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Cross-border parental responsibility conflicts

Report[1]
Committee on Social Affairs, Health and Sustainable Development
Rapporteur: Ms Martine MERGEN, Luxembourg, Group of the European People's Party

Summary

When parents of different nationalities separate, the sharing of parental responsibility is made more complex by different legal and judicial systems. Sometimes it can result in cross-border conflicts, or even child abductions. While international legal instruments may seem sufficient, the situation can turn out to be dramatic in practice: the complexity of domestic and international law, conflicts between court systems, the length and cost of proceedings, and a break in the link between one of the parents and his or her children.

The Parliamentary Assembly should recommend that member States ensure that the best interests of the child prevail in order to prevent or solve such conflicts, by making the enforcement of a parental responsibility decision abroad simpler, speedier and less costly, helping to widen the geographical scope of the key international legal instruments, streamlining the processing of cases of child abduction/retention, and ensuring the specialisation of the professionals concerned and effective co-operation between the "Central Authority" of one country and other national authorities.

The Assembly should also ask them to guarantee that the views of the child or children concerned are heard and taken into account and, lastly, to encourage recourse to properly and internationally recognised mediation services and agreements.

1. Reference to committee: Doc. 13630, Reference 4095 of 26 January 2015.

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A. Draft resolution[2]

1. More and more of Europe's couples are binational – which is excellent, unless a couple splits up. Unfortunately, when the couple concerned has one or more children, the often already difficult situation regarding the sharing of parental responsibility following a break-up is further complicated by different national legal systems, cultures and expectations, and can lead to cross-border parental responsibility conflicts and even child abductions.

2. The international and European legal instruments which govern these situations are based on the concept of a fair balance being struck between competing interests (those of the child, of the two parents, and of public order), while guaranteeing the primacy of the child's best interests. The objectives of prevention of child abduction and the immediate return of the abducted child have been judged by the European Court of Human Rights to correspond to a specific conception of "the best interests of the child" in this context.

3. The 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, as well as the applicable European Union regulations for European Union member States, thus aim to protect children from the harmful effects of their wrongful retention in or removal to a State other than their State of habitual residence, and for this purpose provide for common rules on jurisdiction, applicable law, and recognition and enforcement in the field of parental responsibility and child protection. These legal instruments establish a system of State co-operation through "Central Authorities" assisting individuals concerned in each Contracting State in resolving cross-border family disputes, and set short deadlines for the court proceedings to return the child to the State of his or her habitual residence.

4. However, in practice, the deadlines are seldom met, and the enforcement of decisions taken can be complicated and costly. The geographical scope of the key legal instruments remains limited, and they are not always properly applied even in States bound by them (as attested by several judgments of the European Court of Human Rights). Thus, for example, the views of the child are not always heard and/or adequately taken into account. In addition, cases in which the primary or sole carer of the child abducts the child are particularly difficult, as the abducting parent may not be in a position to accompany the child back to the State of his or her habitual residence, thus leading *de facto* to a situation which may violate a child's right not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis.

5. The Parliamentary Assembly thus recommends that Council of Europe member States make the enforcement of a parental responsibility decision abroad simpler, speedier and less costly, by:

5.1. helping to widen the geographical scope of the key legal instruments and ensure their proper application in all countries bound by them, including their own (for example by making information widely available to the general public and professionals concerned);

5.2. streamlining the processing of cases of child abduction/retention in the context of cross-border parental responsibility conflicts, including by limiting the number of appeals possible and by doing away with onerous requirements of exequatur for the enforcement of decisions taken;

5.3. finding a way to better deal with cases in which the abducting/non-returning parent is the primary or sole carer of the child/ren concerned, by giving particular weight to the views of the child/ren concerned in such cases;

5.4. seeking to guarantee that the views of the child/ren concerned are heard and taken into account in an adequate manner in all cases;

5.5. ensuring a proper specialisation of professionals concerned and good co-operation between the Central Authority and other national authorities;

5.6. promoting properly (and internationally) recognised mediation services and agreements in cross-border parental responsibility conflicts.

2. Draft resolution adopted unanimously by the committee on 19 September 2017.

B. Explanatory memorandum by Ms Martine Mergen, rapporteur

1. Introduction

1. In October 2014, Mr Pierre-Yves Le Borgn' and several of our colleagues tabled a motion for a resolution on “Parental authority conflicts” (Doc. 13630). The motion notes that 13% of Europe’s couples are binational – which is excellent, unless a couple splits up: “The situation in such cases can be terrifying: complexity of the legal position, conflicts between court systems, length and cost of proceedings, a break in the link between one of the parents and the children as well as heavy legal fees for the parents of another nationality from that of the country of residence.” The motion deems it essential that in such cases, “the superior interest of the child does not simply remain a concept of international law, but becomes a reality which is recognised and valued in the same way in all member States”, and thus recommends that the Parliamentary Assembly contribute to finding a solution to this situation which has a direct impact upon our citizens.

2. As the rapporteur appointed by the Committee on Social Affairs, Health and Sustainable Development, I could not agree more. As our committee has already made clear on previous occasions, most recently in relation to Resolution 2079 (2015) “Equality and shared parental responsibility: the role of fathers”, the best interests of the child must come first, also in parental authority conflicts. Our committee concluded at the time: “The committee wishes to emphasise that a parent’s right to shared parental responsibility, joint custody or shared residence for a child can never supersede the rights of the child concerned. Every child has the right not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. A child who is capable of forming his or her own views also has the right to express those views freely in all matters affecting him or her, the views of the child being given due weight in accordance with the age and maturity of the child. It is thus not sufficient for parents themselves or the competent courts to determine how parental responsibility, custody or the child’s residences are to be shared – the views of the child concerned must be taken into account and his or her best interests must be given primacy.”[3]

3. Many of our member States find it difficult enough to ensure these rights to children in parental responsibility conflicts which exclusively concern their own nationals; when the conflicts involve nationals of different States (often also nationals from States which do not belong to the Council of Europe), the situation is usually even more complicated. It is these cross-border parental responsibility conflicts which I would like to focus on. In this report, I take stock of the situation and of the legal tools already at our disposal to solve cross-border parental responsibility conflicts, based on the excellent expert paper by Ms Juliane Hirsch,[4] which she presented to the committee at its meeting in Strasbourg on 25 April 2017,[5] and the very illuminating fact-finding visit to Paris on 20 June 2017, where I met with representatives of the French Central Authority at the Ministry of Justice, and of the Mediation Centre of the Paris Notaries.[6]

2. The legal situation in Council of Europe member States, the European Union and worldwide

4. When it comes to cross-border parental responsibility conflicts, the more countries are bound by a treaty, the better. Thus I will start my analysis of the legal situation with the global instruments of particular relevance:

– The United Nations Convention of 20 November 1989 on the Rights of the Child[7] sets forth fundamental principles for the protection of children’s rights with specific attention given to children’s rights in cross-border family matters. See in particular Article 10 2 concerning personal relations and contact between children and parents living in different States and Article 11 concerning child abduction. The Convention has 196 State Parties. All 47 Council of Europe member States are a Party to this Convention.

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3. Committee opinion, Doc. 13896.
4. AS/Soc/Inf (2017) 03.
5. For the minutes of the exchange of views, please see document AS/Soc (2017) PV 03 add.
6. I would like to thank, in particular, Ms Christelle Hilpert, Head of the Office on EU law, private international law and mutual aid in civil matters, Civil Affairs and Seals Directorate, Ministry of Justice, and her colleagues, as well as Ms Nathalie Graffagnino, Director of the “Centre de Médiation des Notaires de Paris” and Maître Drilhon-Jourdain, notary and mediator, for having taken the time to meet me.
7. Text of the Convention: www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx.

– The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the "1996 Hague Child Protection Convention")[8] provides for common rules on jurisdiction, applicable law, and recognition and enforcement in the field of parental responsibility and child protection. The Convention establishes a system of State co-operation through Central Authorities assisting individuals concerned in each Contracting State in resolving cross-border family disputes. Any State can join this global instrument. Currently (October 2017), the Convention has 47 Contracting States. All European Union member States and 39 of the 47 Council of Europe member States[9] are Parties to the Convention.

– The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter the "1980 Hague Child Abduction Convention")[10] – aims to protect children from the harmful effects of their wrongful retention in or removal to a State other than their State of habitual residence. This Convention deals solely with the civil aspects of a child's wrongful removal or retention and does not touch upon the question of possible penal law consequences of the removal or retention. Through the establishment of an international legal framework for the expeditious return of these wrongfully removed or retained children, the Convention assists in securing a continuous relationship of the child with both parents. The Convention prevents conflicting decisions on custody in the situation of a wrongful removal or retention of a child by forbidding the courts of the State to which the child was wrongfully removed (or in which the child is wrongfully retained) to take a decision on the merits of custody while return proceedings are ongoing. The Central Authority system set up by the Convention assists parents in abduction cases and also in cross-border contact cases in which no wrongful removal or retention has occurred. The 1980 Hague Child Abduction Convention is open for signature by all States and is currently (October 2017) in force for 98 States. All Council of Europe member States with the exception of Azerbaijan and Liechtenstein are Parties to this Hague Convention.

5. Several European Union instruments are also of particular relevance, despite their more limited geographical scope, as they tend to "go further" in prescribing different actions, and are usually binding on all 28 member States of the European Union:

– The Charter of Fundamental Rights of the European Union (2010/C 83/02)[11] sets forth fundamental rights of European Union citizens and residents. The Charter, originally proclaimed in Nice in December 2000, has, as amended and proclaimed in December 2007, been given binding legal effect in the European Union with the entry into force of the Lisbon Treaty in December 2009.

– The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter "Brussels II *bis* Regulation")[12] unifies in the European Union member States the rules on jurisdiction and recognition and enforceability of decisions and enforceable agreements in the field of parental responsibility and establishes a system of administrative State co-operation through Central Authorities supporting individuals in need of assistance in cross-border family disputes concerning parental responsibility. This Regulation is only applicable between EU member States (the Regulation does not apply to Denmark). It is important to note that the Regulation prevails over the 1996 Hague Child Protection Convention in matters covered by the Regulation, namely jurisdiction, recognition and enforcement. The 1980 Hague Child Abduction Convention remains fully applicable in the European Union but is supplemented by certain provisions of the Brussels II *bis* Regulation. Currently a recast of the Regulation is being discussed.[13]

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8. The text of the Convention: https://www.hcch.net/en/instruments/conventions/full-text/?cid=70; Explanatory Report: www.hcch.net/upload/expl34.pdf; the Practical Handbook on the operation of the Convention: https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf.

9. The following Council of Europe member States are not a Party to the 1996 Hague Convention: Andorra, Azerbaijan, Bosnia and Herzegovina, Iceland, Liechtenstein, Republic of Moldova, San Marino and "the former Yugoslav Republic of Macedonia".

10. Text of the Convention: www.hcch.net/index_en.php?act=conventions.text&cid=24; Explanatory Report available at www.hcch.net/upload/expl28.pdf.

11. Text of the Charter: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF.

12. Text of the Regulation: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF; see also the "Practice Guide for the application of the Brussels IIa Regulation": http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf.

13. See the Proposal COM(2016)411 final of 30 June 2016 for the recast of the Brussels II *bis* Regulation: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF.

– The Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[14] aims to promote the amicable settlement of disputes concerning civil and commercial matters by encouraging the use of mediation and by ensuring "that parties to mediation can rely on a predictable legal framework".[15] All member States of the European Union, except Denmark, are bound by the Directive and had to comply with the Directive before 21 May 2011.

6. Council of Europe instruments have the advantage of a wider geographical scope than EU instruments in theory, but are in practice often not widely ratified (with the exception of the European Convention on Human Rights (ETS No. 5), of course). Of particular relevance are:

– The said European Convention on Human Rights of 4 November 1950[16] sets forth fundamental rights and freedoms, including the right to respect for private and family life (Article 8). To ensure the observance of the State Parties' engagements, the Convention established the European Court of Human Rights in Strasbourg dealing with individual and inter-State petitions. All 47 member States of the Council of Europe have signed and ratified it.

– The European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (ETS No. 105) (hereinafter "1980 European Custody Convention")[17] protects custody and access rights in international situations and creates a Central Authority system providing for free, prompt, non-bureaucratic assistance in discovering the whereabouts and restoring custody of wrongfully removed children. This Convention is open for signature by all Council of Europe member States as well as non-member States invited to accede to the Convention (see Articles 21 and 23). To date, 37 Council of Europe member States have ratified the Convention, including all EU member States except Slovenia.

– The European Convention on the Exercise of Children's Rights (ETS No. 160) of 25 January 1996[18] aims to protect the best interests of children and promotes the exercise of children's rights in legal proceedings concerning the child. This Convention is open for signature by all Council of Europe member States as well as non-member States that have participated in the drafting of the Convention. Furthermore, other non-member States can be invited to accede to the Convention (see Article 22). To date, 20 Council of Europe member States have ratified it.[19]

– The Council of Europe Convention on Contact concerning Children (ETS No. 192) of 15 May 2003[20] sets forth general principles to be applied to contact decisions as well as safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact. The Convention aims to establish co-operation between all relevant bodies and authorities and reinforces existing international legal instruments in this field of law. The Convention is open for signature by all Council of Europe member States and by non-member States that have participated in its drafting as well as by invited non-member States (see Articles 22 and 23). Nine Council of Europe member States have so far ratified it.[21]

7. Furthermore, the following important recommendations and instruments of guidance (which, unlike the legal instruments mentioned above, are not binding) should be mentioned:

– Recommendation CM/Rec(2015)4 on preventing and resolving disputes on child relocation, adopted by the Committee of Ministers of the Council of Europe on 11 February 2015;[22]

– The Washington Declaration on International Family Relocation, of 25 March 2010;[23]

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14. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF.
15. See recital 7 of the Directive.
16. www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm.
17. www.conventions.coe.int/Treaty/en/Treaties/Html/105.htm; Explanatory Report: www.conventions.coe.int/Treaty/en/Reports/Html/105.htm.
18. www.conventions.coe.int/Treaty/en/Treaties/Html/160.htm; Explanatory Report: www.conventions.coe.int/Treaty/en/Reports/Html/160.htm.
19. These are: Albania, Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Malta, Montenegro, Poland, Portugal, Slovenia, Spain, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine.
20. www.conventions.coe.int/Treaty/en/Treaties/Html/192.htm; Explanatory Report: www.conventions.coe.int/Treaty/en/Reports/Html/192.htm.
21. Albania, Bosnia and Herzegovina, Croatia, Czech Republic, Malta, Romania, San Marino, Turkey and Ukraine.
22. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c44a6
23. https://assets.hcch.net/upload/decl_washington2010e.pdf.

– Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on 17 November 2010;[24]

– Recommendation No. R (84) 4 on parental responsibilities**,** adopted by the Committee of Ministers of the Council of Europe on 28 February 1984;[25]

– Resolution 2079 (2015) "Equality and shared parental responsibility: the role of fathers", adopted by the Parliamentary Assembly in October 2015;

– Recommendation No. R (98) 1 on family mediation, adopted by the Committee of Ministers of the Council of Europe on 21 January 1998;[26]

– Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, European Commission for the Efficiency of Justice (CEPEJ) (CEPEJ(2007)14);[27]

– Principles for the establishment of mediation structures in the context of the Malta Process, drawn up by the Hague Conference's Working Party on Mediation in 2010.[28]

3. Problems to be resolved

8. Most international couples which break up are not composed of lawyers (and not all lawyers are all that familiar with private international law and human rights law either). As Baroness Massey remarked during the exchange of views with Ms Hirsch in April, the first problem for "ordinary" parents is thus, where to turn? How to get access to the necessary information on what the rights of all concerned are (of parents and children alike), and how best to respect and protect them in a practicable way?

9. The legal instruments presented in the preceding chapter provide tools to prevent and resolve cross-border parental responsibility conflicts. All mentioned instruments contribute to the same objective: avoiding conflicting decisions in matters of parental responsibly and bringing about a speedy resolution of the cross-border dispute (especially when a child has been abducted or not returned) in order to protect the children concerned.

10. There are several tools:

10.1. First, many of the legal instruments create a "Central Authority co-operation system" which is designed to assist individuals in the prevention and resolution of cross-border family disputes. In every country which is bound by these instruments, there should thus be a central (national) authority that ordinary parents (and their lawyers) can turn to in order to receive information and assistance as necessary. In France, I met with representatives of the Central Authority, who explained to me that they tried to help interested parties with practical information, by, for example, explaining the different procedures and how to go about applying them, and providing lists of lawyers, while taking care never to "replace" the parties themselves. Co-operation between the different countries' central authorities was usually good; the biggest problem was actually posed by parents who were unaware of their rights (and obligations), and did not get legal advice in time – some parents simply left the jurisdiction with their child(ren) without even being aware that they were breaking the law, which very much complicated reaching an amicable agreement between the parties afterwards. The French Central Authority gave training courses to judges (including foreign judges), clerks, mediators and others in an effort to make the proper procedures more widely known. A practical guide for the attention of the police and lawyers was currently under preparation concerning the abduction of children in cross-border parental responsibility conflicts. The Central Authority had dealt with 280 such cases in 2016, 78 of which had led to a return of the child following a court decision, and 87 without (the other cases were still being treated, or the return of the child had been refused, usually due to the identification of a "grave risk" to the child, such as an abusive parent).

10.2. Second, most of the legal instruments focus on the habitual residence of the child as the favoured connecting factor for matters of parental responsibility. This means that in practice, usually the law of the country of habitual residence of the child is applied and the court at the place of the habitual residence of the child is considered to be the one generally best suited to decide on child-related

24. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804b2cf3.
25. https://www.coe.int/t/dghl/standardsetting/family/Rec.84.4.%20E.pdf.
26. www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec(98)1%20E.pdf.
27. https://wcd.coe.int/ViewDoc.jsp?p=&id=1223897&Site=&direct=true.
28. https://www.hcch.net/en/publications-and-studies/details4/?pid=5317&dtid=52.

matters. There is thus a focus on the proximity to the child's actual circumstances of everyday life. These legal instruments thus contribute to avoiding parallel proceedings and conflicting decisions in two different countries (each using their own laws). The 1996 Hague Child Protection Convention also ensures that the change of habitual residence of the child and consequently the change of the law applicable to child protection matters cannot lead to an extinction of parental responsibility existing under the former law of habitual residence of the child (see Article 16.3 of the Convention). In other words, parents are discouraged from abducting or not returning their children, since this will not change which courts are primarily responsible and which countries' laws will be applied, and will not lead to a better position for the abducting/non-returning parent in terms of parental responsibility – quite the contrary. However, as the representatives of the French Central Authority informed me, procedures were not always as easy or as speedy as might be wished, as national law varied greatly. Thus, for example, France had a system of execution of judgments which was based on criminal law – complicating the execution of foreign civil law judgments.[29] France also only heard the child concerned at his or her request, while other countries made such a hearing mandatory.[30]

10.3. Finally, the 1996 Hague Child Protection Convention, the Brussels II *bis* Regulation and the 1980 European Custody Convention provide for simplified and speedy recognition and enforcement of decisions. This is important, because notwithstanding the aforementioned principles enshrined in the different legal instruments, if a parent does abduct/not return a child in a cross-border parental responsibility conflict, time is of the essence. The problem is that, in particular for very young children, if proceedings to return the child take years and years, it may no longer be in the best interests of the child to be returned. The European Court of Human Rights has thus held that "the best interests of the child must be of primary consideration and the objectives of prevention and immediate return correspond to a specific conception of 'the best interests of the child'".[31]

11. This leads us straight into the problems which still need resolving:

11.1. First, the enforcement of a parental responsibility decision abroad needs to be further simplified, speeded up and made less costly. The time frame "envisaged" by the 1980 Hague Child Abduction Convention to render a decision in return proceedings is six weeks (see Article 11 of the Convention). Under the Brussels II *bis* Regulation, the six-week period has been turned into an obligation (see Article 11.3 of the Regulation). Statistics on return proceedings indicate, however, that courts in many States, even though expeditious proceedings have been introduced, struggle with meeting this tight timeline and that despite the stricter Brussels II *bis* rules, return proceedings inside the European Union are not faster (where average proceedings currently take up to 165 days).[32] It should be noted that this issue is among the matters discussed for the recast of the Brussels II *bis* Regulation.[33] The European Commission's 2016 proposal for the recast aims to speed up the real time needed for a return by replacing the current six-week deadline (seen as unrealistic) with a new "6+6+6" deadline, by:[34]

11.2.
- introducing a new six-week deadline for the central authorities to receive and process the application, locate the respondent and the child, promote mediation (while making sure this does not delay the proceedings), and refer the applicant to a qualified lawyer or file the case with the court (depending on the national legal system);
- limiting the possibility to one appeal (with a separate six-week time limit applying to proceedings before the first instance court and the appellate court, respectively);
- abolishing the requirement of exequatur (which generates average delays per case of several months and costs of up to €4 000 for citizens);
- introducing an indicative time limit of six weeks for the actual enforcement of a decision (with a reporting requirement to the requesting Central Authority of the EU member State of origin/the applicant if the time limit is breached).[35]

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29. When there is a problem with the execution of a foreign civil law judgment, it is necessary to seize a judge in France to make the foreign judgment enforceable in the country.
30. The French position was motivated by the desire not to transfer the responsibility for making decisions to the child, thus overburdening the child.
31. *X v. Latvia,* Application No. 27853/09, judgment of 26 November 2013 (Grand Chamber), paragraph 95.
32. Prel. Doc. No 8 B of May 2011 – A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Part II – Regional Report, p. 10, https://assets.hcch.net/upload/wop/abduct2011pd08be.pdf.
33. See Proposal COM(2016) 411 (*supra* footnote 13), at p. 13.
34. Ibid.

11.3. Second, the geographical scope of application of the key legal instruments needs to be widened, and States which have bound themselves to these instruments need to ensure they are fully respected and implemented in practice. If one of the parents in the separating binational couple is from a country which is not bound by the legal instrument[36] or does not fully enforce it, justice cannot be served.[37] Common problems include insufficiently expeditious return procedures and/or enforcement mechanisms for return decisions.

11.4. Third, a better solution needs to be found to deal with primary carer abduction cases. The statistics on the operation of the 1980 Hague Child Abduction Convention indicate that contrary to what was thought at the outset, the majority of cross-border child abductions are conducted by the sole primary or joint primary carer of the child. Often it is the mother having left her home country to live with her husband or partner abroad who, following the relationship breakdown, leaves with the child to her home State. The dangers a cross-border child abduction imply for children remain: In contrast to children lawfully relocated to another State, wrongfully removed or retained children are at risk of losing contact with the left-behind parent, extended family and friends and risk losing touch with the cultural links to the other country, which is why the international legal framework needs to provide remedies for these situations. However, the fact that the primary carer is often the taking parent has brought about unforeseen complications in practice. How can the *status quo ante* abduction be restored as envisaged by the Convention, if the primary carer decides not to accompany the returning child (or, if due to criminal proceedings in the State of return, the taking parent, cannot accompany the child without risking prison)? The return decision of the 1980 Hague Child Abduction Convention is meant not to affect the decision on the merits of custody but in the above-mentioned cases it factually can bring about a short and long-term change of the primary carer of the child.[38]

11.5. Fourth, the specialisation of professionals dealing with these cases needs to be improved. Problems often arise due to the involvement of non-specialised judges, lawyers and other stakeholders.[39] Clearly where the expeditious return mechanism of the 1980 Hague Child Abduction Convention is not well applied, problematic situations can arise, as is reflected, *inter alia*, in the case law of the European Court of Human Rights.[40] Similarly, problems can arise when co-operation is insufficient between central authorities and other national authorities.

11.6. Fifth, there needs to be broader agreement among all States on what exactly constitutes the hearing and taking into account of the views of the child concerned. National legal systems vary significantly on whether and from which age a child's views must be heard; often, this is further complicated when court proceedings are taking place in the jurisdiction of "origin" of the child, from which the child has been physically removed.[41] However, it must also be kept in mind that the European Court of Human Rights has held that the 1980 Hague Child Abduction Convention does not grant a child the freedom to choose where he or she wishes to live.[42]

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35. Making this effectively a "6+6+6+6"-deadline until the actual return of the child, eg. 24 weeks – the exact same time average proceedings take nowadays in the European Union (165 days).

36. While the European Union claims to promote a world-wide ratification of/accession to the 1980 Hague Convention, the actual acceptance of a third country's accession to the Convention is subject to a specific EU procedure requiring the unanimous agreement of EU member States by means of Council Decisions adopted in the interest of the European Union, following an European Court of Justice Opinion of 2014. Ten such Council Decisions have already been adopted, but "When considering whether to accept an accession it is necessary to consider the third State's ability to implement the Convention effectively". Reply of the European Union to specific questions in the Questionnaire on the Practical Operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, https://assets.hcch.net/docs/49f7bd34-7abf-40ac-bc77-4820a719ead3.pdf.

37. In France, roughly half of the cases of child abductions in cross-border parental responsibility conflicts concerned other EU States, the other half the States of the Maghreb (with which France also had bi-lateral agreements covering the issue).

38. In view of the above issues, some Contracting States have proposed that the 1980 Hague Convention be reformed and a Protocol to the Convention drawn up. The in-depth exploration of the matter by the Sixth Special Commission to review the operation of the instrument in 2011/2012 revealed a preference for further developing and elaborating good practices under the Convention and tools of guidance in order to make the instrument compatible with new challenges and assist, in particular, newly acceding States in applying the Convention's return mechanism judiciously.

39. This seems to be less of a problem in France, where there are more than 30 specialised courts (since 2009), and two decrees (of 2012 and 2017) have put into place clear and efficient procedures in child abduction cases.

40. The Court has repeatedly held that States were in breach of their obligation under Article 8 of the European Convention on Human Rights when not taking effective measures to ensure the expeditious return of children under the 1980 Hague Child Abduction Convention. See the fact sheet of the Court's Press Unit on International child abductions published in October 2016.

11.7. Sixth and finally, agreed solutions to cross-border family disputes through specialised mediation services could do much to prevent the need for the application of the specialised legal instruments in the first place. All modern international and regional family law instruments encourage the amicable resolution of disputes. Most of these instruments thereby make an express reference to "mediation". In parallel, a number of international and regional organisations, including the Council of Europe, have in the past years undertaken initiatives to promote cross-border family mediation, provide guidance and elaborate minimum standards in order to safeguard the quality of mediation.[43] Probably the most detailed work on cross-border family mediation, including mediation in the context of international child abduction, has been undertaken by the Hague Conference on Private International Law. In 2010, a Working Group drew up the so-called "Principles for the establishment of mediation structures in the context of the Malta Process" aiming to set up contact points for international family mediation assisting individuals in finding specialised mediators and setting out general requirements for cross-border family mediation. In 2012, the Guide to Good Practice on Mediation in the context of the 1980 Hague Child Abduction Convention was published. However, problems have arisen concerning the cross-border recognition and enforceability of mediated agreements.[44] For example, in France, the Central Authority proposes free-of-charge mediation services when it is seized of a case or when parents so request it, but only one in ten couples takes up the offer.[45]

4. Conclusions and recommendations

12. The six problems identified in the previous chapter are those to which solutions need to be found. Thus, my recommendations focus on ways of:

– making the enforcement of a parental responsibility decision abroad simpler, speedier and less costly;

– widening the geographical scope of the key legal instruments and ensuring their proper application in all countries bound by them;

– better dealing with cases in which the abducting/non-returning parent is the primary or sole carer of the child/ren concerned;

– ensuring a proper specialisation of professionals concerned, and better co-operation between the Central Authority and other national authorities;

– seeking to guarantee that the view of the child concerned is heard and taken into account in an adequate manner;

– promoting properly (and internationally) recognised mediation services and agreements in cross-border parental responsibility conflicts.

41. Thus, for example, the European Commission's 2016 proposal for the recast of the Brussels II *bis* Regulation introduces an obligation to give the child an opportunity to express his or her views, using videoconferencing and other technical tools as necessary.
42. *Rouiller v. Switzerland*, judgment of 22 July 2014.
43. Of particular relevance in this regard is the work of the Council of Europe, see Recommendation No. R (98) 1 on family mediation later followed by the 2007 Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, both addressing the matter of cross-border family mediation; furthermore, see the European Union Mediation Directive aiming to set minimum common standards for cross-border family mediation.
44. The Hague Conference has set up a Group of Experts, which is mandated to further explore the matter and "to develop a non-binding 'navigation tool' to provide best practices on how an agreement made in the area of family law involving children can be recognised and enforced in a foreign State under the 1980, 1996 and 2007 Hague Conventions".
45. Thus, the Central Authority arranged for mediation in only 42 cases in 2016.