



**EUROMED
JUSTICE**

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STUDY

EUROMED JUSTICE

**Comparative Study
on the application by national
religious and civil judges of
international norms concerning the
best interests of the child**



**ALGERIA
EGYPT
ISRAEL
JORDAN
LEBANON
MOROCCO
PALESTINE
TUNISIA**

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LINGUISTIC VERSIONS

Original: EN

Manuscript completed in March 2019

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The information contained in the Child Comparative Study is based on the research and data provided by the senior experts assigned, and by the inputs received from representatives of the Southern Partners Countries in the framework of the work carried out under the Working Group of the EuroMed Justice Project on: the Application by National Religious And Secular Judges of International Norms concerning the best Interests of the Child, except for Lebanon. In conformity with Lebanese Law none of the Lebanese judges and representatives contributed to the work in any mean or way. The Consortium implementing this EuroMed Justice project cannot be held responsible for the accuracy, actuality or exhaustiveness of the analysis, nor can it be made liable for any errors or omissions, contained in this document.

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Acknowledgements

1. The Senior Short Term Experts are delighted to present the outcome of the first overall Comparative Study on the application by religious and secular judges of the international norms on the best interests of the child in the ENI South region aiming, in particular, to present a realistic picture of how the various jurisdictions from the region apply the concept of the best interests of the child in cross-border family conflicts. The results of this effort are collective, and each person who made this work possible should be fully acknowledged.
2. A first acknowledgment goes to the secular and religious judges from the ENI South Partner Countries who participated in at least one of the two Working Group meetings and whose accumulated wisdom and experience as well as commitment to the Euromed Justice project have been essential for the creation of this Comparative Study. Sharing their professional experience and knowledge in the course of the Working Group discussions as well as through extensive responses to a Questionnaire the participating judges helped the Short Term Experts to gain a better understanding of how national religious and secular judges apply international norms concerning the best interests of the child.
3. Furthermore, a special mention needs to be made of the continuing support for the Euromed Justice work by the Hague Conference on Private International Law. The Hague Conference has already in the course of the previous projects, Euromed I, II and III wherever possible, contributed expertise in the field of international family law and, in every possible way, promoted synergies between the organisation's work and the Euromed Justice work encouraging, in particular, links with the Hague Conference initiated Malta Process. Special thanks for the support of the Euromed Justice IV project are due to the Hague Conference's Secretary General Christophe BERNASCONI, the Hague Conference's First Secretary Philippe LORTIE, the Hague Conference's Legal Adviser Frédéric BREGER and Hague Conference's Senior Legal Officer Maja GROFF.
4. Further acknowledgements are due to the Euromed project team: Victoria PALAU, Team Leader; Virgil IVAN-CUCU, Capacity Building; Dania SAMOUL, Coordinator; and the Programme Organisers, Diana GALISTEO DEL POZO and Valérie BERNAL QESNEL. They are to be congratulated for successfully managing every Working Group Child meeting with professionalism and colossal personal engagement.

Juliane Hirsch,
Roberta Ribeiro Oertel,
Dolly Hamad,
Ahmed Bakry El Sayed,

Senior Short-term experts

Abbreviations of international, regional and bilateral instruments referred to in the comparative study

GLOBAL INSTRUMENTS	
UNCRC	<i>United Nations Convention of 20 November 1989 on the Rights of the Child</i> ¹
1980 Hague Child Abduction Convention	<i>Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction</i> ²
1996 Hague Child Protection Convention	<i>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</i> ³
2007 Hague Maintenance Convention	<i>Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance</i> ⁴
2007 Hague Protocol	<i>Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations</i> ⁵

REGIONAL INSTRUMENTS	
African Region instruments	
African Charter on Human Rights	<i>African Charter on Human and Peoples' Rights</i> ⁶
African Charter on Children's Rights	<i>African Charter on the Rights and Welfare of the Child</i> ⁷

1. See for the Convention text and further information the United Nations website at < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> > (last consulted on 1 April 2018). All ENI South Partner Countries as well as all European Union (EU) Member States have signed and ratified this Convention.

2. See for the Convention text, status table and further details the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> > (last consulted on 1 April 2018). The 1980 Hague Child Abduction Convention is open for signature by all States and is currently in force for 98 States (status 1 April 2018). In the European Union, all States are Contracting States to this Convention and among the ENI South Partner Countries, Israel, Morocco and Tunisia are Contracting States.

3. See for the Convention text, status table and further details the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> > (last consulted on 1 April 2018). The 1996 Hague Child Protection Convention is open for signature by all States and currently (status 1 April 2018) has 47 Contracting States. In the European Union, all States are Contracting States to this Convention; among the ENI South Partner Countries, Morocco is currently the only Contracting State.

4. See for the Convention text and status table the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131> > (last consulted on 1 April 2018). The 2007 Hague Convention is open for signature by all States and currently (status 1 April 2018) in force in 38 States. The Convention is in force for all EU Member States except Denmark. It is not yet in force in any ENI South Partner Country.

5. See for the Protocol text, status table and further details the Hague Conference website at < http://www.hcch.net/index_en.php?act=conventions.text&cid=133 > (last consulted on 1 April 2018). The Protocol is currently (status 1 April 2018) in force in 29 States.

6. The Charter is also referred to as "Banjul Charter". See for the text of the Charter and the status of ratifications the website of the African Commission on Human and Peoples' Rights at < <http://www.achpr.org/instruments/achpr/> > (last consulted on 1 April 2018). The Charter has been ratified by 53 States (status 1 April 2018) including Algeria and Egypt.

7. Adopted by the Organisation of African Unity on 1 July 1990, charter text and status table available at the webpage of the African Commission on Human and Peoples' Rights at < <http://www.achpr.org/instruments/> > (last consulted on 1 April 2018).

ARAB STATES INSTRUMENTS

Riyadh Agreement for Judicial Cooperation	<i>Riyadh Arab Agreement for Judicial Cooperation</i> ⁸
Arab Charter on Human Rights	<i>Arab Charter on Human Rights of 22 May 2004</i> ⁹
Charter of the Arab Child	<i>Charter of the Rights of the Arab Child</i> ¹⁰

EUROPEAN UNION INSTRUMENTS

EU Charter on Fundamental Rights	<i>Charter of Fundamental Rights of the European Union (2010/C 83/02)</i> ¹¹
European Brussels IIa Regulation	<i>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</i> ¹²
European Maintenance Regulation	<i>The Council Regulation (EC) No 4/2009, of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations</i> ¹³

INSTRUMENTS OF THE GREATER EUROPEAN REGION

European Convention on Human Rights	<i>Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950</i> ¹⁴
European Custody Convention	<i>European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children</i> ¹⁵
Council of Europe Exercise of Children's Rights Convention	<i>Council of Europe Convention on the Exercise of Children's Rights of 25 January 1996</i> ¹⁶
Council of Europe Contact Convention	<i>Council of Europe Convention on Contact concerning Children of 15 May 2003</i> ¹⁷

8. Endorsed by the Council of the Arab Ministers of Justice on 6 April 1983. An unofficial English version of the text of the Riyadh Arab Agreement for Judicial Cooperation is available online at < <http://www.unhcr.org/refworld/docid/3ae6b38d.html> > (last consulted on 1 April 2018).

9. An unofficial English translation of the Charter is available at < http://www.eods.eu/library/LAS_Arab%20Charter%20on%20Human%20Rights_2004_EN.pdf > (last consulted on 1 April 2018).

10. The Charter of the Rights of the Arab Child of 1983 is available online in Arabic at < <http://www.lasportal.org/ar/Pages/default.aspx> > (last consulted on 1 April 2018).

11. See for the Charter text < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF> > (last consulted on 1 April 2018).

12. Regulation text available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF> > (last consulted on 1 April 2018).

13. Regulation text available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:01:EN:HTML> > (last consulted on 1 April 2018).

14. Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm> > (last consulted on 1 April 2018). All 47 Member States of the Council of Europe, including all EU Member States, have signed and ratified this Convention.

15. Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/105.htm> > (last consulted on 1 April 2018). 37 States have currently (status 1 April 2018) ratified the Convention, including all EU Member States except Slovenia.

16. Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/160.htm> > (last consulted on 1 April 2018). 20 States have currently (status 1 April 2018) ratified the Convention, including the following EU Member States: Austria, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Malta, Poland, Portugal, Slovenia and Spain.

17. Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/192.htm> > (last consulted on 1 April 2018). Nine States have currently (status 1 April 2018) so far ratified the Convention, including the following EU Member States: Czech Republic, Malta and Romania.

BILATERAL INSTRUMENTS

Bilateral agreement Algeria-France	<i>Convention between the government of the French Republic and the government of the People's Democratic Republic of Algeria concerning children from mixed separated French-Algerian couples, Algiers, 21 June 1988¹⁸</i>
Bilateral agreement Egypt-Australia	<i>Agreement between the government of Australia and the government of the Arab Republic of Egypt regarding cooperation on protection of Children, Cairo, 22 October 2000¹⁹</i>
Bilateral agreement Egypt-Canada	<i>Agreement between the government of Canada and the government of the Arab Republic of Egypt regarding cooperation on consular elements of family matters, 23 July 1997²⁰</i>
Bilateral agreement Egypt-France	<i>Convention between the government of the French Republic and the government of the Arab Republic of Egypt on judicial cooperation in civil matters, including personal status, and in social, commercial and administrative matters, Paris 15 March 1982²¹</i>
Bilateral agreement Egypt-Sweden	<i>Judicial agreement between the Kingdom of Sweden and the Arab Republic of Egypt regarding co-operation in civil and personal status matters, Stockholm 23 August 1996²²</i>
Bilateral agreement Egypt-USA	<i>Memorandum of Understanding Between the United States and Egypt concerning parental access to children, 22 October 2003²³</i>
Bilateral agreement Lebanon-Canada	<i>Agreement between the government of Canada and the government of the Lebanese Republic regarding cooperation on consular matters of a humanitarian nature, 2000²⁴</i>

18. French text available at < <http://www.hcch.net/upload/2fr-alg.pdf> > (last consulted on 1 April 2018).

19. English text available at < <http://www.hcch.net/upload/2au-eg.pdf> >, Arabic text available at < http://www.hcch.net/upload/2au-eg_a.pdf > (last consulted on 1 April 2018).

20. English text available at < http://www.hcch.net/upload/2ca-eg_e.pdf >, French text available at < http://www.hcch.net/upload/2ca-eg_f.pdf >, Arabic text available at < http://www.hcch.net/upload/2ca-eg_a.pdf > (last consulted on 1 April 2018).

21. French text available at < http://www.hcch.net/upload/2fr-eg_f.pdf >, Arabic text available at < http://www.hcch.net/upload/2fr-eg_a.pdf > (last consulted on 1 April 2018).

22. English text available at < <http://www.hcch.net/upload/2se-eg.pdf> > (last consulted on 1 April 2018).

23. English text available at < <http://www.state.gov/s/l/2003/44396.htm> >, Arabic text available at < <http://www.hcch.net/upload/2us-eg.pdf> > (last consulted on 1 April 2018).

24. English transcript of the text available at < http://www.hcch.net/upload/2ca-leb_e.pdf >, French transcript of the text available at < http://www.hcch.net/upload/2ca-leb_f.pdf > (last consulted on 1 April 2018).

BILATERAL INSTRUMENTS

Bilateral agreement Lebanon-France	<i>Agreement between the government of the French Republic and the government of the Lebanese Republic concerning cooperation in certain family matters, 2000²⁵</i>
Bilateral agreement Lebanon-Switzerland	<i>Agreement of 31 October 2005 between the Swiss Confederation and the Lebanese Republic concerning cooperation in certain family matters²⁶</i>
Bilateral agreement Morocco-Belgium	<i>Memorandum of Understanding establishing a Belgo-Moroccan Advisory Committee on Civil Matters, Rabat, 1981²⁷</i>
Bilateral agreement Morocco-France	<i>Convention between the government of the French Republic and the Kingdom of Morocco on the status of persons and the family and judicial cooperation, Rabat, 10 August 1981²⁸</i>
Bilateral agreement Morocco-Spain	<i>Convention between the Kingdom of Morocco and the Kingdom of Spain on Mutual Legal Assistance, Recognition and Enforcement of Judgments in Respect of Custody and Access Rights and the Return of Children, Madrid, 30 May 1997²⁹</i>
Bilateral agreement Tunisia-Belgium	<i>Memorandum of Understanding establishing a Tunisian-Belgian Advisory Committee on Civil Matters, 1989³⁰</i>
Bilateral agreement Tunisia-France	<i>Convention between the government of the French Republic and the government of the Republic of Tunisia on mutual legal assistance with regard to the right to custody of children, access rights and maintenance obligations, Paris 18 March 1982³¹</i>
Bilateral agreement Tunisia-Sweden	<i>Memorandum of Understanding establishing a Tunisian-Swedish Advisory Committee on Civil Matters, 1994³²</i>

25. French transcript of the text available at < http://www.hcch.net/upload/2fr-leb_f.pdf > (last consulted on 1 April 2018).

26. French text available at < <http://www.admin.ch/opc/fr/classified-compilation/20052040/index.html> >, Arabic text available at < http://www.hcch.net/upload/2ch-leb_a.pdf > (last consulted on 1 April 2018).

27. French transcript of the text available at < <http://www.hcch.net/upload/2ma-be.pdf> > (last consulted on 1 April 2018).

28. French text available at < <http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/source-les-conventions-applicables-conventions-bilaterales-21128.html#maroc> > (last consulted on 1 April 2018).

29. French text available at the website of the Moroccan Ministry of Justice at < <http://adala.justice.gov.ma/FR/Conventions/ConventionsPays.aspx> > under "Espagne" (last consulted on 1 April 2018).

30. French transcript of the text available at < <http://www.hcch.net/upload/2tu-be.pdf> > (last consulted on 1 April 2018).

31. French transcript of the text available at < http://www.hcch.net/upload/2fr-tu_f.pdf > (last consulted on 1 April 2018).

32. French transcript of the text available at < <http://www.hcch.net/upload/2se-tu.pdf> > (last consulted on 1 April 2018).

Introduction

5. Acknowledging the importance of further extending and improving cooperation in the Euro-Mediterranean region in the field of international family law, the Euromed IV Project – Component “Child”, was set up with the aim of developing a Comparative Study on the application by religious and secular judges of the international norms on the best interests of the child in the Euro-Mediterranean region.
6. The Comparative Study is meant to assist in a better understanding of how legal systems of the European and Mediterranean Region safeguard the best interests of the child and connected children's rights enshrined in the UNCRC. As particular focus, the study concentrates on the application of the principle of the best interests of the child in cross-border family disputes.
7. A Working Group consisting of experts from the following ENI South Partner Countries was established:
 - the People's Democratic Republic of Algeria,
 - the Arab Republic of Egypt,
 - Israel,
 - the Hashemite Kingdom of Jordan,
 - Lebanon,
 - the Kingdom of Morocco,
 - Palestine, and
 - the Republic of Tunisia.
8. The Working Group held two meetings, one from 4-6 July 2017 in Luxembourg and the second one from 12-14 December in The Hague. In addition, the experts responded to a Questionnaire (see ANNEX), which had been developed at the first Working Group meeting.
9. Building on achievements of the predecessor projects, the **Euromed Justice Project I** (2004-2007), the **Euromed Justice Project II** (2008-2011) and the **Euromed Justice Project III (2012-2014)**, **the work on the comparative study benefited in particular from research undertaken for the Handbook on good practices concerning the resolution of cross-border family conflicts**³³ and the *Research Report, Overview of the current situation in the ENPI South Region and comparative study of national experiences in the resolution of cross-border family conflicts*.³⁴
10. It is important to note the synergies between the Euromed Justice Projects in the field of international family law and the so-called “**Malta Process**”³⁵ initiated by the Hague Conference on Private

33. J. Hirsch, *Handbook on good practices concerning the resolution of cross-border family conflicts – With a special focus on cross-border disputes concerning parental responsibility*, 2012, available online at < <https://www.euromed-justice.eu/en/system/files/A%20Handbook%202%20EN.pdf> > (last consulted on 1 April 2018).

34. G. Parolin, *Research Report - Overview of the current situation in the ENPI South region and comparative review of national experiences in resolution of cross-border family conflicts*, EUROMED Justice III Project, Component II Resolution of cross-border family conflicts, 2011, available online at < <http://www.euromed-justice-iii.eu/system/files/B%20RR2%20EN.pdf> > (last consulted on 1 April 2018).

35. For more information on the Malta Process and for the “Malta Declarations” resulting from the, so far, four Malta Conferences, see the Hague Conference website at < <https://www.hcch.net/en/publications-and-studies/details4/?pid=5214> >.

International Law. The “Malta Process” is a dialogue between senior judges and high-ranking government officials from Contracting States to the 1980 and 1996 Conventions⁵ and non-Contracting States with Islamic law influenced legal tradition with the aim to improve the protection of cross-border rights of contact of parents and their children and to find solutions to problems posed by the cross-border wrongful removal or retention of children, in particular, where relevant international legal framework is not applicable.

11. As the Euromed Justice projects in international family law, the Malta Process is based on the respect for the diversity of legal systems, cultures and traditions and driven by the commitment to the common objective of protecting children from the harmful effects of cross-border family disputes. Thus, at the very essence, the Euromed Justice projects as well as the Malta Process contribute to safeguarding the best interests of the child in international conflicts.
12. Last but not least, an initiative resulting from the Malta Process aiming to assist in promoting the amicable resolution of cross-border family disputes shall be mentioned. The “**Principles for the Establishment of Mediation Structures in the context of the Malta Process**”³⁶ call for the establishment of a “Central Contact Point for international family mediation”³⁷ in each State facilitating the provision of information on available mediation services, on access to mediation, and other related information, including information regarding access to justice. Furthermore, the Principles lay down certain standards regarding the identification of international mediation services as well as certain standards regarding the mediation process and implementation of the results of mediation. It is important to note that any State is free to adopt and implement these Principles.

36. The Principles and the accompanying Explanatory Memorandum are available on the Hague Conference website at < www.hcch.net > under “Child Abduction” then “Cross-border mediation”.

37. So far ten States, namely, Australia, Brazil, France, Germany, Hungary, the Netherlands, Pakistan, the Russian Federation, the Slovak Republic and the United States of America have established a Central Contact Point for cross-border family mediation in accordance with these Principles, see the Hague Conference website at < <https://www.hcch.net/en/publications-and-studies/details4/?pid=5360> > (last consulted on 1 April 2018).

Terminology

13. In view of the legal and cultural diversity of the Euro-Mediterranean region, some central terms used in this Comparative study will be briefly defined in this section. The definitions used are to a large extent lend from the “Handbook on Good Practices Concerning the Resolution of Cross-border Family Conflicts”.

A. Definition of the “child”

14. The term “child” applied in the context of this study is used in accordance with the relevant instruments or law referred to. The UNCRC establishes in its Article 1 that “a child means every human being below the age of eighteen years”. This is the legal parameter mostly used, also in Europe, to define what a child is.
15. Under Council of Europe law, most instruments relating to children adopt the UNCRC definition of a child. The age of 18 is the age of full legal capacity in all member States of the Council of Europe.³⁸ Thus, the ECHR does not contain a definition of a child, but its Article 14 guarantees the enjoyment of the rights set out in the Convention “without discrimination on any ground”, including grounds of age. The ECtHR has accepted applications by and on behalf of children irrespective of their age and in its jurisprudence, it has accepted the UNCRC definition of a child, endorsing the “below the age of 18 years” notion.³⁹
16. Under EU law, the protection of the rights of the child has been expressly recognised as one of the leading objectives of the EU both internally and in its relations with the wider world. Although children’s rights have found a statutory footing in Article 3 of the Treaty on European Union (hereinafter “TEU”), which requires the EU to promote the protection of the rights of the child, there is no definition of ‘child’ set out in any of the treaties, their subordinate legislation or case law. In fact, the definition of a child can vary considerably under EU law, depending on the regulatory context. For example, EU law governing the free movement rights of EU citizens and their family members defines children as “direct descendants who are under the age of 21 or are dependent”,⁴⁰ essentially endorsing a biological and economic notion as opposed to one based on minority.⁴¹

38. In this respect see the Committee of Ministers’ Resolution (72) 29 on the lowering of the age of full legal capacity, available on line at < <https://rm.coe.int/16804b2cf3> > (last consulted 1 April 2018).

39. *Handbook on European Law relating to the Rights of the Child*, European Union Agency for Fundamental Rights and Council of Europe, 2015, available online at < https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF > (last consulted on 1 April 2018), at p. 18-19.

40. Directive 2004/38/EC of the European Parliament and of the Council of Europe, 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004 and OJ L 158, 29 April 2004, Article 2 (2) (c).

41. Other areas of EU law, particularly those areas in which EU action complements that of Member States (such as social security, immigration and education), EU instruments refer to national law to **determine who is a child**. In these contexts, the UNCRC definition is generally adopted, cf., *Handbook on European law relating to the rights of the child*, *op. cit.* note 39, at p. 19.

17. In the national law of several ENI South Partner Countries a child is defined as a person under the age of 18 years.⁴²

B. Parents' rights and duties towards their children

18. In particular, regarding the terms used to describe parents' rights and duties towards their children a definition is necessary, since the legal systems of the European and Southern Mediterranean region do not use a uniform terminology.

Parental responsibility

19. This Comparative Study uses the term "parental responsibility" as defined in the 1996 Hague Child Protection Convention, *i.e. the term "parental responsibility" is meant to include "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child"*.⁴³ The term "parental responsibility" used in this broad sense, includes all legal rights and duties parents, guardians or other legal representatives have in respect of a child with a view to raising the child and ensuring the child's development and thus encompasses "rights of custody" as well as "rights of contact". The term "parental responsibility" as used in this Comparative Study and as defined by the 1996 Hague Child Protection Convention also comprises the parental rights and duties commonly referred to as "hadana" and "wilaya" in Islamic law influenced legal systems.
20. It should be noted that recent years have brought a change in terminology employed to describe the legal parent-child relationship in many legal systems which shifted the terminological focus from the parents' rights (as in "custody right" and "access right") towards a greater acknowledgement of the equal importance of parental duties and children's rights and welfare. This development is reflected in the increasing use of the term "parental responsibility" in international, regional and national legal instruments.

Custody rights

21. The term "custody rights" is usually understood as encompassing a number of parental rights and duties. However, the exact definition of what the term "custody rights" comprises differs from one legal system to another. In many European legal systems, the rights of custody of a child are traditionally understood to comprise the care of the person of the child, the responsibility for the child's education and upbringing, the responsibility for important decisions in the child's life as well as the legal and financial responsibility for the child, including, in general, the child's legal representation. It should be noted that the Islamic law term "hadana", which is often translated as "right of custody", does not have exactly the same content (see below).

42. See *infra*, Part II, B, para 412.

43. See Article 1(2) of the 1996 Hague Child Protection Convention; see also the similar definition in Article 2(7) of the Brussels IIa Regulation.

22. Recognising and respecting the differences in the definition and understanding of the term “custody rights” in different legal system, the 1980 Hague Child Abduction Convention determines that the term “rights of custody”, for Convention purposes, shall be understood to “include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence”. The same definition has been reproduced in the 1996 Hague Child Protection Convention⁴⁴ as well as in the Brussels IIa Regulation.⁴⁵
23. The Comparative Study uses the term “custody rights”, unless otherwise noted, in a wide sense, as referring to all parental rights and duties connected with the physical care, education and upbringing of the child, the child's legal representation and the responsibility to take important decisions in the child's life including the determination of the child's residence.

Contact rights

24. The term “contact right”⁴⁶ is used in this Comparative Study in a broad sense to include the various ways in which to maintain personal relations, whether through periodic visitation, by distance communication or by other means. Particular importance is given in this Comparative Study to the securing of “parent-child contact”. But the “contact rights” may, depending on the applicable family law, also relate to contact between the child and other persons, such as grandparents, stepparents etc.
25. The Comparative Study refers to the term “direct contact” with the child as meaning face-to-face contact. In contrast, the Comparative Study uses the term “indirect contact” to mean contact by way of distance communication or through intermediaries.

Hadana and Wilaya

26. The Islamic law influenced family legislations in the Mediterranean region distinguishes regarding parents' rights and duties traditionally between: “**hadana**” and “**wilaya**”.
27. “Hadana” in Islamic tradition refers to the care of the person of the child and the child's upbringing in the daily life. The “hadana” is complemented by the “wilaya”, the financial responsibility for the child, the responsibility for important decisions in the child's life and the child's legal representation. The two terms will be used in this traditional meaning in the Comparative Study. In accordance with the Islamic tradition, the “hadana” of a child is with the mother up to a certain age of the child (the age limit differs today from legal system to legal system and may depend on the gender of the child). The “wilaya” is, in accordance with the Islamic tradition, the natural right of the father. In case the father has passed away or is considered to have passed away, the court can decide that another person will take over the father's parental responsibilities under the “wilaya”. The person will then be granted the “wissaya”. It should be noted that the Islamic law based or inspired family laws in the different legal systems in the Mediterranean region have, although deriving from common roots, taken

44. Article 3 b) of the 1996 Hague Child Protection Convention.

45. Article 2(9) of the Brussels IIa Regulation.

46. The term “right to access” is a term less and less used in many legal systems today (see regarding the shift in terminology towards a greater emphasis of child's rights above the definition of “parental responsibility”).

different developments.⁴⁷ It is therefore always necessary to verify how the relevant family law uses the terms “hadana”, “wilaya” and “wissaya”. Furthermore, it is important to note that other religious laws in the region also use the terms “hadana”, “wilaya” and “wissaya” and may give these terms a different meaning.

28. In any case it is important to note that the legal concept of “hadana” in the Islamic law although often translated as “rights of custody” is not the exact equivalent of the legal concept “rights of custody” in the tradition of many European legal systems. In many European legal systems “rights of custody” traditionally includes the responsibility for important decisions in the child’s life and the legal representation of the child, which in the Islamic tradition is encompassed by the separate legal concept “wilaya” often translated with “guardianship”.

C. International wrongful removal or retention of a child

29. The Comparative Study uses the expression “international wrongful removal or retention of a child” in line with the definition under the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and the Brussels IIa Regulation. The “international wrongful removal or retention of a child” refers to a removal of a child to / or the retention of a child in a State other than the State of the child’s habitual residence in breach of actually exercised rights of custody. The breach of custody rights can be a breach of “rights of custody attributed to a person, an institution or any other body, either jointly or alone”.⁴⁸ The law considered as the law decisive for the question, whether such a “right of custody” existed at the time of the removal or retention, is the law of the State in which the child was habitually resident immediately before the removal or retention. As understood by the international and regional instruments mentioned above, “right of custody” is considered to be exercised jointly when “pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child’s place of residence without the consent of another holder of parental responsibility”.⁴⁹

D. Mechanisms to bring about an amicable resolution of a dispute

30. Among the different mechanisms to bring about an amicable resolution of a dispute mentioned in this Comparative Study, the terms “mediation” and “conciliation” require a brief definition, because these

47. For example, the Working Group explained that the age limits for the mother’s “hadana” differ in several Islamic law based or inspired family laws of the region. Furthermore, some State’s Islamic law inspired family laws such as that of Morocco and Tunisia define the “hadana” today as a parental right and obligation that during the marriage is equally shared by father and mother. Also, as concerns the “wilaya” a number of differences can be observed. For example, in some States the Islamic family law (for example, Lebanese Islamic law) provides that the “wilaya” will, should the father be deceased, be given as “wilaya” to the paternal grand-father and only if that is impossible will the court consider to give the responsibilities in form of “wissaya” to another person. In other States, such as Egypt, there is no such fixed priority rule for a certain person to take over the responsibilities of the father and any person appointed by court decision to take over these parental responsibilities would be referred to as having the “wissaya”, i.e. the term “wilaya” exclusively refers to responsibilities exercised by the father himself.

48. See Article 3(1) a) 1980 Hague Child Abduction Convention, Article 7(2) a) 1996 Hague Child Protection Convention, see also Article 2(11) of the Brussels IIa Regulation.

49. See Article 2(11) of the Brussels IIa Regulation. See also Articles 3 and 5 of the 1980 Hague Child Abduction Convention and Article 7 of the 1996 Hague Child Protection Convention.

terms are employed with differing content and understanding in the different legal systems. It is important, however, to highlight that the below definitions solely serve the purpose of stating how these terms are used in the Comparative Study; i.e. these definitions do not represent an attempt to find a common definition of these terms for the use in the region. This also means that whenever the Comparative Study refers to reports by the delegations on their legal systems, the terms used by the delegations are to be understood in the context of the relevant legal system and may differ from the below “Comparative Study” definitions.

Mediation

31. For the purposes of the Comparative Study the term “mediation” is understood as a voluntary, structured and confidential process whereby an impartial third party, the mediator, facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.⁵⁰ As used in this Comparative Study, the term “mediation” refers solely to those processes in which the impartial third party, the mediator, has no decision making powers in the concrete case and where the agreement, if any, is found by the parties themselves, with the mediator assisting in the decision-making process. The Comparative Study employs the term “mediation” to refer to both out-of-court and court-annexed mediation schemes.

Conciliation

32. The terms “mediation” and “conciliation” are sometimes used as synonyms, which can cause confusion. For the purpose of the Comparative Study, the term “conciliation” is understood as referring to a process, in which an impartial third party facilitates communication between the parties to a conflict, helping them to come to an agreed solution to the conflict. As used in the Comparative Study, the term “conciliation” refers to a dispute resolution mechanism used in courts as part of certain family law proceedings. In comparison to “mediation” as defined above, “conciliation” is a more directive process and it is regularly characterised by a reporting duty towards the court on the content of the discussions held in the conciliation meetings. By contrast, “mediation” as defined above, is a completely confidential process, at the end of which the mere fact of whether mediation has or has not ended with an agreement and possibly the content of an agreement found may be transmitted to the referring court, while anything said and exchanged in the course of mediation sessions remains confidential. An additional distinguishing factor for “conciliation” as defined for the purpose of the Comparative Study is that the third party assisting the process of conciliation may have (certain) decision making powers in the concrete case and may be under an obligation to suggest concrete solutions to the parties.

50. This is also how the term “mediation” is defined for the purpose of the Hague Conference’s Guide to Good Practice on Mediation, available online in several languages, see the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/publications/1/?dtid=3&cid=24> > (last consulted on 1 April 2018).

**PART I. INTERNATIONAL LAW BACKGROUND,
SOLUTIONS FOR CROSS-BORDER FAMILY CONFLICTS
IN THE EUROPEAN AND SOUTHERN MEDITERRANEAN
REGION – INTERPRETATION OF THE RIGHTS
OF THE CHILD – CASE LAW**

Roberta Ribeiro Oertel & Juliane Hirsch

33. Part I of the Comparative Study provides in Chapter A background information on the UNCRC and the “best interests of the child” principle and how the Committee on the Rights of the Child monitors the implementation and application of the UNCRC. Links are made with the human rights and children’s rights legal framework with particular relevance for the European and Southern Mediterranean region.
34. In Chapter B, Part I further explores in what regard international, regional and bilateral instruments for the resolution of cross-border conflicts play a role in safeguarding the best interests of the child.
35. Leading European case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) is summarised in Chapter C of Part I with regard to the application of the best interests of the child principle.
36. Finally, in Chapter D of Part I a brief insight is given on how the principle of the best interests of the child principle is applied in some European countries, namely Germany and France.

A. The best interests of the child in the instruments of protection of human rights and in UNCRC

Roberta Ribeiro Oertel

37. In the framework of this Study, it is appropriate to review the international human rights instruments that enshrine the rights of the child as individual & fundamental rights that must be assured through the implementation of the principle of the best interests of the child.
38. As a first step, the instruments adopted under agreements concluded at European level will be examined (1), followed by instruments relevant to the ENI Southern Partner Countries (2). Finally, the significance and implementation of the principle of the best interests of the child in the UNCRC (3) will be examined.

1. Evolution of children's rights in human rights protection instruments at European level

39. The United Nations Convention on the Rights of the Child (hereinafter "the UNCRC") was adopted on 20 November 1989 and entered into force on 2 September 1990.⁵¹ With 196 ratifications since 1989, the Convention is the most widely ratified human rights convention in history. The UNCRC is the result of a process that began with the preparations for the International Year of the Child in 1979.
40. In fact, the protection of children and their fundamental rights have been discussed on many occasions in the international community. The first historical text that recognises and affirms the existence of rights specific to children, and above all the responsibility of adults with respect to them, is the Geneva Declaration on the rights of the child adopted by the League of Nations in 1924.⁵² Subsequently, a second text was adopted by the United Nations in 1959. This is the Declaration of the Rights of the Child,⁵³ which is informed by the idea that humanity must give its best to the child. The Preamble to this Declaration highlights the child's need for special protection and care, including appropriate legal protection both before and after birth. Article 2 of the Declaration underlines the need to respect the best interests of the child when enacting laws and in the implementation of his/her rights.

51. The basic needs of the child are recognised in 54 Articles. The convention deals with the well-being of the child and recognises his/her right to development, assistance and care, and its right to protection. See for the Convention text *supra*, note 1.

52. Available online at < https://www.unicef.org/vietnam/01_-_Declaration_of_Geneva_1924.PDF > (last consulted on 1 April 2018).

53. This Declaration was unanimously adopted by the 78 member countries of the UN in its General Assembly on 20 November 1959 in Resolution No. 1387. Available online at < <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf> > (last consulted on 1 April 2018).

41. In addition to the international instruments, other instruments for the protection of human rights at European level have also included special provisions on the rights of the child. These are the Council of Europe Conventions (a) and the Charter of Fundamental Rights of the European Union (b).

a) Council of Europe Conventions

42. The major human rights instrument in Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights or the ECHR,⁵⁴ contains several specific references to children. The main provisions are as follows: Article 5 (1) (d) foresees the lawful detention of a minor for the purpose of his/her compulsory education; Article 6 (1), which limits the right to a fair and public hearing where the interests of minors require this; Article 2 of Protocol No. 1, which provides for the right to education and requires States to respect the religious and philosophical convictions of parents in the education of their children.
43. In addition, all other general provisions of the ECHR are applicable to everyone, including children. Some have proven to be of particular relevance to children, namely Article 8, which guarantees the right to respect private and family life, and Article 3, which prohibits torture and inhuman or degrading treatment or punishment.
44. The Council of Europe is organised around the ECHR, whose application is monitored by the European Court of Human Rights (hereinafter “ECtHR”). This is a Council of Europe jurisdiction responsible for ensuring compliance with the ECHR by the 47 States that have ratified it. By applying interpretative approaches that emphasise the positive obligations inherent in the ECHR, the ECtHR has developed an extensive body of jurisprudence addressing the rights of the child, which includes many references to the UNCRC.⁵⁵
45. Another important human rights treaty is the European Social Charter.⁵⁶ Established under the auspices of the Council of Europe and setting out rights and freedoms of a social nature, the Charter provides for the protection of social rights, with specific provisions for the rights of the child. It contains two provisions of particular relevance to the rights of the child, namely: Article 7, which sets out the obligation to protect children against economic exploitation, and Article 17, which requires States to take all necessary and appropriate measures to provide children with the care, support, education and training they need (including free primary and secondary education), to protect children and adolescents against neglect, violence or exploitation and to protect children deprived of their family support.
46. The implementation of the European Social Charter is overseen by the European Committee of Social Rights, which is composed of independent experts who decide on the conformity of the law and practice of the States that are party to the European Social Charter, either within the framework of collective complaints procedure, or by means of the national reporting systems.

54. See for the Convention text *supra* note 14.

55. See *infra*, Part I, C.

56. The European Social Charter is a Council of Europe convention, signed on 18 October 1961 in Turin and revised on 3 May 1996 in Strasbourg. The revised Charter entered into effect in 1999, gradually replacing the original 1961 treaty. See the Compendium of texts (7th ed.), updated: 1 January 2015. Available online at < <https://rm.coe.int/168048b058> > (last consulted on 1 April 2018).

47. Finally, the Council of Europe supports the implementation of international standards in the field of children's rights by all Council of Europe Member States and, in particular, promotes the implementation of the UNCRC thereby emphasising its key principles, which are non-discrimination, the right to life and development, the priority given to the best interests of the child in decision-making and the right of children to be heard.⁵⁷
48. It is, moreover, with regard to the principle of the best interests of the child that two important instruments have been adopted by the Council of Europe, the first being the European Convention on the Exercise of Children's Rights of 25 January 1996⁵⁸ (i) and, the second, the Convention on Personal Relations concerning the Child of 15 March 2003⁵⁹ (ii). It is important to note that these two conventions are also open to signature by States that are not a Member of the Council of Europe that participated in its development alongside Member States of the European Union.

i) The European Convention on the Exercise of Children's Rights

49. The European Convention on the Exercise of Children's Rights is an important even though not yet widely ratified instrument for the recognition of children's rights in family proceedings of relevance to them.⁶⁰ Children are no longer merely an object of such procedures, they can also actively participate. Even if they are not recognised as parties to the proceedings, they may nevertheless exercise a number of rights. In this respect, the right to request access to any relevant information and the right to be heard give the child concerned an effective opportunity to express his/her opinion. It is also important that children receive all relevant information before a decision is rendered on issues of great importance such as their place of residence.
50. This Convention defines the best interests of the child as a guiding principle in the deliberations of the judicial authorities in procedures involving a child to ensure that the respective authorities have sufficient information before making any decision. To this end, the judicial authority must hear the child unless this is manifestly contrary to the child's best interests. It is for the judicial authority to decide whether to hear the child personally. To the extent possible, the judicial authority will directly obtain the opinion of the child but it may also, for example, decide to ask another person or an appropriate body to determine the opinion of the child and present this to the court.
51. Nevertheless, children are free to refuse to express their opinion. Determining the child's opinion not only means talking to the child and asking him/her to express his/her opinion verbally, but it also includes "observation"⁶¹ of the child by a representative or, for example, by a medical expert. Furthermore, these representatives can express their views on the best interests of children.

57. It should be noted that in 2006, the Council of Europe launched its "Building a Europe for and with Children" programme, an interdisciplinary action plan on children's rights issues, including the adoption of normative instruments in various areas. On this point, see the Committee of Ministers (2011), Council of Europe Strategy on the Rights of the Child (2012-2015), CM (2011) 171 final, 15 February 2012, available online at < <https://rm.coe.int/168045d224> > (last consulted on 1 April 2018).

58. For the Convention text see *op. cit.* note 16. The total number of signatures not followed by a ratification is 8 and the total number of ratifications and accessions is 20.

59. For the Convention text see *op. cit.* note 17. The total number of signatures not followed by a ratification is 10 and the total number of ratifications and accessions is 9.

60. See the Explanatory Report to this Convention available online at < <https://rm.coe.int/16800cb629> > (last consulted on 1 April 2018).

61. *Ibid.*, p. 5 et seq.

52. The Convention places the judicial authorities under an obligation to act promptly to avoid unnecessary delay where such delays may be detrimental to the well-being of the child and thus contrary to his/her best interests. On the other hand, if the judicial authorities are not always able to act as promptly as they would wish, for example if they have not received sufficient information to make a final decision in the best interests of the child, in such cases it may be appropriate to take provisional measures.
53. Finally, the Convention requires the representative of a child to act in an appropriate manner, in particular with a view to providing the child with information and explanations, determining the child's opinion and presenting this opinion to the judicial authority. The representative may be a person, such as an attorney, appointed to appear before a judicial authority on behalf of a child. The obligations related to the representation of the child must be satisfied unless this is manifestly contrary to the best interests of the child.⁶²

ii) The Convention on Contact Concerning Children

54. The Convention on Contact Concerning Children aims to improve the implementation of the rights of children to maintain personal relations and direct contact with both parents on a regular basis, as well as to examine ways of improving mechanisms for international cooperation in cases concerning custody of children and cross-border contact.⁶³ It replaces the notion of "visitation" with that of "personal relationships" to emphasise the fact that children possess certain rights. It therefore seems more appropriate to talk about personal relationships of children with different persons rather than to refer to visitation rights of certain persons with the child.
55. Thanks to the ECtHR, the concept of personal relationships has become the leading concept, replacing that of visiting rights.⁶⁴ This terminological change makes provisions for the inclusion of personal relationships between the child and a person with whom the child does not usually live. Article 8 of the ECHR states that "[e]veryone has the right to respect for his private and family life [...]"⁶⁵. This provision assures, according to the ECtHR jurisprudence, the right of a parent and his/her child to maintain regular contact with each other.
56. In addition, the bodies responsible for implementing the ECHR and the ECtHR have recognised the existence of this right in their jurisprudence and ruled that this right may only be restricted or excluded for serious reasons if this is necessary in the best interests of the child, for example, for the protection of moral welfare or the health of the child etc.

b) The Charter of Fundamental Rights of the European Union

57. The European Union (hereinafter the "EU") is a voluntary economic and political association of European States, aiming to ensure the maintenance of peace in Europe and to promote economic and social progress. The EU was created by the Treaty on European Union (hereinafter "TEU") signed in

62. See Articles 2, 3 and 10 of the Convention.

63. See the Explanatory Report to this Convention available online at < <https://rm.coe.int/16800d3845> > (last consulted on 1 April 2018).

64. *Ibid.*

65. See for the text of the ECHR *supra* note 14.

Maastricht on 7 February 1992, which entered into effect on 1 November 1993. It is the result of the process started in 1951 with the creation of the European Coal and Steel Community.⁶⁶

58. Within the EU, now composed of 28 Member States,⁶⁷ the rights of the child have developed in a sectorial manner over many years. From a historical perspective, child-related legislation has largely focussed on addressing child-related aspects in the context of wider political and economic initiatives, for example in the area of consumer protection⁶⁸ and the free movement of persons.⁶⁹
59. The Charter of Fundamental Rights (hereinafter the “Charter”) was first drafted and adopted in 2000; it has become a legally binding instrument of EU law since the entry into force of the Lisbon Treaty in 2009.⁷⁰ The Charter is equally binding as the founding Treaties of the EU under Article 6 TEU for both the EU institutions and the Member States when they act within the scope of EU law. Accordingly, the EU and its Member States are placed under an obligation to protect the rights enshrined in the Charter when implementing EU law. Therefore, compliance is monitored by the Court of Justice of the European Union (hereinafter the “CJEU”). The Charter compiles all civil, political, economic and social rights deriving from the various international instruments and from which European citizens, including children, can benefit. The rights are grouped under various themes: dignity, freedom, equality, solidarity, citizenship and justice.
60. The Charter’s preamble states that this instrument reaffirms respect for “*rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights*”.⁷¹ This respect for the limits of competence also applies, according to the preamble, to the commitments previously made by States with regard to the ECHR and the Social Charters.
61. In view of the ratification of the UNCRC by all EU Member States, the European Union is also obliged to respect the provisions and principles enshrined therein, at least as regards issues falling within its competence as established by the treaties. This obligation is reinforced in particular by the Charter of

66. The European Economic Community (hereinafter the “EEC”) was created in 1958, establishing ever closer economic cooperation between six countries: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Since then, a huge single market has emerged, which continues to grow and develop its full potential. In this regard, see the website < https://europa.eu/european-union/about-eu/eu-in-brief_en > (last consulted on 1 April 2018).

67. The EU Member States are as follows: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

68. For example, Directive 2009/48 / EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJEU L 170/I of 30.6.2009, which implements safety measures for children’s toys.

69. For example, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, often referred to as “Citizenship Directive”. OJEU L 158 of 30.4.2004.

70. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into effect on 1 December 2009. Therefore, from that date, any reference to the European Economic Community must be understood as referring to the European Union (EU). See the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJEU, 2012/C 326/01 of 26/10/2012 p.0001 - 0390. Available online at < <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> > (last consulted on 1 April 2018).

71. See also *The Charter of Fundamental Rights of the European Union - A Reading Guide - In the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of the European Social Charter (revised)*, Conference of INGOs of the Council of Europe, May 2008, available online at < <https://rm.coe.int/16802f5eb7> > (last consulted on 1 April 2018).

Fundamental Rights, which in Article 24 (2) states that the best interests of the child shall be a “primary consideration” as do the Articles 3, 9 and 12 of the UNCRC.⁷² Article 24 of the Charter sets out three fundamental principles concerning the rights of the child: the right to express their views freely in accordance with their age and maturity (Article 24 (1)), the right to have their best interests considered as a primary consideration in all actions affecting them (Article 24, (2)) and the right to maintain regular personal relations and direct contact with both parents (Article 24, (3)).

2. Evolution of children’s rights in human rights protection instruments concerning ENI South Partner Countries

a) The protection of the child in legal instruments specific to the African continent

62. The **African Charter on Human and Peoples’ Rights (hereinafter the “African Charter on Human Rights”)** was adopted in Nairobi⁷³ in 1981 by the Conference of Heads of State of the Organisation of African Unity (hereinafter the “OAU”), which later became the African Union (hereinafter the “AU”). The Heads of State and of government unanimously endorsed the final text, which demonstrates the importance of these rights and the need to protect them.
63. The drafters of the African Charter on Human Rights genuinely strived to base the conceptualisation of human rights on the circumstances and data specific to African societies. In reality, the field of human rights in the region “raises even more questions on the African continent where there are regular reports of [arbitrary] arrests, deprivation of liberty and non-respect of constitutional and legislative codes”.⁷⁴ In this difficult context, the African Charter on Human Rights plays an important role in the process of democratisation initiated in some African countries since the beginning of the 1990’s. It is a flagship instrument in the political development and protection of human rights whose main intended beneficiaries are the individuals living in the States concerned.
64. It should be noted that the African Charter is complemented by another specific instrument whose objective is the protection of the child, namely, the **African Charter on the Rights and Welfare of the Child adopted by the OAU on 1st July 1990 (hereinafter “African Charter on Children’s Rights”)**.⁷⁵ The latter sets out fundamental principles for the protection of the rights and well-being of children. Of the participating ENI South partner countries, Algeria and Egypt have signed and ratified the African Charter on Children’s Rights, while Tunisia has signed the Charter but has yet to ratify it.

72. See the *Handbook on European Law relating to the Rights of the Child*, op. cit. note 39.

73. See for the text and ratification status *supra* note 6.

74. A. Badara Fall, *La Charte africaine des droits de l’homme et des peuples : entre universalisme et régionalisme in La démocratie en Afrique*, 2009/2 (No. 129), pp. 77-100, available online at < <https://www.cairn.info/revue-pouvoirs-2009-2-page-77.htm> > (last consulted on 1 April 2018).

75. The African Charter on the Rights and Welfare of the Child was adopted by the Twenty-sixths OAU Conference of Heads of State and government in Addis Ababa, Ethiopia. See for the text of the Charter and the status of ratifications *supra* note 7.

65. Under the present African Charter on Children's Rights, the term "child" refers to every human being under the age of 18 years. This definition makes it possible to extend to anyone under the age of 18 the special protection which is due to a child, regardless of any national legislation which may set a lower age of majority (Article 1).
66. It should be noted that the African Charter on Children's Rights draws on the UNCRC and the two documents share the fundamental principles of universally recognised children's rights, such as the principle of non-discrimination, the respect for the best interests of the child, the participation of children, the survival and development of the child. These principles encompass all civil, political, economic, social and cultural rights that guarantee the protection of the child. In addition, the African Charter on Children's Rights provides for specific rights of protection for children subject to adoption procedures and for children separated from their parents.
67. In the context of the application of the African Charter on Children's Rights, the concept of the best interests of the child occupies a central place according to Article 4 (1), which provides that *"In any action concerning a child, undertaken by any person or authority the best interests of the child shall be the primary consideration"*. Mirroring the concerns of the UNCRC with regard to the protection of the child in family law disputes, this article provides that *"In all judicial or administrative proceeding affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate"* (Article 4 (2)).
68. The preamble of the African Charter on Children's Rights recalls the particular context in which many African children live because of cultural, social, economic, traditional factors, armed conflict, hunger, etc. It is in the best interests of the child that States must take the necessary measures to implement the provisions of the Charter. To this end, any custom, tradition, cultural practice that is incompatible with the specified rights and duties should be discouraged (Article 21). It is the best interests of the child that must be the primary consideration (Article 4), thereby taking into account the child's physical and mental immaturity.

b) The protection of the rights of the child within the League of Arab States

69. The League of Arab States (hereinafter the "Arab League")⁷⁶ is a regional organisation with observer status at the UNO. It was founded on 22 March 1945 in Cairo by 7 countries: Egypt, Saudi Arabia, Iraq, Jordan, Lebanon, Syria and North Yemen. It currently has 22 Member States, including several ENI South Partner Countries such as Morocco (1958), Tunisia (1958) and Algeria (1962).⁷⁷ The association aims to promote the unity of the Arab "nation" and the independence of each of its members.

76. See the website of the League of Arab States (only available in Arabic) < <http://www.lasportal.org/ar/Pages/default.aspx> > (last consulted on 1 April 2018).

77. *Ibid.*, for a complete list of the accession status of the Arab countries.

70. The organisation of the Arab League is based on four main bodies: The Summit of Heads of State, the Council of Ministers, the Standing Committees and the General Secretariat. In addition, various treaty bodies were created to complement the 1945 Pact and several specialised agencies work closely with it.⁷⁸
71. On 15 September 1994, the Council of the League adopted the Arab Charter on Human Rights, which was retrospectively amended 20 years later, as the States did not accede to the Charter until 10 years after its initial adoption. International or national human rights organisations pointed out the weaknesses in the Arab Charter and this encouraged the adoption of a new **Arab Charter on Human Rights on 22 May 2004**.⁷⁹
72. The preamble to the Arab Charter on Human Rights recalls that human rights are “*considered in their universality and complementarity*” (para. 4) and in the new Article I the various objectives which the Charter assigns itself such as “*placing human rights at the heart of the national concerns of the Arab States; educating individuals in the Arab countries in accordance with universal principles and values and with those proclaimed in international human rights instruments; and establishing the principle that all human rights are universal, indivisible, interdependent and inseparable*”.⁸⁰
73. With regard to the protection of children, Article 33 (3) of the Arab Charter on Human Rights provides that “*State parties shall make all the necessary legislative, administrative and judicial provisions for the protection, survival and well-being of the child in a climate of freedom and dignity, ensuring that under all circumstances the child’s best interests form the basis for all measures concerning the child, be it a child at risk or a delinquent child*”.⁸¹
74. In the field of child protection, it is important to underline that the Arab League presented a specific project to the Council of Arab Social Affairs Ministers at their fourth meeting in Tunis from 4 to 6 December 1983, and these ministers adopted the **Charter of the Rights of the Arab Child (hereinafter the “Charter of the Arab Child”)**⁸² two years later, following the first Arab Congress on the Arab Child held in Tunis from 8 to 10 April 1980. The Charter of the Arab Child has been ratified by 7 Arab States, namely Palestine represented by the Palestine Liberation Organisation (1985), Syria (1985), Iraq (1986), Libya (1987), Jordan (1992) and Egypt (1994).⁸³
75. It should be noted that the Charter addresses the rights of the Arab child, rather than addressing the rights of all children in Arab countries. The Charter provides for the protection of the rights of the child and its entitlement to be raised in a family characterised by stability, affection with the assurance of a worthy status in its family. The child must have access to social security, housing and a balanced diet appropriate to each stage of its development. In addition, the protection of the rights of the child must be implemented through legislative initiatives in each Arab State, taking into account the

78. M.A. Al-Midani, The League of Arab States and the Arab Charter on Human Rights, available online at < https://www.acihl.org/Articles.htm?Article_id=6 > (last consulted on 1 April 2018).

79. For the text of the Arab Charter on Human Rights see *op. cit.* note 9.

80. See, A. Mahiou, *La Charte arabe des droits de l’homme*, pp. 1-19, especially p. 9, available online at < https://blogavocat.fr/sites/default/files/fichiers/la_charte_arabe_des_droits_de_l_homme_-_a_ma.pdf > (last consulted on 1 April 2018).

81. See the text of the Arab Charter on Human Rights *supra* note 9.

82. See the text of the Arab Charter of the Arab Child *supra* note 10.

83. For further details on the Charter of the Arab Child and the state of accession to this agreement, see M. Amin Al-Midani, *op. cit.* note 78, available online at < https://www.acihl.org/Article.htm?Article_id=7 > (last consulted on 1 April 2018).

commitments made on the basis of this Charter and ensuring that the interests of the child is a priority in all cases.

76. Nevertheless, the Charter of the Arab Child has been strongly criticised for being incoherent with international law since it lacks an effective mechanism for enforcing protection of the child.⁸⁴ In fact, Article 50 of the Charter makes it incumbent on the Member States of the Arab League, not just the signatory States to the Charter, to submit to the Secretariat of the League, “*reports on the measures adopted as well as the achievements made in the light of what has been agreed in this Charter*”. This same article also requires that these reports must mention the factors and obstacles “*which affect the degree of fulfilment of the obligations arising from the present Charter*”. However, the latter does not specify whether there is a follow-up to these reports by the Secretariat or, for example, by the Permanent Arab Commission on Human Rights.⁸⁵
77. At its 2012 Summit, the Arab League adopted the Marrakesh Declaration, which affirmed the commitment to the principles set out in the UNCRC and its Protocols. To date, no proposal to revise the Charter of the Arab Child has been initiated in the Arab League.⁸⁶

3. The scope and implementation of the principle of the best interests of the child in the UNCRC

78. Article 1 of the UNCRC states that “*a child means any person under the age of eighteen*”. The age of the child is a legal parameter currently also used in Europe to define a child.⁸⁷
79. The aim is to recognise that the child, as the possessor of its own rights, is not a passive beneficiary of welfare organisations, but an active participant in his/her own development. The UNCRC defines childhood as a period that is distinct from adulthood and sets out the rights that are required by a child so that he/she can fully develop without suffering from hunger, poverty, deprivation of care or abuse.
80. Implementation of the UNCRC is based on a rights-based approach to child rights issues. Human rights are a set of standards that are internationally agreed and legally binding, and that all persons, including children, should be able to benefit from. They can serve as standards of human dignity and identity to be embedded in every culture, religion and tradition around the world. Human rights represent a validated framework and action plan for mutual accountability and dialogue between international development partners and civil society.
81. In this sense, the UNCRC is the most comprehensive expression of the rights of the child in international law. This was the first instrument of human rights legislation to combine in one document legal

84. See M. Rishmawi, *The League of Arab States - Human Rights Standards and Mechanisms*, available online at < <http://www.cihrs.org/wp-content/uploads/2015/12/league-arab-states-manual-en-20151125.pdf> > (last consulted on 1 April 2018), p. 83.

85. See M.A. Al-Midani, *op. cit.* note 78. See also M.A. Al-Midani, *Les droits de l'homme et l'Islam. Textes des Organisations arabes et islamiques*, Association des Publications de la Faculté de Théologie Protestante, Université Marc Bloch, Strasbourg, 2003, pp. 7 *et seq.*

86. See M. Rishmawi, *The League of Arab States - Human Rights Standards and Mechanisms*, *op. cit.* note 84.

87. See also the terminology section “Definition of the child” *supra* paras 14 *et seq.*

norms relating to economic, social, cultural, civil and political rights. States that ratify the UNCRC, including all ENI South Partner Countries, make a legal commitment to implement the associated provisions. Hence, the UNCRC is applicable in Algeria⁸⁸, Lebanon⁸⁹, Morocco⁹⁰, Tunisia⁹¹, Egypt⁹², Jordan⁹³, Israel⁹⁴ and Palestine.⁹⁵

82. As a result, the main responsibility for respecting, protecting and implementing the rights of the child lies with the State. Aiming to assist States in the effective implementation of the UNCRC obligations, the International Committee on the Rights of the Child is responsible for monitoring the practice under the UNCRC and its Optional Protocols (a).
83. In addition, the United Nations Committee on the Rights of the Child urges State parties to comply with their obligation to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”⁹⁶ to respect the best interests of the child (b).

a) The role of the International Committee on the Rights of the Child

84. The International Committee on the Rights of the Child (hereinafter the “Committee”) is a body of 18 independent experts whose mission, according to Article 43 UNCRC, is to review the progress made by State parties in fulfilling the obligations under this Convention.
85. The Committee defines itself as the supervisor of the implementation of the rights of the child. The State parties are required to submit reports to it at regular intervals – within two years from the date of entry into force of the Convention and every five years thereafter – “provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned”.⁹⁷ After submission of these reports, the Committee drafts “Concluding Observations”⁹⁸ in which it informs the State concerned of its preoccupations and recommendations.
86. It should be noted that three optional protocols are annexed to the UNCRC to reinforce rights in specific areas: the Protocol on the involvement of children in armed conflicts⁹⁹, the Protocol on the sale of children, child prostitution and child pornography¹⁰⁰ and the optional Protocol to the

88. The UNCRC was signed by the government of Algeria on 26 January 1990 and ratified on 16 April 1993.

89. The UNCRC was signed by the government of Lebanon on 26 January 1990 and ratified on 14 May 1991.

90. The UNCRC was signed by the government of Morocco on 26 January 1990 and ratified on 21 June 1993.

91. The UNCRC was signed by the government of Tunisia on 26 February 1990 and ratified on 30 January 1992.

92. The UNCRC was signed by the government of Egypt on 5 February 1990 and ratified on 6 July 1990.

93. The UNCRC was signed by the government of Jordan on 29 August 1990 and ratified on 24 May 1991.

94. The UNCRC was signed by the government of Israel on 3 July 1990 and ratified on 3 October 1991.

95. The UNCRC was signed by the government of Palestine on 3 April 2014.

96. Article 4 of the UNCRC. See also the United Nations Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available online at < <http://www.refworld.org/docid/4538834f.html> > (last consulted on 1 April 2018).

97. See Article 44 (2) UNCRC.

98. Concluding Observations of the Committee are available per country on the United Nations website at < www.ohchr.org > (last consulted on 1 April 2018) under “Human Rights by Country” then “Country name” then “reporting status” then “CRC-Convention on the Rights of the Child”.

99. For the text of the Protocol see < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACRC.aspx> > (last consulted on 1 April 2018).

100. For the text of the Protocol see < <http://www.ohchr.org/FR/ProfessionalInterest/Pages/OPSCCRC.aspx> > (last consulted on 1 April 2018).

Convention on the Rights of the Child on the establishment of a communications procedure.¹⁰¹ The UNCRC and its three Protocols are monitored by the Committee.

87. The Committee is not in itself a body with jurisdictional powers. Nevertheless, it has the authority to examine submissions from individuals and to initiate applications in regard to serious or systematic violations of the rights set forth in the Convention, the Optional Protocol to the Convention, on the sale of children, child prostitution and child pornography, or the Optional Protocol to the Convention on the involvement of children in armed conflict. It invites the State party to co-operate in the examination of this information and, to this end, to promptly submit their comments.
88. The Committee has no enforcement powers; it may simply enjoin State parties to implement its recommendations contained in the Concluding Observations, by stating: The Committee urges the State to make every effort to implement previous recommendations, the Committee urges the State party to make every effort to comply with recommendations, the Committee urges the State to do its utmost to follow up on the recommendations, etc. In view of this lack of power of enforcement, it is quite possible that States may not comply with their reporting obligations in a timely manner or may not implement previous recommendations of the Committee.
89. In order to compensate for its lack of powers of enforcement, the Committee actively encourages States to incorporate the UNCRC in domestic law to enable the courts to punish violations, to ratify international conventions that have binding legal mechanisms, or to appoint a mediator or commissioner or other independent human rights body with a broad mandate, powers and resources to monitor, protect and promote all rights set out in the Convention for all children.

b) The development of the concept of the best interests of the child in the UNCRC

90. The concept of the “best interests of the child” is explicitly stated in several human rights protection instruments. The concept actually predates the UNCRC and was already enshrined in the 1959 Declaration of the Rights of the Child (principle n. 2)¹⁰² and in the Convention on the Elimination of All Forms of Discrimination against Women (Articles 5 (b) and 16 (1) d)),¹⁰³ as well as in various regional instruments and in many national laws and international instruments.¹⁰⁴
91. The UNCRC has the distinction of being the first legally binding international instrument to incorporate a range of human rights, including civil, cultural, economic, political and social rights. To this end, it considers the child in his/her entirety, i.e., by emphasising the aspects of the child as an individual and as a member of a family and a community, with rights and responsibilities related to the child's age and stage of development. In this sense, the widespread acceptance of the UNCRC indicates a general

101. For the text of the Protocol see < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCR.aspx> > (last consulted on 1 April 2018). It has been adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011, which entered into effect on 14 April 2014, see < www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx > (last consulted on 1 April 2018).

102. See for the text of the Declaration *supra* note 53.

103. The Convention text is available online at < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> > (last consulted on 1 April 2018).

104. For more information on some of these instruments, see *infra* Part B.

commitment to the rights of children. This implies that States that have ratified this Convention have an obligation to respect and to enforce all the rights devoted to children therein.

92. The UNCRC also focuses on the protection and promotion of the rights of children with disabilities, children of minorities (or indigenous children) and refugee children. In addition, it sets out four principles to which the implementation of all the rights that it stipulates for must be subordinated, i.e. non-discrimination, the right to life, survival and development, respect for the child's opinions and the best interests of the child.
93. The Committee was of the opinion that Article 3 (1) "*represents one of the four general principles of the Convention for interpreting and implementing all the rights of the child and applies it as a dynamic concept requiring assessment adapted to the specific context*"¹⁰⁵. This concept is a general criterion which should guide all decisions concerning children, meaning that "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"¹⁰⁶
94. Thus, the concept of the best interests of the child is a principle that plays a vital role in all actions that affect children. When decisions about their future are made, for example in cases of parental divorce, children have the right to be heard and to give their opinion in a manner appropriate to their age and degree of maturity.
95. In cases relating to custody and access rights, the best interests of the child are a primary consideration to be raised by the presiding judge when assessing the individual situation of the child so as to reach a decision that meets the child's needs. In addition, they may also serve as a method of assessment in custody or access rights cases in which the parents are of different religions or where the case has an international aspect. Finally, the concept can also be introduced in accelerated procedures under family laws relating to custody or access rights in national legal systems, or in cases of unlawful removal and retention of a child across international borders.¹⁰⁷
96. In the context of this Study, it is therefore appropriate to review the framework for the application of the concept of the best interests of the child.

i) The function of the concept of best interests of the child

97. The UNCRC does not specify where and how the child's interests are determined, and in fact none of the international conventions concerning minors, in which the concept is omnipresent, nor the domestic law that refers to it, has ever provided a definition.

105. UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1)*, 29 May 2013, CRC/C/GC/14, available at < <http://www.refworld.org/docid/51a84b5e4.html> > (last consulted on 1 April 2018), at p. 3. See also N. Cantwell, *La genèse de l'intérêt supérieur de l'enfant dans la Convention relative aux droits de l'enfant*, *Journal du droit des jeunes*, 2011/3 (No. 303), p. 22-25. DOI: 10.3917/jdj.303.0022, available online (in French) at < <https://www.cairn.info/revue-journal-du-droit-des-jeunes-2011-3-page-22.htm> > (last consulted on 1 April 2018).

106. Article 3 (1) UNCRC.

107. See P. Hammje, *L'intérêt supérieur de l'enfant face aux sources internationales du droit international privé*, in *Mélanges P. Lagarde*, Paris, Dalloz, 2005, pp. 365 et seq. The author proposes an interpretation of the best interests of the child that goes beyond the conventional distinction between abstract interest and concrete interest, contrasting the "conflictual" interest of the child with its "substantive" interest.

98. The reason is probably connected with the idea that this concept can only be effective if it is presented to the judge without a predefined meaning, so that it is up to the latter to give the concept a specific meaning in each case that he hears. Indeed, it seems impossible to determine in advance what should be considered in the interest of the child as this consideration is to be applied in multitude of different situations and will often simply mean that between two solutions, the one most favourable to the child is to be preferred.
99. In addition, the Committee states that the principle of the best interests of the child has three dimensions¹⁰⁸.
100. Firstly, the principle of the best interest of the child is a “substantive right” which must be taken into account when “different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general”.¹⁰⁹ Thus, paragraph 1 of Article 3, which creates an intrinsic obligation for States, is directly applicable and can be invoked before a court, since it more broadly establishes a right for all parties involved in the process of separation of the child and its parents.
101. Secondly, it is a “fundamental interpretative legal principle”¹¹⁰ which serves as guidance when a legal provision is open to several interpretations. In this case, the Committee stresses that the choice that most efficiently serves the best interests of the child should be selected. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.
102. Thirdly, the principle of the best interests of the child is a “rule of procedure” imposed on State parties, which must justify the manner in which a decision in the best interests of the child is reached, that is to say “what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases”.¹¹¹
103. The Committee requests that provisions of the UNCRC be given concrete application in the light of Article 3 concerning the best interests of the child and that governments make this principle a “primary consideration”.¹¹² It therefore serves as a standard, an objective, a road map, a guiding concept, which should inform, animate and influence all internal norms, policies and decisions as well as funding related to children.¹¹³

ii) Taking into consideration of the best interests of the child in all decisions

104. The term best interests of the child is a highly subjective notion and it can only be determined by the sovereign judgement of judges, whereby “its content must be determined on a case- by-case basis”.¹¹⁴ It is a flexible concept that must be evaluated and applied according to the specific situation in which the child finds itself. This is why Article 3 (1) of the UNCRC limits itself to prescribing that the

108. See the General Comment No. 14 (2013), *op. cit.* note 105, at para. 6.

109. *Ibid.*

110. *Ibid.*

111. *Ibid.*

112. See General Comment No. 5 (2003), *op. cit.* note 96, at para. 45.

113. In this regard, see: A. Gouttenoire et al, *Article 3: Intérêt supérieur de l'enfant, La Convention internationale des droits de l'enfant vingt ans après. – Commentaire Article par Article, Droit de la famille* No. 11, November 2009, dossiers 13 and 16: “According to the first paragraph of Article 3, the best interests of the child must guide the author of any action concerning a child”.

114. See the General Comment No. 14 (2013), *op. cit.* note 105, at para. 32.

interests of the child shall be a primary consideration in the decision-making process and not the “raison d’être” of the decision.

105. The wording of Article 3 (1) of the UNCRC that the best interests of the child are a consideration informing the judge in his deliberations, does not result in an autonomous right but is intended to accompany the application of other legal provisions, on the basis of which the judge is required to make a decision concerning the child. The best interests of the child serves as a directive to the judge on how to apply other legal provisions, i.e. *to seek the best solution to be adopted under this principle*.
106. In general, the formulation makes it possible to extend the application of this clause to a multitude of subjects and decisions. For example, in cases of cross-border wrongful removal or retention of children, the 1980 Hague Child Abduction Convention aims to protect the best interests of children by providing for a mechanism of immediate return to the place of habitual residence. However, in individual circumstances, such as those defined in Article 13 (b) of the Hague Convention of 25 October 1980, an exception to the return might be necessary to protect the best interests of the child. These circumstances are defined as “*a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation*”¹¹⁵; it is quite obvious that it is not in the best interests of the child to order the child’s immediate return if this were to expose him or her to one or other of these dangers.¹¹⁶
107. *Inter alia*, the Committee underlines that in the assessment of the best interests of the child respect should be paid to “*the child’s right to express his or her views freely and due weight given to said views in all matters affecting the child*”.¹¹⁷
108. It should be noted that Article 3 (1) UNCRC is intended to ensure that measures taken in the name of the child are indeed in the child’s best interests. In this case, the principle of “*the best interests of the child is similar to a procedural right that obliges State parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration*”.¹¹⁸ The Committee recognises the existence of inextricable links between Article 3 (1) and Article 12 UNCRC in affirming the complementary role of these two articles. Indeed, “*one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children*”¹¹⁹ and taking this into consideration in all cases that concern them, including in the evaluation of their best interests.
109. In relation to the assessment of the best interests of the child, the Committee goes on to specify that the State parties must make the necessary arrangements for representation of the child, as well as establishing mechanisms to enable the child to be heard either directly or indirectly (through a representative) in any relevant judicial or administrative proceedings.¹²⁰

115. See Article 13 b) of the 1980 Hague Child Abduction Convention, *op. cit.* note 2.

116. See for ECtHR jurisprudence underpinning the compatibility of the mechanisms offered by the 1980 Hague Child Abduction Convention with the UNCRC principle of the best interests of the child under Part I, C, 2 at paras 178 *et seq.*

117. See the General Comment No. 14 (2013), *op. cit.* note 105, at para. 43.

118. UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at < <http://www.refworld.org/docid/4ae562c52.html> > (last consulted on 1 April 2018) at para. 70.

119. See the General Comments No. 14 (2013), *op. cit.* note 105, at para. 74.

120. *Ibid.*, at paras 44 and 45.

B. How international, regional and bilateral instruments aimed at resolving cross-border family conflicts assist in safeguarding the best interests of the child

Juliane Hirsch

110. In the following, a brief overview shall be given of international, regional and bilateral instruments offering solutions for cross-border family disputes in the European and Southern Mediterranean region. It will be explored how these instruments assist in safeguarding the central children's rights enshrined in the UNCRC and in particular the principle of Article 3 (1) UNCRC that in all actions concerning children the best interests of the child shall be a primary consideration.

1. International instruments to resolve cross-border family conflicts

a) The 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention

i) The 1980 Hague Child Abduction Convention

111. The **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction**¹²¹ soon approaching its 40th anniversary is one of the most widely ratified Hague Family Conventions. It is currently (status: 1 April 2018) in force in 98 States from all regions of the world. In the European Union, all Member States are Contracting States to this Convention and among the ENI South Partner Countries, Israel, Morocco and Tunisia are Contracting States.

112. It is to be highlighted that this Convention deals solely with the civil aspects of a child's wrongful removal or retention and does not regulate the question of possible penal law consequences of the removal or retention.

113. As stated in the Preamble, the 1980 Hague Child Abduction Convention aims "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish

121. See for the text and further information on the 1980 Hague Child Abduction Convention *supra* note 2.

procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access”.

- I 14. The Convention is an important tool in protecting the interests of children in cross-border family disputes. It has to be highlighted that expeditious action under the Convention is “*a critical factor in protecting children’s interests*”. Swift action in international child abduction cases will, *inter alia*, “*minimise disruption [from the child’s] familiar environment*”; “*minimise harm to the child caused by separation from the other parent*” and “*prevent or limit any advantage to the abductor gained by the passage of time*”.¹²²
- I 15. As reflected in the Explanatory Report,¹²³ the drafters have been very cautious to create an instrument that could assist in safeguarding the best interests of the child in cases of international wrongful removal or retention taking into consideration the individual circumstances of the case. The Convention’s provisions on the expeditious return mechanism contain a limited number of exceptions to the return, recognising that in the individual circumstances of a case the child’s removal “*can sometimes be justified by objective reasons which have to do either with [the child’s] person, or with the environment with which [the child] is most closely connected*”.¹²⁴
- I 16. The 1980 Convention predates the entrance into force of the UNCRC, but nonetheless serves as a tool to implement a number of important children’s rights enshrined in the UNCRC.¹²⁵
- I 17. It is the 1980 Convention’s objective to ensure that rights of custody and contact are effectively respected across borders. Through the establishment of an international legal framework for the expeditious return of wrongfully removed or retained children, the Convention assists in securing a continuous relationship of the child with both parents (corresponding to the rights guaranteed by Article 9 and 10 of the UNCRC). Besides, the Convention also provides remedies for cross-border contact cases, which are not necessarily linked to a cross-border wrongful removal or retention.
- I 18. The 1980 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 the return proceedings are ongoing, see Article 16 of the Convention. The Convention thereby equally assists in guaranteeing that the decision on custody can be taken by a court with proximity to the child’s habitual life circumstances which is well placed to assess the best interests of the child in view of the custody decision.¹²⁶

122. See Chapter 1.5.3. of the Guide to Good Practice under the 1980 Hague Child Abduction Convention Practice: Part I Central Authority Practice, 2008, available online in several languages, see the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=24> > (last consulted on 1 April 2018).

123. See E. Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, available at < www.hcch.net > under “Publications” then “Explanatory Reports”, at paras 21 et seq.

124. *Ibid.*, at para. 25.

125. In particular Articles 4, 8, 10, 11 and 35, see the recommendation to ratify the 1980 Child Abduction Convention as a means of implementing certain central children’s rights, *The Implementation Handbook for the Convention on the Rights of the Child*, Fully Revised Third Edition, commissioned by the United Nations Children’s Fund, UNICEF, Geneva, 2007. Article 4 – Implementation of the Rights in the Convention – Ratification of other international instruments, pp. 50-51; Article 8 - Preserving the child’s identity, pp. 117, 119; Article 10 – Preserving parent-child contact – p. 139; Article 11 – Illicit transfer and non-return of children – pp. 143-146; Article 35 – Prevention of Abduction, sale and trafficking – p. 541.

126. Apart from the negative rule on jurisdiction in Article 16 of the 1980 Convention, the Convention does not contain any rules on international jurisdiction for custody decisions. See for the rules on international jurisdiction contained in the 1996 Hague Child Protection Convention below.

119. The notion that children of sufficient age and maturity should have their own say in matters of custody and contact (rights embodied in Article 12 of the UNCRC) is equally part of the understanding that influenced the drafting of the 1980 Convention. The Convention applies only to children up until the age of 16 and this is because the drafters considered that “a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority”.¹²⁷ In addition, the Convention provides in Article 13(2) that the child's views concerning the essential question of return will be taken into consideration provided the child has attained an age and sufficient degree of maturity.¹²⁸
120. Finally, it goes without saying that the 1980 Hague Child Abduction Convention serves as a tool to implement the State obligation to “combat the illicit transfer and non-return of children abroad” (Article 11(1) UNCRC) and the abduction of children (Article 35 UNCRC).
121. Two examples shall briefly illustrate the functioning of the 1980 Hague Child Abduction Convention. It shall be assumed that the 1980 Convention is in force between States A and B.

Example for a wrongful retention

The child (7 years of age) habitually resides with her custodial mother in State A. The father, who had relocated to State B following the couple's divorce, spends part of the summer holidays with child in State B. At the end of the holidays, the father refuses to return the child to State A.

Example for a wrongful removal

The child (5 years of age) lives with her unmarried parents in State A. Following the breakdown of the couple's relationship, the mother decides to go back to her home State B to live there with the child. She takes the child to State B without the consent of the child's father who, under the law of State A, has joint rights of custody by operation of law.

122. In the above introduced examples, the 1980 Convention would assist in resolving the cross-border family dispute in the following way: The “left-behind parent” will be directly supported by the Central Authorities under the Convention in effectuating the expeditions return of child. The Central Authority in the State to which the child has been wrongfully removed (or in which the child is wrongfully retained) will assist, in particular, with discovering the whereabouts of the child, trying to bring about a voluntary return of the child and initiating or facilitating the institution of judicial or administrative

¹²⁷. See para. 77 of the Explanatory Report of the 1980 Hague Convention, *op. cit.* note 123.

¹²⁸. With the further evolvement of the child's right to be heard in legal proceedings, children are today regularly given the opportunity to be heard in the course of Hague return proceedings if they are of sufficient age and maturity independent of whether the Article 13(2) exception is raised by one of the parties or not, see the observations made in No 50. of the Conclusions and Recommendations adopted by Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011): “The Special Commission welcomes the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defense has been raised. The Special Commission notes that States follow different approaches in their national law as to the way in which the child's views may be obtained and introduced into the proceedings. At the same time the Special Commission emphasises the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible. The Special Commission recognises the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity”. See also Philippe Lortie / Frédéric Breger, *The Child's Voice – 15 Years later Judges' Newsletter*; Vol. XXII, Summer-Fall 2018, available online at < <https://www.hcch.net/de/publications-and-studies/details4/?pid=6614> > (last consulted on 31 December 2018).

proceedings with a view to obtaining the return of the child and to make arrangements for organising or securing the effective exercise of rights of access (see Articles 7 and 21 of the Convention). Contracting States are obliged to provide expeditious return proceedings and the court seized with the Hague return proceedings is expected to order the return of the child within 6 weeks (Article 11 of the Convention).¹²⁹ Only if one of the narrow exceptions of Article 13 and Article 20 applies in the case the court can refuse to order the child's return. In the sample cases, nothing indicates the existence of facts justifying such an exception. The return order in Hague proceedings is without prejudice to the determination of the merits of custody, see Article 19 of the 1980 Convention.

123. It must be highlighted that all Hague Conventions established by the intergovernmental organisation Hague Conference on Private International Law benefit from the organisation's so-called post Convention services. As part of this, the Hague Conference invites all Contracting States and other interested States to meet in periodically organised Special Commission meetings to review the practical operation of the Convention. As a result of these meetings, the practice under the Convention is further elaborated and adapted to meet modern challenges and guarantee consistency with predominant international legal framework. The recommended practices for the 1980 Child Abduction Convention can be found in the Conclusions and Recommendations of Special Commission meetings.¹³⁰ In addition, a number of Guides to Good Practice have been developed under the 1980 Convention to assist in a better implementation and application of the Convention.¹³¹ Furthermore, in order to promote the consistent and uniform application of the Convention provisions, the Hague Conference makes available at the international case database INCADAT (www.incadat.com) summaries of court decisions in Hague Abduction Cases from Contracting States to the Convention.

ii) 1996 Hague Convention on Child Protection

124. 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**¹³² has currently (status: 1 April 2018) 47 Contracting States. In the European Union, all States are Contracting States to this Convention; among the ENI South Partner

129. The six-week delay noted in Article 11 of the Hague Convention is not an obligation and it is left open whether it should refer to the first instance proceedings only or to the whole Hague return proceedings, including appeal. Nonetheless, the Contracting States are doing their best to constantly improve the expeditious return mechanism under the Convention and a number of legal systems manage for a big part of their return applications to provide a final decision, including the appeal instance within a timeframe no longer than six weeks, such as UK-England and Wales. The most recent statistics (concerning the 2015 applications) on the operation of the Convention commissioned by the Hague Conference indicate that average time to conclude Hague return application in the over 74 Contracting States that participated in the statistical analysis were 124 days, including appeals. Among the legal systems with a very short average time to finalize the Hague return proceedings despite a relatively high number of applications are UK Scotland - 59 days, Norway - 69 days, Latvia - 70 days, UK England Wales - 76 days, Denmark - 79 days, Germany - 82 days, and New Zealand and Switzerland with both 87 days. See Nigel Lowe / Victoria Stephens, *Part I — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global report*, Prel. Doc. No. 11 A of September 2017, available online at < <https://assets.hcch.net/docs/511f0cb3-2163-4fd1-92ce-e3f16e304377.pdf> > (last consulted on 1 April 2018).

130. See for the Conclusions and Recommendations of Special Commission meeting to review the practical operation of the 1980 Convention and further connected documents the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=57&cid=24> > (last consulted on 1 April 2018).

131. These include the Guide to Good Practice on Central Authority Practice, the Guide to Good Practice on Preventive Measures, the Guide to Good Practice on Enforcement, and Guide to Good Practice on Mediation, as well as the Guide to Good Practice on Transfrontier Contact Concerning Children which equally is including Good Practice for the 1996 Hague Child Protection Convention. All Guides are available online in several languages, see the Hague Conference website at < <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=24> > (last consulted on 1 April 2018).

132. See for the text and further information on the 1996 Hague Child Protection Convention *supra* note 3.

Countries, Morocco is currently the only Contracting State.¹³³ The Convention provides for common rules on jurisdiction, applicable law, and recognition and enforcement in the field of parental responsibility. As the 1980 Hague Convention, the 1996 Hague Convention establishes a system of Central Authority-cooperation assisting individuals concerned in resolving cross-border family disputes.

125. The 1996 Convention stems from an area when the UNCRC was already in force. The Convention pays particular attention to central children's rights enshrined in the UNCRC. The preamble of the 1996 Convention which expressly refers to the UNCRC includes an express confirmation that the "*the best interests of the child are to be a primary consideration*". Throughout the Convention, the best interests of the child are given a central role.¹³⁴
126. The terminology used in the 1996 Hague Convention is proof of a change of perception of the role of the child in international family law as incited by the UNCRC. The modern term "parental responsibility" used by the Convention reflects the notion of a reciprocal rights situation between parents and children. The Convention, however, also refers to the today less used terms custody and rights of access, in order to reflect the linkage with the 1980 Convention.¹³⁵
127. The 1996 Hague Conventions, which applies to children up until the age of 18 years (Article 2), contributes to protecting children in cross-border family disputes and other cross-border situations (e.g., unaccompanied or separated children, runaway children) through a number of very effective mechanisms.
128. The Convention centralises jurisdiction on matters of parental responsibility in the courts / authorities of the country of habitual residence of the child, see Article 5. *I.e.*, in a given case, normally, only one country's courts / authorities can have jurisdiction on parental responsibility. This avoids parallel proceedings and conflicting decisions. At the same time, centralising jurisdiction in the State of habitual residence assists in safeguarding that the assessment of the best interests of the child in the course of custody or contact proceedings is made by a court / authority with proximity to the habitual life circumstances of the individual child.
129. In the situation of an international wrongful removal or retention of a child, the 1996 Convention reinforces the 1980 Hague Child Abduction Convention and upholds the jurisdiction on the merits of custody in the State of original habitual residence of the child before the removal or retention, see Article 7 of the 1996 Convention.
130. In addition, the Convention provides an effective system of recognition and enforcement of so-called measures of child protection, including decisions on parental responsibility, see Articles 23 *et seq.*¹³⁶ A

133. *Ibid.*

134. See for example Articles 8, 9, 10, 22, 28, 33 of the 1996 Convention; see also for further details P. Lagarde, *Explanatory Report on the 1996 Hague Child Protection Convention*, in *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998.

135. Explanatory Report of the 1996 Convention, *op. cit.* note 134, at para. 20, clarifying that the terms rights of custody and rights of access to children are reproducing the formulations found in 1980 Convention: "*The concept even of 'right' of the parents in custody and access matters was contested in the new context of parental responsibility instituted by the Convention on the Rights of the Child. The term has however been retained both for reasons of convenience and in order to take into account the still numerous legal systems which continue to conceive of parental responsibility as a linkage based on authority*".

136. See the general rule of jurisdiction in Article 5 of the 1996 Convention and the general rule on applicable law in Article 15 (1) of the 1996 Convention.

decision rendered in one Contracting State based on the Convention jurisdiction rules is, by operation of law, recognised in all other Contracting States and can, after being declared enforceable in accordance with the Convention be enforced there.

131. It is worth noting that 50 States from different regions of the world and with very differing legal traditions, including Islamic law based legal tradition, participated in the negotiations of the 1996 Convention.¹³⁷ The Convention text and Explanatory Report reflect the wish to create an international instrument of mutual respect between different legal systems in the field of child protection. It is not the Convention's intention to harmonise national family law. On the contrary, the Convention provides an effective system of recognition and enforcement of measures of child protection, which were taken based on the *lex fori of the court or authority having jurisdiction under the Convention*.¹³⁸ Article 3 of the 1996 Convention, which lists measure of child protection falling within the scope of the Convention, makes express reference to the Islamic law institute of "kafala",¹³⁹ demonstrating the capacity of the Convention to be applied in respect of very different family law legal traditions.
132. It should furthermore be noted that the 1996 Convention pays particular importance to the right of the child to be heard. Article 23(2) b) of the 1996 Convention provides that the recognition of a foreign measure of child protection can be refused should this measure have been taken "*except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State*".

b) 2007 Hague Child Support Convention and the 2007 Hague Protocol

i) The 2007 Hague Child Support Convention

133. The **Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance**¹⁴⁰ is a relatively recent international instrument, which is currently (1 April 2018) in force for 38 States. In the EU, the Convention is in force in all Member States except Denmark. It is not yet in force in any of the ENI South Partner Countries. 141 70 States from all regions of the world representing various legal traditions participated in the negotiations of the Convention.¹⁴²
134. The 2007 Convention simplifies and accelerates the cross-border recovery of maintenance by introducing procedures that are "*accessible, prompt, efficient, cost-effective, responsive and fair*".¹⁴³ It is expected to soon supersede former instruments on the cross-border recovery of maintenance,

137. See the Explanatory Report of the 1996 Convention, *op. cit.* note 134, at para. 1.

138. See the general rule of jurisdiction in Article 5 of the 1996 Convention and the general rule on applicable law in Article 15 (1) of the 1996 Convention.

139. See Article 3 e) of the 1996 Convention, see also the Explanatory Report of the 1996 Convention, *op. cit.* note 134, at para. 23 noting that „kafala“ had been included following a presentation of this institute by the Moroccan delegation.

140. See for the text and further information on the 2007 Hague Maintenance Convention *supra* note 4.

141. *Ibid.*

142. A. Borrás & J. Degeling, with the assistance of W. Duncan & P. Lortie, "Explanatory Report on the 2007 Hague Child Support Convention", The Hague, 2013, available online at < www.hcch.net > under "Publications" then "Explanatory Reports", at para. 11.

143. See the Preamble of the Convention.

including the widely ratified *UN Convention on the Recovery Abroad of Maintenance of 20 June 1956*, whose operational problems were the reason to set up a new Hague Convention.¹⁴⁴ The 2007 Convention establishes a Central Authority cooperation system assisting individuals involved in cross-border maintenance cases with far-reaching assistance, including free legal assistance for child support applications.

135. In its preamble, the 2007 Hague Convention refers directly to Article 3 of the UNCRC recalling that in all actions concerning children the best interests of the child shall be a primary consideration. In helping to recover child maintenance across borders, the 2007 Convention assists in implementing the rights and obligations enshrined in Article 27 of the UNCRC, namely, that “every child has a right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” that “the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development, and” that States “should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child”.¹⁴⁵

ii) The 2007 Hague Protocol

136. Together with the 2007 Hague Child Support Convention, the **Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations**¹⁴⁶ was created. The 2007 Hague Protocol sets up uniform rules on applicable law in international maintenance cases and replaces the existing 1956 and 1973 Hague Conventions¹⁴⁷ on law applicable to maintenance obligations. It is today (1 April 2018) in force for 29 States and can be joined regardless of a ratification of the 2007 Hague Convention.
137. The Protocol’s uniform applicable law rules assist in avoiding conflicting decisions in maintenance matters and thus underscore the objectives of the 2007 Convention. In accordance with the basic rule in Article 3 of the 2007 Hague Protocol, the law of the State of habitual residence of the maintenance creditor as law applicable to matters of maintenance, i.e., in law applicable in child support cases, is generally the law of the habitual residence of the child. However, should in a child support case, the debtor be sued for maintenance in the State of his/ her place of habitual residence, the law applicable is the law of that State, Article 4.

144. See the Explanatory Report of the 2007 Hague Convention, *op. cit.* note 142, at para. 2.

145. See express reference to Article 27 UNCRC in the preamble of the 2007 Hague Convention.

146. See for the text of the 2007 Hague Protocol and further information on the instrument *supra* note 5.

147. *The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children*, see for the Convention text < http://www.hcch.net/index_en.php?act=conventions.text&cid=37 > (last consulted on 1 April 2018) and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, see for the Convention text < http://www.hcch.net/index_en.php?act=conventions.text&cid=86 > (last consulted on 1 April 2018).

2. Regional instruments

a) European Union instruments

i) EU Brussels IIa Regulation

138. 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**¹⁴⁸ is only applicable in relation between the EU Member States (the Regulation does not apply to the EU Member State Denmark). It unifies the rules on jurisdiction, recognition and enforceability of decision and enforceable agreements in the field of parental responsibility inside the EU and establishes as the above-described Hague Conventions a system of Central Authority cooperation. Besides, the EU Brussels IIa Regulation also regulates jurisdiction and recognition for matrimonial matters.
139. As concerns matters of parental responsibility, the content of the EU Brussels IIa Regulation is quite similar to that of the 1996 Hague Convention only that the EU Brussels IIa Regulation does not contain applicable law rules. The general jurisdictional rules contained in the two instruments are nearly identical as are the rules on Central Authority cooperation. The rules on recognition and enforcement also show similarities, however; the EU Brussels IIa Regulation abolishes the exequatur for certain decisions when accompanied by a certificate in accordance with the Regulation (see Article 41 and 42 of the Regulation).
140. When it comes to the interrelation between the EU Brussels IIa Regulation, the 1996 Hague and 1980 Hague Conventions, it can be stated in a simplified way: The 1980 Convention and the 1996 Convention apply internationally and in conjunction with each other. Inside, the EU, the Brussels IIa Regulation has priority as between Member States bound by the Regulation, but only as concerns the matters governed by the Convention. The 1980 Hague Convention is fully applicable inside the EU but is added to by provision of the Regulation.¹⁴⁹ The 1996 Hague Convention is largely replaced by the very similar provisions of the Regulation. The applicable law rules of the 1996 Hague Convention remain applicable in the EU, since the Brussels IIa Regulation does not regulate applicable law.¹⁵⁰
141. Like the 1996 Hague Convention, the EU Brussels IIa Regulation assists in protecting children in cross-border family disputes.

148. See for the text of the Brussels IIa Regulation *supra* note 12.

149. Article 61 of the Regulation states with regard to the 1996 Hague Child Protection Convention that the Regulation has predominance "(a) where the child concerned has his or her habitual residence on the territory of a Member State; (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.". However, since the EU Brussels IIa Regulation does not contain any rules on applicable law, the applicable law rules of the 1996 Hague Convention apply also as between EU Member States even where the child concerned has his / her habitual residence in an EU Member State.

150. As concerns the relation with the 1980 Convention, Article 60 e) notes that the "Regulation shall take precedence" "in so far as they concern matters governed by this Regulation". However, recital 17 of the Regulation clarifies that "in cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11".

142. As highlighted in Recital 12 of the Regulation, the Regulation jurisdiction rules are “*shaped in the light of the best interests of the child, in particular on the criterion of proximity.*” Any deviation from the general rule that jurisdiction lies with the authorities of the habitual residence of the child must be compatible with the best interests of the child, see Article 12 and 15 of the Regulation.
143. The EU Brussels IIa Regulation goes further than the 1996 Hague Convention in underscoring the right of the child to be heard. Article 11 of the EU Regulation, which contains additional rules applicable inside the EU for international child abduction cases under the 1980 Hague Convention, requests that “*it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity*”.¹⁵¹ Furthermore the issuance of the certificates required for the exequatur-free cross-border recognition of certain decisions is conditioned upon that “*the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity*”, see Article 41 (2) c), 42(2) a) of the Regulation. In addition, like the 1996 Hague Convention, the Regulation provides as a ground for refusal of recognition of a foreign decision on parental responsibility that the decision “*was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought*”, Article 23, b) of the Regulation.

ii) The EU Maintenance Regulation

144. The **Council Regulation (EC) No 4/2009, of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations**¹⁵² only applies between EU Member States.¹⁵³ As the 2007 Hague Convention, the EU Maintenance regulation serves as a tool to implement Article 27 UNCRC.
145. When drafting the EU Maintenance Regulation, great importance was paid to ensure proper symmetry with the 2007 Hague Convention. Both instruments contain a number of identical rules in particular with regard to the Central Authority cooperation and the legal aid provisions. With regard to recognition and enforcement the EU Regulation goes much further than the international instrument: it abolishes the exequatur for maintenance decisions inside the EU.¹⁵⁴ The Regulation furthermore contains direct rules on jurisdiction and harmonises the law applicable to maintenance obligations inside the European Union by referring to the 2007 Hague Protocol, which is provisionally applied (see above the notes on the 2007 Hague Protocol) in the European Union since 18 June 2011 in all Member States except the United Kingdom and Denmark.
146. The Maintenance Regulation takes precedence over the 2007 Hague Convention, as between EU Member States.¹⁵⁵

151. See Article 11(2) EU Brussels IIa Regulation.

152. See for the text of the EU Maintenance Regulation *supra* note 13.

153. With some restrictions with regard to Denmark.

154. Provided that the decision was rendered in a EU Member State bound by the 2007 Hague Protocol, see Articles 15, 17 of the EU Maintenance Regulation.

155. See Article 69 (2) of the Regulation.

b) Council of Europe instruments - Council of Europe 1980 Custody Convention

147. The **European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children**¹⁵⁶ contributes to the international protection of children in cross-border family disputes by providing an effective system for the cross-border enforcement of custody and contact decisions rendered in a Contracting State. The Convention sets up 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, 23). 37 States have currently (status 1 April 2018) ratified the Convention, including all EU Member States except Slovenia.
148. The Convention is applicable without prejudice to the applicability of the 1980 Hague Convention and *vice versa*. This means, that for example a parent, whose child has been wrongfully removed to another State, can choose which remedy to use, provided the two States concerned are Contracting States to both the Council of Europe 1980 Custody Convention and the 1980 Hague Child Abduction Convention. A requirement for the effective use of the Council of Europe Convention in an abduction situation is, however, the existence of a “decision relating to custody”¹⁵⁷ whereas the 1980 Hague Convention solely requires that this removal has occurred in the breach of an actually exercised right of custody whereby custody rights by operation of law suffice. It is to be noted that the Brussels IIa Regulation takes precedence over the Council of Europe 1980 Custody Convention.¹⁵⁸

c) Regional Instruments endorsed by the Council of Arab Ministers – The Riyadh Arab Agreement for Judicial Cooperation

149. The **Riyadh Arab Agreement for Judicial Cooperation**¹⁵⁹ endorsed by the Council of the Arab Ministers of Justice on 6 April 1983 provides for rules on judicial cooperation including rules on recognition and enforcement of decisions in civil and commercial matters. The agreement, which can be joined by State member of the Arab League, is today in force for more than 20 legal systems including the ENI South Partner Countries: Algeria, Jordan, Lebanon, Morocco, Palestine and Tunisia (status 1 October 2017). The Riyadh Agreement for Judicial Cooperation is very broad in scope and covers, *inter alia*, to “judgements made by the courts of any other contracting party in civil cases including judgements related to civil rights made by penal courts and in commercial, administrative and personal statute judgements having the force of *res adjudicate*”.¹⁶⁰ A decision rendered in a party to the Riyadh Agreement for Judicial Cooperation will be recognised in any other contracting party provided, the decision was rendered based on a ground of jurisdiction contained in Article 27 and 28 of the agreement and provided none of the grounds for non-recognition of Article 30 are applicable.

156. See for the text of the Council of Europe 1980 Custody Convention *supra* note 14.

157. See Article 7 et seq. of the Council of Europe 1980 Custody Convention.

158. See Article 60 d) of the Brussels IIa Regulation.

159. *Supra* note 8.

160. See Article 25 of the agreement's unofficial English translation available at < <http://www.refworld.org/docid/3ae6b38d8.html> > (last consulted on 1 April 2018).

3. Bilateral arrangements

150. A brief look shall be taken on the various bilateral agreements that States in the European and Southern Mediterranean region have concluded aiming to assist in the resolution of cross-border family conflicts, in particular, in cases of cross-border wrongful removal or retention. The analysis will concentrate on the following bilateral agreement in force between two States from the European and Southern Mediterranean region:

- Bilateral agreement Algeria-France (1988),¹⁶¹
- Bilateral agreement Egypt-Australia (2000),¹⁶²
- Bilateral agreement Egypt-Canada (1997),¹⁶³
- Bilateral agreement Egypt-France (1982),¹⁶⁴
- Bilateral agreement Egypt-Sweden (1996),¹⁶⁵
- Bilateral agreement Egypt-USA (2003),¹⁶⁶
- Bilateral agreement Lebanon-Canada (2000),¹⁶⁷
- Bilateral agreement Lebanon-France (2000),¹⁶⁸
- Bilateral agreement Lebanon-Switzerland (2005),¹⁶⁹
- Bilateral agreement Morocco-Belgium (1981),¹⁷⁰
- Bilateral agreement Morocco-France (1981),¹⁷¹
- Bilateral agreement Morocco-Spain (1997),¹⁷²
- Bilateral agreement Tunisia-Belgium (1989),¹⁷³
- Bilateral agreement Tunisia-France (1982),¹⁷⁴
- Bilateral agreement Tunisia-Sweden (1994).¹⁷⁵

151. The protection of children and children's interest is a central motive of these bilateral agreements, which is explicitly often referred to in several of them.¹⁷⁶ While the majority of these bilateral agreements predate the entry into force of the UNCRC, some of the more recent make express reference to the UNCRC. The objective "*to combat the illicit transfer and non-return of children abroad*" in accordance with Article 11 of the UNCRC figures prominently in the preamble of a number of bilateral agreements.¹⁷⁷ In addition, the bilateral agreements assist in implementing, in particular the right of the

161. *Supra* note 18.

162. *Supra* note 19.

163. *Supra* note 20.

164. *Supra* note 21.

165. *Supra* note 22.

166. *Supra* note 23.

167. *Supra* note 24.

168. *Supra* note 25.

169. *Supra* note 26.

170. *Supra* note 27.

171. *Supra* note 28.

172. *Supra* note 29.

173. *Supra* note 30.

174. *Supra* note 31.

175. *Supra* note 32.

176. See for example, bilateral agreements Algeria-France: Preamble and Article 12(1); Egypt-Australia: Art 1; Egypt-France: Chapter V; Egypt-Sweden: Article 2c); Lebanon-Switzerland: Preamble; Lebanon-France: Preamble; Morocco-France: Preamble; Morocco-Spain: Preamble.

177. See the bilateral agreements Egypt-Australia, Egypt-Canada, Egypt-Sweden, Lebanon-Canada, Lebanon-France, Lebanon-Switzerland and Tunisia-Sweden.

child to maintain personal relations and direct contact with both parents on a regular basis as enshrined in Articles 9 and 10 of the UNCRC. It should be noted, that some of the bilateral agreements, such as the agreement between Morocco and France and the agreement between Tunisia and France are larger in scope and also deal with other subject matters such as the recovery of maintenance.

152. Overall, the bilateral agreements follow a similar model of operation. They establish so-called “Joint Consultative Commission” often comprising officials from Ministries of the two Contracting States.¹⁷⁸ Some bilateral instruments create a central authority in each Contracting State instead¹⁷⁹ or in addition to the creation of a joint consultative commission¹⁸⁰ or in addition to a working group¹⁸¹. The Commission and / or central authority assists in bringing about at solution of cross-border family disputes and fulfils a number of more or less specifically described tasks of assistance including support with discovering the whereabouts of the child and with the actual implementation of rights of contact.¹⁸² A core responsibility of the Commission and / or central authority is to assist in bringing about an amicable resolution of the dispute where feasible.¹⁸³
153. Most of the Commissions established by bilateral agreements meet at least once a year¹⁸⁴ or upon request and regularly deal with a number of cases at the same time.
154. It is reported that the bilateral agreements have over the past years assisted to settle cross-border family disputes in a considerable number of cases. They remain, however, a relatively weak remedy, since the bilateral treaties are mere cooperation agreements and the body (bodies) created to assist in the resolution of the disputes does not have decision-making power. Furthermore, the frequency within which many of the commission created by the instruments meet is not necessarily permitting a speedy response in urgent cases.
155. With more effective binding international instruments in the field of international child protection, such as the 1980 Hague Convention and or the 1996 Hague Convention, in place between the two parties to a bilateral, the importance of the bilateral agreement will most likely diminish. However, since the “Joint Consultative Commissions” are working alongside existing international legal framework in place between the States bound by the agreement, they may also assist in the better implementation of international law between the two States.

178. See for example bilateral agreements Egypt-Australia: Article 3; Egypt-Canada: Article 1; Egypt-Sweden: Article 1; Lebanon-Canada: Article 1; Lebanon-Switzerland: Article 2; Morocco-Belgium: Article 1; Tunisia-Belgium: Article 1; Tunisia-France: Article 1; Tunisia-Sweden: Article 1.

179. See bilateral agreements Algeria-France: Article 1; Morocco-France: Article 20; Morocco-Spain: Article 3

180. See bilateral agreement Tunisia-France: Article 2.

181. See bilateral agreement Egypt-France: Articles 8, 38.

182. See for example bilateral agreement Algeria-France: central authority tasks set out in Article 2; Egypt-Australia: joint commission tasks set out in Articles 5 and 6; Egypt-Canada: joint commission tasks set out in Article 2; Egypt-France: central authority tasks set out in Article 35; Lebanon-Canada: joint commission tasks set out in Article 4; Lebanon-France: joint commission tasks set out in Article 4; Lebanon-Switzerland: joint commission tasks set out in Article 4; Tunisia-France: central authority tasks set out in Article 5.

183. See Algeria-France: Article 2 c); Egypt-Australia: Article 6 b) and c); Egypt-France: Article 35; Lebanon-Switzerland: Article 4 (2)a); Tunisia-Switzerland: Article 3. Encouraging a voluntary solution is also defined as a core task in the Egypt-USA under the point “Facilitating Parental Access to Children”, however, in contrast to other bilateral agreements the Egypt-USA bilateral does not set up a special institution charged with this task but encourages general consular cooperation.

184. See for example bilateral agreement Egypt-Sweden: Article 5; Lebanon-Switzerland: Article 3(1); Article 5; Lebanon-France: Article 3, Article 4(1); Morocco-Belgium: Article 2; Tunisia-Switzerland: Article 4; Tunisia-Sweden: Article 5.

C. European region - jurisprudence ECtHR and CJEU

Juliane Hirsch

156. In the European region, the children's rights law has been further developed and elaborated based on the international legal framework. The Council of Europe and the European Union have played an important role in this process. In addition to the above-mentioned legal instruments set up by the Council of Europe and European Union,¹⁸⁵ the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has contributed considerably to the implementation of children's rights in Europe. The fact that UNCRC principles and provisions have been introduced into binding instruments and case law at the European level provides effective channels of enforcement for children's rights in Europe.¹⁸⁶
157. A brief overview shall be given of particularly important children's rights law jurisprudence from both the ECtHR and the CJEU relating to the subject of this comparative study. More precisely, it shall be explored how the ECtHR¹⁸⁷ and CJEU¹⁸⁸ jurisprudence assists in implementing the UNCRC principle that the best interests of the child shall be a primary consideration in all actions concerning children (Article 3(1) UNCRC) and the connected right of the child to be heard and have his/ her views taken into consideration in accordance with age and maturity of the child (Article 12(2) UNCRC).

1. Overview ECtHR & CJEU competency on children's rights matters

a) The ECtHR

158. The ECtHR has jurisdiction on matters relating to the interpretation and application of the European Convention on Human Rights (ECHR) and its Protocols. Not surprisingly, the ECtHR has an extensive jurisprudence on children's rights. Of particular relevance for the subject addressed in this comparative study is the ECtHR's jurisprudence on Article 8 (right to respect for family life) and Article 6 (right to fair trial) of the ECHR.
159. The ECtHR case law regularly refers to the UNCRC, and in a number of cases the UNCRC is explicitly relied on.¹⁸⁹ It should be underlined in this context that the ECtHR consistently recognised that *"the [European] Convention [on Human Rights] cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law [...] in particular the rules concerning the international protection of human rights"*.¹⁹⁰

185. See *supra* Part I, A.

186. See also Handbook on European law relating to the rights of the child, *op. cit.* note 39, at pp. 26, 27.

187. ECtHR jurisprudence can be found online at < <https://hudoc.echr.coe.int/> > (last consulted on 1 April 2018).

188. CJEU jurisprudence can be found online at < <http://curia.europa.eu/> > (last consulted on 1 April 2018).

189. See also the Handbook on European law relating to the rights of the child, *op. cit.* note 39, at pp. 30, 31.

190. See ECtHR, **Nada v. Switzerland** (Grand Chamber), No. 10593/08, para. 169 with further references.

160. Any violation of the ECHR independent of whether it relates to the application of domestic or international law in force in the relevant Council of Europe State Party can be brought in front of the ECtHR.¹⁹¹ This also means that the jurisprudence of the ECtHR has an important influence on a “human rights”- consistent interpretation of international instruments in force in State Parties.
161. It is important to highlight that not only States but also individuals can seize the ECtHR. The individual applicant must file a complaint depicting that a State Party to the ECHR violated the Convention and that this violation directly and significantly affected the applicant and that domestic remedies are exhausted (see Articles 34, 35 ECHR). Given the limited legal capacity of children, children’s rights cases the ECtHR deals with are regularly the result of litigation initiated by a parent or legal representative of the child.
162. In the event the ECtHR finds that a State Party is in violation of its obligations under the ECHR, the State concerned is bound to ensure that such violation will not occur again and must, where necessary, amend its national legislation. The individual concerned can be awarded compensation for damages (see Articles 41 ECHR *et seq.*)

b) The CJEU

163. The CJEU has an area of responsibility that severely differs from that of the ECtHR. The Court of Justice is an institution of the European Union charged with ensuring that the European Union law is interpreted and applied consistently across the European Union. It equally is tasked with ensuring that countries and EU institutions abide by EU law.
164. Due to the court’s focus of competency, the CJEU has in the past had much less opportunity to deal with children’s rights issues. Most children’s rights cases so far delivered by the CJEU are in the context of EU citizenship and free movement.¹⁹² In the area of family law, a number of cases on the interpretation and application of the European Brussels IIa Regulation have given the CJEU the opportunity to allude to children’s rights principles. With the binding force given as of 2009 to the Charter of Fundamental Rights of the European Union, which implements central children’s rights as part of European Union law,¹⁹³ it is to be expected that in the future more children’s rights cases will be adjudicated by the CJEU.

2. ECtHR jurisprudence

165. The ECtHR has in various cases underpinned the UNCRC principle that the best interests of the child must be a primary consideration in all actions concerning the child.¹⁹⁴ In many family law cases where individual complaints allege a breach of Article 8 EHCR (right to respect for family life) as a

191. See the reference to established case law in this regards in ECtHR, **Nada v. Switzerland** (Grand Chamber), No. 10593/08, para. 167.

192. See further *Handbook on European law relating to the rights of the child*, *op. cit.* note 39, at pp. 29,30.

193. In particular Article 24 of the Charter; see above Part I, A. b).

194. See for example the ECtHR’s statement in ECtHR, **Maumousseau and Washington v. France**, No. 39388/05, 6 December 2007, at para. 66: “The Court notes that since the adoption of the New York Convention on the Rights of the Child of 20 November 1989, “the best interests of the child” in all matters concerning it, within the meaning of the New York Convention, have been paramount in child protection issues, with a view to the child’s development in its family environment”.

result of how State authorities dealt with matters of parental responsibility, custody and contact rights, the EHCR ultimately considers whether the best interests of the child concerned have been adequately assessed as required by international law. The ECtHR thereby does not itself make a conclusive assessment of the best interests of the child but examines whether the national authorities concerned were in their actions lead by an adequate assessment of the child's best interest.¹⁹⁵ In this context the ECtHR regularly also deals with the question of whether the child concerned was given opportunity to be heard and whether the child's views have been given due weight in accordance with the age and maturity of the child.

166. A few examples shall illustrate the way the ECtHR upholds the fundamental children's rights of Article 3(1) and Article 12 UNCRC.
167. When deciding whether or not there has been a violation of Article 8 ECHR in parental responsibility cases, the ECtHR consistently refers to the importance of striking a fair balance between the competing interests of the parents and the child and underlines the predominant importance of the best interests of the child, which may outweigh the parents' interests.¹⁹⁶
168. In **Sommerfeld v. Germany**,¹⁹⁷ where a father complained about restrictions on his contact rights with his daughter, who consistently opposed the contact, the ECtHR emphasised that **"in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents."**¹⁹⁸
169. In **Schneider v. Germany**,¹⁹⁹ where a biological father complained to have been denied contact with his child, whose legally recognised father was the mother's husband, equally underlined that the **[c]onsideration of what lies in the best interest of the child concerned is of paramount importance" and repeated that "depending on their nature and seriousness, the child's best interest may override that of the parents".**²⁰⁰
170. Similarly, in **Levin v. Sweden**,²⁰¹ where a mother complained about restrictions on her contact right with her children, who had been in institutional care following a history of child neglect, the ECtHR reiterated that in balancing the competing interest **"particular importance [is attached] to the best interests of the children which, depending on their nature and seriousness, might override those of the applicant" and added: "In essence, it is the best interest of the children that is of crucial importance."**²⁰² The ECtHR found that in this case **"the imposed contact restrictions were taken to protect the best**

195. As clarified in various judgments **"the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their power of appreciation"** see inter alia ECtHR, **Sahin v. Germany** [Grand Chamber], No. 30943/96, 2003, para. 64; ECtHR, **Sommerfeld v. Germany** [GC], No. 31871/96, 8 July 2003, para. 62; ECtHR, **Z.J. v. Lithuania**, No. 60092/12, 29 April 2014, at para. 96.

196. See, inter alia, ECtHR, **Sommerfeld v. Germany** [GC], No. 31871/96, 8 July 2003, para. 72; ECtHR, **Schneider v. Germany**, No. 17080/07, 15 September 2011, para. 93; ECtHR, **Anayo v. Germany**, No. 20578/07, 21 December 2010, paras. 65, ECtHR, **Levin v. Sweden**, No. 35141/06, 15 March 2012, at para. 64.

197. ECtHR, **Sommerfeld v. Germany** [GC], No. 31871/96, 8 July 2003.

198. ECtHR, **Sommerfeld v. Germany** [GC], No. 31871/96, 8 July 2003, at para. 72.

199. ECtHR, **Schneider v. Germany**, No. 17080/07, 15 September 2011.

200. ECtHR, **Schneider v. Germany**, No. 17080/07, 15 September 2011, at para. 93.

201. ECtHR, **Levin v. Sweden**, No. 35141/06, 15 March 2012.

202. ECtHR, **Levin v. Sweden**, No. 35141/06, 15 March 2012, at para. 64.

interests of the children” and that the interference with the applicant’s rights was “proportionate to the legitimate aim pursued”.²⁰³

171. As explained above, the ECtHR does not itself undertake a conclusive assessment of the best interests of the child in place domestic authorities, but rather reviews, in the light of the Convention, the domestic authorities’ assessment in the exercise of their power of appreciation. Hence, there are no ECtHR judgements that elaborate on a possible list of factors that such an assessment could take into consideration. However, in the course of examining the adequacy of the national authority’s assessment of the child’s best interests, the ECtHR sometimes alludes to aspects that should make part of this assessment.
172. In ***Maumousseau and Washington v. France***²⁰⁴ the ECtHR notes: “In matters of child custody, for example, the reason for considering the “child’s best interests” may be twofold: firstly, to guarantee that the child develops in a sound environment and that a parent cannot take measures that would harm its health and development; secondly, to maintain its ties with its family, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots...”²⁰⁵
173. At several instances, the ECtHR underlined that the assessment of the best interest of the child must be made in view of the particular circumstances of the individual case. See, for example, ***Anayo v. Germany***²⁰⁶ and ***Schneider v. Germany***.²⁰⁷ In ***X v. Latvia***²⁰⁸ the ECtHR highlighted that the “*child’s best interests do not coincide with those of the father or the mother, except in so far as they necessarily have in common various assessment criteria related to the child’s individual personality, background and specific situation*”.²⁰⁹ Referring to the “Guidelines on Determining the Best Interests of the Child”²¹⁰ issued by the United Nations High Commissioner for Refugees, the ECtHR notes in ***Neulinger and Shuruk v. Switzerland***: “*The child’s best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences ... For that reason, those best interests must be assessed in each individual case.*”²¹¹
174. In a number of cases, the ECtHR criticises the assessment of the child’s best interests as insufficient, because the child’s views were not explored and / or taken into consideration. Here, the right of the child to be heard, directly or indirectly, and have his / her views taken into consideration in accordance with the child’s age and maturity blends into the child’s best interests assessment.

203. ECtHR, ***Levin v. Sweden***, No. 35141/06, 15 March 2012, at para 69.

204. ECtHR, ***Maumousseau and Washington v. France***, No. 39388/05, 6 December 2007.

205. *Ibid.*, at para. 67; see also ECtHR, ***Gnahoré v. France***, no. 40031/98, at para. 59.

206. ECtHR, ***Anayo v. Germany***, No. 20578/07, 21 December 2010, at paras. 67 and 71 – highlighting that the best interests of the child had to be examined in the particular circumstances of the case.

207. ECtHR, ***Schneider v. Germany***, No. 17080/07, 15 September 2011, at paras. 95, 100, 104 – highlighting that the best interests of the child had to be examined in the particular circumstances of the case..

208. ECtHR, ***X v. Latvia*** [Grand Chamber], No. 27853/09, 26 November 2013, at paras. 101, 106, 107 and 115–119.

209. *Ibid.*, at para. 100.

210. UNHCR Guidelines on Determining the Best Interests of the Child, May 2008.

211. ECtHR, ***Neulinger and Shuruk v. Switzerland*** [Grand Chamber], No. 41615/07, 2010, at para. 138.

175. For example, in *N.Ts. v. Georgia*²¹² the ECtHR held that the Georgian courts had made an inadequate assessment of the best interests of the children concerned, failing to take into consideration the children's "emotional state of mind".²¹³ The case concerned three young boys, whose mother had died and who since that event had been in the care of the maternal family. In the last instance of appeal, it had been decided that the boys were to live with their father, who had at the time of the mother's death undergone treatment for drug addiction but wished, once his addiction had gone into remission, to take care of his sons. The ECtHR observed that there had been flaws in the legal representation of the children and criticised that "**taking into account the relevant international standards**" it was not understandable "*why the domestic courts failed both to give any consideration to the possibility of directly involving the older boy in the proceedings and to give reasons for not hearing him*".²¹⁴ Criticising the Georgian courts for failing to take into consideration that the children opposed being returned to their father, ECtHR highlighted that ordering the return to the father in the given circumstances "*without considering a proper transition and preparatory measures aimed at assisting the boys and their estranged father in rebuilding their relationship appear[d] to be contrary to their best interests*".²¹⁵
176. The above-cited Grand Chamber judgement *Sommerfeld v. Germany*²¹⁶ of the ECtHR contains further important findings regarding the hearing of children and the consideration of the child's views in decisions concerning parental responsibility. The 13-year old child concerned had been heard directly by the German judge and had expressed that she did not wish to have contact with her father. She had expressed this view consistently over the years in former proceedings. On the question of whether or not the national court should have ordered a psychological report on the possibilities of establishing contact between the child and the applicant, the Grand Chamber observed "*that as a general rule it is for the national courts to assess the evidence before them, including the means to ascertain the relevant facts [...]. It would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned*".²¹⁷ Referring to the age of the child concerned and the way she had been heard in the German proceedings, the ECtHR concluded that the German courts could "*reasonably reach the conclusion that it was not justified to force the girl to see her father, the applicant, against her will*" and that a psychological expert opinion had not been imperative.²¹⁸
177. In *Sahin v. Germany*²¹⁹, the ECtHR did not see a violation of Article 8 ECHR in the fact that the domestic courts had rendered a decision on the contact rights of a father without hearing the four-year-old child directly in court and without having the appointed psychological expert question the child directly on the relationship with her father. The ECtHR noted that the domestic courts had reasonably relied on the psychological expert's advice that the questioning of the child in court entailed a risk as did the direct questioning concerning the child's relationship with her father. The ECtHR clarified: that "**It would be going too far to say that domestic courts are always required to hear a**

212. ECtHR *N.Ts. v. Georgia*, No. 71776/12, 2 February 2016.

213. ECtHR *N.Ts. v. Georgia*, No. 71776/12, 2 February 2016, at para. 84.

214. See *N.Ts. v. Georgia (no. 71776/12)* at para. 80.

215. *Ibid.*, at paras. 80, 82.

216. ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003.

217. ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003, at para. 71.

218. ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003, at para. 72, 73.

219. ECtHR, *Sahin v. Germany* [GC], No. 30943/96, 2003.

*child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.*²²⁰ The ECtHR concluded that given the methods applied by the psychological expert “and her cautious approach in analysing the child’s attitude towards her parents” the German domestic court “did not overstep its margin of appreciation” when relying on the expert’s findings.²²¹

178. Last but not least, a brief look shall be taken on the particularities of the best interests of the child assessment in international child abduction cases as pointed out by the ECtHR.
179. Clarifying the relationship between the ECHR obligations and obligations from other international instruments in the field of international child abduction the ECtHR consistently holds that “**the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction [...] and the Convention on the Rights of the Child of 20 November 1989.**”²²² The ECtHR declared to be “entirely in agreement with the philosophy underlying the Hague Convention”²²³ and has over the years developed an important body of case law that has assisted in a better implementation and more considerate application of the Hague Convention in many Council of Europe State parties.
180. The ECtHR has repeatedly been seized by individuals claiming that the failure of a Contracting State to the 1980 Hague Abduction Convention to enforce the ordered return of their child, violated their right to respect for family life of Article 8 ECHR. The ECtHR found on several occasions that there had indeed been a breach of Article 8 ECHR because the authorities had “*failed to make adequate and effective efforts to enforce the applicant’s right to the return of [the] children*”,²²⁴ see for example **Ignaccolo-Zenide v. Romania**,²²⁵ **Sylvester v Austria**,²²⁶ **Karadžić v. Croatia**²²⁷ and **Cavani v. Hungary**.²²⁸ The ECtHR consistently underlined that in international abduction cases “*the adequacy of measures taken by the authorities [to enforce the return order] is to be judged by the swiftness of their implementation*” and that they “*require urgent handling as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them*”.²²⁹
181. At the same time, the ECtHR has dismissed in a number of instances complaints of parents, who had wrongfully removed or retained a child, that measures taken to enforce a Hague return order, including coercive measures, violated their rights under Article 8 ECHR. In the admissibility decision **Paradis**

220. ECtHR, **Sahin v. Germany** [GC], No. 30943/96, 2003, at para. 73.

221. ECtHR, **Sahin v. Germany** [GC], No. 30943/96, 2003, at para. 75.

222. See, for example, ECtHR, **X v. Latvia** [Grand Chamber], No. 27853/09, 26 November 2013, para. 93; ECtHR, **Neulinger and Shuruk v. Switzerland** [Grand Chamber], No. 41615/07, 2010, at para. 132 and **Maire v. Portugal**, No. 48206/99, 26 June 2003, para. 72 with further references.

223. ECtHR, **Maumousseau and Washington v. France**, No. 39388/05, 6 December 2007, at para. 96.

224. See ECtHR, **Ignaccolo-Zenide v. Romania**, No. 31679/96, 25 January 2000, at para. 113. See also ECtHR, **Sylvester v Austria**, No. 40104/98, at para. 72; ECtHR, **Karadžić v. Croatia**, No. 35030/04, 15 December 2005, at para. 63; ECtHR, **H.N. v. Poland**, No. 77710/01, 13 September 2005, at para. 83.

225. ECtHR, **Ignaccolo-Zenide v. Romania**, No. 31679/96, 25 January 2000.

226. ECtHR, **Sylvester v Austria**, No. 40104/98, at para. 72;

227. ECtHR, **Karadžić v. Croatia**, No. 35030/04, 15 December 2005, at para. 63.

228. ECtHR, **Cavani v. Hungary**, No. 5493/13, 28 October 2014.

229. See, for example, ECtHR, **Ignaccolo-Zenide v. Romania**, No. 31679/96, 25 January 2000, at para. 102; ECtHR, **Karadžić v. Croatia**, No. 35030/04, 15 December 2005, at para. 62.

and Others v. Germany,²³⁰ the ECtHR noted “that although coercive measures against children are not desirable in such sensitive situations, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live”. Similarly, in **Maumousseau and Washington v. France**²³¹, where the mother had gone into hiding with the child following the return order issued by the French court of appeal, the ECtHR noted that the use of coercive measures were a result of the mother’s total lack of cooperation with the French authorities and that “coercive measures cannot by itself entail a violation of Article 8 of the Convention”.²³²

182. Safeguarding the best interests of the child plays a central role in international child abduction cases. As the ECtHR repeatedly emphasised, a return under the 1980 Hague Convention “cannot be ordered automatically or mechanically”;²³³ this “follows directly not only from Article 8 of the [ECHR] but also from the Hague Convention itself, given the exceptions expressly enshrined therein to the principle of the child’s prompt return to his or her country of habitual residence”.²³⁴ The exceptions to return allow for an analysis of the interests of the child in circumstance of the individual case.
183. However, the assessment of the best interests undertaken in the context of Hague return proceedings should not be confused with of best interest of the child assessment in the context of a custody decision. This is a very important principle deriving from recent ECtHR jurisprudence: In **X. v. Latvia**,²³⁵ the ECtHR clarified that in the context of a Hague return application, which is clearly distinct from custody proceedings, “the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention, which concern the passage of time (Article 12), the conditions of application of the Convention (Article 13 (a)) and the existence of a “grave risk” (Article 13 (b)), and compliance with the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20).”²³⁶ This clarification by the ECtHR had become necessary following the judgement of **Neulinger and Shuruk v. Switzerland**,²³⁷ which had given raise to ambiguity concerning the assessment of the best interests of the child in the context of Hague return proceedings.

3. CJEU jurisprudence

184. As noted above, the Court of Justice of the European Union (CJEU) has, due to its field of competency, in the past had few opportunities to elaborate on principles of children’s rights law. Of particular relevance for the topics discussed in this comparative study are a number of CJEU judgements relating to the interpretation and application of the European Brussels IIa Regulation.

230. ECtHR, **Paradis and Others v. Germany**, decision as to the admissibility of the Application no. 4783/03.

231. ECtHR, **Maumousseau and Washington v. France**, No. 39388/05, 6 December 2007.

232. ECtHR, **Maumousseau and Washington v. France**, No. 39388/05, 6 December 2007, at para. 85.

233. See ECtHR, **X v. Latvia** [Grand Chamber], No. 27853/09, 26 November 2013, para. 98; see also ECtHR, **Maumousseau and Washington v. France**, No. 39388/05, 6 December 2007, at para. 72, ECtHR, **Neulinger and Shuruk v. Switzerland** [Grand Chamber], No. 41615/07, 2010, at para. 138.

234. See ECtHR, **X v. Latvia** [Grand Chamber], No. 27853/09, 26 November 2013, at para. 98.

235. ECtHR, **X v. Latvia** [Grand Chamber], No. 27853/09, 26 November 2013.

236. *Ibid.*, paragraph 101.

237. ECtHR, **Neulinger and Shuruk v. Switzerland** [Grand Chamber], No. 41615/07, 2010.

185. In **Zarraga v. Pelz**²³⁸ the CJEU had to decide whether the enforcement of a judgement in accordance with Article 42 of the Brussels IIa Regulation could exceptionally be opposed on the ground that the court of origin, despite stating in the accompanying certificate that it had fulfilled its obligation to hear the child, had in fact not heard the child.
186. The case concerned the enforcement of the return of a child to Spain following a wrongful retention in Germany by the child's mother. Following the parents' divorce in Spain in 2008, the Spanish courts had awarded the rights of custody of the then 8-year-old child to the father (Mr. Zarraga) and granted rights of access to the mother (Ms Pelz). This had been based, *inter alia*, on an expert opinion identifying the father as "best placed to ensure that the family, school and social environment of the child was maintained" since the mother had repeatedly expressed her wish to relocate to Germany to live there with her new partner. Subsequently the mother had indeed settled in Germany. Following the first summer holidays the daughter spent with her mother in Germany, the mother did not return the child to Spain. The Hague return proceedings initiated by the father ended with a final non-return decision in January 2009 based on Article 13(2) of the Hague Convention since the child resolutely opposed the return. Following that, the Brussels IIa Regulation's additional rules in child abduction cases concerning two EU Member States came to play. In accordance with Articles 11(6)-(8) of the Regulation, the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention may in the context of a decision on the merits of custody decide that the child should return. This custody decision is, if accompanied by the relevant certificate is directly enforceable in the other EU Member State to which the child had been removed (or in which the child had been retained). In **Zarraga v. Pelz** the CJEU had to deal with exactly such a certificate issued by the Spanish court, which had in the context of a custody decision ordered the return of the child to Spain. As Article 42(2) of the Brussels IIa Regulation clearly states, "*the judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity*". The Spanish court had issued the certificate, although the child had not been heard.
187. Answering the questions brought before it by the court in the Member State of enforcement, the CJEU noted that it was "*solely for the national courts of the Member State of origin [i.e., the Spanish courts] to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation*" and held that the courts in the State of enforcement could not oppose the enforcement.
188. In the judgement, the CJEU took the opportunity to elaborate on the child's right to be heard as protected by Article 24 of the European Charter of Fundamental Rights. The CJEU noted that the Brussels IIa Regulation "*may not be contrary to the Charter of Fundamental Rights*" and that "*Article 42 of that regulation, the provisions of which give effect to the child's right to be heard, must be interpreted in the light of Article 24 of that charter*".²³⁹ The court further highlighted that "*recital 19 in the preamble to that regulation states that the hearing of the child plays an important role in the application of the regulation and recital 33 emphasises, more generally, that the regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights, ensuring, in particular, respect for the*

238. CJEU, C-491/10 PPU, **Zarraga v. Pelz**, 22 December 2010

239. See para. 60.

fundamental rights of the child as set out in Article 24 of the charter.”²⁴⁰ The CJEU, however observed that the provisions “refer not to the hearing of the child per se, but to the child’s having the opportunity to be heard”²⁴¹ and emphasised that “it is for the court which has to rule on the return of a child to assess whether such a hearing is appropriate, since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them.”²⁴² The CJEU emphasised that “hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights”²⁴³ and reiterated the court retains a degree of discretion.

189. Another important judgement in which the CJEU elaborates on principles of children’s rights law is **E. v. B.**²⁴⁴ In this case the CJEU had to examine a question relating to the prorogation of jurisdiction under Article 12(3) of the Brussels Ia Regulation. The CJEU highlighted that as noted in recital 12 of the Regulation, “the grounds of jurisdiction established in that regulation in matters of parental responsibility are shaped in the light of the best interests of the child, in particular on the criterion of proximity, and that one of the conditions set out in Article 12(3)(b) of that regulation requires that any prorogation of jurisdiction in accordance with that provision be carried out in the light of those interests.”²⁴⁵ The CJEU stated: “It follows that jurisdiction in matters of parental responsibility must be determined, above all, in the best interests of the child”²⁴⁶ and that “while a prorogation of jurisdiction accepted by the holders of parental responsibility of a young child for specific proceedings may be considered as being in the best interests of that child, it cannot be accepted that, in every case, such a prorogation of jurisdiction remains — beyond the end of the proceedings in respect of which that jurisdiction was prorogued and throughout the childhood of the person concerned — in that person’s best interests”.²⁴⁷

240. *Ibid.*, at para. 61.

241. *Ibid.*, at para. 62.

242. *Ibid.*, at para. 64.

243. *Ibid.*, at para. 64.

244. CJEU, C-436/13, **E.v.B.** 1 October 2014.

245. *Ibid.*, at para 44.

246. *Ibid.*, at para 45.

247. *Ibid.*, at para 46.

D. Examples from European States concerning the application of article 3 UNCRC

190. As set forth above, in Europe regional legal framework assist in the implementation and further elaboration of children's rights. Chapter D will provide some insight into how the principle of Article 3 UNCRC is applied in national law on the example of two EU Member States: France and Germany. It must be highlighted that independent of whether certain areas of law have become EU competency, all EU Member States remain bound by their obligation under the UNCRC. As emphasised by the Regional Office of the High Commissioner for Human Rights, the Member States "*cannot release themselves from [their international] obligations by delegating powers relevant to their implementation to the EU.*"²⁴⁸

1. Germany, *Juliane Hirsch*

191. The German Federal Republic ratified the UNCRC in March 1992 and it entered into force for Germany internationally on 5 April 1992. However, the declaration deposited by the German government with the instrument of ratification of the UNCRC brought about considerable doubts as to the direct applicability of the Convention in Germany. In its detailed declaration, the German government, on the one hand, welcomed the UNCRC as a "*milestone of the development of international law*" and underlined Germany's willingness to reform national legislation in line with the spirit of the UNCRC but, on the other hand, stated that the Convention should "*not apply directly*" in Germany.²⁴⁹ This declaration exemplified the German government's understanding, at that time, that the UNCRC was merely creating State obligations and would not have immediate effect in German law practice.²⁵⁰

192. The discussion among legal scholars in Germany, whether Germany's declaration was indeed capable of blocking a direct application of the UNCRC, and in particular Article 3(1) UNCRC inside Germany, or whether the declaration's denial of immediate effect was irrelevant since it was incompatible with the obligations deriving from the UNCRC, ended with Germany's withdrawal of the reservation on 15.07.2010 taking effect as of 1.11.2010.²⁵¹ Since that date, it is undisputed that the self-executing norms of the UNCRC, such as Article 3(1), have direct effect in Germany.

248. The European Union and International Human Rights Law, Publication of the Regional Office of the High Commissioner for Human Rights, available online at < http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf >, at p. 6 (last consulted on 1 April 2018).

249. See for the declaration BGBl 1992, at pp. 990 et seq., available online < https://www.bgbl.de/xaver/bgbl/start.xav#___bgbl___%2F%2F%5B%40at-tr_id%3D%27bgbl292s0990.pdf%27%5D__1509454897543 > (last consulted on 1 April 2018).

250. See Reinald Eichholz, *Der Vorrang des Kindeswohls – Die Bedeutung von Art. 3 Absatz 1 der UN-Kinderrechtskonvention für die deutsche Rechtsprechung*, National Coalition Deutschland, 2015, at p. 5, available online at < http://www.netzwerk-kinderrechte.de/fileadmin/bilder/user_upload/Text_Eichholz_24112015.pdf > (last consulted on 1 April 2018).

251. Schmahl, *Kinderrechtskonvention mit Zusatzprotokollen*, Handkommentar, 2nd edition, Baden-Baden 2017, at p. 53; Reinald Eichholz, *op. cit.* note 250, at p. 5.

193. The UNCRC is considered to have the rank of a federal law.²⁵² Considerations to include a specific children's rights provision in the German federal constitution (*Grundgesetz*) have so far not been realised, but as noted with satisfaction by the Committee on the Rights of the Child, several of the German *Bundesländer* have "explicitly recognised children's rights in their constitutions".²⁵³ Despite the fact, that the Committee on the Rights of the Child has regretted that the German federal constitution is not leading by example, German legal scholars argue that in view of the children's rights-based national legislation and jurisprudence the express inclusion of children's right in the *Grundgesetz* is not a necessary step to better protect children's subjective rights in Germany.²⁵⁴
194. While in the first years following the ratification of the UNCRC, courts did not include any direct references to the UNCRC, since the withdrawal of the reservation in 2010 an increasing number of cases Germany's highest courts referred directly to the UNCRC their judgements.²⁵⁵
195. There is hardly jurisprudence explicitly referring to Article 3(1) UNCRC. As concerns decisions on matters of custody and contact this may be explained by the fact that the best interest assessment is an integral part of relevant German family law provisions.²⁵⁶ The judges thus do not necessarily refer to the UNCRC when basing their decision on the best interest of the child assessment.
196. The Committee on the Rights of the Child noted in its Concluding Observations 2014, "that the welfare of the child is a guiding principle in the State party's legal order and one that is increasingly being applied" but also expressed concerns "that the principle of the best interests of the child has not yet been fully incorporated into federal legislation and the prioritization of the child's best interests has not yet been integrated into all areas of the legislative, executive and judicial branches of government. In particular, it is frequently disregarded in cases concerning children from educationally and socioeconomically disadvantaged families, including refugee and asylum-seeking children." Germany's ratification of the 3rd Optional Protocol to the UNCRC setting up an individual complaint mechanism is expected to further strengthen children's rights in Germany.²⁵⁷

2. France, Roberta Ribeiro Oertel

a) The application of the UNCRC in France

197. The UNCRC has undeniably influenced French legislation over the last twenty years, particularly in the area of personal and family law.

252. See Schmahl, *op. cit.* note 251, at p. 54.

253. See the Concluding Observations on the combined third and fourth periodic reports of Germany, 25 February 2014, para. 9, available online at < www.ohchr.org > under "Human Rights by Country" then "Germany" then "reporting status" then "CRC-Convention on the Rights of the Child".

254. See Schmahl, *op. cit.* note 251, at p. 52.

255. Schmahl, *op. cit.* note 251, at p. 54. See for example, BGH 29.05.2013 – XII ZB 530/11, paras 13, 21, 22.

256. Several family law provisions of the BGB request in relation to custody and contact that decisions are to be taken in line with the best interests of the child or, as the German law often put it, should not be conflict with the "welfare of the child" §§ 1626a, 1631d, 1632, 1666, 1682, 1682a, 1696 BGB.

257. Schmahl, *op. cit.* note 251, at p. 5.

198. By way of illustration, we can cite some of the laws that have at least partly been designed to bring French law closer into line with the UNCRC, namely: the Law of 8 January 1993, which introduced to the Civil Code the hearing of the minor concerned by a judicial procedure, Laws No. 89-487 of 10 July 1989, Laws No. 98-468 of 17 June 1998 and No. 2004-1 of 2 January 2004 on the protection of children, Laws No. 96-604 of 5 July 1996 and No. 2001-111 which reformed the adoption in the sense of taking greater account of the interest of the child, Laws No. 2000-1209 of 13 December 2000, No. 2001-588 of 4 July 2001 relating to the contraception and the voluntary termination of pregnancy and No. 2002-303 of 4 March 2002 relating to the rights of patients who have granted greater autonomy to the minor in the medical field or Law No. 2002-305 of 4 March 2002 on parental authority which definitively recognised co-parenting, as well as Law No. 2001-1135 of 3 December 2001, which eliminated all discrimination against illegitimate children.²⁵⁸
199. If, on the one hand, the French legislator undoubtedly has worked bring French law into greater conformity with the UNCRC, on the other, the Court of Cassation – in its *Lejeune*²⁵⁹ ruling of 1993 – ruled against direct applicability of the provisions of the UNCRC. It found that “*the Convention on the Rights of the Child does not recognise specific, definite rights for the child, but contains commitments made by the State parties, so that the treaty has no direct application in France*”.²⁶⁰
200. Nevertheless, there was a change of direction in 2005 when the Court of Cassation sanctioned non-compliance with Article 388-1 of the Civil Code, paragraph 2, stating “*when the minor requests to be heard, this request can only be refused by a specially justified decision*” (a). This decision was followed by a second relating to the immediate return of the child and its best interests (b).
201. The recognition of the direct applicability of the treaty countered criticism of the jurisprudence of the Court of Cassation, which it was claimed had undermined the effectiveness of the UNCRC. This recognition allows a harmonisation of the norms relative to the rights of the minor and particularly to the question of the minor being hearing in the legal proceedings, whether these are international or European.²⁶¹

b) Best interests of the child and right of the child to be heard

202. In a judgement issued by the Court of Cassation on 18 May 2005²⁶², Chloé B., then aged 12 years, requested by letter presented to the Court of Appeal to be heard in the proceedings instituted by her father to change her place of domicile, which hitherto had been determined as being with her mother in the United States. The Court of Appeal had ruled without taking into account the opinion of the child or without refusing her request in a reasoned manner as prescribed by Article 388-1, para. 2,

258. The laws adopted in France can be viewed online at < www.legifrance.fr > (last consulted on 1 April 2018).

259. 1st Civ. 10 March 1993, *Bull.* 1993, I, No. 103, Appeal No. 91-11.310 - in relation to Article 12 of the Convention, available online at < www.legifrance.fr > (last consulted on 1 April 2018).

260. See *L'application directe de la Convention de New York relative aux droits de l'enfant*, available online at < https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2009_3408/etude_personnes_3411/chambre_civile_3417/convention_new_3423/introduction_15306.html > (last consulted on 1 April 2018).

261. The Brussels IIa Regulation, *supra* note 12, came into effect in France on 1 March 2005, and in many of its provisions makes the recognition of court decisions relating to parental authority contingent on the possibility of child being heard in the proceedings, in a form that reflects that of the International Convention on the Rights of the Child. It would have been embarrassing, therefore, if norms with similar content were not equally accepted into the body of norms applicable before domestic courts. *JOCE* No. L 338 of 23/12/2003 p. 0001 – 0029.

262. 1st Civ. 18 May 2005, *Juris-Data* No. 2005-028424, available online at < www.legifrance.fr > (last consulted on 1 April 2018).

of the French Civil Code. The Court of Cassation overturned the decision of the Court of Appeal under Articles 3 (1) and 12 (2) of the UNCRC, 388-1 of the Civil Code and 338-1 and 338-2 of the new Code of Civil Procedure on the grounds that “*the paramount consideration of the interest of the child and the right of the child to be heard required the court to take into account the request of the child*” [translation from French].

203. In fact, Article 12 of the UNCRC provoked prolonged discussion among those who interpreted it only as a right of the child to express its opinion in any procedure in which it had an interest and those who saw as it the right of the minor to intervene personally and by its own volition in court.²⁶³
204. Hearing and intervention as a party to the proceedings are two different methods of expression and, by introducing Article 388-1 into the Civil Code, after the adoption of the Law of 8 January 1993²⁶⁴, the French legislature clearly opted for a general principle of letting the child be heard while strictly limiting the cases in which it may be a party to the proceedings. Moreover, this law has been presented as an instrument of incorporating into French law the principles laid down by the UNCRC in Chapter V: “*L’audition de l’enfant en justice et la défense de ses intérêts*” [Hearing the child in court and defending his/her interests].
205. Indeed, the Court of Cassation criticises the Court of Appeal for not having “*taken into account*” the request to hear the child and for not having heard it. As the Court of Cassation recalls, Article 388-1, paragraph 2, of the Civil Code provides that “*When the minor so requests, its request for a hearing may only be dismissed by a specially justified decision*”; however, in the spirit of the 1993 law, this obligation to justify his decision imposed on the judge constitutes proof that the minor’s request has indeed been taken into account, even if it did not lead to the minor being heard in the proceedings concerned. This obligation to justify a refusal to hear the child also seems in the view of the Court to satisfy Article 3 (1) (c) of the UNCRC, wherever it can reasonably be supposed that the best interests of the child are the primary reason for the refusal. Consequently, while recognising a direct effect of Article 12 (2), the Court aligns its application with the possibility already established in substantive law of obtaining the opinion of a child in court. Ultimately, the provisions of national law by themselves would have been sufficient to result in the quashing of the appeal judgement.
206. With regard to Article 3 (1) of the UNCRC, which provides that: “*In all decisions concerning children, whether made by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child must be a primary consideration*”, it should be noted that the obligation that it establishes concerns all the organs of the State, including the courts, and not the only legislator. The justification previously put forward by the Court of Cassation, according to which the UNCRC only recognised commitments by the State, was therefore particularly inappropriate for rejecting any direct effect of this article.
207. Accordingly, by declaring Article 3 (1) to be of direct application before the French courts, the Court of Cassation also undertook to ensure that any judicial decision takes into consideration the best interests of the child.

263. J. Rubellin-Devichi, *Le principe de l’intérêt de l’enfant dans la loi et la jurisprudence française*, JCP G 1994, I, 3739, No. 13 d. J.-M. Bret, *La Convention des Nations Unies sur les droits de l’enfant*, Gaz. Pal. 1991, vol. 2, at p. 748.

264. Law No. 93-22 of 8 January 1993 amending the Civil Code relating to civil status, the family and the rights of the child and establishing the family court, available online at < www.legifrance.fr > (last consulted on 1 April 2018).

c) Best interests of the child and immediate return of the child

208. In the judgement handed down by the Court of Cassation on 14 June 2005²⁶⁵, the mother of the minor Charlotte appealed to the Aix-en-Provence Court of Appeal against an order for the immediate return of her daughter to the United States in accordance with the Hague Convention of 25 October 1980, as the removal of the child from its new integration environment constituted a serious risk as provided for in Article 13 (b) of the said Convention and that, *inter alia*, Article 3 (1) of the UNCRC required that the best interests of the child be taken into account in assessing the appropriateness of this disruption.
209. In this case, the child was born in the United States with a mother of French nationality and a father of American nationality, who were married in the United States. The family were living in the United States when the mother came to France with the child on vacation and then informed her husband that she did not intend to return to the United States. The husband applied to the central U.S. authority for application of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction so as to obtain an order for the immediate return of the child to the United States, the habitual place of residence. The State Attorney at the High Court had the mother of the child summoned for this purpose. She objected to the exculpatory judgement ordering the immediate return of the child to the United States. It follows from Article 13 (b) of the Hague Convention of 25 October 1980 that an exception may be made to the immediate return of the child only if there is a risk of serious danger or if an intolerable situation would thus be created.
210. The 1st Civil Division dismissed the appeal on the grounds that the conditions preventing the return of the child were not met and that the Court of Appeal had assessed these conditions thereby duly considering the best interests of the child. This decision was based on the assumption in principle that Article 3, paragraph 1 of the UNCRC is “*directly applicable in French courts*”.
211. In fact, the Court of Appeal ruled that, after referring to the child's living conditions with its mother, there was no evidence of a harmful attitude of the father toward his daughter; that it was established that he was neither an alcoholic nor a drug addict, that the psychological state of the child was satisfactory, and that its father offered the child favourable living conditions in the United States, under the care of a graduate of a nursing college. It follows from these statements that the best interests of the child were taken into account by the Court of Appeal, which determined without incurring procedural objections that it was necessary to order the immediate return of the child in accordance with the Hague Convention.
212. The Court of Cassation affirmed that, pursuant to Article 3 (1) of the UNCRC, circumstances justifying an exception being made to the return of the child, as defined in Article 13 (b) of the Hague Convention of 25 October 1980, “*must be considered on the basis of the best interests of the child*”. However, these circumstances are defined as “*there being a grave risk that the child's return would expose it to physical or psychological harm or otherwise place the child in an intolerable situation*”, it is quite obvious that it is not in the best interests of the child to order its immediate return if this were to expose it to one or other of these dangers.

265. 1st Civ. 14 June 2005, Juris-Data No. 2005-028932, available online at < www.legifrance.fr > (last consulted on 1 April 2018).

PART II. COMPARATIVE ANALYSIS - SOUTHERN PARTNER COUNTRIES

A. Comparative Analysis Egypt Israel, Jordan, Palestine

Ahmed Bakry

Methodology

213. This part of the study focusses on the current situation in the following four ENI Southern Partner Countries: Egypt, Israel, Jordan and Palestine. It provides a comparative analysis of national legislation and case law in the field of cross-border family conflicts.
214. The primary sources relied upon include the answers to the Questionnaire²⁶⁶ as well as interviews with judges from the participating countries. In addition, the author included the results of his own research on national legislations and jurisprudence. All the legal provisions of the relevant laws for Egypt, Jordan and Palestine are translated by the author.
215. Regarding **Egypt**, the author relied mainly on the legal texts, Court of Cassation judgments and Supreme Constitutional Court judgments. In addition, the reports of the UN Committee on the Rights of the Child and the Committee's Concluding Observations for Egypt were taken into consideration. Finally, the author included findings from interviews conducted with judges from the family courts.
216. Regarding **Israel**, the author relied mainly on the translated Supreme Court judgments that are available online (VERSA and Cardozo Law school on the opinions of the Supreme Court of Israel). In addition, the reports of the UN Committee on the Rights of the Child and the Committee's Concluding Observations for Israel and the website of the Israeli Ministry of Justice, containing English translations of several Israeli laws were taken into account.
217. Regarding **Jordan**, the author mainly relied on the laws available at Eastlaws.com, which is a legal database for the laws and judgments of Arab Countries. The author faced difficulties in identifying legal provisions with relevance to cross-border family disputes for Jordan.
218. Regarding **Palestine**, the author relied mainly on the laws available at Eastlaws.com. The author faced difficulties in identifying legal provisions with relevance to cross-border family disputes for Palestine. It should be noted in this regard that due to the current situation in Palestine the laws and judgments that were provided related only to the area of West bank.

266. See Annex.

1. Competent court to deal with cross-border family matters concerning children

a) Competent courts, specialist judges, specialised courts and concentrated jurisdiction (Questions: A.1-A.4, A.6-A.9)

219. **Egypt** is a country with a single jurisdiction system, with multiple applicable laws determined in accordance to the parties' religious affiliation.²⁶⁷
220. The system of religious courts has been abolished in 1956 and since the establishment of specialised family courts in 2004, the civil family courts are the competent courts to hear all personal status matters.²⁶⁸ There is a first instance family court for every district in addition to an appellate court located at the eight Courts of Appeal in Egypt.²⁶⁹ The first instance family court is composed of a circuit of three judges and two specialists (social and physiological), one of whom must be a woman. While the family court of appeal is composed of a circuit of three judges who can be assisted with specialists when needed.²⁷⁰ Since 2004, the Court of Cassation no longer has jurisdiction to rule over appeals on decisions from the family courts.²⁷¹ Hence for family matters only two instances are available.
221. The family court judges are specialized in personal status matters and are required to have previous experience in family law. Many family court judges have been working in the field of Family Public Prosecution before being appointed.
222. There is no concentrated jurisdiction for matters of cross-border family conflicts. All family courts have jurisdiction over all personal status matters raised before them.²⁷²
223. **Israel** has a multiple jurisdiction system with several applicable laws. Both, the civil family courts and religious courts, can have jurisdiction over cases involving family disputes.
224. The civil family courts are a specialised section of the civil courts. They can, in accordance with the **Family Court Law**,²⁷³ hear all family matters, except those relating to marriage and divorce that fall within the exclusive competence of the religious courts.²⁷⁴ The civil family court judges are specialized in family matters as they are required to have experience and expertise in family law prior to their appointment. In contrast to religious courts, judges in civil family courts deliberate alone. It should be noted that in accordance with the "one judge – one family" – principle applied in Israeli family courts, all family conflicts relating to the same family, are heard by the same judge.

267. See Article 12 of the **Law No. 10/2004 Promulgating the Law on the Establishment of Family Courts** (hereinafter "Law No 10/2004 Establishing Family Courts"). (Translated by the author).

268. *Ibid.*

269. See Article 1, Law No. 10/2004 Establishing Family Courts. (Translated by the author).

270. See amended Article 2, Law No. 10/2004 Establishing Family Courts. (Translated by the author).

271. See Article 14, Law No. 10/2004 Establishing Family Courts. (Translated by the author).

272. See Article 3, Law No. 10/2004 Establishing Family Courts. (Translated by the author).

273. **Court for Family Affairs Law, 5795-1995** (hereinafter "Family Court Law").

274. See for example Article 1 of the **Law of the Rabbinical Court's Jurisdiction (Marriage and Divorce) of 4 September 1953, 5713-1953**, (hereinafter "Marriage and Divorce Law 1953").

225. Civil family courts have exclusive jurisdiction over cross-border family matters, including cases under the Hague Child Abduction Convention,²⁷⁵ but also cross-border family conflicts relating to legal separations, family maintenance, parental responsibility and adoption.²⁷⁶
226. Since 2016, attempting mediation is compulsory prior to the filing of legal claims between spouses or parents and children.²⁷⁷ Mediation is organised by the Welfare Units. Proceedings are suspended for at least 45 days. The compulsory national mediation does not apply in cases of international family disputes involving wrongful removal or retention of children.
227. Religious courts have exclusive jurisdiction over matters of marriage and divorce.²⁷⁸ The religious court can, in the context of divorce, also deal with ancillary matters such as, custody and visitation rights.²⁷⁹ If the parties are of different religions, the civil family court will be competent to decide on matters of divorce.
228. The Questionnaire answers indicate that there are matters the civil family courts will decide based upon religious law, such as child support, and that there are matters which the religious courts will decide based on civil law, such as the matters relating to the Financial Relations Law and the determination of custody and visitation rights, if the parties are of the same religion and they are residents of Israel.
229. There are several kinds of religious courts in Israel: the Rabbinical Court for the Jewish majority,²⁸⁰ the Shari'a²⁸¹ courts for persons of Muslim faith, the Druze Court²⁸² for the Druze population and Ecclesiastical courts for the Christian population. These courts are regularly composed of one or three judges. In the Rabbinical courts there are only male judges; in 2017 the first female judge was appointed as judge in a Shari'a court. Exceptionally, parties that are of the same religion and have the Israeli citizenship can choose to bring their case in front of a court other than the normally competent religious court.²⁸³
230. The Israeli Supreme Court has under certain circumstances authority to set aside or correct the decisions of religious courts (see further below under Part II, A, I, c). The judges of the Supreme Court are civil family law experts with legal knowledge of religious law.
231. In the **Jordanian** judicial system, national courts are, according to Articles 99 *et seq.* of the **Jordanian Constitution of 1952**,²⁸⁴ divided into: (1) regular civil courts, with jurisdiction over all people in civil and criminal matters, (2) religious courts, with jurisdiction over all family and inheritance matters,

275. Article 295 (a-z) **Civil Law Procedure Regulations, 5744-1984**.

276. See G. Parolin, *Research Report*, *op. cit.* note 34, at p. 25 (of the EN version).

277. See **Resolution of Family Disputes Law of 17 July 2016 (hereinafter „Family Disputes Law 2016“)**.

278. See Marriage and Divorce Law 1953, 7 LSI 139.

279. For more details on the ancillary jurisdiction of the Rabbinical courts, Supreme Court judgment HCJ 124/59 Glaubhardt v. The Haifa Regional Rabbinical Court.

280. Rabbinical Courts were established by virtue of the Rabbinical court jurisdiction (Marriage and Divorce) law 5713-1953.

281. For more details on the jurisdiction of the Shari'a courts, see the Palestine Order in Council, 1947.

282. For more information on Shari'a Courts see, available at < <http://www.justice.gov.il/En/Units/ShariaCourts/Pages/default.aspx> > (last consulted on 1 April 2018).

283. For more details on the agreement to choose a court, see Supreme Court judgment HCJ 8638/03 Amir Vs. The Great Rabbinical Court of Jerusalem (06-04-2006).

284. **Constitution of the Hashemite Kingdom of Jordan of 11 January 1952, unofficial English version available online at** < <http://www.refworld.org/pdfid/3ae6b53310.pdf> > (last consulted on 1 April 2018).

and (3) special courts with exclusive jurisdiction over certain matters according to the laws establishing them. Each court system has its own law establishing its categories, divisions, jurisdiction and administration.²⁸⁵ Religious courts are divided into Shari'a courts and tribunals of other religious communities.²⁸⁶

232. The Shari'a courts have jurisdiction over issues relating to the personal status of Muslims applying only Shari'a proceedings.²⁸⁷ The Shari'a courts are courts of first instance and their decisions can be appealed before the Shari'a courts of appeal. Since 2015, the decisions of the Shari'a court of appeal can be challenged before the Shari'a Supreme Court.²⁸⁸ The tribunals of other religious communities, which have been or will be recognised by the Jordanian government,²⁸⁹ have jurisdiction over personal status matters concerning the members of their communities only as long as this religious community is recognized by the government.²⁹⁰ In the event that the religious community is not listed as recognized by the government and does not have a court, the parties may agree to choose either Shari'a courts or civil courts.²⁹¹ Similarly, if the parties are not of the same religion, they can, in accordance with Article 103(I) of the Jordanian Constitution, also choose the jurisdiction of civil courts in accordance with the laws of the Shari'a courts.²⁹²
233. The appointment of judges at religious courts is related to the religious faith and regulated by the relevant law establishing each such court. The appointment of judges at the Shari'a courts is stipulated in the **Law on the Formation of Shari'a Courts** setting out detailed requirements for the appointment.²⁹³ Similarly, the rules on appointing a judge to the tribunals of Christian communities are detailed and require the judges to have several years of relevant professional experience.²⁹⁴
234. There is no concentrated jurisdiction for cross-border family disputes in Jordan.
235. The judicial system of **Palestine** is, according to the **2003 Palestinian Basic Law**, divided into regular courts (civil and criminal), religious courts, namely Shari'a courts, Ecclesiastical courts, Administrative court, Constitutional court and Corruption court.

285. See the amended Article 100 of the Jordanian Constitution.

286. See Article 104 of the Jordanian Constitution.

287. See Articles 105/I and 106 of the Jordanian Constitution. Article 2 of the **Law No. 31/1959 on the Proceedings of Shari'a Courts** stipulates that Shari'a Courts have jurisdiction over all matters relating to marriage and emanating from marriage agreement between Muslims (Section 9) in addition to all personal status matters between Muslims (Section 16).

288. See Article 3 of the 2015 amended **Law No. 19/1972 on the Formation of Shari'a Court**.

289. See Article 108 of the Jordanian Constitution.

290. See, for example, Articles 2/A and 4/A of the **Law No. 28/2014 on the Tribunals of Christian Communities** which stipulates that recognised Christian Communities are authorised to establish courts to adjudicate in personal status matters in accordance with the law of each Christian Community.

291. See Article 7 of the Law No. 28/2014 on the Tribunals of Christian Communities.

292. For more details See, Court of Cassation Judgment, 543 – Judicial Year 1986, pp.1710. See Article 4/B of the Law No. 28/2014 on the Tribunals of Christian Communities.

293. See Article 3 of the Law No. 19/1972 on the Formation of the Shari'a Courts specifying the conditions for the appointment of judges as follows: 1. To be a Jordanian Muslim; 2. To be more than 27 years of age; 3A. To have a degree in Shari'a judiciary or Islamic Jurisprudence, or 3B. To have a degree from the faculty of Da'wa and Foundations of religion and worked as a cleric for the Shari'a courts, or 3C. To have a degree in Islamic studies and worked as a cleric for the Shari'a courts before 2008; 4. To work as a cleric for Shari'a courts for a probationary term not less than 3 years; 5A. To have a good reputation and not to have been convicted of a crime before; 5B. To be appointed after passing the judicial selection contest.

294. See Article 3/C of the Law No. 28/2014 on the Tribunals of Christian Communities specifying the conditions for appointment of judges as follows: 1. To have the Jordanian nationality or a nationality of an Arab country; 2. To be fluent in writing and reading in Arabic; 3. To exceed the age of 30; 4. To have a law degree or a degree in Ecclesiastical studies; 5. To have a good reputation; 6. To have at least five years of experience as a judge or in serving a Church or ten years of experience as a lawyer; 7. Not to have been convicted of a crime before.

236. Palestine is a multiple jurisdiction systems with several religious, civil and foreign applicable laws. There are two court systems that have jurisdiction over cases of family disputes, namely civil courts and religious courts.
237. The Ecclesiastical courts are competent for matters relating to the personal status of Christians. The Shari'a courts are the competent to decide on matters of family disputes involving children if both parents are Muslim. However, there is an exception to this, as parties of different religions can agree to choose to discuss their family law case before a Shari'a court or a civil court.²⁹⁵ As according to Article 7 of the **Law of Religious Communities**, which states that *"if one of the parties to a case is Muslim, the case should be discussed before regular courts or the parties may agree to choose to discuss their case before Shari'a courts"*.
238. The Shari'a court system is a separate system with specialist judges deciding on family disputes. However, Palestine has no specialized courts or judges to deal with matters of cross-border family disputes.²⁹⁶

b) Impact of nationality and religion on the determination of the competent court (Question A.5)

i) Impact of nationality

239. In **Egypt**, the parties' nationalities do not influence the court's jurisdiction if the parties habitually reside in Egypt.²⁹⁷ The civil family courts have exclusive jurisdiction over family matters.²⁹⁸
240. In **Israel**, if the parties are of different nationalities, the civil family courts will have exclusive jurisdiction in family matters.
241. In **Jordan**, the requirement of establishing jurisdiction when a foreigner is involved is based upon the religious affiliation. For example, in cases where the parties are Christians with different nationalities and one of them holds the Jordanian nationality, the tribunals of Christian communities will have jurisdiction.²⁹⁹ In the event that both parties are Muslims and one of them holds the Jordanian nationality, the Shari'a courts will have jurisdiction. If both parties are foreigners of the same nationality residing in Jordan, the civil courts will have jurisdiction and will apply the laws of their country in certain circumstances.³⁰⁰ In the event these two foreigners are Muslims, the Shari'a courts will have jurisdiction and will apply the laws of their country in certain circumstances.³⁰¹

295. According to the Ruling 589/2002 for the Palestinian Court of Cassation couples of different religions can agree have their case heard before Shari'a courts even if one of them is not Muslim.

296. The operating family law in Palestine is the **Jordanian Martial Status Law No. 61/1976**.

297. See G. Parolin, *Research Report, op. cit.* note 34, at p. 21 (of the EN version) referring to Article 12 of the Law No. 10/2004 Establishing Family Courts and Article 10 of the Law No. 1/2000.

298. See Article 3 of the Law No. 10/2004 Establishing Family Courts.

299. See Article 13 of the Law No. 28/2014 on the Tribunals of Christian Communities.

300. See Article 103/I of the Jordanian Constitution. See Articles 27-29, **Law No. 24/1988 on Civil Procedures**. See also **Court of Cassation Judgment, 70 for the judicial year 1980, at pp. 1395 et seq.**

301. See Article 185 of the Law No. 31/1959 on the Proceedings of Shari'a Courts.

242. In **Palestine**, if a couple residing in Palestine are of different nationalities, the Shari'a courts are the competent courts, provided either both of them or at least the man is Muslim and in that event, the law of Palestine is applied regardless of the parties' nationalities.

ii) Impact of religion

243. In **Egypt**, the religion of the parties does not impact the jurisdiction of the court in matters of personal status. As stated above, there are no religious courts in Egypt. Personal status matters are heard and ruled upon by the civil family courts. However, the religion of the parties affects the law applied by the court in a family case. Egypt recognizes different religious groups, namely the Muslim majority, as well as the Christian and Jewish communities. Each religion is governed by its own personal status law. Accordingly, there is no uniform personal status law for all Egyptians.³⁰²
244. In **Israel**, if the parties are of different religions, the civil family court will have exclusive jurisdiction. The religious courts have jurisdiction only in the event that the parties belong to the same religious community to which the court itself belongs and hold the Israeli citizenship.
245. In **Jordan**, if the parties are of different religions, the regular civil courts will have jurisdiction, unless the parties agree to accept the jurisdiction of the Shari'a courts.³⁰³ While in cases where both parties are affiliated to a Christian community, which is not recognized by the government the civil courts will be competent.³⁰⁴ The Jordanian Court of Cassation in one of its judgements considered that a change of a party's religious faith during court proceedings affects the jurisdiction of the court, thus allowing a Christian man who converted to Islam during the on-going proceedings before an Ecclesiastical Latin court to challenge the court's competence and have his case heard either before civil or Shari'a courts.³⁰⁵
246. In **Palestine**, the Shari'a court has the jurisdiction to hear all family issues of Muslims. In cases where the wife is Christian or Jewish married to a Muslim, the civil courts will have jurisdiction unless the parties agree to hear the case before Shari'a courts.³⁰⁶ While in cases where the couple is Christian of the same religious community, the Ecclesiastical court is competent to hear the case. In cases where the couple is Christian of different religious communities, the Ecclesiastical court will be competent, unless the parties disagree. In that event, the civil courts will be competent.³⁰⁷
247. As an exception, couples of different religions can choose between Shari'a courts and civil courts. However, in practice many mixed couples resort to Shari'a courts to hear their custody and contact cases. The Questionnaire answers indicate that, the option to resort to the civil courts, even though theoretically possible, is not often used in reality due to the civil courts' lack of experience with these kind of cases.

302. J. Moussa, *Chapter I - Egypt in 'Parental Care and the Best Interests of the Child in Muslim Countries'*, edited by N. Yassari, L. Möller, I. Gallala-Arndt, Springer, Hamburg 2017, at p.4.

303. See Article 4 of the Law No. 28/2014 on the Tribunals of Christian Communities.

304. See Article 7 of the Law No. 28 /2014 on the Tribunals of Christian Communities.

305. Court of Cassation Judgement no. 1527/2009, 29/10/2009.

306. See Article 7 of the Law No. 2/1938 on the Tribunals of Christian Communities.

307. See Article 10 of the Law No. 2/1938 on the Tribunals of Christian Communities.

c) Conflicts of jurisdiction/competence

i) Internal conflicts of jurisdiction/competence (Question A.10)

248. In **Egypt**, the system of religious courts has been abolished in 1956. All personal status matters are under the jurisdiction of one court for all religions, which since the reform of 2004 is the civil family court.³⁰⁸ Accordingly, religion does not impact the court's jurisdiction. As concerns territorial jurisdiction, the court first seized by one of the parties is deemed the competent court to hear all personal status matters relating to disputes of the same family including future disputes.³⁰⁹
249. In **Israel**, the coexistence of different religious courts and the civil family courts can sometimes lead to competency disputes. Normally the question of jurisdiction is brought in the beginning of the proceedings by one of the parties challenging the jurisdiction of the court and the court will decide whether it has competence or not.³¹⁰ As the Supreme Court of Israel sitting as the high court of justice ruled, the first court to hear the issue of jurisdiction is the court (civil family court or religious court) to determine which court has jurisdiction to hear the case. In one of its decisions, the Supreme Court explained the principle of comity between courts (civil family courts and religious courts), requiring a family court, adjudicating a matter ancillary to divorce, to wait for the decision of the Rabbinical court on the issue of divorce of the couple, which is pending due to a demand for reconciliation in good faith by one of the parties. Thus allowing the Rabbinical court to reach an appropriate finding on whether the marriage is irreconcilable or not. Accordingly, a conflicting judgement from the family court can be prevented.³¹¹ This principle applies also in the case of the opposite circumstances where the religious court should wait for the decision of the family court.
250. Furthermore, according to Articles 15(c), (d)4 of the **Judiciary Basic Law 1984**,³¹² the Supreme Court can in its capacity annul decisions of religious courts in certain exceptional circumstances. The Supreme Court has the authority as a court of equity to annul religious court decisions granting relief for the sake of justice in circumstances that the religious courts have exceeded their jurisdiction or diverged from the rules of natural justice.³¹³
251. In **Jordan**, the issue of the conflict of jurisdiction is stipulated in the **Law on the Formation of Regular Courts**,³¹⁴ the Law on Civil Procedures³¹⁵ and the Law on the Proceedings of Shari'a Courts³¹⁶. The Jordanian legislator regulated the issue of conflict of jurisdiction in its different forms. In cases when there is a conflict of jurisdiction between two Shari'a courts, the parties may request the Shari'a

308. See Article 1 of the Law No. 10/2004 Establishing Family Courts.

309. See Article 12 of the Law No. 10/2004 Establishing Family Courts.

310. For more information on the conflict of jurisdiction between Rabbinical and family courts see, HCJ 8497/00, Felman v. Felman, 2003.

311. For more details on the principle of "Comity between Courts" see Supreme Court judgement LFA 3151/14 no. 5775, A v. B, paras 39 – 44, (04/05/2015).

312. The Judiciary Basic Law of 8 March 1984, see for an unofficial English version of the law < <http://www.refworld.org/docid/3ae6b51d24.html> > (last consulted on 1 April 2018).

313. For further details on the reasoning of the Supreme Court intervention, see Supreme Court Judgment, HCJ 2578/03 Pachmawi v. Pachmawi (08/05/2006).

314. **Law No. 26/1952 on the Formation of Regular Courts.**

315. *Supra* note 300.

316. *Supra* note 288.

court of appeal to resolve the conflict.³¹⁷ Whereas in cases of conflict of jurisdiction between a Shari'a court and a Tribunal of Christian community, a special court of three judges from the Court of Cassation is formed to resolve the conflict.³¹⁸ The same procedures apply in cases of conflict of jurisdiction between regular civil courts and religious courts.³¹⁹

252. In addition, the Jordanian legislator regulated how to proceed in cases of conflicting judgments. If two different courts rendered a judgment on the same issue between the same parties, the Court of Cassation will resolve the conflict by forming a special court comprised of three judges.³²⁰
253. Where a party proceeded in his/her case without raising the issue of jurisdiction, the Jordanian courts will consider themselves competent based on an implicit acceptance of jurisdiction.³²¹
254. In **Palestine**, there has been a legal argument that there is a conflict of jurisdiction in cases where there is a couple of different religions and one of the parties is arguing that the court has no authority to discuss the case, as in this case civil and Shari'a courts will both have jurisdiction.
255. The Palestinian legislator did not include a solution for the conflict of jurisdiction in cases of parties challenging the competency of religious and civil courts, although this issue was organized before through Article 11 of the amended **Law 26/1952 on the Formation of Regular Courts**. However, the Palestinian law of High Constitutional Court No. 3/2006 stipulated in Article 24/3 that *"the High Constitutional Court is exclusively competent to settle the conflict of jurisdiction between the judicial bodies and the administrative bodies having judicial competencies"*.³²²

ii) International conflicts of jurisdiction / competence (Question A.11)

256. In **Egypt**, in international conflicts of jurisdiction the same criteria apply as in internal conflicts of jurisdiction. Accordingly, the court first seized will decide on issue of jurisdiction.
257. In **Israel**, in international conflicts of jurisdiction principally the same approach is taken as in internal jurisdiction will apply. The national court in such cases will before it can decide consider whether it has jurisdiction to hear the dispute. To this effect the court will consider some factors such as, whether the case involved child abduction, the citizenship of the parents and children, the regular residence of the child and siblings, the position/views of the child depending on his age, the first court seized and whether the foreign court discussed the issue of jurisdiction or not.
258. There is a tendency to respect other judicial forums from other countries. However, if there is an immediate need to protect the child's safety or to provide temporary remedies, then the Israeli

317. See Article 9 of the Law No. 31/1959 on the Proceedings of Shari'a Courts.

318. See Article 11/4 of the Law No. 26/1952 on the Formation of Regular Courts. See also Article 24 of the Law No. 28/2014 on the Tribunals of Christian Communities.

319. See Article 11/1 of the Law No. 26/1952 on the Formation of Regular Courts.

320. See Article 11/5 of the Law No. 26/1952 on the Formation of Regular Courts.

321. Court of Cassation Judgment, 543 of the year 1986, at pp.1710 et seq.

322. In a recent High Constitutional Court ruling 3/2016, the Court ruled it had jurisdiction in cases of conflict of jurisdiction between Shari'a courts and a Christian religious court, in accordance with Article 24/3 of the Law No. 3/2006.

courts are competent to intervene to hear the case and grant remedies under the **Legal Capacity and Guardianship Law**.³²³

259. In **Jordan**, the Constitution allows the regular courts to apply foreign laws in certain cases and this includes personal status matters of foreign nationals.³²⁴ The Court of Cassation considered that courts should apply the laws of foreign countries in cases involving foreign nationals.³²⁵ However, the Court of Cassation established a legal principle allowing for the application of foreign laws but with a limitation in line with the principle of State sovereignty.³²⁶
260. On the other hand, in cases involving Christians, the religious courts have jurisdiction over cases involving non-nationals who are not residing in Jordan in certain circumstances.³²⁷
261. **Palestine** has no international or regional cooperation in matters concerning family and children, although there is a need for this, especially in cases related to Israel and Jordan. Which leaves the issue of abducted or relocated children unsolved.

2. Application of Articles 3, 9, 10 and 12 of the UNCRC

a) Application of the principle of the best interests of the child and particularities of procedural law

i) The application of the principle of Article 3 UNCRC, the principle's implementation in domestic law (Question B.3)

262. **Egypt** signed the UNCRC on 5 February 1990 and ratified the Convention on 6 July 1990. The Convention was published in the Official Gazette on 14 February 1991 by the **Law No. 260/1990 Regarding the Approval of the UNCRC. According to Article 151 of the new Egyptian Constitution**³²⁸ promulgated in 2014 “[t]he President of the Republic represents the state in foreign relations and concludes treaties and ratifies them after the approval of the House of Representatives. They shall acquire the force of law upon promulgation in accordance with the provisions of the Constitution”.³²⁹ This signifies that Egyptian courts are obliged to implement the provisions of the Convention as domestic legislation. However, the use of the Convention has been limited depending on the judge's and parties' familiarity with its provisions. In this regard, the UNCRC Committee in its Concluding Observations

323. Legal Capacity and Guardianship Law, 5722/1962.

324. See Article 103/B of the Jordanian Constitution 1952. (Translated by the author).

325. See Court of Cassation Judgment, 70 for the judicial year 1980, at p.1395.

326. See Court of Cassation judgment, 2825, for the judicial year 1999, 18/05/2000, at pp.2847 et seq.

327. See Article 13 of the Law No. 28/2014 on the Tribunals of Christian Communities.

328. **Constitution of the Arab Republic of Egypt of 2014; see for an unofficial English translation** < <http://www.sis.gov.eg/Newwri/Dustor-en001.pdf> > (last consulted on 1 April 2018).

329. Translated by the author.

on Egypt's third and fourth periodic reports noted that, “when, in matters relating to custody of the child, the starting point for consideration is age and there is a risk that each child is not treated individually”.³³⁰

263. In response to pressure from civil society organisations, the Egyptian Constitution of 2014 incorporated the notion of the best interests of the child for the first time in Egypt's history at the constitutional level.³³¹ Already in 2008, the Egyptian legislator had stressed the recognition of the UNCRC by amending the **Child Law**³³² which now states: “The State guarantees as a minimum requirement, the rights of the child stipulated in the Convention on the Rights of the Child and other relevant international instruments in force in Egypt”.³³³ In addition, the Child Law stipulates that “[t]he protection and interests of the child shall be the priority in all decisions or procedures relating to children, regardless of the entity applying or operating them”.³³⁴ This is applicable to both the criminal and civil aspects of the disputes concerning children. Furthermore, the Egyptian legislator has incorporated the principle of the best interests of the child in relation to the civil aspects of child related matters by stating that “[t]he Court shall be guided by its rulings and decisions in accordance with the requirements of the best interests of the child”.³³⁵
264. These changes have been welcomed by the UN Committee in its Concluding Observations of the third and fourth periodic reports for Egypt.³³⁶
265. It must be highlighted that the Egyptian Supreme Constitutional Court (hereinafter “SCC”) and the Court of Cassation have been playing a major role in safeguarding the application of Article 3 of the UNCRC. Since the entry into force of the UNCRC, the SCCs jurisprudence has developed a theoretical framework for interpreting Article 3. It has done so by promoting progressive legal reforms through stressing the difference between immutable aspects of the Shari’a jurisprudence on the one hand (which related to aspects having gained consensus among Shari’a scholars and have accordingly become explicit principles), and other aspects (which have not reached consensus and were / had been left open for other interpretations) thus allowing to meet the advancing social needs on the other hand. This distinction allowed for a more progressive understanding and application of the best interests of the child as long as it does not conflict with Shari’a explicit principles.
266. In a recent decision, the SCC presented a new approach linking the principle of the best interests of the child with the Islamic law concept of safeguarding the child.³³⁷ The Court of Cassation went even further in one of its decisions by analysing the concept of Article 3 UNCRC by explaining how it should be applied in the domestic laws and giving the superiority to the interpretation of the Convention over the wrong interpretations applied by Egyptian courts.³³⁸

330. For more details see the UN Committee on the Rights of the Child Concluding Observations on Egypt's third and fourth periodic reports (CRC/C/EGY/CO/3-4), at para. 36, available online at < www.ohchr.org > under “Human Rights by Country” then “Egypt” then “reporting status” then “CRC-Convention on the Rights of the Child”.

331. J. Moussa, *supra* note 302, at pp.3 et seq.

332. Law No. 12/1996, Child Law; amended by the law No. 126/2008.

333. See the amended Article 1 of the Law No. 12/1996, Child Law; amended by the Law No. 126/2008. (Translated by the author).

334. See the amended Article 3 of the Law No. 12/1996, Child Law; amended by the Law No. 126/2008. (Translated by the author).

335. See Article 10 of the Law No. 10/2004 Establishing Family Courts. (Translated by the author).

336. *Op. cit.* note 330, at para. 36.

337. Supreme Constitutional Court, Judgment No. 6 of the 34th Judicial Year, 05/03/2016.

338. Court of Cassation, judgment No. 241 of the 74th Judicial Year, 18/05/2009, pp. 627 et seq.

267. **Israel** signed the UNCRC on 3 July 1990 and the Knesset ratified the Convention on 4 August 1991. The Convention is often mentioned in rulings of both the Supreme and the lower courts as a legal basis for a decision reached and as a source of interpretation.³³⁹ As indicated by the Questionnaire answers, Israel has no Constitution. However, over the years, several important basic laws were legislated. The basic principles legislated in these laws are considered to be constitutional guidelines.
268. In Israel, the term best interests of the child is defined in domestic law through Israeli case law.³⁴⁰ According to the Questionnaire answers the principle of the best interest of the child is a fundamental and very important principle in the Israeli law and, in particular, in relation to custody and visitation rights. According to the Israeli law, the best interests of the child are examined on a case-by-case basis taking into consideration the specific child's interest at that time. There can also be a difference between the best interests of children of the same family.
269. There are a number of laws that deal with the welfare of the child demonstrating the legal commitment to act in accordance with the best interests of the child. Moreover, there are several laws that can be considered as guidelines to the best interest of the child, such as the Legal Capacity and Guardianship Law, which states that civil family courts are authorized to hear a minor's case when the domicile of the child is Israel regardless of citizenship, residency or official status of the child.
270. Article 3 of the UNCRC is regularly referred to in Israeli jurisprudence, see for example, the Tel Aviv family court relying on Article 3 UNCRC in 1320/10/16 Anonymous v. Attorney General (13/02/2017). Since the best interests of the child principle has become a substantive part of Israeli family law, not all decisions applying the principle make express reference to the UNCRC.
271. In addition, the Supreme Court is performing a major role in the implementation of Article 3 UNCRC. In several decisions, the Court made express reference to Article 3 regarding the best interests of the child. For example, in HCJ 7395/07 Anonymous v. The Rabbinical Court of Appeals (21.1.2008), the Supreme Court overruled a decision of the Rabbinical Court, which had not considered the best interests of the children in question.³⁴¹
272. The UN Committee on the Rights of the Child, in its Concluding Observations on the second to fourth periodic reports of Israel in 2013 noted that Israel took several measures to ensure respect for the right of the child to have his/her best interests taken as a primary consideration.³⁴²
273. In **Jordan**, the concept of the interest (*maslaha*) of the child was introduced for the first time in Jordanian statutory law in 1951 and since then references to the principle have increased, which is partly due to the impact of the ratification of the UNCRC in 1991.³⁴³ Although the UNCRC was published in the Official

339. See R. Levush, *Israel Children's Rights: International and National Laws and Practice*, Law Library of Congress, 2007-04112, at pp.113 et seq., available online at < <https://www.loc.gov/law/help/child-rights/pdfs/ChildrensRights-Israel.pdf> > (last consulted on 1 April 2018).

340. See G. Parolin, *Research Report*, Research Report, op. cit. note 34, at p. 82 (of the EN version).

341. For more details on the application of Article 3 UNCRC, see Supreme Court judgments (HCJ 1129/06 Anonymous et. al. v. The Shari'a Court of Appeals et. al. (05.06.2006). (H.C.J. 1073/05 Anonymous et. al. v. The High Rabbinical Court et. al. (25.06. 2008).

342. For more details see the UN Committee on the Rights of the Child Concluding Observations on Israel's second to fourth periodic reports (CRC/C/ISR/CO/2-4), at para. 23, available online at < www.ohchr.org > under "Human Rights by Country" then "Israel" then "reporting status" then "CRC-Convention on the Rights of the Child".

343. D. Engelcke, *Chapter 5 - Jordan in 'Parental Care and the Best Interests of the Child in Muslim Countries'*, edited by N. Yassari, L. Möller, I. Galla-la-Arndt, Springer, Hamburg 2017, at p. 121.

Gazette in 2006,³⁴⁴ there is no direct reference to the principle of the best interest of the child in personal status laws or in religious or regular court's judgements; instead the old term (*maslaha*) continues to be used. In addition to this, the Jordanian law tends to consider both the best interest of the parents on the one hand and those of the child on the other hand without making the child's interest a primary consideration. Due to the absence of any direct reference to the supremacy of international treaties ratified by Jordan over the domestic laws the status of the UNCRC in Jordanian law remains not clear.³⁴⁵ The concept of the best interests of the child has not been fully incorporated into the Jordanian legal system and it can be best described as an implicit guiding principle.³⁴⁶

274. In its Concluding Observations on the fourth and fifth periodic reports for Jordan, the UN Committee on the Rights of the Child expressed concern that there is a misinterpretation of the best interests of the child as reflected in several provisions of the **Personal Status Law No. 36/2010**,³⁴⁷ in particular, those relating to child custody, which are incompatible with the right of children to have their best interests taken into consideration. The Committee recommended that the principle should be appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings.³⁴⁸
275. As a positive step, training courses are given to Sharia judges, assistant judges and court officials countrywide. The courses provide detailed explanations on children's rights and guidelines on how to ensure the principle of the best interest of the child is applied.³⁴⁹
276. In **Palestine**, the best interest of the child is given a primary consideration in judicial, legislative and administrative authorities.
277. Although the Palestinian Basic Law does not consider international treaties ratified by Palestine as part of domestic laws, however, a recent Constitutional Court judgement considered that, international treaties are not only part of domestic laws but rather have supremacy over domestic laws.³⁵⁰ Palestine only ratified the UNCRC in April 2014, the term "best interest of the child" was used in several Palestinian legal provisions, such as in Article 2 of the Law No. 4/2016 regarding the Juvenile Welfare, Articles 7, 19, 24 of the Law No. 10/2003 for Family Foster Care and in Articles 4, 21, 23 of the Child Law No. 7/2004.
278. There are no provisions referring directly to the best interest of the child in the laws relating to personal status in Palestine. However, the Palestinian legislator tends to use the term "*maslaha*" [interest] in relation to custody, which is similar to the same concept adhered by the Jordanian legislator.³⁵¹

344. See Law No. 50/2006, Ratification of the Convention on the Rights of the Child.

345. D. Engelcke, *op. cit.* note 343, at p. 126.

346. *Ibid.*

347. Law No. 36/2010 on Personal Status 17.10.2010 (hereinafter Personal Status Law).

348. For more details see, UN Committee on the Rights of the Child Concluding Observations on Jordan's fourth and fifth periodic reports (CRC/C/JOR/CO/4-5), at paras 19-20, available online at < www.ohchr.org > under "Human Rights by Country" then "Jordan" then "reporting status" then "CRC-Convention on the Rights of the Child".

349. *Ibid.*, at para. 40.

350. Constitutional Court Judgement No. 12 for the judicial year 2, issued on 29/11/2017.

351. See Article 158 of the Law No. 61/1976, Personal Status Law.

279. The Questionnaire answers indicate that Shari'a court judges examine and assess the interest/*masla-ha* of the child on a case-by-case basis according to the circumstances and conditions of each specific child, such as the age and health of the child. There can also be a difference in the assessment of interests for the children in the same family. For example, the Palestinian Shari'a court of appeal decided in one of its judgements that for a father of two children different modalities of visitation should apply including different times and places, in order to best take into consideration, the children's age difference and different needs of each individual child.³⁵²

ii) The assessment of the best interests of the child in custody and contact cases, the factors considered

(I) In national family conflicts (Questions B.4-B.5)

280. In **Egypt**, judges are required to assess the best interest of the child in custody and contact cases in accordance with the understanding of Article 3 of the Child Law and Article 10 of the Law No. 10/2004. However, in practice, the consideration of the best interest of the child is left to the discretion of domestic judges and therefore the application can differ considerably from one sitting judge to another and can be dependent on the circumstances of each case.³⁵³ In this regard, the UN Committee on the Rights of the Child recommended that the legal reasoning of all judicial and administrative judgments and decisions should also be based on the principle of the best interests of the child. It recommended that the Egyptian government should initiate awareness-raising programmes, including campaigns, on the principle of the best interests of the child, targeting in particular all line ministries, members of the judiciary and the Child Protection Committees.³⁵⁴

281. In Egypt, in line with Islamic jurisprudence, the **Law No. 25/1929**³⁵⁵ (Personal Status Law for Muslims) provides that mothers are responsible for the personal care (*hadina*) of younger children and that, once the child has attained a certain age, the personal care of the child will pass to the father. Judges are bound by the conditions for the attribution of custody stipulated by law based on the age of the child.³⁵⁶ However, judges can exercise some discretion. This is possible, for example in cases of loss of maternal custody, since the law is completely silent on the circumstances that lead to such loss of maternal custody allowing the judge in such case to decide to extend custody to the other parent or a family member other than the custodial parent.³⁵⁷ Judges may also suspend custody temporarily for a period to be decided by the court. The family court in one of its decisions applied a formula of assessment of the best interests of the child and considered a relocation of two children abroad with their mother preventing the children's from having regular direct contact with their father as not being in the children's best interests and constituting a reason for a temporary withdrawal of custody from the mother. However, the family court of appeal reversed the decision of the first instance court applying another assessment criteria considering that the relocation of the children with their mother to

352. See judgement No. 74/2013, Shari'a Court of Appeal, issued on 03/03/2013.

353. J. Moussa, *supra* note 302, at p.2.

354. For more details see the UN Committee on the Rights of the Child Concluding Observations on third and fourth periodic reports for Egypt, *op. cit.* note 330, at para. 37.

355. Law No. 25/1929 on Personal Status Matters as amended by Law No. 100/1985 (hereinafter Personal Status Law for Muslims).

356. For more details on the articles related to custody see Article 20 of the Law No. 25/1929 (Personal Status Law of Muslims) and Articles 127-139 of the Law of 1938, Personal Status of Orthodox Copts.

357. J. Moussa, *supra* note 302, at p.12.

another country was in their best interests.³⁵⁸ This exemplifies that judges have the possibility to apply their own discretion in custody cases and that the assessment of the best interest of the child can be considerably different from a court to another. It should be noted in this regard that the Court of Cassation issued an important ruling in 2009 reversing a family court decision which had been approved by the court of appeal withdrawing custody from a Coptic custodial mother whose husband (the plaintiff) had converted to Islam. The Court of Cassation assessed the best interests of the children in the case and proved that the religion of the mother did not affect the children while in her custody; the Court thus reversed the decision and awarded custody to the mother.³⁵⁹

282. In **Israel**, according to the Questionnaire answers, it is common practice that judges assess the best interest of the child in custody and contact cases according to the following criteria: the situation prior to the separation of the parents, the main parent responsible for the child before the separation, the role of each parent in the care of the child, the relationship of the child with each parent, the special needs of the child, the child's age, the distance of the residence of the parents from each other's, the child's position on the matter according to his/her age and ability, the position, situation and age of other siblings, claims regarding parental functioning, whether there are any complaints about violence and parental behaviour towards one of the parents or the children, communication between the parents, whether there are any significant differences between the parents that may affect the best interests of the child such as which of the parents is religious.³⁶⁰ The Rabbinical courts will give greater weight to the issue of religion and the practicing of its customs in relevance to such decisions.
283. In **Jordan**, it is hard to assess the impact of the UNCRC and specifically the principle of the best interest of the child. As noted above, the Jordanian law does not make direct reference to the term of the best interests of the child as understood in the UNCRC. However, there are references to the Jordanian interest of the child concept "*maslaha*" in provisions relating to custody and contact rights.
284. In the Law No. 36/2010 on Personal Status, the judges have some discretion to assess the interest of the child in custody matters. Even though judges are abiding by the rules of the Personal Status Law regarding custody, they can decide to change the custodian of the child in certain circumstances, such as when the custodian loses one of the conditions for custody.³⁶¹ In addition, judges may assess the interest of the child by deciding who else from the relatives of the child can have custody, other than the mother, maternal grandmother, paternal grandmother and the father.³⁶² Taking a close analytical look at the concept of the interest established by the Jordanian legislator, it can be noted that custody rights are rather connected to the gender of the parent than to the best interest of the child.³⁶³
285. For the assessment of contact rights, judges can only consider the best interests of the child in case the parents cannot agree on the issue themselves. In that case, the Personal Status Law gives the judges the right to assess what is best for the parents on one hand and for the child on the other

358. See judgement no. 107/2016, Misr Al Jadida family court, on 28/05/2016 and its appeal no. 15851 of the judicial year 132 on 07/03/2017.

359. Court of Cassation, judgment No. 15277 of the 74th Judicial Year, 15/06/2009, at pp. 727 *et seq.*

360. For more information on the assessment criteria see, Tel Aviv Jaffa district court, 55785-02-12 K.S. v. A.S. (20.9.2012).

361. See Articles 171/172 of the Law No. 36/2010, Personal Status Law.

362. See Article 170 of the Law No. 36/2010, Personal Status Law.

363. D. Engelcke, *op. cit.* note 343, at pp. 129 *et seq.*

hand.³⁶⁴ The court does so while taking into consideration the age of the child and his/her conditions to balance the best interests of the child and his/her parents' interests.³⁶⁵

286. In **Palestine**, the best interest of the child principle is applied in custody cases according to the judge's belief and discretion within the rules of law in the context of personal status laws and the general rules, ensuring that the child grows in a safe environment developing his/her social needs.
287. The use of the term "best interest of the child" is not very common in civil and religious court judgments on custody and contact matters. As mentioned above the laws relating to personal status does not consider the principle of the best interest of the child. However, the term is widely used in criminal cases relating to children in assessing the condition of the child in criminal proceedings. An amendment is needed in this regard in order to incorporate the term the best interest of the child in the personal status laws and to oblige judges to assess the best interests of the individual child in cases of custody and contact.
288. Due to the absence of a stipulation on the principle of the best interests of the child in personal status laws, it is possible that judges rely on Article 21 of the Child Law No. 7/2004 which states that "[t]aking into account the best interests of the child separated from his/her parents or one of them, the right to maintain personal relations and direct contact with both parents on a regular basis".³⁶⁶ This Article may be used by both religious and civil judges for an assessment of the best interest of the child in the context of custody and contact cases.
289. Articles 154 to 166 of the **Law No. 61/1976 regarding Personal Status** contain rules of custody and contact based on Shari'a jurisprudence. They identify the rights of the parents clearly in accordance with the age of the child. Another matter of importance for the allocation of custody is whether the mother is married to a stranger to the child or not married. But nothing in the personal status law indicates a discretion of the judge permitting the application of the best interest of the child in custody and contact cases. Nonetheless, the Shari'a court of appeal in one of its decisions used judicial discretion in assessing visitation rights and decided that a paternal mother is entitled to spend 24 hours weekly with her grandchildren.³⁶⁷

(2) In international family conflicts (Questions B.7-B.9)

290. In **Egypt**, there are no special procedures for cases with an international element. Accordingly, the assessment of the best interest of the child will be based on the same criteria as applied in national family conflicts. Although the issues of travelling and relocating were not regulated in the Egyptian legislation for personal status matters, the legislator allowed the head of a family court circuit to issue interim orders regarding travelling disputes after hearing the parties as a precautionary measure to prevent any foreseen wrongful removal.³⁶⁸ (For further details on cases of wrongful removal or retention, see below under Part II, A, 4).

364. See Articles 181, 182 and 183 of the Law No. 36/2010, Personal Status Law.

365. D. Engelcke, *op. cit.* note 343, at pp. 132 *et seq.*

366. Translated by the author.

367. See Shari'a Court of Appeal Judgment No. 146/2014, on 29/06/2014.

368. See amended Articles 1 – 1/5, Law No. 1/2000, Personal Status Procedures, amended by Law No. 10/2004.

291. The **Israeli** responses to the Questionnaire indicate that there is a significant difference between assessing the best interests of the child in purely national custody and contact cases and assessing the best interest of the child in cases of an envisaged cross-border relocation. In the latter case the criteria of assessment will be based on different factors, as there will be a significant separation from one of the parents. It will be usually much harder to find a compromise between the parents in such cases due to the complexity of the situation.
292. It is interesting to note the evolution of the criteria of assessment used in Israeli courts in relocation cases. In *Goldman v. Goldman*, a case that predates establishment of the family courts in Israel in 1996, the assessment focussed mainly on the impact on the child and the impact on the relationship with the parents.³⁶⁹ The Supreme Court later rejected the criteria used in *Goldman* and held that the best interests of the child are the only determinants when adjudicating matters of relocation. The Supreme Court has made such assessment in several cases of cross-border relocation or removal.³⁷⁰
293. In **Jordan**, there are no special procedures for family disputes with a foreign element other than the normal procedures stipulated for national family conflicts. Accordingly, the assessment of the (interests/*maslaha*) of the child will be based on the same criteria applied in national family conflicts. The principle of the best interest of the child was explicitly applied in conformity with the UNCRC understanding in the articles relating to travelling with a minor child. The Personal Status Law stipulated that a custodian is allowed to travel with his/her child inside the country if it is guaranteed that this will not affect the child's interest. In case it is proven that the traveling will affect his/her interest, it will not be permitted and the custody will be given to the next person in the custody chain.³⁷¹ When it comes to cases of international relocation, a mother of a Jordanian child can only travel with her child upon the approval of the father "*wali*" and after guaranteeing that this will be in the child's interest.³⁷² In cases of temporal travelling, where the father has not agreed to the travel in advance, the custodial mother will need to obtain permission from the judge, which will be conditioned on an assessment of the child's best interest and the provision of sufficient guarantees to ensure that the child will return to the country.³⁷³ While a custodial father is allowed to reside with the child abroad if the custody had been abandoned by the mother.³⁷⁴ The above-mentioned cases form the basis of the criteria applied by the judges when assessing the best interest of the child when an international element is involved.
294. In **Palestine**, there are no special procedures for cross-border family cases other than the normal procedures stipulated for national family conflicts. Accordingly, the assessment of the best interest of the child will be based on the same criteria applied in national family conflicts.

(3) Particular difficulties (Question B.6)

295. In **Egypt**, one of the biggest challenges faced by family courts is connecting defendants to the cases through the summoning system, which is an archaic one lacking the usage of new technology. This results in delays for the majority of cases at family courts.

369. Tel Aviv District Court, Personal status file 2069/92, *Goldman v. Goldman*, 27/08/1993.

370. For more details on the assessment criteria in relevance to international conflicts, see Supreme Court Judgment LFA 741/11 I, *Doe v. Doe*, at para. 36 (17/05/2011).

371. See Article 175 of the Law No. 36/2010, Personal Status Law.

372. See Article 176 of the Law No. 36/2010, Personal Status Law.

373. See Article 177/A of the Law No. 36/2010, Personal Status Law.

374. See Article 177/B of the Law No. 36/2010, Personal Status Law.

296. In addition, there are certain complicated cases in which judges cannot closely examine the situation of the child due to the large caseload and the insufficient number of judges and specialists at the court for the separate examination of each case. This affects the application of Articles 3 and 12 of the UNCRC.
297. In **Israel**, the answers to the Questionnaire indicate that the main difficulty in determining custody and visitation rights is that the assessment is not based on a uniform formula but rather on a determination between different options. The court is entitled in such cases to create a new reality of life for the family and to determine what is the best interest of the child in a way that anticipates the future, which is a highly complex task. Moreover, such a decision is not of a purely legal nature and accordingly, judges usually request the assistance of competent professionals from the field of social affairs in order to obtain recommendations for determining the custody and times of stay with each parent, and for the clarification and determination of the best interest of the specific child.
298. In **Jordan**, one of the major difficulties in adjudicating cases that involve assessing the child's best interests (or interest/*maslaha* for the case of Jordan), is the large and increasing number of cases heard before the Jordanian Shari'a courts, which is not in proportion with the current number of judges.³⁷⁵ This affects the productivity of judges and can hinder the process of assessment for each individual case. In addition, it is difficult for judges to assess the best interests of a specific child due to the complication of the dispute and the defence tactics followed by the parents hindering the court from assessing the real situation of the child.
299. In **Palestine**, the answers to the Questionnaire indicate that the main difficulty facing the judges at the Shari'a courts is that the role of the social specialists and protection guides is not considered as a fundamental part in the adjudication of personal status matters. The Palestinian Personal Status Law No. 61/1976 did not consider the role of the social specialists and the protection guides which affects the judges of the Shari'a courts. Accordingly, judges cannot rely on reports which describe the status and living conditions of the child, thus leaving the judges to decide only upon the facts written on the documents submitted by each party to the dispute. Judges in Palestine work in difficult circumstances due to insufficient resources, which, for example, hinders the judges from hearing family cases "in camera" - until now there are no confidential court rooms for family courts. In addition, judges are not provided with training on the adequate application of the best interests of the child principle.

iii) Time to obtain a custody decision (Questions B.10)

300. In **Egypt**, the timeframe for obtaining a custody decision varies from one case to another. The time frame is usually between two months and six months. However, cases involving investigation by the court, cases requiring expert opinions and cases involving international element, may take longer than six months.
301. In **Israel**, the timeframe for obtaining a custody decision varies from one case to another. The time frame is usually between one month and a few months. In more complex cases the decision might take several months, especially in cases where professional opinions are required and where more

375. According to the latest official statistics published on the website of the Shari'a courts, available in Arabic at < <http://www.sjd.gov.jo/Pages/viewpage.aspx?pageID=206> > (Last consulted on 1 April 2018).

complex issues are discussed. Judges normally give custody issues priority, both in the decision-making and in terms of timetables.

302. In **Jordan**, the time required to obtain a custody decision differs from one case to another, but in religious courts a decision takes from one to six months up to one year. During this period, litigants can obtain interim orders, if it is in the interest (*maslaha*) of the child.
303. In **Palestine**, a custody decision normally takes from four to six months. However, this period is only considered for first instance courts and do not include the time for the appellate instance.

b) The application of Article 12 UNCRC

i) The application of the principles set forth in Article 12 UNCRC, the principles' implementation in domestic law (Question C.1)

304. In **Egypt**, the Egyptian legislator has made several legislative amendments aiming to implement the main principles of the UNCRC. In 2008, the Egyptian legislator enacted an amendment to the Child Law adding the following Article: *"This law, in particular, guarantees the following principles and rights: (C) The right of the child who is able to form his or her own views to obtain information that enables him or her to form and express such views and to hear on all matters relating thereto, including judicial and administrative proceedings, in accordance with the procedures established by law".*³⁷⁶ In addition and in support of the child's right to be heard, the Personal Status Law was amended to state the following: *"The eligibility for litigation in matters of personal status for self-sufficiency is established for a person who has completed fifteen full years enjoying full mental ability. If he does not have his/her representative or if there is a reason to initiate proceedings in contravention with the opinion of his representative or against him, the court appoints a custodian for the dispute on its own behalf or at the request of the public prosecution or others".*³⁷⁷
305. Although these provisions seem clear and explicit, an analytical view reveals that these provisions do not oblige the judges to undertake any particular action during the proceedings. In this context, it should be noted that the UNCRC Committee expressed concerns in its Concluding Observations regarding the limited practical application of the child's right to be heard and that this right is not systematically implemented in judicial and administrative proceedings. Accordingly, the Committee urged the Egyptian government to strengthen the family courts and take all necessary measures to ensure that the principle of the right of the child to be heard is reflected and implemented in all administrative and judiciary decisions, policies and programmes relating to children.³⁷⁸ Despite the obstacles to the implementation of the child's right to be heard by the courts, the SCC in a 2013 ruling continued its indispensable and evolutionary role in interpreting the right to custody of the child by determining that the right of the child to be heard is a fundamental right that does not conflict with

376. See amended Article 3(C) of the Law No. 12/1996, Child Law, amended by the Law No. 126/2008. (Translated by the author).

377. See Article 2 of the Law No. 1/2000, Personal Status Procedures. (Translated by the author).

378. For more details see the UN Committee on the Rights of the Child Concluding Observations on third and fourth periodic reports for Egypt, *op. cit.* note 330, at paras 40 and 52.

the provisions of Sharia and their application is in the best interest of the child in accordance with the developments experienced by the society and the family.³⁷⁹

306. In **Israel**, the right of the child to be heard in matters affecting his/her interest has been incorporated into national law in accordance with Article 12 UNCRC. This right has been clearly defined in some of the latest legislative amendments, for example, Amendment No. 14 to the **Youth Law 5731-1971**, which constitutes an extensive amendment that applies to several laws applicable to children. Section 1B (a) of the Amendment No. 14 to the Youth Law states that “*minors are entitled to state their opinion and express their personal feelings prior to a decision being reached in matters that affect them*”³⁸⁰. In addition, the amendment stipulates that court’s rulings should be given subsequent to the child in question having expressed her/his opinion. Judges and administrators are required to pay attention and give substantial weight to the minor’s opinion when ruling or making a decision that affects the child, bearing in mind the child’s age and level of maturity.
307. In addition, Regulation No. 258(lg)2 of the Civil Procedure Regulations stipulates the principle of the duty to hear the opinion of the child, which generally applies from the age of six years.
308. The Questionnaire answers indicate that a court that discusses an action relating to children as provided in Regulation Nos. 258(7)3, (6), (10) or (12) of the Civil Procedure Regulations, shall give the child an opportunity to express his/her feelings, opinions and desires, in the matter before the court, and this will be given proper weight in accordance to the child’s age and maturity. If the court decides that the child’s opinion is not to be heard, because it is convinced that the realisation of the child’s right to be heard will be harmful for the child and thus not in the best interests of the child, the specific reasons are to be recorded.
309. Civil family courts regularly hear minors, specifically in cases concerning custody. The new Amendment affected the *modus operandi* of family court proceedings by requiring judges in the civil family court to “*hear the voice*” of the child concerning a range of legal issues such as: claims dealing with custody, education, visitation rights, ensuring the connection between a minor and his/her parent and transporting a minor from Israel, the return of a minor child under the 1980 Hague Convention, a claim to change the name of the minor, hearing the minor over the age of nine in adoption proceedings and immigration.
310. In its Concluding Observations the UN Committee on the Rights of the Child welcomed the positive steps taken by Israel in expanding to all courts by 2014 the experimental programme initiated in 2007 at the Haifa and Jerusalem courts with the participation of children involved in family matters proceedings.³⁸¹
311. In **Jordan**, there is no direct reference to the application of Article 12 UNCRC in the laws relating to personal status. The Personal Status Law grants importance to the child’s views only on one particular case: the child after reaching the age of 15 years to choose to live with his/her father or stay with his/her mother until reaching the age of 18 years which can be considered an application of Article

379. Supreme Constitutional Court, Judgment No. 145 of the 27th Judicial Year, 12/05/2013.

380. Translated by the author.

381. For more details see the UN Committee on the Rights of the Child Concluding Observations on Israel’s second to fourth periodic reports, *op. cit.* note 342, at para. 27.

12 UNCRC.³⁸² In the overall legal practice in Jordan, hearing the voice of the child seems not well implemented as observed by the Committee on the Rights of the Child. The Committee recommended that Jordan should “*take measures to ensure the effective implementation of legislation that recognizes the right of the child to be heard in relevant legal proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle*”.³⁸³

312. In **Palestine**, there is no direct reference to the application of Article 12 UNCRC in the laws relating to personal status. However, the Juvenile Law No. 4/2016 is more homogeneous with the UNCRC and specifically Articles 3 and 12 UNCRC. Since Palestine has not yet submitted a report to the Committee on the Rights of the Child and thus no concluding observations of the Committee exist, it is difficult to assess the implementation of Article 12 UNCRC in Palestine.

ii) Age as of which children are heard (Question C.2)

313. In **Egypt**, it is permissible to hear a person who has not reached the age of 15 years but only by way of inference (*estdelal*), which entitles the judge to deduce facts and evidence from the child without considering him/her as a witness and without reasoning from explicit statements.³⁸⁴ While the Civil Code stipulates that “*1-A person is considered unaware due to his/her age, imbecility or insanity and shall not be able to exercise his/her civil rights. 2-A person who did not attain the age of seven years shall be deemed as lacking awareness*”³⁸⁵

314. Accordingly, a child above the age of seven years can be heard by way of inference.

315. In **Israel**, according to Article 295/9(5) of the 1995 Amendment to the Civil Law Procedures and section 1B (a) of the Amendment No. 14 to the Youth Law children are heard from the age of six. However, younger siblings in the family are heard as well in certain cases. Usually, a further review is performed by a social worker, who visits the home of the parties and meets with the minor and then presents accordingly to the court the picture of the child's life by means of a report (see *infra* para. 381).

316. In **Jordan**, the judge can listen to the child by way of inferring (*este'nas*) from the age of seven years, as it is stipulated in the Personal Status Law that anyone who has not reached the age of seven is considered unaware.³⁸⁶ Judges can hear children from the age of 15 in the case of determining the child's choice whether he/she wants to stay with the custodial mother.³⁸⁷ Although, the Jordanian legislator did not indicate whether judges are obliged to hear children before the age of 15 years, the law is silent in this regard. However, as indicated by the Questionnaire answers, judges and specialists can hear the child from the age of awareness which is above seven years.

317. In **Palestine**, Article 74/2 of the **Law No. 4/2001 regarding Civil and Commercial Data** stipulates that “*A person may not be eligible for testimony if he/she has not attained the age of fifteen years and*

382. See Article 173/B of the Law No. 36/2010, Personal Status Law.

383. For more details see, UN Committee on the Rights of the Child Concluding Observations on Jordan's fourth and fifth periodic reports, *op. cit.* note 348, at para. 24 (a).

384. See Article 64 of the Law No. 25/1968, Evidence in Civil and Commercial Provisions.

385. See Article 45 of the Law No. 131/1948, Civil Code. (Translated by the author).

386. See Article 204/B of the Law No. 36/2010, Personal Status Law.

387. See Article 173/B of the Law No. 36/2010, Personal Status Law.

shall be presumed to have the right to be heard by a person who has not reached that age without an oath”.

318. Accordingly, a child can be heard on his own by the age of 15 years before the Shari’a courts. During proceedings, the child who did not reach the age of 15 may be permitted to be heard in the sessions based on the discretion of the judge and if his/her involvement proves beneficial and favourable to him/her.³⁸⁸

(I) Possibility to appoint a legal representative (Question C.5)

319. In **Egypt, according to the Personal Status Law for Muslims** “*The eligibility for litigation in matters of personal status for self-sufficiency is established for a person who has completed fifteen full years enjoying full mental ability. If he/she does not have his/her representative or if there is a reason to initiate proceedings in contravention with the opinion of his/her representative or against him/her, the court appoints a custodian for the dispute on its own behalf or at the request of the public prosecution or others*”.³⁸⁹ Accordingly, the court has powers to appoint a legal representative for the child in accordance with its discretion in certain circumstances. Article 2 of the Law No. 1/2000, Personal Status Procedures reflects that the right of the child to be heard is applied in such cases where the child might have his/her own views which might conflict with those of the guardian/custodian and accordingly the court can appoint a legal representative to communicate the views of the child to the court.
320. In addition, the public prosecution is entitled in certain circumstances to raise a case in matters of personal status if there is a conflict with public order or morals. It must also intervene in personal status cases, which are raised before the first instance courts, otherwise the judgment will be considered null and void.³⁹⁰
321. In **Israel**, the civil family courts have increasingly in recent years appointed guardians for minors, particularly in complex parental disputes when the dispute and conflict affect the child and when the communication between the parents is very poor.
322. According to the Capacity and Guardianship Law, 5776-2016, in Article 68 (a) “*The Court may, at any time, upon application of the Attorney-General or his representative or upon application of an interested party or of its own motion, take temporary or permanent measures which seem appropriate for protecting the interests of a minor, a legally incompetent person, or a ward, either by appointing a temporary guardian or guardian ad litem, or otherwise*”. The court may also do so on application of the minor, the legally incompetent person or the ward himself.
323. In addition, Israel established a Legal Aid Department at the Ministry of Justice with the purpose of providing free of charge separate representation of children in civil family courts in order to preserve and promote the interests and rights of minors when the rights of the minor are in conflict with his/her parents or require separate representation.³⁹¹ Children over 14 years are entitled to approach the

388. See G. Parolin, *Research Report, Research Report*, op. cit. note 34, at p. 70 (of the EN version).

389. See Article 2 of the Law No. 1/2000, Personal Status Procedures. (Translated by the author)

390. See Article 6 of the Law No. 1/2000, Personal Status Procedures.

391. For more information about the Legal Aid Department see, available at < <http://www.justice.gov.il/En/Units/LegalAid/About/Pages/ACTIVITY-OF-THE-LEGAL-AID-DEPARTMENT.aspx> > (last consulted on 1 April 2018).

Legal Aid Department directly but it has to be proven that the interests of the child are conflicting with those of his/her parents. When there is an on-going case at the family court, the judge on his own motion can request legal aid for the child. Legal aid can also be requested by the child, one of the parents or upon recommendation from a social worker. It should be noted that legal aid for children is only available in the civil family courts and not in religious courts.

324. In **Jordan**, according to the Personal Status Law, the guardian (*wali*) of the child is his/her father and it is considered a natural right of the father to represent his child.³⁹² However, the guardianship can be withdrawn or restricted from the father in certain cases if he violates the rules of guardianship.³⁹³ In case the guardianship (*wilaya*) was restricted or withdrawn, the judge can appoint a (*wasi*) which is a form of assigned guardianship.³⁹⁴ A (*wasi*) can be a male or female who is a relative of the child or in cases of absence of such relative the court may appoint a (*wasi*) to represent the child under the supervision of the court.³⁹⁵ These rules are applicable from the child's birth until he/she reaches the age of 15 years.
325. There is no direct reference to appointing a legal representative for a child during the civil proceedings of a case concerning the child.
326. In **Palestine**, there is no reference to appointing legal representatives of a child during the proceedings of a case before Shari'a or other religious courts. The family public prosecution is entitled in certain circumstances to raise a case in matters of personal status or matters relating to children, if there is a conflict with public order or morals. The public prosecution may intervene in personal status cases on its own initiative or upon request from the head of the Shari'a court (*qadi al qodah*).³⁹⁶ In cases relating to contact and custody rights usually there is no interference – only if there is a dangerous situation for the child.

(2) Minimum age to raise a case before the court (Question C.6)

327. In **Egypt**, a child can raise a case on his/her own from the age of 15.³⁹⁷ Thus, if the guardian or custodian has filed a case on behalf of a 15-year-old child, the judge will be required to advise the representative that the child should be representing himself in the case or the case will be dismissed. In that event, the case will not be admissible because children are eligible to represent themselves before family courts from the age of 15.³⁹⁸
328. In **Israel**, the Family Court Law³⁹⁹ stipulates in Article 3(d) that a minor may file a suit independently before a court or with the assistance of a close friend.⁴⁰⁰

392. See Article 223 of the Law No. 36/2010, Personal Status Law.

393. See Articles 227/B and 228 of the Law No. 36/2010, Personal Status Law.

394. See Article 230 of the Law No. 36/2010, Personal Status Law.

395. See Article 232 of the Law No. 36/2010, Personal Status Law.

396. See Articles 5(2), 7, 8 from the Regulation of Family Public Prosecution of the year 2004.

397. See Article 2 of the Law No. 1/2000, Personal Status Procedures.

398. Court of Cassation Judgment, 402 for the Judicial Year 70, 06/04/2008, at pp. 372 et seq.

399. *Supra* note 273.

400. Article 3 (d) of the Family Court Law states: "Regarding a family matter relating to a minor, a social worker appointed by law, by means or subject to the approval of the Attorney General or representative thereof, may file a suit under this Law; the minor further may, independently or with the assistance of a close friend, file such suit in any matter in which his or her right is liable to be seriously prejudiced."

329. In **Jordan**, a child can seize a court on his/her own from the age of 15. The Committee on the Rights of the Child in its Concluding Observations expressed its concern that children under the age of 15 cannot lodge complaints of violations of their rights if they are not assisted by their parents or their guardians. The Committee also raised concerns that the mechanisms to support children in reporting their claims have yet to be established.⁴⁰¹
330. In **Palestine**, the **Palestinian Civil Code** identified in its Article 53 the persons who cannot exercise their civil rights as “persons who did not reach the age of 18 years”. This rule has an exception before Shari’a courts which according to its law considers a child as fully grown and responsible to exercise his/her rights by the age of 15 allowing him/her to bring his/her own case before the Shari’a courts. This issue raises a conflict in cases where a child wants to initiate a case on his/her own before civil courts when he/she had reached the age of 15.

iii) The person in charge of hearing the child (Question C.3)

331. In **Egypt**, the child is heard using a number of methods. Primarily the child is directly heard by the first instance family court, which is composed of a circuit of three judges and two specialists (social and psychological), one of whom must be a woman. In the family court of appeal, the court is composed of three senior judges who can choose to be assisted by specialists.⁴⁰² The attendance of the specialists is compulsory only in cases of custody, contact and relocation. Each specialist is required to submit a report to the court about the social and psychological condition of the child.⁴⁰³ The court can also appoint other experts for specific cases or for an issue within a case, and require them to submit a report and shall set a time limit for the submission of the report not exceeding two weeks.⁴⁰⁴
332. In **Israel**, children can be heard in a number of different ways. Depending on the court’s decision, the judge him-/herself is the one who can hear the child in the presence of a social worker trained to hear children, in addition to an employee from the Welfare Unit trained to hear children. The court can also authorise professionals such as social services, who are required to submit a report, a psychologist that examines the status of the minor and a lawful guardian appointed by the Court.
333. In **Jordan**, judges are primarily in charge of hearing the child. In addition, the child can be heard by family reformer if the judge referred the case to the family reform and conciliation office.⁴⁰⁵ The court can also authorise a psychologist to hear the child if needed.
334. In **Palestine**, judges are in charge of hearing the child. In addition, the child can be heard by social specialists and protection guides, but as mentioned above, judges are not entitled to rely on the reports of social specialists and protection guides (see *supra* Part II, A, 2, a, ii.3, at para. 299).

401. For more details see UN Committee on the Rights of the Child Concluding Observations on Jordan’s fourth and fifth periodic reports, *op. cit.* note 348, at para. 35.

402. See Article 2 of the Law No. 10/2004 Establishing Family Courts.

403. See Article 11 of the Law No. 10/2004 Establishing Family Courts.

404. See Article 4 of the Law No. 1/2000, Personal Status Procedures.

405. See Article 7 of the Law No. 17/2013, Office of Family Reform and Conciliation.

iv) The consideration of the child's views in the assessment of the best interests of the child (Question C.4)

335. In **Egypt**, hearing the child is required in certain cases stipulated by law such as when the child reaches the age of 15 years, the court will allow the child to choose with which parent to stay until he/she prefers to live until the child reaches the age of legal majority. Judges have discretion to order to hear the child who is under 15 years of age in accordance with what he/she considers is in the best interests of the child.⁴⁰⁶
336. In **Israel**, the hearing of the child is extremely significant for determining the custody decisions and visitation arrangements. Hearing of the child assists the judge in getting acquainted with the child's life, his/her wishes and needs. It also helps the judge to and understand the best interests of the child in the decision-making process.
337. In **Jordan**, the hearing of the child is required in certain cases stipulated by the law. However, the judge can hear the child according to his own discretion in accordance with what he considers in the best interest of the child (see *supra* at para. 316).
338. In **Palestine**, during proceedings, the child may be permitted to be heard based on the discretion of the judge and if his/her involvement proves beneficial and favourable to him/her.⁴⁰⁷ Accordingly, an assessment can be made based on the views of the child, which can form a basis for the judge's decision.

c) The Concluding Observations and General Comments of the Committee on the Rights of the Child (Questions B.1-B.2)

339. The last UNCRC report concerning **Egypt** was submitted on 30 August 2008 and the Concluding Observations regarding this report were published on 30 September 2010.⁴⁰⁸ The reports are not circulated among judges in family courts. The Committee recommended that the consolidated third and fourth periodic reports and written replies submitted by the Egypt and the related recommendations (Concluding Observations) it adopted be made widely available and accessible in all languages of the country, including (but not exclusively) through the Internet to the public at large, civil society organizations, youth groups, professional groups and children.⁴⁰⁹ Egypt was due to submit its next report on 02 March 2016. However, the report has not yet to submitted (status 1 April 2018).
340. The last UNCRC report concerning **Israel** was submitted on 11 June 2010 and the Concluding Observations regarding this report were published on 04 July 2014.⁴¹⁰ However, such reports are not circulated among judges in family and religious courts. The UNCRC Committee in its Concluding

406. See Article 20 of the Law No. 25/1929, Personal Status Law.

407. See G. Parolin, *Research Report*, *Research Report*, *op. cit.* note 34, at p. 70 (of the EN version).

408. For more specific information on the reporting cycle for Egypt see < www.ohchr.org > under "Human Rights by Country" then "Egypt" then "reporting status" then "CRC-Convention on the Rights of the Child" (last consulted on 1 April 2018).

409. For more information see the UN Committee on the Rights of the Child Concluding Observations on third and fourth periodic reports for Egypt, *op. cit.* note 330, at para. 92.

410. For more specific information on the reporting cycle for Israel see < www.ohchr.org > under "Human Rights by Country" then "Israel" then "reporting status" then "CRC-Convention on the Rights of the Child"

Observations recommended that the combined second and fourth periodic reports, written replies and the related recommendations (observations) to be made widely available to the public.⁴¹¹ Israel is due to submit its next report on 2 November 2018.

341. The last UNCRC report relating to **Jordan** was submitted on 16 August 2012 and the Concluding Observations regarding this report were published on 01 March 2013.⁴¹² According to the Questionnaire answers, the UNCRC reports and Concluding Observations are not circulated among judges in religious and civil Courts. Moreover, judges from the Shari'a courts take part in the preparation of the UNCRC reports. In its Concluding Observations on the fourth and fifth periodic reports for Jordan, the UNCRC Committee encouraged the Jordanian government to develop procedures and criteria to provide guidance to all relevant persons in authority for determining the best interests of the child, as well as to courts of law, administrative authorities and legislative bodies, and traditional and religious leaders.⁴¹³ Jordan is due to submit its next report on 22 July 2019.
342. **Palestine** ratified the UNCRC in April 2014. However, there are no reports submitted to the Committee on the rights of the child; accordingly, there are no observations made for Palestine in this regard. The UNCRC country report for Palestine was supposed to be submitted in May 2016. However, the report has not yet to submitted (status 1 April 2018).

3. Amicable dispute resolution

a) The implementation of parental agreements on custody and contact (Question D.1)

343. In **Egypt**, due to the large number of family disputes, the legislator provided for more support and encouragement to the process of settling family disputes amicably. In January 2006, the United States Agency for International Development (USAID) and the Egyptian government launched the family justice programme through the implementation of the Law No. 10/2004 Establishing Family Courts.⁴¹⁴ The project was implemented in close cooperation with the Ministry of Justice to help provide family advice and help settle family disputes amicably before they are referred to the courts. This project also helps in raising awareness of the work of family courts and their role, in promoting the rights of the child and the family, mobilising resources to support children and families, and providing social, psychological and legal family advice.⁴¹⁵

411. For more information see UN Committee on the Rights of the Child Concluding Observations on Israel's second to fourth periodic reports, *op. cit.* note 342, at para. 77.

412. For more specific information on the reporting cycle for Jordan see < www.ohchr.org > under "Human Rights by Country" then "Jordan" then "reporting status" then "CRC-Convention on the Rights of the Child".

413. For more details see UN Committee on the Rights of the Child Concluding Observations on Jordan's fourth and fifth periodic reports, *op. cit.* note 348, at para. 20.

414. See Article 5 of the Law No. 10/2004 Establishing Family Courts.

415. For more information, see the Third and fourth periodic reports of Egypt submitted to the UN Committee on the Rights of the Child, available online at < www.ohchr.org > under "Human Rights by Country" then "Egypt" then "reporting status" then "CRC-Convention on the Rights of the Child", at para. 126.

344. The procedure of parental settlement agreements can be made whether by the parents themselves or through the court intervention, by sending the file of an on-going case to the conciliation office. In the first case, parents are free to conclude a parental agreement among themselves over all matters related to custody and contact rights by submitting the agreement directly to the Family Disputes Settlement Office in order to be considered as an enforceable binding document.⁴¹⁶ On other hand, parties to a dispute have to submit their file first to the settlement office before the court can discuss the case, as the case will be considered inadmissible without trying to settle the dispute.⁴¹⁷ In both cases judges are entitled to approve the content of the agreement after it has been signed by the parties.⁴¹⁸
345. In **Israel**, according to section 24 of the Legal Capacity and Guardianship Law, 5722/1962 parents who do not live together are entitled to conclude a guardianship agreement determining custody and visitation rights. Such an agreement requires the approval of the courts in order to confirm, *inter alia*, that the agreement is not manifestly contrary to the child's best interests.
346. The process of approving the agreement requires that the court to first and foremost examine whether the parties understand the agreement and its implications. The court focuses less on examining issues concerning the best interests of the child; the presumption being that the parents have considered the best interests of their children in the best way possible. However, in exceptional cases, the judge may intervene. In practice, cases in which a judge decides to disapprove an agreement on the grounds of harming the best interest of the child are very rare. In a recent case, *Ls v. SM*, a mother and her former husband concluded an agreement as a result of which the children were to relocate with the mother and the father's child support arrears were to be reduced. The civil family court rejected the parents' agreement, ruling that it was not in the best interest of the children. On the appeal, the district court overturned the civil family court's decision. The court held that where parents reach an agreement regarding the living arrangements of their children, the courts must respect the parent's prerogative to determine their children's best interest since the court should not replace the parent's judgment by its own.⁴¹⁹
347. Accordingly, the judge will intervene to disapprove the agreement only in very exceptional cases, which clearly contradict the best interest of the minor and in cases where the agreement does not comply with the law, or is not in compliance with public order and so forth.⁴²⁰
348. According to the law, in the case of an agreement, the judge can choose to hear the minors, though this is usually exceptional.
349. In 2016, a new law was passed - the Family Disputes Law - which holds that prior to the filing of legal claims between spouses or parents and children (up to the age of 18), they must attend compulsory mediation in the Welfare Units (social workers of the Ministry of Welfare). During the mediation period, there is a period of at least 45 days of suspension of proceedings in which neither party can file claims. The compulsory mediation does, however, not apply in international case of wrongful

416. See Article 6 of the Law No. 10/2004, Establishing Family Courts.

417. See Article 8 of the Law No. 10/2004, Establishing Family Courts.

418. See Article 9/6 of the Law No. 1/2000, Personal Status Procedures.

419. Family appeal 1066/06, Jerusalem District Court.

420. For more details on the assessment of parental agreements, see Supreme Court Judgment LFA 741/11, *Doe v. Doe* (17/05/2011).

removal or retention. The **Hague Convention (Return of Abducted Children) Law, 1991** stipulated that the family court has to reach a decision in such cases within six weeks, while the mediation procedures might last longer than this period.

350. In **Jordan**, the procedure of parental agreements can be made either by the parents themselves or through the intervention of the court. Parents can conclude an agreement among themselves over all matters relating to custody and contact rights by submitting the agreement directly to the Office of Family Reform and Conciliation in order to be transformed into an enforceable binding document.⁴²¹ The Shari'a Enforcement Law allows the parents to amend their entire agreement or some of its provisions before the enforcement judge. It is also possible for the parents to annul a previous agreement and conclude a new agreement in front of the Family Reform and Conciliation Office.⁴²²
351. In the event that the parents are in disagreement and resort to the courts, judges can interfere according to the Principles of Shari'a Proceedings Law and refer the case file to the Office of Family Reform and Conciliation before deciding on the case, and that is an optional measure taken by the judge.⁴²³ The Office in such case will try to conciliate between the parents in a period not exceeding 30 days and in case there is an agreement the Office will present it to the judge to be transformed into an enforceable binding document.⁴²⁴ In both cases, judges are supervising the agreements made by the parents whether in the context of their free will or through the interference of the court through the Office of Family Reform and Conciliation. As stipulated by law, the court can only interfere in cases where the agreement is contrary to public order.⁴²⁵ It should be noted, that it is unclear whether the law allows the judge to hear the child's views regarding the agreement during the amicable settlement proceedings. There is no reference to the best interest of the child as a reason to confirm or reject a parental agreement; the law only stipulates that a judge can withdraw an agreement if it is contrary to public order.⁴²⁶
352. In case the parents are Christians, the law on Tribunals of Christian Communities allows the judge, in case he finds that there is a possibility for conciliation, to appoint persons to conciliate between both parties. When an agreement is reached the court will add it to the case file and will consider the agreement an enforceable judgement.⁴²⁷
353. In **Palestine**, the Shari'a judicial system encourages amicable dispute resolution and amicable settlements between parents and in case the agreement reached is approved by a judge it will have the power of an executive document and it will be considered as a final decision. Judges will apply the principle of the best interest of the child when assessing and approving the agreement. Judges are also entitled to hear the views of the child in the parental agreement from the age of 7 years and must hear the views of the child from the age of 15.

421. See Articles 7 and 11/A of the Law No. 17/2013, Family Reform and Conciliation.

422. D. Engelcke, *op. cit.* note 343, at p. 135.

423. See Article 11 of the Law No. 31/1959 on the Proceedings of Shari'a Courts.

424. See Article 11 of the Law No. 17/2013, Family Reform and Conciliation.

425. *Ibid.*

426. *Ibid.*

427. See Article 17 of the Law No. 28/2014 on the Tribunals of Christian Communities.

354. In 2004, the Division of Family Guidance and Reform was established by a presidential decree.⁴²⁸ There is an office for the Division in every Shari'a court. The Division plays an important role in resolving several disputes with parental agreements.⁴²⁹

b) The option to designate a Central Contact Point for International Family Mediation⁴³⁰ (Question D.2)

355. In **Egypt**, it is possible that a Central Contact Point for International Family Mediation be established at the Egyptian Ministry of Justice, thus it will be located near to the International Cooperation Department at the Egyptian Ministry of Justice. It will be more effective if this contact point works together with the International Cooperation Department to facilitate the process of contacting the authorities of other countries.

356. In **Israel**, a Central Contact Point for International Family Mediation should be established in Tel Aviv in proximity to the civil family court. This is the central location for the establishment of such a point. In addition, in terms of local authority, the Civil Procedure Rules stipulate that in cases where there is no jurisdiction and where the parties did not have a last joint residence in Israel, the civil family court in Tel Aviv is usually authorized to decide (the Rules provides exceptions).

357. In **Jordan**, *it is recommended that such Central Contact Point be established as a division of the Court of Cassation.*

358. In **Palestine**, the Central Contact Point would have to be connected to the competent Ministry and the Supreme judge (*qadi al qodah*) department.

4. Cross-border wrongful removal or retention

a) The available remedies / mechanisms (Questions E.1-E.2)

359. **Egypt** has concluded a number of bilateral agreements regarding cross-border wrongful removal or retention of children.⁴³¹ As noted by the Annual Report on International Parental Child Abduction, issued by the United States of America Department of State, Egypt has no other procedures in place for returning abducted children and therefore does not adhere to any protocols with respect to

428. For more details on the division of family guidance and reform see, available in Arabic at < http://www.ljc.gov.ps/index.php?option=com_content&view=Article&id=109&Itemid=38 > (last consulted on 1 April 2018).

429. See also Article 79 of the Shari'a Judiciary Law No. 3/2011, which stipulated the formation of the division, its role and procedures.

430. The "**Principles for the Establishment of Mediation Structures in the context of the Malta Process**" call for the establishment of a "Central Contact Point for international family mediation" in each State facilitating the provision of information on available mediation services, on access to mediation, and other related information, including information regarding access to justice. See *supra* Introduction at para. 12.

431. For more information on the treaties concluded by Egypt see the UN Committee on the Rights of the Child Concluding Observations on third and fourth periodic reports for Egypt, *op. cit.* note 330, at para. 141.

international parental child abduction.⁴³² However, Egyptian family courts are entitled to issue temporary decisions as remedies to protect children from wrongful removal or retention. A parent can seek the issuance of a temporary decision from the family court if he/she has grounds to believe that his/her child might be abducted. The family court in such cases is obliged to issue a temporary decision to restrict a child from travelling outside Egypt.⁴³³ In addition, a parent who is enforcing a contact decision can request from the court which issued the decision to restrict the travelling of his/her child. Thus, the competent administrative authorities in Egypt may be obliged not to allow the child's travel based on a temporary decision from the family court. The Administrative Court has established in several rulings, that a decision of the family court is required to compel the State authorities to prevent the travelling of a child.⁴³⁴

360. Although in practice, cases of cross-border wrongful removal from or to Egypt are not rare, Egypt is not yet a Contracting State of the Hague Convention on the Civil Aspects of Child Abduction.⁴³⁵ The UN Committee on the Rights of the Child recommended that Egypt joins the 1980 Hague Convention.⁴³⁶ In an attempt to overcome the legal gap in cases of cross-border abduction, Egypt created the International Cooperation Committee at the Egyptian Ministry of Justice to settle disputes on custody or visits in the cases of mixed marriages or families living abroad.⁴³⁷
361. **Israel** has signed and ratified the Hague Convention on the Civil Aspects for Child Abduction on 01 December 1991. The Israeli law has a very organised mechanism for the management of the civil return proceedings.
362. Cross-border wrongful removal or retention cases must be decided swiftly and effectively, regardless of the issue of custody determination so as not to make the case a custody proceedings case. If there is a decision from the court of a foreign country, the court in Israel will usually respect it.
363. As another means of preventing the illicit transfer of children in situations of parental disagreement, in addition to the fact that both parents are the child's guardian, the Ministry of Interior issues passports to children only with the consent of both of their parents. If a parent fears that the other parent may attempt to illicitly transfer the child to another country, she/he may request an injunction against the child leaving the country.
364. As an example of case law, an Israeli Supreme Court decision ordering the return of two children to their State of habitual residence in accordance with the 1980 Hague Convention shall be referred to here. The mother had legal custody of her minor children and they were living with her in Italy. During one of the father's regular visits to Italy to meet with his children, he took them with him to Israel without the knowledge and/or permission of the children's mother. The mother filed a suit with the Israeli first instance court – demanding the return of the children according to the Hague Convention. The father claimed that the children's opposed to being returned and that therefore an exception to

432. For more information see < <https://travel.state.gov/content/dam/childabduction/complianceReports/2016.pdf> > (Last consulted on 1 April 2018).

433. See Articles 5/1 and 10 of the Law No. 1/2000, Personal Status Procedures.

434. Administrative Court Ruling No. 47376, for the Judicial Year 64, 20/01/2015.

435. For the Convention text and further information see *supra* note 2.

436. For more information see the UN Committee on the Rights of the Child Concluding Observations on third and fourth periodic reports for Egypt, *op. cit.* note 330, at paras 55-56.

437. See the Third and fourth periodic reports of Egypt submitted to the UN Committee on the Rights of the Child, *supra* note 415, at para 138.

the return would apply. The court held that under Article 13 (2) of the 1980 Hague Convention there is no duty to return the children to the State of origin if the children of sufficient age and maturity explicitly object to the return. Since the return to the State of habitual residence is generally considered in the best interest of the child the use of the exceptions to return cited in Article 13 must be limited, in order to comply with the Convention's goal. In this case, it was held that the children's determination to stay in Israel was not established, therefore they should return to Italy.⁴³⁸

365. In **Israel**, courts are entitled to issue temporary decisions as remedies. The court is competent to give temporary orders to protect the safety of children during the period of their stay in Israel; contact arrangements with both parents; medical and mental care. The court is not limited in terms of the temporary remedies it gives, as long as the matter overlaps with the clarification of custody or arrangements prior to the decision-making in the matter of wrongful removal or retention of a child. Within the framework of The Civil Procedure Rules that relate to procedures concerning the wrongful removal or retention of a child, according to the Questionnaire answers, the court is allowed to give the following remedies:

1. A stay of exit order against the child or anyone holding him or her;
2. An order that forbids the exit of the child from the location specified in the order;
3. An order for depositing a passport or any travel document of the child or such document where the child is recorded;
4. An order instructing the Israel Police to investigate the circumstances of the wrongful removal or retention of the child, to locate the child's whereabouts and to assist a welfare officer in bringing the child before the court;
5. An order directed at other judicial or administrative authorities not to discuss the child's interests under Article 16 of the Schedule to the Law;
6. Any order which, in the opinion of the court, may prevent further harm to the child or to the rights of interested parties or such that will ensure the voluntary return of the child or the peaceful settlement of disputes.

366. In **Jordan**, courts are entitled to issue temporary decisions as remedies. As according to the Personal Status law courts can issue interim decisions in cases of travelling with the child by allowing the judge to impose an interim decisions with guarantees that the child will not be relocated outside the country.⁴³⁹ However, the custodial father only is allowed to relocate with the child without the consent of the mother or the court.⁴⁴⁰

367. The court is competent to give temporary orders to protect the safety of children during their period of residence in Jordan. In addition to the special provisions stipulated in the Shari'a Enforcement Law regarding enforcing foreign judgements⁴⁴¹, judges can expedite the execution on the same day in case it is proved by the plaintiff that the child might be relocated outside of the country. While in the event of an ongoing custody dispute when there is fear that the custodian might escape with the child outside of the country, judges can issue interim decisions such as banning from travelling.⁴⁴² Also in the

438. See F.M.A 672/06 Taufik Abu Arar v. Paula Ragozo (15.10.2006). (For a similar decision see, F.M.A 902/07 Anonymous v. Anonymous (26.4.2007).

439. See Article 177/A of the Law No. 36/2010, Personal Status Law.

440. See Article 177/B of the Law No. 36/2010, Personal Status Law.

441. See Article 12 of the Law No. 10/2013, Shari'a Enforcement.

442. See Article 7 of the Law No. 10/2013, Shari'a Enforcement.

case of a dispute involving two Christians, the judge of the religious court may issue temporary decisions relating to the case.⁴⁴³

368. In **Palestine**, there are precautionary measures applicable for the cases of wrongful removal or retention, as Articles 164 and 166 of the Law 61/1976 regarding Personal Status regulated the matters relating to removal or retention. However, these articles are not enough protection for preventing cross-border removal since Article 166 only prohibited the custodial mother from travelling with the child without the consent of the father and giving enough guarantees that the child will be returned and in certain cases the guarantee is financial.
369. There is no mechanism for cases of cross-border removal or retention in the personal status laws. However, the Questionnaire answers indicate that there is a strategic plan to incorporate the international and regional agreements with the national laws in this regard.
370. Despite the absence of mechanisms and remedies, a parent may issue a decision from a court abroad and use this decision before Palestinian national courts by executing this decision according to Article 12 of the **Law 17/2016 regarding the Enforcement of Shari'a Judgements**. Article 12/3 stipulated the conditions under which a foreign decision can be executed.⁴⁴⁴

b) The procedures

i) The timeline / delay (Questions E.4-E.6)

371. In **Egypt**, no specific remedies exist for cross-border wrongful removal and retention. However, interim/temporary decisions might assist in the protection of child in such cases (see above). These measures take from one day up to one month in complicated cases.
372. In **Israel**, in international child abduction cases there is a clear period of time: a family court ruling must be given within six weeks, subsequently to hearing the evidence and the summations. After these stages, the time frames for appeals to the district court is seven days. The entire procedure usually lasts a few weeks.
373. The Civil Procedure Rules, which stipulate the manner for conducting the procedure, stipulate a number of mechanisms and objectives to make the procedure very swift and efficient: a very short period from the beginning of the process through to the decision and the time frame for appeals, the manner of proving foreign Law, the provision of legal aid from the state. Usually, it is not necessary to translate the documents and there is an easement in terms of enclosing documents from overseas.
374. In **Jordan**, no specific remedies exist for cross-border wrongful removal and retention. However, interim and temporary decisions might assist in the protection of child in such cases (see above). These interim decisions and precautionary measures might take from one day up to one month.

443. See Article 11/B Law No. 28/2014 on the Tribunals of Christian Communities.

444. Article 12/3 "The conditions of superseding a foreign judgment with the status of an executive decision are: 1- That the court which issued the decision is competent 2-To be a final decision 3-Not contradicting with Shari'a rules, Basic law and public morals. 4- That the defendant in that judgment is informed with the decision from the competent court".

375. In **Palestine**, there are precautionary measures to avoid cross-border removal of children but in a national context such as Article 54 of the **Law No. 31/1959 regarding the Principles of Shari'a Legal Proceedings**, which allows the court to issue a travel ban decision preventing a defendant (parent) from travelling in cases it is convinced that the defendant is delaying the case or intending to leave the country. This is specifically applicable in cases of custody. As indicated in the Questionnaire answers, such interim decisions are issued on the same day that they are requested.

ii) Safeguarding the parent-child contact (Question E.7)

376. In **Egypt**, there are no specific mechanisms safeguarding the parent-child contact in the family courts for cross-border family disputes.

377. In **Israel**, the court is competent to stipulate the visitation arrangements with the left-behind parent *during the period of proceedings with him/her. The left-behind parent usually appears in the legal proceedings and temporary arrangements can be made. If there is a concern as to the best interests of the child, it is possible to set the meeting in the presence of a social worker or at a Child Contact Centre.*

378. In **Jordan**, according to the Questionnaire answers, a central office for cross-border family disputes was established in 2014 in Amman Shari'a court, which is responsible for safeguarding the parent-child contact in cross-border family disputes, which involve a foreign national.

379. In **Palestine**, there are no specific mechanisms safeguarding the parent-child contact in the Shari'a court for cross-border family disputes.

iii) Hearing the child (Question E.8)

380. In **Egypt**, judges are entitled to hear children in national conflicts from the age of 7 and from the age of 15 a child is entitled to initiate proceedings on his/her own, but this does not include cross-border family disputes, since there is no regulation operating in this regard.

381. In **Israel**, regulation 295/9(5) of the 1995 Amendment to the Civil Law Procedures 5744-1984 stipulates that if the child's age and level of maturity enables him/her, the court shall not make a decision prior to hearing the child's opinion, unless there is a special reason not to do so (such reason must be documented). Regulation 295/9(5) of the 1995 Amendment to the Civil Law Procedures also allows the court to consider the child's opinion in an indirect manner, namely via a professional in child care, in accordance with the Convention on the Rights of the Child. The Israeli courts formulated basic conditions to consider the weight given to a child's opinion: (a) age and level of maturity; (b) free will and (c) rationality.

382. In **Jordan**, children are heard in national conflicts from the age of seven, but this does not include cross-border family disputes.

383. In **Palestine**, children are heard in Shari'a courts in national conflicts from the age of puberty "9-15" but this does not include cases of cross-border family disputes.

iv) Possibility of appointing a legal representative (Question E.9)

384. In **Egypt**, the court may appoint a legal representative for the child, but this does not include cases of cross-border family disputes.
385. In **Israel**, the court may appoint a legal representative (guardian ad litem etc.) to safeguard the best interests of the child. However, it should be considered that the procedure is meant to be short, effective and focused, and it is necessary to make sure that such appointment will indeed help the court in clarifying the disputes.
386. In **Jordan**, *the court can appoint a (Wasi) for the child, but this does not include cases of cross-border family disputes.*
387. In **Palestine**, the Shari'a court may appoint a legal guardian for a child as a temporary measure in legal and financial issues if needed, but this does not include wrongful removal or retention in cross-border family disputes.

5. Enforcement of foreign custody and contact decisions

a) Competent court or authority to declare the foreign decision enforceable (Question F.1)

388. The family court in **Egypt** is the competent court to declare a foreign custody or contact decision enforceable. Once a decision is declared enforceable, the executing judge at each family court shall supervise the enforcement of such decision.⁴⁴⁵ As Egypt accepts enforcing foreign decisions in certain circumstances.⁴⁴⁶
389. The family court in Israel is the competent court to declare a foreign custody/contact decision enforceable. Once a decision is declared enforceable, it can be enforced with all the measures provided for enforcement of judgments issued by Israeli courts.⁴⁴⁷
390. In **Jordan**, Shari'a courts are responsible for the enforcement of foreign judgements if the case involves Muslims.⁴⁴⁸ When the parties to the case are Christians the court will apply the Law of Enforcement Foreign Judgements.⁴⁴⁹ In case the parties are of different religions the competent enforcement court in such case is the regular civil court. The civil courts have exclusive jurisdiction to declare foreign judgements enforceable, even if the enforcement will be carried out by religious courts.⁴⁵⁰

445. See Article 15 of the Law No. 10/2004 Establishing Family Courts.

446. See Article 296 of the Law No. 13/1968, Civil and Commercial Procedures.

447. According to Article "10(a) of the Foreign Judgment Enforcement Law (1958): "A foreign judgment which has been declared enforceable shall, for the purposes of enforcement, have the effect of a judgment validly given in Israel."

448. See Article 12 of the Law No. 10/2013, Shari'a Enforcement.

449. See Article 15 of the Law No. 10/2013, Shari'a Enforcement.

450. Court of Cassation Judgement, no. 2749/2011, 15/02/2012.

391. In **Palestine**, Article 12 of the Law No. 17/2016 regarding the Enforcement of Shari'a Judgements stipulates that Shari'a courts are responsible for the enforcement of foreign judgements in accordance with its jurisdiction. To declare a foreign judgement enforceable, a case should be brought before the Shari'a courts. Before declaring the judgement enforceable, the court will examine if it has competence.

b) Mechanisms safeguarding the enforcement of foreign decisions

i) Available mechanisms (Question F.2)

392. In **Egypt**, a judgment in a personal status matter rendered in a foreign country is not automatically recognized by Egyptian courts. As according to the Law of Civil and Commercial Procedures a judgement will not be considered enforceable unless" (1) The courts of Egypt are not competent to adjudicate the dispute in which the foreign judgment or order was issued and that the foreign courts which issued the judgement are competent according to the rules of international jurisdiction established by its laws. (2) The litigants in the case in which the judgment was rendered were assigned to present and duly represented. (3) The judgment or order shall have the force of a final binding decision in the law of the court which has issued it. (4) The judgment or order does not conflict with a ruling or order issued by the courts of the Republic and does not contain anything contrary to public order or morals.⁴⁵¹

393. Egyptian courts accepted the enforcement of foreign judgments in case they conform to the provisions contained in Article 297 of the Egyptian Civil and Commercial Procedures Law. In one of its rulings, the Court of Cassation decided to consider a custody ruling issued by the Abu Dhabi Court for the benefit of a mother enforceable in the Arab Republic of Egypt.⁴⁵²

394. In addition, in order to facilitate the implementation of the rulings issued by family courts, it is stipulated that there should be a unit of enforcement in each family court under the supervision of a judge from the family court and the members of this unit shall be given training on the enforcement of custody decisions.⁴⁵³

395. In **Israel**, a judgment in a personal status matter rendered in a foreign country is not automatically recognized. Before a judgment will be recognised or enforced, it must first undergo a domestic integration process. A declaration of enforceability (exequatur) is dependent on meeting certain conditions specified by statute.⁴⁵⁴ It should be noted that, there is an expedited procedure available for the recognition and enforcement of a foreign judgement on custody, if the request is presented under the Hague Convention Law, 1991.

451. See Article 298 of the Law No. 13/1968, Civil and Commercial Procedures. (Translated by the author).

452. Court of Cassation Judgment, No. 15 for the judicial year 53, 20/03/1984.

453. See Article 15 of the Law No. 10/2004 Establishing Family Courts.

454. H. Carmon, *Foreign Judgments in Israel: Recognition and Enforcement*, Springer, 2013, pp.xix et. seq., available at < <https://link.springer.com/content/pdf/10.1007%2F978-3-642-32003-3.pdf> > (last consulted on 1 April 2018).

396. In the event that the request is presented under the general law,⁴⁵⁵ the Law on the Enforcement of Foreign Judgments (1958), stipulates the conditions for recognizing a foreign ruling. It further applies to the enforcement and recognition of a judgment handed down in a foreign country, which concerns custody and visitation rights. Sections 3, 4 and 5 of the Law stipulates the conditions for such enforcement:

Article 3.(1) the judgment was given by a court which – under the laws of the State of the court - was authorized to give the judgment.

Article 3.(2) the judgment is no longer appealable.

Article 3.(3) the obligation imposed by the judgment is enforceable according to the laws regarding the enforcement of judgments in Israel, and the tenor of the judgment is not repugnant to public policy.

Article 3.(4) the judgment is executable in the State in which it was given.

Article 4.(a) A foreign judgment shall not be declared enforceable if it was given in a State the laws of which do not provide for enforcement of judgments of Israeli courts.

Article 5. The court shall not entertain an application for the enforcement of a foreign judgment if such application is filed more than five years after the day on which the judgment was given, unless a different period has been agreed upon between Israel and the state in which the judgment was given, or unless the court considers that there are special circumstances justifying the delay.

In addition, it is conditioned that the foreign country recognizes and enforces Israeli rulings - that is, the principle of reciprocity in enforcement.

Judgments dealing with cross-border family disputes on custody or contact will be exclusively discussed in the family court and the court may determine the conditions for the enforcement of the judgment.

397. In **Jordan**, a foreign judgement is not automatically recognized for enforcement in Jordan, the law stipulated certain requirements for a decision to be enforced by the Shari'a courts:

1. To be decided by a competent court.
2. To be final.
3. Not contradicting with Shari'a principles, Constitution or public order.
4. That the respondent was notified of the case from the competent court.⁴⁵⁶

455. See G. Parolin, *Research Report*, *Research Report*, *op. cit.* note 34, at p. 95 (of the EN version).

456. See Article 12 of the Law No. 10/2013, Shari'a Enforcement.

398. In case the foreign judgement concerns Christians, the court will apply the Law of Enforcing Foreign Judgements No. 8/1952.⁴⁵⁷ In the event that the foreign judgement concerns parties of different religions, the regular civil court will apply the Law of Enforcing Foreign Judgements No. 8/1952.⁴⁵⁸ While if the parties are of different religions and one of the parties is requesting enforcement before Shari'a court, the applicable law in such case is Law of Shari'a Enforcement.⁴⁵⁹
399. In **Palestine**, a foreign judgement is not automatically recognised for enforcement. The law stipulates certain requirements for a decision to be recognised and be declared enforceable by the Shari'a courts: (1) that the Palestinian courts do not have exclusive jurisdiction to issue such judgement; (2) that the foreign court was competent to decide on the matter; (3) that the decision is final; (4) that the foreign decision is not in contradiction with another judgement issued by a Palestinian competent court; and (5) and not contradictory to public order or morals.⁴⁶⁰ It should be noted, that a particular challenge when it comes to enforcing foreign judgements in Palestine are the judgements issued from Shari'a courts in territories under the control of the State of Israel such as Western Jerusalem. The Palestinian Court of Cassation set aside an enforcement judgement issued by the Shari'a court of Western Jerusalem on the grounds that the Jerusalem court of appeal was mistaken in considering it a national judgement, thus ruling that a judgement issued from the West Jerusalem court is a foreign judgement in accordance with Articles 36/1 and 37 of Enforcement Law No. 23/2205. Accordingly, it should be examined in accordance with the requirements stipulated for recognising a foreign decision.⁴⁶¹

ii) The respect of the best interests of the child (Question F.3)

400. In **Egypt**, the law only requires the foreign judgement not to contradict with public order and morals. There is no reference to the best interest of the child in this regard.
401. In **Israel**, the court can always review the best interest of the child. However, the exceptions to the non-recognition of the foreign rulings are limited and the Israeli court shall not become an additional appeal to the foreign court. In addition, the defences set forth in Article 6 of the Law on the Enforcement of Foreign Judgments (1958), do not include conditions applying the principle of the best interest of the child. In addition, the principle of reciprocity must be maintained with respect to the enforcement of a foreign ruling.
402. In **Jordan**, the law only requires the foreign judgement not to contradict with Shari'a principles, Constitution or public order.⁴⁶² There is no reference to the best interest of the child in this regard.
403. In **Palestine**, the Questionnaire answers indicate that, during the process of enforcement of a judgement children can be heard from the age of nine by the enforcement specialist in the event that the child refuses a decision of custody or visitation. In such case the specialist may refer the case file again to the enforcement judge in order to stop the enforcement of the judgement.

457. See Article 15 of the Law No. 28/2014 on the Tribunals of Christian Communities.

458. See Article 3 of the Law No. 8/1952, Enforcement of Foreign Judgments.

459. See Article 12, Law no. 10/2013, Shari'a Enforcement

460. See Article 37, Law no. 23/2005, Enforcement Law.

461. See Court of Cassation judgement no. 422/2010, on 13/1/2011.

462. See Article 12/3 of the Law No. 10/2013, Shari'a Enforcement. See also Article 7, Law No. 8/1952, Enforcement of Foreign Judgments.

iii) Possibility to communicate with the central contact points or International Cooperation offices for the enforcement of judgements (Question F.4)

404. In **Egypt**, judges are not eligible to communicate the International Cooperation Department at the Ministry of Justice.
405. In **Israel**, the family court may, within the framework of the ruling, refer the ruling to the central authority if it is of the opinion that the matter may assist in the enforcement of the judgment. This is practiced only in exceptional cases and not routinely.
406. In **Jordan**, judges are not eligible to communicate with International Cooperation Offices.
407. In **Palestine**, there are no mechanisms or contact points addressing this issue.

B. Comparative analysis Algeria, Lebanon, Morocco, and Tunisia

Dolly Hamad

List of abbreviations for national legislation:

PILC	Private International Law Code (Tunisia)
CPC	Civil Procedures Code (Lebanon / Morocco)
CAPC	Civil and Administrative Procedure Code (Algeria)
CCPC	Civil and Commercial Procedures Code (Tunisia)
CCP	Code of Child Protection (Tunisia)
PSC	Personal Status Code (Tunisia)

408. This section offers a comparative analysis of the legal systems of Algeria, Lebanon, Morocco and Tunisia in terms of the competent jurisdictions in cross-border family conflicts, the application of the provisions of the UNCRC in domestic law, the amicable resolution of cross-border family conflicts, the handling of wrongful removal and retention of children, the enforcement of foreign custody and contact decisions, and final observations

409. The four States examined in this section of the Comparative Study are governed by the civil law system, *i.e.* a codified legal system with its origins in Roman law with a strong religious influence, particularly in family matters, with the exception of the **Tunisian Personal Status Code**⁴⁶³ (hereinafter the “PSC”), which has often been described as revolutionary with its recognition of the emancipation of women, the prohibition of polygamy, increased rights for the wife in marriage and recognition of rights as the wife as equal to those of the husband when it comes to ending the marital relationship.⁴⁶⁴

463. Decree of 13 August 1956 promulgating the Personal Status Code, for the text (in French) see the legal portal of the Tunisian judiciary at < <http://www.e-justice.tn/index.php?id=266> > (last consulted on 1 April 2018).

464. See W. Ltaief, *Le droit de la famille au Maghreb*, available online in French language at < <https://www.cairn.info/revue-confluences-mediterranee-2008-2-page-169.htm> > (last consulted on 1 April 2018).

410. It should be noted that with the exception of **Lebanon**, which is a multiple jurisdiction system with “multiple applicable laws”⁴⁶⁵ in family matters,⁴⁶⁶ civil courts have general jurisdiction in **Algeria, Morocco**⁴⁶⁷ and **Tunisia**.
411. These four States are parties to the UNCRC and explicitly include the principle of the best interests of the child in their legislation. **Morocco**⁴⁶⁸ and **Tunisia**⁴⁶⁹ are also parties to the 1980 Hague Child Abduction Convention.⁴⁷⁰
412. Similar concepts exist in these legal systems, including the definition of the child, the recognition of the offence of failure to a child to the person entitled to custody/access and the procedure for enforcing foreign judicial decisions. As regards the definition of the child, in **Algeria** in accordance with Article 2 of the **Law Relating to the Protection of the Child**⁴⁷¹ (hereinafter Child Protection Law) a “child is understood as any person who has not reached 18 years of age”; a definition that is also found in **Lebanese law** in Article 1 of the Law No. 422/2002.⁴⁷² In **Tunisian law**, the child is “(...) any person under the age of 18 who has not yet reached the age of majority by virtue of special provisions” (Article 3 of the **Code of Child Protection**⁴⁷³, hereinafter the “CCP”).

1. Competent court to deal with cross-border family matters concerning children

413. This section is essentially concerned with defining the competent courts in cases relating to cross-border family conflicts involving children and specifically (a), the impact of nationality or religion on the jurisdiction of the courts (b) and finally the settlement of internal and international conflicts of jurisdiction (c).

465. See G. Parolin, *Research Report*, op. cit. note 34, at p. 22 (of the FR version).

466. It should be noted that Lebanon is a multi-confessional State, which in Annex I of Decree L/R 60 of 1936, as amended in 1996, recognises nineteen communities: eleven Christian communities, three Jewish communities and five Muslim communities (Sunni, Shi'ite, Druze, Ishmaelite and Alawite).

467. With a section of the family court ruling on Judaic law when the parties are Moroccan Jews, see G. Parolin, *Research Report*, op. cit. note 34, at p. 22 (of the FR version).

468. The 1980 Hague Convention entered into force in Morocco on 1 June 2010.

469. Law No. 2017-30 of 2 May 2017 approving the accession of the Republic of Tunisia to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. The Convention entered into force in Tunisia on 1 October 2017.

470. See for the Convention text and status table *supra* note 2. Tunisia has made a reservation under Article 24 and 26 of the Convention in accordance with which communications and other documents must principally be submitted in Arabic language. Furthermore, Tunisia will not bear the costs under Article 26(2) of the Convention. The reservations and the ratification statuses are available online at < <https://www.hcch.net/fr/instruments/conventions/status-table/?cid=24> > (last consulted on 1 April 2018).

471. Law No. 15-12 of 15 July 2015 relating to the Protection of the Child, text (in French) available online at < <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/99843/1/19311/F177738812/DZA-99843.pdf> > (last consulted on 1 April 2018).

472. Law No. 422 of 6 June 2002 on the Protection of Children in Conflict with the Law or in Danger, text available online in Arabic at < <http://www.hccdoc.gov.lb/node/516> > (last consulted on 1 April 2018).

473. Law No. 95-92 of 9 November 1995 publishing the Tunisian Code of Child Protection, available online (in French) at the legal portal of the Tunisian judiciary at < <http://www.e-justice.tn/index.php?id=266> > (last consulted on 1 April 2018).

a) Competent courts, specialist judges, specialised courts and concentrated jurisdiction (Questions: A.1-A.4, A.6-A.9)

414. In **Algerian law**, there are no religious courts, the Algerian judicial system only provides for civil courts in family matters. The ordinary courts thus preside over all family proceedings (Article 32 of the **Civil and Administrative Procedure Code**,⁴⁷⁴ hereinafter the CAPC). The family affairs section, a specialised section of the civil courts,⁴⁷⁵ hears cases related to the exercise of the custody and access rights (Article 423 CAPC). As regards custody of the children, the competent court is that with jurisdiction over the location where the custody is exercised (Article 40 of the CAPC), a principle taken up in Article 426 of the aforementioned Code.⁴⁷⁶
415. The family affairs section does not have general jurisdiction over cases of wrongful removal and retention⁴⁷⁷ because the failure to present a child in breach of law is an offence punishable under Articles 327 and 328 of the Algerian **Criminal Code**⁴⁷⁸ and therefore falls under the jurisdiction of the criminal courts. The judge of minors (French: “*juge des mineurs*”) also intervenes to protect the child in danger; that is to say in the sense of Article 2 of the Algerian Child Protection Law “*a child whose health, moral well-being or safety are at risk or likely to be put at risk or whose living conditions or behaviour may expose the child to a potential danger or threaten his/her future or whose environment exposes him/her to physical, psychological or educative danger*”.
416. As there are no specialised judges for cross-border family conflicts (and in particular cases of cross-border wrongful removal and retention of children), the court best placed to deal with these cases, and in particular cases involving the return of the child,⁴⁷⁹ is that presided over by a family judge or by the president of the court in matters of interim relief in urgent cases, in application of Article 30 of the Code of Civil and Administrative Procedure so that the judge can issue his/her judgement quickly, taking into consideration the best interests of the child. The case could be brought as an interim action before the court at the location of the incident or at the location in which the measure is sought (Article 299 of the CAPC).
417. In **Lebanese law**, jurisdiction over custody in a cross-border family conflict depends on the nationality and religious affiliation of the parties as well as the manner in which the couple married.⁴⁸⁰ The rules of jurisdiction are also applicable in the case of a purely national conflict.

474. Law No 08-09 - Civil and Administrative Procedure Code of 25 February 2008, available online at < http://www.douane.gov.dz/pdf/code/code_des_procedures_civile.pdf > (last consulted on 1 April 2018).

475. G. Parolin, *Research Report*, op. cit. note 34, at p. 27 (of the FR version).

476. The court with territorial jurisdiction is the court in whose jurisdiction custody is exercised in respect of the right of custody, access rights and administrative authorisations issued to the minor.

477. G. Parolin, *Research Report*, op. cit. note 34, at p. 27 (of the FR version).

478. Law No. 66-156 of 8 June - Criminal Code, as completed and modified, available online (in French) at < <http://www.joradp.dz/trv/fpenal.pdf> > (last consulted on 1 April 2018).

479. Information provided by the Algerian delegation.

480. G. Parolin, *Research Report*, op. cit. note 34, at p. 74 (of the French version).

491. Lebanese Criminal Code of 2009, for an unofficial copy see < <https://www.legal-tools.org/doc/5ab593/pdf/> > (last consulted on 1 April 2018).

offences in order to ensure the safety of the child. Law No. 422/2002 provides that the judge of minors may change the terms of custody and guardianship where this is in the best interests of the child.

423. Thus, in the case of domestic violence, parental authority can be temporarily revoked (Law No. 422/2002) and in this case the judge of minors acts as the guarantor of the safety of the minor being the victim of violence. In this type of situation, the judge can place the child under the care of a guardian designated by the court or place the child in institutional care.⁴⁹²
424. In the case of failure to hand over a child to the person entitled to custody/access, jurisdiction lies with the criminal courts. Finally, in accordance with Article 79 of the Code of Civil Procedure, the Lebanese civil courts have jurisdiction in disputes arising from marriage contracts concluded in a foreign country between Lebanese nationals or between Lebanese and foreigners in civil form recognised in that country (see, to that effect, **Decree No. 166 of the Court of Cassation, Civil Chamber of 19 December 2000**⁴⁹³), in accordance with the legal provisions relating to the jurisdiction of the Muslim community courts, if both spouses are Muslims and at least one of the parties is Lebanese.
425. As the court with jurisdiction over custody is religious, the parties are not free to choose the court, unless the child is considered to be in danger in which case the ordinary judicial court hears the case.
426. The cases of wrongful removal and retention of children are not dealt with by a specialised court or judge.
427. The court best placed to handle cross-border family cases is that presided over by a Shari'a judge because this court has jurisdiction over custody.⁴⁹⁴ If a child is in danger in the meaning of the Law No. 422/2002, it will be the judge of minors who is best placed to protect the child.
428. In **Moroccan law**, under Article 18 of the **Civil Procedure Code** (hereinafter "Moroccan CPC"),⁴⁹⁵ the Courts of First Instance are able to hear all family matters; and in urgent cases, the President of the Court of First Instance has jurisdiction over all problems relating to the execution of a judgement and has powers to order any precautionary measure (Article 149 Moroccan CPC), including those in relation to custody and wrongful removal of children.
429. It should be noted that the parties do not have the right to choose the court as the jurisdiction is fixed by law. The family justice sections⁴⁹⁶ (or family section) are civil courts with competence in general law in domestic and cross-border family cases, so accordingly there are no specialised judges in cross-border cases.

492. See *Étude du secrétaire général de l'Organisation des Nations Unies sur la violence contre les enfants - Réponses du ministère libanais de la Justice*, available online at < <http://www.ohchr.org/Documents/HRBodies/CRC/StudyViolenceChildren/Responses/Lebanon.pdf> > (last consulted on 1 April 2018).

493. ص. 765. 2000 رداص في قوقح الحاروشنملا، في ندمل تارارقلا، زيي مدتلأ يف رداص.

494. Information provided by the Lebanese delegation.

495. Law No 1-74-447 of 28 September 1974 approving the Civil Procedure Code, available online (in French) in the consolidated version of 6 June 2013 at the website of the Moroccan Ministry of Justice at < <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/codecivil.pdf> > (last consulted on 1 April 2018).

496. The functions of the family judge with responsibility for marriage are exercised by a judge of the court of first instance (Article 179 CPC).

430. Hence, cases of wrongful removal and retention of children are not dealt with by a court or specialised judge. But in practice, in the majority of cases, these conflicts fall under the jurisdiction of the president of the court of first instance or his substitute (in interlocutory proceedings). It should be noted that the failure to hand over a child to the person entitled to custody/access is punishable as a criminal offence under Moroccan law (Article 477 of the Criminal Code).
431. In terms of the court best placed to handle these cases, and as cross-border family conflicts are complex and delicate, requiring experience in private international law and in the mechanisms of international and bilateral conventions in this area as well as a good knowledge of communication and mediation, these conditions are fulfilled by the majority of the judges of the family section.⁴⁹⁷
432. In **Tunisian law**, no distinction is made for reasons of religious affiliation in the Personal Status Code; Tunisian civil courts are competent to hear family matters,⁴⁹⁸ whether these are purely national or involve a cross-border element. In family matters, the jurisdiction of the courts varies according to the nature of the dispute, in particular **the family judge**⁴⁹⁹ decides on divorce cases⁵⁰⁰ and any consequences thereof, notably the custody of the children, their place of residence, alimony and visitation rights. The family judge also deals with the situation of a child at risk (Article 52 CCP) in the cases provided for in Article 20 of the aforementioned Code.⁵⁰¹
433. It follows from Article 6 (1) of the **Private International Law Code**⁵⁰² (hereinafter “PILC”) that the Tunisian courts deal with measures relating to the protection of a child residing in the Tunisian territory. The action is brought before the family judge to take interim measures to protect the child in danger, pending judgement on the merits of the case.⁵⁰³
434. The family court is a specialised section of the civil courts.⁵⁰⁴ However, there are no specialised judges for cross-border family conflicts. The legislator has given Tunisian civil courts a general mandate in terms of jurisdiction.
435. Lastly, the cantonal court is the only first instance court to hear claims for maintenance introduced as main claims (Article 39 of the **Civil and Commercial Procedures Code**,⁵⁰⁵ hereinafter referred to as “CCPC”). It has exclusive jurisdiction in matters of adoption (Article 13 of the **Law on Public Guardianship, Unofficial Guardianship and Adoption**).⁵⁰⁶⁵⁰⁷

497. Information provided by the Moroccan delegation.

498. "At the time of national independence, the judiciary and the law were unified with the abolition of the religious courts competent for personal status matters and, once the Code had been promulgated (1956) it became applicable for all Tunisians regardless of their confession." (Quote translated from French), see M. Ben Jémia, *Y a-t-il du nouveau en matière d'ordre public international ?*, published online at < <http://maison-migrations.tn/index.php/39-actualites/actualites-migrations-en-tunisie/108-tunisie-y-a-t-il-dunouveau-en-matiere-d-ordre-public-international> > (last consulted on 1 April 2018).

499. He is selected by the President of the court from among his vice-presidents (Article 32 PSC).

500. It should be noted that in Tunisia “Divorce can only be effected before the Court” (Quote translated from French) (Article 30 PSC).

501. That is to say the child who lives in a difficult situation threatening his/her health or his/her physical or moral well-being.

502. Law No. 98-97 of 27 November 1998 promulgating the Tunisian Private International Law Code, for the text (in French) see the legal portal of the Tunisian judiciary at < <http://www.e-justice.tn/index.php?id=266> > (last consulted on 1 April 2018).

503 سن 2008، قتي اضراقلا و قينوناقلا تاساردا زلغوم ،يناوزغلا افلامو ينادشلا فيفطل قيلعت ،صاخلا يلودلا نوناقلا علىم .

504. In each court there is a space for family and child-related matters: G. Parolin, *Research Report*, *op. cit.* note 34, at p. 30 (of the French version).

505. Law No. 59-130 of 5 October 1959 promulgating the Civil and Commercial Procedures Code, text (in French) available in an updated version of 2010 at < <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/65196/61347/F77773999> > (last consulted 1 April 2010).

506. Law No. 1958-0027 of 4 March 1958 on Public Guardianship, Unofficial Guardianship and Adoption, **text (in French) available at** < <https://www.jurisitetunisie.com/tunisie/csp/L1958-0027.htm> > (last consulted on 1 April 2018).

507. ينبتل او قل افكل او عي موم على اءى البول اب قل عتي سرام 4 نون اق .

436. The Tunisian courts have jurisdiction if the parties to the dispute designate them as the competent courts or if the defendant agrees to be judged by them⁵⁰⁸ (Article 4 PILC).
437. They also hear cases relating to parentage or to a protective measure for a minor residing in the Tunisian territory and cases relating to maintenance obligation when the creditor resides in Tunisia (Article 6 PILC).
438. It is to be noted that the Tunisian legislator recognises the principle of related actions in Article 7 of the Code of Private International Law in accordance with which Tunisian courts have jurisdiction for related matters in cases pending before them.
439. It should also be noted that according to Article 3 of the Civil and Commercial Procedures Code, an agreement that derogates from the rules of jurisdiction established by law is invalid.
440. The court best placed to handle cross-border cases (including the wrongful removal and retention of children) is the family judge.⁵⁰⁹

b) Impact of nationality and religion in the determination of competent court (Question A.5)

441. In principle, the courts retain their jurisdiction regardless of the nationality and religion of the parties to the dispute, with a nuance found in the **Lebanese laws on confessional communities**.

i) Impact of nationality

442. Under **Algerian law**, the civil court retains jurisdiction regardless of the nationality of the parties. Under Articles 41 and 42 of the Civil and Administrative Procedure Code, any foreigner, even if not residing in Algeria, may be summoned before the Algerian courts to enforce performance of his obligations contracted in Algeria with an Algerian citizen. He may be summoned before Algerian courts for obligations he has entered into in a foreign country towards Algerians. Any Algerian may be summoned before Algerian courts for obligations contracted in a foreign country, including with foreigners.
443. In **Lebanese law**, nationality has no impact before *Sunni and Ja'fari Shari'a courts*. In fact, according to Article 25 of the Law on the Organisation of Sunni and Ja'fari Shari'a Jurisdictions, any person of *Lebanese or foreign* nationality can bring an action before Shari'a courts for any dispute within the jurisdiction of these courts.
444. However, according to Article 18 (2) of this law, Shari'a courts cannot hear any dispute with regard to foreigners of Sunni or Ja'fari confessions, originating from States applying the civil law in matters of personal status except if one of the spouses is Lebanese.

508. Unless the object of the litigation is a property right (right *in rem*) relating to immovable property located outside Tunisian territory.

509. Information provided by the Tunisian delegation.

445. Before the *ordinary judicial courts*, a difference of nationality of the parties has no impact. Indeed, according to Article 7 of the Lebanese Civil Procedure Code, any person of *Lebanese or foreign nationality* has the right to take legal action. Lebanese civil courts are also competent to hear cases against Lebanese nationals or foreigners who do not have an actual or designated residence in Lebanon, if the object of the application is an interim measure in Lebanon or if the object of the case is to return the minor to the rightful custodian if the former is present in Lebanon or if the latter resides in Lebanon (Article 78 of the Lebanese CPC),
446. In **Moroccan law**, according to Article 2 of the Family Code,⁵¹⁰ nationality has no impact on jurisdiction.⁵¹¹
447. In **Tunisian law**, Article 2 of the Civil and Commercial Procedure Code establishes the principle that Tunisian courts are competent to hear all disputes between all persons residing in Tunisia regardless of their nationality. The principle is restated in Article 3 of the Private International Law Code, under which Tunisian courts may hear civil disputes between all persons whatever their nationality, if the defendant is domiciled in Tunisia.⁵¹² It should be noted that a new jurisprudence has emerged as concerns basing jurisdiction on 'necessity' in response to the cases in which the party is unable to file a legal suit abroad, where the defendant is domiciled. Accordingly, the Tunis court of First Instance asserted its jurisdiction in a judgment of 7 March 2016 (case No. 2348)⁵¹³ even though the defendant (the husband) was domiciled in the USA and did not accept to have his case heard by Tunisian courts.⁵¹⁴ The court based its decision on the fact that the applicant (the wife) was subject to "legal obstacles" preventing her from travelling to the USA and to possible additional expenses.⁵¹⁵
448. Thus, any difference in the nationality of the parties does not affect the jurisdiction of the Tunisian courts, except if the defendant is not domiciled in Tunisia and does not accept the jurisdiction of Tunisian courts (Articles 3 and 4 PILC).

ii) Impact of religion

449. In **Lebanese law**, according to Article 6 of the Law on the Organisation of Sunni and Ja'fari Shari'a Jurisdictions, the jurisdiction of these courts is limited to the actions and acts of members of the Sunni or Ja'fari communities, with the exception, however, of foreigners of the Sunni or Ja'fari confession originating in States applying civil law in matters of personal status. The jurisdiction of *ecclesiastical courts* is limited exclusively to members of non-Muslim communities (Article 31 of the Law of 2 April 1951 on the Jurisdiction of the Confessional Courts of non-Muslim Communities). Before the *ordinary judicial courts*, a difference in the religion of the parties has no impact.

510. Article 2 Family Code states „3) regarding relationships between any two persons as long as one is Moroccan“ (translation from French).

511. Information provided by the Moroccan delegation.

512. The defendant must appear in the court of the place of his actual or elected place of domicile (Article 30 CCPC).

513. Unpublished judgment, provided by the Tunisian delegation.

514. In the same vein, see also: Tunis Court of First Instance, Judgment of 13 June 2016 (Case No. 3649), where the wife was domiciled in England; judgment of 10 February 2015 (Case No. 94247); Judgment of 7 December 2015 (Case No. 392): Unpublished judgments, provided by the Tunisian delegation.

515. «أهل عجي نأ نأش نم جراحلا ب متماق انكفم لكاحم مام اده جوز فاضا قمل لفلذل اعبتت عي عجلال اناح او عيسنوتلا لكاحملا صاصتخا مدع نال ع نأ شح»
 «عي عجلال اهيل ع زج عتق فليلكف نم جراحلا ب يضاقنلا هب جونس ي ام بناج ولال لقتلا يف اهتيرج قوعت عي نوناق زج اوح ن ع قمعان مدع بع اصل مل فضرع
 عيسنوتلا لكاحملا صاصتخا ل ملوبق مدعو سنوتب هيل ع عجلال قماق ارفوت مدع ن ع رظنلا تضغب يوعلا يف رظنلا تارابت عالا فذل قاعارم هجتي شي
 «نوناقلا قبط هيا عبتساب عي عجلال متماق نأ دعب لفلذو»

450. In **Algerian, Moroccan and Tunisian law**, the civil courts have jurisdiction whatever the confession of the parties. Regarding **Moroccan law**, however, since Moroccans of Jewish faith are subject to the rules of the Moroccan Jewish personal status (Article 2 of the **Family Code**⁵¹⁶), the law defining the judicial organisation established a section of the family court in the court of first instance (Article 4).⁵¹⁷ Thus, a single court has general jurisdiction, with however two separate sections for family law, *i.e.* one section for Moroccan Jews and one for all other cases⁵¹⁸.

c) Conflicts of jurisdiction

i) Internal conflicts of competence / jurisdiction (Question A.10)

451. In **Algerian law**, a distinction is made between two scenarios:

- if the tribunals come from within the jurisdiction of the same court, the motion for the resolution of the conflict of jurisdictions is brought before this court (Article 399 (1) and Article 35 of CAPC).
- if they belong to different courts, the petition is presented before the Civil Chamber of the Supreme Court (Article 399 (2) of the CAPC).

452. In **Lebanese law**, the chambers of the Court of Cassation sit in joint session to hear applications in relation to positive and negative conflicts of jurisdiction between civil courts or between civil and religious courts, or between the different religious courts (Article 95 of the Lebanese CPC).

453. In a decision of 23 April 2007, the Plenum of the Court of Cassation, ruling in the Court responsible for resolving conflicts of jurisdiction, specified that the judge of minors is competent to decide on modifications of custody rights, not only in cases where the parent is guilty of a crime or offence but also if the parent is not guilty of the above but in order to protect the child who lives in an environment that the judge considers harmful to the minor. In the Court's opinion, there is no conflict of jurisdiction, the judge of minors does not sit as a judge hearing guardianship cases and does not impinge on the jurisdiction of the community court concerned. As the children and parents were Muslim, the judges took the precaution of specifying that the measures taken in this context should remain protective measures and contained nothing that could affect the prerogatives of the Muslim community courts in the matter of guardianship.⁵¹⁹

454. Under **Moroccan law**, under Article 301 of the Code of Civil Procedure, conflicts of jurisdiction are brought before the immediately superior court common to the courts whose decisions are contested and in the case courts concerned do not have a common superior court, the case is heard by the Court of Cassation.

516. Law No. 70-03 promulgating the Family Code, consolidated version of 4 February 2016 (in French) available at < <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/Code%20de%20la%20Famille.pdf> > (last consulted on 1 April 2018).

517. G. Parolin, *Research Report*, *op. cit.* note 34, at p. 24 (of the FR version).

518. G. Parolin, *Research Report*, *op. cit.* note 34, at p. 32 (of the FR version).

519. A. Moukarzel Héchaime, *op. cit.* note 486.

455. In **Tunisian law**, the Court of Cassation has sole competence to judge over conflicts of jurisdiction (Article 198 CCPC).

ii) International conflict of competence / jurisdiction (Question A.11)

456. In **Algerian law**, where international conflicts of jurisdiction exist, these are resolved on a legal basis that differs from that for internal conflicts of jurisdiction provided for in the **Civil Code**⁵²⁰ (Articles 9 et seq.).⁵²¹

457. It is recalled that according to Article 40 of the Civil and Administrative Procedure Code, the court responsible for child custody is that in whose territorial competence the place falls where the custody is exercised. Therefore, if custody is exercised in Algeria, the Algerian courts would have exclusive jurisdiction.

458. In **Lebanese law**, conflicts of jurisdiction which put foreign jurisdictions in conflict with the Lebanese courts in the same case are generally resolved according to case law in favour of the latter courts.

459. According to Article 1016 of the Civil Procedure Code, the Lebanese courts refuse to grant recognition (*exequatur* status) to a foreign judgement when a final judgement between the parties has been rendered in the same dispute that gave rise to the foreign judgement, or if a case in the same dispute and between the same parties is still pending before Lebanese courts, and if the parties filed it in a date prior to the action abroad.

460. Under **Moroccan law**, jurisdiction over protection of the child in international situations is governed by the 1996 Hague Child Protection Convention⁵²² ratified by Morocco.

461. In **Tunisian law**, no provision has been made by the Tunisian legislator for the case of *lis pendens*, which obliges the national courts to relinquish the dispute in favour of foreign courts. Due to the silence of the legislator regarding the issue of *lis pendens* the national court cannot declare that it has no jurisdiction and relinquishing the case in favour of the first seized foreign court.⁵²³ However, the case-law is not consistent. Indeed, in a judgment delivered by the Tunis Court of First Instance on 7 March 2016 (case No. 98488),⁵²⁴ the Court declined jurisdiction in favour of the Canadian Court first seized.⁵²⁵

520. Law No. 75-58 of 26 September 1975 - Civil Code, as completed and modified, available online (in French), at < <http://www.joradp.dz/TRV/FCivil.pdf> > (last consulted 1 April 2018).

521. Information provided by the Algerian delegation.

522. See for the Convention text and further information *supra* note 3.

523. 166. ص، قباس عجرم، ين اوزغل الكلامو يلداشلا يفظل قىلعت، صاخلا يلودلا نوناقللا ؤل جم .

524. Unpublished judgment, provided by the Tunisian delegation.

525. رشنلا يف قبسالا يه قىدنكلا مكاحملا امام قروشنملا يوعلا نوكتت شيحو « .
 ”عازنلا لصا يف ضوخللا نود يوعلا ضفرب مكاحلا هجتتي هناف مكاحال براضتل ابن جتو مطسب قبس امل اذانتساو شيحو

2. The application of Articles 3, 9, 10 and 12 of the UNCRC

462. The status of international conventions in domestic law is explicitly recognised in the legislation of Algeria, Lebanon, Morocco and Tunisia.
463. Thus, in **Algerian law**, *“Treaties ratified by the President of the Republic, under the conditions provided by the Constitution, take precedence over the law”* (Article 150 of the **Constitution**⁵²⁶).
464. In **Lebanese law**, in case of divergence between the provisions of an international convention and those of a national law, the primacy of the international convention is recognised according to Article 2 of the Civil Procedure Code.⁵²⁷
465. In **Moroccan law, duly ratified conventions take** *“precedence over the domestic law of the country” within “the framework of the provisions of the Constitution and the laws of the Kingdom, in the respect of its immutable national identity, and from the date of publication of the conventions”* (Preamble of the Constitution⁵²⁸). In application of this principle, the Court of Cassation in a judgement of 2 June 2015, affirmed that *“the Convention[the UNCRC] has primacy over the provisions of the Family Code”*.
466. In **Tunisian law**, *“The conventions approved by Parliament and ratified have precedence over the laws but are inferior to the Constitution”* (Article 20 of the **Constitution**⁵²⁹).
467. Therefore, it holds true for all four countries that national judges are able to apply the provisions of the UNCRC which takes precedence over national laws since all the States concerned have ratified this Convention (Algeria in 1993, Lebanon in 1991, Morocco in 1993 and Tunisia in 1992⁵³⁰). Some of these countries issued declarations when signing the Convention, such as **Algeria’s** interpretative declaration that *“the education of the child shall be conducted in the religion of his father”* in accordance with the provisions of the Algerian **Family Code**.⁵³¹
468. When ratifying the UNCRC, **Morocco** also made the following declaration⁵³² *“parents owe their children the right to religious guidance and education based on good conduct”* in accordance with the provisions of the Moroccan Family Code.⁵³³ These declarations allow the national judge to take into account the requirement of religious education in any decision relating to custody.

526. Constitution of the Algerian Republic, Official journal No. 76 of 8 December 1996, last modified by Law No. 16-01 of 6 March 2016, text (in French) available online at < <http://www.joradp.dz/TRV/Fcons.pdf> > (last consulted 1 April 2018).

527. Information provided by the Lebanese delegation.

528. The preamble forms an integral part of the Constitution. The full text of the Constitution: Law No. 1-11-91 of 29 July 2011 promulgating the Constitution is available online (in French) at the website of the Moroccan Ministry of Justice is available online at: < <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/La%20Constitution.pdf> > (last updated on 1 April 2018).

529. Constitution of the Tunisian Republic published in the Official Journal of 20 April 2015. The text (in French) is available online at < <http://www.e-justice.tn/index.php?id=266> > (last consulted on 1 April 2018).

530. This is the date of receipt of ratification or accession.

531. Law No. 84-11 of 9 June 1984 – Family Code, text (in French) available at < <https://www.joradp.dz/TRV/FFam.pdf> > (last consulted 1 April 2018).

532. For the declarations made by Morocco when ratifying the UNCRC see < https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en > (last consulted on 1 April 2018).

533. In accordance with the Moroccan delegation this declaration is not literally applied. The principle of the best interests of the child could guide the judge in a decision in certain cases without taking into consideration religious education. The analysis is to be made on a case-by-case basis.

469. This section deals with the application of the principle of the best interests of the child (a) and the right of the child to be heard (b), on which the Committee on the Rights of the Child has issued comments for the States concerned (c).

a) Application of the principle of the best interests of the child and particularities of procedural law

470. As the principle of the best interests of the child is enshrined in the laws of the States concerned, judges are expected to take this principle into account in all decisions and procedures, including respecting an adequate time limit for reaching a custody decision.

i) The application of the principle of Article 3 UNCRC, the principle's implementation in domestic law (Question B.3)

471. In **Algerian law**, the legislator incorporated the provisions of Article 3 (1) of the UNCRC⁵³⁴ into national law. It is integrated in the Family Code (namely Articles 64, 65, 66, 67, 69), the Child Protection Law where *"The best interests of the child shall be the objective of any procedure, measure or judicial / administrative decision taken with regard to the child (...)"* (Article 7). As regards family matters, Article 424 of the Civil and Administrative Procedure Code provides that *"The judge for family cases is specifically responsible for ensuring the protection of the interests of minors"*.

472. In **Lebanese law**, concerning *Sunni Islam*, the Shari'a courts take into account the best interests of the child in application of Articles 13, 17, 20, 22, 29, 30, 31 of the **Regulation No. 46 of the High Islamic Shari'a Council of 1 October 2011**. Concerning the Druze, one of the important amendments⁵³⁵ made by the **Law No. 58 of 17 October 2017**⁵³⁶ to the Law on the Personal Status of the Druze Community of 24 February 1948 lies in the recognition of the principle of the best interests of the child (Article 64 as amended), which was completely absent from the original 1948 Law.⁵³⁷ Ordinary courts also take into consideration the best interests of the child in accordance with Article 2 of the Law No. 422/2002.

473. The principle of the best interests of the child has been incorporated in **Moroccan law**,⁵³⁸ namely in the Family Code (Articles 166, 169, 170, 171, 178, 186⁵³⁹), and the **Law on the Care ("kafala") of abandoned Children**^{540 541} (Articles 10, 19, 20, 27, 29).

534. Furthermore, the Constitution provides for the protection of "the rights of the child" (Articles 72 and 77).

535. The most important amendment concerns a change to the age of maternal child custody from 7 to 12 years for boys and from 9 to 14 years for girls (Article 64 as amended).

536. The law is available in Arab language at <<https://www.lp.gov.lb/Resources/Files/2ede7bab-a118-4938-b3c9-1ae27a59eb1d.pdf>> (last consulted on 1 April 2018).

537. Article 64 as amended: "Lebanon's Druze personal status law: Developing deference to the Constitution", available in English at : <<http://legal-agenda.com/en/article.php?id=4106>> and in Arabic at: <http://legal-agenda.com/article.php?id=4106> (last consulted on 1 April 2018).

538. In addition, and according to Article 32 of the Constitution, the State *"assures equal legal protection and equal social and moral consideration to all children, regardless of their family situation"*.

539. *"In any event for the application of the provisions of this chapter, the court shall take into account the interests of the child under custodianship"*.

540. Law No 1-02-172 of 13 June 2002 promulgating the Law No 15-01 relating Care ("kafala") of abandoned Children, text (in French) available at < <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/enfants%20abandonne.pdf> > (last consulted on 1 April 2018).

541. [Law on the care of abandoned children]. نون اقلنا. 541

Available online at < adala.justice.gov.ma/production/legislation/fr/.../enfants%20abandonne.docx >.

474. In **Tunisian law**, the principle of the best interests of the child has constitutional value; it being expressly enshrined in Article 47 of the Constitution of 2014. The Tunisian legislator has also incorporated this principle in several pieces of legislation, notably Articles 4, 8, 11, 14, 16, 56, 58 and 63 of the Code of Child Protection and in Articles 56, 58, 60, 62, 66 bis, 67 of the Personal Status Code and in Article 33 of **Organic Law No. 2017-58 of 11 August 2017 on the Elimination of Violence against Women**.⁵⁴²

ii) The assessment of the best interests of the child in custody and contact cases, the factors

(I) In national family conflicts (Questions B.4-B.5)

475. Under **Algerian law**, according to Article 7 of the Child Protection Law, “*When assessing the best interests of the child, the following aspects are taken into consideration: the child’s health, his/her moral, intellectual, emotional and physical needs, his/her family environment, as well as all aspects related to the child’s situation*” (translated from French).

476. The best interests of the child in assigning child custody are assessed in safeguarding⁵⁴³ “*the maintenance, schooling and education of the child in his/her father’s religion as well as in safeguarding his/her physical health and moral well-being*” (Article 62 of the Family Code) (translated from French).

477. A judgement of the Algerian Supreme Court, Family and Probate Chamber of 14 February 2013,⁵⁴⁴ declared that the criterion for establishing the custody over a child is the child’s best interest and that the not only the wishes of the minor should be considered.

478. The Supreme Court, Chamber of Personal Status dated 21 May 2003⁵⁴⁵ considered a case in which the mother had been deprived of her right of custody (which was entrusted to the father) without examining the situation and the interests of the children that the lower court had not given reasons for its decision.

479. And a judgement of the Supreme Court, Personal Status Chamber of 19 March 1990,⁵⁴⁶ stated that “*it is established law that the custody of the male child ceases at the age of 10 and that of the female child at the marriageable age and the judge extends this period up to 16 years for the male child*”⁵⁴⁷ while taking into account the best interests of the child.

480. The same assessment criteria in a custody case apply to procedures relating to contact rights. Under Article 64 of the Family Code, the judge must grant contact rights on issuing a transfer of custody order, which must necessarily take into account the child’s best interests.

542. Organic Law No. 2017-58 of 11 August 2017 on the Elimination of Violence against Women. Available in French at <<http://legislation-securite.tn/node/56327>>, and in Arabic at <http://legislationsecurite.tn/node/56327?secondlanguage=ar&op=OK&form_build_id=form321fd-477732b87a128949982dc4d9d8f&form_id=dcaf_multilanguage_form_render> (last consulted on 1 April 2018).

543. . G. Parolin, *Research Report*, op. cit. note 34, at p. 82 (of the FR version).

544. Information provided by the Algerian delegation.

545. Information provided by the Algerian delegation.

546. See Judicial Review No. 191. Information provided by the Algerian delegation.

547. In the event that the male child is placed in the custody of his mother if she has not remarried (Article 65, para. 2 PSC).

481. In **Lebanese law**, the principle of the best interests of the child for the purpose of determining parental responsibility is not specifically defined. However, the jurisprudence of the religious courts determines custody of the child according to his/her age and gender.⁵⁴⁸
482. Before *Sunni Shari'a courts*, the criteria for custody are set by Articles 11 et seq. of Regulation No. 46; these include the age of the child, the requirement for an Islamic education, the condition of non-re-marriage for the mother⁵⁴⁹ (unless the husband is a close relative⁵⁵⁰) etc. In practice, the religious criterion, i.e. the requirement for an Islamic education, predominates (Articles 11, 12, 13, 14 and 24 of Regulation No. 46). In general, religious judges have wide discretion in custody decisions.
483. In some cases, the custody decision was not in the best interests of the child. For example, in a decision of 5 December 2011,⁵⁵¹ the Sunni High Court ordered the mother to hand over custody of her three children to their father because he was considered better able to protect, educate and guide them, even though, according to a medical/legal report, he had physically abused them justifying his behaviour with exercising his right to discipline his children. The court was content to obtain a commitment from the father not to repeat these acts.
484. However, some religious courts have, in a positive development, taken into account the best interests of the child in this matter; turning away from the general trend of the legal age of custody in some judgements. The judges decided that the children should stay with their mothers even after the legal age of maternal custody has been exceeded, taking into account the best interests of the child. Accordingly, a judgement of the Sunni court in Beirut of 24 November 2008 rejected the father's request to take back his twin children after reaching the legal age at which the mother's original right of custody ceases to exist, for as long as he was not better placed to safeguard their health, moral and educational interests.
485. In the *Druze religious courts*, the judge does not have the discretion to consider particular circumstances, including the best interests of the child, and is required to grant custody to the father immediately after the child has reached the legal age at which the mother's original right of custody ceases to exist (Article 64 of the Law on the Personal Status of the Druze Community). Nonetheless, the Law No. 58 of 17 October 2017,⁵⁵² amending this personal status law,⁵⁵³ authorises the judge to grant custody to the mother, upon her request, if the child suffers from mental illness or has special needs and if the best interests of the child so require (Article 64 as amended).
486. As for the *ecclesiastical jurisdictions*, in some cases they consider the best interests of the child as the "absolute rule in relation to the custody of the child" where parents separate (Maronite Court of First Instance, judgements of 13 June 2007 and 14 July 2009).⁵⁵⁴
487. Some ecclesiastical jurisdictions exercise their discretion by appointing social and psychological specialists to investigate the living conditions of each parent and require psychological tests for the whole

548. G. Parolin, *Research Report*, op. cit. note 34, at p. 70 (of the FR version).

549. The right of custody is withdrawn from the mother:

550. Mahram (close male relative of females).

551. See the Human Rights Watch online publication, *Unequal and Unprotected Women's Rights under Lebanese Personal Status Laws*, op. cit. note 488.

552. Op. cit. note 536.

553. See *supra* note 535.

554. See the Human Rights Watch online publication, *Unequal and Unprotected Women's Rights under Lebanese Personal Status Laws*, op. cit. note 488.

family in order to determine the best interests of the child (judgement of the Maronite Court of Appeal of 9 May 2009).⁵⁵⁵

488. On the other hand, there are cases where custody is granted to the father without any explanation (judgement of the Maronite Court of First Instance, 11 May 2010). Likewise, in cases examined by the Orthodox courts, judges automatically applied the age of paternal custody without regard to the best interests of the child (judgement of the Orthodox Tribunal of 17 December 2007, judgement by the Syrian Orthodox Court of Mount Lebanon of 26 November 2007).⁵⁵⁶
489. Regarding visiting rights, these are legally recognised by the *Sunni Shari'a courts* for the non-custodial parent (Article 28 of Regulation No. 46), who must fulfil certain formal requirements provided for in Article 29 et seq. of the Regulation, in particular relating to the visiting schedule.
490. As for the *ordinary courts*, the law does not specify criteria for assessing the best interests of the child, therefore it is up to the individual judge to assess these based on the situation of the child.
491. In this regard a decision of the Civil Chamber of the Lebanese Court of Cassation can be cited, which affirmed that in relation to custody the decision shall take into account the best interests of the child. The decision was based on the girls having become accustomed to each living with one parent, and that it was preferable that the existing situation remained unchanged. The Court also stated that judges have discretionary powers in this regard.⁵⁵⁷
492. In the same context, the Court of Cassation issued a decision on 7 July 2009 rejecting the appeals of religious communities against decisions of the civil courts in relation to protective measures for minors, although these were in contradiction to the decisions of the Shari'a or ecclesiastical courts, such as deciding to leave a child in the custody of its mother despite the decision to grant custody to the father according to the religious judgement. The decision was based on the notion of "the child at risk" (or in danger), thereby rejecting any religious judgement with effects that are contrary to the protection and interests of the child.⁵⁵⁸
493. In **Moroccan law**, the interest of the child is decisive in the choice of the person to whom custody will be entrusted. This person must comply with several preconditions according to Article 173 of the Family Code, which defines the "conditions of transfer of custody" as follows:
1. having reached the age of legal majority for persons other than the father and mother of the child;
 2. personal rectitude and honesty;
 3. the ability to bring up the child in custody, to ensure the child's religious, physical and moral welfare and protection, and to watch over the child's education;
 4. the unmarried state of the female person to whom the custody is to be transferred, with the exception of the cases envisaged in Articles 174 and 175 (the child has not exceeded 7 years of age or the new spouse is a relative of the child with whom there is an impediment to marriage or if the new spouse is the child's legal representative etc.).

555. *Ibid.*

556. *Ibid.*

557. 765. ص. 2000، رداص فيقوق الحلا تاروشنملا، فيندملا تارارقلا، زيميتملا يف رداص .

558. See the Human Rights Watch online publication, *Unequal and Unprotected Women's Rights under Lebanese Personal Status Laws*, op. cit. note 488.

494. In a judgement of the Court of First Instance of Fez of 13 May 2015,⁵⁵⁹ it was decided that the best interests of the two children concerned required that they be returned to their habitual place of residence with their mother in France, taking into account the violation of custody rights assigned to the mother according to the law of the country where the children reside.
495. And according to the Court of Appeal of Agadir (19 February 2014),⁵⁶⁰ the existence of a foreign judgement stipulating the habitual residence of the children with their mother; their psychological, educational and social stability, and the continuation of a treatment for one of them, made it in their best interest to continue their status of residence in France, justifying the decision to return them to their habitual place of residence.
496. For the Court of Cassation (2 June 2015),⁵⁶¹ the best interest of the child was to return to his habitual place of residence. According to the Court *“It is established that the child’s habitual place of residence was with his mother in France where he pursued his studies, and that the father had not contested that the child was visiting this country; Therefore in order to protect the best interests of the child, it must be recognised that the child should be returned to France in accordance with Article 8 of [the 1980 Hague] Convention and with the Article 13 of the same Convention which applies exclusively”*.
497. As for the procedures relating to access, “in any event” the court takes into account the interests of the child under custody (Article 186 of the Family Code) as is the case with an infant or a disabled child or because of the psychological state of the child.
498. In **Tunisian law**, the best interests of the child are assessed under national law, taking into account the personal and family situation of the child,⁵⁶² whether in relation to custody or to contact rights.
499. In fact, according to Article 4 (2) of the Code of Child Protection, *“the emotional and physical moral needs of the child, his/her age, state of health, family environment and various factors relating to his/her specific situation must be taken into consideration”*.
500. In a case heard by the family judge at the Tunis Court of First Instance on 10 June 2016,⁵⁶³ in which the foreign mother asked for the extension of arrangements for exercising her right of access, the judge was guided by the principle of best interests of the child.
501. According to the judgement, the decisive criterion in the application is the best interests of the child without any other consideration, a criterion based on many legal provisions, the most important of which are Article 47 of the Tunisian Constitution which provides that *“(…) The State must provide all forms of protection to children without discrimination and in the best interests of the child”*, Article 9

559. Unpublished judgement, provided by the Moroccan delegation.

560. Unpublished decision, provided by the Moroccan delegation.

561. Unpublished decision, provided by the Moroccan delegation.

562. According to the Tunisian delegation, in general, a welfare report reflecting the opinions of specialists on the medical and psychological status of the child may be consulted in accordance with Article 32 of the PSC. For case-law examples, see the judgments of the Tunis Court of First Instance of 4 January 2016 (case No. 99826) and of 27 June 2016 (case No. 99128), both of which are unpublished judgments provided by the Tunisian delegation.

563. Unpublished.

as the conditions of the interest of the child in receiving an Islamic education are fulfilled in accordance with Article 11 et seq. of Regulation No. 46.

508. However, the mother may not travel abroad with her child without the notarised authorisation of the guardian or an order of the Shari'a court. The same applies for the father if he does not have custody. In any event, the judge may prohibit or authorise child travelling abroad if the child's interests require this (Article 22 of Regulation No. 46).
509. If the parents are of different religions, the non-Muslim mother loses the right to custody over her child before *Sunni Shari'a courts* when the child reaches the 5 years of age (by the Gregorian solar calendar) under Article 14 of the Regulation No. 46.
510. In a case before the Sunni High Court (13 January 2010),⁵⁶⁸ the father requested that the mother should lose her right of custody over the child because she was not a Muslim. The court accepted this as reasonable grounds for depriving the mother of custody, but requested the mother to officially convert to Islam and present it with an updated copy of her personal documents proving that she was now Muslim so that she could retain custody. To avoid problems with her family as a result of the registration of her conversion, the mother read the testimonies of her conversion before the court, which did not rule on the issue of custody until after obtaining a judgement that the reading of the testimonies was sufficient to prove her conversion.
511. It is the same before the ecclesiastical courts. *In a decision issued by the Unified Maronite Court of First Instance on 31 January 2008, the court ruled that the mother was to be deprived of custody, since her conversion to Islam posed a danger that the girl who was a minor would be raised according to Muslim rather than Christian principles, which would go against her best interests and well-being.*⁵⁶⁹
512. Differences of religion have no impact on access rights.
513. Before the *ordinary courts*, neither nationality nor religion have an influence on this decision.
514. In **Moroccan law**, if cases involving custody or access rights have an international aspect, and where a multilateral or bilateral convention exists, the provisions of this Convention are applied.
515. In other cases, the judge applies the provisions of the Family Code. The difference in religion does not affect the understanding of the best interests of the child, which is the personal conclusion reached by the judge based on the investigations conducted.
516. However, the provisions of Article 173 of the Family Code specify that one of the conditions for a transfer of custodianship is "the capacity to bring up the child subject to custodianship, ensuring the child's religious, physical and moral well-being and protection, and to ensure that the child receives a proper education".

⁵⁶⁸. See the Human Rights Watch online publication, *Unequal and Unprotected Women's Rights under Lebanese Personal Status Laws*, op. cit. note 488.

⁵⁶⁹. *Ibid.*

517. Moreover, a change in the place of residence within Morocco of a woman who has custody of the child or of the legal representative of the latter does not entail the forfeiture of custody rights, except in the case of established grounds which are demonstrated to the court, "taking into account the interests of the child", such as special circumstances of the father or of the legal representative and the distance separating the child from his/her legal representative (Article 178 of the Family Code).
518. Under **Tunisian law**, the best interests of the child in cases involving custody or access rights are not assessed differently when the case has an international aspect, particularly if one of the parents is of foreign nationality.
519. However, the same does not apply if one of the parents lives abroad. Indeed, according to Article 61 of the Personal Status Code "*If the person who has custody of the child changes his place of residence and moves so far away that this prevents the guardian from performing his duties towards his ward, the former will be deprived of this right*". The Tunis Court of First Instance applied this provision; accordingly, it deprived the mother of her right to custody and convicted her for failure to hand over a child to the person entitled to custody/access, as she had taken her minor daughter to France (judgment⁵⁷⁰ of 24 February 2015, case No. 94299).⁵⁷¹
520. Thus, the best interests of the child in cases involving custody or access rights will not be assessed in the same way in the case of a divorce between spouses residing in the country and in cases in which one spouse resides outside the national territory.
521. As concerns the difference in religion between parents, it is not an obstacle in assessing the best interests of the child. According to Article 59 of the Personal Status Code, "*the holder of the custody rights who is of a confession other than that of the father of the child may exercise this right only if the child has not yet reached five years of age and there is no reason to fear that the child will be raised in a religion other than that of his/her father. The provisions of this article do not apply when the right is exercised by the mother*".

(3) Particular difficulties (Question B.6)

522. Particular difficulties are encountered in assessing the best interests of the child in proceedings relating to custody or rights of access, as the responses of the delegations to the Questionnaire demonstrate.
523. In **Algeria**, these difficulties include:
- non-cooperation of the parents with the judge in providing all the information relating to the child's personality and his/her physical and intellectual capacities, which force the judge to undertake additional efforts to pursue the aim of rendering an adequate decision to safeguard the best interests of the child;

570. Unpublished judgment, provided by the Tunisian delegation.

571. نأو اهب لاصتال عطقن او اسنرف لدا (...). رصاقل تنبلا عم ترفاس اهيل عى عدمل قنضاجال نأ فلما تافورظم نم تثبت شي حو «
سنوتب ميقم يعدمل
نوضم راضح إدع قمبرجب اهيل عى عدمل قناداب يئازج مكح رص شي حو
"ادل اول امانس او اهيل عى عدمل ن ع (...). تنبلا قنضاح طاقس اقبس امل اعبت هجت شي حو

- lack of specialisation of judges in family matters: lack of training, judges are sometimes ill-equipped to answer questions concerning the best interests of the child.
524. In cross-border family conflicts in particular, even if the criteria for assessing the best interests are generally the same, the difference in conditions and standards of living as well as the psychological and social conditions of the child in different countries may make it difficult to determine appropriate measures to safeguard the best interests of the child.
525. In **Lebanon**, before the *Sunni courts* if there is a contradiction between the religious demands and the material requirements (the standard of living), the religious demands generally prevail.
526. This problem does not arise with *ordinary courts*.
527. In **Morocco**, among the specific difficulties is the absence of one of the parties to the dispute despite being summoned, or the refusal to appear at the hearing or before the social worker or to allow the latter into the his/her residence to investigate the family and housing conditions, especially if one of the parties refuses to comply with the expert procedures.
528. In **Tunisia**, family judges face many difficulties in assessing the best interests of the child due to pressures placed by the parents on the child to influence the child's opinion on the custody matter. Family judges also face difficulties in reaching the best decision when there are social and material inequalities between parents, for example, between a father who has the means to meet the child's material needs and the mother who may not have these means but who has all the moral and physical qualifications to raise her child, complicating the allocation of custody.

iii) Time to obtain a custody decision⁵⁷² (B.10)

529. Under **Algerian law**, the average time to obtain a decision on custody is 3 months.
530. Under **Lebanese law**, no statistics are available for the normal time to reach a decision. The time to reach a decision by *Shari'a courts on custody cases varies between a month and six months, and sometimes more. Before ordinary courts, in principle and in the majority of cases, the time to reach a decision is a few days.*
531. In **Moroccan law**, in relation to custody in general, the normal period varies between 2 and 6 months because of the conciliation. In fact, if the couple has children, the court undertakes two attempts of conciliation, separated by a minimum period of thirty days (Article 82 of the Family Code). When it comes to the withdrawal of custody rights, the duration may be longer depending on the case, especially if one of the parents lives abroad. An application for the return of the child before the interlocutory judge is the quickest procedure but it does not settle the substance of the case, in this case custody.
532. In **Tunisian law**, divorce is not pronounced until the family judge has been unsuccessful in his attempt to bring about reconciliation. And if there are one or more minor children, three conciliation hearings

572. Information provided by the national delegations.

will be held, each of which may not be held less than 30 days after the one preceding it (Article 32 of the PSC).

533. The family judge must order if necessary *ex officio* all *urgent measures* concerning in particular the custody of the children and visiting rights. These measures are the object of an immediately enforceable court order, which is not open to appeal nor cassation proceedings, but which can be revised by the family judge until a final ruling has been issued (Article 32 PSC).

534. The court decides on the divorce in the first instance after a two-month period of reflection.

b) The application of Article 12

535. The right of the child to be heard is generally recognised in the domestic law of the States concerned without, however, the minimum age for taking into account the child's opinion regarding the custody being specified, although with a slight difference in Moroccan law. It is worth noting that the Committee on the Rights of the Child underlined that "*article 12 imposes no age limit on the right of the child to express her or his views, and discourages State parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him*".⁵⁷³

i) The application of the principles set forth in Article 12 UNCRC, the principles' implementation in domestic law (Question C.1)

536. In **Algeria**, the child is heard in proceedings relating to custody or contact by the family court. In fact, Article 8 of the Child Protection Law provides for the right of the child "*to freely express its opinions in accordance with its age and degree of maturity [...]*".

537. In **Lebanon**, the judge, whether Shari'a or civil, has discretionary power. Thus, in two cases before the *Ja'fari courts*, the judge granted custody only after taking note of the children's opinion (judgement of the Ja'fari Court of Baabda of 9 January 2012 and judgement of the Ja'fari Court of Beirut of 16 February 2009). In other cases, the judges have explicitly refused to do so. For example, in a judgement of 2 April 2009, the Ja'fari Court of Saida refused to hear the opinion of the two children and ordered the mother to immediately hand them over to the father after the end of the legal age of maternal custody. The Court determined that the children were not of the age of discernment even though they were 13 and 14 years old. The Ja'fari Court of Baabda took a similar approach when it refused to take into consideration the wish of a 15-year-old girl to stay with her mother (judgement of 2 July 2012).⁵⁷⁴

538. In **Morocco**, children of a certain degree of maturity are heard by the judge in accordance with their best interests, in all the procedures which concern them, in particular in matters of custody and visiting rights or any question which concerns their education, schooling and contentious issues between parents.⁵⁷⁵

573. See General Comment No. 12 (2009), *op. cit.* note 118, para. 21.

574. See the Human Rights Watch online publication, *Unequal and Unprotected Women's Rights under Lebanese Personal Status Laws*, *op. cit.* note 488.

575. Information provided by the Moroccan delegation.

539. For an application of the principle in case of a breakdown of the marital relationship between the parents, and according to Article 166 of the Family Code, the child may, at the age of 15, choose whether his/her father or mother should assume custody. In the absence of the father and the mother, the child may choose one of his/her close relatives referred to in Article 171 of the Family Code, provided that this choice is not incompatible with his/her best interests and that the child's legal representative agrees.
540. In **Tunisia**, the Code of Child Protection guarantees the child the right to freely express his/her opinions, which must be taken into consideration in accordance with the child's age and degree of maturity. For this purpose, the child will be given a special opportunity to express his/her views and to be heard in all court proceedings concerning his/her situation (Article 10 CCP).

ii) Age as of which children are heard (Question C.2)

541. In **Algeria**, the legislator has not set an age for the child to be heard in custody or access rights proceedings. However, the judge takes into consideration the age of the child (especially the age of discernment). Thus, the judge can exempt the child from appearing if his/her age or his/her state do not permit this.⁵⁷⁶
542. In this regard, reference is made to a decision by the Family Affairs and Successions Chamber of the Supreme Court of 14 February 2013.⁵⁷⁷ According to the Court, the mother has a greater entitlement to custody of her daughter, especially as the latter is young and needs her mother, whereas the father cannot meet the needs of the child and therefore the wishes of the child should not be taken into account.
543. In **Lebanon** where no specific age for hearing the child is recognised, the judge, whether Shari'a or civil, has discretionary power. Indeed, the hearing of the child is rarely prescribed in the laws for confessional courts, but if the child is heard before the latter, no specific age is set and the decision is left to the discretion of the judge.⁵⁷⁸
544. In **Morocco**, according to Article 166 of the Family Code, and in the event of a breakdown in the marital relationship of the parents, the child may choose, at the age of 15 whether his/her father or mother (or one of his/her relatives in the absence of the parents) will assume custody, provided that this choice is not incompatible with the child's best interests and that its legal representative agrees.
545. In **Tunisia**, the legislator has not set a minimum age for the child to be heard. However, according to Article 10 of the Code of Child Protection, the child's views must be taken into account in accordance with "his/her age and degree of maturity".

576. G. Parolin, *Research Report*, op. cit. note 34, at p. 82 (of the FR version).

577. *Revue Judiciaire* 2014/1, p. 304.

578. G. Parolin *Research Report*, op. cit. note 34, at p. 70 (of the FR version). See the above decisions of the Ja'fari courts.

(1) Possibility to appoint a legal representative (Question C.5)

546. In **Lebanese law**, and before *Shari'a courts*, the President of the competent court can temporarily appoint a representative pending the appointment of a legal representative in the event that the legally incapable party (such as the child) has no guardian or custodian at the time or in the course of the lawsuit (Article 31 of the Law on the Organisation of Sunni and Ja'fari Shari'a courts).
547. In **Moroccan law**, the judge, at the request of the person concerned or the public prosecutor, can appoint a legal representative to protect the child and his/her rights pending the decision on custody.⁵⁷⁹
548. In **Tunisian law**, while there are no statutory provisions to prevent the court from appointing a legal representative to protect the best interests of the child in these proceedings, this practice is not applied by the Tunisian courts.⁵⁸⁰
549. It is recalled that the family judge must order *ex officio all urgent measures concerning the domicile of the spouses, alimony, the custody of the children and visiting rights (Article 32 PSC), thus in application of these provisions, he may appoint a legal representative if this is necessary to safeguard the interests of the child.*

(2) Minimum age to raise a case before the court (Question C.6)

550. In **Algeria**, where the age of majority is 19 (Article 40 of the Civil Code) a child can bring an action before the civil court only through his/her legal representative. However, the legislator gave the child at risk in Article 32 of the Child Protection Law the right to submit *a petition* to the judge of minors. The petition made by the child can be heard verbally, after which the judge will decide on one of the measures provided for by the law.
551. In **Lebanese law**, before the *Sunni and Ja'fari Shari'a courts*, Article 28 of the Law on the Organisation of Sunni and Ja'fari Shari'a Jurisdictions provides that the capacity to bring legal actions is subject to the law of the State. And in any event, the court must first verify whether this capacity exists (Article 29 of the aforementioned law). As mentioned above, the President of the competent court can temporarily appoint a representative pending the appointment of a legal representative in the event that a person without independent legal capacity (such as a child) has no guardian or custodian at the time or in the course of the lawsuit (Article 31 of the Law on the Organisation of Sunni and Ja'fari Shari'a Jurisdictions). Before the *ordinary courts*, the child *may lodge a complaint*; this rule derives from Article 26 of the Law No. 422/2002 according to which the judge of minors can intervene "*on the basis of a complaint of the minor*" without however specifying the age of the child.
552. In **Moroccan law**, the general rule is that only parties who have legal capacity may take part in legal proceedings (Article 1 of the Moroccan CPC), therefore the minor must be represented by one of his/her parents or a guardian, or the public prosecutor as defender of the general interest. It is noted that cases concerning the family are referred *ex officio* to the public prosecutor (Article 9 (2) of the

579. Information provided by the Moroccan delegation.

580. Information provided by the Tunisian delegation.

Moroccan CPC). As an exception to the foregoing, spouses married before the age of the matrimonial⁵⁸¹ majority provided for in Article 19 of the Family Code (18 years of age according to the Gregorian calendar) acquire the civil capacity to litigate in court concerning all rights and obligations arising out of the effects resulting from marriage (Article 22 Family Code).

553. It is recalled that the age of legal majority is set at 18 years of age (Gregorian calendar) (Article 209 Family Code). A child who has not reached the age of legal accountability does not have legal capacity (Article 217 Family Code), whereby the child possesses legal accountability when he/she reaches 12 years of age (by the Gregorian calendar) (Article 214 Family Code).

554. In **Tunisian law**, the child cannot directly take legal action. Indeed, taking legal action is restricted to persons having the necessary quality and capacity; a minor (person without legal capacity) cannot personally initiate legal action; to assert his/her rights, the minor is therefore obliged to act through his/her legal representative, parent or guardian. However, an action in matters of interim relief and cases of special urgency may validly be brought by a minor possessing the age of discernment (Article 19 CCPC).

iii) The person in charge of hearing the child (Question C.3)

555. In **Algerian law**, the child is heard by the family judge who can order an investigation into the child's social situation as affirmed by the Supreme Court, Personal Status Chamber in a judgement of 18 May 2005, according to which the judge can rely on the social worker's report in the assessment of the best interests of the child. However, referral to the social worker report is optional. In this regard, the decision of the Supreme Court of 13 November 2011⁵⁸² shall be cited which indicates that "*the judge is not required to refer to a welfare report in assessing the best interests of the child*". It is noted that according to Article 425 CAPC, the President of the family affairs section, acting as an interlocutory judge, may order the appointment of a social worker, a specialist physician or make recourse to any competent agency in the matter.

556. In **Lebanese law**, before *Shari'a courts*, the child is heard by the judge himself. Regarding the Druze community, pursuant to article 47 of the Personal Status Law as amended, social workers and psychologists may be appointed to solve conflicts between spouses. This article opens up the possibility for social workers or psychologists to hear the child.

557. In **Moroccan law**, the child is generally heard by the judge in a manner appropriate to its age, thereby avoiding any pressure or influence. The judge can order the child to be heard by social workers (Article 172 Family Code) or by a physician or a child psychiatrist.

558. In **Tunisian law**, when a child is at risk, the child is to be heard by the family judge, or also by the child protection officer⁵⁸³ (Article 35 CCP), or otherwise by specialists with psycho-social background where the child protection officer is entitled "*to order the welfare reports necessary to assess the*

581. With the permission of the family judge.

582. Revue Judiciaire 2012/1, p. 313. Information provided by the Algerian delegation.

583. Who is "*in charge of a preventive intervention in all cases where it appears that the health of the child or his/her physical or moral well-being are threatened or the child is exposed to a danger due to the environment in which he/she lives, or actions and activities he/she carries out, or because of the various forms of ill-treatment to which the child is subjected, and in particular in the difficult situations defined in Article 20 of this Code*" (Article 30 CCP).

reality of the child's particular situation" (Article 35 CCP). Likewise, Article 55 of the Code of Child Protection enables the family judge to authorise a medical or psycho-clinical examination of the child.

iv) The consideration of the child's views in the assessment of the best interests of the child (Question C.4)

559. In **Algeria**, the judge takes into consideration the child's opinion in the assessment of his/her best interests, on the basis of the criteria set out in Article 7 of the Child Protection Law, including:

- the age of the child;
- the state of the child's health so that custody is awarded to the parent who is best able to care for the child and meet his/her needs;
- social status: the parent who is best able to provide adequate social conditions to ensure the psychological and educational well-being of the child.

560. Accordingly, in a judgement by the Family and Probate Chamber of the Supreme Court of 14 February 2013,⁵⁸⁴ the Court considered that the criterion for establishing guardianship of a child is his/her best interests and not only the will of the minor.

561. In **Lebanon**, taking into account of the opinion of the child is left to the discretion of the Shari'a or civil judge. Reference to the position of religious judges on this issue is made because of their discretionary power in reviewing custody cases. In judgements of the *Sunni Shari'a courts*, the judges heard the views of children who had reached the age at which their mother's custodianship normally ended before deciding to transfer custody to the father according to their wishes. In these cases (where judges heard the children's views), the judgements indicated that the decision was made in the best interests of the child (judgements of the Sunni Court of Beirut of 13 May 2010 and 15 June 2010, judgement of the Sunni High Court of 5 December 2011). And in a judgement of the Sunni Court of Beirut of 7 November 2009, where the child had not reached the age at which the mother's custodianship normally ended, after hearing the child's opinion, the court was convinced that the best interests of the child required the child to remain in the mother's custody. In some cases, the *Ja'fari courts* have exceeded the prescribed ages when the child, at the age of discernment (normally set at puberty), declared his/her preference for living with one of the parents.⁵⁸⁵

562. In **Morocco**, the judge assesses the best interests of the child after hearing the child or the parents, or on the basis of a social welfare report⁵⁸⁶ or a medical or psychological examination or by assessing the father's income or by examining the case file and by having recourse to any other useful measure.

563. It is recalled that according to Article 166 of the Family Code, when the child, at the age of 15 chooses which of the parents is to assume custody, this choice must necessarily not be incompatible with the child's interests.

584. Revue judiciaire 2014/1, p. 304.

585. See the Human Rights Watch online publication, *Unequal and Unprotected Women's Rights under Lebanese Personal Status Laws*, op. cit. note 488.

586. The court may appoint a social worker to create a report on the conditions under which the custodian meets the basic material and moral needs of the child entrusted to his custody (Article 172 of the Family Code).

564. In **Tunisia**, according to Article 10 of the Code of Child Protection, the views of the child must be taken into consideration in accordance with *his/her age and degree of maturity*, while assuring that the best interests of the child are treated as a major consideration in all measures taken with respect to the child (Article 4 CCP). In this regard, a judgment⁵⁸⁷ issued by the Tunis Court of First Instance on 4 January 2016 (case No. 99826) is worth mentioning.⁵⁸⁸
565. In a judgment of 12 December 2017,⁵⁸⁹ the Kef Court of First Instance rejected that a mother remarried to a foreigner lose her right to custody. Indeed, the former husband claimed that, because of this marriage, his children would be raised by a non-Muslim, which could have an influence on his/her religious education
566. In accordance with the social investigations ordered by the court, **the children who insisted on living with their mother** performed well in school, dressed appropriately and behaved properly. Similarly, the expert concluded to the good psychological health of the children following a psychological assessment and considered that the children should rather stay with their mother for their psychological well-being.
567. In the court's view, insofar as the defendant did not demonstrate that the children would be mistreated or neglected, the request had to be dismissed, the best interests of the child being the sole criterion when deciding on matters of custody.

c) The Concluding Observations and General Comments of the Committee on the Rights of the Child (Questions B.1-B.2)

568. In **Algeria**, Lebanon, Morocco and Tunisia, the observations of the Committee on the Rights of the Child are not communicated to judges.⁵⁹⁰
569. However, Article 44 of the UNCRC stipulates that “State parties shall make their reports widely available to the public in their own country” (Article 44(6) UNCRC). In the General Comment No. 5 (2003),⁵⁹¹ the Committee on the Rights of the Child recommended that State parties widely disseminate the Committee's Concluding Observations, a recommendation reaffirmed in, for example, Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.⁵⁹² It is recommended that State parties circulate this General Comment “to parliaments,

587. Unpublished judgment, provided by the Tunisian delegation.

588. نبي ع ذخال عم هب قصا خال فياض قلا تاء ارجال ا يف لافطال اءارب ذخال نكمي نأ اىل ع لفظلا فيام ح لاج نم 10 لصفلا صين شيحو. جضن ةجرو ه نيس رابت عالا
نالك... فياض قلا يف هيل ع ريرحتلا دن عو 1/7/2013 خيراتب وف يلاتل ابو 2001 قنس دولوم نأ... لفظلا قذالو نومضمل عو جلالاب تبث شيحو
لكاردالا نم قلوبق عم قيسن لمحي وف يلاتل ابو قنس 12 يلاوح رم عالا نم غلبي
جرا خال نم امهيل ع بابلا قل ع عم احابص دوعتل اليل رداغتو لزنملا يف ما عطل او متيقش عم طكرت متدل او نأ عارص لفظلا ح رص شيحو
...ام منوؤش ب مايقلل مال ا قراج مدع اىل ع ليلدل اميقت هيل عى عدمل قن اضحل دانس! لبق امهتدل او قبح صرب نالفظلا اهاضق ايتل ا قرتفل نأ شيحو
... قن اضحل دانس! يف يس اسال رايعمل ايه اىل ضفلا نوض حمل ةلصم نأ يف لاج ال نأ شيحو

589. Available in Arabic at <<http://www.pointjuridique.com/2017/12/28/الاضطرار-الى-ع-اس-يس-ات/2017/12/28/>> (last consulted on 1 April 2018).

590. Information provided by the delegations. However, the Tunisian delegation specified that generally the ratification by the Tunisian State of an international treaty is followed by seminars and workshops by specialists in the field to explain the provisions of the treaty as well as the related reports.

591. General comment No. 5 (2003), *op. cit.* 96, at para. 77.

592. General comment No. 14 (2013), *op. cit.* 105.

governments and the judiciary, nationally and locally". The comment "should also be made known [...] to all professionals working for and with children (including judges [...]). To do this, the general comment should be translated into relevant languages, child-friendly/appropriate versions should be made available, conferences, seminars, workshops and other events should be held to share best practices on how best to implement it. It should also be incorporated into the formal pre- and in-service training of all concerned professionals and technical"⁵⁹³.

570. In any event, the UNCRC Committee issued comments on the best interests of the child, abduction and child custody.
571. With regard to **Algeria, the Committee**⁵⁹⁴ noted with satisfaction that the principle of the best interests of the child has been incorporated in a number of legal provisions: "The Committee is however concerned that the general principle of the best interests of the child has not been incorporated in all legislation concerning children and is therefore not applied in all administrative and judicial proceedings, nor in policies and programmes relating to children".⁵⁹⁵
572. The Committee further urges "State party to strengthen its efforts to ensure that the principle of the best interests of the child is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings as well as in all policies, programmes and projects relevant to and with an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate them to the public or private social welfare institutions, courts of law, administrative authorities and legislative bodies. The legal reasoning of all judicial and administrative judgments and decisions should also be based on this principle, specifying the criteria used in the individual assessment of the best interests of the child".⁵⁹⁶
573. The Committee also notes that "[t]he right to be heard in all judicial and administrative proceedings remains largely ineffective".⁵⁹⁷ Thus, the Committee "draws the attention of the State party to its general comment No. 12 (2009) on the right of the child to be heard".⁵⁹⁸
574. As regards custody, "[t]he Committee reiterates its concern about the difficulty in implementing judicial decisions regarding custody and visitation rights for Algerian children with one parent living outside Algeria and the prevalence of child abduction among children of mixed marriages".⁵⁹⁹
575. "The Committee reiterates its recommendations (CRC/C/15/Add.269, para. 49) that the State party undertake all necessary efforts to prevent and combat illicit transfer and non-return of children and to ensure proper and expeditious implementation of judicial decisions made with regard to custody and visiting rights. It further recommends that the State party strengthen dialogue and consultation with relevant countries, notably those with which the State party has signed an agreement, regarding custody or visitation rights. The

593. *Ibid.*, at para. 100.

594. The Committee examined the third and fourth regular reports of Algeria submitted in a single document on 8 June 2012, and adopted the Concluding Observations on the subject on 15 June 2012 (CRC/C/DZA/CO/3-4) available online at < www.ohchr.org > under "Human Rights by Country" then "Algeria" then "reporting status" then "CRC-Convention on the Rights of the Child.

595. *Ibid.*, at para. 31.

596. *Ibid.*, at para. 32.

597. *Ibid.*, at para. 35.

598. *Ibid.*, at para. 36.

599. *Ibid.*, at para. 50.

Committee also urges the State party to ratify the Hague Convention on Civil Aspects of International Child Abduction of 1980.”⁶⁰⁰

576. Concerning **Lebanon**, in the light of its General Comment No. 14 (2013)⁶⁰¹ on the right of the child to have his or her best interests taken as a primary consideration, the Committee “*recommends that the State party strengthen its efforts to ensure that this right is appropriately integrated and consistently interpreted and applied in all legislative, administrative and judicial proceedings and decisions, as well as in all relevant policies, programmes and projects that have an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance and training to all relevant persons in authority for determining the best interests of the child in every area and for giving it due weight as a primary consideration*”.⁶⁰²
577. The Committee, in line with its general comment No. 12 (2009)⁶⁰³ on the right of the child to be heard, recommends that the State party “[c]ontinue to take measures to ensure the effective implementation of legislation recognising the right of the child to be heard in relevant legal and administrative proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle”.⁶⁰⁴
578. Concerning **Morocco**, with regard to the principle of the best interests of the child, “*the State party is encouraged to develop procedures and criteria to provide guidance to all relevant persons in authority for determining the best interests of the child in every area and for giving them due weight as a primary consideration*”.⁶⁰⁵
579. With regard to **Tunisia**, the Committee raised the issue of custody rights in its Concluding Observations of 11 June 2010⁶⁰⁶ in which it noted that “*that article 58 of the Code of Personal Status, which provides that a female guardian must be unmarried, and that a male guardian should have available a wife to discharge the duties of guardianship, might be inconsistent with the principle of the best interests of the child*”.⁶⁰⁷
580. With regard to the principle of the best interests of the child the Committee recommended “*that the State party take all appropriate measures to ensure that the principle of the best interests of the child is adequately integrated in all legal provisions and implemented in practice in judicial and administrative decisions and in programmes, projects and services which have an impact on children, in accordance with article 3 of the Convention*”.⁶⁰⁸

600. *Ibid.*, at para. 51.

601. *Op. cit. note 105*.

602. The Committee considered the combined fourth and fifth periodic reports of Lebanon at its meetings held on 18 and 19 May 2017, and adopted the Concluding Observations at its meeting held on 2 June 2017 (CRC/C/LBN/CO/4-5), at para. 15 available online at: < www.ohchr.org > under “Human Rights by Country” then “Lebanon” then “reporting status” then “CRC-Convention on the Rights of the Child” (last consulted on 1 April 2018), para. 15.

603. *Op. cit. note 118*.

604. See the Concluding Observations of 2 June 2017, *op. cit. note 602* at para. 16.

605. The Committee examined the third and fourth regular reports of Morocco submitted in a single document on 3 September 2014, and adopted the Concluding Observations on the subject on 19 September 2014 (CRC/C/MAR/CO/3-4), at para. 27, available online at < www.ohchr.org > under “Human Rights by Country” then “Morocco” then “reporting status” then “CRC-Convention on the Rights of the Child” (last consulted on 1 April 2018).

606. CRC/C/TUN/3, available online at < www.ohchr.org > under “Human Rights by Country” then “Tunisia” then “reporting status” then “CRC-Convention on the Rights of the Child”.

607. *Ibid.*, at para. 30.

608. *Ibid.*, at para. 31.

3. Amicable dispute resolution

581. The purpose of this section is to describe the implementation of parental agreements on custody and contact rights and how the *best interests of the child* are safeguarded (a) as well as to consider the possibility of designating a central contact point for cross-border family mediation in the States concerned (b).

a) Implementation of parental agreements on custody and contact and the best interests of the child (Question D.1)

582. Under **Algerian law**, according to Article 444 of the Code of Civil and Administrative Procedure, the judge may take into consideration the arrangements agreed by the spouses when ordering provisional measures. The judge should ensure that the best interests of the child have been respected in these agreements. For example, he can intervene:

- in the case of a custody-sharing agreement where the judge relies on the principle of non-division and, exceptionally, will agree to joint (or alternating) custody if this is in the best interest of the child;
- in the case of renunciation of the right of custody. A renunciation is valid as long as it does not compromise the interests of the child (Article 66 of the Family Code). For example, the renunciation of custody rights was declared inadmissible where the mother could not demonstrate that another person capable to assume custody exists.⁶⁰⁹

583. Thus, the agreement may be contrary to the interests of the child, which is why the judge remains the only competent authority to decide who exercises custody rights over the child.⁶¹⁰

584. In **Lebanese law, before Sunni courts**, parental agreements on custody and contact are recognised by Regulation No. 46. However, the agreement does not prohibit the parent concerned from seeking the application of Shari'a provisions in relation to custody (Article 26). The same applies for visiting rights (Article 32).

585. In a judgement issued on 13 April 2010, the Sunni Court of Beirut refused to grant custody to the mother, basing its decision on the divorce agreement between the spouses.⁶¹¹ The Ja'fari court of Baabda also refused to grant custody to a mother who "*had renounced her right to custody in exchange for a divorce*" even though the child had not completed the first year of life (judgement of 15 March 2010).⁶¹²

609. M. Djennad, 'Les droits de l'enfant en Algérie', Mémoire, D.E.S. 2006, available online at < http://www.memoireonline.com/02/07/359/m_les-droits-de-l-enfant-en-algerie8.html > (last consulted on 1 April 2018).

610. G. Parolin, *Research Report*, op. cit. note 34, at p. 87 (of the FR version).

611. See the Human Rights Watch online publication, *Unequal and Unprotected Women's Rights under Lebanese Personal Status Laws*, op. cit. note 488.

612. *Ibid.*

586. As for the *ecclesiastical courts*, in a judgement issued on 3 August 2008, the *Syriac Orthodox Court* granted custody to the father since the mother had renounced her right of custody.⁶¹³
587. Conversely, pursuant to the Law No. 58 of 17 October 2017⁶¹⁴ amending the *Druze Personal Status Law*, renouncing the right of custody is inadmissible, as this right may be waived only in case of legal or Shari'a-based obstacles (Article 64, as amended).
588. In **Moroccan law**, the family judge normally endorses agreements between the parents on custody and visitation unless the agreement contains a clause deemed to be contrary to the best interests of the child. In this case, he will modify the clauses of the agreement.⁶¹⁵
589. The two spouses can indeed agree on the principle of ending their marital union, either unconditionally or with conditions, provided that they are not incompatible with the provisions of the Family Code and do not harm the interests of children. In case of agreement, the petition for divorce is accompanied by a document establishing the agreement for the purpose of obtaining the authorisation to implement it (Article 114 Family Code).
590. The parents can, in an agreement, also foresee the modalities for visits and communicate this to the court, which records the contents of the agreement in the decision granting custody (Article 181 Family Code).
591. In the event of a disagreement between the father and the mother, the court shall, in the decision granting custody, set the visitation intervals and specify the times and places for the visits so as to prevent, to the extent possible, any fraudulent action in the execution of the decision.
592. For this purpose, the court takes into consideration the specific conditions of each party and the circumstances of each case (Article 182 Family Code).
593. In **Tunisian law, the legislator has recognised the principle of party autonomy according to which the parties are** free to decide on their commitments provided they respect the law⁶¹⁶ and these are not contrary to public order. Thus, the Tunisian courts admit the agreements between the parties concerning custody except those contrary to the family law. The judge intervenes when he realises that the agreement is clearly contrary to the best interests of the child, but also in cases where the agreement is contrary to moral standards, public order or the law.
594. Moreover, during the conciliation period,⁶¹⁷ the family magistrate must order *ex officio* all urgent measures concerning in particular the custody of the children by immediately enforceable order. However, the parties may agree to expressly waive such measures provided that this does not harm the interests of minor children (Article 32 PSC).

613. *Ibid.*

614. *Op. cit.* note 536.

615. Information provided by the Moroccan delegation.

616. According to Article 67 of the Code of Obligations and Contracts, an obligation based on an unlawful cause is void when it is contrary to moral standards, public order or the law.

617. These are three conciliation hearings, each of which may not be held less than 30 days after the one that precedes it (Article 32 PSC).

595. It is recalled that the best interests of the child “*must be a major consideration*” (Article 4 CCP), a principle that has constitutional value in Tunisia. The judge gives the child the opportunity to express his/her opinion in accordance with Article 10 of the Code of Child Protection in order to really evaluate its best interests.

b) The option to designate a Central Contact Point for International Family Mediation⁶¹⁸ (Question D.2)

596. **Algerian law** does not provide for family mediation,⁶¹⁹ except for the mediation provided by the Bilateral Agreement Algeria-France of 1988.⁶²⁰ In the other cases, a central point of contact could be established within the Ministry of Justice in liaison with the public prosecutor as the guarantor of public order.

597. In **Lebanon**, the central point of contact for cross-border family mediation could be situated in the Minors Department of the Ministry of Justice.

598. In **Morocco**, there is also a central unit for communication, mediation and international cooperation within the Ministry of Justice and Freedoms.⁶²¹ This point could be designated as central point of contact for cross-border family mediation.

599. In **Tunisia**, a central point of contact for international family mediation could be established within the Ministry of Justice. It should be noted that “[t]he Ministry of Justice is the Tunisian central authority within the meaning of article 6 of the Convention on the Civil Aspects of International Child Abduction...” (Article 1 of Governmental Decree No. 2017-1209 of 7 November 2017 designating the central authority established by the Convention on the Civil Aspects of International Child Abduction concluded on 25 October 1980 in The Hague).⁶²² Furthermore, it is worth noting that in the context of the bilateral agreements a commission is established, as is the case under the Bilateral agreement Tunisian-Belgium⁶²³. In accordance with Article 3 of the Bilateral cooperation is entrusted to the Tunisian Ministry of Justice (Directorate of civil matters).

4. Cross-border wrongful removal or retention of children

600. This section deals with the remedies and mechanisms available in case of wrongful removal and retention of children across borders (a), as well as the relevant procedures (b).

618. The “**Principles for the Establishment of Mediation Structures in the context of the Malta Process**” call for the establishment of a “Central Contact Point for international family mediation” in each State facilitating the provision of information on available mediation services, on access to mediation, and other related information, including information regarding access to justice. See *supra* Introduction at para. 12.

619. Information provided by the Algerian delegation.

620. *Supra* note 18.

621. Information provided by the Moroccan delegation.

622. Governmental Decree No. 2017-1209 of 7 November 2017 designating the central authority established by the Convention on the Civil Aspects of International Child Abduction concluded on 25 October 1980 in The Hague. Available in French at: <<http://legislation-securite.tn/node/56573>> and in Arabic at: <http://legislation-securite.tn/node/56573?secondlanguage=ar&op=OK&form_build_id=form0758bd34f2e487b-1f1b69ebb1431cb83&form_id=dcaf_multilanguage_form_render> (last consulted on 1 April 2018).

623. *Supra* note 30.

a) The available remedies / mechanisms (Questions E.1-E.2)

601. **Algeria** is bound in terms of custody by several bilateral agreements safeguarding the best interests of children from mixed couples,⁶²⁴ such as the **Bilateral Agreement Algeria-France**.⁶²⁵ This Convention provides for judicial and administrative protective measures and designated the Ministries of Justice, as the central authorities responsible for fulfilling the obligations set out in the Convention, to take all appropriate measures such as establishing the child's location and facilitating the effective exercise of access rights (Articles 1 and 2).⁶²⁶ Article 6 states that any judicial decision issued by the jurisdictions of the Contracting Parties and ruling on the custody of the child shall confer access rights, including cross-border access, to the other parent, and any refusal by a parent to the other parent to exercise the internal or cross-border access rights granted by a judicial decision renders the said parent subject to criminal prosecution for failure to hand over a child to the person entitled to custody/access (Article 7).
602. Thus, in the case of children removed from one country to another without the consent of one of the parents, this bilateral agreement implements close collaboration between the central authorities, in particular to facilitate any amicable solution that may ensure the return of the child, promote the effective exercise of access rights and facilitate the return of the child to the applicant when enforcement of the decision is granted. According to this convention, and in order to ensure that the child has the possibility of maintaining relations with both of his/her parents, the decision on the custody of the minor whose recognition is sought abroad must provide for cross-border access to the parent with whom the child does not live. This agreement also aims to facilitate simplified enforcement of the access provisions to guarantee the actual return of the child at the end of the visitation period with the parent with whom the child does not does not habitually reside.
603. Finally, in the absence of a bilateral convention, the provisions of the UNCRC remain applicable, with the Algerian authorities ensuring the resolution of cross-border custody disputes in accordance with the Convention, provided that the education of the child is in the religion of his/her father (interpretative declaration by Algeria on the Convention).
604. Moreover, wrongful removal and retention of the child are considered criminal offences under Articles 327 and 328 of the Criminal Code.
605. In **Lebanese law**, the provisions of bilateral conventions are applied where these exist. In this connection, mention should be made of the **Bilateral Agreement Lebanon-France**⁶²⁷ establishing a joint advisory committee composed of representatives of the Ministries of Justice, the Interior and Foreign Affairs of both States parties, and a coordinator appointed by each party to monitor the work of the commission and to liaise with the other party.

624. Information provided by the Algerian delegation. See the list of bilateral agreements, *supra* at p. 7.

625. *Supra* note 18. This bilateral agreement only applies when one of the parents is of French nationality and the other is Algerian (the notion of dual nationality being interpreted restrictively by the Algerian central authority, which considers a "binational" French-Algerian as an Algerian national), and excludes natural children from its scope.

626. It should be noted that the judicial or administrative protective measures concerning a minor who is an exclusive national of one of the two States shall be taken after consultation with the competent consulate of that State (Article 4).

627. *Supra* note 25. Reference is also made to the Bilateral Agreement Lebanon-Switzerland, *supra* note 26.

606. This agreement does not set up any judicial procedure, but defines the powers of the committee as the coordinating and consultative body, which must create provisions:
- promoting the conciliation of the parties, with a view to facilitating the return of the wrongfully removed child or enabling the non-custodial parent to exercise its access rights;
 - informing the parents about the location, the material and moral situation of the children and the state of the proceedings in progress;
 - facilitating the movement of children and parents between the two jurisdictions in order to ensure the effective exercise of the right of each child to maintain direct and personal relations with its parents;
 - facilitating the obtaining of visas or exit permits;
 - promoting close cooperation between the competent authorities of both parties (Article 4).
607. It should be noted that Lebanon adopted a **Law on judicial mediation**⁶²⁸ on 10 October 2018, which applies in all types of disputes in which conciliation is possible provided that it is not contrary to public policy and mandatory laws (Article 2); confidentiality, impartiality and independence are guaranteed to the parties (Articles 16 et seq.).
608. As for the *community courts, the ecclesiastical courts* in urgent cases falling within their jurisdiction may prohibit the defendant from travelling (Article 21 of the Law of 2 April 1951 on the Jurisdiction of the Confessional Courts of non-Muslim Communities).
609. Finally, Article 495 of the Criminal Code provides for the prosecution of a person who removes or abducts a minor not having attained the age of 18, even with his/her consent, with the intention of removing the minor from the authority of the person with parental authority or custody rights. And Article 496 provides for the punishment of the father, the mother or any other person who, notwithstanding the order of the judge, has delayed access or refused to grant access to a minor under 18 years of age.
610. In **Moroccan law**, Moroccan courts apply international conventions in international cases of wrongful removal or retention, in particular the **1980 Hague Child Abduction Convention**,⁶²⁹ and proceed as a matter of urgency with the return of the wrongfully removed child to his/her habitual place of residence. The procedures for requesting the return of the child to a parent who is outside the national territory are pursued and executed by the central authorities of the Moroccan Ministry of Justice through the territorially competent public prosecutor's office.
611. In a judgement of the Rabat Court of Appeal of 28 September 2015,⁶³⁰ it was decided that the removal of the child from the other parent caused the child definite harm; even in the case of a breakdown of the marital relationship the child benefits morally and materially from being close to both parents taking care of matters relating to the child. Such applications are always urgent and therefore the judge hearing the application for interim relief is competent to take any provisional measure to ensure the exercise of the respective rights.

628. The Law on Judicial Mediation of 10 October 2018 is available in Arabic at < <https://www.lp.gov.lb/Resources/Files/b5f5680b-8084-4dd4-a282-b34d3faca47a.pdf> > (last consulted on 31 December 2018).

629. *Supra* note 2.

630. Information provided by the Moroccan delegation.

612. One of the objectives of the 1980 Hague Convention, which under the Moroccan Constitution took precedence over national legislation as soon as it was published, is to ensure the immediate return of children who have been wrongfully removed; and this immediate return comes under the jurisdiction of the judge hearing applications for interim relief.
613. In accordance with Article 19 of the 1980 Hague Convention, a decision on the return of the child shall not be taken to be a determination on the merits of any custody issue. The return of the child to his/her habitual place of residence does not constitute an endorsement or withdrawal of custody rights, but rather a procedure to re-establish the *status quo ante* the removal of the child.
614. The triggering of the action by the Public Prosecutor within the framework of the Convention makes the latter the main party in the proceedings, whereby this does not contravene his status as defender of the general interest because Article 6 of the Convention allows Contracting States to designate a central authority responsible for fulfilling their obligations under the Convention.
615. Morocco is also bound by bilateral conventions, such as the **Bilateral Agreement Morocco-France**,⁶³¹ which dedicates Chapter III to questions related to child custody and access.
616. With regard to the wrongful removal of children, the bilateral agreement is intended to apply to any child belonging to one of the two State parties. It came into effect on 13 May 1983 and employs the following two mechanisms:
- immediate return to the child's habitual place of residence with the parent who has legal or *de facto* custody;
 - the exequatur status of the court order determining the domicile of the child and attributing parental authority.
617. The bilateral agreement requires that all applications for judicial return of a child be made through the central authorities.
618. When the Central Authority is required by its counterpart to obtain the return of a child that has been wrongfully removed or retained in its territory, it must immediately contact the prosecutor with jurisdiction in the respective territory. It is the responsibility of the latter to take all appropriate measures to ensure the voluntary return of the child. In the event of refusal, he will refer the case to the court, which must give an interlocutory ruling, in order to either to ensure execution in its jurisdiction of an enforceable decision rendered in the other country, or to obtain a decision on the application for return of the child. The agreement also requires the judge to stay the proceedings on any application relating to the substance of the right of custody, which are referred to him, until a final decision on the application for return of the child has been made. The exceptions provided for immediate return of the child are:
- if custody has not been effectively exercised or not exercised in good faith by the party to whom it was entrusted,

631. *Supra* note 28.

- a serious risk to the health or safety of the child, due to the occurrence of an event of exceptional gravity since the award of custody.
619. It should be noted that there are no exceptions to the return in relation to the age and maturity of the child, nor is there any exception related to the integration of the minor into his/her new environment, taking the passage of time into account.
620. In cases where no convention (multilateral or bilateral) is applicable, and according to Article 177 of the Family Code, the father, mother and close relatives of the child subject to custody and all third parties must notify the Public Prosecutor of all detriments to which the child is exposed, so that the latter can take the necessary measures to protect the rights of the child, including an application for the removal of custody.
621. According to Article 179 of the Family Code, *“the court may, at the request of the Public Prosecutor or the legal representative of the child in custodianship, include in the decision granting custody or a subsequent decision, a prohibition on the child being taken on a trip outside Morocco without the consent of its legal representative”* (translated from French).
622. The Public Prosecutor is responsible for notifying the competent authorities of any such prohibition, so that the necessary measures are taken to ensure its execution.
623. In case of refusal of the legal representative to agree to the child being taken on a trip outside Morocco, the interlocutory judge may hear an application for an authorisation to this effect.
624. It should be noted that the Moroccan **Criminal Code**⁶³² provides for the offence of failure to hand over a child to the person entitled to custody/access in Article 476 *et seq.*
625. Under **Tunisian law**, the Tunisian authorities have been bound by the **1980 Hague Child Abduction Convention**⁶³³ since 1 October 2017, and therefore its provisions fully apply.
626. As regards bilateral agreements, mention may be made in this regard of the provisions of the **Bilateral Agreement Tunisia-France**⁶³⁴ in which the central authorities are required to take all appropriate measures to ensure the voluntary surrender of children or to facilitate an amicable solution. In urgent cases, these authorities shall take any provisional measure that seems appropriate in order to prevent new dangers for the child (Article 6). Under Article 11, the judge of the State to which the child has been removed or in which he/she is detained must order, as a precautionary measure, the immediate surrender of the child, unless the person who moved or detained the child establishes that: (i) at the time of the alleged violation the person to whom custody had been entrusted before the removal did not actually exercise the custody right in good faith or; (ii) the return of the child would be likely to seriously jeopardise its health or safety by the occurrence of an event of exceptional gravity since the award of custody.

632. Law No. 1-59-413 of 26 November 1962 approving the Criminal Code, consolidated version (in French) of 15 December 2016 available online at < <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/code%20penal.pdf> > (last consulted 1 April 2018).

633. *Supra* note 2.

634. *Supra* note 31.

627. In cases where no convention is applicable, Article 62 of the Personal Status Code will be applied, according to which the father can only remove the child from the mother's place of residence with her consent provided that she retains the right of custody unless the child's best interests require the contrary. The rights of the parent with custody over the child cannot prevent the other parent from "exercising his/her right to visit and oversee the child". The family judge rules on the request for the exercise of access rights under the summary proceedings (Article 66 PSC). Moreover, the person who has custody would be deprived of his/her right in case of a change of residence and his/her relocation so far away as to prevent prevents the guardian from performing his/her duties (Article 61 PSC). The family judge may also be seized if it is believed that the child is in danger (in particular because is deprived of being in touch with one of the parents) to take the necessary measures provided for in Article 59 of the Code of Child Protection. Wrongful removal and retention (an offence) can justify revoking the offending party's custody rights or restricting access rights and taking preventative measures such as a prohibition on travelling to the offending parent.

b) The procedures

i) The timeline / delay (Questions E.4-E.6)

628. In **Algerian law**, it is difficult if not impossible to state the average duration of these proceedings, particularly in the absence of an international agreement; these cases range in duration from one to five months, sometimes even more than a year.
629. In urgent cases, a parent who fears that his/her child will be removed abroad may refer the case to the president of the family affairs section who will exercise the powers of a judge in summary proceedings (Article 425 CAPC) to prevent the child from leaving Algerian territory.
630. In **Lebanese law**, before the *Sunni Shari'a courts*, no specific expedited procedures exist in this area. However, general summary proceedings relating to custody and visitation rights may be applied (Article 35 of Regulation No. 46). In the *ordinary courts*, and in the absence of an international agreement, no specific procedures are defined. However, the protection cases are dealt with rapidly under Article 26 of the Law No. 422/2002, with the judge being able to take protective measures for the child at risk.
631. Under **Moroccan law**, the Moroccan judicial system and the provisions of the 1980 Hague Convention make it possible to submit such cases to the judge for interim relief in order to ensure the "immediate return" of the child (Article 7 of the Convention). The proceedings should not take more than one month in most cases.⁶³⁵
632. In the absence of an applicable international agreement, the judge hearing the application for interim relief is competent by virtue of the urgency of the case to order any precautionary measure, whether or not the dispute is brought before the trial judge deciding on the merits (Article 149 of the Moroccan CPC), to protect the child from a particular harm and protect his/her best interests.

635. Information provided by the Moroccan delegation.

633. In a judgement of the court of first instance of El Jadida of 5 November 2014,⁶³⁶ the arrest of the father who wrongfully removed his daughters who lived in France to Morocco, one of whom was pursuing her studies and the other receiving treatment for chronic heart disease and mental retardation, resulted in a ruling by an interlocutory judge to ensure the children's return to their habitual residence under the custody of their mother.
634. And in a judgement of the court of first instance of Témara of 9 July 2015,⁶³⁷ a foreign judgement awarding custody to the mother was recognised as having *res judicata* status. The separation of the child from the mother merited the case being heard by a judge in interlocutory proceedings. The refusal of the father to hand over the child to the custodial mother in the child's habitual residence in Germany resulted in depriving the child of the mother's affection; the gravity of this situation required the intervention of the judge in view of its urgency to uphold the mother's rights and return the child to the mother in the child's habitual residence in Germany.
635. Finally, in a judgement of the court of appeal of "Al Hoceïma" of 9 April 2013,⁶³⁸ the removal of children by their father from their habitual place of residence in the Netherlands to Morocco to entrust them to persons who had no special training in this area is an unlawful act that causes harm to children as a consequence of deprivation of their mother's care. Therefore, and in view of the urgency of the case, the application for interim relief was justified in order to safeguard the rights of the children, especially as it was established that the father is in the Netherlands.
636. Under **Tunisian law**, the provisions of multilateral agreements (such as the **1980 Hague Convention**, in force for Tunisia since 1 October 2017) or bilateral agreements apply, as is the case with the **Bilateral Agreement Tunisia-France**.⁶³⁹
637. If such agreements do not exist, ordinary law, which provides for summary proceedings, is applied, and in the case of a child in danger, the family judge takes the measures provided for in Article 59 of the Code of Child Protection.
638. The decision is usually of an urgent nature such as in relation to the maintenance of the child or the granting of temporary custody to one of the parties or the prohibition of travel.⁶⁴⁰

ii) Safeguarding the parent-child contact (Question E.7)

639. In **Algeria**, there are special judicial procedures for parties who want to assure cross-border contact, as is the case with the provisions of the Bilateral Agreement Algeria-France.⁶⁴¹ In other cases that are not governed by a convention, the Algerian courts are the only competent authority to recognise foreign judicial rulings.⁶⁴² Same-sex or adoptive parents are the only exceptions that can be invoked

636. Unpublished decision. Information provided by the Moroccan delegation.

637. *Ibid.*

638. *Ibid.*

639. *Supra* note 31.

640. Information provided by the Tunisian delegation.

641. *Supra* note 18. See also G. Parolin, *Research Report*, *op. cit.* note 34, at p. 101 (of the FR version).

642. On this point, see *infra* Part 2, B, 5.

where the recognition of a foreign decision on access rights would be denied, as these exceptions are seen as being contrary to public order and the morality of Algerian society.⁶⁴³

640. In **Lebanon**, before the *Sunni courts*, contact between the parent and the child is safeguarded by the access rights procedure. As for the *Druze* community, one of the most significant amendments to the Law on the Personal Status of the Druze Community concerns the establishment of a legal right to contact. Thus, the custodial parent may not prevent the other parent from exercising his/her contact rights. In case of disagreement on the date and location of the visit, the judge decides on the modalities of contact while taking into account the interests of the child; a visit at least once a week has to be provided for (Article 64 of the Lebanese CSP, as amended).
641. In **Morocco**, as a party to the 1980 Hague Child Abduction Convention, the relevant provisions are fully implemented.
642. It should be noted that no further action may be taken on the application for authorisation to travel abroad with the child who is habitually residing in Morocco if there is no assurance that the planned journey is of a temporary nature and that the return of the child to Morocco is assured (Article 179 of the Family Code).
643. If the child has been removed and not returned, there are no special judicial procedures regarding cross-border contact while return proceedings are ongoing.⁶⁴⁴ Firstly, it is necessary to locate the illegally displaced or retained child in the national territory under the control of the central authorities of the Ministry of Justice. The Public Prosecutor with jurisdiction over the respective locality seeks to bring about an amicable solution to ensure the voluntary return of the child as well as maintaining contact with the other parent by modern means of communication. In the case of the failure to reach an amicable solution, a judicial procedure is initiated by the Public Prosecutor (in the majority of the cases an action for interim relief) to ensure the return of the child, and in the case where the child is victim of violence, a criminal action is initiated.
644. The enforcement of foreign contact decisions can also be applied for. The exceptions that can be invoked where the recognition of a foreign decision would be denied in this matter is a decision relating to same-sex parents, adoptive parents and any other decision that would be considered contrary to public order.⁶⁴⁵
645. In **Tunisia**, the provisions of the 1980 Hague Child Abduction Convention have been applied since the beginning of October 2017. In other cases, the conciliation process provides for temporary contact decisions.⁶⁴⁶ Indeed, the procedure for the implementation of conciliation agreements requires the judge to order, even automatically, all the urgent measures concerning the residence of the spouses, alimony, custody of the children and the right of access⁶⁴⁷ (Article 32 PSC).

643. G. Parolin *Research Report*, op. cit. note 34, at p. 102 (of the FR version).

644. Information provided by the Moroccan working party (of the FR version).

645. G. Parolin, *Research Report*, op. cit. note 34, at p. 108 (of the FR version).

646. G. Parolin, *Research Report*, op. cit. note 34, at p. 50 (of the FR version).

647. The following example has been provided by the Tunisian delegation: A wife requests the right of custody; the husband is (automatically) granted the right of contact but in the presence of the mother in the case of sexual assault by the father. This is a question of support to protect the best interests of the child.

646. The rights of the parent with custody over the child cannot prevent the other parent from “exercising his/her right to visit and supervise the child”. The family judge rules on the request for the exercise of access rights in summary proceedings (Article 66 PSC).
647. It is to be recalled that the person who has custody would be deprived of his/her right in case of a change of residence and his/her relocation is so far away as to prevent the guardian from performing his/her duties (Article 61 PSC). According to Article 33 of Organic Law No. 2017-58 of 11 August 2017 on the Elimination of Violence against Women,⁶⁴⁸ the family judge may adopt measures, such as the loss of custody or guardianship for the perpetrator, and set contact arrangements, while giving priority to the best interests of the child.
648. The custodial parent might either refuse to make the child available to the other parent with access rights, or remove the child completely to an unknown place. In both cases, this constitutes the offence of failure to hand over a child to the person entitled to custody/access,⁶⁴⁹ the parent who is aggrieved can act by an application to the public prosecutor for the prosecution of the offending parent.
649. In fact, when the legislator realised that sanctions for such situations had been provided for at the time of the promulgation of the Personal Status Code on 13 August 1956, it adopted the law⁶⁵⁰ establishing the offence of failure to hand over a child to the person entitled to custody/access (Law No. 62-22 of 24 May 1962⁶⁵¹) according to which “if the custody of a minor has been decided by an interim or final court order, a father, mother or any person who does not grant access to this minor to those who are entitled to this, even if this does not involve fraud or violence, or who removes or abducts the child or has the child removed or abducted from the custody of those to whom its custody has been entrusted, or from places where the latter have placed this child, then this person will be subject to punishment by imprisonment from three months to one year and a fine [...] or only one of these two penalties”⁶⁵² (translated from French).
650. Finally, the exception that can be invoked for not recognising a foreign decision on contact is that of a decision relating to same-sex parents since same-sex parenting is viewed as contrary to public order.⁶⁵³

iii) Hearing the child (Question E.8)

651. For **Algeria and Lebanon**, the replies to the Questionnaire did not reveal any special characteristics regarding the hearing of the child in cases of cross-border wrongful removal and retention. The general rules are therefore applied, see for details Part II, B, 2 b).

648. *Op. cit.* note 542.

649. “*Délit de non représentation*”. Prosecution for the offence of failure to hand over a child to the person entitled to custody/access can only be initiated if the complaining party has a court order granting custody of the child or access to it.

650. This law contains only one Article.

651. ن.وض.ح.م.ا. راضح! مدع قديمي رج شادح إب قل عتي 1962 يام 24 يف خرؤم 1962 ن.س.ل 2 ددع نوناق .
[Law of No. 62-22 of 24 May 1962 relating to the offence of failure to comply with an access order to a child].

652. See: H. Bougarra published in the Tunisian law journal *Infos Juridiques*, No. 60/61 of January 2009, pp. 6 and 7: “*l’enlèvement et non présentation d’enfant de parents séparés ou divorcés*”, available online at < <https://tunis.consulfrance.org/Enlevement-et-non-presentation-d> > (last consulted on 31 December 2018).

653. . G. Parolin, *Research Report*, *op. cit.* note 34, at p. 110 (of the FR version).

652. In **Moroccan and Tunisian law**, and in accordance with Article 13 (2) of the 1980 Hague Convention, the judicial or administrative authority may refuse to order the return of the child if the child itself opposes his/her return and has reached an age and a maturity where it is appropriate to take this opinion into account.

iv) Possibility of appointing of a legal representative (Question E.9)

653. In **Algerian law**, there has been no case where the court has appointed a legal representative except where the child is in danger when the judge of minors may take the measures provided for in Article 35 (such as interim custody order) or Article 40 of the Child Protection Law. It should be noted that legal representation is mandatory for return procedures involving the wrongful removal or retention of the child.⁶⁵⁴

654. In **Lebanese law**, the same provisions apply as in purely national family disputes.⁶⁵⁵

655. In **Moroccan law**, legal representation is not mandatory.⁶⁵⁶

656. In **Tunisian law**, the court can appoint a legal representative to protect the interests of the child, which is often an institution for the care of children, but this measure remains exceptional,⁶⁵⁷ it being the objective of the Tunisian legislator to keep the child in its family environment (Article 8 CCP).

657. Legal representation is not mandatory and can be arranged by the Central Authority, the Public Prosecutor or an attorney.⁶⁵⁸

5. Enforcement of foreign custody and contact decisions

658. It is a matter of identifying the jurisdiction competent to declare that a foreign judicial ruling is enforceable (a) and the mechanisms assuring such implementation, including the respect of the principle of the best interests of the child (b).

a) Competent court or authority to declare the foreign decision enforceable (Question F.1)

659. In the law of all four States concerned exequatur procedure is required for a foreign judgement to become enforceable.

654. G. Parolin, *Research Report*, op. cit. note 34, at p. 129 (of the FR version).

655. *Ibid.*

656. *Ibid.*

657. Information provided by the Tunisian delegation.

658. G. Parolin, *Research Report*, op. cit. note 34, at p. 129 (of the FR version).

660. Under **Algerian law**, decisions issued by foreign courts can only be enforced in Algeria when they have been declared enforceable by the Algerian courts. The family judge is the competent judge when it comes to declaring a foreign custody decision enforceable.
661. The above is without prejudice to the rules provided for by international and judicial conventions concluded between Algeria and other countries (Article 608 CAPC).
662. In **Lebanese law**, in cases falling within the jurisdiction of the ecclesiastical courts, foreign judgements issued by civil courts can be enforced after they have been declared enforceable by the competent civil courts. If judgements are issued by ecclesiastical courts, the declaration of enforceability is issued by the competent ecclesiastical courts in Lebanon (Article 30 of the law of 2 April 1951 on the Jurisdiction of non-Muslim Confessional Courts).
663. For the *ordinary courts*, the request for declaring a foreign judgement enforceable is brought before the President of the civil court of appeal at the defendant's place of domicile or residence (Article 1013 Lebanese CPC).
664. In **Morocco**, a distinction is to be made between the recognition and enforcement of foreign decisions. Recognition does not require any particular procedure, also decisions and measures taken under international conventions such as the 1980 and 1996 Hague Conventions are binding. As concerns decisions or procedures that have an enforceable effect (enforcement on persons or property), an exequatur is necessary.⁶⁵⁹
665. For decisions falling within the scope of the 1996 Hague Child Protection Convention, Article 26 of the Convention stipulates that any interested person can request the declaration of enforceability, which may only be refused for one of the reasons set out in Art 23 (2) of the Convention.
666. For judgements rendered in the States with which Morocco has signed bilateral agreements, the central authority recognises these judgements and makes them enforceable in consultation with the competent authorities.
667. In accordance with the Bilateral Agreement Morocco-France a parent who has been the victim of the wrongful removal and retention of his/her children may also choose to submit, through the Central Authority of his/her country, an application to make enforceable in the territory of the State of refuge a court decision on the exercise of parental authority in the territory of the habitual place of residence of the child before its removal (for the conditions and the procedures of this recognition, refer to the Agreement between France and Morocco on Mutual Judicial Assistance on the Exequatur of Judgements and on Extradition of 5 October 1957).⁶⁶⁰
668. In accordance with the bilateral agreement, a parent who wishes to obtain the recognition and enforcement of a court decision on child custody or access rights may also choose to enter **directly** into exequatur proceedings with the competent court of law of the other State, in accordance with

659. Information provided by the Moroccan delegation.

660. Text (in French) available online at < http://adala.justice.gov.ma/production/Conventions/fr/Bilaterales/France/CJ_exq_jugt_extradition_FR_58.htm > (last consulted on 1 April 2018).

the provisions of Chapter II of the 1957 Agreement. According to the same procedures for presentation as for applications for the return of a child, applications for the establishment or protection of the exercise of **access rights** may be presented to the Central Authorities by the parent who does not have custody of the child. When it receives a request for the return of a child, the Prosecutor (of the Republic for France or of the King for Morocco) will bring an action before the competent judicial authority, in order to obtain a court decision recognising the access rights who does not live in the child's country of habitual residence.

669. As for the judgements rendered in the other cases, the courts of first instance will issue the declaration of enforceability. In the case of family matters, it is the family section of the court of first instance that is competent for the declaration of enforceability.
670. In **Tunisia**, proceedings relating to the exequatur of foreign judgements are brought before the court of first instance at the place of residence of the party against whom the foreign judgement is invoked. If there is no domicile in Tunisia, the action is brought before the court of first instance of Tunis (Article 16 PILC).

b) Mechanisms safeguarding the enforcement of foreign decisions

i) Available mechanisms (Question F.2)

671. In **Algerian law**, a foreign decision that meets the conditions of Article 605 of the Code of Civil and Administrative Procedure is enforceable. The exceptions that may be invoked for not recognising such a decision are exhaustively listed, namely:
- not to violate the rules of jurisdiction;
 - have acquired the force of *res judicata* in accordance with the laws of the country in which it was issued;
 - not be contrary to decisions already issued by Algerian courts and which the defendant invokes;
 - not to be contrary to public order or morality in Algeria.
672. In a judgement by the Personal Status Chamber of the Supreme Court of 13 November 2013, it was decided that a foreign judgement that is contrary to the provisions of the Algerian Family Code on custody cannot be declared enforceable by the Algerian courts.
673. The bailiffs are in charge of the enforcement (Article 611 of the CIFA), and in case compliance with the decision is refused, there is recourse to compulsory enforcement. The judges of the Public Prosecutor's Office are required to engage the law enforcement agencies to enforce the order within a maximum period of 10 days from the filing of the request for a court order (Article 604 CAPC).
674. In **Lebanese law**, according to Article 1016 of the Code of Civil Procedure, Lebanese courts refuse to grant the exequatur if a final judgement between the parties has been rendered by a Lebanese court in the same dispute that led to a foreign judgement or if a case in the same dispute and between the same parties is still pending before the Lebanese courts, and if the parties filed it at a date prior to the action abroad.

675. The exequatur of foreign judgements is subject to a simplified, streamlined procedure introduced by way of petition. The conditions necessary for the granting of the petition are liberal and do not include verification of the law applied by the foreign judge. Revision of the foreign judgement is, on the other hand, excluded, provided, however, that there is reciprocity in the State of the foreign judgement. A revision is however performed if the respective judgement contains flagrant irregularities or has been pronounced on the basis of false documents. The exequatur renders the foreign judgment enforceable and confers to it the authority of *res judicata*, which it has in the foreign country.
676. Moreover, in the case of cross-border family disputes, public order is considered to fall within the exclusive jurisdiction of religious courts if the marriage took the form of a religious ceremony. It is also invoked to prevent the execution of a foreign judicial decision considered too “liberal” especially if foreign courts decide on the dissolution of a religious marriage. Thus, in a judgement of 24 February 1992, the Mount Lebanon Court of Appeal refused to enforce a French decision dissolving a marriage performed in Lebanon between spouses residing in France. For the court, a foreign jurisdiction cannot judge a case when a national civil court cannot do this.⁶⁶¹
677. The foreign judgement for which an exequatur has been issued is enforceable as are Lebanese judgements and benefits from the means of enforcement provided by law (Article 1022 Lebanese CPC).
678. As stated above, in **Morocco** a number of international and bilateral treaties are in place providing specific rules for the process of declaring a foreign decision enforceable. When it comes to rendering a foreign decision enforceable in accordance with Moroccan national law, the court hearing the case must ensure the lawfulness of the decision and the competence of the foreign jurisdiction, which issued it. The court also verifies whether any provision of this decision is contrary to public order in Morocco (Article 430 of the Moroccan CPC).
679. In addition, Article 128 (2) of the Family Code provides that “*the judgements of divorce, judicial divorce, “Khol” divorce or marriage dissolution rendered by foreign jurisdictions are enforceable if they are issued by a competent court and based on reasons that are compatible with those enacted by this code for terminating a marital relationship. The same applies to decisions issued abroad before the competent officers and public officials, after having completed the legal procedures relating to exequatur, in accordance with the provisions of Articles 430, 431 and 432 of the Code of Civil Procedure*” (translated from French).
680. Thus, a lack of valid jurisdiction, the non-final nature of the decision and any breach of public order (such as adoption or interfaith marriage involving a Muslim woman) may be invoked as reasons for not recognising a foreign decision.⁶⁶²
681. The Supreme Court of Morocco moved in this direction in its judgement No.180 in the personal status case file No. 277/99 dated 24/04/2003 by affirming “*that there are no provision that exclude the exequatur of foreign judgements issued in matters of personal status as long as the conditions required by the law are fulfilled*”.⁶⁶³

661. G. Parolin, *Research Report*, op. cit. note 34, at p. 58 (of the FR version).

662. G. Parolin, *Research Report*, op. cit. note 34, at p. 57 (of the FR version).

663. Available online at < <http://vl.ahjucaf.org/Maroc,7307.html>. > (last consulted on 31 December 2018).

682. In **Tunisian law**, in cases where no bilateral agreement exists, foreign judgements that become enforceable in Tunisia are executed in accordance with Tunisian law subject to the requirements of reciprocity (Article 18 PILC).
683. For foreign judgements, an exequatur is issued except in cases of refusal provided for in Article 11 of the Private International Law Code. Hence, exequatur is not granted to foreign judicial decisions if:
- the subject of the dispute falls within the exclusive jurisdiction of the Tunisian courts;
 - the Tunisian courts have already issued a decision that cannot be appealed by ordinary means on the same subject, between the same parties and for the same cause.
 - the foreign judgement is contrary to public order⁶⁶⁴ within the meaning of Tunisian Private International Law, or has been issued following a procedure that did not duly protect the rights of the defence;
 - the foreign judgement has been annulled, or its enforcement suspended in accordance with the law of the country where it is issued, or is not yet enforceable in the country where it was issued (Article 11 PILC).
684. For this reason, exequatur is not granted to a foreign judgement on custody as long as a judgement not subject to appeal has been issued by a national court (Court of Appeal of Tunis, Judgement No. 90330 of the November 12, 2002⁶⁶⁵).
685. In the absence of objection by one of the parties and when the conditions for issuing the exequatur are fulfilled, the content of foreign judicial decisions, whether contentious and non-contentious, will have probative force before Tunisian jurisdictions and administrative authorities (Article 12 PILC).

ii) The respect for the best interests of the child (Question F.3)

686. In **Algerian law**, the mechanisms are intended to take into consideration the best interests of the child, a principle that must be respected in all proceedings concerning the child.
687. In **Morocco**, a judgement of the court of appeal of Agadir of February 19, 2014 can be cited in this regard.⁶⁶⁶ The existence of a foreign judgement which determines the habitual residence of the children with their mother, their psychological, educational and social stability, and the follow-up of a treatment for one of them, makes it in their best interest to continue their status of residence in France, justifying the decision to return them to their habitual place of residence.
688. Under **Tunisian law**, these mechanisms are supposed to take into consideration the best interests of the child by ensuring respect of the fundamental legal principles (the right of the defence and the adversarial principle with both parties having the opportunity to put their point of view) and the respect of the rules of public order and of private international law.

664. . For judicial decisions that have not granted exequatur status to foreign judgments for non-respect of national public morality, see:

اهيلي امو 250. ص، قباس عجرم، يناوز غلا لالامو يلذاشلا يفسط قيعت، صراخا يلودلا نوناقلا لاجم.

665. 235. ص، قباس عجرم، يناوز غلا لالامو يلذاشلا يفسط قيعت، صراخا يلودلا نوناقلا لاجم.

666. Unpublished decision provided by Moroccan delegation.

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6. Concluding comments

696. The States considered in this study are parties to the UNCRC. This Convention takes precedence over national laws and, consequently, its provisions are applicable before the national courts, in particular with regard to custody and access to rights, subject in the case of Algeria and Morocco to special declarations.
697. The principle of the best interests of the child recognised in Article 3 (1) UNCRC is to a large extent respected in the courts of the States concerned, its application being sometimes impeded where this is in conflict with the demands of religious education. That way, religious requirements are often decisive in terms of custody, particularly in Algeria, Lebanon and Morocco.
698. In the event of wrongful removal and retention, apart from the existence of multilateral or bilateral treaties, summary proceedings as well as proceedings for the protection of the child at risk remain the most effective for safeguarding the best interests of the child. This principle of the best interests of the child is also taken into account in the enforcement of foreign judgements in the national territory when the conditions of the exequatur are fulfilled.

Recommendations

Documents of guidance in the resolution of cross-border family disputes

- When dealing with international family conflicts in the European – Southern Mediterranean region, it is recommended to take into consideration the good practices developed in the “HANDBOOK ON GOOD PRACTICES CONCERNING THE RESOLUTION OF CROSS-BORDER FAMILY CONFLICTS WITH A SPECIAL FOCUS ON CROSS-BORDER DISPUTES CONCERNING PARENTAL RESPONSIBILITY” prepared in the course of the Euromed Justice III Project.⁶⁷⁰
- The results of this Comparative Study and the Euromed Justice III Handbook should be disseminated to judges, administrations and other stakeholders dealing with child related matters and family law matters.

Promotion and better implementation of the best interests of the child principle (Article 3 UNCRC)

- It is recalled that in all actions concerning children the best interests of the child shall be a primary consideration (see Article 3 UNCRC).
- States are encouraged to take all necessary measures to assist in the effective implementation of the principle of the best interests of the child. States should provide tools to those dealing with child related matters to apply the principle of the best interests of the child in line with the UNCRC.
- It is recalled that States should submit reports to the Committee of the Rights of the Child in accordance with the Article 44 UNCRC.
- States shall make their reports widely available to the public in their own countries in line with Article 44(6) UNCRC and communicate to judges and stakeholders dealing with child related matters the general observations and the final conclusions of the Committee of the Rights of the Child.
- States should provide training for judges and stakeholders dealing with child related matters regarding children's rights enshrined in the UNCRC and how to implement these right in practice.
- States should take steps to bring about a specialisation of judges dealing with cross-border family matters. The establishment of specialised courts and / or a specialisation of one or more judges to deal with international family conflicts inside a court structure is recommended. States should provide and / or encourage initial and continues specialised training for international family law matters.
- Judges and stakeholders dealing with child related matters should to the extent feasible in their practice assist in safeguarding the implementation of UNCRC's principle of the best interests of the child. Judges might, for example, assist in awareness raising and in promoting the use of the best interests of the child principle by:

⁶⁷⁰. Handbook on good practices concerning the resolution of cross-border family conflicts – With a special focus on cross-border disputes concerning parental responsibility, 2012, available online at < <https://www.euromed-justice.eu/en/system/files/A%20Handbook%202%20EN.pdf> > (last consulted on 1 April 2018).

- reflecting the steps taken in order to assess the best interests of the individual child in custody and contact cases in the reasoning of their decision (to the extent allowed by the national procedural law)
- exchanging good practice with colleagues nationally and internationally
- publishing relevant decisions (in anonymised form in line with national procedural law).

Appointing a Network Judge to the International Hague Network of Judges

- States are encouraged to designate a Network Judge to the International Hague Network of Judges.

Promotion and better implementation of the child's right to be heard (Article 12 UNCRC)

- It is recalled that children should be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. In accordance with the age and maturity of the child, due weight should be given to the views of the child (see 12 UNCRC).
- The modalities of hearing the child must be adapted to the particularities of the case in view of the individual child. For example, a young child should be heard in a child-adapted environment. The child might be heard by the judge directly and / or a social worker or psychologist.

Promotion of amicable dispute resolution and establishment of specialist services for the amicable resolution of cross-border family disputes

- Judges and all stakeholders dealing with international family conflicts should, where feasible and appropriate, encourage the amicable resolution of these disputes while at the same time safeguarding that the speedy resolution of the disputes is not compromised.
- The establishment of specialised amicable dispute resolution mechanisms for the resolution of cross-border family disputes, and in particular the establishment of cross-border family mediation services should be encouraged.
- States are encouraged to appoint a Central Contact Point for cross-border family mediation in the sense of the PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS.

Combating cross-border wrongful removal or retention

- States should take measures to combat the illicit transfer and non-return of children abroad and promote the conclusion of bilateral or multilateral agreements or accession to existing agreements (see Article 11 UNCRC). In particular, States that are not yet a Contracting State to the 1980 Hague Child Abduction Convention should explore the solutions offered by this Convention and consider becoming a party.⁶⁷¹
- States should provide means for judges and stakeholder dealing with child related matters to act expeditiously in cases of cross-border wrongful removal or retention.

671. A delegate from Jordan expressed reservations.

Protecting the right of the child to maintain personal relations and direct contact with both parents (Article 9 and 10 UNCRC)

- States should take all measure to safeguard that right of the child 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 (see Articles 9 and 10 of the UNCRC). In line with this obligation, States should facilitate the simple and speedy provision of visa for cross-border parent-child visits.
- States that are not yet a Contracting State to the 1996 Hague Convention should explore the solutions offered by this Convention and consider becoming a party.

Annex – questionnaire

A. Competent court to deal with cross-border family matters involving children (focus: matters of parental responsibility, including custody and contact)

1. Which court has in accordance with national law (internal/local) jurisdiction to decide on matters of cross-border family disputes involving children?
2. Will the same court be competent if the case is a purely national case?
3. When is the competent court a religious court?
4. Can the parties choose a court?
5. What is the impact on the determination of the competent court if
 - a) the parties have different nationalities,
 - b) if the parties are of different religions.
6. Are there specialist family judges deciding on matters of cross-border family disputes?
7. Is there concentration of jurisdiction, i.e. are there specialised courts, which have competency in cross-border family matters?
8. Are cases of wrongful cross-border removal or retention dealt with by a specialised court/judge?
9. If jurisdiction is not already 'concentrated' for cross-border child and family disputes, which courts / judges in your jurisdiction do you think would be best placed to hear such cases (e.g. including cases of wrongful cross-border removal or retention of children)?
10. How are internal conflicts of jurisdiction / competence regulated in your legal system?
11. How do your courts deal with international conflicts of jurisdiction / competence? (For example, a court in your legal system was seized to decide on custody of a child by one parent and a court of another country was seized by the other parent with the same matter.)

B. Application of Articles 3, 9, 10, UNCRC by national courts competent to decide on cross-border family matters

1. Are UNCRC committee observations and initial reports of your country circulated among civil and religious judges?
2. Are there any observations made for your country by the UNCRC committee relevant to child abduction and custody?
3. How is the principle set forth in Article 3(1) UNCRC applied in your country? In particular, are the best interests of the child a primary consideration in custody proceedings and in contact proceedings?
(Please note the relevant provisions of national law and / or jurisprudence.)
4. How will a judge in your country assess the best interests of the child in a custody case in a purely national context? In particular, what factors will be taken into consideration to make this assessment in the individual case? Please answer this question for civil judges (A) and/or religious judges (B) – depending on who will in your country may be competent to deal with custody proceedings.
(Please note the relevant provisions of national law and / or jurisprudence.)

5. *Is the same assessment applied in contact proceedings? Please explain, should there be any differences. Please distinguish again between decisions rendered by civil judges (A) and by religious judges (B).*
6. *What are particular difficulties in the assessment of the best interests of the child in custody or contact proceedings? Please distinguish again between decisions rendered by civil judges (A) and by religious judges (B).*
7. *Does it make a difference if the assessment of the best interests of the child in custody or contact matters is made in the context of:*
 - a) *a divorce or a separation or*
 - b) *an envisaged cross-border relocation? (Example: The mother wishes to relocate together with the 4-year-old child to the neighbouring country; the father will maintain his habitual residence in your State.) (Please do not yet consider cases of wrongful removal or retention in this question – there is a separate chapter below.)*
8. *Are there any differences in the assessment of the best interests of the child in custody or contact cases where the parents have different religions? Please distinguish again between decisions rendered by civil judges (A) and by religious judges (B).*
9. *Are there any differences in the assessment of the best interests of the child in custody or contact cases with an international element (For example: One parent has a foreign nationality or one parent is living abroad)? Please distinguish again between decisions rendered by civil judges (A) and by religious judges (B).*
10. *What is the normal time it takes to obtain a custody decision in your country? Please answer this question for civil courts (A) and/or religious courts (B)*

C. Application of Article 12 UNCRC by national courts competent to decide on cross-border family matters

- 1 *How are the principles set forth in Article 12 UNCRC applied in your country? In particular, are children of sufficient age and maturity provided the opportunity to be heard in custody or contact proceedings? Please answer this question for civil judges (A) and/or religious judges (B). (Please note the relevant provisions of law.)*
- 2 *As of which age are children heard in the context of custody or contact proceedings? Please answer this question for civil judges (A) and/or religious judges (B).*
- 3 *By whom are children heard (the judge, a psychologist, social worker etc.)? (Please answer this question for civil courts (A) and/or religious courts (B).*
- 4 *To what extent can the views of the child be taken into consideration by the judge in the assessment of the best interests of the child in custody or contact proceedings? Please answer this question for civil judges (A) and/or religious judges (B).*
- 5 *Can the court appoint a legal representative (guardian ad litem etc.) to safeguard the best interests of the child in custody or contact proceedings? Please answer this question for civil judges (A) and/or religious judges (B).*
- 6 *As of which age can a child raise a case before the courts on his/ her own. Please answer this question for civil judges (A) and/or religious judges (B).*

D. Amicable dispute resolution – to what extent courts support and respect parental agreement on custody / contact – how the best interests of the child are safeguarded in these cases

1. *How will a judge deal with parental agreements on custody and contact when asked to embody them in his/her decision or when asked to homologate the agreement?*
 - (i) *Will the judge, as a general rule, make a best interests of the child assessment?*
 - (ii) *Will the judge only intervene when seeing that the agreement is clearly contrary to the best interests of the child?*
 - (iii) *Is there a presumption that parental agreements are normally in the best interests of the child?*
 - (iv) *Will the judge hear the child's views in such cases?**Please answer these questions for civil judges (A) and/or religious judges (B).*
2. *If your State were to voluntarily designate a “Central Contact Point for International Family Mediation” (in the sense of the Principles for the establishment of mediation structures in the context of the Malta Process)⁶⁷² where could such a Central Contact Point be established in your view?*

E. Cross-border wrongful removal or retention (civil law not criminal law meaning)

1. *How do you deal with cases of wrongful removal or retention of children?*
(Example: The child stays in your country to visit the father during the holidays. After the end of the holidays, the father refuses to return the child to the country of habitual residence.)
 - a) *Do you have specific mechanisms in place in your country? Please specify (including specific mechanisms under bilateral agreements).*
 - b) *Do you rather solve these cases through the recognition of the foreign custody decision?*
or
 - c) *Other, please specify.*
2. *Please give us relevant case law on how those cases are dealt with. Please answer this question for civil courts (A) and/or religious courts (B).*
3. *What are the good practices you can recommend in cases wrongful of removal or retention of children?*
4. *Are expeditious proceedings provided in your legal system for cases of cross-border wrongful removal or retention of a child? Please answer this question for civil judges (A) and/or religious judges (B).*
5. *Within what time are such proceedings on average dealt with? Please answer this question for civil courts (A) and/or religious courts (B).*
6. *Are there expeditious proceedings in your legal system providing for interim or protective measure?*
7. *How is it safeguarded that the child concerned does not lose contact with the left behind-parent in a situation of cross-border wrongful removal or retention? Please answer this question for civil courts (A) and/or religious courts (B).*
8. *Are children of sufficient age and maturity heard in cases of cross-border wrongful removal or retention of a child? Please answer this question for civil courts (A) and/or religious courts (B).*
9. *Can the court appoint a legal representative (guardian ad litem etc.) to safeguard the best interests*

672. For details see <<https://assets.hcch.net/docs/c96cle3d-5335-4133-ad66-6f821917326d.pdf>> (last consulted on 31 December 2018).

of the child in proceedings concerning a wrongful removal or retention of a child? Please answer this question for civil judges (A) and/or religious judges (B).

F. Enforcement of foreign custody / contact decisions

- 1. Which court or authority has competency to declare a foreign custody or contact decision enforceable in your State?*
- 2. What are the mechanisms safeguarding the enforcement of foreign decisions in cross-border family disputes on custody or contact?*
- 3. Do these mechanisms consider the best interests of the child?*
- 4. Does a civil or religious judge, having declared the decision enforceable, have the right/duty to communicate with the central contact points or International Cooperation offices for the enforcement of judgments in order to safeguard/supervise the enforcement of the judgment by the competent authority in your country?*