Doc. prél. No 7
Prel. Doc. No 7

août/August 2002

ENLÈVEMENT D'ENFANTS ET DROIT DE VISITE TRANSFRONTIÈRE : CONVENTIONS BILATÉRALES ET ETATS DE TRADITION ISLAMIQUE

RAPPORT DE RECHERCHE

établi par Caroline Gosselain
pour le Bureau Permanent

* * *

CHILD ABDUCTION AND TRANSFRONTIER ACCESS: BILATERAL CONVENTIONS AND ISLAMIC STATES

A RESEARCH PAPER

drawn up by Caroline Gosselain
for the Permanent Bureau

Document préliminaire No 7 d'août 2002
à l'intention de la Commission spéciale de septembre / octobre 2002

Preliminary Document No 7 of August 2002
for the attention of the Special Commission of September / October 2002

TABLE OF CONTENTS

Page

INTRODUCTION

The breaking up of the family unit has become a common phenomenon in present-day society. Separation, divorce and re-marriage are part of family life nowadays. However, when matrimonial relations and the relationships between parents and children have an international dimension, conflicts can worsen and take on an extreme character. In this context, children often become the scapegoats for family difficulties and victims of the multicultural nature of their parents.

Indeed, as long as there is harmony between the two spouses, the child of a mixed couple is able to benefit much from the multicultural nature of its parents. In the event of divorce, if one of the parents returns to his or her home country, or decides to place a border between the child and the ex-spouse by illicitly removing the child, the parental conflict is sometimes doubled by a cultural or religious conflict which is the confrontation of two legal approaches which are different and not easily reconciled. Trapped between two cultures, the child loses its emotional, social and cultural references.

In an effort to find appropriate and objective solutions to these situations, which are both delicate and dramatic from a human point of view, and also to protect the child's interests as best as possible, a number of international organisations drew up specific legal instruments to ensure institutionalised co-operation between States: two such Conventions were opened for signature in 1980 by the Hague Conference on Private International Law and the Council of Europe: the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the so-called *Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions Relating to Custody of Children; European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.* A Convention was opened as well for signature in 1989 by the Organisation of American States, the *Inter-American Convention on international Return of Children* called *Montevideo Convention on 15 July 1989*.

Following this, other Conventions concerning the protection of children and their rights came into being: among them, the *United Nations Convention of 20 November 1989 on the Rights of the Child* which laid down the basis for world-wide legal protection of the child. This is however only a statement of fundamental principles. In a number of its provisions, the 1989 Convention[1] encourages co-operation between States with a view to implementing the principles it upholds. Article 11 of this Convention, which relates to abduction and illicit international non-return, encourages accession to existing multilateral treaties, whereas Article 35 encourages States to take all appropriate measures, multilateral among others, to prevent the abduction, sale and trafficking of children.

Finally, mention should also be made here of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children,* which entered into force on 1 January 2002.

On this basis and upon request of a number of Member States, the Permanent Bureau has carried out preliminary studies to identify some of the special issues, which arise in relation to international abduction and cross-frontier access/contact cases where one of the countries concerned is an Islamic State. The idea is to explore in a preliminary way the potential for further co-operation in these cases, the relevance of current international instruments, in particular the Hague Conventions of 1980 and 1996, and the possibilities for further developments at the international level.

[1] On 26 August 2002, this Convention had 191 States Parties.

As a first step this paper focuses on the bilateral agreements (whether consular or administrative in type, or agreements of co-operation or specific legal co-operation) which exist between Islamic States (some of which are members of the Hague Conference) and the Member States of the Hague Conference.[2]

In order to take into consideration the experience, advantages and disadvantages of this type of agreement in an objective manner and to pinpoint the differences in legal conceptions and sensitivity, an informal questionnaire was drawn up by the Permanent Bureau and transmitted to a number of Central Authorities. Examination of the responses to this questionnaire was above all aimed at enabling the Permanent Bureau to identify the wishes of, requests from and difficulties met by the parties to these agreements.

This research paper therefore attempts to set out the tools for reflection and discussion between States Parties to the Hague Conventions and countries of Islamic tradition so as to help define, for the future, the elements of a system of co-operation which both respects diversity and ensures the protection of the child.

[2] A copy of each Agreement is included in the Annex Nos 2-12.

1. THE RELATIONSHIPS BETWEEN PARENTS AND CHILDREN: A COMPARISON OF ISLAMIC AND WESTERN LAW

This chapter will discuss the relationships between parents and children within the framework of mixed family situations. These frequently involve, although not exclusively, a national of an Islamic State and a national of a non-Islamic State with regard to marriage, divorce, or parental responsibility/authority issues, etc.

From a legal viewpoint, these situations are characterised by the co-existence of two different systems: one secular and one religious. In cases of divorce, when or if the immigrant parent returns to his or her home country, the question of custody of the child often becomes a source of serious conflict between two uneasily reconciled legal systems and two contradictory interests, each of which has its own legitimacy.

Currently under international law, parental responsibility/authority arrangements made following a divorce are guided by "the interests of the child".[3] However, this is an undefined and variable concept, which may cover a wide range of approaches within any particular legal system, with each judge interpreting the child's interests according to his own family and social environment. This diversity becomes even more pronounced when a judge confronts two different traditions and legal sensibilities with which he is unfamiliar.[4]

In the spirit of the Convention on the Rights of the Child,[5] parental responsibility/authority arrangements made after divorce or separation are based on equal sharing of responsibilities between the child's parents until he or she reaches the age of majority.[6] In this way, the child benefits from a balanced relationship between the two parents.

Parental equality[7] with regard to offspring from a marriage or cohabitation is a characteristic principle of modern Western legal systems.[8] In cases of divorce or

---

[3] This principle is established in Article 3 of the United Nations Convention "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".

[4] A child's interest is a concept, which is recognized in every legal system, although with different meanings. In the so-called "Western" systems, the child's interest is dependant upon the judge's understanding of the child's individual situation (the child's interest is interpreted on a case-by-case basis). By contrast, in the Islamic traditions, the interest of the child depends upon "the more communal concepts of lineage and the transmission of a code of conduct from parent to child" in M. Foblets " Le statut personnel de l'enfant d'une famille musulmane. Questions particulières relatives à la gestion par le droit de l'appartenance " ; *L'enfant et les relations familiales internationales*, Actes du VII Colloque de l'association famille et droit (Louvain-la-Neuve 19-20 octobre 2001), Bruxelles, Bruylant, sous presse.

[5] It should be mentioned here that at the time of signature and/or ratification of this Convention, some States of Islamic tradition made both general and specific reservations, declaring that their commitment was in accordance and with full respect of Sharia law (for example, Iran, Morocco, Egypt, Pakistan). *See* Annex No 1.

[6] In this connection, *see* Articles 5 and 18(1) of the 1989 United Nations Convention on the Rights of the Child. According to Article 5, "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." Article 18 (1) stipulates that: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

[7] This shared responsibility between the parents includes rights and duties, as well authority over child's person and assets.

[8] *See e.g.* UK "Children's Act," Sect. 3:1; French Civil Code, Art. 371:2; Spanish Civil Code, Art. 154; German Civil Code (B.G.B.), Para. 1626; Austrian "Law on Parental Equality" of 30 June 1977; Belgian Civil Code, Art. 373; California Civil Code, Sect. 4600.

separation, this principle of shared responsibility can take many forms.

Some European laws tend to grant a "female privilege" in allocating custody after divorce.[9] Other systems, such as the Scandinavian[10] or those of North America[11] favour a "joint legal custody/authority"[12] or "joint physical custody/authority"[13] between the ex-spouses, decided via custody agreements after divorce or separation.

The concept of joint custody after divorce or separation is not divided in the same way in all the so-called "Western" legal systems. For a long time, and still today according to some laws, custody allocation is one-sided: the mother benefits from the "ultimate responsibility" without interference from the other parent.[14] Equal custody therefore does not translate into equal power; nevertheless, it offers "each parent the right to participate in decisions"[15] and, when necessary, with the benefit of judicial intervention.

Beyond this equal sharing of parental responsibility, "Western" systems are characterised, as shown above, by subordination of the exercise of parental authority or responsibilities to the "actual best interests of the child". Many provisions expressing this concept are to be found in Spanish,[16] German[17] or Italian[18] law. Under English law, according to the "1989 Children Act", the interests of the child are of "paramount consideration."[19] This search for the interests of the child may sometimes lead the judicial or administrative authorities to transfer this parental authority/responsibility to the grandparents or to other members of the family. This parental authority covers therefore different relationships.

In the *Hague Convention of 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and*

---

[9] According to the Swiss Civil Code, Art. 297:3 (Z.G.B.), custody is granted to only one parent after divorce. In reality, 90% of the custody decisions are in favour of the mother. This preference for granting custody to the mother has been confirmed by a decision of the Federal Court, 23 September 1982, when "devotes herself personally to the children's education." The judge may not deviate from this solution except for "compelling reasons." This same tendency can be seen in Canadian jurisprudence through the mid-1980's, as well as in the Minnesota (U.S.) Supreme Court's 1982 Pikula decision which adhered to the doctrines of "tender years" and "primary caretaker."

[10] *See e.g.* the Danish Law of the Child of 18 May 1960 (revised 1986), the Swedish law of 1976 (revised 1980), and the Norwegian law of 1981, all of which give special consideration to parental agreements and family mediation in deciding a child's situation after a divorce.

[11] These legal systems are characterized by the importance given to "custody agreements" which favour shared custody, by the ability to make pre-marital agreements governing divorce, and by mediation. *See* California Civil Code, Sect. 4600 (d).

[12] Joint legal custody can be determined by the court and does not imply physical custody. Parents take decisions about the child's health and education together.

[13] This implies that each parent enjoys "significant periods of regular and frequent contact with the child."

[14] *See* Kruger v. Kruger, Court of Appeal of Ontario, Canada, 5 September 1979.

[15] H. Fulchiron, "L'éducation des enfants étrangers," *Le droit de la famille à l'épreuve des migrations transnationales* (F. Dekeuwer-défosser), Librairie Générale de Droit et de Jurisprudence, Paris, 1993, pp. 197-234.

[16] Article 154 (3) of the Spanish Civil Code (Law of 13 May 1981) states "If the children possess sufficient capacity of judgment, they must be heard before a decision is taken which concerns them".

[17] In this connection, *see* § 1626 (2) of the German Civil Code (BGB).

[18] Following Article 333 of the Italian Civil Code, if parental authority is exercised "to the detriment of the minor", judicial intervention is required.

[19] F. Boulanger, *Les Rapports juridiques entre les parents et les enfants, Perspective comparatiste et internationale*, Paris, Economica, 1998, p. 37.

Measures for the Protection of Children, "parental responsibility" includes "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." [20]

In Islamic law, custody (Hadanah) and guardianship (Wilaya) of the child are based on complementary conception of the rights and obligations of the father and of the mother depending on the age of the child.

This shared parental structure corresponds to a certain abstract vision of the interests of the child which finds its source in ancestral Islamic tradition and not in the appraisal of a judicial authority. In countries of Islamic tradition, the interests of the child depend on the conception of the family and society as determined by Islam. The Koran, the most important legal source, determines a set of rules of conduct and social obligations which provide structure and organisation to the family. This vision is not easily compatible with the conception of "western" systems, which favour actual striving for the interests of the child.

In countries of Islamic tradition, parental tasks are distributed in a specific and unequal complementary manner, which is not based on the same concepts as the so-called "secular" systems, which apply the principle of equality.

Custody of the child or "Hadanah" is attributed to the mother (maternal attribution); she is therefore responsible for the daily care of the child.[21] This prerogative exists for a short period while the child is a minor.[22] The duration of this period varies according to the sex of the child and according to the different interpretations of Koranic law. For a boy, this maternal prerogative ends when he is no longer in need of his mother's care (according to Hanafite tradition) or at puberty (according to Malekite tradition). For a girl, this period is marked by the consummation of marriage. The attribution of custody to the mother in this manner amounts to attribution to her of the care of the child for a defined period and not to the attribution to her of the exercise of parental authority in the western sense of the term. This responsibility is attributed to the father who is effectively the bearer of the permanent guardianship of the child and holds the power of decision over the child's education, and according to the principles of Islam.[23]

Under the Islamic legal traditions, when there are conflicts of nationality in a mixed marriage where one of the spouses comes from an Islamic country, the Islamic personal status predominates. Thus, for example, both the effects of marriage and its dissolution between an Egyptian national and a French national are regulated according to Egyptian law. In the majority of mixed marriages between nationals of States of Islamic tradition and "western" States, the husband is muslim and the wife is a national of a non-muslim country; Islamic law is therefore applied as being that of the husband. In the event that a muslim woman, national of an Islamic State, should marry a muslim from a secular State, the national status of the wife would also prevail over that of the foreign spouse. This nationality/religion preference prevails as well in transnational conflicts concerning custody of the child.[24] Authority rests with the father who must be able to exercise

---

[20] Hague Convention of 1996, Article 1, second paragraph.

[21] When exercising Hadanah, the mother is responsible for the child's upkeep, education, and physical and moral well-being, as well as ensuring his upbringing in his father's religion.

[22] Custody is generally defined as the education of the child during a period where a feminine presence is a necessity for a child.

[23] According to Article 62 of the Algerian Family Code "the right of custody consists in the care, instruction and education of the child according to the religion of the father as well as the safeguard of his or her physical and moral well-being"; Article 97 of the Moudawana states that "custody consists of preserving the child where possible from that which could be harmful to him; to bring him up and take care of his interests"; according to Tunisian law "custody consists of bringing up the child and ensuring its protection at home (Article 54 of the Tunisian Code of Personal Status).

[24] The father transmits his name and religion to his child regardless the religion of the mother. Indeed, as both religion and political-juridical system, Islam subjects all Muslims to the Koran and to Islamic tradition.

custody without hindrance. The aim here is to avoid a non-Muslim mother taking advantage of custody rights to bring up the children according to a religion other than that of the father, *i.e.* Islam.[25] Custody of the child is only attributed to the mother if she is resident in the same country as the father.[26]

The Islamic solution therefore is not based on principles of equality (equality between men and women, as persons, parents, spouses) and non-discrimination, which are in force in western systems. In these family conflicts, religious and cultural considerations hold sway above all else. Islamic law is applied as the law of the husband. The primary status of the Muslim condition is respected "both, with regard to conflicts of laws by exclusion of the foreign law, and with regard to conflicts of jurisdictions by refusal to enforce foreign decisions which may not have been applied".[27]

This privileging of "nationality" or "religion", strengthened according to some authors by a "privilege of masculinity" is applied, either in accordance with specific provisions of the Civil Code[28] or in accordance with existing case law, in all the countries of Islamic tradition, with the exception of Lebanon. The Lebanese legal system is a so-called "inter-community" system as opposed to an "inter-confessional" system.[29] This means that the Lebanese State is not founded on one religion (it is neutral) but rather that its law is based on the rules of different religious communities which have equal status. The Lebanese legal system does not therefore award any privileged status to a specific law based on religion or nationality. This view is shared by other Arab-Muslim countries when no part of the Islamic tradition is implicated in a trans-national dispute; in those cases the privilege of nationality/religion plays no part.

Contrary to legal systems of the Islamic tradition, when attributing rights of custody, European systems have moved away from "the nationality principle" and searched progressively for more neutral solutions in an effort to maintain objectivity in the relationships. Indeed, since 1902 in the Hague Conventions relating to guardianship[30] and protection of minors, "habitual residence" [31] has been increasingly used as a connecting factor on questions of conflicts of law. The *Hague Convention of 5 October 1961 Concerning Legal Authorities and Choice of Law Relative to Minors* gives priority to habitual residence.[32] The authorities of the State of habitual residence of a minor have the possibility to take judicial or administrative measures to guarantee his or her protection; however, the possibilities for modification of those measures depending on the habitual residence by the State of the minor's nationality should be taken into

[25] Article 61 of the Tunisian Code on personal status, modified by the law of 18 January 1981, provides that the guardianship of the father is effective on the loss of custody of the mother if she modifies her residence and settles "so far away that the guardian is prevented from fulfilling his obligations towards his ward".

[26] For mixed divorced couples resident in Tunisia, custody is most often attributed to the mother when she is resident on Tunisian territory.

[27] J. Deprez, "*Droit international privé et conflits de civilisations, aspects méthodologiques*", *Recueil des cours*, tome 211, 1988 (IV), p. 127.

[28] *See* Article 13 of the Algerian Civil Code, Article 14 of the Libyan and Egyptian Civil Codes, Article 15 of the Syrian and Jordanian Civil Codes.

[29] A confessional system infers that the State is founded on a given religious conception, such as Islam for example, and that this conception enjoys a privileged status.

[30] *Hague Convention of 12 June 1902 on Guardianship of Minors*. In particular, *see* Article 3 that establishes the habitual residence as the criteria for attachment, subject to national law.

[31] It should be noted that "habitual residence" is not defined in any Hague Convention, the objective being not to restrict the term through any technical rules which might create the inflexibility or contradictions which sometimes arise between different legal systems.

[32] *See* Article 1 of the Convention.

account. Finally, the 1996 Hague Convention[33] gives priority to habitual residence both in terms as a jurisdictional and a conflict of laws rule.[34] This criteria for attachment has the advantage of being neutral and objective.

Despite this evident objectivity, western systems are not entirely innocent of wariness or even defiance towards other legal systems, including those inspired by the Koran. Indeed, from examination of Belgian case law over the last few years, it "would appear that the majority of magistrates systematically apply Belgian law, when even the nationality of the parties would require that they apply the original foreign law". This choice is a deliberate one: either it is a question of respecting the interests of the child, or of encouraging as much as possible the integration of the family, whether foreign or bi-national, in Belgian society by "application of the internal national legislation, considered to be more protective of women and children".[35] This tendency is also to be found in French case law.

However, there are also examples of decisions, which recognise and take into account that which constitutes the interests of the child and is culturally dependant. For example, in the English Court of Appeal decision in *Osman v. Elasha*, it was held that the children should be returned to Sudan, despite the fact that this may mean that access by the mother was limited. The Court pointed out that there is a problem if "a State whose system derives from Judeo-Christian foundations condemns a system derived from an Islamic foundation when that system is conceived by its originators and operators to promote and protect the interests of children within that society and according to its traditions and values."[36] The Court emphasised that, where there is a sufficient connection between the children and the relevant culture, the values and presumptions of that culture must be respected in the legal system determining their 'best interests'. It was noted, however, that this would not always be the case and that each decision would depend on the facts. In the case at hand, the children had grown up in Sudan and had strong ties there. Where there is less of a connection or where the values of that system are entirely repugnant to the western legal system, the result may be different. What is clear from this case law, however, is that legal systems inspired by other cultures cannot be simply disregarded.

The differences in philosophy, spirit, logic[37] and confession between the various systems studied are manifest. The real difficulty is not that of recognising and respecting these legitimate differences, but rather that of determining the principle or criterion applicable to the inter-cultural family relations. The various parental authority models and institutions have to be taken into account, which have the same functions in countries of different cultural and juridical traditions. In addition, this must be done in conformity with the fundamental right of the child to maintain direct contact and a regular personal relationship with both of his or her parents.

---

[33] *See* Article 5, first paragraph, of the Convention "The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property."

[34] *See* also the judgment in the *Rivière* case of 17 April 1953 from the French *Cour de cassation*.

[35] M. Foblets " Le statut personnel de l'enfant d'une famille musulmane. Questions particulières relatives à la gestion par le droit de l'appartenance "*L'enfant et les relations familiales internationales*, Actes du VII Colloque de l'association famille et droit (Louvain-la-Neuve 19-20 octobre 2001), Bruxelles, Bruylant, sous presse.

[36] See *Hala Bin Osman v. Elasha Majdi Elasha*, Court of Appeal, (England Wales) 24 June 1999, at p. 11, paragraph F.

[37] J.-Y. Carlier *"Le respect du statut personnel musulman; De quel droit par quel droit?"*, *Le statut personnel des musulmans*, (J.-Y. Carlier et M. Verwilghen), Bruylant, 1992, p. 385.

2. BILATERAL INSTRUMENTS

Bilateral instruments have an identical goal: to ensure effective co-operation between States in conflicts concerning custody and access across international borders. The means available to reach this objective vary depending on the instruments concerned. There are different types of bilateral convention, as shown by the bilateral agreements concluded for example, between:

- Australia and Egypt: "Agreement between the Government of Australia and the Government of the Arab Republic of Egypt regarding Co-operation on Protecting the Welfare of Children", Cairo, 22 October 2000;[38]

- Belgium and Morocco: "The Agreement Protocol establishing a Belgian-Moroccan consultative committee on civil matters", Rabat, 29 April 1981;[39] [Unofficial translation]

- Belgium and Tunisia: "The Agreement Protocol establishing a Belgian-Tunisian consultative committee on civil matters" , Tunis, 7 April 1989;[40] [Unofficial translation]

- Canada and Egypt: "Agreement between the Government of Canada and the Government of the Arab Republic of Egypt regarding Co-operation on Consular Element of Family Matters", Cairo, 10 November 1997;[41]

- Canada and Lebanon: "Agreement between the Government of Canada and the Government of the Lebanese Republic regarding Co-operation on Consular Matters of a Humanitarian Nature";[42]

- France and Algeria: "Franco-Algerian Exchange of Letters on Co-operation and Judicial Assistance", Algers, 18 September 1980;[43] followed by the "Convention between the Government of the French Republic and the Government of the Algerian Democratic Republic on children of separated mixed Franco-Algerian couples", Algers, 21 June 1981;[44] [Unofficial translation]

- France and Egypt: "Convention between the Government of the French Republic and the Government of the Arab Republic of Egypt on judicial co-operation in civil, social, commercial and administrative matters", Paris, 15 March 1982;[45] [Unofficial translation]

- France and Lebanon: "Agreement between the Government of the French Republic and the Government of the Lebanese Republic regarding Co-operation in some elements of family matters", Paris, 12 July 1999; [46] [Unofficial translation]

---

[38] *See* the text of the Agreement in Annex No 2.

[39] *See* the text of the Agreement Protocol in Annex No 3.

[40] *See* the text of the Agreement Protocol in Annex No 4.

[41] *See* the Agreement in Annex No 5.

[42] *See* the full Agreement in Annex No 6.

[43] *See* the text of the Exchange of Letters in Annex No 7.

[44] *See* the text of the Convention in Annex No 8.

[45] *See* the text of the Convention in Annex No 9.

[46] *See* Annex No 10.

- France and Morocco: "Convention between the Government of the French Republic and the Kingdom of Morocco on the status of persons and the family and on judicial co-operation", Rabat, 10 August 1981;[47] [Unofficial translation]

- France and Tunisia: "Convention between the Government of the French Republic and the Government of the Tunisian Republic on judicial co-operation in matters of custody, access and maintenance obligations",[48] Paris, 18 March 1982. [Unofficial translation]

Even if each of these agreements aspires to the same objectives, their scope and the means by which they are put into practice differ considerably. Each agreement is a tailor-made instrument in as much as it reflects the needs of the States Parties to the bilateral relationship, acting as a "specific" remedy to the problem of international abduction in each country.

These bilateral instruments can be divided into different categories and sub-categories:

- bilateral conventions on administrative and judicial co-operation
    - limited co-operation agreements
    - bilateral agreements inspired by multilateral conventions
    - specific bilateral agreements
- consular co-operation agreements
- administrative agreement protocols

2.1 Bilateral Conventions on administrative and judicial co-operation

This section will distinguish between agreements referred to as limited co-operation agreements and agreements inspired by the multilateral Hague and Luxembourg Conventions.

2.2 Limited co-operation agreements

In agreements characterised by the general principle of mutual co-operation in matters of custody and access law, States commit themselves to take the necessary steps to ascertain the whereabouts of the displaced child; to provide information on the physical and emotional needs of the child, as well as on any measures of protection taken concerning the child; and also to encourage voluntary return of the child.

An agreement of this type was concluded between France and Algeria: the Franco-Algerian exchange of letters on co-operation and judicial aid.[49]

The scope of this agreement is subsidiary to that of the Franco-Algerian Convention of 21 June 1988 relating to children of mixed separated French-Algerian couples, which is examined below. The agreement is applicable to natural children, adopted children and to those whose parents are both French or Algerian.

---

[47] *See* Annex No 11.

[48] See Annex No 12.

[49] Agreement published in France by Decree No 80-774 of 1 October 1980.

A mechanism has been set up for mutual co-operation and aid between the Ministries of Justice of the respective countries (Article 3). This reciprocal co-operation is implemented with a view to ensuring "the search for and location of children whose custody is contested or unknown".[50] The competent authorities from the Ministries of Justice must provide information concerning the living conditions of the child when requested. They must co-operate to "obtain the voluntary return of the child by conciliatory means and to aid the enforcement of decisions relating to the rights of custody and access".[51] In Article 7, Algeria commits itself unilaterally to awarding legal aid to French applicants in custody and access cases.

2.3 Bilateral agreements inspired by multilateral conventions

These agreements take their inspiration from two multilateral models cited above, *i.e.* the Luxembourg Convention of 20 May 1980 and the Hague Convention of 25 October 1980.

These agreements have the following points in common:

- the awarding of priority to "habitual residence" as the connecting factor for the protection of the child;
- the conferral of equal status on custody rights and access rights (considered to be a consequence of rights of custody) which are protected and defended by the establishment and co-operation of specialised Central Authorities;
- the perception that the interests of the child lie in the rapid restitution of the initial situation in the cases of illicit removal;
- the granting of an automatic right to legal aid.

Beyond these common points, bilateral agreements of this type are distinguished by the creation of "mixed consultative committees" which bring together representatives of the respective Ministries of Foreign Affairs and Justice, at regular intervals and on the request of one or the other State. The aim of these committees is to smooth out differences and to facilitate settlement of the most complex cases, which either State may consider useful to submit to them.

As each agreement is based on the individual bilateral relationship, main characteristics vary. For this reason, the following section presents a theoretical study and synthesis of the different conventions. The practical implementation is the subject of another chapter in this report.

2.3.1 Classical agreements, e.g. the Franco-Egyptian Convention of 15 March 1982 on judicial co-operation in civil, social, commercial and administrative matters [Unofficial translation]

The aim of this Convention is to set up a system of close co-operation for the protection of children during the period of custody.[52] The notion of custody does not have the same definition in Egyptian law as in French law. It is specifically stated that the Convention only applies in Egypt "during the period of maternal custody (Hadanah) or at the end of this period (Dam)". The Convention provides for Central Authorities[53] and also protection of access rights through judicial proceedings and not *ex lege*.[54]

---

[50] Article 4 of the Agreement.

[51] *See* Article 5 of the Agreement.

[52] This notion is defined in comparison with the concept of Muslim law (*see* Chapter 2).

[53] The Central Authorities are the respective Ministries of Justice of the two States.

[54] *See* Articles 35 to 37.

The Central Authorities have the following functions: they search for and determine the whereabouts of the displaced child, provide information on the physical and emotional needs of the child and on any measures of protection taken concerning the child; they work to encourage voluntary return of the child and must co-operate with a view to organising rights of access for the non-guardian parent. They initiate or facilitate the opening of emergency legal proceedings to obtain the return of the child. To this end, they can direct requests for recognition or enforcement of custody decisions.

Apart from the Central Authorities, the Convention also provides for a working group charged with facilitating the practical operation of the Convention and reinforcing judicial co-operation between the two States.

It should be noted that with regard to enforcement in matters of custody the Convention provides for an indirect and special rule of jurisdiction. Indeed, according to the text of Article 26, paragraph 8, the authorities of the original State which rendered the custody decision are considered internationally competent by the enforcement judge if these were the court of the residence of the parent with whom the child or children were residing, or the family residence, unless the decision was by default.

This enforcement procedure must be completed rapidly within a period of less than six weeks. If this is not the case, the Central Authority of the requested State must inform the Central Authority of the requesting State of the reasons for the delay.

In the same manner as the Hague Convention of 1980, the procedure for the legal return of the child[55] established in this Convention has a possessory and conservative character as it aims at "the restitution of the situation existing before the illicit removal and the return of the child". However, this procedure only sanctions the violation of custody rights, which have been attributed by a court.[56] The judge in the requested State has therefore limited jurisdiction; he is only able to order the return of the child on the condition that the custody decision is enforceable in the State of origin and it was rendered by the court of the residence of the family or the residence of the parent with whom the child lives.

2.3.2 Synthesis agreements, e.g. the Franco-Moroccan Convention of 10 August 1981 on the status of persons and the family and on judicial co-operation; the Franco-Tunisian Convention of 18 March 1982 on judicial co-operation in matters of custody, access and maintenance obligations [Unofficial translation]

Of the bilateral conventions cited and examined during this study, both the Franco-Moroccan and Franco-Tunisian Conventions appear to be the closest syntheses of the Luxembourg and Hague Conventions.

The Franco-Moroccan Convention covers a number of different subjects. The first two chapters of this instrument set down the rules of conflicts of law and jurisdiction regarding personal status. This study concerns itself with the third chapter,[57] which deals with the issues of custody and access regarding children.

In order to facilitate recognition and enforcement of decisions rendered and to ensure the return of the displaced child and protect access rights in matters of custody and access, these two Conventions – as is the case with other bilateral conventions of this type – provide for judicial co-operation which centres around the institution of Central Authorities; these authorities having the same functions as those specified in the Franco-

---

[55] *See* Article 37.

[56] The only condition for the implementation of an action for the return of the child contained in Article 37 is "the removal of the child in violation of an enforceable judicial decision which was rendered by a court which has jurisdiction over the custody, in the sense of paragraph 8 of Article 26 of this Convention". [Unofficial translation]

[57] *See* Articles 15 to 25 of the Convention.

Egyptian Convention. The Central Authorities are assisted in their task by mixed consultative committees. These are judicial and diplomatic authorities which are charged with "facilitating the resolution of the most difficult problems submitted to the Central Authorities".[58]

The Central Authorities designated according to these Conventions are the Ministries of Justice of the respective States. The functions attributed to them[59] are the same as those which figure in Articles 3 and 5 of the Luxembourg Convention of 1980 and Article 7 of the Hague Convention of 1980. They centre on two important points: mutual judicial assistance[60] and co-operation concerning the exercise of custody and access rights within the territories of the countries concerned. The aim of this co-operation is to guarantee the free exercise of custody and access rights within the territory of the States Parties to the Convention and "under the sole condition of the child's interests".[61]

Just as in the case of the Franco-Egyptian Convention, these Conventions do not include any provision on direct jurisdiction of the courts. The general regime for recognition and enforcement of judicial decisions in civil and commercial matters is determined by Chapter II of a second Franco-Moroccan Convention: the Convention of 5 October 1957 on mutual legal assistance, enforcement of judgments and extradition. The provisions of this Convention were slightly modified in the 1981 Franco-Moroccan Convention on custody and access rights[62] representing only a very small change as their effect is limited to those judgments which are likely to be recognised or enforced.[63] Indeed, under the terms of Article 16, paragraph c, of the 1957 Convention, the decision must have the status of *res judicata* whereas Article 18 of the 1981 Convention only requires decisions relating to custody or access decisions to be enforceable.

The regime[64] established by the Franco-Tunisian Convention, however, is governed by Chapter II of the Franco-Tunisian Convention of 28 June 1972 on judicial co-operation in civil and commercial matters and on judicial recognition and enforcement. This regime is the same as the one applied to the Franco-Moroccan situation.

In addition, the enforcement and the recognition of foreign decisions[65] are governed by specific rules, which differ from one convention to the other.

According to Article 24 of the Franco-Moroccan Convention, recognition or enforcement of a custody decision applies when the following judicial and legislative jurisdictional conditions are met:

---

[58] Article 16, second paragraph and Article 2, second paragraph.

[59] *See* Articles 17 and 20 of the Franco-Moroccan Convention and Articles 3 and 5 of the Franco-Tunisian Convention.

[60] The Central Authorities are able to provide declarations concerning the content of their legislative provisions on custody and access.

[61] Article 5 of the Franco-Tunisian Convention. The drafters of the Franco-Moroccan Convention went further in that in the Franco-Moroccan Convention Central Authorities must co-operate ""under the sole condition of the child's interests, without any restriction being applied from internal law" (Article 19). This provision is aimed at avoiding problems which may be caused by the difference in prevailing principle for the attribution of custody and access rights in the French and Moroccan systems.

[62] Articles 18, 20 and 24 of the 1981 Convention re-adjust the general regime set up by the 1957 Convention.

[63] The other provisions set down in Article 16 of the 1957 Convention must be respected.

[64] *See* Articles 4 and 10 of the 1982 Convention.

[65] A comparison of the texts of these Conventions reveals that these rules only concern custody decisions.

1. The court of origin which rendered the decision is

   a) the court of the effective common residence of the parents;
   b) the court of the residence of the parent with whom the child habitually lives.

2. The court of origin has applied
   a) in the event that the parents are of the same nationality, their common national law;
   b) in the absence of a common nationality of the parents, either
      - the law of their effective common residence, or
      - the law of the residence of the parent with whom the child habitually lives.

The Convention takes care of both the competent authority and the applicable law. However, the introduction of a conflict of laws rule would appear to be debatable as the 1957 Convention, which determines the enforcement regime only provides for verification of the jurisdiction of the court which has ruled (and not that of the law applied). According to some authors,[66] this Article should be considered as providing alternative conditions.[67]

The rule set forth in Article 10 of the Franco-Tunisian Convention is much less complex: the judge cannot refuse enforcement if the court which has rendered the custody decision is that of the effective common residence of the parents or the residence of the parent with whom the child habitually lives.

Finally, the enforcement proceedings – and this is true for both the Franco-Moroccan and Franco-Tunisian Convention – may be brought by the Public Ministry at the request of the Central Authorities. The court seized must rule rapidly and in the event of a period longer than six weeks the Central Authority of the requested State must inform the requesting Central Authority how the proceedings are progressing.[68]

The terms of Articles 25 and 11 of the respective Conventions allow for judicial action for return of the child and are directly inspired by Article 13 of the Hague Convention of 1980, aiming to prevent parents from taking unilateral action. The decision to return the child to the guardian parent must not have any effect on the final determination of custody. The two reasons envisaged in these instruments for refusal to return the child are:

- non-exercise of custody right;
- possible of harm to the health and safety of the child if it is returned.[69]

The protection of the access rights is guaranteed by the Central Authorities. They are charged with seizing the competent authorities through the Public Ministry so that the access decision may be enforced in the other State or that "the exercise of the right of access to the child is protected in the other State in a manner which favours the parent who does not have custody of the child".[70]

---

[66] F. Monéger, "The Franco-Moroccan Convention of 10 August 1981 relating to the status of persons and the family and to judicial co-operation", *Rev. crit. de d.i.p.*, 1984, p. 279.

[67] Enforcement is awarded when the court which is competent in accordance with Article 24 has applied another law than that indicated by the conflict rule set down in this Article and also when a court which is not competent in accordance with Article 24 has applied a law which is competent under the terms of this Article.

[68] This provision is identical to that set down in Article 11 of the Hague Convention.

[69] According to both Conventions, the grounds for refusal must be considered in the light of the social situation of the child and the content of the legislative provisions on custody in the State of the habitual residence of the child.

[70] Article 22, second paragraph, and Article 8, second paragraph.

It should be mentioned here that Belgium has also negotiated this type of agreement with Morocco. In July 1991, three Conventions were signed between these two States concerning respectively:

- applicable law and recognition of marriages and their annulment;
- recognition and enforcement of judicial decisions relating to maintenance obligations;
- recognition and enforcement of judicial decisions relating to rights of custody and access.

However, no ratification procedure with regard to these three Conventions was initiated. Following the desire of Morocco to progressively integrate into the system of Hague Conventions, bilateral negotiations with Belgium were revived. After re-examining the three initial Conventions in May 2001, on 26 June 2002 two new Conventions on maintenance obligations and custody and access rights were concluded between Belgium and Morocco. Inspiration for these two new Conventions was drawn directly from the principles of the 1980 Hague Convention.[71]

It should be mentioned that during an official visit to his Dutch counterpart in The Hague in May 2000, the Minister of Justice of Morocco made a declaration marking the intention of Morocco to accede to the 1980 Hague Convention.

In addition, on 22 August 2002, Morocco ratified the 1996 Hague Convention.[72] Morocco became thus the first Muslim State to ratify a multilateral convention providing precise rules on the co-operation in respect of parental responsibility and the protection of children. This is a significant breakthrough in international family law concerning Islamic and western countries, because the ratification builds an important bridge between Islamic Sharia law and western principles of family law.

2.3.3 Innovative agreements, e.g. the Franco-Algerian Convention of 21 June 1988 on children of separated mixed Franco-Algerian couples

The administrative co-operation introduced by the Franco-Algerian Exchange of Letters of 18 September 1980[73] was unable to respond to the specific characteristics of Franco-Algerian family relationships. Indeed, children of mixed Franco-Algerian couples are most often children born of a French mother and an Algerian father. After separation, custody is generally attributed to the mother by a French court. A number of fathers wishing to obtain custody of their children removed the children to Algeria, prevented all contact with the maternal family and often obtained a contrary decision from the Algerian courts which confirmed the accomplished situation.

In this context, the drafters of the 1988 Convention took account of the specific character of the Franco-Algerian relationship and the dual character of the child's culture. The new instrument is adapted to the special circumstances existing between Algeria and France. It aims to guarantee the priority of the child's right to move freely between the domiciles of his or her separated parents.[74] This objective cannot be fulfilled without balanced protection of the respective interests of both parents, which translates concretely into the setting up of special[75] and innovative mechanisms: (a) a unique jurisdictional rule with regard to custody, (b) a fundamental rule that the right of access is an obligatory consequence of the right of custody, accompanied by guarantees for both parents (see hereafter). The Convention also includes classical provisions found in instruments

---

[71] These texts have not yet been authorised by the Parliaments of the respective States and are therefore unavailable to the public at present.

[72] This Convention will enter into force on 1 December 2002.

[73] *See* above under 3.2.1.

[74] This objective is also included in the United Nations Convention on the Rights of the Child (Article 8, first paragraph, and Article 9, third paragraph).

[75] These mechanisms are specified in Chapter II of the Convention.

inspired by multilateral Conventions such as provisions on the intervention of Central Authorities whose functions are to co-ordinate and implement measures for determining the whereabouts of displaced children, together with provisions on information,[76] on unconditional access to legal aid[77] and on the establishment of a participation committee.[78] These mechanisms, however, are only applicable to a limited number of children.

The scope *ratione personae* is restricted to legitimate children of Franco-Algerian couples who are separated or divorced,[79] as demonstrated by the provisions of Articles 5 and 6 which refer to "marital home" and "separated spouse" and by the parliamentary proceedings.[80] The exclusion of both natural children and adopted children from the scope is related to the situation of children within the legal systems of countries of Islamic origin, which do not recognise either natural consanguinity[81] or the institution of adoption.[82] Bi-national children are also excluded from the scope of the Convention.[83] It should be noted that no condition was set regarding the age of the child, despite different legal ages of majority.

With regard to the specific mechanisms set down in this instrument:[84]

a) The Convention provides a jurisdictional rule with regard to custody, which determines that the competent authority is that of the place of the marital home, and understanding this to be the place where the family lives (Article 5).[85]

b) The Convention also establishes an innovative fundamental rule in an obligatory link between rights of custody and rights of access across international borders: "every judicial decision rendered by the courts of the contracting parties and ruling on the custody of the child attributes a right of access, including across international borders, to the other parent".[86] A single exception to this principle was provided for: "in the event of exceptional circumstances which place the physical or emotional well-being of the child in danger, the judge must adapt the practical aspects of this right in conformity with the interests of the child".[87] The

[76] *See* Articles 1 and 2.

[77] *See* Article 3.

[78] *See* Article 12.

[79] On this point, the Franco-Algerian Convention differs from the other Conventions concluded between France and Egypt, Morocco or Tunisia, which do not explicitly exclude natural children. These Conventions refer to "custody of the children" without further precision regarding which children; the issue of natural children remains under discussion. However, in view of the position adopted by Islamic law with regard to these institutions (no juridical existence), it would appear that natural children are also excluded from the scope of the Franco-Moroccan and Franco-Tunisian Conventions.

[80] *See* the Report by M. Le Déaut, Project No 115 – Discussion and Adoption of 7 July 1988, p. 14.

[81] *See* Article 40 of the Algerian Family Code, which provides that "consanguinity is established by valid marriage, recognition of paternity, proof, apparent or invalidated marriage and any marriage annulled after consummation (…)".

[82] In terms of Article 46 of the Family Code, this institution is not recognised as such by Algerian law: "Adoption is prohibited by charia and the law". However, Algerian family law (Article 116 of the Family Code) recognises the institution of *kafala* that is legal care of the child constituted by "the commitment to take voluntary responsibility for the maintenance, education and protection of the minor child in the same manner a father would for his son". However, *kafala* has no effect on consanguinity as "the child cared for in this manner can be of known or unknown consanguinity, and if the parents are known the child's original consanguinity must be maintained" (Article 119 and 120 of the Family Code).

[83] One nationality condition is set: the agreement only applies to children of parents of whom, in accordance with the legislation of either State, one has French nationality and the other Algerian nationality. The Convention therefore excludes from its scope Algerian couples resident in France, and vice versa, as well as couples formed by a French or an Algerian national and a national of a third country.

[84] The originality of the Convention is based on both the intangibility of the right of custody and the automatic character of the right of access.

[85] This provision may be the source of a number of difficulties. Indeed, it is necessary to determine the place of joint family life, which may be different to that of the present residence of the father or of the mother, and must be on the territory of one or other State.

[86] Article 6, second paragraph of the Convention.

[87] Article 6, third paragraph of the Convention.

effectiveness of this international right of access would be illusory without guarantees for the protection of the interests of the non-guardian parent.

c) The system established in favour of the parent to whom a right of access is attributed is as follows: the competent judge (in terms of Article 5) must attribute an international right of access; the guardian parent is open to prosecution[88] if he or she does not respect this right of access; moreover, the judgment (enforceable judicial decision) attributing this right bears the authorisation for the child to exit the territory,[89] whatever the law applied to the case.

d) Provision is also made in this instrument for protection of the interests of the guardian parent against abuse of access rights. This is accomplished by means which aim to guarantee the effective return of the child after simplified enforcement proceedings with regard to the provisions concerning the international access rights. However, these enforcement proceedings are limited to that part of the judgment which concerns the access rights.[90] Nevertheless, in the event of abusive exercise of these rights, this limitation does allow for order of the return of the child to a guardian parent. Indeed, if the child is not returned to the custodial parent after the period determined for the child to stay abroad has expired (Article 8, first paragraph), or when the child has been removed outside the period determined in the judgment (Article 8, second paragraph), there is "immediate recognition and enforcement of the enforceable judicial provisions concerning the international rights of access".[91] It should be emphasised that this enforcement is not automatic; according to Article 8, second paragraph "it cannot be refused", which implies that it must be requested by the guardian parent. The effectiveness of the return of the child is guaranteed by the provisions of Article 11, which allows for enforcement of the *exequatur* decision. The Public Prosecutor is thus obliged to call for "the use of the public authorities to obtain enforcement and guarantee the effective return of the child to the territory from which he or she was removed".[92]

2.4 Consular Agreements on Co-operation

While some States have taken inspiration from the multilateral Conventions of Luxembourg and The Hague when drafting bilateral agreements, others have preferred to base such agreements on two more universally recognised texts, the United Nations Convention on the Rights of the Child and the Vienna Convention of 24 April 1963 on Consular Relations.

Under Article 11 of the Convention on the Rights of the Child, "States Parties shall take measures to combat the illicit transfer and non-return of children abroad [and] [t]o this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements." Articles 5(e) and 5(h) of the Convention on Consular Relations establish a principle of assistance for the consular authorities of a country with regard to its citizens. Thus, consular functions consist, among other things, of "helping and assisting nationals… of the sending State [and] safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors… who are nationals of the sending State."

---

[88] Article 7, second paragraph, obliges the Public Prosecutor to prosecute the author of an infraction of the type "non-presentation of a child". This provision does not exist in any other bilateral Convention of this type. In addition, it waives the principle of autonomy of the French judicial authorities on this matter.

[89] This provision aims at removing the power of prevention that fathers hold from the paternal authority in Algerian law.

[90] This special provision is aimed at overcoming the difficulties inherent to the different conceptions of the notion of custody between the so-called "western" systems and the systems of Islamic tradition.

[91] According to the Report by Le Déaut, this Article 8 is "at the heart of the efficiency of the Convention; it is the privileged tool for the freedom of movement of the children between France and Algeria". Report by Le Déaut, *op. cit.* pp. 8-9.

[92] Article 11, second paragraph of the Convention.

Countries such as Australia, France, Canada, Egypt and Lebanon have concluded bilateral so-called 'consular' agreements.[93] These agreements aim to promote and implement cooperation among States Parties, with a view to regulating the difficult question of child custody and, in a larger sense, ensuring the protection of children's rights. The first agreement of this type, the Agreement Between the Arab Republic of Egypt and Canada Regarding Cooperation on Consular Elements of Family Matters, was concluded by Canada and Egypt on 10 November 1997. Other agreements have since followed, including an agreement between France and Lebanon on co-operation in some family matters; between Australia and Egypt on the well-being of children;[94] and between Canada and Lebanon on cooperation in some humanitarian consular matters.

These agreements have in common:

- the belief that the child's [best] interests lie in respecting his/her right to have personal, direct, and regular relations with both his/her parents;
- the promotion of respect for the non-custodial parent's rights of access; and,
- the establishment of Advisory Commissions to ensure the amicable resolution of family disputes, particularly those relating to child custody and child access.

These agreements are administrative in nature and aim to facilitate, through advisory mechanisms and through recommendations, the resolution of disputes involving child abduction, transfrontier child access, and the protection of the rights of children. These goals are carried out by mixed advisory commissions,[95] which include civil servants from each State, from the Ministry of Foreign Affairs and International Trade, the Ministry of Justice and the Interior, as well as the Royal Police.[96] In some cases a coordinator (and liaison officer) is also designated in order to ensure the follow-up to the commissions' work.

These commissions are empowered, in accordance with the laws of each contracting party, to ensure the respect of the non-custodial parent's rights of access, notably by taking the necessary steps to facilitate the obtaining of visas or other titles of transport, either for the non-custodial parent or the child, and to enforce the respect of the child's right to have regular, direct contact with both parents.[97] In addition, they promote close cooperation and understanding between the authorities involved from the contracting parties, as well as communication and the exchange of information and documents pertaining to the case between the contracting parties. They also provide recommendations to the relevant authorities in order to facilitate the implementation of any private solution to a dispute that is reached by the parents and other interested parties.[98] Finally, they follow the development of each case in order to make progress reports.

---

[93] This type of agreement encourages the development of amicable relations between States and ensures protection and assistance for foreigners residing on the territory of other States.

[94] This convention was directly inspired by the one concluded between Canada and Egypt. Given the success of this first negotiation, Australia decided to follow Canada's example.

[95] Within the framework of the Franco-Lebanese agreement, the Commission was designed to provide dialogue, coordination, and consultation.

[96] Members of the Royal Police of Canada are represented in the Egypto-Canadian and Canado-Lebanese Advisory Commissions.

[97] Unless such contact is contrary to the best interests of the child or, more precisely, if exceptional circumstances pose an immediate danger to the child's physical or mental health.

[98] The extent of such recommendations is established only in Article 6 of the Egypto-Australian agreement.

In the Franco-Lebanese Convention, the Advisory Commission does not have this function; instead, it plays a more extensive role that closely resembles that of the Central Authorities. The Franco-Lebanese Commission is responsible for "taking the measures necessary to facilitate the face-to-face reconciliation of the parties, in particular with regard to bringing about the return of wrongfully displaced children." It is also responsible for keeping parents informed as to the location and physical and emotional circumstances of their children, as well as on the status of proceedings. The Franco-Lebanese Commission also differs from the others in that it can hear from any person with relevant information.[99]

These mechanisms do not apply to everyone, since the scope *ratione personae* is limited. The Lebanese-Canadian Convention only applies to persons with Canadian or Egyptian citizenship. This seems to be the case with the Franco-Lebanese agreement as well, since the Commission is empowered to examine cases involving citizens of one or the other country. For the two other agreements (Canada-Egypt and Australia-Egypt), the scope is greater, as it includes persons with Canadian or Australian nationality on the one hand, or Egyptian nationality on the other, as well as those with dual nationality.

The Constitution of the Advisory Commissions does not limit the actions States can take; these cases can also be resolved by other means (*e.g.* judicial or penal).

Those cases that are transmitted to the Commissions are done so through diplomatic channels.

It is important to note that the international duties and obligations of the States Parties to these consular agreements on co-operation are not limited by the conclusion of this type of agreement.

2.5 Administrative agreement protocols

In the absence of a juridical framework for litigation settlement in civil matters (personal status and family law), including child abduction between immigration and emigration countries of Islamic tradition, a number of States decided to conclude (bilateral) administrative agreement protocols based on principles of co-operation, discussion and information. These protocols establish "mixed consultative committees" [100] which are charged with the amicable settlement of civil litigations and are without power of constraint. These agreements are direct responses to specific problems and are aimed at smoothing out difficulties and maintaining an open relationship between the two countries involved.

Belgium has concluded two agreements of this type: one with Tunisia[101] and the other with Morocco.[102] As the texts of these two Protocols are almost identical, with the exception of one or two small details, this report will limit itself to their examination in general.

These Agreement Protocols establish Belgian-Moroccan / Belgian-Tunisian consultative committees on civil matters composed of representatives from the Ministries of Foreign Affairs and Justice of each of the two States (Article 1). They are charged in particular[103] with "submitting to both governments any proposal of a type to facilitate the settlement of issues which, in the relationship between the two States, may create difficulties in civil

---

[99] Article 8 of the agreement between France and Lebanon.

[100] These committees are composed of representatives from the Ministries of Foreign Affairs and Justice of each of the two States.

[101] The Agreement Protocol of 29 April 1989 establishing a Belgo-Tunisian consultative committee on civil matters.

[102] The Agreement Protocol of 29 April 1981 establishing a Belgo-Moroccan consultative committee on civil matters.

[103] These committees are also charged with communicating juridical information in civil matters.

matters,[104] in particular in the fields of personal status and capacity and of family law".[105] In addition, these committees may also have individual cases brought before them with a view to encouraging an amicable settlement. They meet once a year upon request of one or other State.

In some difficult cases, co-ordination with the judicial authorities is also established.

This chapter has attempted to provide a detailed picture of the bilateral conventions which exist already in the field of child abduction and international access between States of Islamic tradition and so-called "western" States. This picture would not be complete without a study of these instruments in practice.

[104] Article 2 of the Belgo-Tunisian Agreement Protocol.

[105] Article 2 of the Belgo-Moroccan Agreement Protocol.

3. THE INSTRUMENTS IN PRACTICE

In order to determine the current relevance of bilateral instruments in force in this field, the Permanent Bureau drew up an exploratory questionnaire, which it sent to a number of Member States of the Organisation (Belgium, Canada and France). The individuals contacted and authorities concerned were invited to give their comments on the questionnaire and to identify any issues concerning the operation of the bilateral conventions, which had not been raised in the questionnaire.

This overview is then based on the responses to the questionnaire, the contacts and meetings held with a number of Central Authorities, academic work in the field and conclusions of various conferences, which have been held on the subject.[106]

This variety of contributions has made it possible to formulate an initial synthesis of the main tendencies to be seen in the application of these bilateral Conventions and Agreements.

It should be emphasised that the conclusions in this chapter are provisional in nature.

3.1 The role of the Central Authorities

In the framework of bilateral agreements inspired by bilateral Conventions, the Central Authorities are institutions of general co-ordination. They provide judicial assistance and co-operation with the aim of guaranteeing effective exercise of custody and access rights on their territory. They are obliged to communicate directly among themselves and to seize the judicial authorities (including the Public Prosecutor) to ensure correct application of the Convention.

In practice, the European Central Authorities experience difficulties in varying degrees with Central Authorities of countries of Islamic tradition:

- delay or abatement in the starting of requested procedures;

- difficulty of actual communication with regard to the progress of the proceedings (hearing dates, very slow communication of decisions rendered);

- difficulty in obtaining readable and integral copies of official documents (judgments, decisions, reports);

- lack of co-operation in determining the whereabouts of the displaced child;

- random confirmation of registration of official requests made which is sometimes due to a total lack of organisation of the administrative services.

Delay in starting judicial proceedings by the Central Authorities of countries of Islamic tradition can be explained by the fact that they tend to favour solutions by amicable means rather than through judicial proceedings. There is a real difference in approach on the part of these authorities, which can be seen in the organisational structure of the institutions (Central Authorities, consultative committees) set up within the framework of bilateral conventions. Egypt has set up, for example, "a committee of advisors" under the Franco-Egyptian Convention. The Egyptian Central Authority forwards all requests sent

[106] Osnabrück Congress, 23-24 October 1998, see in this context: C. von Bar, "Islamic Law and its Reception by the Courts in the West", Volume 57, Köln, C. Heymans Verlag KG, 1999; Euro-Mediterranean Forum on International Child Abduction, Rome, 12– 13 March 2001; International Forum on Parental Responsibility, Brussels, 7-8 October 2001.

by the French Central Authority to this committee, which is charged with finding amicable solutions. In this manner, initial application of the Convention is withheld.[107]

3.2 Consultative Committees

Mixed consultative committees have been set up in parallel to the Central Authorities by all the bilateral Conventions. More precisely, the consular conventions and the administrative agreement protocols (which are not conventions on judicial co-operation) essentially provide for the creation of consultative committees, discussion and mediation groups charged with examining cases concerning the exercise of custody and international access rights and to facilitate their solution by amicable means. The mixed committees are supposed to meet each year. However, it is not always possible for them to do so due to lack of funding or availability. The advantage of these committees is that they offer a relatively flexible working framework and negotiate case-by-case specific issues such as any visa problems encountered in the exercising of access rights or the financing of any travel by the child during the exercising of access rights.

In practice, these meetings allow on the one hand appreciation of the difficulties in the application of these conventions, and on the other hand improvement in the effectiveness of the action of the Central Authorities in the countries of Islamic tradition. Indeed, a large number of judicial decisions are rendered just before these meetings in cases where the proceedings had stagnated for months, and new elements of information are communicated (on the precise functioning of the judicial system, duration of proceedings, judicial situation of the parents). Each meeting is the focus of much media and political attention. The authorities are more disposed to obtain concrete results so as to show the public that they are actually taking concrete action.

During the last meeting of the mixed Franco-Lebanese committee, the fate of displaced children and the precarious situation of French mothers whose access rights were systematically refused was brought to the attention of the Lebanese authorities. Tangible results were obtained: collective access rights were organised in the Lebanon and some requests for access by French mothers were accepted by the Lebanese authorities.

Since the implementation of the Consular agreement between Canada and Egypt, the number of child abduction cases has decreased, and amicable solutions have been found to access arrangements in the majority of cases.

The committee can also be a working group charged with strengthening co-operation between the two States. The work carried out by the Belgian-Moroccan consultative committee resulted in the elaboration and signature of three conventions in 1991,[108] of which two were adapted and signed in June 2002 by both States.[109]

However, results obtained within the framework of the consultative committees and through co-operation with Central Authorities are only obtained after long periods of time and are often few in number.

---

[107] As a reminder, in the event of no voluntary return of the child, the Central Authorities are obliged to seize the judicial authorities through the Public Ministry so as to obtain enforcement in the requested State of the decisions of the requesting State, in cases of requests for return of a displaced child or to determine or protect the exercising of access rights.

[108] The Convention on the applicable law and recognition of marriages and their annulment; the Convention on the recognition and enforcement of judicial decisions in matters of maintenance obligations; the Convention relating to the recognition and enforcement of judicial decisions in matters of custody and access.

[109] The Convention on the recognition and enforcement of judicial decisions in matters of maintenance obligations; the Convention relating to the recognition and enforcement of judicial decisions in matters of custody and access. See Press Release from the Deputy Prime Minister and the Minister of Justice and Middle Classes of Belgium, Mr Malchior Watelet, 15 July 1991.

3.2.1 Relationships of co-operation

Another conclusion concerns the type of co-operation which exists between the so-called "western" countries and the countries of Islamic tradition and which is characterised by a marked imbalance. In the majority of cases investigated and examined through the bilateral conventions, the "western" Central / competent Authorities are "requesting authorities"; *i.e.* they initiate the requests for return or access. The extreme example is that of France and Algeria where the French Central Authority is the requesting authority in all cases. It has however been shown that co-operation functions most efficiently when it does not occur in one direction.

3.3 Access

The (Central) Authorities of countries of Islamic tradition seize foreign Central Authorities in the main for requests concerning access. The search for a solution must firstly take place by amicable means, as the Islamic Central Authorities do not wish to rely on foreign judicial authorities to settle differences of this type.

This vision (of non-intervention by foreign judicial authorities) explains the reticence of a number of Islamic (Central) Authorities to seize their judicial authorities with a request for access by a European mother.

In order to alleviate the effects of this difficulty, parents wishing to exercise access in countries of Islamic tradition are invited to initiate requests for regular access themselves before the courts of these countries.

In the majority of cases, practical arrangements are only possible with agreement of the father. In addition, due to the lack of suitable structures surrounding this right of access, the mother has to exercise her right of access within the family either under the control of the father or in uncomfortable surroundings such as police stations or the court buildings.

Practical arrangements for access also pose difficulties in the opposite direction however: the father, who is a national of a country of Islamic tradition, has to make a request to the authorities of the "western" country. Difficulties may be encountered concerning the conditions of entry and stay on European territory, especially if the father has been the subject of penal investigations for the illicit removal of children. After the return of the children, both the judicial authorities and the mothers of the removed children are reticent to award access to the father in his home country. This is the reason why, at an initial stage, the "western" authorities will only award very supervised access in neutral locations and in the presence of psychologists, for example on the mother's national territory.

3.4 Judicial proceedings – enforcement of decisions relating to custody and access

The main obstacle to good application of these bilateral conventions remains the difference between the "western" legal systems and those of Islamic tradition.

Despite the conventions, which have been signed, both the respect and the enforcement of foreign decisions which have been rendered are refused (refusal for *exequatur* proceedings or forced enforcement of a decision rendered) by the Islamic courts on the grounds of incompatibility with national public order, based on Koranic law. Interpretation of the term public order is indeed very wide and generally blends with the notion of best interests of the child which is regarded as the education of the child by the father in his religion (Islam) and restricted to his national territory.

Consequently, it is extremely difficult for a child to leave his father's country without his authorisation and even in cases where an *exequatur* judgment regarding a Belgian

decision fixing the mother's residence in Belgium, for example, or a decision to return the child to its mother, has been rendered.

The other obstacle concerns the length of proceedings. The countries of Islamic tradition demand that a final judgment (concerning the divorce or custody of the child) is rendered before initiating enforcement proceedings. These initial proceedings take months or even years before they are finalised as the father almost systematically initiates appeal proceedings against a decision in favour of the mother. In addition, enforcement of the decisions is only possible with the agreement of the father and it is difficult, if not impossible to obtain forced execution of a judgment by the competent authorities.

4. THE FUTURE OF THESE INSTRUMENTS

At this stage of preliminary exploration, it is probably unwise to draw conclusions on the efficiency of the bilateral conventions and the effectiveness of the co-operation between countries of Islamic tradition and "western" countries with regard to the problems of international child abduction. Several points may however be emphasised:

The bilateral conventions in this field operate with difficulty. Good application of this type of instrument is linked to a variety of political, cultural and judicial factors as well as to the degree of investment by the competent authorities. The search for a harmonious solution (by amicable or judicial means) within a bilateral or multilateral framework should take place with knowledge of and respect of the various models and institutions relating to parental authority which have the same functions in countries of different judicial and cultural traditions, and in conformity with the right of the child to maintain a regular relationship with both parents.

Without this knowledge, any judicial (convention on judicial co-operation) or amicable (consular agreement and administrative agreement protocol) co-operation will lead by way of public order exception to the foreign law being disregarded. The difference in conception of the notion of parental responsibility encountered during this research is an example of the need for knowledge of – in the sense of respect for – the different legal traditions concerned.

It would therefore appear necessary, as has been recalled by the authorities and persons contacted, to deepen experience with the help of training (magistrates, lawyers and practitioners) and to encourage the creation of communication networks. Without a relationship of confidence between the authorities, no system of co-operation can be effective. This confidence can only be gained by knowledge of the characteristics of the different legal traditions and systems involved.

Consequently it may be concluded that, although unable to provide global solutions, bilateral co-operation is an elementary and useful legal framework serving on the one hand as a channel of information and communication between authorities, and on the other hand in some situations rendering possible – and this is the essential element – the return of the child and the arrangements for access across international borders.

Parallel to this bilateral co-operation, it appears necessary to develop fully-monitored multilateral co-operation, strengthening dialogue, between States of Islamic tradition and "western" States so as to protect as best as possible the interests and development of children who have their roots in two different cultures.

Given its nature and expertise, the Hague Conference is the appropriate forum for the encouragement and nurturing of such dialogue.[110]

[110] See the conclusions by Professors Marie-Claire Foblets and Hugues Fulchiron drawn up at the closure of the international Forum on "Parental Responsibility: Private or Public Responsibility? Challenges and Consequences for the Child", Brussels, 7-8 October 2001, p. 7.