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**EUROPEAN COMMITTEE ON LEGAL CO-OPERATION**  
**(CDCJ)**

**COMMITTEE OF EXPERTS ON FAMILY LAW (CJ-FA)**

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**REPORT FOR THE ATTENTION OF THE COMMITTEE OF EXPERTS ON FAMILY  
LAW (CJ-FA)  
CONTAINING AN EVALUATION OF THE COUNCIL OF EUROPE LEGAL  
INSTRUMENTS IN THE FIELD OF FAMILY LAW**

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## **I Terms of Reference and form of report**

The terms of reference of this report are threefold, namely

- To evaluate the existing conventions, recommendations and regulations in the field of family law with a view to assessing whether they correspond to society's current needs and represent the standards of the Council of Europe;
- To examine the case-law of the European Court of Human Rights in the field of family law with a view to identifying areas where the European Committee on Legal Co-operation (CDCJ) and the CJ-FA can effectively contribute to the useful/best implementation of the European Convention on Human Rights, and
- To advise how the Council of Europe and in particular the CDCJ can ensure the monitoring of the family law legal instruments in its member states.

Implicit in the first two terms of reference is the invitation to suggest the direction that the Council's future work in the field of family law might or should take.

With these terms of reference in mind the report comprises the following:

- Introduction – which explores the key issue of what the Council's role should be in the field of family law and in particular how its work relates to that of other international bodies; the different types and purpose of the instruments produced and the question of ratifications and accessions of the Council's instruments.
- An evaluation of the Council's existing family law instruments;
- How the instruments should be monitored;
- An evaluation of the relevant case-law of the European Court of Human Rights and its possible impact on the Council's future work; and finally
- What direction the Council's future family law programme might take.

## **II Introduction**

As the Council of Europe has itself said:<sup>1</sup>

“During the last thirty years there has been a period of intense legislative activity in the field of family law in the Council of Europe Member States. The Council has paid special attention to the need for reform and has, in particular, drawn up a large number of international instruments (Conventions and Recommendations) on this subject”.

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\* I am indebted to Sharon Willicombe of Cardiff Law School for typing this report under considerable pressure. I should also like to acknowledge the help of the Council's Secretariat (in particular Tracey Hudson) in dealing with my many queries.

<sup>1</sup> *Council of Europe Achievements in the Field of Law: Family Law and the Protection of Children* DIR/JUR (2002) 9 at p 9.

One might add that during this period there has also been intense activity in the field of family law by the Hague Conference on Private International Law and, more recently, by the European Union.

(a) *The Inter-relationship between the Council's work and that of the Hague Conference and EU*

Apart, then, from considering the current and future relevance and utility of the Council's international instruments (which will be undertaken in the next section) any review must also consider the Council's output and future work as against that done by other international bodies. It is a key thesis of this report that clashes of international instruments must be avoided (the author of this report has voiced concern elsewhere about the proliferation of international instruments and the resulting complexity).<sup>2</sup> It is also sensible, from a practical point of view, that the Council should not duplicate work done by others. How then does the Council's work relate to that of the Hague Conference and EU?

(i) *The Hague Conference*

As one might expect, given its name, the Hague Conference has traditionally been associated with private international law promoting internationally agreed rules of jurisdiction and consequent recognition and enforcement. It does not, generally, purport to govern internal laws.<sup>3</sup> Unlike the Council, membership of the Hague Conference is global (there are currently 65 member states) and worldwide accessions by non-member states are common (see further below). Like the Council, the Hague Conference has been very active in the field of family law. Over the last thirty years or so it has drawn up Conventions (the Hague Conference does not create instruments other than Conventions, that is, there is no Hague equivalent of the Council's stand alone resolutions and recommendations)<sup>4</sup> on the recognition of divorce and legal separation;<sup>5</sup> the celebration and recognition of the validity of marriages;<sup>6</sup> the applicable law, recognition and enforcement of maintenance obligations;<sup>7</sup> international child abduction;<sup>8</sup> intercountry adoption<sup>9</sup> and on child protection.<sup>10</sup> In terms of the number of Contracting States, the Abduction Convention and Intercountry Adoption Convention have been particularly successful, with 76 States ratifying or acceding to the former and 68 to the latter.

(ii) *The European Union*

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<sup>2</sup> See e.g. N Lowe "International Conventions Affecting the Law Relating to Children – A Cause for Concern?" [2001] *International Family Law* 171 at 178-9.

<sup>3</sup> As an exception to this, the 1996 Hague Convention on the Protection of Children does affect domestic rules on the allocation of parental responsibility.

<sup>4</sup> Conclusions and recommendations are, however, made in the context of reviews of specific Conventions.

<sup>5</sup> Ie the 1970 Hague Convention on Recognition of Divorce and Legal Separation.

<sup>6</sup> Ie the 1973 Hague Convention on the Celebration and Recognition of the Validity of Marriages.

<sup>7</sup> Ie the 1973 Hague Conventions on the Law Applicable to Maintenance Obligations and on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. A new Convention on Child Support is currently being prepared.

<sup>8</sup> Ie the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

<sup>9</sup> Ie the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

<sup>10</sup> Ie the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. This is in fact the third Convention on the Protection of Children: the first was drawn up in 1902 and the second in 1961.

A relative newcomer in the field of family law is the European Union which of course comprises less member states than the Council, though with the imminent succession by Bulgaria and Romania, there will be 27 member states. Although the EU has long had some potential to impact upon family law matters, until recently it did so only peripherally.<sup>11</sup> All that changed with the implementation in March 2001 of 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 commonly referred to as “Brussels II”.<sup>12</sup> This instrument was originally drafted as a Convention but was converted to a Regulation (the significance of which is that in accordance with Article 249 EC it became directly applicable in member states party to it)<sup>13</sup> upon the basis of the Treaty of Amsterdam which brought judicial co-operation in civil matters squarely into the community framework. Subsequent to Amsterdam the European Council set out the so-called “Tampere milestones”<sup>14</sup> which included 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”. In other words, the underlying rationale is that the free movement of judgments would facilitate the free movement of people within the Union. The Council accordingly endorsed the principle of mutual recognition as the “cornerstone of judicial cooperation in civil... matters within the Union”.<sup>15</sup>

Notwithstanding the Tampere milestones the EU does not have unlimited law making competence. So far as family law is concerned competence rests upon Article 65 EC which opens with the words

“Measures in the field of judicial cooperation in civil matters having cross-border implications... and insofar as necessary for the proper functioning of the internal market, shall include...”

It is generally thought<sup>16</sup> that Art 65 limits EC competence to cross-border issues affecting the proper functioning of the internal market which therefore excludes matters of purely domestic substantive family law. However, matters are not straightforward as (1) there is an inherent difficulty in drawing a firm line between a cross-border issue and one of pure domestic substantive law; (2) Article 308 EC provides “If action by the Community should prove necessary to attain... one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission, and after consulting the European Parliament, take the appropriate measures”. However, notwithstanding the width of this provision it is unlikely to be considered to give general latitude to make substantive law provision, and (3) the Charter of Fundamental Rights of the European Union, Articles 7, 9 and 24 of which provide respectively for the right to respect for private and family life, the right to marry and found a family and for the right of the child inter alia to such protection and

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<sup>11</sup> See, for example, the discussion in C Hamilton and K Standly *Family Law in Europe* (1<sup>st</sup> edn) 580-597.

<sup>12</sup> Although this was first family law *Regulation*, it was inspired by what was then the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, known as “Brussels I”. That Convention was also converted into a Regulation (namely, Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdictions and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), but which came into force on 1 March 2002 ironically one year *after* Brussels II.

<sup>13</sup> That is all Member States, except Denmark

<sup>14</sup> Named after its meeting held in Tampere in October 1999, see Bulletin EU 10-1999.

<sup>15</sup> Ibid at para 1.10, 33.

<sup>16</sup> See e.g. M Jänterä-Jareborg “Unification of international family law in Europe – a critical perspective” *Perspectives for the Unification and Harmonisation of Family Law in Europe* CEFL Series No 4 (ed K Boele-Woelki) 194.

care as is necessary for their well-being and to express their views freely (such views are to be taken into account on matters which concern them in accordance with their age and maturity) and to maintain on a regular basis a personal relationship and direct contact with both parents unless it is contrary to their interests. Although these rights seem to trespass upon internal substantive law, the Charter has not been incorporated into a Treaty and is thought to have declaratory force only.<sup>17</sup> Moreover, Article 51(2) EC states “The Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”. However, notwithstanding this clear provision the EU Commission have already relied upon the Charter<sup>18</sup> to include the child’s right of continued contact and a right to be heard in the revised Brussels II Regulation (discussed below).

Issues of law making competence are not just important for determining what the EU can itself do, but also, following the so-called ERTA case law<sup>19</sup> (by which the European Court of Justice ruled that each time the community exercises its international competence by adopting provisions laying down common rules, it acquires *exclusive* external competence to undertake obligations with third countries that affect those rules or alter their scope), limit individual member states independent competence to ratify or accede to rather international instruments. This proved a thorny issue with regard to the European Convention on Contact Concerning Children, the opening for signing of which was delayed because of an argument about whether or not the Community and/or had competence to sign it.<sup>20</sup>

At the moment there are two Regulations affecting family law, namely, Brussels I and the revised Brussels II<sup>21</sup> (variously referred to as BIIR, Brussels IIA or Brussels II Bis) which from 1 March 2005 replaced the original one. Brussels I provides a general framework for recognition and enforcement of civil and commercial judgments, including maintenance, but expressly excluding matters of status and rights of property arising from marriage. The revised Brussels II provides exclusive and separate rules of jurisdiction in relation to matrimonial proceedings (i.e. for divorce, annulment of marriage and separation but not directly for other issues such as for financial relief after divorce) and in respect of matters of parental responsibility for children and for a consequent scheme of recognition and enforcement. Unlike the original Brussels II, the revised Regulation applies to *all* civil matters<sup>22</sup> relating to the attribution, exercise, delegation, restriction and termination of parental responsibility. The Regulation does *not*, however, apply to the establishment or contesting of a parent-child relationship, adoption, names, emancipation, maintenance obligations, trusts or succession or measures taken as a result of criminal offences committed by children.<sup>23</sup>

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<sup>17</sup> See inter alia “Communication From the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union” Com (2000) 644 Final (11 October 2000).

<sup>18</sup> See the proposal dated 3.5.2002 (Com)(2002) 222 Final at p 7.

<sup>19</sup> See Case 22/70, *Commission v Council* [Re European Road Transport Agreement] [1971] ECR 263, para 17; 2/91, “ILO Convention No 170 Concerning Safety in the Use of Chemicals at Work” [1993] ECR 1-1061, para 26; Opinion 1/94, “WTO” [1994] ECR 1-5267, para 77; and Opinion 2/92, “Third Revised Decision of the OECD on National Treatment” [1995] ECR 1-521, para 31.

<sup>20</sup> The power to do this is conferred by Art 22(1). The Commission maintained that by signing up to Brussels II, Member States lost their competence on issues of contact. Even now, no Member State of EU has been able to ratify this Convention – see further below. It has also prevented EU wide ratification the 1996 Hague Convention on the Protection of Children.

<sup>21</sup> Council Regulation (EC) 2201/2003 OF 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

<sup>22</sup> The original Regulation only applied to issues of parental responsibility for children of both spouses involved in matrimonial proceedings.

<sup>23</sup> Article 3.

Other Regulations are on their way. Negotiations are at an advanced stage for what will probably be known as Brussels III dealing with applicable law on divorce, annulment and separation,<sup>24</sup> and a Green paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition has just been published.<sup>25</sup> Their future agenda also includes mediation.<sup>26</sup>

(iii) *The Council's position*

The Council of Europe's mandate to draw up international instruments derives from Article 1 of the Statute of Europe, which states

- "a. The aim of the Council of Europe 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.
- b. This aim shall be pursued through the organs of the Council of Europe by discussion of questions of common concern and by agreements and common action in [among other matters] legal and administrative matters and in the maintenance and further realisation of human rights and freedoms".

Many of the international instruments produced by the Council refer to this general mandate in their preamble, though they do so in different ways. For example, the 1967 European Convention on the Adoption of Children refers to "the aim of the Council of Europe is to achieve a greater unity between its members for the purpose, among others, of facilitating their social progress". The 1975 European Convention on the Legal Status of Children Born out of Wedlock" refers to the aim "to achieve a greater unity between its members, in particular by the adoption of common rules in the field of law". The 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine refers to the aim of "the achievement of a greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms". Another variation found in Resolution (77)33 on the Placement of Children and Recommendation R (79) 17 Concerning the Protection of Children Against Ill-Treatment is to refer to the aim being "the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress". Other instruments simply refer to the aim "to achieve greater unity between its members".<sup>27</sup>

Although its mandate clearly extends to international regulation and control, what makes the Council unique in the European context (i.e. as against the Hague Conference and the European

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<sup>24</sup> This is currently often referred to as Rome III.

<sup>25</sup> Com (2006) 400 final.

<sup>26</sup> See Proposed Directive of the European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters Com (2004) 718 final (22 October 2004).

<sup>27</sup> See the 1996 European Convention on the Exercise of Children's Rights and the 1997 European Convention on Nationality.

Union) is its mandate to harmonise domestic laws. Indeed, as one former Head of the Private and International Law Division, Directorate of Legal Affairs at the Council has put it,<sup>28</sup>

“By promoting law reform, harmonisation and co-operation, the Council of Europe assists domestic laws to cope with the problems of both national and international families”.

It is suggested that this norm setting approach, driven in part by rulings of the European Court of Human Rights (it is of course vital that the Council’s work is informed by that Court’s decisions)<sup>29</sup> is not only what the Council does best but also will generally avoid clashes with Hague or EU instruments. It is proposed, therefore, to add this criterion to that of modernity and utility when assessing existing instruments. It will also be an important consideration when planning future work. This theme will therefore be developed throughout this paper but at this stage it may simply be observed that the current work on adoption and on the establishment and legal consequences of parentage fall classically within the criteria. On the other hand, the 1980 Custody Convention strayed into the territory of private international law and though, ironically, attracting more Contracting States than other instruments, it was from the outset generally treated as of secondary importance to the 1980 Hague Abduction Convention and has now been virtually superseded by the revised Brussels II Regulation (see further below).

*(b) The types of instruments produced by the Council*

One of the curious features of the Council’s work is the different types of international instruments produced, namely, Conventions, Recommendations and now, “White Papers”. Conventions are familiar international instruments and require no further discussion. Recommendations, however, are unusual. Although often produced as the result of lengthy consultation and no less conditional on member states’ general agreement, recommendations clearly have less standing than Conventions. They are not formally signed or ratified by member states and although there is power to monitor their implementation (Article 15 of the Statute of the Council of Europe empowers the Committee of Ministers to “request governments of members to inform it of the action taken by them with regard to... recommendations”) there are no sanctions against “non compliance”. They have aptly been described by one commentary<sup>30</sup> as “guidelines” and by another<sup>31</sup> as “international aspirations”.

What then is their utility? First, they have been and can be used as a prompt to member states to implement existing Conventions. Secondly, they can be used as the basis for future Conventions and thirdly, they have the advantage of providing international encouragement to member states to ensure that their national laws comply with recommendations but at the same time giving leeway as to how and when. They can also be used by the European Court of Human Rights when determining the extent to which a particular legal solution has been commonly embraced.

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<sup>28</sup> Margaret Killerby “The Council of Europe’s Contribution to Family Law (Past, Present and Future)” in *Families Across Frontiers* (eds N Lowe and G Douglas) 13 at 25.

<sup>29</sup> Indeed, as para 1 of the Warsaw Declaration Third Summit of the Heads of State and Government of Member States of the Council of Europe, Warsaw, May 2005 (CM/2005 145 rev) states “The Council of Europe shall pursue its core objective of preserving and promoting human rights, democracy and the rule of law. All activities must contribute to this fundamental objective”.

<sup>30</sup> Killerby, *op cit*, at 14.

<sup>31</sup> Lowe and Douglas *Bromley’s Family Law* (10<sup>th</sup> edn) 27.

There seems, however, to be no Council policy on the use of recommendations, and this seems worthy of review (see further below). One issue might be whether the Council should be able to withdraw or modify a recommendation.

For the sake of completeness mention needs to be made of the “White Paper” on “Principles Concerning the Establishment and Legal Consequences of Parentage”. This is clearly a consultation paper but is something of a departure in the field of family law instruments. It raises the issue as to whether such White Papers should become common or at least more common practice.

*(c) Ratification and accession issues*

It is a matter of concern that there have been relatively few ratifications particularly of the later family law conventions. It is especially disappointing that there have only been 10 ratifications with a further 14 signatures of the 1996 Convention on the Exercise of Children’s Rights and only 3 ratifications with a further 14 signatures of the 2003 Convention on Contact Concerning Children. In the latter case matters have undoubtedly been complicated by the question of the individual competence of member states of the European Union to ratify and it may be that that has now become an issue with regard to the 1996 Convention. What this points to, however, is the need to consider these issues at the earliest point possible when preparing new Conventions, though of course making provision for the European Community to ratify, as in the case of the Contact Convention, might go some way to solving any problems.

It seems a good policy to facilitate as wide a commitment to the Council’s Conventions as possible. Observer status at the drafting stage ought therefore to be encouraged as should accessions. In this respect it is notable that the 2001 European Convention on Cybercrime has been acceded to by the USA and signed by Canada, Japan, Montenegro and South Africa. This provides a useful precedent for any future family law instruments. Furthermore, in another welcome development of direct relevance to the family law field, it is to be noted that Canada, Mexico, Japan and the USA together with the United Nations Committee on the Rights of the Child and the European Community were invited as observers to the first meeting of the Standing Committee on the 1996 European Convention on the Exercise of Children’s Rights held in June 2006.<sup>32</sup>

So far as accessions are concerned attention needs to be paid to the precise mechanisms. The 1967 Adoption Convention and the 1975 Convention on the Legal Status of Children Born Out of Wedlock simply stated that after entry into force the Committee of Ministers “may invite any non-member State to accede...”. On the other hand, while accessions to the 1980 Custody Convention, are at the invitation of the Committee of Ministers they are made subject to a “unanimous vote of the representatives of the Contracting States entitled to sit on the Committee”. A similar wording can be found in the 2003 Convention on Contact Concerning Children and is proposed for the revised Convention on Adoption. A different and more elaborate provision is made in the 1996 Convention on the Exercise of Children’s Rights inasmuch as the Committee of Ministers, either on its own initiative or following a proposal from the Standing Committee to that Convention and after consultation with the parties, can invite accessions by non-member states as well as the European Community, but it is still subject to a unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

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<sup>32</sup> T-ED 3 (2006) E.

All these provisions give the impression that accessions are unusual and, particularly, given the right of veto of existing Contracting States in many of the Conventions, are difficult. It might be more “accession” friendly if, in future Conventions, provision is made for an applicant State itself to apply to accede which is simply made subject to the approval of the Committee of Ministers after consultation with existing Contracting States.

### **III An Evaluation of the Existing Instruments**

#### **(a) *European Convention on the Adoption of Children 1967 and the draft European Convention on Adoption of Children (Revised)***

The 1967 Adoption Convention was the first Convention in the field of family law drawn up by the Council. Its aim was to update and harmonise the laws of member states and thus to avoid conflict of laws where the adoption involves a child’s transfer from one State to another. The Convention deals with the conditions for adoption and the type of adoption and contains provisions concerning such consequential issues as name, nationality and succession. It quickly attracted 19 ratifications and three signatures though it has since been denounced by Sweden and partially denounced by the United Kingdom (the only instance of a denunciation of a Council instrument in the field of family law). It is also potentially the first family law Convention to be completely revised.<sup>33</sup> Such a revision is timely.

Although it is perhaps outside the terms of reference of this report to comment on the specific provisions of the draft, it may be observed that (i) requiring the consent of the child (Art 4(1)(b)) is likely to be controversial. Such a recommendation was, for example, specifically not enacted in the recently implemented Adoption and Children Act 2002 in England and Wales in part because of the fact that it would place an unnecessary burden on the child. Would it not be preferable just to make provision for consultation as in Article 5(2)?;

(ii) Although the proposed Article 6(2), under which re-adoptions are restricted to certain limited circumstances, repeats Article 6(2) of the 1967 Convention it may be wondered whether it is too rigid. In particular it is not clear whether it permits a re-adoption following the *breakdown* as opposed to the “ending” of the first (query whether Article 6(2)(d) could be interpreted as accommodating this scenario?).

One further point needs to be made, namely, the absence of any reviewing mechanism which needs to be addressed before finalising the instrument (see further below).

But these comments apart, the revised Adoption Convention satisfies the requirements of modernity and utility and happily sits with the 1993 Hague Inter-country Adoption Convention. It will therefore be a useful additional Convention in the field of family law.

#### **(b) *The 1975 European Convention on the Legal Status of Children Born Out of Wedlock, Recommendation No R (84)4 on parental responsibilities and the “White Paper On Principles Concerning the Establishment and Legal Consequences of Parentage”***

The 1975 Convention, which has been ratified by 21 States and signed by a further 4, seeks to assimilate the status of children born out of wedlock with that of children born in wedlock.

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<sup>33</sup> Although the 2003 Convention on Contact Concerning Children amends and replaces Article 11(2) and (3) of the 1980 Custody Convention, see below.

Though important at the time of its conclusion, it has long been recognised that this Convention needs updating and indeed at its 30<sup>th</sup> meeting in September 1997 the CJ-FA gave Working Party No 2 on the legal status of children the task of drawing up a report containing principles relating to the establishment and legal consequences of parentage. In 1998 the Working Party was mandated to prepare principles to be included in an international instrument (either a Convention or a Recommendation) on the legal status of children in the light of the proposals made during the XXVIIth Colloquy on European Law on legal problems relating to parentage (Malta, 1997). In the event the Working Party produced a “*White Paper*” *On Principles Concerning the Establishment and Legal Consequences of Parentage*, which was adopted by the CJ-FA in 2001, and published for consultation.<sup>34</sup> The CJ-FA was mandated to produce a report taking into account comments made on the White Paper. At the time of writing, however, it has not yet done so.

Before examining the White Paper in more detail reference also needs to be made to Recommendation No R(84) 4 on Parental Responsibilities. That Recommendation comprises 11 Principles concerning the attribution and exercise of parental responsibilities (though it may be noted that the difference between *attribution* and *exercise* is not clearly delineated by the Recommendation).<sup>35</sup> Although largely complimentary to the 1975 Convention, there is some direct overlap in the Recommendation, for example, the duty of all parents to maintain the child (Article 6 of the Convention and Principle 8 of the Recommendation) and the possibility of the parent with whom the child does not live to maintain a personal relationship with the child (Article 8 and Principle 8). On other occasions the relationship between the provisions requires careful analysis. Thus, for example, while Article 7 provides that “where the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone”; Principle 7(2) allows in these circumstances for parental responsibilities to be exercised by the father alone. The two provisions are compatible since the former is dealing with the attribution and the latter with the exercise of parental authority/responsibilities. In short, however, the relationship between the two instruments is problematic and any revision of the 1975 Convention should also take on board Recommendation (84) 4 so as to avoid both the inconvenience of having two instruments and the possibility of any perceived clash or inconsistency between them.

The White Paper comprises three parts; Part A: principles relating to the establishment of legal parentage; Part B: principles relating to legal consequences of parentage; and Part C: possible legal consequences where the parentage has not been established. Parts A and B are substantial containing 17 and 11 Principles respectively (Part C comprises just one Principle) and would largely update and replace the 1975 Convention as well as covering other areas. The replacement provisions are not in the same order as the 1975 Convention, for example, while Principles 1 and 2 roughly equate to Articles 2 and 3 of the Convention (establishment of maternal and paternal affiliation respectively), Article 6 would be replaced by Principle 26 in the White Paper (parental obligation to maintain), and Article 7 by a combination of Principles 19 and 20 (in whom parental responsibilities are vested and by whom exercisable). It would be helpful if the derivations are spelt out in the Explanatory Report.

Not all the provisions of the 1975 Convention are covered by the White Paper’s Principles. One of these, Article 9 which deals with succession (a child born out of wedlock should have the same

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<sup>34</sup> CF-FA (2001) 16 rev.

<sup>35</sup> Ie there are no discrete parts of the Recommendation focused respectively on attribution and exercise. Indeed, some Principles e.g. Principle 7 deal with both.

rights of succession as a child born in wedlock) is, however, expressly discussed at pars 85 and 86 of the White Paper. But nothing is said about Article 10 under which a parents' subsequent marriage confers the legal status of a child born in wedlock. It may be, of course, that this provision is considered now to be outdated and unnecessary, but the White Paper's silence is not helpful. Another Article, Article 8 which deals with access, is also not dealt with in the White Paper though this is covered by the Convention on Contact Concerning Children, but again some express reference in the Explanatory Notes would be helpful.

The White Paper's Principles also generally updates and replaces those in Recommendation 84 (4) though again not in the same order. Thus Principle 18 of the White Paper (defining parental responsibilities) is the equivalent to Principle 1 of the Recommendation; Principle 19(1) (attribution of parental responsibilities) is equivalent of Principle 5 of the Recommendation; Principle 20 (insofar as it deals with the exercise rather than the attribution of parental responsibilities) is the equivalent of Principle 2; Principle 21 (right of child to express views etc) is the equivalent of Principle 3; Principle 22 (effect of divorce etc) is the equivalent of Principle 6; Principle 23 (effect of death) is the equivalent of Principle 9; Principles 24 and 25 (deprivation of parental responsibilities) cover Principle 4 and Principle 26 (obligation to maintain) is the equivalent of Principle 8 of the Recommendation. There is, however, no systematic reference to the Recommendation in the White Paper and it is suggested that there should be. Moreover, not all the Recommendation's Principles are accommodated by the White Paper. In particular, there is no equivalent of Principle 10 (joint exercise of responsibilities by agreement), nor of Principle 11 (the right to be informed of the exercise of responsibilities). It is suggested that these gaps need to be addressed.

Although the White Paper's Principles provide a rational scheme it is not above criticism. First, it does not clearly differentiate between the attribution and exercise of parental responsibilities nor with whether legal parenthood should be distinct from parents having parental responsibilities. Secondly, it is perhaps odd (certainly as a matter of structure) to deal with maintenance (Principle 26), name (Principle 27) and nationality (Principle 28) after dealing with parental responsibilities. There is also a gap in that nothing is mentioned of citizenship. Thirdly, Principles 15 and 16 (on adoption) are surely too extensive and in any event overlap with the draft Adoption Convention. Fourthly, there are the already identified gaps of coverage of the 1975 Convention and the 1984 Recommendations. Regard also needs to be had to recent rulings by the European Court of Human Rights<sup>36</sup> that limits on the ability to initiate paternity proceedings need to be proportionate and non discriminatory. In addition, the "Principles Regarding Parental Responsibilities" recently drafted by the academic body, the Commission on European Family Law (CEFL), could also profitably be consulted and even accommodated. To accommodate some of these criticisms, consideration could be given to having a section on the consequences of parentage for the child.

Notwithstanding the above comments, it is suggested that a new instrument (in the author's firm view, it should be a Convention) on Parentage is essential. Such an instrument should *clearly* replace the 1975 Convention and 1984 Recommendations. The new instrument would satisfy the

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<sup>36</sup> E.g. *Paulik v Slovakia* (Application No 10699/05), [2006] 3 FCR 323, *Taoli v Turkey* (Application No 11449/02), *Rozanski v Poland* (Application No 55339/00), [2006] 2 FCR 178, *Mizzi v Malta* (Application No 26111/01), [2006] 1 FLR 1048 and *Shofman v Russia* (Application No 74826/01) [2006] 1 FLR 680. Note also *Mikulic v Croatia* [2002] 1 FCR 720 in which a court's inefficiency in determining paternity was held to be in breach of the child's Article 8 rights to have her personal identity resolved without unnecessary delay; and *Karcheva and another v Bulgaria* (Application No 60939/00), [2006] 3 FCR 434 in which the undue length (over 6 years) of proceedings to resolve paternity was held to violate Article 6.

criteria of modernity and utility and would not clash with any other existing international instruments. It is suggested that work on this should be regarded as a top priority.

(c) *The 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and a Restoration of Custody of Children*

The 1980 Convention is the most widely accepted of all the European Conventions in the field of family law, having been ratified by 34 States, acceded to by one and signed by a further State. It has been augmented by two Recommendations, namely Recommendation No R (95)<sup>6</sup> and Recommendation R(99)<sup>7</sup>. Both urged those States that had not already done so, to sign and ratify both the European Convention and the 1980 Hague Abduction Convention. The 1995 Recommendation also sought to encourage States to improve the operation of transfrontier access to children and, mindful of the delay of repatriation of a child where neither parent is able or willing to pay for its costs, urged States “to secure the rapid return of a child in compliance with a court decision”. The 1999 Recommendation urged Contracting States to withdraw reservations and “whenever possible” to make a decision concerning recognition and enforcement within six weeks from the date of the commencement of the proceedings before the judicial authority.

Although commonly perceived as an instrument for dealing primarily with child abduction, or what the Convention itself refers to as “improper removals”, the Convention has a wider ambit, namely, as its title indicates, the recognition and enforcement of decisions relating to the custody of and access to children under the age of 16. At the time of its original conception,<sup>37</sup> there was a desperate need for some form of international regulation in this area and there were no competing instruments or even proposals.<sup>38</sup> However, notwithstanding the innovation both of extending the technique of recognition and enforcement to custody orders (which had hitherto been ignored by other instruments) and of creating a Central Authority to administer the day-to-day working of the Convention, the instrument was quickly overshadowed by the 1980 Hague Abduction Convention which came into force just three months after the European Convention.

The European Convention has generally been perceived as being more complex than the Hague<sup>39</sup> and though States found it convenient to ratify both instruments, it was evident that the European Convention was invoked only in a minority of abduction cases.<sup>40</sup> There is, however, one area where the European Convention is superior to that of the Hague, namely, in relation to access since unlike under the latter instrument, under the former there is a clear *Convention* obligation upon the courts to recognise and enforce such orders.<sup>41</sup> But even this advantage has now been all but negated by the revised Brussels II Regulation which came fully into force on 1 March 2005 and

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<sup>37</sup> Viz the Seventh Conference of European Ministers held at Basle in 1972 which was concerned with ways of improving co-operation in respect of guardianship and custody of children, based on a report presented by the then Austrian Minister of Justice, Christian Boda, see the Council’s Explanatory Report to the Convention and R L Jones “Council of Europe Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children” (1981) 30 ICLQ 467.

<sup>38</sup> The Hague’s work on child abduction did not begin until 1976, see Lowe, Everall and Nicholls *International Movement of Children, Law Practice and Procedure* at 12.1.

<sup>39</sup> See C Bruch “How to Draft a Successful Family Law Convention: Lessons from the Child Abduction Convention” in Doek, Van Loon and Vlaardingerbroek (eds) *Children on the Move* 47 at 54.

<sup>40</sup> Ie in less than 10% of cases, see N Lowe and A Perry “International Child Abduction – The English Experience” (1999) 48 ICLQ 127.

<sup>41</sup> Indeed, in *Re G (A Minor)(Enforcement of Access Abroad)* [1993] Fam 216 Hoffmann LJ expressly advised English practitioners to use the European Convention in preference to the Hague.

which takes precedence over both the European and Hague Conventions.<sup>42</sup> It is now the case that as between member states of the European Union (except Denmark) recognition and enforcement both of custody or access orders is *exclusively* governed by the revised Brussels II Regulation. This in turn means that the European Convention can only be invoked by or “against” Contracting States that are not party to Brussels II, namely (at the time of this report) Bulgaria, Denmark, Iceland, Liechtenstein, Moldova, Norway, Romania, Serbia, Switzerland, the former Yugoslav Republic of Macedonia, Turkey and Montenegro. With their accession to the European Union in 2007, Bulgaria and Romania will become parties to Brussels II. Even in these cases, with the exception of Liechtenstein, which alone of the Contracting States to the European Convention, is not a Contracting State to the Hague Convention, the probability is that in the vast majority of cases it will be the Hague Convention that is invoked and not the European. Even the advantage of using the European Convention in relation to access will diminish if States choose to ratify the 1996 Hague Convention on the Protection of Children and the Council’s own 2003 Convention on Contact Concerning Children since both also deal with that area.

What conclusions should be drawn from these developments? There are two. First, there seems no point in actively promoting the Convention. It has essentially served its purpose though, equally, if States choose to preserve it (and no State has yet denounced it) there is no need, even if it were possible, to revoke the Convention altogether, for example, by encouraging denunciations. The second point is that the history of the Convention illustrates the dangers and complexities of dealing with private international law issues. This is not to say that the Council should never venture into this arena but that it should at least be alive to the potential problems of doing so.

*(d) The 1996 European Convention on the Exercise of Children’s Rights*

The 1996 Convention, which has been ratified by 10 States and signed by a further 14, is essentially designed to underpin the United Nations Conventions on the Rights of the Child (particularly Article 12(2)) by providing for the procedural rights of children to be heard in legal proceedings.

In 1990 the Parliamentary Assembly adopted a Recommendation on the rights of children<sup>43</sup> which included an invitation to the Committee of Ministers to take steps to examine the possibility of drawing up a legal instrument to secure among other things the rights of children in court proceedings. Following this invitation the Committee of Experts on Family Law were given the task of preparing an appropriate instrument on certain questions relating to the rights of children not already covered by the UN Conventions. That Committee decided<sup>44</sup> to prepare an instrument “which would facilitate the exercise of children’s rights by strengthening their procedural rights” so as to ensure, in the words of Article 1(2), that “children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority”.

Article 1(3) confines the Convention’s application to “family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children”, while Article 1(4) requires Contracting States to “specify at least three categories of family cases before a judicial authority to which this Convention shall apply”. Curiously, “family cases” are not defined in the Convention but according to the Explanatory Report<sup>45</sup> examples of categories which *may* be

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<sup>42</sup> See respectively Article 60(d) and (e) of the revised Regulation.

<sup>43</sup> Recommendation 1121 (1990).

<sup>44</sup> See Margaret Killerby “The Council of Europe’s Contribution to Family Law”, *op cit* n 26, at 25.

<sup>45</sup> Published by the Council of Europe, 1997, see para 17.

specified are custody, residence, access, questions of parentage, legitimacy (declaration, contestation), adoption, legal guardianship; administration of property of children; care procedures; removal or restriction of parental responsibilities; protection from cruel and degrading treatment and medical treatment.

Whether Article 1(4) is wise can be debated for what it means is that even among Contracting States there may be no uniformity on which areas are covered by the Convention. Furthermore, it allows States to nominate relatively narrow areas. Another difficulty is that the Explanatory Report is loosely worded and could be interpreted as permitting States to nominate their own categories of cases.

The substantive part of the Convention makes important provision for

- children's procedural rights – in particular the right, if considered by internal law as having sufficient understanding, to be informed and express views in proceedings (Article 3) and the right to apply for the appointment of a special representative (Article 4);
- the role of judicial authorities – in particular the duty to consider whether it has sufficient information at its disposal to take a decision in the best interests of the child and, if not, to obtain further information; to ensure that children having sufficient understanding have received all relevant information; to consult the child in appropriate cases; to allow the child to express his or her views and to give due weight to those views (Article 6); to act speedily (Article 7); and to appoint a special representative for the child in cases where holders of parental responsibilities are precluded from representing the child as a result of a conflict of interests between them and the child (Article 9);
- the role of representatives – in particular to provide to a child having sufficient understanding, relevant information and explanations of the possible consequences of compliance with his or her views and to determine those views and present them to court (Article 10).

In addition, Article 13 encourages States to make provision for mediation and other processes to resolve disputes so as to avoid proceedings being taken before a judicial authority.

One further innovation of the Convention is the creation of a Standing Committee to keep the Convention under review and to make any recommendations or propose amendments (Article 16).<sup>46</sup>

It was anticipated that the 1996 Convention would attract widespread ratification<sup>47</sup> but the response has (so far) been more muted (see above). One suspects that one of the reasons that States have not ratified the Convention is the reluctance to commit themselves to the costs of compliance even in three nominated areas of family cases. Ironically, a lot of the criticism of the Convention is that it does not go far enough; in particular it is complained that it "back-pedals" on the aims of Article 12 of the UN Convention by only applying children *considered by internal law* as

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<sup>46</sup> According to Article 18, the Standing Committee should have been invited to meet within three years of the Convention coming into force. In fact it did not meet until June 2006 (see Standing Committee on the European Convention on the Exercise of Children's Rights (T-ED), T-ED 3 (2006) E, nearly six years after the Convention came into force. See further below.

<sup>47</sup> See Killerby, *op cit* n 26, at 25.

having sufficient understanding which according to one commentator<sup>48</sup> “enables a state to adopt an arbitrary and extremely high qualifying age before children can be deemed of “sufficient understanding”, irrespective of the actual competence of children below it”. Others<sup>49</sup> complain that it is “weak” and “toothless” especially when compared with the European Convention on Human Rights.

Notwithstanding these criticisms the Convention does serve a useful purpose. The Committee of Experts on Family Law were obviously right to identify that a weakness of the UN Convention is that children may not be able to exercise their substantive rights and appropriate procedural measures to back them up. The 1996 Convention goes some way to address that weakness albeit in a limited way. The criticism that the Convention does not go far enough is not entirely well made since (a) it is *not* in derogation of the UN Convention so that Article 12 of that Convention still imposes a wider international obligation on State parties to that Convention<sup>50</sup> and (b) the assertion that States could fix an *arbitrarily* high qualifying age of competence, overlooks the impact of the European Convention on Human Rights and the potential scrutiny of the European Court at Strasbourg. That court is unlikely to accept that arbitrary assessments of competence will satisfy the requirements of a fair trial under Article 6 or justify interference with family life under Article 8.

The lack of “teeth” for enforcing the Convention is a more telling criticism, though whether the creation of a more effective monitoring system would encourage more ratifications is perhaps debatable. Certainly, the Standing Committee does not operate as a scrutiny committee to ensure individual State compliance. Perhaps consideration could be given to “beefing up” the Standing Committee’s role in this regard.

For all its imperfections, the 1996 Convention is worth pursuing. It is the only international instrument that attempts to spell out the obligations under the UN Convention on the Rights of the Child. It deals with a key area of importance and one which is likely to become more rather than less important as legal systems are increasingly moving away from treating children as passive victims of family breakdown towards regarding them as participants and actors in their family justice system. It is therefore recommended that renewed effort be made to encourage States to ratify the Convention or at least to provide some explanation as to why they are not prepared to do so.

(e) *The 2003 European Convention on Contact Concerning Children*

The European Convention on Contact Concerning Children was finally opened for signature on 3 May 2003<sup>51</sup> and has now been ratified by 3 States and signed by 14 others. One stumbling block for ratifications is the competence of individual member states of the European Union to be able to do so (discussed above).

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<sup>48</sup> J Fortin *Children’s Rights and the Developing Law* (2<sup>nd</sup> edn) 201. See also, for a comprehensive critique, C. Sawyer “One step forward, two steps back – the European Convention on the Exercise of Children’s Rights” [1999] 11 CFLQ 151.

<sup>49</sup> M Freeman *The Moral Status of Children* 39.

<sup>50</sup> Which can therefore be subject to adverse comments by the UN Committee on the Rights of the Child which scrutinises the UN Convention.

<sup>51</sup> It had been planned to open the Convention for signature during the 6<sup>th</sup> European Conference on Family Law in October 2002 but this was delayed to resolve a dispute over EU Member States’ competence to sign and ratify it.

The Convention has its origins in a recommendation of the Third European Conference on Family Law, "Family Law in the future"<sup>52</sup> which noted "that with the continuing internationalisation of family relationships within a unified Europe, the question of transfrontier access was becoming more and more topical".<sup>53</sup> Work began in 1996 when the CJ-FA set up a Working Party on custody and access.

(i) *The scope and scheme of the Convention*

Article 1 sets out three objects of the Convention, namely:

- '(a) to determine general principles to be applied to contact orders;
- (b) to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact;
- (c) to establish co-operation between central authorities, judicial authorities and other bodies in order to promote and improve contact between children and their parents, and other persons having family ties with children'.

Although the second object is primarily and the third object is exclusively concerned with trans-frontier contact, the first object is concerned to establish general principles which domestic courts should observe when dealing with contact issues. The thinking behind this is explained in the Preamble, namely that the 'machinery set up to give effect to foreign orders relating to contact concerning children is more likely to provide satisfactory results where the principles on which these foreign orders are based are similar to the principles in the State giving effect to such foreign orders'.

The Convention's reference to 'contact' rather than 'access' is a deliberate change of terminology and is intended to be 'more in line with the modern concerns such as a parental responsibility or parental responsibilities'.<sup>54</sup>

Contact itself is widely defined by Article 2 to include staying contact for a limited time, other forms of communication and the provision of information both to and about the child.<sup>55</sup> A 'contact order' is defined as a decision of a judicial authority (which means both a court and an administrative authority having equivalent powers) in respect of any level of contact. An order also includes 'an agreement concerning contact which has been confirmed by a competent judicial authority or which has been formally drawn up or registered as an authentic instrument and is enforceable'. The Explanatory Report explains that 'The inclusion of both court-approved agreements and authentic instruments ... is due to the fact that in very many cases, contact with a child results from private agreements rather than a judicial decision'. However, these must be distinguished from purely private agreements which are outside the scope of the Convention.

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<sup>52</sup> Cadiz, Spain, April 1995.

<sup>53</sup> See the Explanatory Report to the Convention at para 1.

<sup>54</sup> Explanatory Report, para 6.

<sup>55</sup> I.e. children under the age of 18 'in respect of which a contact order may be made or enforced in a State Party' (Article 2(c)). This latter qualification preserves, as does the revised Brussels II Regulation, the application of those internal laws where a child under the age of 18 can obtain full capacity (for example, upon marriage) or whose orders cannot be made or enforced where the child is 16 or over as, for example, in Scotland.

### *Recognition and enforcement of trans-frontier contact orders*

Although the Convention neither establishes rules of jurisdiction nor deals directly with issues of recognition and enforcement, provision was nevertheless thought to be needed to underline 'the obligation of States Parties to establish, where applicable, in accordance with relevant international instruments, means to facilitate the exercise of contact and custody rights in the case of transfrontier contact order'.<sup>56</sup> Article 14 accordingly states that States Parties must provide

- '(a) a system for recognition and operation of law and, where appropriate, enforcement of orders made in other Contracting States concerning contact and rights of custody; and
- (b) a procedure for the advance recognition and enforcement of contact orders made in other States'.

Advance recognition and enforcement is both important and innovative. As the Explanatory Report says,<sup>57</sup> such a provision 'is the most important guarantee to be taken in order to facilitate the normal exercise of the right of transfrontier contact'. Its main advantage is that 'the prompt return of the child after a period of contact would be facilitated in case of any removal or retention of the child and therefore the parent not having custody of the child would be less likely to try to retain the child after a period of contact'.

Under Article 15 the judicial authority of the State Party in which a transfrontier contact order in another State party is to be implemented may, when recognising or declaring enforceable such a contact order, or at any later time:

'fix or adapt the conditions for its implementation, as well as any safeguards or guarantees attaching to it, if necessary for facilitating the exercise of this contact, provided that the essential elements of the order are respected and taking into account, in particular, a change of circumstances and the arrangements made by the persons concerned. In no circumstances may the foreign decision be reviewed as to its substance'.

Article 15 is modelled on Article 11(2) of the 1980 European Custody Convention, which provision replaces.<sup>58</sup> It is intended that the new wording will remove the current problems of interpreting the existing provision.<sup>59</sup>

Article 16 deals with the crucial issue of the child's return at the end of a period of transfrontier contact. It provides:

- '1. Where a child at the end of a period of transfrontier contact based on a contact order is not returned, the competent authorities shall, upon request, ensure the child's immediate return, where applicable, by applying the relevant provisions of

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<sup>56</sup> Explanatory Report, para 108.

<sup>57</sup> At para 111.

<sup>58</sup> See Art 19, under which Art 11(2) and (3) of the 1980 Convention will also cease to apply.

<sup>59</sup> See the Explanatory Report, at para 117. These 'problems', however, are not articulated in the Report, but includes the issue of whether the *place* of contact is regarded as "an essential element" of the order.

international instruments of internal law and by implementing, where appropriate, such safeguards and guarantees as may be provided in the contact order.

2. A decision on the return of the child shall be made, whenever possible, within six weeks of the date of an application for the return’.

As the Explanatory Report says,<sup>60</sup> although the Convention does not itself deal with recognition and enforcement of contact orders, Article 16 is an important additional guarantee for the proper exercise of transfrontier contact.

Article 11 obliges each State Party to establish a Central Authority to discharge the functions provided for by the Convention in cases of transfrontier contact. Mirroring the 1980 European Custody Convention, Article 12 enjoins Central Authorities to ‘co-operate with each other and promote co-operation between the competent authorities, including judicial authorities’ and to act with all ‘necessary dispatch’. Underlining the importance of international co-operation, Article 13 enjoins judicial authorities and ‘social and other bodies’ to co-operate in relation to proceedings regarding transfrontier contact. Central authorities are particularly required to assist judicial authorities in communicating with each other and obtaining such information and assistance as may be necessary for them to achieve the Convention’s objectives; and assist children, parents and others having family ties with the child to institute proceedings regarding transfrontier contact.

(ii) *Commentary*

The Contact Convention has a positive contribution to make towards tackling the thorny problem of access or contact. It is helpful to have agreed general principles upon which orders are made in the first place and it is advantageous to have a Convention which reflects modern thinking about the issue, not least by referring to ‘contact’ rather than ‘access’ and defining it appropriately.

So far as transfrontier contact is concerned there are some potentially important provisions. Of these perhaps the most interesting is that of advance recognition which seems a good idea. The provision for the return of the child at the end of the contact period could also be a useful supplement to the other instruments particularly the enjoiner to reach a decision within six weeks. The powers to modify an access order under Article 15 might well be an improvement on the existing Article 11 of the 1980 European Custody Convention, though in view of the revised Brussels II Regulation, the opportunity to apply it is severely limited. The provisions concerning co-operation are generally well thought out though perhaps the opportunity was missed to promote and facilitate amicable settlements.

Although the Contact Convention satisfies the twin tests of modernity and utility, its major difficulty is its inter-relationship with other international instruments dealing with access. Nevertheless the Convention manages to tread a fine line between not stepping on the toes of other Conventions on questions of jurisdiction, recognition and enforcement, while (assuming that it is possible to mix and match Conventions) making some positive contribution to dealing with the problem. Concerted efforts should be made to encourage further ratifications and accessions.

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<sup>60</sup> At para 118.

*(f) Other instruments*

Time and space does not permit a detailed analysis of all the Council's Recommendations in the field of family law. Some, like Resolution (72) 29 on the lowering of the age of full legal capacity and possibly Resolution 78 (37) on Equality of Spouses in Law, have probably fulfilled their purpose but do not require further action. Others, such as Resolution (77) 12 on the nationality of spouses of different nationalities and Resolution 77 (13) on the nationality of children born in wedlock have to some extent been overtaken by the 1997 European Convention on Nationality. This raises the issue, previously adverted to, as to whether Recommendations can be withdrawn. But a number of others remain of some importance. For example, Recommendation No R (98) 1 on Family Mediation and Recommendation No R (98) 8 on Children's Participation in Family and Social Life remain of considerable contemporary importance and relevance. They compliment the 1996 European Convention on the Exercise of Children's Rights and their application could profitably be reviewed together with that Convention (although note should be taken of the EU's proposals and the possible interest of the Hague Conference concerning mediation). Another pair of Recommendations, namely, Recommendation No R (79) 37 Concerning the Protection of Children Against Ill-treatment and Recommendation No R (85) on Violence in the Family are also of considerable contemporary importance and concern and could profitably be revisited to determine the level of compliance and whether they could or should be converted into a Convention.

Another group of Recommendations that are worth reviewing are those dealing with public law issues concerning children, namely, Recommendation No R (87) 6 on foster families, Recommendation No R (91) 9 on emergency measures in family law and (possibly) Recommendation No R (87) 20 on social reactions to juvenile delinquency. Issues of public law fall outside the field of competence of the European Union and not being primarily issues of private international law, will not be dealt with by the Hague Conference. At the same time the issues are of contemporary relevance and have been the subject of a number of European Court of Human Rights decisions (discussed further below).<sup>61</sup> It may be, therefore, that this is another area which the Council could consider for future action.

**IV How Instruments Should Be Monitored**<sup>62</sup>

It is, of course, one thing to draw up an international instrument but quite another to determine the extent to which it is complied with. Because of the obvious need to know whether and how a particular instrument is working, monitoring the application of instruments is an extremely important issue. This has been recognised by the Council and indeed at its October 2005 meeting, the Bureau of the CDCJ instructed the Secretariat to prepare concrete proposals on monitoring, with the CJ-FA being in charge of this initial activity in the field of family law. Further, in the light of this instruction, the CJ-FA has been invited to establish a monitoring mechanism.<sup>63</sup> As a result of this instruction/invitation, the issue of monitoring is a crucial part of the remit of this review.

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<sup>61</sup> See e.g. *KA v Finland* [2003] 1 FLR 696, *Venema v Netherlands* [2003] 1 FLR 552, *P, C and S v United Kingdom* [2002] 2 FLR 631 *TP and KM v United Kingdom* (Application Number 28945/95) [2001] 2 FLR 549, *K and T v Finland* [2001] 2 FLR 707 and *Scott v United Kingdom* [2000] 1 FLR 958.

<sup>62</sup> I would like to acknowledge the help of Maaïke Voorhoeve (a Doctoral Student at the University of Amsterdam) for the preparation of this section.

<sup>63</sup> See the Bureau of the European Committee on Legal Co-Operation "monitoring the implementation of instruments falling within the field of competence of the CDCJ". CDCJ-BU (2006) 2.

To tackle this issue consideration will first be given to reviewing the existing mechanisms for monitoring in the various family law instruments drawn up by the Council. Regard will also be had to monitoring mechanisms used in other family law instruments drawn up by the Hague Conference and the European Union. In the light of this review suggestions will be made on how to proceed.

One further preliminary point needs to be made, namely, as to what is meant by a “monitoring” provision. There are, of course, direct reviewing mechanisms such as a formally stated obligation to review the instrument, the imposition of an obligation upon Contracting States to explain the way in which the instrument is complied with, or the creation of a Standing Committee to oversee the operation of the instrument. But in addition there are what may be termed as “soft monitoring devices” such as States having to notify the General Assembly of the measures taken to implement a particular instrument or to communicate contact details of the authority(ies) required to be set up to the Secretary-General (such appointments are in themselves an indication that the State is implementing the standards of the instrument in question). Examples of all these methods can be found in the family law instruments.

(a) *Existing mechanisms for monitoring the Council's family law instruments*

(i) *General monitoring mechanisms*

Before examining monitoring mechanisms specifically provided for in individual instruments it is worth pointing out that there are some more general means of reviewing Council standards. A key body, of course, is the European Court of Human Rights, which will adjudicate alleged breaches of the European Convention, in particular, in the family law context, Article 8 (right to respect for family life) and Article 12 (right to marry). Many of the Council's instruments in the field of family law build on these individual rights set out in the Human Rights Convention. However, since complaints are lodged against a particular State, rulings are necessarily State specific and while Court judgments may have wide implications for other States, recourse to the Strasbourg court cannot be regarded as a satisfactory general mechanism of review.

It is also worth mentioning in this context, the Commissioner of Human Rights, whose role with regard to monitoring the implementation of Council of Europe standards, is complementary to that of the Court. The Commissioner has several functions, among which is: “providing advice and assistance: (i) to member States:”, when he/she identifies possible shortcomings in the law and practice of member states, and to promote “the effective implementation of [human rights] standards by member States and assists them, with their agreement, in their efforts to remedy such shortcomings” (Article 3e). The Commissioner exercises his or her functions independently and impartially while respecting the competence of the supervisory bodies set up under the human rights instruments of the Council of Europe. However, the Commissioner does not take up individual complaints and cannot, therefore, accept any requests to present individual complaints before national or international courts, nor before national administrations...” Furthermore, like the Court, the Commissioner is only competent regarding the European Convention on Human Rights. In short, unless the mandate is changed, the Commissioner cannot be regarded as a general monitoring agent.

In contrast to the Court and the Commissioner, the Committee of Ministers does play an important role in the *general* monitoring of the implementation of instruments. According to Article 15 of the Statute of the Council of Europe, the Committee of Ministers is competent to monitor the

implementation of recommendations: 'In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations.'<sup>64</sup>

The Parliamentary Assembly has appointed a Monitoring Committee which is responsible for verifying the fulfilment of obligations assumed by member states under the terms of the Organisation's Statute, the Convention on Human Rights and all other Council of Europe Conventions, as well as the honouring of commitments entered into by the authorities of member states upon accession to the Council of Europe.

Under Article 52 of the Convention, the Secretary-General has the right to request from any State Party an explanation of the manner in which its internal law ensures the effective implementation of the provisions of the Convention. In ratifying the Convention, the States Parties accept the obligation to supply the requested explanations.

Finally, it should be mentioned that the Committee of Ministers has mandated the CDCJ to monitor the instruments in its field of competence. According to Article 4. B. iii. of the Terms of Reference of the CDCJ, one of its functions is to: "... monitor the functioning and implementation of the international instruments coming within its field of competence ...". Furthermore, according to Article 4. D "The CDCJ shall assist States: i. to carry out appropriate reforms: a. with regard to their domestic laws: b. to implement international instruments..." The CDCJ shall also, according to Article 4. D ii: "... obtain information by means of: a. publications ...; b. conferences ...".

The legal basis for the competence of the Committee to monitor Conventions is based on international treaty practice. Because there is a need for follow-up of instruments, the body adopting a convention has the function of monitoring its implementation by the Contracting Parties.

(ii) *Specific monitoring mechanisms provided for in the family law instruments*

Most of the instruments, including Conventions, under review have no direct monitoring mechanisms. A number, however, impose obligations upon States to notify the Secretary-General of the measures taken to comply with the requirements imposed by the instrument.<sup>65</sup> This is true of the 1967 Convention on the Adoption of Children (Articles 1 and 2) and its proposed replacement (Article 1 of the draft Convention)<sup>66</sup> and the 1975 Convention on the Legal Status of Children Born Out of Wedlock (Article 1). A similar obligation is included in some of the older Resolutions (see, for example, Res (72) 1 on the standardisation of the legal concepts of "domicile" and "residence"; Res (72) 29 on the lowering of the age of full legal capacity and Res (78) 37 on the

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<sup>64</sup> Furthermore by rule 9, part 2 of the rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies), the Committee of Ministers monitors the implementation of the case law of the European Court of Human Rights. In this connection 'The Committee of Ministers shall be entitled to consider any communication from non-governmental organisations, as well as national institutions for the promotion and protection of human rights, with regard to the execution of judgments under Article 46, paragraph 2, of the Convention.'

<sup>65</sup> On a strict interpretation of this type of provision, no obligation of notification arises if, prior to ratification, a State's laws already comply with the instrument in question, see further below.

<sup>66</sup> The draft Convention also requires State Parties to notify the Secretary-General of the names and addresses of the competent authority to which enquiries can be made pursuant to Article 14 (Article 28).

equality of spouses in civil law). Recommendation No R (79) 37 Concerning the Protection of Children Against Ill-Treatment goes a further inviting “governments of member states to inform the Secretary-General of the Council of Europe *every five years* of the steps they have taken to implement the present recommendation. Another variation is Article 2 of the 1967 Adoption Convention which obliges Contracting Parties to notify the Secretary-General both of measures taken to comply with Part III (which provides “supplementary provision” to the Convention) and “having given effect, it *ceases* to give effect to any of these provisions” (emphasis added).

In none of the above instruments is it provided what the Secretary-General should do with the notifications – there is, for example, no obligation to publish them. Nor is there any sanction for failure to notify the Secretary-General.

The 2003 Convention on Contact Concerning Children has no direct monitoring mechanism but there is an obligation (Article 11) to notify the Secretary-General of any appointment of a Central Authority. There is also provision (Article 21) for a Party to propose amendments. Such proposals must be communicated to the CDCJ and that body must express its opinion on the proposal to the Committee of Ministers. This process could operate as one of review.

None of the post 1970s Recommendations, including in particular those on parental responsibilities, violence in the family and family mediation, have any direct or “soft” monitoring provisions at all.

Of all the family law instruments only two have what may be fairly described as direct monitoring mechanisms. The first of these is the 1980 Convention on Recognition and Enforcement of Decisions Concerning Custody, Article 28 of which directs the Secretary-General to invite representatives of the Central Authorities<sup>67</sup> appointed by the Contracting State “to meet in order to study and to facilitate the functioning of the Convention”.

According to Article 28 the first meeting had to be called at the end of the third year following the Convention’s entry into force and thereafter at the Secretary-General’s discretion.<sup>68</sup>

More extensive provision for monitoring is made in the 1996 Convention on the Exercise of Children’s Rights inasmuch as Article 16 provides for the creation of a Standing Committee whose express function is to “keep under review” problems relating to the Convention. It is empowered to consider any questions concerning the interpretation and implementation of the Convention and can make recommendations thereon (subject to there being a three quarters majority). It can also propose amendments to the Convention and provide advice and assistance to national bodies set up to promote the exercise of children’s rights. Mirroring the obligation under the 1980 Convention, Article 20 directs the Secretary-General to invite the Standing Committee to meet at the end of the third year following the Convention’s entry into force and thereafter at the Secretary-General’s discretion. In fact because of “budgetary restraints and staff limitations” the first meeting was not held until June 2006 nearly six years after the Convention first came into force.<sup>69</sup>

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<sup>67</sup> Article 2(3) obliges Contracting States to notify the Secretary-General of the appointment of a central authority.

<sup>68</sup> There have been 10 such meetings in all. The last one was held in June 2006.

<sup>69</sup> Standing Committee on the European Convention on the Exercise of Children’s Rights T-ED 3 (2006) E.

(iii) *Monitoring provisions and practice in comparable Hague and EU instruments*

How do the monitoring provisions in the Council instruments compare with those in family law instruments drawn up by the Hague Conference and the European Union?

Surprisingly, there are no monitoring provisions in the 1980 Hague Abduction Convention but in practice the Permanent Bureau organises periodic Special Commissions, held roughly every four years, to review the operation of the Convention. To date there have been five such meetings. This practice has been expressly incorporated into both the 1993 Hague Intercountry Adoption Convention (see Article 42) and the 1996 Hague Protection of Children Convention (see Article 56) which instructs the Secretary-General of the Hague Conference on Private International Law to invoke at “regular intervals” a Special Commission “in order to review the practical operation of the Convention”.

A not dissimilar technique is employed in the revised Brussels II Regulation, Article 65 of which, makes specific provision for a review (in the form of a presentation of report presented by the Commission inter alia to the European Parliament and to the Council based on information supplied by member states) to be conducted “no later than 1 January 2012, and every five years thereafter”.

(b) *Commentary and recommendations*

What this review clearly demonstrates is that the Council’s family law instruments differ widely in their provisions, if any, on monitoring. In other words there is no discernible policy on review and monitoring in the instruments themselves. Given the obvious importance of knowing how the instruments are operating, it is suggested that *all* future instruments concluded by the Council, be they Recommendations or (especially) Conventions, should make *express* provision for monitoring (indeed this issue should be considered as a matter of routine by any Working Party or Committee responsible for the drafting of an instrument). It is tempting to suggest that there should be a single standard monitoring device but this may not be appropriate given the variety of instruments produced by the Council. However, for Conventions there must be a case for making provision for regular review. This could be done via the creation of a Standing Committee as in the Council’s 1996 Convention on the Exercise of Children’s Rights or simply mandating the Secretary-General of the Council to hold a meeting with appropriate representatives, as in the Council’s 1980 Custody Convention and in the Hague Conventions. These “meetings” could take different forms, for example, intergovernmental meetings such as that of the CDCJ, or more general conferences. The advantage of the latter is that it is more “open” but against that has to be balanced the question of costs.

As to the frequency of meetings it seems sensible to hold one relatively soon after the coming into force of the Convention and the Council’s choice of requiring a meeting at the end of the third year in both the 1980 and 1996 Convention is certainly defensible. However, as the experience of the 1996 Convention shows, resources might not always permit strict compliance with this type of obligation. It seems preferable, therefore, to use the “Hague formula”, i.e. simply to direct the Secretary-General to hold meetings “at regular intervals”. This formula also of course deals with subsequent meetings – it seems preferable to the Brussels II specific requirement to hold subsequent meetings every five years since that is too rigid and is also, it is submitted, better than simply leaving it to the Secretary-General’s discretion. *One result of this suggestion is that the draft*

*Adoption Convention will need amending to provide for a review and any future instrument on parentage will also need an express monitoring mechanism.*

Although a formal review mechanism might not be appropriate for all Recommendations, there are some existing ones, for example, Recommendation No R (98) 1 on family mediation and Recommendation No R (99) 4 on children's participation in family and social life where it would seem apt (in this regard the operation of those Recommendations could be reviewed together with the 1996 Convention on the Exercise of Children's Rights – see further below). For other Recommendations, classically those which have a narrow focus such as R (95) 6 and R (99) 4 which *inter alia* urge State to ratify the Council's 1980 Custody and the Hague's 1980 Abduction Convention or Resolution 72 (29) which recommended the lowering the age of majority to 18, it might be sufficient just to require States to notify the Secretary-General of measures taken. However, this requirement of notification should (a) clearly include the obligation to explain how the law already complies if no fresh steps have been taken<sup>70</sup> and (b) obligate the Secretary-General to publish those responses and to conduct subsequent follow-up surveys.

While the foregoing suggestions deal with future instruments there remains the question of what to do with existing ones. So far as family law *conventions* are concerned, this is not such a large issue. The 1967 Adoption Convention is in the process of being revised and work is also being done to modernise the 1975 Custody Convention on the Legal Studies of Children Born Out of Wedlock. The 1980 Custody Convention, which in any event has a direct monitoring provision, has become, as has been argued, largely redundant. The 1996 Convention on the Exercise of Children's Rights has a direct monitoring provision and the Steering Committee has recently met. That leaves the 2003 Convention on Contact Concerning Children. That should be reviewed at some point relatively soon (i.e. in late 2008 or 2009) given that it has been in operation since 1 September, 2005. However, given the absence of any internal provision for review it is suggested that the Secretary-General takes it upon his own initiative to hold a review at some future point (either on its own or together with other instruments).

As for Recommendations it would be useful to know (a) what level of compliance there is among member states and (b) what Recommendations member states consider to be of continuing importance. It is suggested that a questionnaire be drawn up along these lines and the responses published and circulated for discussion at least by the CD-CJ. Depending upon the response it might be worth holding a European Conference on Family Law specially devoted to reviewing all the family law work done by the Council and which might also be used to determine the future direction.

It would be wrong, when considering monitoring issues, to ignore the issue of costs and resources. Full-scale reviews are time consuming and expensive. They not only demand the expenditure of resources of the Council but also of the member states. Obviously such costs have to be weighed in the balance with other priorities (though they can be reduced if meetings are organised to review more than one instrument).<sup>71</sup> Nevertheless since there seems little point in drafting Instruments that are ineffective, it does seem vitally important to know how they are operating. This seems a timely moment to take stock.

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<sup>70</sup> See also below, for a discussion of monitoring *before* ratification.

<sup>71</sup> The Permanent Bureau at the Hague, for example, included reviewing the 1996 Protection of Children Convention together with the 1980 Abduction Convention.

One final issue associated with monitoring might be mentioned here, namely “monitoring” *before* ratification.

The issue of monitoring deals with the implementation after ratification. However, the situation before ratification can also play an important role. The more the national law is made in compliance with the instrument before ratification, the less depends on monitoring when making national law answer to the standards of the Council of Europe. Guidance for individual States can be organised within the framework of the Council of Europe assistance and co-operation programmes.

Even though it is assumed to be a general obligation for States to make national law in compliance with an instrument *before* ratification<sup>72</sup>, this is rarely explicitly asked for<sup>73</sup> and is therefore not always the case. The Treaty Office does not check this. Many instruments provide for the possibility to use reservations, in order to make national law gradually in compliance with the instrument. Some instruments require a periodical revision of the reservation. This could be used as an opportunity for monitoring: requiring a motivation of the reservation at accession and of the renewal of the reservation.

The United Nations makes use of ‘accession packages’, in order to facilitate a State to make its national law in compliance with the instruments. The Council could provide for such a tool, accompanied by a small conference or at least the appointment of an expert that can help. Another option would be that the Treaty Office gets more competence in this field, e.g. examining if national law is in compliance with the instrument.

## V *An Evaluation of Relevant Case-Law of the European Court of Human Rights*<sup>74</sup>

Even since 2000 there has been a plethora of European Court of Human Rights decisions in the field of family law and the following survey is of necessity selective.

Reference has already been made to some case-law both in connection with paternity issues and with public law issues concerning children. Here the case-law is discussed in a little more detail.

### (a) *Paternity issues*

A number of recent decisions have been concerned with restrictions or even prohibitions on bringing proceedings to establish or to deny paternity. In *Rozanski v Poland*<sup>75</sup> it was held that the inability of the applicant (who was not married to the mother) to commence either of the procedures (viz appointing a guardian, or requesting the district prosecutor to do so) open to him

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<sup>72</sup> Art. 18 Vienna Convention:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or  
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

<sup>73</sup> Council of Europe: only in connection with the Convention on Data Protection.

<sup>74</sup> I wish to acknowledge the research assistance of Katarina Horosova, Research Assistant at Cardiff University Law School's Centre for International Family Law Studies.

<sup>75</sup> Application No 55339/00, [2006] 2 FCR 178.

to establish his paternity violated his Article 8 rights. Conversely, in both *Shofman v Russia*<sup>76</sup> and *Mizzi v Malta*<sup>77</sup> the inability of the husbands in each case to challenge the presumption of paternity notwithstanding the evidence of DNA tests violated, inter alia, their Article 8 rights. Restrictions have to be proportionate to the legitimate aims being pursued, i.e. some restrictions (for example, time limits) might be justifiable but they must not be arbitrary or discriminatory, or pointless. An illustration of this latter point is *Znamenskaya v Russia*<sup>78</sup> in which a mother wished to challenge the registration of her former husband as the father of her stillborn child but was thwarted because the domestic courts held that the relevant legislation only applied to living children and in any event the dead child had acquired no civil rights. Here it was held that the prevailing of a legal presumption over biological and social reality without regard to both established facts and the wishes of those concerned and which benefited no-one was a clear violation of Article 8. Finally, regard might also be had to *Mikulic v Croatia*<sup>79</sup> in which a domestic court's inefficiency to determine paternity violated the child's (who had been born out of wedlock) Article 8 rights to have the uncertainty as to her personal identity resolved without unnecessary delay.

This case-law has relevance to the current work being done on parentage.<sup>80</sup>

**(b) Public law issues concerning children**

Perhaps not surprisingly, given the seriousness of the issue, there have been numerous cases concerning the State's removal or failure to remove children into care. They have also concerned a number of different Convention rights.

A cluster of decisions, all against the United Kingdom, have concerned alleged breaches of Article 3 (in these cases, the right not to be subjected to inhuman or degrading punishment). Thus in *E v United Kingdom*<sup>81</sup> the local authority's failure to protect children from abuse by their stepfather (who had been convicted of offences of indecency and who, as the local authority knew, still lived at home contrary to a probation order condition) violated Article 3. Similarly, in *Z v United Kingdom*<sup>82</sup> Article 3 was also found to be violated because of the local authority's failure to take adequate protective measures in respect of the severe neglect and abuse which the four applicant children were known to be suffering at the hands of their parents.

Article 5 (the right to liberty etc) was unsuccessfully invoked in *Koniarska v United Kingdom*<sup>83</sup> by an applicant detained under a secure accommodation order since its purpose was educational supervision as interpreted for Convention purposes.

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<sup>76</sup> Application No 74826/01, [2006] 1 FLR 680.

<sup>77</sup> Application No 26111/01, [2006] 1 FLR 1048. See also *Paulik v Slovakia* (Application No 10699/05), [2006] 3 FCR 323 and *Tavli v Turkey* (Application No 11449/00).

<sup>78</sup> Application No 77785/01, [2005] 2 FCR 406.

<sup>79</sup> [2002] 1 FCR 720. Note also *Karcheva v Bulgaria* (Application No 60939/00), [2006] 3 FCR 434 in which unduly long proceedings to resolve paternity was held to be in breach of Article 6.

<sup>80</sup> As does *Odièvre v France* [2003] 1 FCR 621 in which the inability of a child seeking information about her birth mother who had given birth anonymously was held (surprisingly) not to violate her Article 8 rights.

<sup>81</sup> [2003] 1 FLR 348. Cf *DP and JC v United Kingdom* [2003] 1 FLR 50 in which because the local authority did not know about the case there had been no violation of Article 3 (nor Article 8) though on the facts the lack of an effective remedy violated Article 13.

<sup>82</sup> Application No 29392/95, [2001] 2 FLR 612.

<sup>83</sup> Application No 33670/96 (12 October, 2000).

Most cases, however, invoke allegations of violations of Article 8 (right to respect for family life) and/or Article 6 (right to a fair trial). They involve a variety of issues. For example, some involve the question of removal of children at birth. Thus in *K and T v Finland*,<sup>84</sup> Article 8 was found to be violated on the basis that while compelling reasons were needed to justify a removal at birth against the mother's will, no such reasons were found in this case. A similar decision was reached in *P, C and S v United Kingdom*<sup>85</sup> it being held that (notwithstanding that the mother had previously lost custody of an older child and had been found guilty of deliberately causing injury to the child) the removal of her second child at birth violated Article 8 because such a removal was unnecessary as there was no suspicion of life threatening conduct from the mother immediately after the child's birth.

Other cases emphasise the temporary nature of care and the consequent positive duty to take measures to facilitate family reunification as soon as is reasonably feasible. See in this respect *R v Finland*<sup>86</sup> and *KA v Finland*.<sup>87</sup> Another aspect of initial removal and subsequent retention of a child is the need for procedural fairness. Hence, the lack of an ability to participate in decision making can amount to a breach of Article 6. See in this respect *Venema v Netherlands*,<sup>88</sup> *P, C and S v United Kingdom*<sup>89</sup> and *L v Finland*.<sup>90</sup> Note might also be taken of *TP and KM v United Kingdom*,<sup>91</sup> in which the local authority's failure to disclose vital evidence (a video of the child's disclosure interview) which deprived the mother an effective opportunity to deal with allegations that the child could not be safely returned to her, was held to violate Article 8.

Cases raising other issues include *MG v United Kingdom*,<sup>92</sup> in which the failure to provide the applicant (who had spent periods in voluntary care) with a full copy of his social services records violated Article 8 and *L v United Kingdom*<sup>93</sup> where it was held not to be in breach of Article 8 to disclose to the police an expert's report prepared for care proceedings and available to all parties to those proceedings.

It is submitted that, as this brief résumé shows, there is sufficient material, particularly in view of the existing Recommendations on emergency measure (R (91) 9), social reactions to juvenile delinquency (R (87) 20) and on foster families (R (87) 6) to justify identifying public law issues concerning children as being a potential area for further work by the Council.

**(c) Private law disputes concerning children<sup>94</sup>**

Not surprisingly a number of petitions determined by the Court involve private law disputes particularly concerning access disputes. One repeated type of breach of Article 8 is a State's failure

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<sup>84</sup> [2001] 2 FLR 707. Note also the breach of Article 8 by reason of the failure to take proper steps to reunite the family.

<sup>85</sup> [2002] 2 FLR 631. Compare also *Haase v Germany* (Application No 11057/2) [2004] 2 FLR 39 in which a court decision (made in the parents' absence) to remove parental rights and to deny access, was, given the absence of urgency, held to be unjustifiable interference with family life, contrary to Article 8.

<sup>86</sup> Application No 34141/96, [2006] 2 FCR 264.

<sup>87</sup> [2003] 1 FLR 696.

<sup>88</sup> [2003] 1 FLR 552. See also *Moser and another v Austria* (Application No 12643/02), [2006] 3 FCR.

<sup>89</sup> Above. But compare *Gnahore v France* (2002) 34 EHRR 38 and *Scott v United Kingdom* [2000] 1 FLR 958.

<sup>90</sup> [2000] 2 FLR 118.

<sup>91</sup> Application No 28945/95, [2001] 2 FLR 549.

<sup>92</sup> [2002] 3 FCR 289.

<sup>93</sup> [2000] 2 FLR 332.

<sup>94</sup> The following discussion omits references to cases whose deportation etc is alleged to violate Article 8 on the basis of interfering with family life.

either to enforce or speedily to enforce a contact order. See in this respect *Zawadka v Poland*,<sup>95</sup> *Kosmopoulou v Greece*<sup>96</sup> and *Hansen v Turkey*.<sup>97</sup> A number of other cases have concerned the lack of enforcement measures to effect a return following child abduction.<sup>98</sup> However, although these are important rulings, their overall significance for this review is perhaps limited. Perhaps of more relevance are cases which involve the issue of hearing the child's voice, which is central to the aim of the 1996 Convention on the Exercise of Children's Rights. In this respect note might be taken of *C v Finland*<sup>99</sup> in which it was held *too much* reliance had been placed on the children's views, effectively giving them a right of veto. Another important decision is *Sahin v Germany, Sommerfeld v Germany*<sup>100</sup> in which it was held, contrary to the earlier Chamber decision, to be going too far to say that domestic courts should always hear evidence from a child in court. In *Sahin* the child was five and the domestic court was held to be entitled to rely on the findings of an expert. However, in contrast the failure to commission any independent report is likely to be contrary to Article 8.<sup>101</sup>

**(d) Miscellaneous cases**

Not all Human Rights cases directly involve children or involve them at all. For example two cases<sup>102</sup> against Germany involved changes in legislation resulting in non payment of child benefit to the applicants. This was held on the facts to be in breach of Article 14 in conjunction with Article 8. Other recent cases have involved successful claims in relation to statelessness,<sup>103</sup> the inability to get married,<sup>104</sup> and the refusal to allow a married woman to use only her maiden name.<sup>105</sup>

However, while these decisions are important in themselves they have little significance in planning at this stage, future work in the field of family law.

**VI What Direction The Council's Future Family Law Programme Might Take**

The obvious immediate priority for the Council is to complete its current work in the field of family law. In the first place this means finalising the draft Convention on the Adoption of Children. Such an instrument should take account both of the comments made in this Review and, of course, any other comments that may have been received. It should also include express monitoring provisions and an express statement that upon ratification the 1967 Convention ceases to have effect. The Explanatory Notes could profitably explain how the new instrument's Articles replace those of the 1967 Convention. In this regard it would be helpful to include a Derivation Table.

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<sup>95</sup> Application No 48542/99, [2006] 1 FLR 371. But compare e.g. *Süss v Germany* (Application No 40324/98), [2006] 1 FLR 522 in which no violation was found because the applicant himself had contributed to the delays; and *Glaser v United Kingdom* [2001] 1 FLR 253 – complexity of proceedings justified delay.

<sup>96</sup> Application No 60457/00, [2004] 1 FLR 800.

<sup>97</sup> Application No 36141/97, [2004] 1 FLR 142. See also *Lebbnik v Netherlands* (2005) 40 EHRR 18 and *Nuutinen v Finland* (2002) 34 EHRR 15.

<sup>98</sup> See in this respect *Karadzic v Croatia* (Application No 35030/04), [2004] 1 FCR 36, *Gil and AUI v Spain* (Application No 56673/00), [2005] 1 FLR 190, *Maire v Portugal* (Application No 48206/00), [2004] 2 FLR 653, *Sylvester v Austria* (Application Nos 36812/97 and 40104/98), [2003] 2 FLR 210 and *Ignaccolo-Zenide v Romania* (2001) 31 EHRR 212.

<sup>99</sup> Application No 18249/02, [2006] 2 FCR 195.

<sup>100</sup> [2003] 2 FLR 671.

<sup>101</sup> See e.g. *Palau-Martinez v France* (Application No 64927/01), [2004] 2 FLR 810 and *Elshoz v Germany* [2000] 2 FLR 486.

<sup>102</sup> See *Okpiz v Germany* (2006) 42 EHRR 32 and *Niedzwieki v Germany* (2006) 42 EHRR 33.

<sup>103</sup> See *Sisojeva v Latvia* (2006) 43 EHRR 33.

<sup>104</sup> *B v United Kingdom* (2006) 42 EHRR 11.

<sup>105</sup> *Ünal Tekeli v Turkey* (2006) 42 EHRR 53.

The second priority is for the Council to complete its work on parentage. In this regard it is recommended that the new instrument should be a Convention (i.e. not a Recommendation). Such a Convention should be based on the White Paper On Principles Concerning the Establishment and Legal Consequences of Parentage but taking into account (a) the comments received during the consultation period, (b) the comments made in this Review, (c) the recent European Court of Human Rights case-law and, ideally, (d) having regard to the about to be completed Principles Regarding Parental Responsibilities drawn up by the Commission on European Family Law. The new instrument should also include express monitoring provisions and should explicitly replace both the 1975 Convention on the Legal Status of Children Born Out of Wedlock *and* Recommendation (84) 4 on Parental Responsibilities. The Explanatory Notes should clearly state how the new provisions equate or relate to both those of the 1975 Convention and 1984 Recommendation and include a Derivation Table.

A third issue, not to be overlooked when considering priorities, is to factor in reviews. Consideration needs to be given as to whether a full-scale European Conference to review all the Council's family law instruments should be organised.

Apart from the above mentioned priorities consideration needs to be given as to what new fields of study might be undertaken by the Council. Existing Recommendations point to two fields, namely, domestic violence and public law issues concerning children. Both fields are of contemporary importance and fall within the norm-setting criteria set out in the Introduction. It may be that in relation to domestic violence the Recommendations already go far enough, though it would be important to know how far member states comply with the Recommendations. This at least argues for a review. With regard to public law issues concerning children, Human Rights case-law (discussed in Section V above) does suggest that there is a need to examine this area and it is therefore suggested that serious consideration be given to investigating this topic.

Looking further ahead there is an arguable case for examining divorce law and the legal position of non marital cohabitants. Again each of these areas are of contemporary importance and fall within the norm-setting criteria set out in the Introduction. The case for examining divorce is that with the increasing mobility of the population (encouraged by freedom of movement within the European Union) there is increasing pressure to harmonise this key law of status. Advantage can be taken of the work done by the CEFL which, after commissioning reports on the position in 22 European jurisdictions, has drawn up a set of Principles on Divorce.<sup>106</sup>

With regard to the position of cohabitants, there is some evidence that this is becoming of increasing concern to many European jurisdictions and again with the increasing mobility of the population, there is an obvious need for some harmonisation of rights and protection.

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<sup>106</sup> See K Boele-Woelki, F Ferrand, C González Beilfuss, M Jänterä-Jareborg, N Lowe, D Martiny and W Pintens *Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses* (2002).

## VII *Summary of Suggestions and Recommendations*

### (a) *General Issues*

- The Council should avoid duplicating work done by the Hague Conference of Private International Law and the European Union. Clashes of international instruments should be avoided at all costs.
- The Council's existing instruments should be judged according to their modernity, utility and their compatibility with the instruments drawn up by other international bodies.
- The Council's future work should be based on norm setting driven in part by the rulings of the European Court of Human Rights.
- The relationship between Recommendations and Conventions needs careful consideration. Query whether there should be a policy on the role of future Recommendations?
- Efforts should be made to widen the reach of the commitment to Conventions. Accessions should be encouraged.
- Future Conventions should be "accession friendly".

### (b) *Existing Instruments*

- The draft Convention on Adoption of Children is generally to be welcomed (though some details of drafting need attending to and there needs to be a specific monitoring provision).
- The 1975 European Convention on the Legal Status of Children Born Out of Wedlock and Recommendation (84) 4 on Parental Responsibilities need to be replaced along the lines of the White Paper on Principles Concerning the Establishment and Legal Consequences of Parentage. This new instrument should take the form of a Convention and be a top priority for the Council's future work.
- The 1980 European "Custody" Convention has largely become redundant and should no longer be promoted.
- The 1996 European Convention on the Exercise of Children's Rights is worth promoting and efforts should be made to secure more ratifications and accessions (in this respect the wider observer participation on the Steering Committee is a welcome development).
- The 2003 European Convention on Contact Concerning Children is worth promoting and efforts should be made to secure more ratifications (the "EU" problem being noted) and accessions. The Secretary General of the Council should call a meeting to review the Convention in due course.
- The Recommendations concerning family violence and the protection of children and on public law concerning children remain of contemporary importance and would be profitably revisited with a review to considering whether they could or should be converted into a Convention.
- The Recommendation on Mediation and on Children's Participation in Family and Social Life are of considerable contemporary importance and should be promoted.

### (c) *Monitoring*

- All future instruments should include express monitoring provisions. The "Hague formula" of directing the Secretary General to hold meetings "at regular intervals" might be an appropriate approach for Conventions and "major" Recommendations.

- For “minor” Recommendations, notification of compliance might be sufficient provided there is an obligation to publish the responses and an opportunity for such responses to be discussed and evaluated.
- Consideration might be given to organising a European Conference on Family Law specifically to review the utility of the existing instruments (particularly Recommendations).

(d) *The Council's Future Family Law Programme*

- Clear priority should be given to completing the current work on adoption and parentage.
- Any new instrument on parentage should be a Convention which should replace the 1975 Convention on the Legal Status of Children Born Out of Wedlock *and* Recommendation (84) 4 on Parental Responsibilities.
- Also to be factored in when assessing priorities is the need for a coherent strategy of review. Query whether a European Conference should be held to review the family law instruments?
- Further fields of study could be Domestic Violence and Public Law Issues Concerning Children. Because of Human Rights case-law it is suggested that the latter field be given priority.
- Looking further ahead a possible field of study could be (a) Divorce – taking advantage of the CEFL's work and (b) The legal position of cohabitants.