Edited by
**Ann Laquer Estin**

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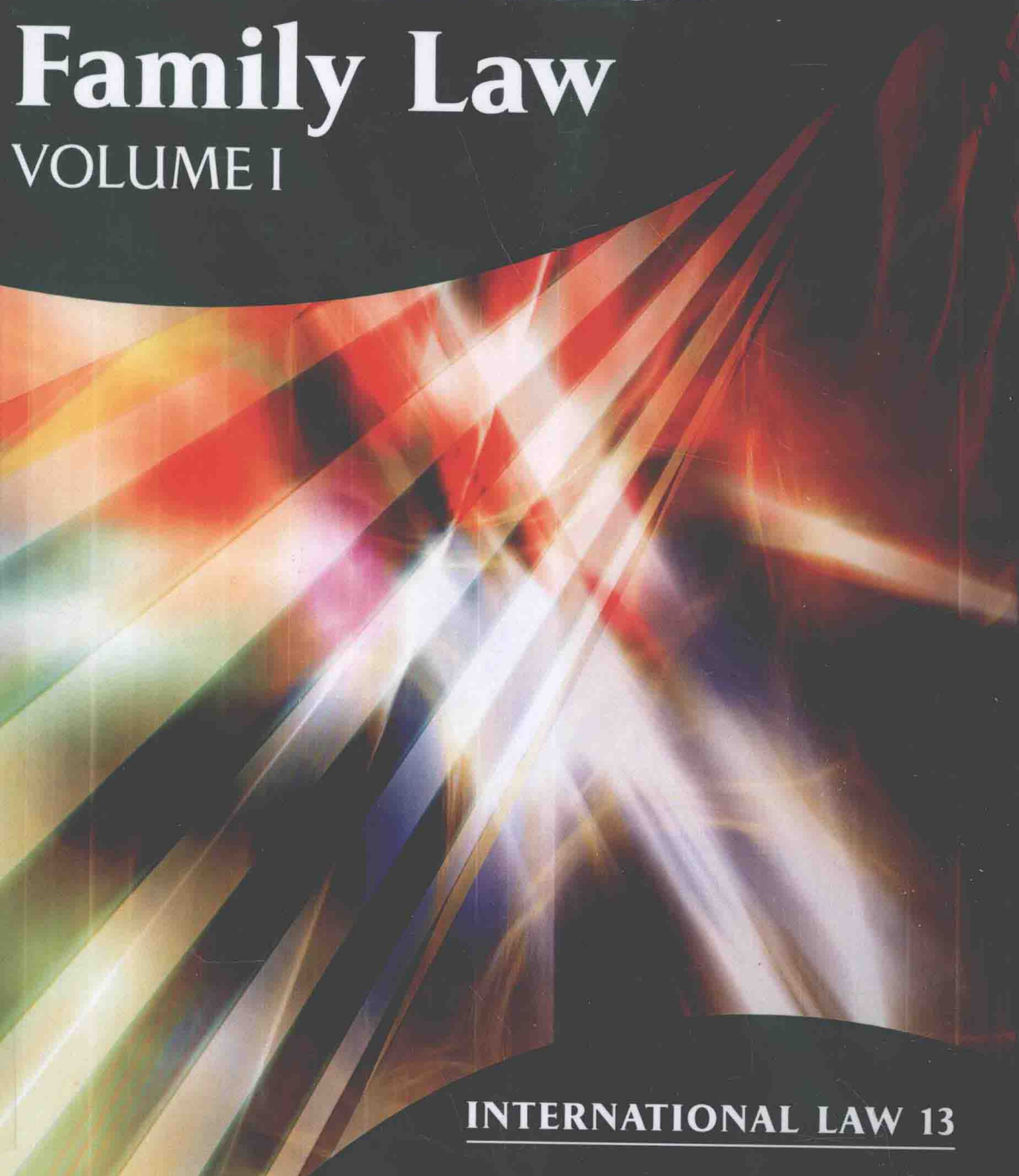
# International Family Law

VOLUME I



INTERNATIONAL LAW 13

# International Family Law
# Volume I

*Edited by*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INTERNATIONAL LAW


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# International Family Law
# Volume I

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# Introduction

*Ann Laquer Estin*

International Family Law has emerged as a distinct field of legal practice in recent decades with a substantial body of scholarly literature from around the world. The growth of the field reflects two different dimensions in which family law has been internationalized. Cross-border family relationships, the traditional focus of private international law, have become a more extensive subject of litigation, treaty-making, and international cooperation. At the same time, international human rights principles have significantly shaped both domestic and international family law systems.

For purposes of this review, the subject of family law begins with a traditional set of private law topics including marriage, divorce, parental responsibilities, adoption, and child support, and then extends out to include a wider range of matters such as nonmarital family relationships, domestic violence, surrogacy, child welfare, and the protection of vulnerable adults. The realities of global family life mean that migration and citizenship laws have come to play a central role in these questions, along with issues of cultural and legal pluralism. Although comparative family law is 'an essential component of international law' (see Boele-Woelki 2008b), the rich literature on foreign and comparative family law falls largely beyond the scope of this review.

This survey focuses primarily on academic journal articles, describing a representative selection of significant articles that collectively provide an overview of the field. Researchers should note that there are also a number of book-length introductions to the subject (see Murphy 2005; Stark, 2005); published teaching materials (see Blair et al. 2015; Estin and Stark, 2007; Pintens and Vanwinckelen 2001; Richards et al. 2009); and treatises and handbooks for practicing lawyers and judges (Estin 2016; Hodson 2015; Morley 2014). Useful groundwork was laid in the Hague Academy lectures of Adair Dyer (1980), Peter Pfund (1996), and Linda Silberman (2006). Current developments are regularly canvassed in *International Family Law*, published quarterly by Jordan Publishing, and in *The International Survey of Family Law*, published annually on behalf of the International Society of Family Law.

## Volume I, Part I The Emergence of International Family Law

In his lecture on 'The Internationalization of Family Law', Adair Dyer (1997, Chapter 2 Volume I) reviewed the development of treaties establishing international norms for resolving family law disputes over the twentieth century, focusing on the work of the Hague Conference on Private International Law. Dyer emphasized that the Hague conventions established and depend upon systems of multilateral and bilateral cooperation between contracting states, which have been created and nurtured by the Hague Conference. Dyer also noted the important

interaction of the four Hague Children's Conventions with the United Nations Convention on the Rights of the Child (CRC).[1] These treaties have been very widely adopted in the years since Dyer's lecture, and form the core of international family law today. With the increasing global movement of families and children, the Children's Conventions apply to many thousands of cases every year. Elizabeth Beck-Gernsheim (2012, Chapter 1 Volume I) has pointed to three areas in which private individuals look abroad for better or different options in shaping their family life: marriage tourism, divorce tourism, and fertility tourism, all of which generate significant legal complexity. As described by Barbara Stark (2006), family law is where 'globalization hits home'. See also Estin (2010), Lipstein (1993), and Weiner (2008).

Both in its concern with cross-border family life, and in its attention to international human rights, international family law depends on careful foreign and comparative law research. Important early comparative work was carried out by Mary Ann Glendon (1987, 1989) and Max Rheinstein (1953, 1972). See also William J. Goode (1993). Subsequent comparative scholars have focused on projects of unification and harmonization of substantive family law, particularly within Europe. See, for example, Katharina Boele-Woelki (2008b). Fernanda G. Nicola's article on 'Family Law Exceptionalism in Comparative Law' (2010, Chapter 4 Volume I) traced this shift toward unification in comparative family law to the emergence constitutional and human rights norms, contrasting it with the traditional view of family law as uniquely grounded in local mores and traditional religious and cultural values, and suggesting that the new projects should address not only moral values and universal rights but also the interdependence between the law of the family and the law of the market.

Questions of human rights pervade international family law today, providing a foundation for private international law conventions and shaping national family laws to a set of shared principles. The most important of the international human rights instruments in family law are the CRC and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[2] which have been widely ratified around the world. At the regional level, the 1950 European Convention on for the Protection of Human Rights and Fundamental Freedoms (ECHR)[3] has come to play a powerful role in family law systems across 47 nations in Europe. In Europe, the right to respect for private and family life under Article 8 of the ECHR has had very important consequences beyond family law, particularly in light of the free movement provisions of European Union (EU) law.

With an understanding of economic globalization as the force that has powered the explosion of international family law, the importance of adding migration law into the family law equation becomes clear. Baroness Brenda Hale, Justice of the Supreme Court of the United Kingdom, made this point in her article, 'Families and the Law: The Forgotten International Dimension' (2009, Chapter 3 Volume I). Family separation and reunification questions are extremely complex in the European Union and beyond; see, for example, McGlynn (2009), Ronen (2012), and Starr and Brilmayer (2003). In this context, Helen Stalford (2002, Chapter 5 Volume I) contrasted the strong stance taken by the European Court of Human Rights and the European Commission of Human Rights regarding Article 8 protections for family and private life with the narrower approach taken by the European Court of Justice, particularly in the migration context. Taking this a step further, Daniel Thym (2008, Chapter 6 Volume I) has described the extension of Article 8 to claims concerning the expulsion and deportation of foreigners under national immigration laws.

## Volume I, Part II Marriage and Partner Relationships

*Marriage across Borders*

International marriage migration has a long history, and questions of marriage recognition are a longstanding topic of private international law. Willis L.M. Reese (1979, Chapter 7 Volume I) considered the problems surrounding marriage recognition in the context of the 1977 Hague Convention on Celebration and Recognition of the Validity of Marriages.[4] See also Pålsson (1978, 1981), Reed (2000), and Wardle (1996). Beyond the conflict of law problems, marriage migration raises complex immigration questions (see Abrams 2007, for example), and serious concerns regarding the risks of trafficking or maltreatment of women. Ryiah Lilith (2000–2001, Chapter 8 Volume I) argued in a provocative paper that 'mail-order' marriage and intercountry adoption can be subject to similar criticisms as practices involving the 'purchase of Third World citizens to complete the families of a (former) colonial and imperial power' (p. 153).

*Marriage and Human Rights*

Marriage practices pose fundamental human rights questions directly addressed by international law. These were considered by Egon Schwelb (1963, Chapter 11 Volume I) in an article about the United Nations Convention on Consent to Marriage, Minimum Age for Marriage, and Recognition of Marriages.[5] Forced and child marriages are also condemned by CEDAW and the CRC, and more recent scholarship has focused on these problems. Ruth Gaffney-Rhys (2011, Chapter 10 Volume I) has argued that although treaties do not have a direct impact on marriage practices, international law can play an important role in local campaigns against child marriage by emphasizing the seriousness of the issues. Looking to cross-border situations, Alison Symington (2001, Chapter 12 Volume I) described the special problems of 'Dual Citizenship and Forced Marriages', pointing out that domestic citizenship laws and international law on diplomatic protection have complicated attempts to assist some individuals who are abducted from one country to another for marriage purposes. In 'Forced Marriage as a Harm in Domestic and International Law', Catherine Dauvergne and Jenni Millbank (2010, Chapter 9 Volume I) contrasted the emergence of domestic initiatives to prevent marriage coercion in immigrant communities with the reluctance to treat forced marriage as a type of persecution in the context of refugee law.

*Traditional and Religious Family Law*

Addressing the law governing marital relationships, family law scholars and activists have focused on CEDAW articles 5 and 16, and legal and cultural practices that may be harmful to women. For example, Javaid Rehman's article on 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007, Chapter 14 Volume I) reviewed the evolution of these doctrines and noted that some Islamic societies have allowed debate and reform to rectify injustices, working from within traditional primary sources. Looking to gender discrimination in patrilineal African countries, Fareda Banda (2003, Chapter 13 Volume I) considered whether these human rights norms can

appropriately be considered as universal in 'Global Standards: Local Values'. See also Armstrong et al. (1993).

*Informal Cohabitation Relationships*

Beyond formal marriage, international and comparative scholars have addressed legal protections for informal cohabitation relationships such as concubinage, or the union marital de hecho. Jens M. Scherpe (2005, Chapter 15 Volume I) surveyed 'Protection of Partners in Informal Long-Term Relationships' noting the dilemmas involved in legal definition and regulation of these relationships. As Scherpe points out, legal protections are particularly strong in New Zealand, where there is no longer a distinction between the property division, maintenance, and pension rights of married and long-term cohabiting couples, see Atkin (2003).

*Same-Sex Marriage and Partnerships*

As countries have developed new devices for recognition of unmarried partner relationships, typically in the context of same-sex couples, the cross-border implications of these protections have been a subject of debate. This area has changed remarkably quickly, with much of the scholarship rendered obsolete almost before the ink dries on the page. As a reference point amid these transitions, Katharina Boele-Woelki's article on 'The Legal Recognition of Same-Sex Relationships within the European Union' (2008a, Chapter 17 Volume I) considered how EU member states have addressed recognition in one country of a same-sex relationship that has been legally registered in another country. Although many more countries in Europe now permit same-sex couples to marry, the complex private international law issues for same-sex couples have not disappeared. See also Curry-Sumner (2009), Melcher (2013). A solution within Europe might come from the European Court of Human Rights, but as analyzed by Nicholas Bamforth (2011, Chapter 16 Volume I) in 'Families but not (yet) Marriages? Same-Sex Partners and the Developing European Convention "Margin of Appreciation"', that body has taken a very cautious approach to these questions. On the possibility of protection under broader international human rights law, see Hodson (2004).

**Volume I, Part III Family Breakdown**

*Divorce and Matrimonial Property*

Comparative law scholars have analyzed many aspects of the 'divorce revolution' that transformed marriage and divorce around the globe during the twentieth century, following the lead of Mary Ann Glendon (1989) and Max Rheinstein (1972). Glendon's article on 'Matrimonial Property: A Comparative Study of Law and Social Change' (1974, Chapter 18 Volume I) described a state of profound upheaval in matrimonial property systems, related to broad changes in the ideology of marriage and the economic and social roles of women. Glendon noted the common underlying tension between the idea that each spouse is an independent and equal individual and the idea that marriage is a community of interest, and

pointed out that different systems struck an equilibrium between these two ideals in different ways. With these changes has come a gradual shift in focus of family law from divorce grounds and defenses to the financial aspects of divorce and parent–child relationships.

Traditional private international law scholarship centered on divorce jurisdiction and recognition of divorce decrees. Only a small number of countries joined the Hague Divorce Convention,[6] however, including the United Kingdom but not the United States. Friedrich Juenger (1972, Chapter 19 Volume I) applauded the 'synergism of judicial, diplomatic and legislative action' that produced practical solutions to the divorce recognition problem in the United Kingdom (p. 511), contrasting this with the American experience 'preoccupied with evasion and collusion, because the stringency of substantive divorce law in many states encouraged migratory divorces' (ibid.). In another comparison of UK and US practices, Alan Reed (1996, Chapter 22 Volume I) focused on transnational non-judicial divorces, such as a Jewish *get* or Muslim *talaq*, arguing for broader recognition of these divorces to avoid the problem of limping marriages combined with laws that allow access to the courts afterward to address financial remedies.

Turning to conflicts questions involving matrimonial property and spousal support rights, J. Thomas Oldham's article asked: 'What if the Beckhams Move to LA and Divorce? Marital Property Rights of Mobile Spouses When They Divorce in the United States' (2008, Chapter 21 Volume I). See also Davie (1993) and Rosettenstein (2009). Within Europe, substantial differences in matrimonial property and maintenance rights have led to significant forum shopping in divorce proceedings, which has been made more difficult by different approaches to choice of law and enforcement of premarital agreements. These differences are surveyed in Scherpe (2013); see also Ryznar and Stępień-Sporek (2009). Premarital contracting is an example of the larger debate over whether individuals should be able to choose the legal rules to govern their relations, also known as party autonomy, see, for example, Yetano (2010).

Divorce has been an important subject for cross-border cooperation within the European Union, which is accomplished primarily through rules coordinating jurisdiction and recognition of judgments under the Brussels II *bis* Regulation.[7] In her book, *Cross-Border Divorce Law: Brussels II* bis, Máire Ní Shúilleabháin (2010a) provided a comprehensive treatment of issues under the Regulation. Ní Shúilleabháin's article on 'Ten Years of European Family Law: Retrospective from a Common Law Perspective' (2010b, Chapter 23 Volume I) concluded that the Regulation and subsequent developments have had profound indirect consequences and a negative impact on English and Irish law, particularly in cases involving forum shopping within Europe and cases with connections to countries outside of Europe. See also McGlynn (2006), McEleavy (2002). Beyond the issues addressed by Brussels II *bis*, divorce law has also been the subject of attempts at substantive harmonization within Europe, particularly through the reports and model laws produced by the Commission on European Family Law. See Boele-Woelki (2005). As described by Jan-Jaap Kuipers in 'The Law Applicable to Divorce as Test Ground for Enhanced Cooperation' (2012, Chapter 20 Volume I), this subject has been the focus of the first program of 'enhanced cooperation' within the EU, with approximately half of the EU member states opting in to conflict of law principles for divorce. See also Boele-Woelki (2010).

*Personal/Religious Family Law*

Seen globally, divorce practices have raised important human rights questions. Debates

surrounding cultural and religious pluralism often center on divorce, both in countries with pluralistic or religious legal systems and in countries with unitary and secular legal systems. In 'Personal Family Law Systems – A Comparative and International Human Rights Analysis' Hadas Tagari (2012, Chapter 26 Volume I) focused on the human rights questions presented by family law systems in Morocco, India, Lebanon and Israel. Pascale Fournier (2010, Chapter 25 Volume I) turned the inquiry toward countries with fully secular family law systems in 'Flirting with God in Western Secular Courts: Mahr in the West.' See also Estin (2004, 2009). Gillian Douglas and her colleagues (2012, Chapter 24 Volume I) have looked empirically in England and Wales at 'The Role of Religious Tribunals in Regulating Marriage and Divorce', concluding that the tribunals in their study did not seek official legal status or recognition, understanding their role as providing a service to meet the religious and communal needs of their users. See also Sandberg et al. (2013).

*Domestic Violence*

International human rights are also deployed to address domestic violence, as described by Barbara Stark (2001, Chapter 27 Volume I) in 'Domestic Violence and International Law: Good-Bye Earl (Hans, Pedro, Gen, Chou, etc.)'. This is an important subject in refugee law, which has been slow to conceptualize harm to women as the type of persecution that may give rise to an asylum claim, particularly when the violence is perpetrated by a family member (see Mullally 2011). Within Europe, these issues play out in the context of free movement principles. An analysis by Adam Weiss (2009, Chapter 28 Volume I) described the origin and operation of the domestic violence protections in European law, noting that these are a subset of immigration law, applicable to certain transnational families, analogous to national laws adopted in countries such as the United States, Australia and the United Kingdom.

**Volume II, Part I Parents and Children**

*Children's Rights*

There is a large literature on children's human rights, well beyond the scope of this review, but one important subset considers children's rights in the context of their family life. Philip Alston's 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994, Chapter 1 Volume II) made the important point that, despite broad consensus around the world on the importance of protecting children's interests, the principle is given very different interpretations in different societies. These issues are particularly pointed in the creation and termination of legal parent–child relationships, which may occur in family courts or through immigration proceedings. Focusing on Europe, Ursula Kilkelly (2002, Chapter 3 Volume II) argued in 'Effective Protection of Children's Rights in Family Cases: An International Approach' for reading the ECHR together with the CRC to develop protections for children in alternative care situations. Looking beyond the family law context, considering both the United States and the United Kingdom, Patrick Glen's article on 'The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing

Imperatives in the Context of Removal Proceedings' (2012, Chapter 2 Volume II) recommended an approach combining elements of each system. See also Thronson (2006).

*Marital and Nonmarital Children*

Discrimination between marital and nonmarital children is expressly prohibited by CRC article 2 and other human rights instruments, but it has taken decades for this principle to be implemented in domestic legal systems. Marie-Therese Meulders-Klein (1990, Chapter 5 Volume II) addressed 'The Position of the Father in European Legislation', emphasizing the child's fundamental right to have a personal relationship with his or her father and mother. Looking at the Islamic world, Shabnam Ishaque (2008, Chapter 6 Volume II) considered 'Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity'. Julia Sloth-Nielson and colleagues (2011, Chapter 7 Volume II) examined African customary and common law in 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries', concluding that distinction in parental responsibilities based on marital status has serious implications for children in light of broader inequities between men and women in society.

European countries have taken a particularly strong view of the child's right to know his or her origins, based on CRC articles 7 and 8 and ECHR article 8. Samantha Besson (2007, Chapter 4 Volume II) described different paradigms within Europe in 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights'. The issue of the child's identity rights is an important undercurrent in the different approaches taken by different countries to assisted reproduction and international surrogacy. In the context of intercountry adoption, these identity rights include questions of nationality, addressed by William Duncan (2006, Chapter 10 Volume II) in 'Nationality and the Protection of Children across Frontiers, and the Example of Intercountry Adoption'.

*Intercountry Adoption*

Nowhere in the field of international family law are views more polarized than they have become on the question of intercountry adoption. The negotiating and drafting of the 1993 Hague Intercountry Adoption Convention[8] responded to widespread concerns about potential abuses. These were described by Jorge L. Carro (1994, Chapter 9 Volume II) in 'Regulation of Intercountry Adoption: Can the Abuses Come to an End?' Alexandra Maravel (1996, Chapter 11 Volume II) framed the development of the Convention as a 'watershed for the way legal and governmental communities comprehend, make, and use international law' because it involved direct implementation of international children's rights law at the national level. On the interaction of the CRC and the Adoption Convention, see also Dillon (2003). Elizabeth Bartholet (1996) has advocated strongly for the expansion of intercountry adoption as a means of assuring that children have the opportunity to grow up in a permanent family of their own. More recently, Bartholet (2014, Chapter 8 Volume II) has argued for an intergenerational justice approach that would encourage domestic and international adoption, provide child welfare to poor parents who want to keep and raise their children, and also change pronatalist

and anti-contraception policies that encourage reproduction of children unlikely to receive nurturing care. Conversely, Shani King (2009) has made a strong case against 'monohumanism' in thinking about intercountry adoption, using post-colonial theory to critique the humanitarian and rescue narratives that have dominated discussion of these issues in the United States.

Over the past half-century, the numbers of intercountry adoptions increased steadily and dramatically until 2004. Empirical work by Peter Selman (2002, Chapter 12 Volume II) explored the increasing numbers of adoptions, particularly from countries such as China, the Russian Federation and South Korea. Since 2004, numbers have fallen steeply, especially from those countries (see Selman 2012). Criticizing these trends, Bartholet (2014) blames the policies put in place by child rights organizations emphasizing in-country placement rather than intercountry adoption, a priority reflected in the CRC and the Adoption Convention known as the subsidiarity principle. Other voices have described the risks of unregulated intercountry adoption. In 'Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers', Marianne Blair (2005) addressed both the debates around intercountry adoption and the important challenges for regulators. In 'Intercountry Adoption as Child Trafficking', David M. Smolin (2004, Chapter 13 Volume II) argued that although various legal fictions and regulatory gaps in both domestic and intercountry adoption have made it difficult to distinguish licit and illicit payments, the adoption systems of a significant number of nations have been seriously impacted by abusive practices related to money and the transfer of children.

*Global Surrogacy*

As with intercountry adoption, the subject of global surrogacy has been disputed and controversial, with substantial policy differences among countries generating large numbers of cross-border procedures and complications. In 'Stateless Babies and Adoption Scams: A Bioethical Analysis on International Commercial Surrogacy,' Seema Mohaptra (2012, Chapter 14 Volume II) used cases from the Ukraine, India and the United States to highlight the ethical and legal dilemmas of global surrogacy and identify areas where better regulations would improve the situation. Katarina Trimmings and Paul Beaumont (2011, Chapter 16 Volume II) have argued that there is an urgent need for legal regulation, reviewing the range of different domestic approaches to surrogacy and proposing an international instrument to regulate cross-border surrogacy arrangements. Richard F. Storrow (2012, Chapter 15 Volume II) tied the debate over the legal status of children born from cross-border surrogacy to the traditional stigma associated with nonmarital birth in 'The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy'.

## Volume II, Part II Families Across Borders

*Parental Responsibilities*

A large portion of international family law practice centers on cross-border parenting, particularly child custody and parental child abduction disputes, and these issues have also produced a substantial academic literature. Parental responsibility questions are universally

based on a child welfare or 'best interests' standard (Alston 1994), but lawyers and litigants know that courts in different places often have different perceptions of what decision would serve the child's interests. In 'Resolving Parental Custody Disputes – A Comparative Exploration', D. Marianne Blair and Merle H. Weiner (2005, Chapter 17 Volume II) provided a useful survey introducing a series of articles describing the custody laws of seventeen different nations.

Private international law questions in this area, including jurisdiction and recognition of judgments, are addressed in the 1996 Hague Child Protection Convention[9] and the Brussels IIA regulation, which are both in effect through much of Europe. Ratification of the Protection Convention proved to be relatively slow and difficult to accomplish. Nigel Lowe (2002, Chapter 19 Volume II) addressed this process in 'The 1996 Hague Convention on the Protection of Children – a Fresh Appraisal'. Reflecting on the situation in the United States, Linda Silberman (2000, Chapter 20 Volume II) asked: 'The 1996 Hague Convention on the Protection of Children: Should the United States Join?' (see also Estin 2011, Chapter 30 Volume II).

Several issues have drawn particular attention in more recent scholarship. For example, scholars have focused on the child's right to a voice in custody or related proceedings. Nicola Taylor and colleagues (2012, Chapter 21 Volume II) surveyed practices in thirteen different countries to determine how children's participation rights under the CRC were respected in private family law proceedings, finding an increasing international commitment to enhancing children's participation and a wide variety of approaches. This subject is also addressed by Patrick Parkinson and Judy Cashmore in their book, *The Voice of a Child in Family Law Disputes* (2008). Many authors have considered the complex and intractable subject of international child relocation disputes. Linda D. Elrod (2010, Chapter 18 Volume II) has argued for a greater focus on children, which 'considers the risk to an individual child based on the child's developmental stage, resilience and adaptability, relationship with both parents, and the child's voice'. See also George (2014), Parkinson and Cashmore (2015). Another emerging area of scholarship has centered on the problematic intersection of child custody law and immigration law. David B. Thronson (2005, Chapter 22 Volume II) addressed this in: 'Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts'. See also Abrams (2006).

### *Child Abduction*

The literature on international parental child abduction centers on the 1980 Hague Child Abduction Convention,[10] which is now in force in more than 90 countries around the world. Nigel V. Lowe and Victoria Stephens (2012, Chapter 26 Volume II) authored an empirical analysis of 'Global Trends in the Operation of the 1980 Hague Abduction Convention', building on several previous studies (see Lowe and Horosova 2007). Important books by Paul R. Beaumont and Peter E. McEleavy (1999) and Rhona Schuz (2013) have set the foundation for inquiry into the wide range of interpretive questions that arise under the Abduction Convention.

One longstanding issue has been the interpretation of 'habitual residence', a concept that is often at the center of disputes under the Abduction Convention. The early paper by E.M. Clive (1997, Chapter 24 Volume II) supported the view that this should be understood as a simple, non-technical concept to be applied directly to the facts of cases and not subject to the kinds of interpretive complexity of concepts such as domicile. Case law under the Convention has