A Plea for the Creation of European Family Law Courts and Inter-Country (Arbitration) Courts to deal with Cross-border Child Custody Disputes

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Gian Paolo Romano

Thank you, Mrs. Chairwoman, for your gracious introduction.

I also want to thank our friends from the Aarhus University.

They have shown a lot of leadership in putting together this founding conference of the *European Association of Private International Law*.

I wish I were there will all of you to celebrate this event.

But I thought it was in the *best interests* of my child for me to stay with him today.

I mention this because what I would like to address has precisely to do with protection of *children.*

The case I want to make is in support of creating what I would call *European Family Courts* within the European Union, as well as – outside the EU – what I would call *inter-country tribunals*, possibly under the aegis of the United Nations, to deal with cross-border custody issues.

Now, this may sound like science fiction: *legal science* fiction.

But I think it is consistent with the spirit of our Association to test new ideas when we feel the existing legal framework is not entirely satisfactory for the human beings it is designed to serve.

Let me start with two stories.

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The first is about Oliver Weilharter.

Some of you might be acquainted with this case.

It attracted some publicity in the media.

Oliver Weilharter is born in Denmark, the son of an Austrian mother, Marion Weilharter, and of a Danish father, Thomas Sørensen.

The family lives primarily in Denmark although they spend quite a lot of time in Austria.

When Oliver is 5, his parents split.

They initially arrange for Oliver to live with the mother in Denmark so the father can continue to see him regularly.

But the mother quickly feels unhappy with this state of affairs.

She misses home, which is Austria.

And so she takes Oliver to Graz.

And she refuses to move back to Denmark.

She argues she is entitled to determine Oliver's residence alone.

The father, who's angry about this unilateral move by the mother – he feels he's been stabbed in the back – files for return of Oliver to Denmark.

He relies on the 1980 Abduction Convention.

But after multiple proceedings, the Austrian authorities refuse to return Oliver to Denmark.

And they award custody to the Austrian mother.

Father's frustration increases.

He contends the Austrian authorities are *biased*.

When a citizen feels *public justice* fails him, when he feels he's not treated *fairly*, what does he resort to?

Private justice.

And so he orchestrates what may look like a counter-abduction.

When Oliver is at the *Kindergarten* in Graz, his father shows up – and assisted by two friends – takes him back to Denmark.

It is now for the mother to be furious about this escalating turn of events.

She files for return before the Danish authorities.

The Danish authorities deny return and they award sole custody to the father.

Which causes a journalist to wonder:

(quote) "*How can it be possible that the Danish authorities can award sole custody to a Danish father and the Austrian authorities can award custody to an Austrian mother*?"

Now, does the mother at least enjoy visitation rights for Denmark?

Problem number 1: she faces *criminal proceedings* for abduction in Denmark.

Just as the father has been *convicted* for abduction in Austria.

Problem number 2: if Oliver is permitted to leave Denmark even for a week to see his Austrian grand-parents or to take some fresh air in the Alps (Denmark is a beautiful but *flat* country), there is high risk that the Austrian authorities won't cooperate to make sure he returns to Denmark.

And so, Oliver, who's Austrian citizen, as well as Danish citizen, is not allowed to travel to Austria, his "*motherland*".

In fact, Oliver is prohibited from travelling *outside Denmark* altogether.

What about his right to *freedom of movement* across the European territory?

It looks as if he's held hostage by his "*fatherland*", Denmark.

Out of despair, Marion Weilharter calls the European institutions for action.

She thought this clash between two Member States has to be solved through *a European body.*

And so, a delegation of members of European Parliament travels to Denmark and tries to sort out the situation *diplomatically.*

To no avail.

According to the last episode of this drama I am aware of, the mother turns to the United Nations.

Austria and Denmark are "United Nations" although they are disuniting this Austrian-Danish family.

The United Nations has, to Marion Weilharter' mind, an *inherent legitimacy* to deal with such a supranational deadlock.

She particularly petitions to the *United Nations Committee for Women's Rights*.

We may come back to this later.

What I would like to emphasize is the extent of distress and pain all members of the family have been experiencing.

This is, to me, one of the clearest examples of a *lose-lose-lose* situation: *three losers*.

Oliver has been suffering under various disorders.

A lot of health issues, some of them threatening to be permanent.

The mother has also been suffering under various disorders, which caused her to be on sickness leave for a longtime.

The father has been suffering tremendously as well.

His career significantly compromised.

Both parents told about this to the media.

You can clearly see this by their body language when you hear them recounting their ordeal.

Also think about how much Austrian taxpayers' and Danish taxpayers' money has been squandered.

The end result is clearly *lose-lose* also from the perspective of the two *communities,* the two *countries*.

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My second story is even more tragic.

It is about a Swiss mother and a Tunisian father.

They have two children, who are both Swiss and Tunisian.

The family lives primarily in Switzerland but with frequent visits to Tunisia.

At some point, the marriage starts deteriorating.

The father travels to Tunisia with the children to visit their Tunisian grandparents.

He does not return them to Switzerland.

It must have been for him a hard decision to make, but he made it.

This unleashes an incredible number of procedures, and triggers the involvement of an incredible number of authorities and professionals:

judges, diplomats, administrative services, central authorities, social services, lawyers, police and law enforcement, prison services, health professionals, most of them funded by Tunisian and Swiss public money.

To make a (very) long story (very) short, the Courts in Zurich award custody to the mother.

The Courts in Tunisia to the father.

But when the father happens to be in Morocco, he gets arrested by the Moroccan authorities and extradited to Switzerland.

The father is then convicted in Switzerland for child abduction.

He serves several years in prison.

What about the children?

They cannot move out of Tunisia, where they are looked after by their paternal grandparents.

As the Court in Zurich put it with dismay:

(quote) "*the parents are in Switzerland without the children, the children are in Tunisia without the parents*".

The Swiss Ministry of Foreign Affairs had advised the mother *against* traveling to Tunisia.

She has become a sort of *persona non grata*.

Driven to despair for not being able to see her children, she commits *suicide.*

Tragic outcome.

Not isolated though.

There is a long list of attempted or successful suicides in cases like this.

Sometimes it is the child who, caught in the middle of this *interparental* and this *inter-country* war, takes his or her life.

Maybe not immediately, five years later, ten years later.

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I would like to go back to the European Union and wonder whether our first case-study would have been different had Denmark been part of "*Brussels IIa*".

A look at the ECJ's case-law does not support this assumption.

Let me mention some of those cases.

I will start with Barbara Mercredi, who's French, and Richard Chaffe, British.

They have a child, Chloé, who's born in London.

When Chloé is barely 1 month, her parents have a fall out.

Mother leaves the UK with Chloé and settles back to a French overseas territory.

Not to Paris, which is two hours' train from London, but to the Réunion, which is 4.000 kilometres away from where Chloé's father live.

Chloe's father immediately turns to English courts.

The dispute quickly escalates.

Several English and French proceedings.

Which results in a (I quote the Advocate-General) "*conflict between two courts of different Member States*".

French courts award custody to the French mother.

English court award custody… to *themselves*, making Chloé a "*ward of the court*", as well as to the British father.

Deticek v. Sgueglia.

Italian father, mother from Slovenia, little girl, Antonella.

After their divorce, Italian courts award custody to the Italian father.

Mother escapes Italy and brings Antonella to Slovenia.

No less than 6 proceedings.

Slovenian courts refuse to return child to Italy and award custody to mother.

At the time of the ECJ ruling, after two and a half year, the child was still in Slovenia.

I have no information about what happened afterwards.

I tried to reach Mr. Sgueglia and Mrs Deticek through LinkedIn.

I got no reply.

Purrucker: Spanish man, German woman, two twins.

Merlín, a boy, Samira, a girl, born in Spain.

They are dual citizens, Spanish and German.

Their parents' union breaks down.

Before the case reaches the ECJ, no less than 16 proceedings, 11 in Germany, 5 in Spain.

Spanish courts awarded custody of *both twins* to Spanish father.

German courts hesitated, filed two requests for preliminary ruling – so they bought some time – and they concluded German that the mother had "*exclusive custody of both twins*".

The clash between Germany and Spain caused the twins not to see each other for at least *four years*.

Can you believe this! (I have a twin sister, I kind of feel *concerned*).

Samira was in Spain with the father and was prohibited from traveling to Germany.

Merlín was in Germany with the mother, and was prohibited from traveling to Spain.

But the most high-profile case is probably *Rinau*.

Lithuanian woman, a prominent politician, a German man, a winemaker.

Their union produces Luisa, who's born in Germany.

Matrimonial crisis.

The mother is graciously allowed by the father to travel with Luisa to Lithuania for two weeks.

And she does not come back.

There follows, in initial stage of the battle, 16 judgments, 4 in Germany, and 12 in Lithuania.

German courts award custody to German father.

The Lithuanian courts and enforcement authorities and public opinion side with the mother.

Luisa is not returned to Germany.

Preliminary ruling by the ECJ.

Then the battle continues and produces 12 additional decisions.

The case is then brought by Mr. Rinau before the European Court of Human Rights.

In the words of the Strasbourg Court (quote) "*Lithuanian and German courts had adopted more than thirty decisions* '*which had often been contradictory and invalidated one another"*".

Another case brought both before the ECJ and (twice) before the ECHR involves Mauro Alpago, Italian, and Doris Povse, Austrian.

They meet in Venice, where Doris Povse has moved to learn Italian.

Romantic city, stimulating mutual attraction.

A little girl, Sofia, is born.

The romance vanishes soon though.

Mother returns to Vienna, taking Sofia with her.

Father cries foul.

First stage of the dispute: 14 decisions, 3 in Italy, 11 in Austria.

Appeals, counter-appeals, applications for interim measures, for change of circumstances…

If you read the ECJ summary, you get lost.

But here's the gist.

Italian courts award custody to Italian father and ordered Sofia to return to Italy.

Austrian courts concluded custody should be awarded to Austrian mother and Sofia should remain in Austria.

Then ECJ's ruling.

Then the battle continues with 16 more proceedings, 30 in total.

It reaches twice the European Court of Human Rights.

The battle then carries on, with at least 3 more rulings.

So, for at least 7 years, Sofia, caught in middle of the arm-wrestling contest between *mother* and *father,* and between *motherland*, Austria, and *fatherland,* Italy, was not permitted to visit Italy.

I am not done.

Frenchman, Patrick Royer, and a Hungarian woman.

They live in France for four years.

A little boy is born in 2013.

Soon after his birth, the parents have a fall out.

The Hungarian mother leaves France for Hungary with the boy.

There follows two years thick with legal proceedings, 7 in France and 15 in Hungary.

The case landed multiple times before the highest court in France (*Cour de cassation*) and before the highest court in Hungary (*Kúria*).

French courts prescribe child's residence in France and custody to the French father.

The Hungarian courts dismiss the petition for return to France, refuse to recognize French rulings based on *public policy* and award custody to the mother.

Here is my last case.

Stefano Liberato, from Italy, and Luminita Grigorescu, from Romania, get married in Rome in 2005.

They move into a home together.

A child is born in February 2006.

The parents split in 2007.

Ms Grigorescu takes the child to Bucharest.

This begins *12 years* of struggle (twelve!) until the ECJ rules in 2019.

During *twelve years*, the child, a national of Italy and Romania, was not able to set foot in Italy and visit there with the Italian part of his family.

Some of whose members have probably died in the meantime.

I will stop there, not because my stock of cases is running out – I could mention many more.

But because your patience is running out.

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So, what do all these cases suggest?

First, if we are serious about *child best interests*, we have to recognize that the interests of Oliver, Chloé, Antonella, Luisa, Merlin, Samira, Sofia, and so on, have gone by the window.

Their childhood has been largely ruined.

A number of their rights under the United Nations Convention on the Rights of the Child have been infringed upon by both countries involved.

Second, what is striking is that the parents involved are most of the time rather good people.

There is not often *in those cases* a history of domestic violence for example.

Take Marion Weilharter and Thomas Sørensen.

Two clever and well-educated persons.

And Denmark and Austria rank very high in terms of prosperity and living standards and facilities for their children.

So why did the *parents* do what they did?

And why did the *Danish and Austrian* authorities do what they did?

Remember: the first move was *by the mother*.

Mrs. Weilharter took Oliver to Austria without applying to Danish court to be *authorized* to relocate to Austria.

Why?

She thought Danish court would deny *relocation*, they won't allow a Danish-Austrian child to move to Austria against the will of a Danish father.

But she also thought: "*it is unfair for me to have to rely on a Danish court that is biased in favor of the Danish side of the family*".

The crux of the matter is there are two sides: Danish and Austrian.

The Danish mother perceived a judge who embodies the Danish side, and the Danish community and is closer to the Danish parent, *not to be sufficiently neutral* to serve even-handed justice.

She perpetrated what was probably an abduction.

But she the reason she did so was because she wanted to move away from a justice system that, in her eyes, to her perception, was *biased.*

I believe this feeling was shared by the Austrian authorities.

They failed to order Oliver's return to Denmark because, first, they *did not want to cooperate* with a system they too perceived as unbalanced.

And second, because they deliver justice *on behalf of the Austrian community* ("*im Namen der [oesterreischen] Republik*"), to which Austrian mother belong, the Austrian authorities had a special sympathy for her.

Pay attention though: that's precisely what Thomas Sørensen felt.

So, let us move to the Danish father's perspective.

In his eyes, Austrian courts were not fair to him.

Same problem.

And so, he dismissed the Austrian custody decision as unworthy of his respect.

And he took justice into his own hand.

And he took the child back to Denmark.

So, to sum up, Austrian mother (and to some extent the Austrian authorities) question the neutrality of the Danish authorities.

The Danish father (and to some extent the Danish authorities) question the neutrality of the Austrian authorities.

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This dual perception underpin pretty much all cases I mentioned.

Now, interestingly, the *Court in Strasbourg* concluded in some cases there has been a *bias* on the part of the mono-national authorities.

The best illustration is *Rinau.*

The President of the Lithuanian Supreme Court is blamed by the Strasbourg court for *siding with the Lithuania side of the family*, for not displaying sufficient neu–trality.

Think about that!

But the Strasbourg court should also recognize (and it does so in other cases) the Lithuanian mother retained Luisa in Lithuania because she felt the German authorities (including the *Jugendämter*) had exactly the *same bias.*

They would not permit a German and Lithuanian child to lawfully relocate to Lithuania against the German father's will.

Self-justice is triggered by a perception of an *injustice.*

And things then escalate.

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Let me quote *The Vienna Review*, of 5 November 2012.

The reporter mentions that

(quote) "*Weilharter finds the current situation agony: 'I would prefer such matters were decided by a neutral court in another country*', she said".

The article further reports Mag. Britta Schönhart, Austrian attorney, to say:

(quote) "*We need a European body or higher court deciding cases like these*".

And Danish attorney, Marianne Linaa Steiness,

(quote) "*wholeheartedly agrees, suggesting that… international conflicts like this would be treated by a European Family Court*".

Both Danish and Austrian sides seem to call for – and be willing to submit to – a European Family Court, where an Austrian judge sits next to a Danish judge, and presided over by, say, a *Dutch* or a *French* judge.

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I am not going to address how we might organise those panels.

I want to focus on some of the benefits that are likely to flow.

Number 1, *both* parents will have *at long last* the impression they are treated *fairly*.

We have to be fair to both.

The anger, the frustration, associated with the perception of being the victim of a judicial bias is likely to diminish.

Less frustration, less anger for the parents means less sadness for their children.

When parents are frustrated, children feel it – they are like a sponge – and they are likely to suffer as well.

Number 2, the mere possibility of relying on a supranational court would actually help the parents to reach an *amicable settlement*.

So the number and the duration of conflicts are likely *to go down*.

I am persuaded that, had we made European Family Courts available to the parents, some of the cases I mentioned would not have landed before the European Family Court, they would have *stayed away from courts altogether*.

The psychological comfort of being able to rely on a neutral body would have encouraged good faith negotiations and parenting agreements.

Number 3, we will remove a powerful incentive to child abduction.

Most of the cases involved child abduction, by *mothers* most of time.

It is the *first unilateral* move that caused the relationship to gradually move to an *inferno.*

Ladies like Marion Weilharter or Doris Povse or Inge Rinau will be less tempted to remove unilaterally their child if they feel they can rely on a neutral body to hear their application to *relocate to Austria or Lithuania*.

Intra-European abductions will be reduced.

Even if it is by 10%, this is thousands of European kids we will have spared the trauma of abductions.

Number 4: whatever the parent who's awarded custody, those European panels will be able to organise cross-border visitation rights.

We will have avoided the situation where a child, who's national of two countries, and who's caught in the middle of a clash between those two countries, is held hostage by one of those countries and prevented to visit the other for long years.

Number 5: Some of the taxpayers money that today is financing 10, 15 and up to 35 proceedings in two countries – with judgments that cancel each other out – will be saved.

And it can be invested to finance scholarships.

And also think about how much *private money* will be saved.

We interviewed Doris Povse.

She spent over 100.000 Euros in courts and attorney's fees.

Same is true for the father, Mauro Alpago.

Isabel Neulinger, a good acquaintance of mine – I invited her to my place a couple of times – had to borrow 500.000 francs to fight her way before seven different courts.

This is money she was not able to invest in her son's future.

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Science fiction?

Well, *European Courts* with a *multi-national composition* will soon be in operation.

This is in the area of *patents*: Unified Patent Court.

Let me quote a passage from its official website.

"Litigation in multiple countries is expensive and there is a risk of diverging decisions...

Forum shopping is often inevitable, as parties seek to take advantage of differences between national courts and their procedures.

The UPC Agreement addresses these shortcomings by creating a specialised patent court".

Why should we think European Courts specialising in custody issues are something unrealistic?

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I have a few minutes left.

Remember Case-study 2: Switzerland and Tunisia have blatantly disregarded the children's most basic rights under the *1989 United Nations Convention on Children's Rights.*

Also, remember what Mrs. Weilharter did: she instinctively turned to the *United Nations.*

United Nations also adopted a Convention that has been the most successful in governing cross-border relationships between private individuals:

the 1958 U.N. Convention on *international arbitration*.

160 plus countries are parties to it.

Almost all Islamic countries.

A vast majority of Asian countries.

Why shouldn't the United Nations be willing to endorse a *similar* instrument for child custody?

It can be done through an additional protocol to the 1989 Convention.

When the mother is Swiss and wants to live with the children in Switzerland, the father is Tunisian and wants to live with the children in Tunisia, they would be able to rely on a *Swiss-Tunisian, mixed, intercountry, binational, bi-religious* tribunal or committee or commission, whatever the name, that represent both sides, both identities, both languages, both religions.

The parents are likely to trust it more than the Swiss mother trusts a Tunisian court and the Tunisian father trusts a Swiss court.

Thanks to the 1958 United Nations instrument on arbitral awards, a Swiss company and a Tunisian company, when they enter into some business, are entitled to rely on *Swiss-Tunisian* (arbitral) tribunal to settle any potential dispute arising between them.

Why such a right should be denied to a Swiss-Tunisian family?

Why should we show less concern for the well-being of Swiss and Tunisian families than for the well-being of Swiss and Tunisian commercial companies?

Thank you for your attention.