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Keith D. Sherry

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OLD TREATIES NEVER DIE, THEY JUST LOSE THEIR TEETH: AUTHENTICATION NEEDS OF A GLOBAL COMMUNITY DEMAND RETIREMENT OF THE HAGUE PUBLIC DOCUMENTS CONVENTION

KEITH D. SHERRY*

There can be no greater error than to expect, or calculate, upon real favors from nation to nation. It is an illusion which experience must cure, which a just pride ought to discard. – George Washington, 1796.¹

INTRODUCTION

The Webster Dictionary defines “authentic” as something “[b]eing what it purports to be; not false or fictitious; genuine; valid; verified”² If one were able to personally witness the execution of documents one would not doubt their authenticity.³ Yet, this is rarely the case.⁴ Most often, one must rely on others to certify the authenticity of signed and unsigned documents because both distance and time have barred the possibility of being first-hand witnesses to the generation and signing of such documents.⁵

* J.D. Candidate, June 1999; Notary Public, State of Illinois.

1. President George Washington made this statement on September 17, 1796, in his Farewell Address. THE COLUMBIA DICTIONARY OF QUOTATIONS, 469 (1993) [hereinafter QUOTATIONS].

2. LEXICON WEBSTER DICTIONARY 67 (1978).

3. See Vincent Gnoffo, Comment, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1068 (1997) (explaining that certain verification procedures are required before parties who have not witnessed the execution of documents will recognize the authenticity of such documents). When the United States was young, parties to transactions could rely on the authenticity of signatures and documents because such transactions were usually executed in person. Michael L. Closten & R. Jason Richards, *Notaries Public-Lost in Cyberspace, or Key Business Professions of the Future?*, 15 J. MARSHALL J. COMPUTER & INFO. L. 703, 717-18 (1997) [hereinafter *Lost in Cyberspace*].

4. See Michael L. Closten & G. Grant Dixon III, *Notaries Public From the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873, 874-75 (1992) [hereinafter *Roman Empire*] (explaining that even in ancient Rome, the need to authenticate documents was recognized).

5. See Gnoffo, *supra* note 3, at 1068 (explaining that parties who are unable to witness the execution of documents must often depend on a notary

Moreover, when a signature or unsigned document's authenticity must be officially recognized in a nation other than where it was executed, the need for a reliable authority to certify its authenticity in the nation in which it originated is great.⁶ Usually, the recipient government, tribunal or private entity requires certification of the authenticity of signed and unsigned documents hailing from foreign nations.⁷ Notarization of such documents is usually the first step in the process of international authentication, followed by a government entity or numerous government entities formally "authenticating" the notarial act through some form of certification process.⁸ Consequently, the role of notaries public in the authentication of documents which must travel across national borders is critical.⁹

The primary responsibility of a notary public, in most countries, is to certify the authenticity of signatures and documents in order to prevent fraud.¹⁰ However, the qualifications, responsibilities and functions of notaries public vary from nation to nation with great disparity.¹¹ Given the notable differences in notaries from nation to nation, governments, courts and private businesses may be reluctant to recognize the validity of documents notarized

public to certify the authenticity of such documents).

6. See *Lost in Cyberspace*, *supra* note 3, at 718 (explaining that the need for signature and document authentication became more important as trade between nations increased).

7. See Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 90 AM. J. INT'L L. 442, 444-46 (1996) (discussing the authenticating role of United States consuls for various documents).

8. See *Apostilles: Authenticating Documents for Use in Foreign Countries*, AM. NOTARY, Apr.-June 1997, at 7 [hereinafter *Authenticating Documents*] (stating the fact that "[m]any foreign nations require certificates of authenticity in order to accept a notarized document"). However, documents such as school transcripts and diplomas are not notarized but still require authentication when presented in foreign nations. See *Apostilles: Jet-Age Authentication*, NAT'L. NOTARY MAG., July 1996, at 10, 14 [hereinafter *Jet-Age*] (describing certain documents requiring authentication). This Comment will primarily focus on the authentication process of notarized documents. Unless otherwise indicated, use of the word "document(s)" will refer to signed and unsigned notarized documents.

9. See *Roman Empire*, *supra* note 4, at 874 (explaining that the role of the notary public is critically important because without the notary, "[t]he potential for fraud would . . . grind the business and legal worlds to a halt").

10. See *id.* (explaining that "[a] notary is . . . relied upon in business and law to minimize fraud in signed documents"). This need, which has existed since ancient times, was recognized and addressed in the early years of the United States' existence. *Id.* at 874-76. State legislatures assumed control of notarial appointments once it became too onerous for the President of the United States to make such appointments, as had been the practice. *Id.* at 876.

11. See Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389, 430-32 (1996) (comparing Latin notaries public to notaries public of other nations).

beyond their own borders.¹² Notaries public in nations such as Mexico,¹³ Germany¹⁴ and Japan¹⁵ must meet more rigid require-

12. See MICHAEL L. CLOSEN ET AL., NOTARY LAW AND PRACTICE 465 (1997) (citing *C.I.S. Ltd. v. Sherren*, 39 C.P.R.2d 251 (1978) which illustrates that absent certain authentication procedures, courts of law in foreign nations may not always recognize a notarial act executed in the United States as valid).

13. Here in our own hemisphere, one can readily observe the juxtaposition of the status of notaries public of the United States with the status of notaries public of foreign nations. A notary public in Mexico, known as a "notariate," is held in high regard and accorded a great deal of respect. See Guillermo Floris Margadant, *Mexican Notariate*, 6 CAL. W.L. REV. 218, 218-19 (1970) (discussing the differences between the "[L]atin notariate, to which the Mexican notariate belongs," and the notary public of Anglo-Saxon countries); See also Julie Barker, *International Mediation - A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOY. L.A. INT'L & COMP. L.J. 1, 55 n.276 (1996) (explaining the functions and importance of the notary public in Mexico). This may be in part because it is much more difficult to become a notary public in Mexico than it is in the United States. Barker, *supra* at 55 n.276. The Mexican notariate receives his/her notarial commission "through personal and professional contacts or through many years of working for a notary before he retires." *Id.* Additionally, the Mexican notariate's functions are far broader than those activities of his counterpart in the United States in that he is responsible for preparing legal documents as well as authenticating facts. Malavet, *supra* note 11, at 434. Perhaps most importantly, the Mexican government strictly regulates the functions of the notariate. Barker, *supra*, at 55 n.276.

14. In Germany, the notary public is known as a "notar" whose responsibilities include the drafting and authenticating such legal documents as "wills, corporate charters, conveyances and contracts." Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 945 (1982). The German notar is highly respected, in part, because the individual who seeks to assume that position must achieve exceptionally high scores on lengthy state administered examinations. Carol Daugherty Rasnic, *EC Legal Systems: An Introductory Guide*, 9 N.Y. INT'L L. REV. 97, 103 (1996) (reviewing JOHN TOULMIN, *EC LEGAL SYSTEMS: AN INTRODUCTORY GUIDE* (1992)). As in Germany, notaries public in France and Italy (respectively known as "notaire" and "notario") are highly respected professionals who are carefully trained for their notarial position and whose numbers are strictly limited. *Id.* In those countries, when a notary public prepares and executes a document, that document is accorded great credibility as to the document's reflection of the signing parties' true intentions. Aldisert, *supra*, at 945. While the degree of respect which notaries and their notarial acts command in nations such as Germany, France and Italy is significant, it should be understood that the specific functions of notaries in these nations vary from nation to nation. See Thomas W. Tobin, *The Execution "Under Oath" of U.S. Litigation Documents: Must Signatures Be Authenticated?*, JAPAN INS. NEWS, July/Aug. 1995, at 34-35 (discussing the functions of notaries public in various nations).

15. In Japan, "Koshonin" is the title bestowed upon a notary public. Kelly Charles Crabb, Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1823 n.63 (1983). "[I]n Japan, there are five 'legal professions' other than the lawyer (bengoshi): judicial scrivener (shiho shoshi), patent lawyer (benrishi), tax lawyer (zeirishi), public accountant (konin kaikeishi), [and] notary (koshonin)". *Id.*

ments to obtain their notarial commissions, and they possess authority and functionality far greater than their notarial counterparts in the United States.¹⁶

Retired members of the Japanese judiciary usually assume the position of notary. Bruce W. MacLennan, Comment, *Establishing a Stock Corporation in Japan After the 1990 Revision of the Commercial Code*, 1 PAC. RIM. L. & POLY J. 127, 167 n.112 (1992). While notarial commissions in the United States do not permit a notary to give legal advice in the execution of his notarial functions, Japanese notary law requires Japanese notaries to give legal advice in the execution of notarial acts. Shinichi Tsuchiya, *A Comparative Study of the System and Function of the Notary Public in Japan and the United States* (May 30 – June 1, 1996), NAT'L NOTARY ASS'N, Jan. 1997, at 4. Japanese notaries, whose functions are far more expansive than those of their counterparts in the United States, are permitted, among other things, to issue writs to enforce notarial deeds. *Id.* at 1. Due to their professional background in the judiciary, Japanese notaries are able to utilize their "deep knowledge of law and legal practice" in the execution of their notarial duties. *Id.* at 5. While most Japanese notaries receive their notarial commission from the Minister of Justice after having served in the judiciary, some notaries in Japan receive their notarial commission from the Minister of Justice after completing a training program and passing a national notary examination. *Id.* at 2. Additionally, it must be recognized that there are far fewer notaries in number and in ratio in Japan than in the United States. *Id.* at 4. There are approximately 540 notaries in Japan compared to the approximately 4.5 million notaries in the United States. *Id.*

16. Malavet, *supra* note 11, at 434-35; Tsuchiya, *supra* note 15, at 1-3. At present, the Secretary of State of each state in the United States makes notarial appointments in accordance with state legislative enactments. Tsuchiya, *supra* note 15, at 2. While most states' laws differ from one another concerning the "appointment and supervision" of notaries, there are significant similarities in state laws due to the adoption and promulgation of both the Model Notary Act and the uniform notarial laws proposed by the Commissioners on Uniform State Laws in 1983. Gnoffo, *supra* note 3, at 1076-77; *Roman Empire*, *supra* note 4, at 877.

Typical qualifications for notarial appointment by a state's Secretary of State require the applicant to meet certain residence, age, language fluency and criminal background standards. *See, e.g.*, 5 ILCS 312/2-102 (West 1993 & Supp. 1996) (enumerating the requirements to obtain a notarial commission in the State of Illinois). Additionally, the applicant must fill out an application form and pay the requisite filing fee to the Secretary of State of the state in which the notarial appointment is sought. *See, e.g.*, GEORGE H. RYAN, ILLINOIS NOTARY PUBLIC HANDBOOK 3 (1996) [hereinafter HANDBOOK] (explaining the procedures required to obtain a notarial commission in the State of Illinois). Finally, the majority of states require that the applicant obtain a notary bond or some sort of insurance. *See id.* (stating the requirement that all notaries public in the State of Illinois obtain a \$5,000 notary bond).

Just as the qualifications for notarial appointments differ little from state to state, the functions of the notary public from state to state also differ very little. Tsuchiya, *supra* note 15, at 2-5. Typical notarial acts include: taking acknowledgments; "taking a verification upon oath or affirmation; witnessing or attesting a signature [and]; administering an oath or affirmation." *See, e.g.*, HANDBOOK, *supra*, at 6 (enumerating the functions of notaries public in the State of Illinois). In spite of the minor differences in procedure for notarial acts as prescribed by each individual state, all states require that "[a] notary public must positively identify the person requesting notarization." *See*

The significant discrepancies between notaries in the United States and notaries operating in foreign nations has created an atmosphere in which foreign recipients of notarial acts performed

id. at 6-7 (specifically stating that a notary public commissioned in the State of Illinois must make an actual positive identification of the individual requesting the notarial act).

Unfortunately, the position and credibility of the notary public in the United States has come under increasing attack with charges that notarial acts are valueless and a mere formality. See Malavet, *supra* note 11, at 427 (discussing the evolution of the notary public as a "purely clerical position"); Gnoffo, *supra* note 3, at 1070 (discussing why notarial acts in the United States are accorded little respect and credibility); Michael L. Closen, *Why Notaries Get Little Respect*, NAT'L L.J., Oct. 9, 1995, at A23 [hereinafter *Respect*] (discussing the current status of the American notary and the many reasons why that status is tainted). The criticism in large part stems from the fact that, all too often, notaries public fail to "comply with the technical details of the notarization procedure and do not properly identify document signers." Gnoffo, *supra* note 3, at 1070. Additionally, many observers believe that there are far too many notaries public in the United States and thus, the result is that notarial acts are perceived as "watered down" in their credibility. See *Respect*, *supra* at A23 (discussing the numbers of notaries public in the United States). There are nearly one half million notaries in the state of Florida alone. *Id.*

However, there may be hope for the American notary. See Gnoffo, *supra* note 3, at 1065-66 (discussing the impending development of the National Notary Association's Revised Model Notary Act). Salvation may come in the form of a Revised Model Notary Act (Revised Act) proposed by the National Notary Association (NNA). *Id.* Appropriately, the NNA expects to have the Revised Act completed around the turn of the millenium. *Id.* at 1065.

The NNA released its current Model Notary Act in 1984. Gnoffo, *supra* note 3, at 1077. The NNA, which was established in 1957 and now boasts a 120,000 plus membership, is an organization dedicated "to educating, informing, and unifying the practices of notaries public." *Id.* at 1075. In an effort to "standardize the diverse laws regulating notaries," the NNA published its 1973 Uniform Notary Act. *Id.* at 1076. The 1984 Model Notary Act replaced the NNA's 1973 Uniform Notary Act. *Id.* at 1077. The Goal of both the 1973 Uniform Notary Act and the 1984 Model Notary Act was to create a "prototype for lawmakers." *Id.* at 1076.

The Revised Act calls for improved methods for deterring fraud through increased standards for document signer identification. *Id.* at 1079-80. Additionally, the Revised Act will address the need for more significant bond requirements and will also attempt to confront the issue of document and signature authentication in cyberspace, as an increasing number of businesses flock to "on-line" methods of conducting business. *Id.* at 1078, 1085-89.

Furthermore, digital signature laws, such as the digital signature law passed in Utah, represent attempts to answer some of the impending challenges facing notaries public of today and tomorrow in the United States. See Michael L. Closen & R. Jason Richards, *Cyberbusiness Needs Supernotaries*, NAT'L L. J., Aug. 25, 1997, at A19 [hereinafter *Supernotaries*] (discussing the impending need for "cybernotaries" and Utah's digital signature law adopted in 1995). Only time will tell if the aforementioned measures can elevate the status of American notaries and the credibility of their notarial acts to the degree of respect bestowed respectively upon notaries and their notarial acts in other nations.

in the United States accord such acts little or no credibility.¹⁷ For instance, a Canadian court in a trademark case refused to recognize the validity of a trademark applicant's affidavit, finding that because a notary of the state of New Jersey had notarized the affidavit in that state, it was defective.¹⁸ More poignantly, an international claims tribunal adjudicating a claim between a company of the United States and an Iranian company harshly criticized the value of submitted affidavits.¹⁹ The tribunal opined that the process of executing and authenticating such affidavits was routinely abused by readily available notaries in the United States who perform their notarial acts for a small fee.²⁰ While it is widely acknowledged that notaries in the United States and their notarial acts are not held in high regard in both courts and commerce around the globe, notarial acts executed in foreign nations are not always recognized as valid in the United States.²¹

17. *Respect, supra* note 16, at A24. The position of the American notary "is in stark contrast to the seriousness with which the responsibility is taken in many foreign countries." *Id.* "They are an embarrassment when it comes to international commerce. In many other countries, businesspeople and government agents rarely take American notarizations seriously, and sometimes reject them." *Id.*

18. CLOSEN, *supra* note 12, at 465 (citing *C.I.S. Ltd. v. Sherren*; 39 C.P.R.2d 251 (1978)).

19. *Id.* at 465-66 (citing *TME Int'l, Inc. v. Iran*, 24 Iran-U.S. Cl. Trib. Rep. 121 (1990) [hereinafter *TME*] (Noori, Arb., dissenting in part and concurring in part) (citing DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 349-50 (1939))).

20. *Id.* In *TME*, Arbitrator Noori stated that "[b]ecause of the informality and looseness of their drafting and the laxness characterizing the administration of oaths at a nominal fee by the ever ready notary public or justice of the peace [scattered throughout the United States] affidavits have been subject to widespread abuse . . ." *Id.* Noori further stated that "so long as there are thousands [now millions] of readily-accessible notaries public or justices of the peace scattered all over the United States, there can be little hope of an improvement in the quality and value of affidavits." *Id.*

21. *See id.* at 427-28 (citing *Choi v. Kim*, 50 F.3d 244, 251 & n.2 (3d Cir. 1995)) (Lewis, J., concurring) (illustrating that foreign notarial acts not executed in accordance with laws of the nation in which they were executed will not be recognized as valid in a court of law in the United States).

A party who seeks to have a foreign notarial act admitted into evidence in a court of law in the United States generally must demonstrate that the foreign notary was indeed a bona fide notary when the subject notarial act was executed and that the foreign notary was vested with the proper authority to execute the subject act. *Id.* at 426. Furthermore, a court may recognize the validity of a foreign notary's act by finding that the foreign notary complied with either the procedural and evidentiary laws of the United States or similar laws of the foreign nation in which the notarial act was performed. *Id.* at 427.

Rule 44 of the Federal Rules of Civil Procedure and Rule 902(3) of the Federal Rules of Evidence prescribe the authentication requirements of the federal court system for records such as notarial acts which originate in foreign nations. BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CIVIL

However, notarial acts requiring recognition in nations other than where they were executed will usually receive such recognition so long as certain authentication procedures are complied with.²² Not surprisingly, such authentication procedures exist in every nation and vary from nation to nation.²³ Broadly termed, these procedures are known as "legalization" and are designed to officially authenticate notarial acts so that proof regarding their authenticity is not required upon receipt.²⁴ The process of legalization²⁵ is time consuming in that it "is essentially a process of authenticating notarizations on foreign documents, involving a chain of government executed certifications."²⁶ One government entity must first certify the validity of the subject notarial act, then the next government entity on the hierarchical ladder must certify the validity of the first government entity's certification of the notarial act, and so on.²⁷ The authentication process may re-

AND COMMERCIAL, VOL. 1 241-42 (1995). Both of these rules require notarial acts executed in foreign nations to comply with certain authentication requirements before they may be admitted into a federal court's official record. *Id.*

22. See William C. Harvey, Comment, *The United States and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, 11 HARV. INT'L. L.J. 476, 477 (1970) (discussing international authentication procedures).

23. See *id.* at 477 (discussing the cumbersome process of document authentication known as "legalization" required in most countries).

24. *Id.* at n.4 (citing R.H. Graveson, *The Ninth Hague Conference of Private International Law*, 10 INT'L & COMP. L.Q. 18, 19 (1961) (discussing the evolution of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents)).

25. Depending on the countries involved, a process known as "protocolization" must sometimes follow the process of legalization. CLOSEN, *supra* note 12, at 467. "Protocolization is a procedure in which documents that are required by law to be made public are reviewed and recorded in a civil law notary's register." *Id.* at 467-68 [italics omitted]. For purposes of this Comment, the process of protocolization will be encompassed by the term "legalization" used to denote the chain-certificate method of authentication across national borders.

26. *Id.* at 467 (citing Stewart Baker & Theodore Barassi, *International Notarial Practitioner*, INT'L L. NEWS, Fall 1995 at 4). In the process of legalization, the chain of authentication:

[B]egins with the local U.S. notary, and concludes with the consul of the . . . jurisdiction in which the [document] will be used. Each signature certifies the preceding governmental authority's signature. For a U.S. originating document, the most onerous process for legalization would be as follows: 1) Notarization by a U.S. notary; 2) Legalization of the notary by a county clerk; 3) Legalization of the county clerk by a state Secretary of State; 4) Legalization of the state Secretary of State by the U.S. department of State; 5) Legalization by the consul of the signature of the U.S. official; 6) Legalization by the Foreign Minister of the signature of the consul; 7) Notarization of the entirety by a notary of the enforcing jurisdiction.

Id. [italics omitted].

27. *Id.* For example, Rule 44 of the Federal Rules of Civil Procedure, pre-

quire up to six authentication certificates from various government agencies for the subject notarial act.²⁸ Critics of legalization contend that the process is "unduly burdensome in view of the limited function it serves."²⁹

In response to such criticism, several nations drafted and ratified the treaty known as the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (Hague Convention or Convention) which abolished the need for legalization of notarial acts and certain other documents utilized between member nations of the Convention.³⁰ In its Letter of Submittal of the Hague Convention to the President, the State Department explained that "[t]he Convention establishes a simplified system for attaining the same objective" as the legalization process.³¹ "The key elements are (a) substitution of a standard certificate bearing one signature for the chain-certificate [portion of the legalization process] and (b) abolition of diplomatic or consular authentication of that certificate."³² While the Hague Convention is a significant improvement over the legalization process, it is far from being a comprehensive solution to the requirements of notarial act

scribes the authentication process required for notarial acts and other documents which originate in nations other than the United States and which must be admitted into the official record of federal court proceedings. RISTAU, *supra* note 21, at 241. The authentication process prescribed by Rule 44 is one of legalization of the subject notarial act or document requiring chain authentication. *Id.* In order to be admitted into the official record of a federal court proceeding, Rule 44(a)(2) requires that the subject notarial act or document be:

[A]ttested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature of official position relating to the attestation. A final certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.

Id. (citing FED. R. CIV. P. 44(a)(2)).

28. See *Apostilles Now Allowed for Mexico*, NOTARY BULL., Dec. 1995 at 12 (explaining that some "[n]ations . . . may require as many as five or six separate [n]otary authenticating certificates from different government agencies, both domestic and foreign").

29. Harvey, *supra* note 22, at 477.

30. R.H. Graveson, *The Ninth Hague Conference of Private Int'l Law*, 10 INT'L & COMP. L.Q. 18, 20 (1961).

31. George Deukmejian, *United States: State of California Attorney General's Opinion on the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 21 I.L.M. 357, 362 (1982) (citing Letter of Submittal, Department of State, (April 8, 1976)).

32. *Id.* Deukmejian, the then Attorney General of the State of California wrote this opinion to address the issue of what effect the Hague Convention had on certain provisions of the California Civil Code. *Id.* at 357.

authentication.³³

This Comment addresses the need for a comprehensive new treaty which can respond to the present and future demands of notarial act authentication in the international arenas of law and commerce. Part I of this Comment will examine the background of the Hague Convention, look at the current status of the Convention and will explain its provisions. Part II will identify the weaknesses and shortcomings of the Hague Convention. Finally, Part III will propose the replacement of the Hague Convention with a comprehensive new treaty.

I. THE HAGUE CONVENTION IN ITS PRESENT FORM

In 1960, delegates of nations present at the Ninth Session of the Hague Conference on Private International Law (Hague Conference or Conference) drafted the Hague Convention.³⁴ Upon the suggestion of Great Britain, the Committee of Ministers of the Council of Europe proposed that the Hague Conference address the elimination of the process of legalization.³⁵

Section A illustrates the history of the Hague Conference while Section B discusses the creation and ratification of the Convention. Section C explains the provisions of the Convention.

A. *The Hague Conference on Private International Law*

Since 1893, when the Hague Conference first convened at the direction of the Dutch government, representatives of many nations have gathered at The Hague³⁶ to discuss issues of "international uniformity of legislation in the field of private international law."³⁷ The hosts of the Hague Conference's First Session extended invitations only to European nations.³⁸ It was not until 1964 that the United States joined the Conference.³⁹

Since its inception, member nations of the Hague Conference have drafted and ratified treaties addressing a wide range of issues stemming from the inevitable increase of international commerce and litigation.⁴⁰ In the early part of the Twentieth Century, the Conference yielded treaties dealing with such issues as mar-

33. CLOSEN, *supra* note 12, at 471 n.2.

34. Graveson, *supra* note 30, at 18-19.

35. *Id.* at 20.

36. The Hague is a city located in the Netherlands and when the city is referred to, the "The" in "The Hague" must be capitalized. *Jet-Age*, *supra* note 8, at 12.

37. J.G. Castel, *Canada and the Hague Conference on Private International Law: 1893-1967*, 45 CAN. B. REV. 1, 2 (1967).

38. Kurt H. Nadelmann, *The United States Joins the Hague Conference on Private International Law*, 30 LAW & CONTEMP. PROB. 291, 292 (1965).

39. Castel, *supra* note 37, at 3.

40. *Id.* at 18-20.

riage, divorce, separation and guardianship.⁴¹ In the 1950s and 60s, the Conference drafted and ratified such treaties as: the Convention on Civil Procedure, the Convention on the Law Governing International Sales of Goods, the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions and, of course, the Convention Abolishing the Requirement of Legalization for Foreign Public Documents.⁴²

B. *The Birth Of A Treaty*

A delegation of observers represented the United States at the Ninth Session of the Hague Conference, even though the United States was not yet a member of the Conference.⁴³ Convened in 1960, eighteen member nations attended the Ninth Session.⁴⁴ The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents was one of the principal achievements of the Conference's ninth official gathering.⁴⁵

A commission of the Conference, responding to a report analyzing the existing "legalization" related laws in different nations, proposed to abolish the process of legalization with respect to "all public acts of a judicial nature and to substitute for other public acts or official documents a simple form of certificate for the existing requirements of legalization."⁴⁶ However, the Convention omitted the distinction between acts of a judicial and non-judicial nature because it proved too difficult for the drafters to determine the judicial versus non-judicial character of acts in different nations.⁴⁷ In its final form, the Hague Convention eliminated the requirement of legalization only with respect to "public documents," a term to be defined below.⁴⁸ The Convention calls for the replacement of the legalization process with a single, standardized certificate system of authentication.⁴⁹

Presently, approximately sixty nations adhere to the Hague Convention.⁵⁰ The United States became a party to the Convention

41. *Id.* at 18-19.

42. Nadelmann, *supra* note 38, at 315-17.

43. Harvey, *supra* note 22, at 480 n.32; Graveson, *supra* note 30, at 18.

44. Graveson, *supra* note 30, at 18. The ninth session of the Conference was attended by "Austria, Belgium, Denmark, Finland, France, Germany (Federal Republic), Great Britain, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, [and] Yugoslavia." *Id.* at n.1.

45. Kurt H. Nadelmann, *The Hague Conference on Private International Law: Ninth Session*, 9 AM. J. COMP. L. 583, 583 (1960) [hereinafter *Ninth Session*].

46. Graveson, *supra* note 30, at 20.

47. *Id.*

48. *Id.*

49. *Ninth Session*, *supra* note 45, at 583.

50. CLOSEN, *supra* note 12, at 544-45. As of 1997, nations and territories

on October 15, 1981.⁵¹

C. Provisions Of The Hague Convention

The Hague Convention is a brief treaty, consisting of only fifteen articles.⁵² A short pre-amble to the Convention sets forth the very reason for the Convention's creation, announcing that "[t]he States signatory to the present Convention, [d]esiring to abolish the requirement of diplomatic or consular legalization for foreign public documents, [h]ave resolved to conclude a Convention to this effect"⁵³ The first nine articles of the Convention are sub-

adhering to the Hague Convention included: Anguilla; Antigua and Barbuda; Argentine Republic; Armenia; Commonwealth of Australia; Commonwealth of Bahamas; Kingdom of Belgium; Belize; Bermuda; Republic of Bosnia & Herzegovina; British Antarctic Territory; British Virgin Islands; Brunei/Darussalem; Cayman Islands; Channel Islands; Croatia; Republic of Cyprus; Falkland Islands; Fiji; Republic of Finland; France; French Guiana; French Polynesia; Republic of the Gambia; Federal Republic of Germany; Gibraltar; Hellenic Republic (Greece); Guadeloupe; Hong Kong; Republic of Hungary; Israel; Italy; Jamaica; Japan; Latvia; Duchy of Liechtenstein; Duchy of Luxembourg; Republic of Malawi; Malta; Mayotte; Mexico; Montserrat; Mozambique; Kingdom of the Netherlands; Netherlands Antilles; Netherlands/Aruba; Kingdom of Norway; Panama; Portuguese Republic; Reunion; Republic of Seychelles; Republic of Slovenia; Republic of South Africa; Spanish State; St. Helena; St. Kitts & Nevis; St. Pierre & Miquelon; Republic of Suriname; Kingdom of Swaziland; Swiss Confederation; Tonga; Turks and Caicos Islands; United Kingdom; United States; Wallis & Futuna Islands and; Yugoslavia. JOHN P. SINNOTT, A PRACTICAL GUIDE TO DOCUMENT AUTHENTICATION: LEGALIZATION OF NOTARIZED & CERTIFIED DOCUMENTS 464 (1997).

51. Marian Nash Leich, *The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 76 AM. J. INT'L L. 182, 182 (1982) [hereinafter *Public Documents*]. The United States began the treaty ratification process on April 8, 1976, when Secretary of State John Sisco transmitted a "Letter of Submittal" to President Gerald Ford recommending that the Senate consent to the ratification of the multilateral treaty. *Hague Conference on Private International Law: 1961 Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 20 I.L.M. 1405, 1407 (1981) [hereinafter *Private International Law*]. In his letter, Sisco acknowledged that the American Bar Association had passed a resolution calling for the ratification of the treaty and that "[t]he unprecedented success of the present Convention demonstrates that the streamlining of procedures for authentication of foreign public documents which it [the Hague Convention] embodies fills a practical need for those involved in private litigation with international aspects." *Id.* at 1409. On July 19, 1976, President Ford transmitted a letter to the Senate requesting "advice and consent to ratification" of the treaty. *Id.* at 1407. More than five years after the President's letter to the Senate, the Hague Convention was ratified by the United States. *Id.* at 1405-07.

52. *Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, Oct. 5, 1961, U.N.T.S. 189, T.I.A.S. 10072 [hereinafter *Hague Convention* or *Convention*]. The text of the Hague Convention is reproduced in its entirety in the appendix.

53. *Id.* at pre-amble.

stantive in nature while the remaining six are more ministerial.⁵⁴ Additionally, the Convention contains one annex which is an example of the certificate prescribed by the Convention, known as an "apostille."⁵⁵

Article 1, the longest of the substantive articles, specifically enumerates the types of documents to which the Hague Convention applies.⁵⁶ The Convention's provisions pertain only to "public documents" executed in one member nation which must be presented in another member nation.⁵⁷ "Public documents" are specified by Article 1 as: notarial acts; court documents; administrative documents and; other official certificates executed by individuals in their private capacity.⁵⁸ Article 1 concludes by specifically excluding "documents executed by diplomatic or consular agents [and] administrative documents dealing directly with commercial or customs operations" from the purview of the treaty.⁵⁹

Article 2 of the Convention provides that documents falling within the scope of the Convention no longer require legalization when used in the territory of any member nation.⁶⁰ In place of the process of legalization, Article 3 designates the use of a standardized certificate issued by a "competent authority" "to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears."⁶¹ However, it must be understood that the use of the aforementioned certificate is the only formality permitted between member nations for authentication.⁶²

The standardized certificate stipulated in Article 3 is known as an "apostille," as provided by Article 4 of the Convention.⁶³ The term "apostille" refers to the "aposition" process which replaces legalization.⁶⁴ As provided by the Convention, the "aposition" process of authentication can require no more than the use of the apostille, and further, that "the authentication is to be done by an official of the country in which the document is to be executed, and not by an official of the country in which the document is to be produced."⁶⁵ Article 4 further states that the apostille can either be printed on the document itself (perhaps with a rubber stamp) or can be attached to the document in the form prescribed by the

54. *Private International Law*, *supra* note 51, at 1408.

55. *Id.*

56. Hague Convention, *supra* note 52, at art. 1.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at art. 2.

61. *Id.* at art. 3.

62. Hague Convention, *supra* note 52, at art. 3.

63. *Id.* at art. 4.

64. Harvey, *supra* note 22, at 478.

65. *Id.* at 478-79.

Convention.⁶⁶ While the apostille may be in the "official language of the authority which issues it," it must be entitled in French as "Apostille (Convention de La Haye du 5 octobre 1961)."⁶⁷ The apostille, which must be in the form of a square "with sides at least 9 centimeters long," must identify and certify: the country in which the public document originated; the signer of the public document; the capacity of the individual signing the document and the seal or stamp of the signer.⁶⁸ Additionally, the apostille must identify: where the certification was executed; the date on which the certification was executed; the index or serial number of the certification; the seal or stamp of the certifying authority and the name, official capacity and signature of the certifying authority.⁶⁹

Article 5 declares that the "signature, seal and stamp" on the apostille is exempt from any and all certification.⁷⁰ According to Article 6, member nations are to designate "by reference to their official function" who may issue apostilles in their country.⁷¹ Article 7 requires authorities who issue apostilles to keep a record in the form of a "register or card index" of all issued certificates.⁷² The information to be contained in the record must include: "[t]he number and date of the certificate [and] [t]he name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp."⁷³ In an effort to preserve the integrity of the apostille, Article 7 states that "[a]t the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate

66. Hague Convention, *supra* note 52, at art. 4.

67. *Id.*

68. *Id.* at annex.

69. *Id.* at art. 5.

70. *Id.*

71. *Id.* at art. 6. In the United States, officials authorized to issue apostilles include the clerks and deputy clerks of: the Supreme Court of the United States; the United States Court of Claims; the United States Court of Customs and Patent Appeals; the United States Court of International Trade; the United States Courts of Appeal and; the United States District Courts. *Private International Law*, *supra* note 51, at 1414-17; SINNOTT, *supra* note 50, at 470. Additionally, the Secretaries of State of most states, along with other specific officials, are authorized to issue apostilles. *Private International Law*, *supra* note 51, at 1417-19.

An average of 1,068 apostilles were issued in 1992 by twenty-five states which participated in a survey conducted jointly by the NNA and the American Bar Association. *Jet-Age*, *supra* note 8, at 14. Delaware issued 4,593 apostilles while South Dakota issued only 45 in 1992. *Id.* During that same year, Spain issued the most apostilles of any nation with Italy, Germany and Argentina following. *Id.* However, the number of apostilles issued in the United States has dramatically increased in recent years. *Authentications on Rise*, NOTARY BULL., Aug. 1997, at 11.

72. Hague Convention, *supra* note 52, at art. 7.

73. *Id.*

correspond with those in the register or card index.⁷⁴

In order to preserve other treaties between member nations which call for less stringent authentication requirements than those of the Hague Convention, Article 8 acts as a savings clause.⁷⁵ Article 9 requires member nations to "prevent the performance of legalizations by its diplomatic or consular agents in cases where the present Convention provides for exemption."⁷⁶

Articles 10 through 15 address administrative issues in that they set forth such procedures as the process of ratification of the Convention along with the procedures for accession by new members.⁷⁷ Article 13 contains a provision giving member nations the option to extend the treaty to their respective territories and Articles 12 and 15 specify certain notification requirements with which member nations must comply.⁷⁸

II. PROVISIONS OF THE HAGUE CONVENTION FAR FROM COMPREHENSIVE

Many issues and questions are not addressed within the fifteen articles of the Hague Convention.⁷⁹ The brevity of the Convention serves to support the contention that this treaty is incomplete, and thus, not as effective as the practices of international litigation and commerce require.⁸⁰ This Part examines the specific weaknesses and shortcomings of the Hague Convention.

A. Language and Terms of the Hague Convention

From the Hague Conference's first gathering in 1893 until the

74. *Id.*

75. *Private International Law*, *supra* note 51, at 1408. Hague Convention, *supra* note 52, at art. 8.

76. Hague Convention, *supra* note 52, at art. 9.

77. *Id.* at arts. 10-15; *Private International Law*, *supra* note 51, at 1409. Accession to the Hague Convention requires the submittal of an application to the Ministry of Foreign Affairs of the Netherlands and then the passing of a six month waiting period. *Three More Nations Join the Hague Treaty*, NOTARY BULL., Aug. 1996, at 13. Any objection by a member nation to the Convention may prevent the applicant nation from being admitted. *Id.* Furthermore, accession to the Convention is difficult for nations which have experienced "political discord" in their past. *Id.* For example, the nation of South Africa acceded to the Convention only after apartheid had been abrogated. *Id.* Accession to the Convention is important because "a country views acceding to the treaty as a step toward improving its economy and foreign trade because international business is encouraged by freer document exchanges between member nations." *Id.*

78. Hague Convention, *supra* note 52, at arts. 12-13, 15.

79. See CLOSEN, *supra* note 12, at 471 n.2 (explaining that the Hague Convention "is only a partial solution" to the challenges of international authentication of documents).

80. See generally Hague Convention, *supra* note 52, at arts. 1-15 (providing only nine substantive articles and six administrative articles).

Conference's Ninth Session in 1960, member nations drafted conventions only in the French language.⁸¹ In fact, French was the "official language of the Hague Conference."⁸² But starting in 1964, at the Conference's Tenth Session, member nations drafted all conventions in both the French and English languages.⁸³ Unfortunately, this change in policy was one session too late with respect to the Hague Convention.

Upon the initiation of Great Britain, a group of delegates from English speaking nations present at the Ninth Session of the Hague Conference translated conventions drafted at the session, including the Hague Convention, into English.⁸⁴ However, the translations were unofficial and not "official texts" of the conventions themselves.⁸⁵ Even so, delegates of both English speaking and non-English speaking nations considered the translations valuable.⁸⁶ At least one commentator has suggested that some nations present at the Ninth Session might have preferred to translate the treaties from English rather than French simply because it was more convenient.⁸⁷ Today, nearly all international agreements utilize English as one of the official primary drafting languages.⁸⁸

81. Graveson, *supra* note 30, at 33-34.

82. *Id.* at 33.

83. Harvey, *supra* note 22, at 476-77 n.3; see Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611, 612-14 (1997) (discussing the advantages and disadvantages of drafting treaties in more than one language). It is often difficult to find two words in two different languages which have the same meaning. Shelton, *supra*, at 612. The ambiguity of terms encountered in the interpretation of international agreements may lead to serious problems because member nations may not fully understand their "rights and obligations" under the treaty. *Id.* at 611-12. However, the process of drafting official texts of treaties in more than one language may serve to clarify the intentions of the member nations. *Id.* at 612. The drafters will be forced to discuss the nuances of terms contained in the treaty and will likewise be compelled to strictly compare the understood meaning of the treaty text in each language. *Id.*

84. Graveson, *supra* note 30, at 34. The last paragraph of the Hague Convention states that the Convention was "done" in French and in English, but that the French text was to prevail "in case of divergence between the two texts . . ." Hague Convention, *supra* note 52, at art. 15. In spite of this ambiguous sentence, it is settled that the only official text of the Hague Convention was in French. Graveson, *supra* note 30, at 34.

85. Graveson, *supra* note 30, at 34.

86. *Id.*

87. *Id.*

88. See Shelton, *supra* note 83, at 615-16 (discussing the evolution of English as a primary official language of international agreements). Until the eighteenth century, most European treaties were drafted in Latin. *Id.* at 614. French was eventually adopted as the official language of treaties and remained so for almost 200 years. *Id.* However, most bilateral or multilateral international agreements are now drafted in English as well as one or two (or

The English translation of the Hague Convention, produced by delegates of the English speaking nations, appears to adequately convey some of the provisions of the treaty.⁸⁹ However, certain fundamental provisions are skewed in the translation from French to English and thus weaken the foundation on which the Convention is premised.⁹⁰ For example, the translators of the Hague Convention attempted to translate the term "actes publics," the term used in the official French text of the Convention denoting what types of documents fall within the purview of the Convention, into the term "public documents."⁹¹ While the term "actes publics" in its native language of French might adequately describe the four categories of documents to which the Hague Convention applies, the correlative term "public documents" in English is vague and conveys nothing as the term itself appears in the English translation of the treaty.⁹² In fact, the English translation of the Convention's title contains the ambiguous "public documents" term and leaves all to ask, "what is a public document?"⁹³ While the specific types of documents covered by the Convention are enumerated in Article 1,⁹⁴ the ambiguity of the "public documents" term serves to illustrate the need for a treaty utilizing English as one of the primary drafting languages.⁹⁵

B. Enforcement of the Hague Convention

Within the fifteen articles of the Hague Convention there are no provisions to ensure the enforcement of the treaty.⁹⁶ While Article 9 states that each member nation is responsible for abolishing the process and requirement of legalization within its own borders, the Hague Convention fails to impose sanctions or penalties upon nations which enter into the treaty but refuse to comply with its

sometimes even more) other languages. *Id.* at 615. For example, English is one of the primary official languages of the Organization of American States as well as the Council of Europe. *Id.* at 616.

89. See Graveson, *supra* note 30, at 34 (opining that the unofficial translations of the agreements reached at the Ninth Session of the Hague Convention were useful even though "such translations cannot have the diplomatic value of English versions agreed [sic] by the delegates themselves").

90. See Shelton, *supra* note 83, at 612 (suggesting that problems encountered in translating international agreements can result in deleterious effects on member nations' compliance with the treaty).

91. Graveson, *supra* note 30, at 20.

92. See Shelton, *supra* note 83, at 619 (discussing the "cultural untranslatability" of certain words and phrases found in different languages).

93. Hague Convention, *supra* note 52, at title.

94. *Id.* at art. 1.

95. See Shelton, *supra* note 83, at 638 (recommending that several languages should be used when drafting official texts of international agreements).

96. Hague Convention, *supra* note 52, at arts. 1-15.

provisions.⁹⁷ The Hague Convention is silent with regard to any form of policing policy aimed at ensuring adherence.⁹⁸ Because enforcement of a treaty by member nations must be a part of each nation's domestic policy, a convention which replaces the Hague Convention must provide for two levels of enforcement policing.⁹⁹

First, an agency created through the provisions of a convention replacing the Hague Convention should police treaty enforcement on an international level.¹⁰⁰ One of the primary responsibilities of such an agency would be to ensure that each member nation was issuing certifications according to the provisions of the replacement convention as well as recognizing certifications authenticating documents and signatures originating in other member nations.¹⁰¹

The second level of policing that must take place, which the Hague Convention fails to address, is that of domestic enforcement of the Convention.¹⁰² The Hague Convention does not require member nations to police and ensure the enforcement of the treaty within their borders.¹⁰³ While some nations have incorporated the provisions of the Hague Convention into their statutes,¹⁰⁴ member nations should not have discretion in deciding whether to incorporate treaty provisions into their domestic laws but rather should be required to do so.¹⁰⁵ A replacement convention must specifically require member nations to ensure that certifications are issued ac-

97. *Id.*

98. *Id.*; see Steven M. Anderson, Comment, *Reforming International Institutions to Improve Global Environmental Relations, Agreement, and Treaty Enforcement*, 18 HASTINGS INT'L & COMP. L. REV. 771, 778-80 (1995) (discussing the difficulty and procedure of enforcing treaties both within a member nation's borders and without).

99. See Anderson, *supra* note 98, at 778-80 (explaining that treaties must be enforced both domestically and internationally).

100. See *id.* at 779 (stating that treaties themselves usually include a mechanism to "delegate enforcement powers" to some sort of agency created to ensure member nations' compliance with the treaty).

101. See *id.* (discussing the use of treaty "secretariats" to implement treaty provisions). Secretariats are usually delegated the responsibility of monitoring the implementation of treaty provisions along with the responsibility of attempting to enforce the treaty provisions. *Id.*

102. Hague Convention, *supra* note 52, at arts. 1-15. See Anderson, *supra* note 98, at 778 (explaining that many international agreements "fail to enact implementing legislation to assure their effective execution").

103. Hague Convention, *supra* note 52, at arts. 1-15. See generally Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court*, 28 VA. J. INT'L L. 281 (1988) (discussing the enforcement of treaties in domestic courts).

104. See FED. R. CIV. P. 44 (permitting authentication of documents according to treaty provisions).

105. See RISTAU, *supra* note 21, at 248 (explaining that the drafters of the Hague Convention decided to give each member nation the discretion in supervising certain provisions of the Convention within their own nations).

ording to the provisions of the treaty and that certifications originating in other member nations are being honored.¹⁰⁶

C. *Standards and Provisions for Authorities Authorized to Issue an Apostille*

As discussed earlier in this Comment, Article 6 of the Hague Convention allows each member nation to designate who may issue an apostille within its own borders.¹⁰⁷ Article 7 requires authorities authorized to issue an apostille (issuing authorities) to keep on file certain information about each certificate issued while Article 9 requires member nations to "prevent the performance of legalizations by its diplomatic or consular agents in cases where the present Convention provides for exemption."¹⁰⁸ These three articles represent the extent to which the Hague Convention sets forth standards of conduct for issuing authorities.¹⁰⁹

Provisions for issuing authorities who fail to comply with the procedures of the treaty or who issue an apostille negligently or fraudulently are conspicuously missing from the language of the Hague Convention.¹¹⁰ Furthermore, the Convention does not address issues such as the criminal and civil liability of issuing authorities as well as bond or insurance requirements for issuing authorities.¹¹¹ Even in the United States, where notaries are subject to less statutory provisions than in most other nations, state statutes address most of the aforementioned issues.¹¹² A replacement convention should specifically prescribe standards of conduct for certificate issuing authorities much like those required for notaries public.¹¹³

It is conceded that member nations will not sacrifice their sovereignty over issuing authorities in their own nations.¹¹⁴ How-

106. See *id.* (discussing the fact that the drafters of the Hague Convention considered the idea of supervising certain provisions of the Convention).

107. Hague Convention, *supra* note 52, at art. 6.

108. *Id.* at arts. 7, 9. See DIGITAL SIGNATURE GUIDELINES 15 n.34 (1996) (explaining use of the term "issuing authorities" to describe individuals who may issue digital authentication certificates for on-line computer transactions).

109. Hague Convention, *supra* note 52, at arts. 1-15.

110. *Id.*

111. *Id.*

112. See, e.g., 5 ILCS 312/2-105, 7-101, 7-105 (providing criminal and civil liability for a notary's official misconduct as well as providing a minimum bond requirement).

113. In the United States, the standard of conduct set for notaries public is one of reasonable prudence. *Roman Empire*, *supra* note 4, at 888. "[T]he notary cannot act negligently, recklessly, or willfully and escape liability." *Id.* at 888-89.

114. See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 573, 577 (1991) (discussing the accepted view that the Constitu-

ever, a replacement convention must strike a balance by preserving each member nation's autonomy while providing for criminal and civil liability in the event of an issuing authority's intentional or negligent wrongdoing.¹¹⁵ The absence of such provisions in the Hague Convention undermines the integrity of the certification process because issuing authorities are not held criminally or civilly liable for their fraud or negligence in issuing apostilles.¹¹⁶ Those injured by such wrongful conduct have no uniform remedies to seek under the Hague Convention.¹¹⁷

In failing to preserve the integrity of the certification process and to prevent and compensate injuries to those harmed by the wrongful issuance of a certification, the Hague Convention contains no bonding or insurance requirement for issuing authorities.¹¹⁸ Because errors and omissions insurance would protect those injured by the wrongful conduct of the issuing authority as well as the issuing authority itself, such insurance is preferable over bonding.¹¹⁹ A replacement convention, by requiring such in-

tion of the United States "takes precedence over a treaty" and the Senate's attempts "to expressly reserve the supremacy of the internal law of the United States with respect to important international legal instruments . . .").

115. See Anderson, *supra* note 98, at 779-80 (explaining that member nations of a convention "may willfully relinquish portions of their sovereignty when they sign and ratify treaties, but they are less willing to concede their sovereign rights . . . when rules are made by governing and administrative bodies granted powers under treaties").

116. See 5 ILCS 312/7-101, 7-105 (attempting to deter wrongful conduct of notaries public by providing civil and criminal penalties for such conduct).

117. Hague Convention, *supra* note 52, at arts. 1-15. A convention replacing the Hague Convention should prescribe minimum standards for criminal and civil liability to be imposed and enforced by member nations within their own borders. See RISTAU, *supra* note 21, at 248 (explaining that the drafters of the Hague Convention failed to provide any standards for the implementation of certain provisions of the Convention). For example, the Model Notary Act provides for the imposition of a fine and or imprisonment for a notary "who knowingly and repeatedly performs or fails to perform any act prohibited or mandated respectively by this [Act]." MODEL NOTARY ACT § 6-203 (1984). Such broad language can be modified and subsequently incorporated into the laws of each member nation once such a minimum standard for criminal penalties is mandated by the Convention. See *id.* at 1 (explaining that the Model Notary Act was drafted with the intent that all or portions of the Model Notary Act be incorporated into individual state's laws). Additionally, a replacement convention should include similar broad language providing for civil liability for those injured by the wrongful conduct of an issuing authority in the execution of its certification duties. See *id.* § 6-101 (providing civil liability for notaries public who proximately injure others through their misconduct).

118. Hague Convention, *supra* note 52, at arts. 1-15.

119. See Gnoffo, *supra* note 3, at 1088-89 (discussing the benefits of errors and omissions insurance over bonding); Michael L. Closten & Michael J. Osty, *Illinois' Million-Dollar Notary Bond Deception*, CHI. DAILY L. BULL., Mar. 2, 1995, at 6 [hereinafter *Bond Deception*] (explaining the advantages of errors and omissions insurance over bonding for notaries public).

surance, can provide monetary protection for parties adversely affected by the misconduct of issuing authorities.¹²⁰ Thus, a replacement convention should establish a minimum amount of errors and omissions insurance which issuing authorities must carry.¹²¹

Since the Hague Convention fails to address the issue of criminal and civil liability for issuing authorities, the issue of jurisdiction has understandably not been addressed by the Convention.¹²² As previously stated, a balance must be struck between a member nation's sovereignty over its citizens and the need to protect those injured by an issuing authority's misconduct as well as the need to deter such wrongful conduct.¹²³ Because the threat of exposure to a civil suit would act as a strong deterrent to misconduct, issuing authorities should be subject to the jurisdiction of courts in member nations where their conduct has proximately resulted in injury to others as well as member nations in which such certifications are issued.¹²⁴ Although extreme, such measures are necessary to ensure the integrity of the certification process as well as protect those injured by the negligent or fraudulent acts of an issuing authority.¹²⁵

D. The Apostille as a Means of Certification

Articles 3 through 5 of the Hague Convention prescribe the use of the apostille and set forth the details of its use.¹²⁶ As discussed earlier, the apostille is the actual physical certificate which verifies the authenticity of a signature and seal appearing on a document originating in one member nation which is to be used in another member nation.¹²⁷ The Hague Convention forbids any further procedures of authentication by any member nations.¹²⁸ The apostille is the only certificate of authentication allowed by the

120. See *Bond Deception*, *supra* note 119, at 6 (explaining the necessity of errors and omissions insurance for notaries public).

121. See *id.* (extolling the benefits of errors and omissions insurance).

122. Hague Convention, *supra* note 52, at arts. 1-15.

123. See *Riesenfeld & Abbot*, *supra* note 114, at 577 (explaining the preeminence of the Constitution of the United States over treaties); *Anderson*, *supra* note 98, at 779-80 (discussing the acquiescence and non-acquiescence of member nations to "concede their sovereign rights").

124. See MODEL NOTARY ACT § 6-101 (1984) (recommending that notaries public be held civilly liable "to any person for all damages proximately caused that person by the notary's official misconduct in performing a notarization"). The Act's broad language used to denote that *any* person proximately injured by the official misconduct of a notary infers that such provisions must be made to deter such conduct. *Id.* [emphasis added].

125. See *id.* (providing civil liability for official misconduct of notaries public).

126. Hague Convention, *supra* note 52, at arts. 3-5.

127. *Id.*

128. *Id.*

Hague Convention.¹²⁹

Unfortunately, the Hague Convention fails to address a few critical issues regarding the apostille. First, there is no provision to prevent the issuance of false or counterfeit apostilles.¹³⁰ Second, the only consistent feature found among apostilles issued in different nations is the French title "Apostille" and its requisite sub-heading.¹³¹ Finally, there is no provision requiring member nations to regularly deposit an issuing authority's records of apostilles issued in a central location accessible by all member nations.¹³²

Article 4 and the annex to the Hague Convention simply require an apostille to: have sides which are at least nine centimeters long; contain certain information about the certification and; contain the heading "Apostille" and subheading "Convention de La Haye du 5 octobre 1961."¹³³ Furthermore, an issuing authority may use a rubber stamp of the apostille applied directly to the document being authenticated.¹³⁴

The Hague Convention's failure to provide a mechanism to prevent the issuance of counterfeit apostilles is blatant.¹³⁵ In fact, the provisions of Article 4 and the annex make it extremely easy for an unscrupulous individual, who is not an authorized issuing authority, to create a false and counterfeit apostille to be used in a member nation.¹³⁶ One need only a pen and paper to create an apostille.¹³⁷ It is ironic that the certificate prescribed by the Hague

129. *Id.*

130. *Id.* at arts. 1-15; see RISTAU, *supra* note 21, at 248 (explaining that the Hague Convention "does not deal directly with the procedure to attack the genuineness of an apostille, if that should become an issue") [italics omitted].

131. Hague Convention, *supra* note 52, at art. 4.

132. *Id.* at art. 7; RISTAU, *supra* note 21, at 248 (explaining that the drafters of the Hague Convention contemplated maintaining a file of issuing authorities signatures in a central location).

133. Hague Convention, *supra* note 52, at art. 4, annex.

134. *Id.* at art. 4.

135. The issue of false apostilles was pondered by the drafters of the Hague Convention. RISTAU, *supra* note 21, at 248. They "considered three possible systems of protective control which might make it possible to detect false information or false signatures placed upon the apostille and, in particular, to facilitate proof of an apostille's non-authenticity." *Id.* First, the drafters considered the creation of an international "central office" designed to keep the signatures of all issuing authorities on file. *Id.* The second system of control which the drafters considered required each member nation to keep the signatures of all issuing authorities within that nation on file. *Id.* Both of these proposals were rejected by the drafters of the Hague Convention because they were considered to be too "cumbersome." *Id.* The third proposal, which was adopted by the drafters, was to leave the problem of false apostilles to the discretion of each member nation. *Id.*

136. The Hague Convention's apostille format requirements are few. Hague Convention, *supra* note 52, at art. 4, annex.

137. The process of legalization was regarded as cumbersome by the mem-

Convention to certify the authenticity of signatures and documents can itself be easily forged.¹³⁸

A convention replacing the Hague Convention should require the use of standardized authentication certificates and should require the controlled distribution of such certificates to issuing authorities.¹³⁹ Such standardized certificates should contain trackable sequential serial numbers and watermarks or holograms to verify their authenticity.¹⁴⁰ The recipient of an authenticated document can trust its authenticity only if the authenticating certificate is identifiable as genuine.¹⁴¹

ber nations of the Hague Convention and thus, the Convention was born. Harvey, *supra* note 22, at 477-78. It appears that the member nations of the Hague Convention sought their solution to the legalization by looking to the other end of the authentication spectrum. They replaced the entire legalization process with a certificate which a child could draw with crayons (and which would still be recognized as valid if actually issued by an authorized issuing authority). Hague Convention, *supra* note 52, at art. 4, annex.

138. The casual apostille format cannot deter the forging of apostilles. Hague Convention, *supra* note 52, at art. 4, annex.

139. A governing body established to implement the provisions a treaty replacing the Hague Convention should issue standardized certificates to be used for authenticating notarial acts and other documents. See Anderson, *supra* note 98, at 779 (explaining the use of governing bodies to implement treaty provisions).

In an opinion regarding certain effects of the Hague Convention, the Office of the Attorney General of the State of California opined that the Apostille format was "amazingly simple and brief" and that it could be recognized anywhere. 71 OPS. CAL. ATTY GEN. 362 (Dec. 21, 1988). The author of this Comment contends that a standardized certificate designed to prevent counterfeit certificates from being issued and circulated can be achieved while maintaining the certificate's simplicity and international recognition.

140. See Andrea E. Migdal, *Verification of Information in Antidumping and Countervailing Duty Proceedings Before the Department of Commerce*, 571 P.L.I./CORP. 365, 417 (1987) (describing the use of serial numbers on Export Certificates); Clifford Miller, *Electronic Evidence - Can You Prove the Transaction Took Place?*, 5 COMPUTER LAW. 21, 24 (1992) (discussing the use of watermarks and holograms in authenticating paper documents).

It is conceded that Article 7 of the Hague Convention requires an issuing authority to keep a record of each apostille issued including some sort of index number. Hague Convention, *supra* note 52, at art. 7. However, the text of the treaty is silent on how apostilles are to be numbered and with what scheme. *Id.* Certificates should be issued to issuing authorities in batches containing sequential numbers by the governing body of a convention replacing the Hague Convention. See Migdal, *supra*, at 417 (discussing the use of serial numbers on Export Certificates).

141. Whether issued in Austria or Russia, parties around the world will instantly recognize a standardized authentication certificate containing a watermark or hologram indicating its genuineness. See Miller, *supra* note 140, at 24 (explaining the use of watermarks and holograms in certifying the authenticity of paper documents). Furthermore, the use of serial numbers issued by the governing body of a replacement convention will allow issuing authorities to easily deposit information about their issuance of certificates to the governing body. See Migdal, *supra* note 140, at 417 (describing the use of serial numbers to track information on Export Certificates). Although ignored

E. *The Outer Limits of the Hague Convention*

As its name implies, the Hague Convention applies only to public documents.¹⁴² While the term "public documents" is ambiguous because it was translated from French, as discussed earlier, the Hague Convention nonetheless excludes documents intended solely for commercial use which lack notarization.¹⁴³ Thus, the value of the Hague Convention is severely limited in its scope as to the types of documents which fall within its purview.¹⁴⁴ While it is true that recipients of commercial documents do not usually require authentication of such documents, a replacement convention should pertain to commercial documents in order to facilitate the process of international commerce when such authentication is required.¹⁴⁵ A convention replacing the Hague Convention should comprehensively address the issue of authentication of signatures and every kind of document requiring authentication, including electronic digital signatures and docu-

in the text of the Hague Convention, such record keeping by a central authority is critical to ensuring the validity of certificates issued. *See* RISTAU, *supra* note 21, at 248 (discussing the drafters' decision to omit such record keeping requirements from the Hague Convention because such requirements were believed to be too "cumbersome"). Parties in member nations should be able to contact one central authority to track any certificate issued. *See id.* (explaining that the drafters of the Hague Convention considered establishing a central authority responsible for keeping certain information on file).

Thus, the governing body of a convention replacing the Hague convention should be responsible for tracking specific certificates issued. *See id.* (explaining that tracking of certain information, such as signatures of issuing authorities, was considered by the drafters of the Hague Convention). An interested party in any member nation who wishes to check the validity of a certificate issued or to obtain any information about a certificate issued should have access to such records. *See* Hague Convention, *supra* note 52, at art. 7 (requiring a minimum amount of record keeping and access to such records); RISTAU, *supra* note 21, at 248 (discussing the drafter's consideration of keeping certain information on file and available). Additionally, a comprehensive list of all authorized issuing authorities and their signatures should be accessible to any interested party. *See* Ian Swinney, *The Notary Public and the Apostille*, 37 J. OF L. SOC'Y OF SCOT. 141, 141 (1992) (explaining that "in the UK a collection of specimen signatures and seals is kept in the Legislation Section of the Foreign and Commonwealth Office, which is the place where Scottish notaries have their status verified . . ."); RISTAU, *supra* note 21, at 248 (explaining that the drafters of the Hague Convention considered establishing a centralized list of signatures of issuing authorities which would be accessible to interested parties).

142. Hague Convention, *supra* note 52, at art. 1.

143. *Id.*

144. *See* Graveson, *supra* note 30, at 20 (explaining that the Hague Convention's authentication procedure pertains only to public documents); 71 OPS. CAL. ATT'Y GEN. 362 (Dec. 21, 1988) (opining that the Hague Convention "is of limited application" because only public documents fall within the Convention's purview).

145. *Public Documents*, *supra* note 51, at 182-83.

ments.¹⁴⁶

Electronic digital signature and document authentication via "on-line" computer communication is not provided for in the Hague Convention.¹⁴⁷ In all fairness, no one should expect the aging treaty to address a need which did not exist nearly forty years ago.¹⁴⁸ But as technology has advanced and commerce with it, so must the Convention.¹⁴⁹

In the near future, companies will conduct a significant part of their business across national borders via the Internet or a similar network.¹⁵⁰ Additionally, governments, parties involved in international litigation and many other users will utilize on-line networks to transport information and agreements around the globe.¹⁵¹ Procedures to ensure the authenticity of electronic digital documents and signatures originating in one member nation and transmitted to another member nation must be prescribed by a replacement convention.¹⁵² An issuing authority's responsibilities must be expanded to include the issuance of the electronic digital equivalent of a paper certification of authenticity.¹⁵³ The blossom-

146. See RISTUA, *supra* note 21, at 246 (discussing the fact that certain documents in need of authentication, such as patent certificates, do not fall within the purview of the Hague Convention).

147. Hague Convention, *supra* note 52, at arts. 1-15.

148. See *Supernotaries*, *supra* note 16, at A19 (discussing the approaching need for "cybernotaries").

149. See *Lost in Cyberspace*, *supra* note 3, at 757-58 (discussing the proposition that laws move forward in accordance with technology).

150. See Randy V. Sabett, *International Harmonization in Electronic Commerce and Electronic Data Interchange: A Proposed First Step Toward Signing On the Digital Dotted Line*, 46 AM. U. L. REV. 511, 513-14, 526 (1996) (discussing the current and impending legal challenges created by the use of "electronic commerce" and "electronic data interchange").

151. See *Lost in Cyberspace*, *supra* note 3, at 729 (discussing the need for "cybernotaries" to authenticate digital signatures in cyberspace).

152. Work has already begun on guidelines which would set standards for international electronic commerce. Christy Tinnes, Comment, *Digital Signatures Come To South Carolina: The Proposed Digital Signature Act of 1997*, 48 S.C. L. REV. 427, 435-36 (1997). Organizations such as The United Nations Commission on International Trade Law, The American Bar Association's Section of Science and Technology and the United States State Department have all begun to address the demands of digital and electronic commerce. *Id.*

153. See *Lost In Cyberspace*, *supra* note 3, at 741-49 (discussing the digital signature statutes enacted in the State of Utah as well as other states); *Supernotaries*, *supra* note 16, at A19 (explaining that Utah's attempt to address the need for on-line "certification authorities" falls short of the mark). While the individual states' attempts to create "cybernotaries" might not represent a comprehensive answer to the demands of on-line communication authentication, such attempts illustrate the impending need for electronic authentications of digital and electronic documents and signatures. See *id.* (proclaiming that "[c]ybernotaries, or certification authorities, are about to be unleashed upon the U.S. marketplace to verify and authenticate digital signatures and electronic documents").

ing electronic digital world of communication demands a treaty which will serve the digital authentication needs of the international community.¹⁵⁴

The Hague Convention has served its purpose as an improvement over the process of legalization, but the significant shortcomings of the treaty and the modern needs of the global community necessitate its retirement.¹⁵⁵ Part III of this Comment proposes the adoption of a comprehensive new treaty equipped to take the world into the Twenty-First Century. The proposed treaty answers the traditional and impending demands of document authentication across national borders.

III. A TREATY FOR THE TWENTY-FIRST CENTURY

This Part sets forth the substantive articles¹⁵⁶ of the Global Authentication Convention. It is proposed that this convention replace the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. The substantive articles of the Global Authentication Convention are in capitalized print.

Preamble

The Global Authentication Convention (GAC) prescribes the procedures for the authentication of notarial acts, signatures, and documents in one member nation and the official recognition of such authentication in another member nation. Upon its ratification, the GAC is to replace the Hague Convention of 1961.

Article 1 – Governing Body

A GOVERNING BODY SHALL BE ESTABLISHED TO IMPLEMENT, ADMINISTER, AND ENFORCE THE PROCEDURES SET FORTH IN THIS CONVENTION.¹⁵⁷ WITHIN SIXTY DAYS OF THE RATIFICATION OF THIS

154. See *Lost in Cyberspace*, *supra* note 3, at 729 (discussing the need for online authentication of signatures).

155. See CLOSEN, *supra* note 12, at 468 n.3 (stating that even though the Hague Convention is a significant improvement over the process of legalization, the Convention “is not without its problems”).

156. Administrative articles addressing issues such as ratification and accession have been omitted from the proposed convention as such issues are outside the scope of this Comment.

157. A small bureaucracy must be created to implement and facilitate the provisions of The Global Authentication Convention (GAC). See Anderson, *supra* note 98, at 779 (discussing an administrative structure composed of delegates from member nations created to implement, monitor and enforce treaty provisions); Douglas M. Zang, *Frozen in Time: The Antarctic Mineral Resource Convention*, 76 CORNELL L. REV. 722, 733-34 (1991) (explaining the administrative scheme of the Antarctic Mineral Resource Convention). Such a bureaucracy should be funded through a small tax imposed on each certification issued. See Zang, *supra*, at 734-35 (explaining a system of fee collection to fund the administrative functions of the Antarctic Mineral Resource Convention).

CONVENTION, THE DELEGATES OF THE MEMBER NATIONS SHALL CONVENE TO ESTABLISH A GOVERNING BODY AND ANY BUREAUS OR AGENCIES NECESSARY TO THE IMPLEMENTATION, ADMINISTRATION AND ENFORCEMENT OF THIS CONVENTION.¹⁵⁸

Article 2 – Scope of the Convention

THE AUTHENTICATION PROCEDURES PRESCRIBED IN THIS CONVENTION SHALL APPLY TO: NOTARIAL ACTS; SIGNATURES; JUDICIAL DOCUMENTS; GOVERNMENT DOCUMENTS OTHER THAN JUDICIAL DOCUMENTS; COMMERCIAL DOCUMENTS; AND ELECTRONIC DIGITAL DOCUMENTS WHICH HAVE BEEN EXECUTED IN ONE MEMBER NATION AND WHICH REQUIRE OFFICIAL RECOGNITION OF AUTHENTICITY IN ANOTHER MEMBER NATION.¹⁵⁹

Article 3 – Authentication Procedures

ANY ITEM ENUMERATED IN ARTICLE 2 SHALL BE AUTHENTICATED IN ALL MEMBER NATIONS CONSISTENT WITH THE FOLLOWING PROCEDURES.

1. THE ITEM TO BE AUTHENTICATED SHALL BE PRESENTED TO AN OFFICIAL “GAC CERTIFICATE” ISSUING AUTHORITY.¹⁶⁰
2. THE ISSUING AUTHORITY SHALL POSITIVELY IDENTIFY THE INDIVIDUAL REQUESTING THE AUTHENTICATION.¹⁶¹
3. THE ISSUING AUTHORITY SHALL REQUIRE THE PRESENTER OF THE

158. Such agencies or bureaus should be created according to their necessity. *See Zang, supra* note 157, at 733-34 (discussing the use of “committees” to supervise certain provisions of the Antarctic Mineral Resource Convention).

159. While the scope of items to be authenticated falling within the purview of the GAC Convention is similar to the Hague Convention, the GAC provides for a much broader range of items to be authenticated in that any item, not just “public documents,” may be subject to authentication under the GAC. *See Hague Convention, supra* note 52, at art. 1 (proclaiming that only “public documents” fall within the Convention’s purview).

160. The GAC Certificate issuing authority would be much like an “international notary” in that such an authority would certify the authenticity of items enumerated in Article 2. *See Stewart Baker & Theodore Barassi, The International Notarial Practitioner*, INT’L L. NEWS, Fall 1995, at 2 (discussing the proposed position of “international notarial practitioner” who would possess the “heightened legal competence necessary to satisfy civil law notarial requirements”).

161. If the individual requesting the authentication is not personally known to the issuing authority, the issuing authority must request of the individual at least one form of government issued identification. *See Gnoffo, supra* note 3, at 1091 (proposing draft legislation requiring notaries public to “examine two current documents of identification from the person who has requested the notarial act, and a government agency shall have issued at least one of the documents”). The issuing authority may request any additional identification, within reason, to positively identify the individual. *See UNIFORM LAW ON NOTARIAL ACTS § 2* (1982) (requiring signer identification for notarial acts).

ITEM TO OFFER SUCH PROOF AS TO THE ITEM'S AUTHENTICITY SUCH THAT THE ISSUING AUTHORITY IS LEFT WITH NO UNCERTAINTY AS TO THE ITEM'S AUTHENTICITY.¹⁶² THE ISSUING AUTHORITY SHALL USE ITS DISCRETION IN DETERMINING THE AUTHENTICITY OF SUCH ITEM AND MAY REQUEST ANY REASONABLE FORM OF PROOF FROM THE PRESENTER OF SUCH ITEM.¹⁶³

4. UPON SATISFACTION OF REQUIREMENTS TWO AND THREE OF THIS ARTICLE, THE ISSUING AUTHORITY SHALL AFFIX A GAC CERTIFICATE TO THE PRESENTED ITEM.¹⁶⁴

Article 4 – GAC Certificate

THE AUTHENTICATION CERTIFICATE TO BE ISSUED IN ACCORDANCE WITH ARTICLE 3 SHALL BE REFERRED TO AND ENTITLED "GAC CERTIFICATE."¹⁶⁵ THE CERTIFICATE SHALL BE A STANDARDIZED CERTIFICATE AND SHALL BE DISTRIBUTED TO ISSUING AUTHORITIES BY THE GOVERNING BODY OF THIS CONVENTION IN BATCHES CONTAINING SEQUENTIAL SERIAL NUMBERS.¹⁶⁶ THE FORMAT OF THE CERTIFICATE SHALL BE PRESCRIBED BY THE GOVERNING BODY OF THIS CONVENTION BUT SUCH CERTIFICATE MUST INCLUDE: IN THE ENGLISH LANGUAGE, "GAC CERTIFICATE" AT THE TOP OF THE CERTIFICATE;¹⁶⁷ A SE-

162. See, e.g., Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., T.I.A.S. 10734, at art. 18 (requiring authenticating official to ascertain the genuineness of a presented document). A GAC issuing authority would perform functions similar to a notary and thus, verifying and certifying the genuineness of presented items would be an important function of a GAC issuing authority. See *Roman Empire*, *supra* note 4, at 874 (explaining that the acts of notaries public are intended to reduce the commission and occurrence of fraud in documents containing signatures). See also UNIFORM LAW ON NOTARIAL ACTS § 2 (1982) (requiring a notary to "determine" if a presented copy of a document or other item is "full, true and accurate . . .").

163. Other than authenticating notarial acts, signatures appearing on documents and the authenticity of presented documents, it is not the responsibility of the issuing authority to certify that the content of an item presented is accurate and truthful. See *HANDBOOK*, *supra* note 16, at 25 (explaining that "[n]otaries have no authority and are not required to verify the truth or accuracy of any document").

164. The GAC Certificate, as prescribed in Article 4 of this Convention, should be physically attached to the authenticated item. See Hague Convention, *supra* note 52, at art. 4 (allowing the apostille to be either physically attached to the authenticated item or to be placed on the item with an ink stamp). The security provisions of the GAC Certificate as prescribed in Article 4 of this Convention make the use of an ink stamp impracticable.

165. See *id.* at art. 4 (requiring the apostille to be entitled "Apostille (Convention de La Haye du 5 octobre 1961)" in French).

166. See *id.* at art. 7 (requiring issuing authorities to assign arbitrary index numbers to all apostilles issued); Migdal, *supra* note 140, at 417 (describing the use of serials numbers on Export Certificates).

167. See Hague Convention, *supra* note 52, at art. 4 (requiring specific heading on the certificate).

QUENTIALLY NUMBERED SERIAL NUMBER;¹⁶⁸ AND A WATERMARK OR HOLOGRAM.¹⁶⁹ THE CERTIFICATE MUST IDENTIFY AND CERTIFY: THE NATION IN WHICH THE ITEM ORIGINATED; THE SIGNER AND OR PRESENTER OF THE ITEM; THE CAPACITY OF THE INDIVIDUAL SIGNING AND OR EXECUTING THE ITEM AND ANY STAMP OR SEAL USED; THE EXACT ADDRESS OF WHERE THE GAC CERTIFICATE WAS ISSUED; AND THE DATE ON WHICH THE GAC CERTIFICATE WAS ISSUED.¹⁷⁰ THE GAC CERTIFICATE SHALL ALSO INCLUDE THE NAME, BUSINESS ADDRESS, OFFICIAL CAPACITY AND SIGNATURE OF THE ISSUING AUTHORITY.¹⁷¹

Article 5 – Compliance With Articles 3 and 4

NO MEMBER NATION SHALL DEVIATE FROM THE AUTHENTICATION PROCEDURES PRESCRIBED IN ARTICLES 3 AND 4 OF THIS CONVENTION. MEMBER NATIONS SHALL NOT ENGAGE IN OR REQUIRE ANY FORM OF “LEGALIZATION” IN THE AUTHENTICATION OF ANY ITEMS ENUMERATED IN ARTICLE 2.¹⁷²

Article 6 – Official Recognition of Authentication

GOVERNMENTS, CITIZENS AND OTHER LEGAL ENTITIES SHALL RECOGNIZE ANY ITEM ENUMERATED IN ARTICLE 2 AS AUTHENTIC IF SUCH ITEM HAS BEEN AUTHENTICATED IN COMPLIANCE WITH ARTICLES 3 AND 4 OF THIS CONVENTION.

Article 7 – Designation of Issuing Authorities

GAC CERTIFICATE ISSUING AUTHORITIES SHALL BE DESIGNATED WITHIN EACH MEMBER NATION BY THE GOVERNMENTS OF SUCH MEMBER NATIONS.¹⁷³ THE GOVERNING BODY, OR ANY BUREAU OR AGENCY ESTABLISHED BY THE GOVERNING BODY OF THIS CONVENTION, SHALL KEEP A CURRENT LIST OF THE AUTHORIZED ISSUING AUTHORITIES IN EACH MEMBER NATION.¹⁷⁴

168. See Migdal, *supra* note 140, at 417 (explaining how serial numbers are used on Export Certificates).

169. See Miller, *supra* note 140, at 24 (explaining how watermarks and holograms are used to authenticate paper documents).

170. See Hague Convention, *supra* note 52, at art. 5 (specifying certain information required to be included in a correctly executed apostille). While some of the provisions for the GAC certificate are based on Article 5 of the Hague Convention, the characteristics of the GAC Certificate are more precisely enumerated than those of the Hague Convention's apostille.

171. See *id.* (prescribing the information to be included in the apostille).

172. See *id.* at art. 9 (requiring member nations to cease the procedure of legalization for items enumerated in Article 1 of the Hague Convention).

173. See *id.* at art. 6 (allowing member nations to designate official issuing authorities within their nations).

174. See RISTAU, *supra* note 21, at 248 (explaining that the drafters of the Hague Convention considered establishing a “central office” to maintain a database of issuing authorities' signatures).

Article 8 – Standard of Conduct for Issuing Authorities

AT ALL TIMES DURING THE EXECUTION OF OFFICIAL FUNCTIONS IN ACCORDANCE WITH THE PROCEDURES PRESCRIBED BY THIS CONVENTION, ISSUING AUTHORITIES SHALL EXERCISE DUE CARE, DILIGENCE AND HONESTY.¹⁷⁵ THE FOLLOWING REQUIREMENTS SHALL APPLY TO ALL ISSUING AUTHORITIES IN ALL MEMBER NATIONS.

1. EACH MEMBER NATION SHALL PRESCRIBE AND IMPOSE CRIMINAL PENALTIES FOR ISSUING AUTHORITIES WITHIN THEIR NATION WHO COMMIT FRAUD IN THE EXECUTION OF THEIR OFFICIAL FUNCTIONS.¹⁷⁶

2. ISSUING AUTHORITIES WHO NEGLIGENTLY OR FRAUDULENTLY PERFORM THEIR OFFICIAL FUNCTIONS SHALL BE SUBJECT TO CIVIL LIABILITY TO ANY LEGAL ENTITY WHO OR WHICH HAS SUFFERED ANY DAMAGES AS A PROXIMATE RESULT OF SUCH MISCONDUCT.¹⁷⁷

3. ISSUING AUTHORITIES SUBJECT TO CIVIL LIABILITY SHALL BE SUBJECT TO THE JURISDICTION OF COURTS IN: THE MEMBER NATION IN WHICH THE ITEM WAS AUTHENTICATED; THE MEMBER NATION IN WHICH THE ISSUING AUTHORITY'S MISCONDUCT PROXIMATELY RESULTED IN INJURY; AND, IF ANY, AN INTERNATIONAL TRIBUNAL DEEMED APPROPRIATE BY THE GOVERNING BODY OF THIS CONVENTION.¹⁷⁸

4. ALL ISSUING AUTHORITIES MUST CARRY AN ERRORS AND OMISSIONS INSURANCE POLICY OF THE EQUIVALENT OF AT LEAST ONE MILLION UNITED STATES DOLLARS.¹⁷⁹

Article 9 – Record Keeping

ISSUING AUTHORITIES SHALL KEEP A DETAILED REGISTER OF ALL GAC CERTIFICATES ISSUED.¹⁸⁰ THE REGISTER SHALL AT LEAST INCLUDE: THE SERIAL NUMBER OF THE CERTIFICATE; THE INFORMATION CONTAINED IN THE CERTIFICATE IN ACCORDANCE WITH ARTICLE 4; AND A THUMBPRINT OF THE INDIVIDUAL REQUESTING THE

175. See *Roman Empire*, *supra* note 4, at 888 (discussing the fact that in the United States, notaries public are held to a standard of reasonable care).

176. See MODEL NOTARY ACT § 6-203 (1984) (requiring criminal penalties for notaries who fail to comply with the provisions of the Act).

177. See *id.* § 6-101 (imposing civil liability on notaries for damages "proximately" resulting from "official misconduct").

178. See *id.* (providing civil liability for notary misconduct). See, e.g., The Antarctic Treaty, Dec. 1, 1959, T.I.A.S. 4780, at art. XI (designating the International Court of Justice as the forum of adjudication for issues between member nations to the treaty).

179. See Gnoffo, *supra* note 3, at 1088-89 (discussing the use of errors and omissions insurance for notaries public).

180. See Hague Convention, *supra* note 52, at art. 7 (requiring issuing authorities to keep records of issued apostilles).

AUTHENTICATION.¹⁸¹ EVERY NINETY DAYS ALL ISSUING AUTHORITIES SHALL FORWARD A COPY OF SUCH REGISTER TO THE GOVERNING BODY OF THIS CONVENTION.¹⁸² THE GOVERNING BODY OF THIS CONVENTION, OR ANY BUREAU OR AGENCY ESTABLISHED BY THE GOVERNING BODY, SHALL CREATE AND MAINTAIN A DATABASE OF THE ISSUING AUTHORITIES' REGISTER INFORMATION.¹⁸³ IN ACCORDANCE WITH ANY PRIVACY POLICY ESTABLISHED BY THE GOVERNING BODY OF THIS CONVENTION, SUCH INFORMATION SHALL BE MADE ACCESSIBLE TO ALL INTERESTED PARTIES.¹⁸⁴

Article 10 – Digital Signatures and Documents

THE GOVERNING BODY OF THIS CONVENTION, OR ANY BUREAU OR AGENCY ESTABLISHED BY THE GOVERNING BODY, SHALL PRESCRIBE STANDARDS FOR THE ISSUANCE AND OFFICIAL RECOGNITION OF ELECTRONIC DIGITAL GACs FOR ELECTRONIC DIGITAL DOCUMENTS REQUIRING AUTHENTICATION IN NATIONS OTHER THAN THE ORIGINATING NATION OF SUCH DOCUMENTS.¹⁸⁵ ANY ELECTRONIC DIGITAL AUTHENTICATION PROCEDURE ADOPTED BY THIS CONVENTION MAY UTILIZE EXISTING ELECTRONIC DIGITAL AUTHENTICATION TECHNOLOGIES OR MAY UTILIZE ANY ELECTRONIC DIGITAL AUTHENTICATION TECHNOLOGY DEVELOPED SUBSEQUENT TO THE

181. See *id.* (requiring certain information about issued apostilles to be kept on file); Gnoffo, *supra* note 3, at 1092 (suggesting that notaries public require thumbprints of individuals signing notarized documents).

182. See RISTUA, *supra* note 21, at 248 (explaining that the maintenance of certain information in a “central office” was pondered by the drafters of the Hague Convention).

183. An information agency or bureau should be established pursuant to Article 1 of this Convention. See Zang, *supra* note 157, at 733-34 (discussing the functions of a convention bureaucracy). Such an agency or bureau should be responsible for storing, tracking and verifying information relating to: certificates; those authorized to issue certificates; treaty violations by member nations; improper conduct with regard to the provisions of the treaty by authorities authorized to issue certificates and; electronic and digital certifications of electronic and digital signatures and documents in accordance with the provisions of the treaty. See Info. Sec. Comm., *Digital Signature Guidelines: Legal Infrastructure for Certification Authorities and Secure Electronic Commerce*, 1996 A.B.A. SEC. SCIENCE & TECH. 1.28 [hereinafter *Secure Electronic Commerce*] (discussing the use of on-line computer repositories to store information regarding the issuance of digital authentication certificates); RISTAU, *supra* note 21, at 248 (explaining that the drafters of the Hague Convention considered creating a centralized office to maintain a current file of issuing authorities' signatures).

184. See Hague Convention, *supra* note 52, at art. 7 (providing that information regarding any apostille issued may be obtained from the issuing authority of such apostille by “any interested party”); *Secure Electronic Commerce*, *supra* note 183, at 1.28 (providing access to digital authentication certificate information stored in digital repositories).

185. See *Lost in Cyberspace*, *supra* note 3, at 744-45 (proposing that state statutes “delegate to the appropriate government department the adoption of regulations to implement the digital signature laws, including the approval of secure verification systems”).

RATIFICATION OF THIS CONVENTION.¹⁸⁶ EVERY TWO YEARS THE GOVERNING BODY OF THIS CONVENTION, OR ANY BUREAU OR AGENCY ESTABLISHED BY THE GOVERNING BODY TO IMPLEMENT AND ENFORCE THE PROVISIONS OF THIS ARTICLE, SHALL CONVENE TO REVIEW THE EFFICACY OF THE TECHNOLOGY EMPLOYED IN THE ELECTRONIC DIGITAL AUTHENTICATION PROCESS AND SHALL MAKE A RECOMMENDATION TO THE MEMBER NATIONS REGARDING THE ADOPTION OF ANY NEW ELECTRONIC DIGITAL AUTHENTICATION TECHNOLOGIES REQUIRED TO ENSURE THE SECURITY OF THE ELECTRONIC DIGITAL AUTHENTICATION SYSTEM IMPLEMENTED PURSUANT TO THIS ARTICLE.¹⁸⁷ ALL ARTICLES OF THIS CONVENTION SHALL APPLY, WHEN PRACTICAL, TO ANY PROCEDURES ESTABLISHED PURSUANT TO THIS ARTICLE.

Article 11 – Enforcement of the Convention

EACH MEMBER NATION SHALL ENFORCE THE PROVISIONS OF THIS CONVENTION WITHIN THEIR NATION.¹⁸⁸ EACH MEMBER NATION SHALL DELEGATE THE ENFORCEMENT OF THIS CONVENTION WITHIN SUCH NATION TO ANY GOVERNMENT ENTITY PRESENTLY IN EXISTENCE OR TO BE CREATED WITHIN THE MEMBER NATION.¹⁸⁹ THE GOVERNING BODY OF THIS CONVENTION SHALL MONITOR SUCH INTERNAL ENFORCEMENT OF THIS CONVENTION BY THE MEMBER NATIONS.¹⁹⁰ THE GOVERNING BODY SHALL PRESCRIBE PENALTIES AND OR SANCTIONS TO BE IMPOSED UPON MEMBER NATIONS WHO FAIL TO INTERNALLY ENFORCE THE PROVISIONS OF THIS CONVENTION.¹⁹¹

CONCLUSION

We do not covet anything from any nation except their respect. – Sir Winston Churchill, 1940.¹⁹²

Unfortunately, not even the highest degree of mutual respect between nations will guarantee the reciprocity of good faith in rec-

186. See *id.* at 735-38 (explaining how “asymmetric cryptography” works); *Secure Electronic Commerce*, *supra* note 183, at 1.3 (explaining the use of “asymmetric cryptography” technology for digital signature authentication).

187. See *Lost in Cyberspace*, *supra* note 3, at 744 (explaining that digital signature security technology will evolve from its present state).

188. See, e.g., Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800, 810 (providing that each member nation “adopt the necessary measures to implement its obligations under this Convention”).

189. See Anderson, *supra* note 98, at 778-80 (discussing the need to enforce treaties domestically and internationally).

190. See *id.* at 779 (explaining that some treaties contain provisions for the creation of an agency to enforce such treaties on an international level).

191. See, e.g., Comprehensive Test Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439, 1455 (providing sanctions for member nations failing to comply with treaty provisions).

192. Sir Winston Churchill made this statement in a radio broadcast to the French people on Oct. 21, 1940. QUOTATIONS, *supra* note 1, at 468.

ognizing the authenticity, and thus validity of notarial acts executed outside a nation's own borders.¹⁹³ Of course, this should come as no surprise when considering the significant disparities between the notaries public of the world as well as each nation's interest in prescribing its own authentication and verification procedures for notarial acts.¹⁹⁴ The Hague Convention reflected the member nations' desire to abolish the cumbersome process of legalization and their concurrent desire to establish a simple process of authenticating notarial acts and other specific kinds of documents.¹⁹⁵ Although the Hague Convention was a significant step toward a global solution to the authentication needs of the nations of the world, the Convention's significant flaws and the newly encountered authentication demands of the modern world beckon the termination and replacement of the Hague Convention.¹⁹⁶

When a treaty is terminated, the rights of the member nations as well as the obligations imposed by such treaty no longer exist.¹⁹⁷ A treaty may be terminated by: a termination clause in the treaty itself; a separate compact between the member nations; certain acts of member nations or; a "joint act" agreed to by all member nations along with the creation and adoption of a new treaty.¹⁹⁸ Any member nation of a multilateral treaty may propose the termination and replacement of such treaty.¹⁹⁹

Having entered into more than 12,000 treaties and international agreements in its history, the United States should take the first step to terminate and replace the Hague Convention.²⁰⁰ The need to terminate, revise or replace treaties was eloquently commented on by Thomas Jefferson in 1790 when he declared that "[o]ur situation is too changing and too improving to render an unchangeable treaty expedient for us."²⁰¹ More than 200 years after they were written, Jefferson's words succinctly instruct the course

193. See *Authenticating Documents*, *supra* note 8, at 7 (explaining that a certificate of authenticity for a notarized document is often required when the notarial act has been executed in a foreign nation).

194. See *supra* notes 13-17 and accompanying text for a discussion of the significant disparities between notaries public of different nations.

195. Graveson, *supra* note 30, at 20.

196. See CLOSEN, *supra* note 12, at 468 n.3 (opining that even though the Hague Convention is flawed, the procedures it prescribes are an improvement over the process of legalization).

197. NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* 8-9 (1994).

198. *Id.* at 10.

199. See *id.* at 154 (discussing the effects of treaty termination, revision and replacement on member nations to a treaty).

200. Kevin C. Kennedy, *Conditional Approval of Treaties By the U.S. Senate*, 19 *LOY. L.A. INT'L & COMP. L.J.* 89, 91 (1996).

201. Thomas Jefferson made this written statement to Edward Rutledge in 1790. Thomas Jefferson on Politics & Government (visited Oct. 26, 1997) <http://pages.prodigy.com/jefferson_quotes/jeff1400.htm>.

of action to be taken today. Replace the Hague Convention.

APPENDIX

The States signatory to the present Convention,

Desiring to abolish the requirement of diplomatic or consular legalization for foreign public documents,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply to public documents which have been executed in the territory of one contracting State and which have to be produced in the territory of another contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

- a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process server ("huissier de justice");
- b) administrative documents;
- c) notarial acts;
- d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

However, the present Convention shall not apply:

- a) to documents executed by diplomatic or consular agents;
- b) to administrative documents dealing directly with commercial or customs operations.

Article 2

Each contracting State shall exempt from legalization documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalization means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates. However, the formality mentioned in the preceding paragraph cannot be required when either the laws, regulations, or practice in force in the State where the document is produced or an agreement between two or more contracting states have abolished or simplified it, or exempt the document itself from legalization.

Article 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an "allonge"; it shall be in the form of the model annexed to the present Convention. It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title "Apostille (Convention de La Haye du 5 octobre 1961)" shall be in the French language.

Article 5

The certificate shall be issued at the request of the person who has signed the document or of any bearer. When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears. The signature, seal and stamp on the certificate are exempt from all certification.

Article 6

Each contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3. It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

Article 7

Each of the authorities designated in accordance with Article 6 shall keep a register or card index in which it shall record the certificates issued, specifying:

- a) the number and date of the certificate,

b) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp.

At the request of any interested person, the authority which has issued the certificate shall verify whether the particulars in the certificate correspond with those in the register or card index.

Article 8

When a treaty, convention or agreement between two or more contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Article 3 and 4.

Article 9

Each contracting State shall take the necessary steps to prevent the performance of legalizations by its diplomatic or consular agents in cases where the present Convention provides for exemption.

Article 10

The present Convention shall be open for signature by the States represented at the Ninth session of the Hague Conference on Private International Law and Iceland, Ireland, Liechtenstein and Turkey.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 11

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 10.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 12

Any State not referred to in Article 10 may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 11. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Such accession shall have the effect only as regards the relations between the acceding State and those contracting States which have not raised an objection to its accession in the six months after the

receipt of the notification referred to in sub-paragraph d) of Article 15. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force as between the acceding State and the States which have raised no objection to its accession on the sixtieth day after the expiry of the period of six months mentioned in the preceding paragraph.

Article 13

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

When the declaration of extension is made by a State which has signed and ratified, the Convention shall enter into force for the territories concerned in accordance with Article 11. When the declaration of extension is made by a State which has acceded, the Convention shall enter into force for the territories concerned in accordance with Article 12.

Article 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, the Convention shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation will only have effect as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

- a) the notifications referred to in the second paragraph of Article 6;
- b) the signatures and ratifications referred to in Article 10;
- c) the date on which the present Convention enters into force in accordance with the first paragraph of Article 11;
- d) the accessions and objections referred to in Article 12 and the date on which such accessions take effect;
- e) the extensions referred to in Article 13 and the date on which they take effect;
- f) the denunciations referred to in the third paragraph of Article 14.

In witness whereof the undersigned, being duly authorized thereto, have signed the present Convention.

Done at The Hague, the 5th of October 1961, in French and in English, the French text prevailing in case of divergence between the two texts, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Ninth session of the Hague Conference on Private International Law and also to Iceland, Ireland, Liechtenstein and Turkey.

ANNEX TO THE CONVENTION

Model of Certificate

The certificate will be in the form of a square with sides at least 9 centimeters long.

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

Country

This public document

has been signed by _____

acting in the capacity of _____

bears the seal/stamp of _____

Certified

At _____

The _____

By _____

No. _____

Seal/Stamp

10. Signature _____

