* at 795.

the Union on internal unification of law. Other governments were hesitant for other reasons and nothing came out of the plan.[6]

Twenty years later the Government of the Netherlands achieved what it had tried unsuccessfully in 1873/74. Representatives of a number of European governments met at The Hague in 1893 to work on unification of rules of private international law. Only European nations had received invitations. The Government of the United Kingdom decided not to participate; it felt that the legal institutions of England differed too widely from those of Continental Europe.[7] The Conference of 1893, as well as those which followed in 1894, 1900, and 1904, were productive. Conventions on questions of personal status, prepared at these meetings, received numerous ratifications and a convention on civil procedure (judicial assistance) was ratified throughout Continental Europe.[8] In England, some specialists began to take an interest in the work. At the meeting of the International Law Association in Antwerp in 1903, Sir Walter Phillimore criticized his government's policy,[9] and a resolution, proposed by him and seconded by an American member of the Association, was adopted urging the British Government to reconsider its position.[10]

In the United States, a jurist of standing, Simeon E. Baldwin, had taken note of the work done at The Hague and reported on it in the journals.[11] He was, in principle, in agreement with the policy of the two common law countries of not going to the Conference; however, he made the point that constitutional difficulties could be overcome by the use of uniform legislation, and he referred to what had been done in the United States by the Annual Conference for Promoting Uniform Legislation—today's National Conference of Commissioners on Uniform State Laws —to secure the general adoption by the states of the Uniform Negotiable Instruments Act.[12] At the Universal Congress of Lawyers and Jurists held in

[6] See [1874-1875] HANDELINGEN DER TWEEDE KAMER DER STATEN GENERAAL 309, 310, 315, 416.

[7] See Van Hoogstraten, *The United Kingdom Joins an Uncommon Market: The Hague Conference on Private International Law*, 12 INT'L & COMP. L.Q. 148, 150 (1963); Asser, *La codification du droit international privé*, 25 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 521, 528 (1893).

[8] See 1 ERNST RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 33 (2d ed. 1958). The conventions on questions of status were based on the principle of nationality. They have since been denounced by a great number of the states which ratified them. See 1 RABEL at 34; Offerhaus, *La Conférence de La Haye de droit international privé*, [1959] SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 27, 30 (1960).

[9] Phillimore, *The Desirability of the British Government Taking Part in the Legal Conferences at The Hague on Private International Law*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 21ST, ANTWERP 1903, CONFERENCE 80 (1904).

[10] *Id.* at 85.

[11] See Baldwin, *The Beginnings of an Official European Code of Private International Law*, 12 YALE REV. 10 (1903); Baldwin, *The New Code of International Family Law*, 12 YALE L.J. 487 (1903); Baldwin, *Recent Progress Towards Agreement on Rules to Prevent a Conflict of Laws*, 17 HARV. L. REV. 400 (1904); Baldwin, *The Hague Conference of 1904 for the Advancement of Private International Law*, 14 YALE L.J. 1 (1904); Baldwin, *The Comparative Results, in the Advancement of Private International Law, of the Montevideo Congress of 1888-89 and the Hague Conferences of 1893, 1894, 1900, and 1903*, 2 AM. POL. SCI. ASS'N, 1905 PROCEEDINGS 73 (1906). *Cf.* FREDERICK H. JACKSON, SIMEON EBEN BALDWIN 147 (1955).

[12] Baldwin, *Recent Progress Towards Agreement on Rules to Prevent a Conflict of Laws*, 17 HARV. L. REV. 400, 403 (1904).

St. Louis in 1904, two European professors, D. Josephus Jitta of Amsterdam and F. Meili of Zurich, reported on the work of the Hague Conference.[13] In the discussion, Judge Baldwin joined in the wish expressed by Professor Jitta that, in future conferences of this character, the invitations of the powers extending them may not be limited to a single Continent.[14]

In the years preceding the First World War, Arthur K. Kuhn became the principal promoter of American participation in the Hague Conferences.[15] In a paper read at the Madrid, 1913, Conference of the International Law Association, he urged that Great Britain and the United States be represented at the Hague Conference meetings.[16]

The United States Government had, it should be noted, sent an Observer to an international conference held at The Hague in 1910 (and continued in 1912) which worked on unification of the substantive law governing bills of exchange and checks. The observer was instructed to call attention to constitutional difficulties and he declined to sign the drafts. He did promise that the drafts would be brought to the attention of the several states of the Union.[17] When the Inter-American High Commission on Uniform Legislation undertook work on the same subject, an observer of the United States Government made a similar statement at the meeting held in Buenos Aires.[18]

John H. Wigmore was one of those who believed at this period in the need for assimilation of the laws in certain areas. He looked with concern at the negative attitude taken by the Government. In a paper read before the Second Pan-American Scientific Congress held in Washington in 1916, he addressed himself to the special problems raised by American participation in international work on unification of law.[19] Discussing the various methods available for unification of law, he concen-

[13] Jitta, *A Review of the Four Hague Conferences on Private International Law,* in OFFICIAL REPORT OF THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS 117 (1905); Meili, *A Review of the Four Hague Conferences on Private International Law, id.* at 135.

[14] Baldwin, in OFFICIAL REPORT, *op. cit. supra* note 13, at 172, 175.

[15] As early as 1905 Kuhn had recommended representation at the Hague Conference meetings. See Kuhn in 2 AM. POL. SCI. ASS'N, 1905 PROCEEDINGS 87, 88 (1906). Kuhn was at that time engaged in translation of one of Meili's works. FRIEDRICH MEILI, INTERNATIONAL CIVIL AND COMMERCIAL LAW (Kuhn transl. 1905).

[16] Kuhn, *Should Great Britain and the United States be Represented at The Hague Conferences on Private International Law,* in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 28TH, MADRID 1913, CONFERENCE 556 (1914); also in 7 AM. J. INT'L L. 774 (1913). *Cf.* Kuhn, *Doctrines of Private International Law in England and America Contrasted With Those of Continental Europe,* in INTERNATIONALE VEREINIGUNG FÜR VERGLEICHENDE RECHTSWISSENSCHAFT, VERHANDLUNGEN DER ERSTEN HAUPTVERSAMMLUNG, HEIDELBERG 1911, at 271 (1912).

[17] See Conférence de La Haye pour l'Unification du Droit relatif à la Lettre de Change, Actes 36, 69 (1910); S. Doc. No. 768, 61st Cong., 3d Sess. (Conference on Bills of Exchange) 89, 117, 319, 321 (1911). Deuxième Conférence de La Haye pour l'Unification du Droit en Matière de Lettre de Change, de Billet à Ordre et de Cheque, Actes 148 (1912); S. Doc. No. 162, 63d Cong., 1st Sess. (Bills of Exchange) 158, 159, 317, 380 (1913).

[18] See ALTA COMISIÓN INTERNACIONAL DE LEGISLACIÓN UNIFORME, ACTAS, INFORMES, RESOLUCIONES Y DOCUMENTACIÓN GENERAL 267, 280 (1916); S. Doc. No. 739, 64th Cong., 2d Sess. 107 (1917).

[19] Wigmore, *The International Assimilation of Laws—Its Needs and Its Possibilities from an American Standpoint,* 10 ILL. L. REV. 385 (1916).

trated on the questions to be faced when the subject matter is within the legislative jurisdiction of the states, rather than the Union. For these cases Wigmore favored the use, with congressional approval,[20] of compacts between states and foreign nations.[21] Use by the states of compacts, both for interstate and international purposes, continued to be foremost in his mind. In 1921, he presented a voluminous report on the subject to the National Conference of Commissioners on Uniform State Laws in his capacity as chairman of its Committee on Inter-State Compacts.[22] This important document concluded with the warning, often quoted, about adverse consequences of American absence from international work on unification of law:[23]

If a world-conference has adopted a uniform code with American ideas left out, the legislatures of America will be obliged either to adopt it in its foreign shape moulded by the bargains of foreign powers among themselves, or to reject it and thus remain behind in the highroad of international unity, suffering all the disadvantages of diversity, and conflict of law.

After the First World War the Government of the Netherlands was anxious to reactivate and even enlarge the Hague Conference. Among those invited to attend a new session were the United Kingdom and the United States. Following the old pattern, the United States declined.[24] The United Kingdom accepted to participate in the discussion of one topic on the agenda, Bankruptcy. When, at the session held in 1925, the Conference embarked upon preparation of a draft which, contrary to the expressed desires of the British Delegation, provided for administration of all assets by a single jurisdiction, the Delegation withdrew.[25] But the United Kingdom was back at the next session held in 1928, where its Delegation took part

[20] Such approval is required by the Constitution. "No State shall, without the Consent of Congress . . . enter into Agreement or Compact with another State, or with a foreign power . . . ." U.S. CONST. art. I, § 10(3).

[21] Wigmore, *supra* note 19, at 396. *Cf.* Wigmore, *Problems of World-Legislation and America's Share Therein*, 4 VA. L. REV. 423, 436 (1917), also in JOHN H. WIGMORE, PROBLEMS OF LAW 105, 126 (1920).

[22] See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1921 HANDBOOK 299 (1921). The proposal of using compacts on the international level found no support. See the Landis Report, *id.*, 1932 HANDBOOK 282, 290 *et seq.* (1932).

[23] *Id.* 1921 HANDBOOK 327, 328 (*Report*, § 13(d)).

[24] In the answer it was said that it would not be practicable at this time for the United States to take part in the Conference. Of the subjects on the agenda three were under state rather than federal jurisdiction (succession, divorce and separation, and marriage), which would make it difficult to participate in an international convention. As regards bankruptcy, that matter was under consideration with a view to possible reform of the bankruptcy laws; pending the outcome of this proposed reform it would be difficult to subscribe to a convention on the subject. The remaining subject was recognition and enforcement of judgments. The various questionnaires had been submitted to the American Bar Association but time was lacking to prepare adequate answers. Should conventions be agreed upon at the coming Conference, the Government would be glad to have an opportunity to consider them with a view to possible adherence thereto. Memorandum of conversation between Undersecretary of State Joseph C. Grew and the Minister of the Netherlands on Oct. 6, 1925. National Archives, State Dep't Record Group 59, File #504.4H1/8. Cf. Loder, *La cinquième Conférence de Droit International Privé*, [1927] GROTIUS ANNUAIRE INTERNATIONAL 1, 5. Judge Loder, president of the Fifth Conference, felt that these arguments lacked clarity.

[25] See Conférence de La Haye de Droit International Privé, Actes de la Cinquième Session 46, 87 (1926).

in work on two topics, revision of the Convention on Civil Procedure and preparation of a convention on choice of the law to govern international sales contracts.[26] The United States had not been invited again.[27]

No report has been found on the 1925 and 1928 sessions in American writings. However, the Government had become involved, technically at least, in problems of unification of the law of conflicts as a participant in the International Conferences of American States. Production of a Code on Private International Law was one of the projects of the Conferences. Active collaboration was avoided,[28] and when the Bustamante Code on Private International Law was produced at the Sixth Conference held at Havana in 1928,[29] the United States Delegation abstained from voting.[30] A reference to constitutional difficulties was offered in explanation. This action or, rather, non-action led to a full discussion of the constitutional and practical aspects of the problem at the annual meeting of the American Society of International Law in 1929.[31] Arthur K. Kuhn pointed at the possibility of using uniform legislation.[32] Professor Quincy Wright noted the availability of still another method.[33] Referring to United Kingdom practice with accession clauses for the benefit of members of the Commonwealth, he said that he saw no reason why the United States could not make a treaty on private international law and put into the treaty itself a statement that it should not apply within the territory of any state of the United States until the President had so declared; this would leave the President free to withhold such declaration until the legislature of a particular state had brought its legislation into conformity with the treaty. At the same meeting, but in another context, Charles Evans Hughes discussed the availability of the treaty-making power in regard to topics over which the states, rather than the Congress, have legislative jurisdiction.[34] He concluded with the often quoted affirmative statement about availability of the power when the conduct of our international relations is involved.[35]

[26] See *id.*, Actes de la Sixième Session 169 *et seq.*, 265 *et seq.* (1928).

[27] "In view of their nonchalant attitude of 1925, the United States was no longer invited." Loder, *La sixième Conférence de Droit International Privé*, [1929] GROTIUS ANNUAIRE INTERNATIONAL 7 (our transl.).

[28] See Scott, *The Gradual and Progressive Codification of International Law*, 21 AM. J. INT'L L. 417, 448-49 (1927).

[29] See THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928, at 325 *et seq.*, 443 (Scott ed. 1931).

[30] *Id.* at 371. Cf. Lorenzen, *The Pan-American Code of Private International Law*, 4 TULANE L. REV. 25 *et seq.* (1929).

[31] 23 AM. SOC'Y INT'L L. PROCEEDINGS 25 *et seq.* (1929).

[32] *Id.* at 33-36.

[33] *Id.* at 39, 40.

[34] *Id.* at 194 *et seq.*

[35] "From my point of view the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations . . . . But if we attempted to use the Treaty-Making power to deal with matters which normally and appropriately were within the local jurisdiction of the states, then again I say there might be ground for implying a limitation upon the Treaty-Making power . . . ." *Id.* at 195-96.

The League of Nations was at the time working on unification of the law of bills of exchange and checks. Invited to participate, the United States Government reiterated the position it had taken with regard to the preceding Conferences held at the Hague in 1910 and 1912.[36] An observer was present at the Geneva Conferences of 1930 and 1931 which produced the uniform laws and conflicts conventions on Bills of Exchange[37] and Checks,[38] now the law on the subject in almost all of Continental Europe.[39]

No further meeting of the Hague Conference on Private International Law was called in the years before the outbreak of the Second World War. The war over, the Government of the Netherlands was anxious to have the activities resumed. A memorandum addressed to the old members of the Conference in 1949 cleared the way for the call of a new session. The memorandum included the suggestion that a possible extension of the membership be discussed at the new session.[40] At the post-war session which took place in October 1951 the Conference gave itself a permanent character[41] and a Charter.[42] As regards membership, the desired collaboration with the Council of Europe made an extension of the membership to states members of the Council but not of the Conference (Greece, Iceland, Ireland, and Turkey) desirable. In the debate, the question of American membership came up incidentally. A delegate from West Germany remarked that Americans in his country had expressed surprise that the United States had not been invited.[43] Professor Cheshire referred to a possible entry of the United States in the Conference in an argument he made for admission of English as an official language.[44] But the chairman parried the latter question by saying that, in his view, such entry was a matter to be left to the future.[45]

[36] See INTERNATIONAL CONFERENCE FOR THE UNIFICATION OF THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES, PREPARATORY DOCUMENTS (League of Nations Doc. C. 234.M.83. 1929.II (C.I.L.C.I.)) 100 (1929). *Cf. supra* note 17.

[37] See LEAGUE OF NATIONS, RECORDS OF THE INTERNATIONAL CONFERENCE FOR THE UNIFICATION OF LAWS ON BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES, 1ST SESSION, GENEVA 1930, at 170. The Observer limited himself to a few references to a report prepared in 1925 by the U.S. section of the Inter-American High Commission (*id.* at 244, 250, 259, 332).

[38] See LEAGUE OF NATIONS, RECORDS OF THE INTERNATIONAL CONFERENCE FOR THE UNIFICATION OF LAWS ON BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES, 2ND SESSION, GENEVA 1931, at 14. The Observer took no active part in the discussions.

[39] See 1 RABEL, *op. cit. supra* note 8, at 38; 4 *id.* at 190.

[40] See CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, DOCUMENTS RELATIFS À LA SEPTIÈME SESSION 2 (1952). *Cf.* [1949/50] JAARBOEK VAN HET MINISTERIE VAN BUITENLANDSE ZAKEN 99, 101 (1950).

[41] Permanency had been recommended by T.M.C. Asser as early as 1902 in a report to the Institut de Droit International. See *Institut de Droit International*, 19 ANNUAIRE 338, 345 (1902).

[42] Text in 102 U. PA. L. REV. 363 (1954), 220 U.N.T.S. 121 (1955).

[43] See CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES DE LA SEPTIÈME SESSION 271 (1952).

[44] *Id.* at 334. Cf. Cheshire, *The 1951 Hague Conference on Private International Law*, 38 TRANSACT. GROT. SOC'Y 35, 40 (1953).

[45] CONFÉRENCE DE LA HAYE, *op. cit. supra* note 43, at 335.

## II

### OBSERVING

In the United States, attention was given to the 1951 session of the Hague Conference. The *American Journal of International Law* brought a Comment.[46] The newly formed *American Journal of Comparative Law* published in translation the four conventions prepared at the session[47] and carried a Comment, signed K. H. N., entitled: "The United States and the Hague Conference on Private International Law."[48] Therein the absence of the United States from the session was noted; and it was suggested that representatives from the United States could have made a contribution to the discussions. The vast internal American experience with unification of law through uniform legislation was emphasized and, with respect to use of uniform legislation, it was observed that, in opening the First Hague Conference in 1893, its president, T. M. C. Asser, had spoken of possible use of either uniform laws or conventions, or of a combination of both.[49]

The Comment in the American Journal of Comparative Law had repercussions not anticipated by its author. In a letter to him in October 1952, the secretary general of the Hague Conference, M. H. van Hoogstraten, explained the rules which had been followed for extending invitations to the Seventh Session; he added that, at the session, a considerable number of delegates expressed sympathy with the idea of American participation in the Conference. This letter was brought to the attention of interested parties in the United States. Also in the Fall of 1952, Dr. Louis I. de Winter, a member of the Netherlands State Commission on Private International Law, the executive committee of the Hague Conference, spent several weeks in the United States, visiting among other places the law schools and gathering reactions to the idea of an American participation in the Hague Conference. The response of the academic world was favorable. At the annual meeting of the Association of American Law Schools in December 1952, a resolution in-

[46] Kuhn, *The Council of Europe and the Hague Conferences on Private International Law*, 46 AM. J. INT'L L. 515 (1952).

[47] *Documents, Seventh Hague Conference*, 1 AM. J. COMP. L. 275 (1952).

[48] K. H. N., *The United States and the Hague Conference on Private International Law*, 1 AM. J. COMP. L. 268 (1952).

[49] 1 ACTES DE LA CONFÉRENCE DE LA HAYE CHARGÉE DE RÉGLEMENTER DIVERSES MATIÈRES DE DROIT INTERNATIONAL PRIVÉ 26-27 (1893): "As for the form to adopt for the new international law, should a choice be made between that of treaties and that of national uniform laws? You know better than I the advantages and disadavantages of each of these two systems. For my part I think that no choice can be made in any absolute or general way. With regard to a number of subjects the treaty form will be inevitable; for others the desired end can be attained more easily by means of uniform laws conforming as much as possible to the drafts presented to the legislatures for approval by a central international committee, as I should like to call from now on this Conference inaugurated under such favorable conditions. Often a combination of the two systems will be possible, with the basic principles adopted in the form of a treaty and regulation of the execution and of details through national laws left to the legislatures of the states" (our transl.). *Cf.* T. M. C. ASSER, ACTES DE LA DEUXIÈME CONFÉRENCE DE DROIT INTERNATIONAL PRIVÉ 11 (1894).

troduced by Professor David F. Cavers of Harvard and seconded by Professor Elliott E. Cheatham of Columbia was adopted authorizing the Executive Committee to make recommendations to the United States Government should, during 1953, the question of participation by the United States in the Hague Conference be given consideration.[50] Private contacts continued.[51] Eventually, the Netherlands State Commission decided to consult the members of the Hague Conference on a possible extension of an invitation to the United States to join the Conference. The members of the Conference approved that an inquiry be made in Washington.

In the United States, the American Branch of the International Law Association became the center of discussion of the problems of American participation in this type of international endeavor. At the annual Branch meeting in May 1953 a panel under the chairmanship of Professor Cheatham discussed "The United States and Governmental Efforts to Unify Rules of Private International Law" on the basis of a paper prepared by the present writer.[52] Greatly expanded, the paper appeared in 1954 in the *University of Pennsylvania Law Review*.[53] A full history of governmental non-action was given and the federal government criticized for not protecting the interests of the States of the Union.

This was the period of efforts on the part of Senator Bricker of Ohio to curb the treaty-making power of the President by way of a Constitutional amendment.[54] Strongly opposed by the Eisenhower Administration, the Bricker Amendment was—by a small margin but definitively-defeated on February 26, 1954. The scare created by the episode has left memories not yet forgotten. Democratic and Republican administrations alike at all costs try to avoid another "state rights" fight in the foreign relations field.

In March 1954, the Ambassador of the Netherlands finally saw the Legal Adviser of the State Department, Herman Phleger, distinguished jurist and statesman and close associate of the then Secretary of State, John Foster Dulles. The Department of State, it was later learned, discouraged thoughts as to American membership in the Hague Conference; however, the possibility of sending an Observer Delegation to the next session of the Conference was not ruled out. In May 1954, at the annual meeting of the American Branch of the International Law Association, on the basis of a report of its Private International Law Committee, the Branch recommended that, pending the further development of methods of participa-

[50] ASSOCIATION OF AMERICAN LAW SCHOOLS, 1952 PROCEEDINGS 68.

[51] For example, the writer paid a visit to the Chairman of the Netherlands State Commission, Professor J. Offerhaus, in Amsterdam in January 1953.

[52] AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1954 PROCEEDINGS AND COMMITTEE REPORTS WITH THE MINUTES OF THE 1953 MEETING 77, 78 (1954).

[53] Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 PA. L. REV. 323 (1954).

[54] See Whitton & Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AM. J. INT'L L. 23 (1954); Sutherland, *The Bricker Amendment, Executive Agreements and Imported Potatoes*, 67 HARV. L. REV. 281 (1953); Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952).

tion in international conferences of this kind, the Department of State send observers to the meetings.[55]

Discussions took place at The Hague between the Embassy of the United States and the Permanent Bureau of the Hague Conference to find a way in which the United States could participate in the work of the Hague Conference on an observer basis. When, in May 1955, Mr. Phleger addressed the annual meeting of the American Branch of the International Law Association,[56] it was known that the discussions had progressed favorably.

The Eighth Session of the Hague Conference was to take place in October 1956. In October 1955, the Department of State addressed to a number of national organizations which had expressed interest in the work of the Hague Conference an inquiry whether they cared to be represented on an Observer Delegation to be accredited to the October 1956 session. Nominations were invited, but it was pointed out that no funds would be made available to cover expenses. The American Bar Association, the American Law Institute, the American Society of International Law, the American Branch of the International Law Association, and the National Conference of Commissioners on Uniform State Laws were among the organizations contacted. On the basis of nominations made, four persons were in the Summer of 1956 appointed to the Observer Delegation: Philip W. Amram of Washington, D. C., Joe C. Barrett of Jonesboro, Arkansas, Kurt H. Nadelmann of Cambridge, Massachusetts, and Willis L. M. Reese of New York City.[57] No instructions, written or oral, were given to the members of the Observer Delegation, nor did they meet before their trip.

The Permanent Bureau of the Hague Conference had sent to the Department of State the Committee drafts which were to be considered at the October 1956 session of the Conference. At the American Branch of the International Law Association these drafts were studied by its Private International Law Committee. The Committee Report, approved at the Branch meeting of May 1956, contained this passage:[58] "In the first place, it is to be noted that the preliminary drafts prepared for discussion at the Conference all are in the form of drafts of international conventions. Our Committee believes that alternative drafts in the form of uniform laws should be prepared by the Conference. It recommends that the Branch go on record in this respect and transmit this view to the American Delegation." Report and Resolution were filed with the Conference.[59]

The members of the United States Observer Delegation found themselves in a

[55] AMERICAN BRANCH, *op. cit. supra* note 52, at 30, 35.

[56] On another subject. AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1955-56 PROCEEDINGS AND COMMITTEE REPORTS 15 (1956).

[57] See Note, *Reports on Hague Conference on Private International Law*, 37 DEP'T STATE BULL. 585 (1957).

[58] AMERICAN BRANCH, *op. cit. supra* note 56, at 19, 56.

[59] Reproduced in CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, DOCUMENTS RELATIFS À LA HUITIÈME SESSION 230 (1957).

perplexing situation at The Hague. They knew by what organization or organizations they had been nominated, but it was unclear whom, if anyone, the Delegation represented. Though appointed by the Federal Government, the Observers were not "representing" the Government, and it was obvious that creation of false impressions should be avoided. On the other hand, equally "in the air" was the question of what if any privileges the Hague Conference would accord to the Observers. The Delegation decided to consult the President of the Conference, Professor Offerhaus. The President assured the Observers of the desire of the Conference that they participate in the discussions, especially by advising, when indicated, on the status of American law. A more reserved answer was given to the query whether the Conference might consider use of uniform legislation in addition to conventions. As suggested by the President, the Observers prepared a memorandum on this subject for circulation[60] and the Conference set a date for discussion of the question.[61]

Discussions at the session[62] did not go well at all. Contrary to what was said in the memorandum, a large number of delegates appeared to think that the United States desired a complete change in the procedures of the Hague Conference. The suggestion of the Observers to consider use of uniform legislation in addition to conventions found support only from the British delegates. They noted that this method would solve problems arising also within the British Commonwealth.[63] For differing reasons, the other speakers all opposed the idea. The Conference resolved to leave it to the national bodies to draw conclusions from the discussion.[64] Private talks after the session brought out that few of the delegates had any knowledge of the work on unification of law undertaken internally in the United States.

"Conservatism" became evident also in another connection. The question of what to do with the unsuccessful Hague draft of 1925 and 1928 on Recognition of Foreign Judgments came up for debate.[65] The Netherlands State Commission's recommendation was not to do anything further on judgments. Attention was called by the present writer to new developments, in particular, the adoption in the United Kingdom of the Foreign Judgments (Reciprocal Enforcement) Act of 1933 with the ensuing conclusion of treaties on the basis of this legislation. Notwithstanding support given by the British Delegates, the recommendation was approved.[66] But the International Law Association stepped in. Following an American suggestion, its Executive Council decided to undertake work in the field.[67] This

[60] Text in translation in *id.*, ACTES DE LA HUITIÈME SESSION 273 (1957).
[61] *Id.* at 248.
[62] *Id.* at 266-69.
[63] *Id.* at 267.
[64] *Id.* at 269.
[65] *Id.* at 282.
[66] *Ibid.*
[67] See INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 48TH CONFERENCE, NEW YORK 1958, at 116 (1959).

work led to the Model Law approved at the Hamburg Conference in the Summer of 1960.[68] In October of that year, the Hague Conference reversed itself and, as we shall see, decided to resume work on judgments.

After their return from The Hague in 1956 the American Observers reported in the law journals on the session. All reports favored continued American representation.[69] The cold treatment given to the suggestion that uniform legislation be used in addition to conventions was duly noted. The entire discussion of this issue at the Conference, together with the Netherlands' Delegation report on the problem to its own Government,[70] was published.[71]

The Observers also reported back to their respective organizations.[72] At its 1957 annual meeting, the American Branch of the International Law Association passed a resolution favoring representation of the United States by observers at governmental conferences on the unification of law and recommending that the Government defray the expenses incurred in the attendance of observer delegations.[73]

Of great consequence was the report which Commissioner Barrett submitted to the National Conference of Commissioners on Uniform State Laws.[74] On the strength of his report, the Conference recommended to the American Bar Association an investigation of the entire problem of American participation in international efforts to unify private law.[75] Accepting the suggestion, the American Bar Association gave the assignment to a Special Committee to be headed by Mr. Barrett.[76] The Committee's report did not become available in time for the Ninth Session of the Hague Conference scheduled for October 1960.[77]

In 1959, it transpired that the Netherlands Governmental Commission had prepared a memorandum on the question of the use of uniform legislation and had sent it for comments to the member governments of the Conference.[78] It also became known that the Department of State had received the committee drafts prepared

[68] See *id.*, REPORT OF THE 49TH, HAMBURG 1960, CONFERENCE at vi, 290 *et seq.* (1961); *id.*, REPORT OF THE 51ST, TOKYO 1964, CONFERENCE.

[69] See Amram, *A Unique Organization: The Conference on Private International Law*, 43 A.B.A.J. 809 (1957); Barrett, *Report*, in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1957 HANDBOOK 299, 303 *et seq.* (1958); Nadelmann, *The United States at the Hague Conference on Private International Law*, 51 AM. J. INT'L L. 618 (1957); Reese, *Some Observations on the Hague Conference on Private International Law*, 5 AM. J. COMP. L. 611 (1956). Cf. Note, 37 DEP'T STATE BULL. 585 (1957).

[70] 1956/1957 JAARBOEK VAN HET MINISTERIE VAN BUITENLANDSE ZAKEN 319 (1957).

[71] Nadelmann & Reese, *The American Proposal at the Hague Conference on Private International Law to Use the Method of Uniform Laws*, 7 AM. J. COMP. L. 239 (1958).

[72] See Barrett, *supra* note 69; Nadelmann & Reese, in AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1957-1958 PROCEEDINGS AND COMMITTEE REPORTS 14, 95 (1958).

[73] AMERICAN BRANCH, *op. cit. supra* note 72, at 14.

[74] Barrett, *supra* note 69.

[75] See REPORT OF PRESIDENT TO THE AMERICAN BAR ASSOCIATION, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1957 HANDBOOK 152.

[76] 82 A.B.A. REP. (for 1957) 42, 176 (1958).

[77] See *Interim Report*, 84 A.B.A. REP. (for 1959) 421 (1960). *Cf.* 85 A.B.A. REP. (for 1960) 127, 157, 219, 314 (1961).

[78] Text in CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, 1 ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION 209 (1961).

for the 1960 session of the Conference. When the drafts were not transmitted to interested groups outside the government (Mr. Phleger had resigned as Legal Adviser in 1957), at its annual meeting in May 1959, the American Branch instructed the chairman of its Private International Law Committee to communicate with the Department and reiterate the Branch's interest in the work of he Hague Conference.[79] At the last moment the Department repeated the procedure followed for the 1956 session of the Conference. On the basis of nominations received, it appointed Philip W. Amram of Washington, D. C., Joe C. Barrett of Jonesboro, Arkansas, James C. Dezendort of Portland, Oregon, Kurt H. Nadelmann of Cambridge, Massachusetts, and Willis L. M. Reese of New York City to the Observer Delegation to be accredited to the Ninth session of the Hague Conference scheduled for October 1960. No instructions of any kind were given. In fact, the letters of appointment were not received until after the Observers had returned from the session.

The situation which the Observer Delegation faced at the 1960 session was easier—in a way. The machinery of the Conference was known by the four members who had already attended the 1956 session, and it was clear that, again, the Observers would have the benefit of the floor. On the other hand, a full discussion of possible use of uniform legislation, in addition to conventions, could be expected. Five Governments had filed written observations on the memorandum of the Netherlands Governmental Commission.[80] Austria, West Germany, and Italy expressed preference for the "traditional" method of conventions; Norway and Sweden did not wish to rule out use of uniform legislation in proper cases. In light of the experience had at the 1956 session, the two Commissioners on the Observer Delegation, Messrs. Barrett and Dezendorf, produced a memorandum on the work of the National Conference of Commissioners on Uniform State Laws[81] which was translated and circulated by the Permanent Bureau.

Consideration of the question of method was assigned to one of the five committees of the Conference. After a preliminary discussion, the committee asked a small Working Group to prepare a report.[82] At the meeting of the Working Group the Scandinavians favored use of uniform legislation. It was also learned that, because of the difficulties with ratification of conventions, the Benelux Committee on Unification of Law had given thought to use of uniform legislation in proper cases. This "favorable" trend came to a halt when the British member insisted on a continuation of the use of conventions "as the method to which the British Parliament had become accustomed." The discussion was embodied in a "Report

[79] AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1959-1960 PROCEEDINGS AND COMMITTEE REPORTS 17 (1960).

[80] See CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, I ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION, 1960, at 219-23 (1961).

[81] Text, *id.* at 235-42.

[82] See CONFÉRENCE DE LA HAYE, *op. cit. supra* note 80, at 225 *et seq.*

with Recommendations" prepared by one of the Secretaries of the Conference.[83] The recommendations[84] proposed drafting conventions in such a way that their contents could be used easily for purposes of legislation, but the principal theme remained that "the diplomatic character" of the Hague Conference required preparation of conventions. Conventions should as much as possible be "open" conventions, free from reciprocity requirements and designed for general application.

The result was disappointing and disturbing from the American point of view. A limitation of the work of the Conference to preparation of conventions would, in all probability, affect American interest in the Conference. This aspect of the matter did not escape the attention of other delegations. But the Observers felt that, as mere observers, they should not press in a matter within the exclusive jurisdiction of the members of the Conference.

When the Report of the Working Group came up for discussion in the Committee, the spokesman for the Observers stated formally that, in the view of the Observers, consideration of the substance of the Report was a matter for the members of the Conference exclusively.[85] The President of the Conference, Professor Offerhaus, intervened and suggested that, in the interest of the discussion, the Observers speak freely without regard to their special position.[86] Their spokesman, thereupon, repeated a question asked by him in the Working Group: Why should it be necessary for the Conference to say that the diplomatic character of the Conference implies the exclusive use of conventions, especially in view of the many differences in the situations with respect to which the question can arise.[87] In the ensuing discussion, the Delegate of the United Kingdom proposed, as a compromise, a version of the sentence saying that the diplomatic character of the Conference implies the elaboration of conventions "in the first place."[88] This amendment was approved unanimously by the members.[89] At the full Session of the Conference the Resolution was approved without debate.[90] The spokesman for the Observers had reiterated their position that they thought the matter to be one within the exclusive jurisdiction of the members of the Conference.[91]

Though slight, the "concession" kept the door open for development of more flexible working methods. The Observers found the session rewarding also in other ways. While in form of a convention, the draft which was adopted on the Law governing the Form of Wills was prepared with due consideration of the law on the

[83] Text, *id.* at 231. A translation is in 9 AM. J. COMP. L. 592 (1960).
[84] *Id.* at 234.
[85] *Id.* at 243-44.
[86] *Id.* at 245.
[87] *Ibid.*
[88] *Id.* at 247. For an account from the U.K. Delegate see Graveson, *The Unification of Private International Law*, in DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES, REPORT OF INTERNATIONAL LAW CONFERENCE HELD AT NIBLETT HALL, JULY 1962, at 56, 61 (1964).
[89] *Ibid.*
[90] *Id.* at 250. A translation of the Resolution is in 9 AM. J. COMP. L. 594 (1960).
[91] *Ibid.*

subject in Canada and the United States. The draft convention on Dispensation with the Requirement of Legalization for Public Documents appeared to meet practical demands, and the draft convention on Guardianships was clearly superior to the earlier Hague convention on the same subject. Furthermore, contrary to the decision taken in 1956, work was started on Recognition of Foreign Judgments. While the direct reason for the reversal was a request made by the Council of Europe, the fact demained that the decision paralleled plans made by the Commissioners on Uniform State Laws to produce a Uniform Act on recognition of foreign money judgments.[92]

In their individual reports on the 1960 session, the Observers reiterated their earlier views on the usefulness of the work undertaken at The Hague.[93] They suggested establishment of closer relations with the Hague Conference. Observer status, they emphasized, made it most difficult to look after American interests effectively. In particular, representation on the committees preparing the drafts for consideration at the sessions appeared necessary; and, in as much as the work undertaken was useful, it was felt that the United States should share in the expenses of the Hague Conference. Reports to the same effect went to the organizations which had nominated the Observers.[94]

## III

### JOINING

The change of administrations in 1961 brought to Washington as Legal Adviser of the Department of State a Harvard professor who was conscious of the developments which had taken place since the change in policy effected under the first Eisenhower Administration. A sign of renewed interest on the part of the Department of State was the appearance in the Department's *Bulletin* of an article on the Ninth Session of the Hague Conference.[95] In July 1961, the comprehensive Report of the American Bar Association's Special Committee on International Unification of Law was released,[96] and the American Bar Foundation made it available in a special print.[97] The conclusion reached by the Committee was that the United

[92] See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1957 HANDBOOK 138, 142(32); *id.*, 1958 HANDBOOK 77, 151. Drafting was completed in 1962. Text of the *Uniform Foreign Money-Judgments Recognition Act*, in 1962 HANDBOOK 242, 11 AM. J. COMP. L. 412 (1962), 9B UNIFORM LAWS ANNOTATED (1963 Pocket Part 27). In 1963, the act was enacted in Illinois and Maryland.

[93] See Amram, *The Hague Conference on International Private Law*, A.B.A. SEC. OF INT'L & COMP. L. BULL., July 1961, at 50; Barrett & Dezendorf, *Report on Ninth Session of the Hague Conference on Private International Law*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1961 HANDBOOK 71 (1962); Nadelmann, *The Hague Conference on Private International Law: Ninth Session*, 9 AM. J. COMP. L. 583 (1960); Reese, *The Ninth Session of the Hague Conference on Private International Law*, 55 AM. J. INT'L L. 447 (1961).

[94] See Barrett & Dezendorf, *supra* note 93; Nadelmann, *Report*, in AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1961 AND 1962 PROCEEDINGS AND COMMITTEE REPORTS 16 (1962).

[95] Maktos, *The Hague Conference on Private International Law, Ninth Session*, 44 DEP'T STATE BULL. 948 (1961).

[96] 86 A.B.A. REP. (for 1961) 128, 219 *et seq.* (1962).

[97] REPORT OF THE AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON INTERNATIONAL UNIFICA-

States Government must take a more active part in international efforts to unify law. After further consideration by other committees these conclusions were approved by the American Bar Association at the 1962 midyear meeting of the House of Delegates.[98]

A decisive step was taken the following year. During the year contacts had multiplied among all interested parties. At the 1963 Midyear meeting of the American Bar Association a resolution was proposed and adopted by the House of Delegates urging that all necessary or appropriate action be taken to cause the United States to become a member of the Hague Conference on Private International Law and the International (Rome) Institute for the Unification of Private Law in time to assure official representation at the next forthcoming meetings of these organizations.[99] Other national groups, among them the American Association for the Comparative Study of Law, the American Branch of the International Law Association, the American Society of International Law, the Association of American Law Schools, and the National Conference of Commissioners on Uniform State Laws, passed similar resolutions.[100] A concerted effort was involved which the Administration duly noted.

Before turning to the steps taken in Washington, reference may be made to contacts with the International (Rome) Institute for the Unification of Private Law.[101] One of the Institute's pre-war experts on sales law was Professor Ernst Rabel, then director of the Institute on Comparative and Conflicts Law in Berlin. A refugee from Nazi Germany, Dr. Rabel in 1939 became a Research Associate at the Law School of the University of Michigan where he wrote his comparative treatise on conflicts law. With Dr. Rabel at Ann Arbor, a private link existed with the Rome Institute. When the Institute published its first Yearbook in 1948 (in French and English), it carried a basic article by Professor Hessel E. Yntema on unification of law in the United States.[102] In 1952, the member governments of the Institute elected Professor Yntema to its Governing Council in his personal capacity (the United States not being a member)—a position in which he was maintained until 1956.[103] Dr. Rabel continued to serve the Institute in its work

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TION OF PRIVATE LAW, UNIFICATION OF INTERNATIONAL PRIVATE LAW (Chicago 1961). See Nadelmann, *Book Review*, 11 AM. J. COMP. L. 112 (1962).

[98] See 87 A.B.A. REP. (for 1962) 387, 388 (1963).

[99] 88 A.B.A. REP. (for 1963) 339, 341 (1964).

[100] These resolutions may be found in *Hearing on H.J. Res. 732 Before the Subcommittee on International Organizations and Movements of the House Committee on Foreign Affairs*, 88th Cong., 1st Sess. (1963).

[101] *Cf.* Wigmore, *Opening of the New International Institute for the Unification of Private Law at Rome*, 23 ILL. L. REV. 61 (1929); Nadelmann, *Unification of Private Law*, 29 TULANE L. REV. 328 (1955).

[102] Yntema, *Unification of Law in the United States*, in INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIFICATION OF LAW 301 (1948).

[103] See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, 3 UNIFICATION OF LAW 1947-1952, at 27, 29 (1954).

on production of a uniform law on the international sale of goods.[104] When the Institute's secretary general, Dr. Mario Matteucci, toured the United States in 1954, he attended the annual meeting of the National Conference of Commissioners on Uniform State Laws.[105] Thereafter the Institute extended to the Conference an invitation to be represented at an international meeting of international and national organizations engaged in work on unification of law called by the Institute.[106] The Conference sent Commissioner Barrett to the meeting which was held in Barcelona shortly before the 1956 session of the Hague Conference on Private International Law.[107] Two further meetings of the same groups took place, in 1959 and 1963, and the Commissioners were again represented.[108] But the United States had no official contacts with the Institute which operates as a research institution rather than through regular periodic sessions, as is the case with the Hague Conference.

Official action in Washington began in August 1963 with the submission by the Secretary of State to the Speaker of the House of Representatives of a proposed bill to provide for the participation by the Government of the United States in (1) the Hague Conference on Private International Law and (2) the International (Rome) Institute for the Unification of Private Law. In the supporting letter, reference was made to the resolutions adopted by the American Bar Association and other organizations, and the view was expressed that it was in the best interest of the United States to become a member of the two institutions, subject to working out suitable arrangements to meet the special requirements of the federal system.[109] Hearings on the proposed Joint Resolution introduced by the Speaker[110] were held on September 16, 1963 before the Committee on Foreign Affairs of the House.[111] The principal witnesses were the Legal Adviser of the State Department, Abram Chayes, and Commissioner Barrett of Arkansas. Representatives of the American Bar Association, the American Society of International Law, the Association of American Law Schools, and the Commission on International Rules of Judicial Procedure likewise testified; other organizations and individuals had sent letters of support.[112] With a ceiling of $25,000 yearly for expenses added, a substitute Resolution[113] was

[104] He became the Institute's representative on the Committee appointed by the Diplomatic Conference held at The Hague in 1951 to revise the Draft Uniform Law. See Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58 (1952).

[105] See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1954 HANDBOOK 39, 40, 114 (address); INTERNATIONAL INSTITUTE, 4 UNIFICATION OF LAW 1953-1955, at 39 (1956).

[106] See NATIONAL CONFERENCE, 1956 HANDBOOK 53, 59, 61 (1957).

[107] See Barrett Report, *id.*, 1957 HANDBOOK 299 (1958). *Cf.* INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, 1956, II YEAR-BOOK UNIFICATION OF LAW 321 (1957).

[108] See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, 1959 YEAR-BOOK UNIFICATION OF LAW 233, 379; *id.*, 1963 YEAR-BOOK.

[109] Letter of Aug. 9, 1963, in *Hearing on H.J. Res. 732, supra* note 100, at 2.

[110] H.J. Res. 732, 88th Cong., 1st Sess. (1963).

[111] *Hearing on H.J. Res. 732, supra* note 100.

[112] See *id.* at 18 (Hynning), 21 (Cardozo), 23 (Merillat), 24 (Yntema), 28 (Reese), 29 (Nadelmann).

[113] H.J. Res. 778, 88th Cong., 1st Sess., introduced Oct. 21, 1963.

reported out favorably on October 29, 1963,[114] and the House passed it on November 4, 1963.[115] No action had as yet been taken by the Senate on the bill introduced in September by the Chairman of the Foreign Relations Committee, Senator Fulbright of Arkansas.[116] A filibuster in connection with the Civil Rights Bill continued until November 22, 1963, the day of the assassination of President Kennedy. On December 16, 1963 the Senate Foreign Relations Committee considered the proposed Joint Resolution in executive session and reported it favorably the same day.[117] The Joint Resolution was passed by the Senate on December 17, 1963[118] and was signed by President Johnson on December 30, 1963.[119]

The legislation came in time to secure membership in the Hague Conference on Private International Law in advance of the Tenth Session scheduled for October 1964.[120] However, another more pressing problem had arisen. The Government was invited to a diplomatic conference at The Hague called for April 1964 to consider drafts for the unification of the law on the international sale of goods.[121] This was to be a follow-up conference to one held at The Hague in November 1951 for the consideration of a pre-war draft of a uniform law on the international sale of goods prepared under the auspices of the Rome Institute.[122] The United States Government had had an observer at the 1951 meeting but no American was put on the Committee elected at that meeting to produce a revised draft. The conference scheduled for April 1964 was called to consider the revised draft.

In January 1964, the Legal Adviser of the Department of State invited a number of persons who had supported the new legislation to discuss the new situation with him. One of the results of the discussion was the creation by the Secretary of State of an Advisory Committee headed by the Legal Adviser to assist the Department in the handling of problems involving international unification of law.[123] Various

[114] H.R. REP. No. 873 (Comm. on Foreign Affairs), 88th Cong., 1st Sess. (1963).

[115] 109 CONG. REC. 19882 (1963).

[116] S. 2129, 88th Cong., 1st Sess. (1963).

[117] S. REP. No. 781, 88th Cong., 1st Sess. (1963).

[118] 109 CONG. REC. 23709 (1963).

[119] "Resolved, That the President is hereby authorized to accept membership for the Government of the United States in (1) the Hague Conference on Private International Law and (2) the International (Rome) Institute for the Unification of Private Law, and to appoint the United States delegates and their alternatives to meetings of the two organizations, and the committees and organs thereof. (2) There is authorized to appropriate such sums as may be necessary, not to exceed $25,000 annually, for the payment by the United States of (1) its proportionate share of the expenses of the Hague Conference on Private International Law and the International (Rome) Institute for the Unification of Private Law, and (2) all other necessary expenses incident to participation by the United States in the activities of the two organizations referred to in clause (1) of this section." 77 Stat. 775 (1963), 22 U.S.C. § 269g (1964).

[120] Membership application was filed in March 1964. Acceptance of the Statute of the Hague Conference on Private International Law (done at The Hague, Oct. 9-31, 1951, entered into force July 15, 1955), 220 U.N.T.S. 121, was deposited Oct. 15, 1964. See 51 DEP'T STATE BULL. 762 (1964); T.I.A.S. No. 5710.

[121] See Nadelmann, *The United States and Plans for a Uniform (World) Law on International Sales of Goods*, 112 U. PA. L. REV. 697 (1964).

[122] See Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58 (1952).

[123] Set up on Feb. 14, 1964. See 52 DEP'T STATE BULL. 265 (1965).

organizations received invitations to nominate representatives, among them: the American Association for the Comparative Study of Law, the American Bar Association, the American Branch of the International Law Association, the American Law Institute, the American Society of International Law, the Association of American Law Schools, the Conference of Chief Justices, the Judicial Conference of the United States, and the National Conference of Commissioners on Uniform State Laws.

The first meeting of the Advisory Committee was devoted principally to the problems of the conference called for April 1964 to draft a uniform law on the international sale of goods. The April Conference and its results are discussed elsewhere in this symposium. Suffice it to say here that drafts hardly ready for final action were adopted over American objections at the end of the three weeks' session;[124] even worse, the drafts entirely disregard generally recognized principles of the law of conflict of laws.[125] One is reminded of what Wigmore said more than forty years ago: if the United States kept aloof from international work on unification of law, it risked unification without proper consideration of American law and interests.[126]

## IV

### THE TENTH SESSION

The Advisory Committee of the Secretary of State had its second meeting late in May 1964. Consideration was given to the problems raised by the agenda of the Tenth Session of the Hague Conference on Private International Law called for the following October. Experts were appointed to report on the drafts which committees of the Hague Conference had prepared for consideration at the October session. The reports reached the members of the Advisory Committee in July. One of the organizations represented on the Committee, the National Conference of Commissioners on Uniform State Laws, arranged for a discussion of the drafts at its annual meeting in August with the experts of the State Department present.[127] Thereafter the Advisory Committee held another session. Special attention was given to the preliminary observations on the drafts which the Department would file in advance of the session in accord with Hague Conference practice. By that time the members of the Delegation to the Session had been appointed. A last

[124] See *Report of U.S. Delegation to the Diplomatic Conference on the Unification of the Law Governing the International Sale of Goods*, The Hague, April 2-25, 1964, in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1964 HANDBOOK 237; Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, *infra*, pp. 326-53.

[125] See Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio*, 74 YALE L.J. 449 (1965).

[126] Text at note 23 *supra*.

[127] See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1964 HANDBOOK 103 *et seq.*, 141 *et seq.* (1965).

meeting of the Advisory Committee took place shortly before the departure of the delegates. Position papers for the benefit of the delegates were discussed.

The Secretary of State had appointed a delegation of seven members, headed by Richard D. Kearney, Deputy Legal Adviser of the Department of State. The other members were the five persons who had served as Observers to the Ninth Session—Philip W. Amram, Joe C. Barrett, James C. Dezendorf, Kurt H. Nadelmann, and Willis L. M. Reese—and John N. Washburn, Attorney-Adviser, Office of the Legal Adviser. The experts who had reported on the drafts were among the appointed. The topics on the agenda of the Conference were assigned to members of the Delegation individually. These individuals spoke for the Delegation at the Committee meetings; however, in accord with the practice of the other principal delegations, the meetings were generally covered by more than one member. The head of the Delegation represented it at the full meetings. Five topics were on the agenda: Foreign Judgments, Adoption, Service of Process Abroad, Forum Selection Clauses, and, for an exploratory discussion, Foreign Divorces. The topics were of varying interest and difficulty.

As anticipated, the draft convention on service of process abroad proved to be of the greatest practical interest, both generally speaking and from the viewpoint of the United States. A Special Committee appointed after the Ninth Session had prepared a draft designed to replace the service of process part of the Hague Conventions on Civil Procedure (Judicial Assistance) of 1905 and 1954.[128] This part had remained practically unchanged since it was first drafted and the system needed to be modernized. The fifteen nations which have ratified the Convention of 1954[129] were involved in the first place but, notwithstanding its traditional preference for bilateral arrangements,[130] the United Kingdom had also expressed interest and was represented on the Committee which prepared the draft.

In the United States, the difficulties encountered abroad with problems of judicial assistance had led to the creation in 1958 by the Congress of the United States of the Commission on International Rules of Judicial Procedure.[131] Instead of embarking immediately upon the assignment given it by the Act of Congress to draft for the assistance of the Secretary of State international agreements to be negotiated by him,[132] the Commission decided to work first on improvement of provisions in American domestic law. As a result, the provisions in the Federal Rules of Civil

[128] Articles 1 to 7. An English translation of the Convention of 1954 is in 1 AM. J. COMP. L. 282 (1952).

[129] Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, Netherlands, Norway, Spain, Sweden, Switzerland, Yugoslavia (members), and Poland (non-member).

[130] The conventions concluded by the United Kingdom are discussed in Dunboyne, *Service and Evidence Abroad under English Civil Procedure in Particular Countries*, 10 INT'L & COMP. L.Q. 295, 301; 29 GEO. WASH. L. REV. 509, 517 (1961).

[131] See Jones, *Commission on International Rules of Judicial Procedure*, 8 AM. J. COMP. L. 341 (1959).

[132] Act of Sept. 2, 1958, Pub. L. 85-906, 72 Stat. 1743, § 2.

Procedure dealing with service of process[133] and taking of testimony abroad[134] have been revised, and corresponding provisions have been included in the Uniform Interstate and International Procedure Act which the National Conference of Commissioners on Uniform State Laws produced in 1962.[135] Furthermore, legislation was sought for revision of provisions in the United States Code dealing with related questions. The bill which had been introduced to that effort became law the day of the opening of the Tenth Session of the Hague Conference.[136] Among other things, this legislation liberalizes State Department practice respecting transmittal of requests received from abroad for service of process[137] and revises the rules for district courts on service in and assistance to foreign litigation.[138]

The developments strengthened the position of the United States Delegation at the Conference. Mr. Amram, who had served as chairman of the Advisory Committee of the Commission on International Rules of Judicial Procedure, was made vice chairman of the Committee to which the topic of service of process was assigned. In view of the overt interest shown by the American Delegation in the draft, its suggestions were given close attention. The chairman of the Committee, a member of the Swiss Federal Court, was familiar with federal-state problems, and this helped greatly. A draft convention on Service of Documents Abroad was produced which was approved without a dissenting vote at the plenary session.[139]

This is no place for a discussion of the merits of the draft which, in addition to providing for a flexible and modern service machinery, establishes minimum notice requirements for the granting of judgments by default.[140] The expectation is that the draft will be given close attention by all member Governments of the Hague Conference, including that of the United States.[141]

[133] FED. R. CIV. P. 4(i), 28 U.S.C. § 4(i) (1963). See Kaplan, *Amendments of the Federal Rules of Civil Procedure*, I, 77 HARV. L. REV. 601, 635, 636 (1964).

[134] FED. R. CIV. P. 28(b), 28 U.S.C. § 28(b) (1963). See Kaplan, *supra* note 133, II, at 811.

[135] Uniform Interstate and International Procedure Act, Articles II (Service) and III (Taking Depositions), 11 AM. J. COMP. L. 415, 423, 426 (1962), 9B UNIFORM LAWS ANNOTATED, 1963 Pocket Part 71.

[136] 78 Stat. 995, 18 U.S.C. § 1621 (1964). See H.R. REP. No. 1052, 88th Cong., 1st Sess. (1963).

[137] 28 U.S.C. § 1781 (1964). *Cf.* 22 C.F.R. § 92.67 (1963), 12 AM. J. COMP. L. 270 (1963).

[138] 28 U.S.C § 1696: Service in foreign and international litigation, and § 1782: Assistance to foreign and international tribunals and to litigants before such tribunals (1964).

[139] Text in 13 AM. J. COMP. L., No. 4 (1964); 14 INT'L & COMP. L.Q. 564 (1965).

[140] See Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters, Arts. 15, 16. The requirements are meant to minimize the dangers resulting from the French system, in force also in the Netherlands and some other countries, under which a non-domiciliary with known address abroad is served in the person of the District Attorney attached to the forum court (*service au Parquet*). French courts have held consistently that such service is valid even if the summons does not reach the defendant, or not in sufficient time for him to defend. See Dalloz Répertoire de Procédure Civile et Commerciale, *Voce* "Exploit" Nos. 153-161 (1955); 1964 Mise à Jour, *Voce* "Exploit" No. 159; Rigaux, *La signification des actes judiciaires à l'étranger*, 52 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [hereinafter cited as REV. CR. DR. INT'L PR.] 447, 450 (1963). Under American standards this is, of course, a violation of due process of law. See Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[141] See *Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7-28, 1964*, 52 DEP'T STATE BULL. 265, 273 (1965). Problems of service of process raise questions of sovereignty in many foreign countries. They cannot be solved unilaterally with

The draft convention on recognition and enforcement of foreign judgments raised different types of problems. The Special Committee appointed after the Ninth Session had needed two sessions to agree on a draft, and a number of questions had been left open. One was the form which the draft should take. Some members of the Committee favored production of a model for bilateral conventions; others were in favor of a multilateral convention; and one member proposed a new form of a multilateral convention: a convention which would become effective only between states which conclude an agreement to that effect (a "bilateralized" multilateral convention).[142]

No representative from a common-law country had served on the Committee. However, the British Foreign Judgments (Reciprocal Enforcement) Act of 1933 was among the materials considered, as was the Uniform Foreign Money Judgments Recognition Act which the Commissioners on Uniform State Law produced in 1962.[143] The Special Committee's draft[144] followed these models to a large extent, but not on all points, including some of consequence.[145]

The law on recognition of judgments is in a deplorable condition in many countries.[146] In some, statutory provisions prohibit recognition in the absence of a treaty, in others a strictly interpreted reciprocity clause produces the same result. In order to improve conditions, international organizations have in recent years prepared model laws.[147] Since the end of the war the number of bilateral treaties has increased considerably,[148] and the Common Market countries currently work on a multilateral convention for their own needs.[149] The Special Committee of the

disregard of the views of the local sovereign. Those who speak of "tenderness to the sensibilities of foreign nations" (see Kaplan, *supra* note 133, at 637), should study the long list of diplomatic incidents. For a recent protest from Switzerland, see 56 AM. J. INT'L L. 794 (1962).

[142] The same issue had plagued the Conference when it worked on Judgments in 1925 and 1928. See Nadelmann, *Ways to Unify Conflicts Rules*, 9 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 349, 353 (1962).

[143] *Supra* note 92. A French version, published in 52 REV. CR. INT'L PR. 676 (1963) (in French), had been made available.

[144] Published in 10 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 328 (1963) (in French); translation in VON MEHREN & TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 865 (1965).

[145] For example, final judgments which are enforceable but are still subject to appeal are not covered; findings of fact involving the basis for assumption of jurisdiction should not be open to challenge; litigation pending in one nation should block litigation in another.

[146] See, generally, Nadelmann, *Non-Recognition of American Money-Judgments Aboard and What to Do About It*, 42 IOWA L. REV. 236 (1957). For a recent change in French law see Nadelmann, *French Courts Recognize Foreign Money-Judgments; One Down and More to Go*, 12 AM. J. COMP. L. 72 (1963).

[147] See, notably, the Model Law prepared by the International Law Association, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 49TH CONFERENCE, HAMBURG 1960, at vi (1961); *id.*, REPORT OF THE 51ST CONFERENCE, TOKYO 1964 (1965).

[148] The United Kingdom now has treaties with France and Belgium (pre-war), West Germany, Norway, and Austria. Other post-war treaties: Austria-Germany (1959); Austria-Belgium (1959); Austria-Switzerland (1960); Austria-Netherlands (1963); Belgium-Switzerland (1959); Belgium-Italy (1962); France-Morocco (1959); Germany-Greece (1961); Germany-Netherlands (1962); Italy-Netherlands (1959).

[149] See Nadelmann, *Common Market Assimilation of Laws and the Outer World*, 58 AM. J. INT'L L. 724 (1964).

Hague Conference which proposed the draft included a number of experts involved in these activities and some appeared also as delegates at the Tenth Session.[150] This made for a high degree of expertness; at the same time, a certain degree of rigidity was noticeable in the discussions.

From the beginning, the lack of a decision on the form which the draft should take hampered work on the substantive provisions. A small working group was appointed to report on the question of form and, in particular, the idea of a "bilateralized" multilateral convention. Discussion of the report took up a full day.[151] Completion of the work at the session, it became evident, was out of the question; in as much as the other committees also needed additional time, the Steering Committee of the Conference decided to slow down on judgments and allocate more time to the other committees. As a result, only the first five sections of the Judgments draft were considered.[152] The provisions on jurisdiction were not reached. The Conference decided that an extraordinary session of the Conference should be called within two years to complete the work. A small *ad hoc* committee has been given the task to prepare a further report on the question of a bilateralized convention for submission to the member governments in advance of the extraordinary session.[153]

A successful outcome of the work on judgments is in the general interest. The codification in this country, through the Uniform Act of 1962, of the liberal rules of the American courts on recognition of foreign judgments can facilitate recognition of American judgments in "reciprocity" countries, but unilateral codification does not remove the other difficulties encountered. In the search for the form which the draft should take, proper attention must be given to the special problems arising with federal systems.[154] A draft acceptable to all members of the Conference, including the United States, can be produced.

The discussion of the draft of a convention on Choice of Court, that is, on forum selection clauses, turned out to be fascinating. The topic is of great importance to international trade. Generally speaking, clauses selecting an exclusive forum for litigation are given effect in the civil law countries unless their use is barred by legislation for a specific area of activity.[155] This could be the case for installment buying, for example. In England, a clause of this sort is given effect by the courts

[150] On the American side the draftsman of the Uniform Act of 1962 handled the judgments subject at the session.

[151] The Report and the discussion will be found in the *Proceedings of the Tenth Session of the Hague Conference on Private International Laws* (to be published).

[152] The text of the first five sections as it resulted from the first reading is given in the Final Act of the Tenth Session, under B (Decisions) I (Judgments). The text of the Final Act may be found in 14 INT'L & COMP. L.Q. 558 (1965); 4 INT'L LEGAL MATERIALS 338 (1965).

[153] See Final Act, B, I, *supra* note 152. The Report, dated March 1965, has become available.

[154] For a reference to the possibility of inclusion of a modern federal-state clause, see the *Report of the U.S. Delegation, supra* note 141, at 272.

[155] For a general survey see the papers read at the Forum on "Validity of Forum Selecting Clauses" held under the auspices of the American Foreign Law Association and the American Association for the Comparative Study of Law, 13 AM. J. COMP. L. 157 *et seq.* (1964).

if its use is not found unreasonable or inconvenient in the case before the court.[156] In the United States, state courts disregard such clauses almost generally, even if their use was reasonable in the given case. In at least one federal circuit, however, the test of reasonableness has been applied in the maritime law field, and clauses meeting the test have been given effect.[157]

Under the Special Committee's draft such clauses were declared valid unless their use was forbidden by the law of the chosen court in view of the subject matter of the contract. No provision was made for protection of the weaker party from abuse of economic power. Yet abuse is a well-known phenomenon, noticeable especially in connection with adhesion contracts. To make things worse, under the draft questions not settled by the convention—for example, the case of mistake or fraud—were to be governed by the law of the chosen forum.[158] A challenge of the latter provision at the session of the Conference was lost by a small margin at an early meeting, but an American proposal to include the defense of abuse of economic power was accepted, though over some opposition. Ultimately, the Committee reversed itself and removed from the draft the clause which gave control over mistakes and fraud to the law of the chosen forum. On the other hand, no attention was given to the American suggestion that the draft be presented as a model for legislation, rather than as a convention. Without going into the merits of all the provisions of the final text, a very improved draft emerged, thanks in large part to American suggestions.[159] Should the National Conference of Commissioners on Uniform Laws decide to produce a uniform law on the subject, it will find useful material in the Hague draft.

The Committee to which the draft of a convention on Foreign Adoptions was assigned[160] had a particularly difficult topic with which to deal. In the preparatory stage, the established procedure of starting with a questionnaire had not been followed. Instead the Special Committee began with a draft prepared by another international group. The result was that the truly extraordinary difference in the law of the different nations on adoption came to light fully only during the discussions at the session. Possibilities of agreement on conflicts rules depend to a large extent upon the kind of differences in the underlying domestic laws. Here, moreover, the conflict between the nationality and domicile principles had also to be taken into account. Furthermore, some delegations desired to impose at the same time some minimum requirements for domestic adoption procedures. All

[156] A leading recent case is The Fehmarn, [1958] 1 Weekly L.R. 159 (C.A.). See Cowen & Mendes da Costa, *supra* note 155, at 179; Graveson, *The Tenth Session of the Hague Conference on Private International Law*, 14 INT'L & COMP. L.Q. 528, 546 (1965).

[157] See Reese, *The Contractual Forum: Situation in the United States*, *supra* note 155, at 187.

[158] Draft, art. 2. The text of the draft may be found in translation in 13 AM. J. COMP. L. 160 (1964).

[159] Text of the Convention on the Choice of Court in 13 AM. J. COMP. L. No. 4 (1964); 14 INT'L & COMP. L.Q. 572 (1965).

[160] The text of the Committee draft (in French) may be found in 10 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 333 (1963).

this made work very difficult. After considerable struggle agreement was finally reached on a text of a convention.[161] Fourteen states voted for, and there were four abstentions. The American representative on the Committee gave no encouragement to the thought that the draft might be found useful in the United States for application to interstate or international cases. Yet the topic is of great human and social importance, and the effort made at The Hague should not be left unnoticed in the United States. The conflicts problems in the adoption field have not been given in American legal writings the attention they deserve.[162]

The preliminary discussion of the Divorce subject at the session allowed no more than a general exchange of views. The regular procedure of starting with a questionnaire prepared by the Permanent Bureau had been followed. On the basis of the answers received, an interesting "academic" discussion took place under the chairmanship of Professor R. H. Graveson, the first Englishman called to the presidency of a Committee. The problems of assumption and of recognition of jurisdiction were broached, as were the questions of choice of law in the different jurisdictional settings.[162a] A Special Committee will be appointed by the Netherlands State Commission to prepare a draft for the next session. Cases in which American divorces have been challenged in foreign courts make news from time to time,[163] and the law in our domestic courts on recognition of foreign divorces is obscure.[164] Therefore, we need to investigate what can be done with respect to establishment of general standards for recognition. The rules developed for interstate purposes under the full faith and credit clause may, or may not, furnish the best answer. In any event, choice of an eminent expert to serve on the Special Committee is important, and the time available before the meeting of the Committee is called should be used to see whether any "American" position on the question can be developed. Basic research in domestic and foreign law may have to be organized, possibly under the auspices of the Advisory Committee.

The Tenth Session, before closing, spent some time on consideration of topics

[161] Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption. Text in 13 AM. J. COMP. L. No. 4 (1964); 14 INT'L & COMP. L.Q. 559 (1965). See Graveson, *supra* note 156, at 532.

[162] For a critical review see ALBERT A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 402 (1962). Cf. ROBERT A. LEFLAR, CONFLICT OF LAWS 340 (1959).

[162a] See Graveson, *supra* note 156, at 550.

[163] *Compare* Mountbatten v. Mountbatten, [1959] P. 43, *with* Armitage v. Attorney General, [1906] P. 135. *Cf.* GEOFREY C. CHESHIRE, PRIVATE INTERNATIONAL LAW 399 (6th ed. 1961). See Speyer v. Picard, Trib. grande instance de la Seine, 5th Chamber, June 6, 1962, [1962] Recueil Dalloz, Jurisprudence 654, involving a Nevada divorce proceeding in which both parties were represented, the wife (plaintiff) being a U.S. citizen married to a Frenchman. Noted by Malaurie, *ibid.* *Cf.* Bergère v. Dame Bittermann, same court, 1st Chamber, July 8, 1963, 91 JOURNAL DU DROIT INTERNATIONAL [hereinafter cited as CLUNET] 325 (1964).

[164] See discussion of RESTATEMENT SECOND, CONFLICT OF LAWS § 430-e (Tent. Draft No. 10, 1964) at the 41st Annual Meeting of the American Law Institute, 1964 PROCEEDINGS (1965). *Cf.* Gould v. Gould, 235 N.Y. 14 (1923), 36 HARV. L. REV. 880 (1923); Wood v. Wood, 245 N.Y.S.2d 800 (1963), 77 HARV. L. REV. 1531 (1964), reversed by the Appellate Division, 152 N.Y. L.J. No. 80, at 15 (1964).

that might be suitable for treatment at future sessions of the Conference.[165] A topic which the United States Delegation suggested is Letters Rogatory. For the moment only the Divorce subject has been retained.[166] Other topics will be added by the Netherlands State Commission which, under the Charter of the Conference, has the responsibility of preparing the agenda in consultation with the member Governments.[167] Obviously the agenda of the 1968 Session should not be overcharged—as was the 1964 agenda.[168]

## V

### EVALUATION

The work accomplished by the Conference at its Tenth Session[169] has been sketched as a typical example of the Conference's operation. For amplification, the results of the Seventh (1951), Eighth (1956), and Ninth (1960) sessions will also be noted.[170] In addition to the Charter of the Conference, drawn up in 1951,[171] eleven conventions have been produced. Of these, the Convention on Civil Procedure of March 1, 1954,[172] in effect since 1957, has been ratified by thirteen member states,[173] and two non-members have acceded to it.[174] It will be recalled that the service of process part of this Convention was re-written at the Tenth (1964) session.[175]

The Convention on the Law Governing International Sales of Goods of June 15,

[165] The following topics were suggested for consideration: (1) assumption of jurisdiction and choice of law in torts; (2) protection of intangible rights of the individual (especially privacy and reputation); (3) maintenance obligations not covered by the Conventions of 1956 and 1958; (4) foreign recognition of internal adoptions (as distinguished from international adoptions); (5) revision of Ch. II, Letters Rogatory, of the Convention of 1954 on Civil Procedure; (6) succession to property, especially problems of administration of estates and the question of *zona vacantia;* (7) revision of the Convention of 1902 on Conflicts of Laws relating to Marriage; (8) Recognition and Enforcement of Judgments Rendered by a Chosen Court. See Final Act, B IV, *supra* note 152.

[166] For the text of the decision see Final Act, B II, *supra* note 152.

[167] CHARTER art. 3(4), *supra* note 42.

[168] "The Tenth Session . . . Considering that according to its decision in matters of divorce, separation, and nullity of marriage, the Conference has undertaken an important task and that it is not suitable to overburden the program of future sessions, requests the State Commission and the Permanent Bureau . . . to examine. . . ." Final Act, B IV, *supra* note 152.

[169] See the Delegation Report, *supra* note 141, and the individual reports of Delegation members: Amram, *Report on Tenth Session of the Hague Conference on Private International Law,* 59 AM. J. INT'L L. 87 (1965); Nadelmann & Reese, *The Tenth Session of the Hague Conference on Private International Law,* 13 AM. J. COMP. L., No. 4 (1964); Barrett & Dezendorf, *Report on Tenth Session of the Hague Conference on Private International Law,* in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1965 HANDBOOK.

[170] Cf. Van Hoogstraten, *supra* note 7, at 154 *et seq.*

[171] See *supra* note 42.

[172] 286 U.N.T.S. 265, 40 REV. CR. DR. INT'L PR. 732 (1951), 1 AM. J. COMP. L. 282 (1952) (English transl.).

[173] Austria, Belgium, Denmark, Finland, France, West Germany, Italy, Luxembourg, Netherlands, Norway, Spain, Sweden, and Switzerland.

[174] Poland and Yugoslavia. Yugoslavia was not a member of the Conference in 1951 when the Convention was drafted.

[175] *Supra* note 139.

1955,[176] ratified by Belgium, Denmark, Finland, France, Italy, Norway, and Sweden, has been in force since September 1964.[177] Its provisions become the general law of ratifying states and thus are applicable generally.[178] The delay in ratification of the Convention was due to opposition to some of its provisions by a group led by Germany.[179] The Convention derives added importance from the fact that states which ratify this convention and wish to adhere to the Convention of July 1, 1964 relating to a Uniform Law on the International Sale of Goods[180] may do so by declaring that they will apply the Uniform Law only when the rules of the Conflicts Convention require its application.[181]

Two conventions were drafted to supplement the Conflicts Convention on Sales, the Convention of April 15, 1958 on the Law Governing Transfer of Title in International Sales of Goods[182] and the Convention of the same date on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods.[183] The first-named convention has received one ratification[184] and the latter, none. The preparation of the Choice of Court Convention at the Tenth (1964) session[185] makes use of the Forum Convention with its narrower scope unlikely.

The Convention of June 15, 1955 designed to Regulate Conflicts between the National Law and the Law of Domicil[186] has received but two ratifications[187] and is not in force. A brain-child of the late E. M. Meijers, this renvoi convention suggests solutions for "false conflicts" situations.[188] Widely acclaimed in academic circles, it can furnish guidance to the courts without any need for ratification. In England, the definition of "domicil" in the Convention has played a role in recent parliamentary endeavors to do away with undesirable aspects of the English notion of domicil.[189] The Convention of June 1, 1956 concerning Recognition of the Legal

[176] 40 REV. CR. DR. INT'L PR. 725 (1951), 1 AM. J. COMP. L. 275 (1952) (English transl.).

[177] Sept. 1, 1964, for Belgium, Denmark, Finland, France, Italy, and Norway; Sept. 6, 1964, for Sweden.

[178] Convention, art. 7.

[179] See Nadelmann, *supra* note 125, at 451. *Cf.* 3 ERNST RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 58-60 (2d ed. 1964).

[180] English text in 13 AM. J. COMP. L. 453 (1964).

[181] Convention, art. IV, *id.* at 454.

[182] Text in 45 REV. CR. DR. INT'L PR. 747 (1956), 5 AM. J. COMP. L. 650 (1956) (English transl.).

[183] Text in 45 REV. CR. DR. INT'L PR. at 750, 5 AM. J. COMP. L. at 653.

[184] By Italy.

[185] See *supra* note 150.

[186] Text in 40 REV. CR. DR. INT'L PR. 730 (1951), 1 AM. J. COMP. L. 280 (1952). *Cf.* ROBERT T. VON MEHREN & DANIEL T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 546 (1965).

[187] By the Netherlands and Belgium.

[188] See also Offerhaus, *The Seventh Session of the Hague Conference on Private International Law*, 70 CLUNET 1071, 1113-37 (1952), for the relationship with the Benelux Convention on a Uniform Law on Private International Law (not yet ratified). Cf. Meijers, *The Benelux Convention on Private International Law*, 2 AM. J. COMP. L. 1 (1953). Furthermore see Cheshire, *supra* note 44, at 35-39.

[189] See Private International Law Committee, *First Report*, CMD. No. 9068 (1954); Graveson, *Reform of the Law of Domicile*, 70 L.Q. REV. 492 (1954); Cohn, *Domicile-Convention and Committee*, 71 L.Q. REV. 562 (1955). But see Private International Law Committee on Domicile, *Seventh Report*, March 1963, CMD. No. 1955, para. 13-16, rejecting art. 5 of the Hague Draft Convention. *Cf.* Graveson, *Comparative Aspects of the General Principles of Private International Law*, 109 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE 1, 59 (1963); Van Hoogstraten, *supra* note 7, at 159.

Personality of Foreign Corporations[190] has received three ratifications,[191] not enough to put it into effect. Doubts seem to exist as to the need for the convention.

The two conflicts conventions dealing with obligations to support minor children have had greater success. A new approach—favoring the child—was used. Both conventions are in force. The Convention of October 24, 1956 on the Law Applicable to Obligations to Support Minor Children[192] has received six ratifications[193] and the Convention of April 15, 1958 concerning the Recognition and Enforcement of Decisions involving Obligations to Support Minor Children,[194] five.[195] The old Guardianship Convention, widely known from the test it received in the International Court of Justice in the *Boll* case,[196] has been replaced by the Convention of October 5, 1961 on the Jurisdiction of the Authorities and the Law Applicable in the Matter of Protection of Minors.[197] Ratifications have not yet been received. The eminently useful Convention of October 5, 1961 Abolishing the Requirement of Legalization for Foreign Public Documents[198] has been signed by many states;[199] it has—so far—been ratified by three states, which is sufficient to put it into effect.[200]

Finally, there is the Convention of October 5, 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions,[201] a useful model for validating legislation. This convention is in force since 1964[202] as a result of ratifications by Austria, the United Kingdom, Yugoslavia, and Japan. It is the first Hague Convention ever to be ratified by either the United Kingdom or Japan. The rules of the Convention are applicable independently of any reciprocity requirement and even when the law to be applied is not that of a contracting state.[203] The United Kingdom, which had defective legislation on the subject,[204] had proposed the topic. In that country, law reform is said to be attainable more easily in connection with

[190] Text in 40 REV. CR. DR. INT'L PR. 727 (1951), 1 AM. J. COMP. L. 277 (English transl.). See Offerhaus, *supra* note 188, at 1091-1113.

[191] By Belgium, France, and the Netherlands.

[192] Text in 45 REV. CR. DR. INT'L PR. 753 (1956), 5 AM. J. COMP. L. 656 (1956) (English transl.).

[193] By Austria, France, West Germany, Italy, Luxembourg, and the Netherlands.

[194] Text in 45 REV. CR. DR. INT'L PR. 755 (1956), 5 AM. J. COMP. L. 658 (1956) (English transl.).

[195] By Austria, Belgium, West Germany, Italy, and the Netherlands.

[196] Case concerning the application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), [1958] I.C.J. Rep. 52.

[197] Text in 49 REV. CR. DR. INT'L PR. 685 (1960), 9 AM. J. COMP. L. 708 (1960) (English transl.).

[198] Text in 49 REV. CR. DR. INT'L PR. 679 (1960), 9 AM. J. COMP. L. 701 (1960) (English transl.).

[199] By Austria, Finland, France, West Germany, Greece, Italy, Luxembourg, Netherlands, Switzerland, Turkey, United Kingdom, and Liechtenstein.

[200] By France, the United Kingdom, and Yugoslavia. Effective since January 25, 1965.

[201] Text in CMD. No. 1729 (1962), 49 REV. CR. DR. INT'L PR. 682 (1960), 9 AM. J. COMP. L. 705 (1960) (English transl.).

[202] For Austria, the United Kingdom, and Yugoslavia since Jan. 5, 1964; since Aug. 2, 1964 for Japan.

[203] CONVENTION art. 6.

[204] See Private International Law Committee, *Fourth Report*, CMND. No. 491 (1958); Graveson, *The Ninth Hague Conference on Private International Law*, 10 INT'L & COMP. L.Q. 18, 21 (1961). *Cf.* Kahn-Freund, *Wills Act, 1963*, 27 MODERN L. REV. 55 (1964); Morris, *The Wills Act, 1963*, 13 INT'L & COMP. L.Q. 684 (1964).

adoption of a convention. The odd result is that, on account of the method used, the Government loses its freedom of action and the law is frozen—for no good reason.[205] Clearly, the topic should be handled by legislation.

Of the eleven Hague Conventions written from 1951 to 1960[206] only six are in effect; and, with one exception, those which are in effect have not been ratified by a great many nations. Yet the work done by the Hague Conference must be called highly successful, for ratification is not all that matters. Indirect effects must also be taken into account, and a look at the conflicts literature shows the beneficial use made of the work undertaken at The Hague. Once the proceedings of the sessions are printed both in English and in French, the Conference will exercise even greater influence.[207]

The success of the Hague Conference is due to the working method developed, and to the quality of the delegations which the governments send to the Committee meetings and to the sessions. The staff of the Permanent Bureau, the Secretary General and the two Assistant Secretaries, are accomplished comparative conflicts specialists who have learned from practice that no useful work can be done without preliminary study of the differences in the substantive law and in the conflicts rules on the subjects to be covered.[208] Without such preparation, arguments in the discussion will not be responsive; and intelligent search for a generally acceptable solution becomes impossible.

However good the preparation of the session, the results depend upon the learning and skill of the delegates attending it. Naturally governments endeavor to select top experts on the topics to be discussed. In smaller countries, the selection is often obvious; in others, alternative choices are likely to exist. The number of all-round trained conflicts specialists with a working knowledge of foreign law has, since the end of the war, grown steadily almost everywhere. Of this group many are likely to be found at the sessions—a meeting place of the "Who Is Who in Comparative Conflicts Law."

Here is an analysis of the composition of the delegations sent to the Tenth Session.[209] The twenty-three member states sent a total of close to ninety delegates.

[205] See Nadelmann, *Ways to Unify Conflicts Rules*, in DE CONFLICTU LEGUM—ESSAYS PRESENTED TO R. D. KOLLEWIJN AND J. OFFERHAUS 349, 359 (1962), and 9 *Nederlands Tijdschrift voor Internationaal Recht* 349, 359 (1962). *Cf.* Graveson, *The Unification of Private International Law*, in DAVID DAVIES MEMORIAL INSTITUTE OF INTERNATIONAL STUDIES, REPORT OF INTERNATIONAL LAW CONFERENCE HELD AT NOBLETT HALL JULY 1962, at 56, 61-62 (1964).

[206] For the fate of the "status" conventions prepared in the early part of the century, doomed because of their reliance on the nationality principle, see 1 RABEL, *op. cit. supra* note 8, at 34; Offerhaus, *supra* note 8, at 30.

[207] The almost complete disregard in English-speaking countries of the work undertaken in the field of conflict of laws by the distinguished *Institut de Droit International* is due to the unfortunate decision of 1950 to print the Proceedings only in French. See 50 II INSTITUT DE DROIT INTERNATIONAL, 1963 ANNUAIRE LVI (1964).

[208] See Van Hoogstraten, *supra* note 7, at 151. *Cf.* Rabel, *The Hague Conference on the Unification of Sales Law*, 1 AM. J. COMP. L. 58, 67 (1952), for an admonition in this regard.

[209] The full list of those present may be found in 1 CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES ET DOCUMENTS DE LA DIXIÈME SESSION (in print).

For the larger states the average was five to six. Slightly more than one third were government officials, slightly less than a third law professors, and the rest were members of appellate courts and practicing attorneys. The relatively large number of officials was in part due to the fact that a question of judicial administration was on the agenda; the other reason is that, in a few continental states, top specialists work in the Departments of Justice as civil servants. Particularly high in 1964—eleven—was the number of members of highest courts.[210] The performances from that corner were noted as particularly constructive.

As an example of the selection of delegates the composition of a few delegations may be given. The Netherlands Delegation was composed of two professors of private international law, two members of the Supreme Court (one the editor of the new edition of the leading text on the conflict of laws), and two practitioners with wide international practice (one the author of a conflicts hornbook). The delegation of the United Kingdom included a law dean (the author of a well-known text on conflicts), a member of the Lord Chancellor's Office, a professor of private international law from Scotland, and legal advisors of the Home Office and the Foreign Office. France sent a former law dean who is also president of the Commission for the Revision of the Civil Code, two teachers of private international law (one the author of the leading textbook and the other editor of a leading hornbook), a former member of the Court of Cassation who wrote most of that court's conflicts opinions during the last decade, and a presiding judge of the Paris court of appeal who, while serving on the Paris court of first instance, had for years handled requests for the exequatur of foreign judgments.

In the past it has happened that, at one session of the Conference, a delegation from a specific country appeared particularly strong and that, the next time, that country's delegation seemed to be among the weakest. Illnesses or deaths may have occurred, or politics may have interfered with the selection of delegates. These matters are much commented upon, and if it may be said that some sort of an international competition exists the effect is wholesome: Governments are forced to take the process of selection of delegates seriously. Experience is among the qualifications which have been considered. A check of the record reveals that almost half of those present at the Tenth Session had attended at least one earlier session; twenty had attended two, and ten even three. However, some of the best performances at the Tenth Session were by newcomers, and the need for breaking in new talent is of course obvious.

Each session has its star performer or performers. Stardom may come from ability to discover hidden reasons behind differing views, from a talent to work out compromises, from superior handling of drafting problems, or "merely" from

[210] They were from France, Italy, Japan, Luxembourg, the Netherlands (2), Norway, Sweden, Switzerland, the United Arab Republic, and Yugoslavia. These courts have a membership substantially higher than the courts in the United States.

intelligent discussion of the merits of the issues. Familiarity with the rules of foreign systems can be of great help. Through a reference to domestic criticism of a rule which is defended, the entire argument in support of it may fall flat. Interestingly, "doctrinal" arguments are hardly ever made, and oratory is rarely deployed. Naturally a position taken by an internationally known expert is likely to be considered with more interest than an argument from a junior official who, it appears, argues "for the record" on the basis of written instructions.[211]

A matter watched with particular interest is always the handling of situations where a delegate cannot in good conscience support provisions in his own law. Delegates of standing are not likely to hide their personal views. In this connection, an incident at the Tenth Session is worth noting. Criticism was voiced by a delegate at the fact that, on occasion, a position is taken by an expert on a Special Commission and that, afterwards, it is not backed up by his country's delegation to the session. Experts, it was intimated, should be "under instructions" like the delegations. The suggestion had an icy reception, and the President of the Conference took occasion to stress that successful work depends largely upon the intellectual independence of the experts on the Special Commissions. Obviously, the experts must be conscious of the fact that preparation of drafts not likely to be accepted is a waste of time and energy.

On questions of policy, "block voting" is sometimes noticed. Interestingly, at the Tenth Session the "division" was rarely between the "common law" and "civil law" groups. Hardly ever were the three common law countries alone with their votes. On closely contested issues the position taken by the Scandinavian countries was often decisive. An analysis of the voting may suggest some "satellite" behavior but, on crucial points, what seemed to be a "block" quite often dissolved. In one particular case, for example, the interests of the smaller and the larger countries happened to clash. On a question like recognition of divorce decrees specific grouping must, of course, be anticipated. But the questions to be voted on do not necessarily raise the basic issue directly, and the problems are often so complex that the results of the vote—voting is in the alphabetical order of the states according to the listing in the French language—cannot easily be anticipated. When indicated, voting may be postponed to give time for reflection and for consultations within and among the delegations. On the basis of observation of two and full participation in one session, it can be said that, even without formal "rules,"[212] the Conference succeeds in securing full discussion of the issues at the sessions. Of course, the quality of the committee chairmen is not always the same, and this can make a difference.

This paper is in praise of the Hague Conference as an institution, but some of

[211] *Cf.* Van Hoogstraten, *supra* note 7, at 153.

[212] We see no need for formal adoption of "rules," as was proposed by the Permanent Bureau at the Tenth Session. See Final Act, B IV (2), *supra* note 152.

the unsolved problems of the Conference should be noted at the same time. The language question has not yet been settled fully. Whatever the additional costs, the interest of the Conference demands that the proceedings be printed in both English and French. Furthermore, the Permanent Bureau should be strengthened by adding an Assistant Secretary from a common law country.[213]

A problem less easy to solve involves the more adequate composition of the membership. History accounts for the present primarily "European" if not "Continental" make-up. The statutory purpose of the Conference, however—"Work for the progressive unification of the rules of private international law"[214]—is not regional, and it should not be.[215] Regional problems are best attended to by regional organizations.[216] In order to have the greatest possible effect, the Conference should, therefore, have as members the principal nations of similar social, economic, and intellectual standing. From this perspective the absence of, for example, Canada, Australia, and India, as well as of the whole of Latin America, must be regretted.[217] Flooding the Conference with members, on the other hand, would endanger its work.[218]

Effectiveness also requires a more open-minded approach to the question of the working method. Some of the topics which have been covered clearly did not ask for treatment by way of a convention: model legislation would have been a better approach.[219] Use of model legislation continues to be regarded by some as a "concession" to the United States, required by its assumed inability to solve the federal-state problem.[220] Further efforts will be needed to end this misconception.[221]

[213] The Charter of the Conference, art. 4 (3), *supra* note 42, provides that the number of Assistant Secretaries may be increased after consultation of the Member Governments.

[214] Charter of the Conference, art. 1, *supra* note 42.

[215] This does not exclude consideration of suggestions from the Council of Europe with which the Conference has a working agreement, as long as treatment of the topic is "general."

[216] This has been the view of the Scandinavian countries, the Benelux, and the Common Market countries. See Van Hecke, *Universalisme et particularisme des règles de conflit au XXe siècle,* in 2 MÉLANGES EN L'HONNEUR DE JEAN DABIN 939, 949-52 (1963).

[217] One of the results is the lack of attention given in these countries to the work done at The Hague. This has had particularly unhappy results in Latin America where, with few exceptions, the literature has not gone beyond coverage of the dated Montevideo Treaties of 1889/1940 and the equally dated Bustamante Code of 1928. See Nadelmann, *The Question of Revision of the Bustamante Code,* 57 AM. J. INT'L L. 384 (1963).

[218] A majority vote of the members is required to accept a new member. Charter of the Conference, art. 2, *supra* note 42.

[219] Examples are the Convention of 1955 on the Law Governing International Sales of Goods, *supra* note 176, the Convention of 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions, *supra* note 201, and the Convention prepared in 1964 on Choice of Court, *supra* note 159. Questions of "form" should not be handled, as they have been, by the Committee on the so-called Diplomatic Clauses but by the Committees dealing with "substance."

[220] See the language of the Resolution "In Respect of Model Laws" adopted at the Tenth Session. Final Act, B III, *supra* note 152. The draft of the Resolution was produced at the full session without previous discussion in a Committee session.

[221] An interesting discussion of the various possibilities of federal-state collaboration took place at the 1964 annual meeting of the Commissioners on Uniform State Laws. In addition to use of the treaty-making power and of uniform legislation, the possibility was discussed of drafting conventions with a federal-state clause which would make applicability of the convention in a particular state dependent

Another, often neglected factor is that in some instances, neither convention nor model legislation are needed to do the job. One or two countries may have improper legislation, and the problem can be resolved by inducing them to revise their law.[222] While the Hague Conference is not a court to hear "complaints," it is a proper forum for open discussion of the real issues in a tactful way. Such discussion, or the mere likelihood of a discussion, may have beneficial effects. In any event, going through the motions when the country involved opposes any change has little value.[223]

## VI

### THE DOMESTIC ANGLE

As a full partner in the venture, the United States has a stake in the success of the Conference. Of all matters here discussed, perhaps the most difficult to solve adequately is how to make sure that we give proper attention to the problems resulting from membership in the Hague Conference and the Rome Institute.[224] The creation by the Secretary of State of an Advisory Committee was a proper and necessary step. Through the appointment to the Committee of representatives of leading national organizations, channels have been established for receipt of advice and assistance from these groups. The expectation is that each of them will develop its own procedures for discharging under the best possible conditions the obligations that arise from representation on the Committee. But the Advisory Committee needs more than representatives of organizations. Persons chosen by the Secretary of State for their standing and experience in the field should constitute the nucleus of the Committee.

Even these steps can solve the problems only in part. With the kind of activity here involved, its combined academic and practical character, dealing with the problems that arise merely on the governmental level is not enough. Burdened with work in need of immediate attention, the Department of State cannot give such problems the kind of constant attention which is needed—even with the help of an advisory committee. The changes in staff and staff assignments make such attention a practical impossibility; moreover, the official machinery is too cumbersome to

upon action by the legislature of that state. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1964 HANDBOOK 147, 150-51.

[222] One famous example is the *service au Parquet, supra* note 140; another is the notorious article 14 of the French Civil Code which gives jurisdiction to the French courts for the benefit of Frenchmen suing resident or non-resident foreigners, even when the transaction has no relation to France. On new complications due to planned extended use of article 14 see Nadelmann, *supra* note 149.

[223] A common experience is that the country involved will insist on insertion of a protective reservation in the convention. See, *e.g.*, the reservations in the draft Convention on the Choice of Court, articles 12 to 14, *supra* note 159.

[224] This is a problem that arises in all countries. The Charter of the Hague Conference, *supra* note 42, provides in article 6 that each Government must designate a national organ for receipt of communications from the Permanent Bureau. Difficulties had developed with correspondence addressed to the governments in a routine way.

handle matters effectively. Nor can initiative and inspiration be expected, as a rule, to come primarily from official quarters. Yet creative thinking is essential. All this would be true even if the questions to be dealt with were all in the field of federal legislative jurisdiction, that is, without the complications which arise when a topic is in the state law area, an area on which the Hague and Rome programs frequently impinge.

What is the answer to the problem? Should a special agency be set up, possibly of the "mixed" federal-state type created for investigation of the difficulties encountered with judicial assistance in the international field?[225] The experience with the Commission on International Rules of Judicial Procedure was disappointing. With the Congress unwilling to appropriate funds, an individual law school beneficiary of a Foundation grant was largely in control of the work, while on the Commission membership changed with changing administrations.[226] Four years were spent on domestic law reform, and when the life of the Commission expired, the assignment given by Congress in the first place, preparation for assistance of the Secretary of State of international agreements to be negotiated by him, had not been reached.[226a]

An American Committee on Private International Law composed of persons with established "status" in the field should be formed. Presently, a grouping of American experts in the conflicts field is lacking. As members of other organizations, these experts can arrange for occasional discussion of conflicts problems within the given organization, but the basic concerns of each existing organization are elsewhere. Even for work on the revision of the Conflicts Restatement the arrangements made are all but perfect,[227] and restating the law is, literally speaking, of lesser dimensions than work on international unification of law. Abroad all kind of schemes have been tried out: official, semi-official, and private.[228] In the case of this country, an effort on both the private and the official levels appears to be indicated. The private group, a "learned" society composed of a limited number of practitioners and teachers, will fill in where officialdom cannot do as well, and

[225] See Jones, *supra* note 131.

[226] See Fourth Report of the Commission on International Rules of Judicial Procedure (mimeo. 1963), reproduced in H.R. Doc. No. 88, 88th Cong., 1st Sess. (1963).

[226a] Time for submission of the final report has been extended to the end of 1966. Pub. L. No. 522, 88th Cong., 2d Sess. (1964), 78 Stat. 700.

[227] The small group of Advisers working with the Reporter is hardly representative of all that is known on conflicts in this country.

[228] The Netherlands has had since 1897 its State Commission on Private International Law. The Ministry of Foreign Affairs' Yearbook reports on its activities. In the United Kingdom, the Lord Chancellor's Private International Law Committee, established after the 1951 session of the Hague Conference (see CMD. No. 9068 (1954)), is available. Some of its work has appeared in Command Papers. In France, the unofficial Comité Français de Droit International Privé has since 1934 rendered outstanding services. It is largely responsible for the withdrawal by the government of the "Niboyet Draft" of a Law on Private International Law. Helped by a research grant, it publishes its "Travaux." In West Germany, the unofficial Deutscher Rat für internationales Privitrecht was established in 1953. The Rat is composed of about thirty members; expenses of operation, including publications, are covered by the Government (information supplied by Professor Gerhard Kegel, its president).

it will ensure that the problems facing the United States become known to the profession. The poor record of the past is, to a large part, due to the fact that problems were withheld from the profession.[229]

The complications which come from the federal system furnish additional reason for establishment of a standing expert body devoted to work on improvement of conditions in the conflicts field. Available to the federal government, the group can also serve the Commissioners on Uniform State Laws. Work of the Conference of Commissioners in the conflicts field has not been very successful, due, in part, to the Conference's working methods.[230] Even when the Conference uses an individual expert as draftsman, the conflicts specialists learn about Uniform Acts only after they have been promulgated.[231] The experience with the Uniform Commercial Code has taught that different ways of preparation must be used.

The expert body needed may well wish to give prime attention to prevention or regulation of interstate conflicts. If, for good or for bad, a new spirit has invaded doctrinal and methodological thinking in the conflicts of field,[232] little energy has so far been spent on the study of conflicts prevention.[233] Ample means exist, under the Constitution and through cooperation of the states, to do away with particularly annoying types of conflicts, some a daily menace to the general public, as, for example, the limitations put in some state laws on the amount of damage which may be claimed in the case of a fatal airplane accident.[234] On occasion, as in this case, work on the international level has been more effective than internal efforts.[235] Under an inspired leadership—and creative minds are not lacking—a standing group

[229] Still today participation in the activities of the Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee, remains practically unreported. *Cf.* A. J. THOMAS & ANN VAN W. THOMAS, THE ORGANIZATION OF AMERICAN STATES 399 (1963).

[230] In the conflicts field, only the Reciprocal Enforcement of Support Act has been a full success. Among the failures: the Powers of Foreign Representatives Act, the Statutes of Limitation on Foreign Claims Act, and the Divorce Recognition Act. The Interstate and International Procedure Act, which includes a long arm statute, has, so far, been enacted in one state (Arkansas), and the Uniform Foreign Money-Judgments Recognition Act, in two (Illinois and Maryland).

[231] Under the Constitution of the National Conference of Commissioners on Uniform State Laws, art. VIII (text in its yearly *Handbooks*), final approval of an act requires consideration of the draft at two annual meetings but the requirement may be waived. The By-laws, sec. 21, provide for notification and consultation of appropriate committees or sections of the American Bar Association. Generally speaking, this machinery has not brought drafts in the conflicts field to the attention of the conflicts specialists. And while the Commissioners prepare drafts in committees (composed of Commissioners), contrary to the established American Law Institute practice, no adviser specialists are selected to work with the draftsmen.

[232] See Symposium, *New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 673 (1963).

[233] But see, in particular, Cavers, *Klaxon Memorandum*, in AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154, 202-14 (Tent. Draft. No. 1 (1963)). *Cf.* Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROB. 860, 866-69 (1963).

[234] See Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (2d Cir. 1962); Griffith v. United Airlines, 416 Pa. 1, 203 A.2d 796 (Pa. 1964).

[235] See Sand, *Limitation of Liability and Passengers' Accident Compensation under the Warsaw Convention*, 11 AM. J. COMP. L. 21 (1962); Lissitzyn, *The Warsaw Convention Today*, 1962 PROCEEDINGS, AM. SOC'Y INT'L L. 115.

dedicated to work on the problems of the conflict of laws can do a great deal to improve the situation.

The standing group will have an unlimited amount of work waiting for it on the "home front"; it will have periodic business coming from the activities of the Hague Conference on Private International Law, the Rome Institute, and the Inter-American Council of Jurists and its standing committee;[236] it will, furthermore, find a backlog of problems which have been piling up on the international level and are in need of further attention.[237] As an urgent first step, the group will have to see to it that materials of interest come in timely fashion to the profession's attention.

A decade ago, when joining the Hague Conference was not yet in the cards, I ventured to propose for this kind of work creation of a *Story Society*.[238] The new involvements seem to make establishment of a permanent study group even more pressing. The use of Story's name would make clear to scholars here and abroad what the society stands for better than any blueprint could.

[236] See Murdock & Gobbi, *The Inter-American Juridical Committee*, 9 AM. J. COMP. L. 596 (1960). The Inter-American Council of Jurists has recommended to the Council of the Organization of American States that it convoke a specialized conference on private international law in 1967 to undertake a revision of the Bustamante Code in the light of advances made in legal doctrine and of the Montevideo Treaties. Inter-American Council of Jurists, Fifth Meeting, San Salvador, Jan. 25 to Feb. 5, 1965, Final Act, Res. No. II. *Cf.* Nadelmann, *The Question of Revision of the Bustamante Code*, *supra* note 217.

[237] An example is the lack of progress made with assessment of the American interest in the international commercial arbitration field. See Leigh, *Enforcement of Judgments and Awards*, in SOUTHWESTERN LEGAL FOUNDATION INTERNATIONAL AND COMPARATIVE LAW CENTER, Symposium on RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD 439, 465 (1965); Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961); *Report of the Committee on International Unification of Law*, A.B.A. SECTION OF INTERNATIONAL AND COMPARATIVE LAW 1960 PROCEEDINGS 194. The Report of the U.S. Delegation to the United Nations Conference of 1958 has never been printed.

[238] Nadelmann, *The Institut de Droit International. For a Story Society*, 5 AM. J. COMP. L. 617, 624 (1956).