

# **EU Family Law and Children's Rights: A better alternative to the Hague Conference or the Council of Europe?**

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## *Introduction*

The brief I've been asked to address is the value, from the children's rights perspective, of the EU intervention in the family law justice arena and in particular whether it improves upon the Hague system (by which is meant instruments concluded and "run" by the Hague Conference on Private International Law) for intra EU cases. I've added to that brief reference to the Council of Europe because that too is an international institution that has an important role in the development of children's rights within Europe.

No doubt when the organiser of this conference approached me she had in mind, because of my particular expertise, the EU impact on international child abduction disputes. So I will begin with that topic and from that seek to draw out wider themes.

## *Child Abduction*

During the 1970s both the Hague Conference and the Council of Europe each decided to draw up a Convention to deal with abduction and each instrument was concluded remarkably close in time, the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children etc, being opened for signature on 20 May 1980, and the Hague Convention on the Civil Aspects of International Child Abduction being made available for signature on 25 October 1980. Although the European Convention was wider in scope than abduction (and is not dissimilar in structure to BIIR) it was an object lesson in the folly of unnecessary duplication of effort by two major international institutions in dealing with a common subject.<sup>1</sup>

The European Convention initially attracted more ratifications but the Hague rapidly became the pre-eminent instrument for dealing with abduction. There are currently 81 Contracting States (compared with 37 to the European Convention) comprising pretty well the whole of Europe including all 27 EU Member States and significant swathes of the rest of the world – the outstanding absent bloc being the Islamic world.

The Hague Abduction Convention of course predated the UN Convention on the Rights of the Child and it may have been drafted differently had it post-dated it. At any rate suffice it to say while it is predicated upon the premise that children's interests are generally best served in cases of wrongful removal or retention by their prompt return to their State of habitual residence, an individual child's interests are *not* the paramount consideration in any particular return application. This is seen as

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<sup>1</sup> For further discussion of the history and scope of the two Conventions, see Lowe, Everall and Nicholls *International Movement of Children – Law Practice and Procedure* (Family Law, 2004) ch 12 and paras 19.1 – 19.39.

a fundamental flaw by some<sup>2</sup> who naturally point to Art 3 of the UN Convention which provides that in all actions concerning children the best interests of the child shall be the primary consideration. This indeed has been tested in the courts e.g. in the Australian Family Court and the German Constitutional Court which both considered the Hague Convention to be compatible with the UN Convention.<sup>3</sup> Indeed, it could be argued that the 1980 Convention gives legitimacy to the Hague since Art 11 entreats States 'to take measures to combat the illicit transfer and non return of children abroad' while Art 35 entreats States to 'take all appropriate national, bilateral and multilateral measures to prevent the abduction of children for any purpose or any form'. But perhaps the best riposte is that the limited exceptions to the obligation to make a return order (particularly those directed to the child under Arts 12(2) and 13) pay sufficient regard to the interests of any particular child particularly since the abduction court is not deciding the 'merits' of any custody dispute but is in effect merely determining in which forum that dispute must be determined.

Whatever the merits of this argument are in theory, the practicality is that throughout Europe the Hague Abduction Convention operates quite happily alongside the UN Convention. Moreover, having been augmented by the revised Brussels II Regulation (BIIR), the EU has also implicitly recognised its compatibility with the UN Convention.

But how come the EU became involved in this area particularly as at the time of the conclusion of the 1980 and 1989 Conventions it had neither interest in, nor competence over, family law in general nor child law in particular? Well to cut a long story short (and this is now well documented territory)<sup>4</sup> after the Treaty of Amsterdam had brought judicial co-operation in civil matters squarely into the Community framework and the European Council's follow-up meeting in Tampere at which the so-called 'Tampere Milestones' (including the notion that 'enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights') were set out, the way was open to convert what may have otherwise been a permanently dormant *Convention*<sup>5</sup> (itself controversially grounded upon the Maastricht Treaty)<sup>6</sup> into a Regulation, namely, Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses – the so-called Brussels II. This Regulation came into force on 1 March 2001 and at a stroke catapulted the EU into a front line international institutional player in family law reform. However, this first taste of major<sup>7</sup> EU family law was hardly encouraging. For example, it provided multiple bases for taking

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<sup>2</sup> See eg Schuz 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 ICLQ 771.

<sup>3</sup> See respectively, *In the Marriage of Murray and Tam* (1993) 16 Fam LR 307 and *G and G v Decision of OLG Hamm* 18 January 1995, 35 ILM 529 (1996).

<sup>4</sup> See eg McEleavy 'The Brussels II Regulation: How the European Community Has Moved Into Family law' (2002) 51 ICLQ 883, McGlynn 'The Europeanisation of family law' [2001] CFLQ 36 and *Families and the European Union – Law, Politics and Pluralism* (Cambridge University Press, 2006) ch 6, Lowe 'The Growing Influence of the EU on Family Law – A View from the Boundary' (2003) 56 Current Legal Problems 439 at 442 ff, and Stalford 'Regulating family life in post-Amsterdam Europe' (2003) 28 EL Rev 39.

<sup>5</sup> Ie Convention on Jurisdiction, recognition and Enforcement of Judgments in Matrimonial Matters 1998, OJ 1998 C221/1-18.

<sup>6</sup> McEleavy, op cit n 4 at 891ff.

<sup>7</sup> This is not to overlook the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, which has now also become a Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000, OJ 2000 L160, 19-20, now known, ironically because it pre-dated Brussels II, as Brussels I) and which inter alia, applies to maintenance issues.

jurisdiction but provided no hierarchy choosing instead to solve the problem of clashing jurisdictions by giving absolute priority to the first jurisdiction seized. That effectively encouraged a jurisdiction race which ran counter to modern family law thinking to encourage mediation. So far as children were concerned it only applied to those of *both* parents involved in divorce proceedings and not, for example, to step-children. It had no application to children outside the context of matrimonial proceedings between spouses.<sup>8</sup> In short, it could hardly be described as a beacon instrument of children's rights.

In the face of these criticisms and taking advantage of a French proposal to amend the Regulation to improve cross border rights of access,<sup>9</sup> the Commission came up with their own proposal to reform Brussels II in relation to children<sup>10</sup>, not least that the instrument should be extended to cover the recognition and enforcement of all decisions relating to parental responsibility. New, child focused rules of jurisdiction, primarily based on the child's habitual residence, but also allowing for prorogation of jurisdiction and for transfers of jurisdiction respectively subject to or based on the child's best interests were also included in the proposal.

All this was fine and a welcome improvement on the original Regulation but the stumbling block was the proposals concerning child abduction which effectively would have disapplied the 1980 Hague Abduction Convention. Although rooted in the desire to create 'even more ambitious rules on child abduction within the Community', and developed in the general context of devising common jurisdictional rules to hear children cases, the proposals split the Community.<sup>11</sup> But just when all seemed lost for these non mandated proposals the Danes brokered a compromise whereby the Hague Abduction Convention would continue to apply to intra EU cases but where a return order was refused new rules (see Art 11(6) – (8)) effectively giving the child's home court the final say following a merits hearing were to be applied. This paved the way for the revised Regulation (variously described as Brussels IIA or II Bis, but hereafter referred to as 'BIIR') to be finally concluded (Council Regulation (EC) No 2201/2003 of 27 November 2003). It came into force on 1 March 2005.

In fact BIIR had a greater impact upon the Hague Abduction Convention than simply applying at the refusal stage. Article 11(2) of the Regulation, for instance, directs the court when applying Arts 12 and 13 of the Hague Convention (effectively whenever a return order is being sought) to ensure that

'the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity'.

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<sup>8</sup> See the criticisms inter alia by McEleavy, op cit n 4, at 884ff and Lowe, op cit n 4, at 462ff.

<sup>9</sup> Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, OJ 2000 C234/7.

<sup>10</sup> Viz. Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, OJ No C 332 of 27.11.2001, 269, on which see 'Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility – Explanatory Memorandum' [2002] IFL 24, written by the Commission.

<sup>11</sup> See Tenreiro and Ekström 'Unification of Private International Law in Family Law Matters Within the European Union' in *Perspectives for the Unification and Harmonisation of Family Law in Europe* (ed Boele-Woelki, Intersentia, 2003) 185. For a debate about the desirability of the abduction proposals, see Lowe 'Article 5(3) of the Draft EU Regulation on Parental Responsibility – Dealing with Child Abduction' [2002] IFL 36 and His Honour Judge Karsten 'Article 5(3) of the Draft EU Regulation on Parental Responsibility – A Reply' [2002] IFL 42.

This indeed broke new ground for although one of the exceptions to the obligation to order a return under Art 13 is that ‘the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views’, the Convention makes no express provision for the child’s voice to be heard in abduction proceedings. In turn, Art 11(2) has had a significant impact on abduction proceedings before the English courts inasmuch as it is now established<sup>12</sup> that the question of how and whether the court will hear the child in discharge of its obligation under Art 11(2) should be considered at the first directions appointment and at any subsequent directions appointment to ensure that the essential ingredient of the obligation is never out of the spotlight. In fact the English courts have changed their practice with respect to *all* abduction cases and not just those governed by BIIR.<sup>13</sup>

Article 11(2) does not purport to dictate to national authorities *how* the child is heard (indeed Recital (19) expressly says that in this respect BIIR ‘is not intended to modify national procedures’) but it has probably led to a greater readiness than previously to give children party status in Hague cases.<sup>14</sup>

Another provision of Art 11 worth mentioning is Art 11(3) which imposes a time limit of six weeks in which (‘except where exceptional circumstances make this impossible’) a court should issue its judgment from the time when the application is lodged. This is a stronger enjoinder than anything to be found in the Hague Abduction Convention and is, undoubtedly, a child welfare/rights enhancing provision. How effective this provision is across the Union is a matter of speculation but certainly England and Wales treats this obligation very seriously and there is evidence that in Germany, for example, court decisions have been considerably speeded up.

Of course BIIR is not just concerned with return order applications in the context of child abduction. Mention might also be made, for example, of the new access provisions which are based on the French proposal and which were the *raison d’être* for revisiting the original Brussels II Regulation. Indeed as the *Practice Guide* to BIIR puts it,<sup>15</sup> one of the main objectives of the Regulation is to ensure that a child can maintain contact with all holders of parental responsibility after a separation even where they live in different Member States. The principal innovation in this context is to provide for a fast track enforcement procedure whereby, provided an appropriate certificate has been issued by the judge that made the order, an access order is directly recognised and enforceable in another Member State. In other words it is neither necessary to apply for ‘*exequatur*’ (as enforcement order) nor is it possible to oppose recognition of the judgment.

Although not beyond criticism, for example, it has been pointed out<sup>16</sup> that ‘no progress has been made in improving the ability of courts to deal with an access order that is out of date, and no longer meets the needs of the child or the family’, the

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<sup>12</sup> See *Re F (Abduction: Child’s Wishes)* [2007] EWCA 468, [2007] 1 FLR 697, following *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961, discussed inter alia by Lowe ‘A Review of the Application of Article 11 of the Revised Brussels II Regulation’ [2009] IFL 27 at 29-30.

<sup>13</sup> See *Re D*, supra, which was not in fact a BIIR case.

<sup>14</sup> See *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1 FLR 251 and *Re C (Abduction: Separate Representation of Children)* [2008] EWHC 517 (Fam), [2008] 2 FLR 6, discussed by Lowe, op cit n 12 at 29-30.

<sup>15</sup> Viz. *Practice Guide for the Application of the New Brussels II Regulation* (revised version, June 2005, drawn up the European Commission) comments on Arts 40 and 41.

<sup>16</sup> By Lowe, Everall and Nicholls *The New Brussels II Regulation* (Family Law, 2005) at 8.2.

access provisions under BIIR provide some important improvements to safeguard what, after all, is a key child right as provided for by Art 9(3) of the UN Convention ‘to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests’.

## TAKING STOCK

At this stage it is time to take stock. What should be made of the EU’s foray into mainstream family law in general and child law in particular at any rate in the context of the Brussels II Regulations 2001 and 2003?<sup>17</sup> Certainly the EU is a potent force. McEleavy makes the point<sup>18</sup> that ‘the evolution of the Brussels II initiative shows how a small grouping of States, in conjunction with the Commission are able to push an agenda and drag the other Member States along with them. Even if the majority are not willing participants the practical reality of European politics means that Member States are unlikely to make a stand unless the issue in question is viewed as being of fundamental national importance or has significant financial consequences’. ‘Family law measures’, he tellingly adds, ‘are unlikely to fall into either category’.

McEleavy was specifically commenting on the initial Brussels II but much the same comment could be made in respect of BIIR, though a significant battle was waged over the abduction provisions and compromises were made. Time will tell whether the same comment will be true of the attempt to amend BIIR by the so-called Rome III proposals dealing with applicable law on divorce.<sup>19</sup> Although these proposals seemed dead in the water following Sweden’s formal veto<sup>20</sup> (the UK and Ireland having previously indicated they would not have “opted-in”), up to 9 Member States may be going ahead anyway invoking what is known as the ‘enhanced co-operation procedure’.<sup>21</sup>

The fact that the original Brussels II has already been fundamentally amended and has been the subject of further proposals to amend it bears testimony to another of McEleavy’s concerns that rather than adopting a measured approach to making further reform in the family law domain, in contemporary European law making, progress is seen simply in terms of the rapid implementation of the measures perceived to be necessary for the creation of an area of freedom, security and justice. In short, McEleavy’s charge is that the EU law making machine is like an unstoppable juggernaut.

Although I think that States have recently shown themselves to be less willing to be rolled over even in respect of family law reform (witness the battle over child abduction in BIIR and the larger opposition to Rome III) there is more than a scintilla of truth in the McEleavy charge. But is this necessarily a bad thing? What are the plusses and minuses of the EU intervention to date and should further intervention be viewed positively or not?

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<sup>17</sup> See also Stalford and Drywood ‘Coming of Age?: Children’s Rights in the European Union’ (2009) CMLR 143, and Stalford ‘Brussels II And Beyond: A Better Deal For Children in the European Union?’ in *Perspectives for the Unification and Harmonisation of Family Law in Europe* (ed Boele-Woelki, Intersentia, 2003) 471.

<sup>18</sup> Op cit n 4, at 908.

<sup>19</sup> Proposal for a Council Regulation amending Regulation (EC) No 2201/2003.

<sup>20</sup> See the EU Council Factsheet Decisions in Civil Matters – Justice and Home Affairs Council, Luxembourg, 2 June 2008.

<sup>21</sup> Under Art 43 of the EU Treaty, the procedure requires a minimum of eight Member States to present their demand for enhanced co-operation to the Commission which must then be accepted by the Commission and approved by a qualified majority of the 27 Member States.

### *The Plusses of EU Intervention*

Although the original Brussels II Regulation was far from an ideal family law instrument, BIIR is much better and does make important contributions to the development of children's rights within Europe. One can point in particular to the provision in Art 11(2) for having to listen to children involved in Hague Abduction Convention proceedings<sup>22</sup> and to Arts 40-41 for the automatic enforcement of access orders in cross border cases. Nor should the child focused rules of jurisdiction be overlooked. Although whether these changes were formulated more for completeness rather than out of genuine concern for and commitment to children's rights can be debated,<sup>23</sup> given their existence, the motivation does not really matter.

One advantage of having EU based rights is that it is subject to the European Court of Justice in Luxembourg (ECJ) which, uniquely for family law instruments, can provide uniform interpretation across the Union.<sup>24</sup> Furthermore the effectiveness of that Court has been immeasurably improved by the introduction in March 2008 of the 'urgent preliminary ruling procedure' by which the reference process has both streamlined and considerably speeded up.<sup>25</sup> In the first case determined under this procedure, *Re Rinau*<sup>26</sup> – a case concerning the application of Art 11(6)-(8) of BIIR following a refusal to make a return order, the reference was made on 14 May 2008 and judgment delivered on 14 July 2008. However, this development is tempered by the fact that under BIIR only 'final' courts can make a reference.<sup>27</sup> Furthermore, there must be concern about the lack of a family law expert on the ECJ Bench.<sup>28</sup>

Another advantage of the EU is that it has the muscle to push changes through – this, if you like, is the plus side of the juggernaut effect. For example, I would consider that having to listen to children as provided for by Art 11(2) is an important improvement on the Hague Abduction Convention, but it is not one that could have been quickly delivered by the Hague Conference, if at all.

The EU also has resources that will enable it to carry through reform and, therefore, will enable it to deliver, for example, on its Strategy on the Rights of the Child.<sup>29</sup> That puts it at a distinct advantage both over the Hague Conference and the Council of Europe.

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<sup>22</sup> Though the blanket nature of the provision has been criticised, see Lowe 'A Review of the Application of Article 11 of the Revised Brussels II Regulation', op cit n 12 at 30.

<sup>23</sup> See eg Stalford and Drywood, op cit n 17 at 150.

<sup>24</sup> Some see this as a key advantage of EU law, see eg Beaumont and Moir 'Brussels II Convention: A New Private International Law Instrument for the European Community' (1995) 20 Eur L Rev 268 at 275 et seq.

<sup>25</sup> See Council Decision of 20 December 2007, amending the Protocol on the Statute of the Court of Justice and the amendment to the Rules of Procedure of the Court of Justice on 15 January 2008 (OJEU L240, p 29).

<sup>26</sup> *Case C – 195/08: Re Rinau* [2008] 2 FLR 1495.

<sup>27</sup> For a discussion of the Art 68 reference system in this context see Lowe 'The Growing Influence of the EU on Family Law – A View from the Boundary', op cit n 4 at 460-462 and for a critique see 478.

<sup>28</sup> The author has long advocated the creation of a specialist Family Panel to Art 68 references under BIIR, see Lowe 'The Growing Influence of the EU on Family Law – A View from the Boundary', op cit n 4 at 478-479.

<sup>29</sup> COM (2006) 367 final.

Finally, the Commission has not proved impervious to criticism or intransigent about its proposals – witness the experience of BIIR - and, arguably, though still barely pausing to take breath, has become more considered about its appropriate strategy for children's rights.

### *The Minuses of EU Intervention*

Although it is understandable that, as an institution, the EU would wish to improve the position of its children and indeed sets great store by doing so (witness the comment by Tenreiro and Ekström<sup>30</sup> that while the Hague Abduction Convention was in force in all Member States and 'functions well, it was possible and indeed desirable to create even more ambitious rules on child abduction within the European Community'), its intervention not only carries the risk of complicating existing international regulation but also comes at a price of removing Member States' individual competence to enter into future international arrangements in the same field. As to the former, national courts have to apply different regimes under the Hague Abduction Convention according to whether they are dealing with another Member State (except Denmark) or a State outside the Union. Complication too can be expected over the precise inter relationship between BIIR and the Hague 1996 Convention.

As to the latter, following the so-called ERTA case law,<sup>31</sup> individual Member States cede to the Union their competence to ratify, accede to or amend other international instruments, be they Hague, European or United Nations, in areas dealt with by EU legislation. In the context of the Brussels II Regulation there were two casualties of this rule arguably to the prejudice to children's rights namely the block on Member States' independent ratification of the 1996 Hague Protection of Children Convention and of the 2003 European Convention on Contact Concerning Children.

Happily, as part of the compromise when revising the Brussels II Regulation, provision was made for EU wide ratification of the 1996 Convention. Although this was further blocked by the UK-Spanish dispute over Gibraltar, that particular issue having eventually been solved in the context of this Convention, the way has indeed been paved for EU wide ratification which, following an EU Council Meeting of June 2008, is set for June 2010.<sup>32</sup> The irony here is that having initially held up wider ratification, the EU resolution has probably meant that EU wide ratification will have been achieved earlier than would have been the case had each State been allowed to act unilaterally. Time will tell what will happen regarding the European Contact Convention.

Reference to the Hague and European instruments prompts the further question of whether EU intervention was necessary at all – at any rate in the context of the Brussels II instruments. Arguably, the French and German differences over divorce could have been solved by their mutual ratification of the 1970 Hague Convention on the Recognition of Divorces and Legal Separations; it would have been preferable for the amendments to the 1980 Hague Abduction Convention to have been undertaken by the Hague conference so as to apply to all Hague Contracting States, and much

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<sup>30</sup> Op cit n 11, at 190.

<sup>31</sup> *Case 22/70: Commission v Council (Re European Road Transport Agreement)* [1971] ECR 263, para 17; Opinion 2/91 'ILO Convention No 170 Concerning Safety in the Use of Chemicals at Work' [1993] ECR I-1061; Opinion 1/94, 'WTO' [1994] ECR I-5267, para 77, and Opinion 2/92, 'Third Revised Decision of the OECD on National Treatment' [1995] ECXR I-152, para 31.

<sup>32</sup> See Council Decision of 5 June 2008 (2008/431/EC OJ L 151/5).

of the wider parts of the BIIR had already been achieved by the 1996 Hague Protection of Children Convention.<sup>33</sup>

However, this is now all water under the bridge, as is the argument about the EU's competence to have done what it has (though its hitherto limited competence via Arts 61(c), 65 and 67 possibly explains its hitherto somewhat haphazard intervention to date and perhaps its essentially primarily adult concerns – a criticism voiced inter alia by Stalford and Drywood<sup>34</sup> – query whether the projected new provision particularly Art 3(5) TEU will give clearer legitimacy to the projected children's rights initiative?).

## THE FUTURE

The more important issue is how one should proceed in the future. Given its limited resources and current projected programme, I don't think much can be expected of *new* child rights initiatives from the Hague Conference. As McElevy points out,<sup>35</sup> the Hague Conference has very limited resources, both financially and in terms of personnel and any new initiative has to go through an arduous process and has to have the support of key Member States. That is a pity inasmuch as the Hague working methods and in particular its readiness to permit NGOs to be involved in the negotiating process are probably the best as compared with the EU<sup>36</sup> and the Council of Europe. In any event the Hague Conference's natural brief is concerned with private international law. Having said that, one might expect Protocols to be added to the Hague Abduction Convention and serious consideration might well be given to the incorporation of Art 11 of BIIR. The issue of individual Member State competence to sign up to new Protocols will remain but now that the Commission is a formal member of the Hague Conference there should be no insurmountable difficulties for the EU wide commitment to any such changes.

The Council of Europe has in fact the clearest mandate of the three European based institutions to make changes to States' substantive laws inter alia to protect children's rights since by Art 1(a) of the Statute of Europe 1949 its aim is

'to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'.

It has a well established track record in concluding instruments to promote and safeguard children's rights, for example, by its 1996 Convention on the Exercise of Children's Rights, but which to date has only been ratified by 11 States, though signed by 13 others, its already mentioned 2003 Convention on Contact Concerning Children (ratified by 6 States and signed by 11 others), by its plethora of Recommendations<sup>37</sup> not least of which are those on Parental Responsibilities (1984)

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<sup>33</sup> See in particular the arguments of McElevy, op cit n 4 at 892-895.

<sup>34</sup> Op cit n 17 at 149ff.

<sup>35</sup> 'First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Time For Reflection?' in *Perspectives for the Unification and Harmonisation of Family Law in Europe* (ed Boele-Woelki, Intersentia, 2003) 509 at 515.

<sup>36</sup> For critical comments on the EU working methods in particular, see Jänterä-Jareborg 'Unification of International Family Law in Europe – A Critical Perspective' in *Perspectives for the Unification and Harmonisation of Family Law in Europe* *ibid*, 194 at 212-213 and McElevy 'First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Time For Reflection?' in *Perspectives for the Unification and Harmonisation of Family Law in Europe*, *ibid*, 509 at 520-523.

<sup>37</sup> Recommendations are a curiosity of the Council's work: while they have less standing than Conventions being neither formally signed nor ratified by Member States (although they are subject to the same process of drafting and are no less conditional on Member States' agreement) they are

and on Violence in the Family (1985). It too has an ambitious programme, namely its Building a Europe for and With Children – Towards a Strategy for 2009-2011. It has recently revised its Convention on Adoption<sup>38</sup> and is currently working on revision of its 1975 Convention on the Status of Children Born in Wedlock and its White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage,<sup>39</sup> having commissioned a fresh study into the rights and legal status of children being brought up in various forms of marital and non marital partnerships and cohabitation.<sup>40</sup>

Its main drawback is that it has become overshadowed by the EU and States have been slow to commit themselves to its Conventions particularly the recent ones.<sup>41</sup> There is also a need for greater monitoring of its instruments, but that is also true of the EU.

In my view it is important that the contributions to the development of children's rights played by all three of the European-based institutions is recognised, preserved, promoted and, above all, coordinated. Domestic violence is a good case in point. There are those<sup>42</sup> who have been lobbying EU Institutions to implement a policy on corporal punishment with a view to having more consistent laws within EU Member States. Yet as Stalford and Drywood, surely rightly point out,<sup>43</sup> while the EU may be 'politically poised to forge greater exchange of good practice and policy between Member States', that is insufficient in itself to legitimize EU action in areas that have no grounding in any area of EU activity. They further point out that it is difficult to attach any persuasive added value to an EU anti-smacking campaign given the 'prodigious international efforts' of the Council of Europe<sup>44</sup> and the UN Committee on the Rights of the Child.<sup>45</sup>

It is clear folly for the institutions to work against or ignorance of one another. But this is less likely to happen now as each have developed a good working relationship with one another (though each will continue to have their own agenda) and the Community/Union as we have said is now a member of the Hague Conference and, for example, is expressly named as an international organisation capable of ratifying the Convention on Contact Concerning Children.<sup>46</sup> So my answer to the basic question posed by the title of this presentation, is not to see the EU as a *better* alternative to the Hague Conference or the Council of Europe, but simply as one of the means, albeit an important one, by which children's rights can be promoted. Mind you, care will be needed (a) to manage the competence issue and (b) not to make international regulation too complicated.

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nevertheless addressed to *all* Member States (Conventions only bind those States that choose to ratify them) who are expected (if they do not already do so) to take steps as soon as possible (for example, when adopting new legislation) to comply the standards contained in the Recommendation.

<sup>38</sup> European Convention on the Adoption of Children (Revised) 2008, CETS No 202.

<sup>39</sup> CJ-FA (2006) 4e.

<sup>40</sup> CJ-FA (2008) 5, written by the author of this paper.

<sup>41</sup> See Lowe 'Does the Council of Europe's Family Law Programme Matter?' [2008] IFL 75.

<sup>42</sup> See eg Doek "Mainstreaming Children's Rights in EU Policy. What already exists? What's already planned? And the experience of other governmental bodies– Some comments from the CRC perspective." (Brussels, 2007).

<sup>43</sup> Op cit n 17, at 147-148.

<sup>44</sup> See eg its "Raising your hand against smacking!" campaign (June 2008).

<sup>45</sup> See general Comment No 8 on "The right to protection from cruel or degrading forms of punishment (Arts 19, 28(2) and 37 inter alia)" (June, 2006).

<sup>46</sup> See further Lowe 'Where in the World is International Family law Going Next?' in *The Continuing Evolution of Family Law* (eds Douglas and Lowe, Family Law, 2009) ch 12.

