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# EUROMED JUSTICE III PROJECT

Component II

Resolution of cross-border family conflicts

WG 2

## HANDBOOK

ON GOOD PRACTICES CONCERNING THE RESOLUTION OF  
CROSS-BORDER FAMILY CONFLICTS

WITH A SPECIAL FOCUS ON CROSS-BORDER DISPUTES  
CONCERNING PARENTAL RESPONSIBILITY

Juliane HIRSCH  
Expert

Implemented by:



Lead Firm

# HANDBOOK

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PARENTAL RESPONSIBILITY**

**Prepared by:**

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# HANDBOOK

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### **OPENING REMARKS AND METHODOLOGY**

In the pages that follow, the reader will find a description of best practices, a descriptive summary of the discussions that helped identify these best practices, and a brief final commentary by the author.

It is important to mention that the characteristic that seems most remarkable in this work is that the best practices described in this handbook reflect the majority consensus observed during discussions among the participants at the preparatory meetings on each of the topics dealt with.

These are not best practices conceived in an abstract manner, tacked on to other considerations; nor are these ideal practices dreamt up in an abstract or utopic scenario, and they do not put forward a complete and exhaustive list of best practices. These are rather more practices that correspond to the level of agreement achieved during the meetings and discussions with the delegations of countries participating in each meeting.

These best practices reflect what the delegations of the beneficiary countries taking part in the meetings consider to be acceptable best practice, worded in such a way that it appears adequate at the moment, practical, adapted to the context and reality of the country, and able to be assimilated from the point of view of the law in force and the institutional and situational framework. These best practices also corresponded to foreseeable progress and can be implemented in technical terms and with realistic margins, in the short and medium term, even if they are not prescriptive in nature.

These are best practices and discussions related to the regional context in which they are adopted. Certain countries have already implemented fully or partially what these best practices recommend or indicate, but their approval reinforces this trend and expresses their merit.

The best practices that have been listed and the information included in the summary of discussions, also provide us with a snap shot of the situation and the principal traits of the topics dealt with.

The discussions, which are summarised after the description of each group of best practices, provide not only condensed information which is felt to be of interest, in fact of great interest, but also reveal where the strong and weak points of the topic addressed lie and the situation in the region. In certain cases, they reveal areas where progress can be more complicated or slow, or areas where it can be easier and faster.

Besides this, in legal terms, they provide an idea of certain specific success areas and reveal deficiencies and shortcomings compared to what could be considered as a standard, desirable situation between the EU and the ENPI South Partner Countries in the project.

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To reach this point, questions, as well as the reference documentation from each meeting, were given to participants beforehand so that they could be better prepared for the discussions. This workgroup had 5 meetings, each one lasting three days. The first was held in Barcelona from 22 to 24 May 2012; the second in Rome from 18 to 20 September 2012; the third in Madrid from 11 to 12 December 2012; the fourth in The Hague from 5 to 7 March 2013 and the last one in Prague from 23-25 April 2013.

All the beneficiary countries were invited to take part in the meetings and each of them could send three experts appointed beforehand by the National coordinator in each country. Not all of the beneficiary countries took part in all of the meetings, and that for different reasons. We took all measures possible to ascertain that the participants from each country were the same at each meeting, or at least that there was a degree of continuity in the composition of the delegation.

During each meeting, different topics were dealt with according to the programme for the project, the team responsible for implementing the project in coordination with the expert prepared the agendas, and each time submitted for the prior approval of EuropeAid. This meant that the expert was able to gather the information that helped to describe the essential elements of the discussions and to draw up the best practices based on the level of consensus observed and expressed in each case. After each meeting, the expert prepared an outline of the work done, including the opinions and ideas of participants and the proposals for best practices relative to conclusions. After that, the expert once again sent his outline report to the beneficiary countries by way of information and verification for further discussion and, if necessary, for the outline to be corrected, amended or validated at the following workgroup meeting. This cumulative way of working facilitated further progress at each meeting and helped arrive at the final result, which is the result of the work done at the time of the last meeting of the workgroup.

Furthermore, and to guarantee to the extent possible that the result is faithful to the method, the final text was sent once again sent to the countries concerned after the results of the last meeting were incorporated, so that these countries could, through their national coordinator and with the support of the participating experts, make their final suggestions, corrections or proposals. These were then included in the final version of the handbook once the author had duly received them.

This document is therefore the result of detailed work done by the expert and author of this handbook, working as a team, the protagonists being all the participants who took part in the different activities required in preparing the handbook.

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Finally, we would like to extend our warmest thanks to all the experts from the ENPI South Partner Countries that have collaborated in the different meetings and have contributed significant input to the various debates held. It goes without saying that without their valuable support, deep commitment and endless efforts, this handbook would not have been possible.

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As the main short term expert, it is with great pleasure that I present the *Handbook on Good Practices concerning the resolution of cross-border family conflicts with a special focus on family disputes concerning parental responsibility*, which contains Principles and Good Practices identified and elaborated by the Working Group 2 in the course of five Working Group meetings.

Sincere thanks are due to all experts<sup>1</sup> from the ENPI South Partner Countries who participated in one or more of the five Working Group meetings and whose accumulated wisdom and experience as well as commitment to the Euromed project have been essential for the creation of this Handbook. Acknowledgements are also due to all experts in the ENPI South Partner Countries who contributed to the establishment of the Handbook through supporting their countries' Working Group members in the accumulation of necessary background materials *etc.* It needs to be highlighted that it is only thanks to the hard work and dedication of all the involved national experts from the ENPI South Partner Countries that the objectives of this project could be achieved, despite the sometimes difficult conditions, including regular changes in the composition of some delegations and the tight timeframes between the meetings.

Furthermore, thanks are due to all short term experts<sup>2</sup> who shared their knowledge and experiences in international family law matters at one or more of the five Working Group meetings.

A special mention needs to be made of the continuing support for the Euromed work by the Hague Conference on Private International Law. The Hague Conference has already in the course of the previous projects, Euromed I and II, 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 work encouraging, in particular, links with the Hague Conference initiated Malta Process. Special thanks for the support of the Euromed III project are due to the Hague Conference's First Secretaries Philippe LORTIE and Lousie Ellen TEITZ.

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<sup>1</sup> The experts from the ENPI South Partner Countries included, *inter alia*: Mr Amr ABDALSALAM KAMS ALTANANE (Egypt); Mr Hany ABDELRAHIM (Egypt); Mrs Reem ABUALROB KHALIL (Palestine); Mr Mondher ALADAB (Tunisia); Mr Mohammad Abdel Jawad Hijazi AL NATSHEH (Jordan); Mr Ashraf AL OMARI (Jordan); Mr Ahmed ALSHAWAAF (Egypt); Mr Youssef AL TAHAT (Jordan); Mr Mohammad AL TARAWNEH (Jordan); Mr Mansour ALTWALBAH (Jordan); Mrs Adva AVNON (Israel); Mrs Ivone BOU LAHMOUD (Lebanon); Mrs Doreen DANIEL (Israel); Mr Maged Mohamed ELANTABLY (Egypt); Mr Abdelhadi ELBATTACHE (Morocco); Mr Ayman Ahmaed Abd ELTHAHER ELTAYEB (Egypt); Mr Tamer Ahmed EZAAT (Egypt); Mr Yehoshua FRIDMAN (Israel); Mrs Hala HAJJAR (Lebanon); Mr Majdi M. HARDAN (Palestine); Mr Haitham HEGAZY (Egypt); Mrs Mariam Patricia KABBARA (Lebanon); Mrs Leslie KAUFMAN (Israel); Mrs Yael KITZIS (Israel); Mrs Yael KOTICK (Israel); Mr Hafeed LAABIDI (Tunisia); Mr Assad MUBARAK (Palestine); Mrs Samaranda NASSAR (Lebanon); Mrs Idith RAHAMIM MANDELBAUM (Israel); Mr Waleed Mohamed REFAAT (Egypt); Mrs Néjiba ROUISSI (Tunisia); Mr Sarmad SIDAWI (Lebanon); Mrs Rima SLEIMAN (Lebanon); Mr Ilyass SLOUB (Morocco); Mr Rami TARABAY (Israel); Mr Abdelhadi ZEHAF (Morocco).

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Juliane Hirsch,  
Main Short-Term expert

## INTRODUCTION

1. Each year, thousands of children are affected by cross-border family disputes. It is not rare for disputes surrounding parental separation or divorce to result in situations that threaten children's rights to maintaining personal relations and direct contact with both their parents. State borders can in such cases add an additional and sometimes invincible layer of obstacles hindering the resolution of the dispute. While parents are drawn into lengthy, exhausting and costly battles over custody and contact, which often weigh heavily on the extended families on both sides, children suffer from the harmful effects of the conflict that sometimes accompany them for a large part or all of their childhood.
2. In today's globalised world, where living and working in foreign countries, be it temporary or long-term, has become a reality in the lives of many families, an increasing number of family disputes has an international element. Tools assisting in the resolution and prevention of cross-border family conflicts have become more important than ever. State cooperation, including cooperation on a governmental, administrative and judicial level, is needed to set up an efficient framework for the resolution of cross-border family conflicts and to protect children from the harmful effects of such conflicts.
3. Acknowledging the importance of further extending and improving cooperation in the Euro-Mediterranean area in the field of international family law, the Euromed Justice III Project, Component II was established with the aim of developing a Handbook of Good Practices regarding the resolution of cross-border family disputes with a particular focus on the Euro-Mediterranean region.
4. The Euromed Justice III Project, Component II provided a unique setting for the identification and elaboration of Good Practices of particular relevance for the region, establishing a Working Group consisting of experts from the following ENPI South Partner Countries:
  - 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.
5. The Good Practices contained in this Handbook are the result of the extensive work of the participating experts in the course of five Working Group meetings held in:
  - (1) Barcelona on 22-24 May 2012,
  - (2) Rome on 18-20 September 2012,
  - (3) Madrid on 11-13 December 2012,
  - (4) The Hague on 5-7 March 2013, and
  - (5) Prague on 23-25 April 2013.
6. In the identification and elaboration of Good Practices for the resolution of cross-border family disputes, the Working Group built on the important work already undertaken by other organisations in this field of law, in particular the work of the Hague Conference

on Private International Law, and took into consideration relevant international, regional and bilateral legal frameworks. The Working Group furthermore benefited in the identification of Good Practices from the work undertaken in the course of the predecessor projects, the **Euromed Justice Project I** (2004-2007) and the **Euromed Justice Project II** (2008-2011)<sup>3</sup>, launched by the European Commission with the aim to promote inter-State and regional cooperation and to encourage continuing exchange between judges and other members of the legal profession and officials of different States. Many of the experts participating in the Working Group set up under the Euromed Justice III Project had formerly participated in one or more of the Euromed seminars or study visits in the course of the predecessor projects.

7. Of significant importance for the identification of Good Practices for the Euro-Mediterranean region was the work undertaken in the context of the so-called “**Malta Process**”<sup>4</sup> initiated by the Hague Conference on Private International Law. The “Malta Process” is a dialogue between senior judges and high-ranking government officials from Contracting States to the 1980 and 1996 Conventions<sup>5</sup> and non-Contracting States with Islamic law influenced legal tradition with the aim to improve the protection of cross-frontier 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 where relevant international legal framework is not applicable. 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. So far, three major judicial conferences on cross-border family law were held in Malta in 2004, 2006 and 2009 addressing in particular how a better cooperation between the participating States in the resolution of cross-border family disputes could be achieved.
8. Of particular relevance for the Euromed Justice III Handbook Project are the recommendations made by the experts participating in the Malta Conferences, the three so-called “**Malta Declarations**”.<sup>6</sup> It is important to note that experts from nearly all of the ENPI South Partner Countries were participating in one or more of the Malta Judicial Conferences.
9. Furthermore, a development flowing from the Malta Process of particular significance for the identification of Good Practices in the Euromed Justice III Project, is the work undertaken to set up structures for international family mediation assisting in the resolution of cross-border family disputes. Following a recommendation contained in the Third Malta Declaration, a Working Party consisting of State-designated experts from Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America elaborated “**Principles for the Establishment of Mediation Structures in the context of the Malta Process**”.<sup>7</sup> The

<sup>3</sup> Further information available at < <http://euromed-justiceii.eu/en/home/list/&tid> > (last consulted 15 May 2013).

<sup>4</sup> See for further information on the “Malta Process” the Hague Conference website at < [http://www.hcch.net/index\\_en.php?act=publications.details&pid=5214&dtid=46#malta](http://www.hcch.net/index_en.php?act=publications.details&pid=5214&dtid=46#malta) > (last consulted 15 May 2013).

<sup>5</sup> See below para. 11 regarding the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and 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.

<sup>6</sup> The three Malta Declarations are available at < [http://www.hcch.net/upload/maltadecl09\\_e.pdf](http://www.hcch.net/upload/maltadecl09_e.pdf) > (last consulted 15 May 2013).

<sup>7</sup> The Principles and the accompanying Explanatory Memorandum are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Cross-border family mediation”.

Principles 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. In addition, 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.<sup>8</sup> So far six States, namely, Australia, France, Germany, Pakistan, 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.<sup>9</sup>

10. The following international, regional and bilateral instruments of particular relevance regarding the resolution of cross-border family disputes concerning children and with regard to the protection of children in cross-border situations have informed the work of the Euromed Justice III Working Group:

11. Global instruments of particular relevance:

- The *United Nations Convention of 20 November 1989 on the Rights of the Child* (hereinafter “UNCRC”)<sup>10</sup> - lays down fundamental principles for the protection of children’s rights with particular attention given to children’s rights in cross-border family matters. All ENPI South Partner Countries<sup>11</sup> as well as all European Union (EU) Member States have signed and ratified this Convention.

- The *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter the 1996 Hague Child Protection Convention)<sup>12</sup> - provides for common rules on jurisdiction, applicable law, and recognition and enforcement in the field of parental responsibility. At the same time, the Convention establishes a system of continuing State-cooperation through Central Authorities in each Contracting State assisting individuals concerned in resolving cross-border family disputes. The 1996 Hague Child Protection Convention is open for signature by all States and is currently (status 15 May 2013) in force for 39 States: In the European Union, all States (except, Belgium and Italy) are Contracting States to this Convention; among the ENPI South Partner Countries, Morocco is currently the only Contracting State.<sup>13</sup> See for further information on the 1996 Hague Child Protection

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<sup>8</sup> The Principles for the Establishment of Mediation Structures in the context of the Malta Process have received wide support from States in the course of the Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions. In the Conclusions and Recommendations, the Special Commission welcomed the Principles and encouraged States “to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point”, see the Conclusions and Recommendations Nos. 60, 61 of the 2011 Special Commission (Part I), available at < [http://www.hcch.net/upload/wop/concl28-34sc6\\_en.pdf](http://www.hcch.net/upload/wop/concl28-34sc6_en.pdf) > (last consulted 15 May 2013).

<sup>9</sup> See regarding the Central Contact Points for international family mediation the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section”, then “Cross-border family mediation” and then “Central Contact Points for international family mediation”.

<sup>10</sup> See Articles 9(3) and 10(2) UNCRC, text available at < <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> > (last consulted 15 May 2013).

<sup>11</sup> This does not apply to Palestine.

<sup>12</sup> See for the Convention text and further information on the Convention the Hague Conference website at < [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=70](http://www.hcch.net/index_en.php?act=conventions.text&cid=70) > (last consulted 15 May 2013).

<sup>13</sup> See for further details the status table of the Convention at the Hague Conference website under < [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=70](http://www.hcch.net/index_en.php?act=conventions.status&cid=70) > (last consulted 15 May 2013).

Convention the Explanatory Report<sup>14</sup> and the Practical Handbook on the Convention's operation.<sup>15</sup>

• The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter the 1980 Hague Child Abduction Convention)<sup>16</sup> - aims to protect children from the harmful effects of their wrongful retention in or removal to a State other than their State of habitual residence. This Convention deals solely with the civil aspects a child's wrongful removal or retention and does not touch upon the question of possible penal law consequences of the removal or retention. Through the establishment of an international legal framework for the expeditious return of these wrongfully removed or retained children, the Convention assists in securing a continuous relationship of the child with both parents. The Convention prevents conflicting decisions on custody in the situation of a wrongful removal or retention of a child by forbidding the courts of the State to which the child was wrongfully removed (or in which the child is wrongfully retained) to take a decision on the merits of custody while return proceedings are ongoing. The Central Authority system set up by the Convention assists parents in abduction cases and also in cross-border contact cases in which no wrongful removal or retention has occurred. The 1980 Hague Child Abduction Convention is open for signature by all States and is currently in force for 89 States (status 15 May 2013): In the European Union, all States are Contracting States to this Convention and among the ENPI South Partner Countries, Israel and Morocco are Contracting States.<sup>17</sup> See for further information on the 1980 Hague Child Abduction Convention the Explanatory Report.<sup>18</sup>

• The *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter "2007 Hague Maintenance Convention")<sup>19</sup> – simplifies and accelerates the cross-border recovery of maintenance by introducing procedures that are "accessible, prompt, efficient, cost-effective, responsive and fair"<sup>20</sup>. The Convention establishes a Central Authority cooperation system, which provides individuals involved in cross-border maintenance cases with far-reaching assistance, including legal assistance. A particular achievement is the introduction of free legal assistance for child support applications. The Convention's rules on recognition and enforcement guarantee a speedy cross-border recovery of maintenance claims. The 2007 Hague Maintenance Convention considerably modernises the cross-border recovery of maintenance and will in the long-term replace the older two Hague Conventions<sup>21</sup> on recognition and enforcement of maintenance

<sup>14</sup> The Explanatory Report on the 1996 Hague Child Protection Convention, drawn up by Paul Lagarde, available online at < <http://www.hcch.net/upload/expl34.pdf> > (last consulted 15 May 2013).

<sup>15</sup> The Practical Handbook on the operation of the 1996 Hague Child Protection Convention will soon be available on the Hague Conference website; in the meantime, the revised Draft Handbook of May 2011 can be consulted at < <http://www.hcch.net/upload/wop/abduct2011pd04e.pdf> > (last consulted 15 May 2013).

<sup>16</sup> See for the Convention text and further information on the Convention the Hague Conference website at < [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24) > (last consulted 15 May 2013).

<sup>17</sup> See for further details the status table of the Convention at the Hague Conference website under < [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) > (last consulted 15 May 2013).

<sup>18</sup> The Explanatory Report on the 1980 Hague Child Abduction Convention, drawn up by Elisa Pérez-Vera, available online at < <http://www.hcch.net/upload/expl28.pdf> > (last consulted 15 May 2013).

<sup>19</sup> See for the Convention text and further information on the Convention the Hague Conference website at < [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=131](http://www.hcch.net/index_en.php?act=conventions.text&cid=131) > (last consulted 15 May 2013).

<sup>20</sup> See the Preamble of the Convention, *ibid.*

<sup>21</sup> The *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children* < [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=38](http://www.hcch.net/index_en.php?act=conventions.text&cid=38) > (last

decisions as well as the *UN Convention on the Recovery Abroad of Maintenance of 20 June 1956* (hereinafter “1956 UN Maintenance Convention”).<sup>22</sup> Currently (status 15 May 2013), the 2007 Hague Maintenance Convention has three Contracting States, namely Albania, Bosnia-Herzegovina and Norway.<sup>23</sup> It should be noted that the 2007 Hague Maintenance Convention can be joined by Regional Economic Integration Organisations, such as the European Union, which in accordance with the Convention shall “have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by the Convention”. The European Union has signed the Convention and it is expected that the Convention will come into force for the European Union in the year 2013. A number of other States are currently preparing the implementation of the Convention, including the United States of America, Ukraine and Burkina Faso, all of which have already signed the Convention (status 15 May 2013). See for further information on the 2007 Hague Maintenance Convention the Explanatory Report<sup>24</sup> and the Practical Handbook.<sup>25</sup>

• The *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (hereinafter “2007 Hague Protocol”)<sup>26</sup> – introduces uniform international rules for the determination of the law applicable to maintenance obligations and replaces the existing 1956 and 1973 Hague Conventions<sup>27</sup> on law applicable to maintenance obligations. It introduces a number of important reforms while retaining some of the older instruments general features. As an innovation in international maintenance law, the 2007 Hague Protocol supports party autonomy allowing, under certain conditions, the choice of law applicable to maintenance obligations. The 2007 Hague Convention and the 2007 Hague Protocol were drawn up together but are independent and can be joined separately. Like the 2007 Hague Convention, the 2007 Hague Protocol can be joined by Regional Economic Integration Organisations and the European Union has already in 2010 deposited the necessary approval instrument for the Protocol to enter into force in the European Union with binding force for all EU Member States except Denmark and the United Kingdom. Following a second ratification by Serbia in April 2013, the 2007 Hague Protocol will enter into force on 1 August 2013.<sup>28</sup> It should be noted that following a decision of the European Union, the Protocol is provisionally

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consulted 15 May 2013) and the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* < [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=85](http://www.hcch.net/index_en.php?act=conventions.text&cid=85) > (last consulted 15 May 2013).

<sup>22</sup> See for the Convention text < [http://www.hcch.net/upload/ny\\_conv\\_e.pdf](http://www.hcch.net/upload/ny_conv_e.pdf) > (last consulted 15 May 2013).

<sup>23</sup> See for further details the status table of the Convention at the Hague Conference website under < [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=131](http://www.hcch.net/index_en.php?act=conventions.status&cid=131) > (last consulted 15 May 2013).

<sup>24</sup> The Explanatory Report on the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, drawn up by Alegría Borrás & Jennifer Degeling, with the assistance of William Duncan and Philippe Lortie, available online at < [http://www.hcch.net/index\\_en.php?act=publications.details&pid=4909&dtid=3](http://www.hcch.net/index_en.php?act=publications.details&pid=4909&dtid=3) > (last consulted 15 May 2013).

<sup>25</sup> The Practical Handbook will be available at the Hague Conference’ website as of autumn 2013 under < [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=131](http://www.hcch.net/index_en.php?act=conventions.text&cid=131) > (last consulted 15 May 2013).

<sup>26</sup> See for the Protocol text and further information on the instrument the Hague Conference website at < [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=133](http://www.hcch.net/index_en.php?act=conventions.text&cid=133) > (last consulted 15 May 2013).

<sup>27</sup> *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](http://www.hcch.net/index_en.php?act=conventions.text&cid=37) > (last consulted 15 May 2013) 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](http://www.hcch.net/index_en.php?act=conventions.text&cid=86) > (last consulted 15 May 2013).

<sup>28</sup> See for further details the status table of the Protocol the Hague Conference website at < [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=133](http://www.hcch.net/index_en.php?act=conventions.status&cid=133) > (last consulted 15 May 2013).

already applied in the European Union since 18 June 2011.<sup>29</sup> See for further information on the 2007 Hague Protocol the Explanatory Report.<sup>30</sup>

12. EU-instrument of particular relevance:

- The ***Charter of Fundamental Rights of the European Union*** (2010/C 83/02) (hereinafter EU Charter on Fundamental Rights)<sup>31</sup> – sets forth fundamental personal, civil, political, economic and social rights of European Union citizens and residents. The Charter, originally proclaimed in Nice in December 2000 has, as amended and proclaimed in December 2007, been given binding legal effect in the European Union with the entry into force of the Lisbon Treaty in December 2009.

- The ***Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*** (hereinafter “Brussels II a Regulation”)<sup>32</sup> - unifies in the European Union Member States<sup>33</sup> the rules on jurisdiction and recognition and enforceability of decision and enforceable agreements in the field of parental responsibility and establishes a system of administrative State cooperation through Central Authorities supporting individuals in need of assistance in cross-border family disputes concerning parental responsibility. This Regulation is only applicable in relation between the EU Member States (the Regulation does not apply to Denmark). See also the “Practice Guide for the application of the new Brussels II Regulation”.<sup>34</sup>

- 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*** (hereinafter “European Maintenance Regulation”)<sup>35</sup> – aims to considerably simplify and accelerate the cross-border recovery of maintenance inside the European Union. The Regulation, which is applicable in the EU Member States<sup>36</sup> as of 18 June 2011, establishes a Central Authority cooperation system and introduces uniform rules of jurisdiction as well as an automatic recognition and simplified enforcement of maintenance decisions abolishing the exequatur. It furthermore 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. For further information on the European Maintenance Regulation, see the online European Judicial Atlas<sup>37</sup> of the European Commission.

<sup>29</sup> See < [http://www.hcch.net/index\\_en.php?act=status.comment&csid=1065&disp=type](http://www.hcch.net/index_en.php?act=status.comment&csid=1065&disp=type) > (last consulted 15 May 2013).

<sup>30</sup> The Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, drawn up by Andrea Bonomi, available online at < <http://www.hcch.net/upload/expl39e.pdf> > (last consulted 15 May 2013).

<sup>31</sup> See for the Charter text < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF> > (last consulted 15 May 2013).

<sup>32</sup> Regulation text available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:338:0001:0029:EN:PDF> > (last consulted 15 May 2013).

<sup>33</sup> The Brussels II a Regulation does not apply to Denmark.

<sup>34</sup> The “Practice Guide for the application of the new Brussels II Regulation” in the updated version of 1 June 2005 is available online at < [http://ec.europa.eu/civiljustice/divorce/parental\\_resp\\_ec\\_vdm\\_en.pdf](http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf) > (last consulted 15 May 2013).

<sup>35</sup> Regulation text available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:01:EN:HTML> > (last consulted 15 May 2013).

<sup>36</sup> With some restrictions with regard to Denmark.

<sup>37</sup> The Judicial Atlas can be accessed at < [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm) > (last consulted 15 May 2013).

• The *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* (hereinafter “European Mediation Directive”)<sup>38</sup> – aims to promote the amicable settlement of disputes concerning civil and commercial matters by encouraging the use of mediation and by ensuring “that parties to mediation can rely on a predictable legal framework”.<sup>39</sup> All Member States of the European Union, except Denmark, are bound by the Directive and had to comply with the Directive before 21 May 2011. For national legislation implementing the Directive and further information on the Directive, see the online European Judicial Atlas<sup>40</sup> of the European Commission.

13. Instruments of the greater European region of particular relevance:

• The *Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950* (hereinafter “European Convention on Human Rights”)<sup>41</sup> – sets forth fundamental rights and freedoms, including the right to respect for private and family life, Article 8. To ensure the observance of the State Parties’ engagements, the Convention established the European Court of Human Rights in Strasbourg dealing with individual and inter-State petitions. All 47 Member States of the Council of Europe, including all EU Member States, have signed and ratified this Convention.

• The *European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (hereinafter “European Custody Convention”)<sup>42</sup> - protects custody and access rights in international situations and creates a Central Authority system providing for free, prompt, non-bureaucratic assistance in discovering the whereabouts and restoring custody of wrongfully removed children. This Convention is open for signature by all Council of Europe Member States as well as non-Member States invited to accede to the Convention (see Articles 21, 23). 37 States have currently (status 15 May 2013) ratified the Convention, including all EU Member States except Slovenia. See for further information on the Convention the Explanatory Report.<sup>43</sup>

• The *European Convention on the Exercise of Children's Rights of 25 January 1996* (hereinafter “European Exercise of Children’s Rights Convention”)<sup>44</sup> – aims to protect the best interests of children and promotes the exercise of children’s rights in legal proceedings concerning the child. This Convention is open for signature by all Council of Europe Member States as well as non-Member States that have participated in the Convention’s elaboration. Furthermore, other non-Member States can be invited to accede to the Convention (see Article 22). Currently (status 15 May 2013), 17 States

<sup>38</sup> Directive text available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF> > (last consulted 15 May 2013).

<sup>39</sup> See recital 7 of the Directive.

<sup>40</sup> The Judicial Atlas can be accessed at < [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm) > (last consulted 15 May 2013).

<sup>41</sup> Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm> > (last consulted 15 May 2013).

<sup>42</sup> Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/105.htm> > (last consulted 15 May 2013).

<sup>43</sup> Explanatory Report available at < <http://www.conventions.coe.int/Treaty/en/Reports/Html/105.htm> > (last consulted 15 May 2013).

<sup>44</sup> Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/160.htm> > (last consulted 15 May 2013).

have ratified the Convention, including the following EU Member States: Austria, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Poland and Slovenia. See for further information on the Convention the Explanatory Report.<sup>45</sup>

- The Council of Europe ***Convention on Contact concerning Children of 15 May 2003*** (hereinafter “Council of Europe Contact Convention”)<sup>46</sup> – sets forth general principles to be applied to contact decisions as well as safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact. The Convention aims to establish cooperation between all relevant bodies and authorities and reinforces existing international legal instruments in this field of law. The Convention is open for signature by all Council of Europe Member States and by non-Member States that have participated in its elaboration as well as by invited non-Member States (see Articles 22, 23). Eight States have so far ratified the Convention, including the following EU Member States: Czech Republic and Romania (status 15 May 2013). See for further information on the Convention the Explanatory Report.<sup>47</sup>

- The Council of Europe ***Convention on preventing and combating violence against women and domestic violence of 11 May 2011*** (hereinafter “Council of Europe Combating Domestic Violence Convention”)<sup>48</sup> – aims to protect women against all forms of violence. The Convention creates a legal framework to prevent, prosecute and eliminate violence against women and domestic violence. The Convention needs 10 ratifications to enter into force. The Convention has currently been signed by 25 States and ratified by 4 States: Albania, Montenegro, Portugal and Turkey (status 15 May 2013). See for further information on the Convention the Explanatory Report.<sup>49</sup>

#### 14. Instrument of the African Region of particular relevance:

- ***African Charter on the Rights and Welfare of the Child*** adopted by the Organisation of African Unity on 1 July 1990 (hereinafter “African Charter on Children’s Rights”)<sup>50</sup> – sets forth fundamental principles for the protection of the rights and welfare of children. Among the participating ENPI South Partner Countries, Algeria, Egypt and Libya have signed and ratified the African Charter on Children’s Rights; Tunisia has signed but not yet ratified the Charter (status 15 May 2013).

#### 15. Instrument endorsed by the Council of the Arab Ministers of Justice of particular relevance:

- ***Riyadh Arab Agreement for Judicial Cooperation*** endorsed by the Council of the Arab Ministers of Justice on 6 April 1983 (hereinafter the “Riyadh Agreement for Judicial Cooperation”)<sup>51</sup> – provides for rules on judicial cooperation including rules on

<sup>45</sup> Explanatory Report available at < <http://www.conventions.coe.int/Treaty/en/Reports/Html/160.htm> > (last consulted 15 May 2013).

<sup>46</sup> Convention text available at < <http://www.conventions.coe.int/Treaty/en/Treaties/Html/192.htm> > (last consulted 15 May 2013).

<sup>47</sup> Explanatory Report available at < <http://www.conventions.coe.int/Treaty/en/Reports/Html/192.htm> > (last consulted 15 May 2013).

<sup>48</sup> Convention text available at < <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm> > (last consulted 15 May 2013).

<sup>49</sup> Explanatory Report available at < <http://www.conventions.coe.int/Treaty/EN/Reports/Html/210.htm> > (last consulted 15 May 2013).

<sup>50</sup> 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 15 May 2013).

<sup>51</sup> 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/3ae6b38d8.html> > (last consulted 15 May 2013).

recognition and enforcement of decisions in civil and commercial matters. The agreement is today in force for more than 20 legal systems including the ENPI South Partner Countries: Algeria, Jordan, Lebanon, Morocco, Palestine and Tunisia (status 15 May 2013).

16. Bilateral arrangements of particular relevance:

- **Algeria-France:** *Convention entre le gouvernement de la République Française et le gouvernement de la République Algérienne Démocratique et Populaire relative aux enfants issus de couples mixtes séparés franco-algérien*, Alger, 21 June 1988,<sup>52</sup>
- **Egypt-Australia:** *Agreement between the government of Australia and the Government of the Arab Republic of Egypt regarding cooperation on protection of Children*, Cairo, 22 October 2000,<sup>53</sup>
- **Egypt-Canada:** *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 1997,<sup>54</sup>
- **Egypt-France:** *Convention entre le gouvernement de la République Française et le gouvernement de la République Arabe d’Egypte sur la coopération judiciaire en matière civile, y compris le statut personnel, et en matière sociale, commerciale et administrative*, Paris 15 March 1982,<sup>55</sup>
- **Egypt-Sweden:** *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 1996,<sup>56</sup>
- **Egypt-USA:** *Memorandum of Understanding Between the United States and Egypt concerning parental access to children*, 22 October 2003,<sup>57</sup>
- **Lebanon-Canada:** *Agreement between the government of Canada and the government of the Lebanese Republic regarding cooperation on consular matters of a humanitarian nature*, 2000,<sup>58</sup>
- **Lebanon-France:** *Accord entre le gouvernement de la République Française et le gouvernement de la République Libanaise concernant la coopération en certaines matières familiales*, 2000,<sup>59</sup>
- **Lebanon-Switzerland:** *Accord du 31 octobre 2005 entre la Confédération suisse et la République libanaise concernant la coopération en certaines matières familiales*,<sup>60</sup>
- **Morocco-Belgium:** *Protocole d’accord instituant une commission consultative Belgo-Marocaine en matière civile*, Rabat, 1981,<sup>61</sup>

<sup>52</sup> French text available at < <http://www.hcch.net/upload/2fr-alg.pdf> > (last consulted 15 May 2013).

<sup>53</sup> 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](http://www.hcch.net/upload/2au-eg_a.pdf) > (last consulted 15 May 2013).

<sup>54</sup> English text available at < [http://www.hcch.net/upload/2ca-eg\\_e.pdf](http://www.hcch.net/upload/2ca-eg_e.pdf) >, French text available at < [http://www.hcch.net/upload/2ca-eg\\_f.pdf](http://www.hcch.net/upload/2ca-eg_f.pdf) >, Arabic text available at < [http://www.hcch.net/upload/2ca-eg\\_a.pdf](http://www.hcch.net/upload/2ca-eg_a.pdf) > (last consulted 15 May 2013).

<sup>55</sup> French text available at < [http://www.hcch.net/upload/2fr-eg\\_f.pdf](http://www.hcch.net/upload/2fr-eg_f.pdf) >, Arabic text available at < [http://www.hcch.net/upload/2fr-eg\\_a.pdf](http://www.hcch.net/upload/2fr-eg_a.pdf) > (last consulted 15 May 2013).

<sup>56</sup> English text available at < <http://www.hcch.net/upload/2se-eg.pdf> > (last consulted 15 May 2013).

<sup>57</sup> English text available at < <http://www.state.gov/s/l/2003/44396.htm> > (last consulted 15 May 2013), Arabic text available at < <http://www.hcch.net/upload/2us-eg.pdf> > (last consulted 15 May 2013).

<sup>58</sup> English transcript of the text available at < [http://www.hcch.net/upload/2ca-leb\\_e.pdf](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](http://www.hcch.net/upload/2ca-leb_f.pdf) > (last consulted 15 May 2013).

<sup>59</sup> French transcript of the text available at < [http://www.hcch.net/upload/2fr-leb\\_f.pdf](http://www.hcch.net/upload/2fr-leb_f.pdf) > (last consulted 15 May 2013).

<sup>60</sup> French text available at < <http://www.admin.ch/opc/fr/classified-compilation/20052040/index.html> > (last consulted 15 May 2013), Arabic text available at < [http://www.hcch.net/upload/2ch-leb\\_a.pdf](http://www.hcch.net/upload/2ch-leb_a.pdf) > (last consulted 15 May 2013).

<sup>61</sup> French transcript of the text available at < <http://www.hcch.net/upload/2ma-be.pdf> > (last consulted 15 May 2013).

- **Morocco-France:** *Convention entre le gouvernement de la République Française et le Royaume du Maroc relative au statut des personnes et de la famille et à la coopération judiciaire*, Rabat, 10 August 1981,<sup>62</sup>
- **Morocco-Spain:** *Convention, entre le Royaume du Maroc et le Royaume d'Espagne relative à l'entraide judiciaire, à la reconnaissance et à l'exécution des décisions judiciaires en matière de droit de garde et de droit de visite et au retour des enfants*, Madrid, 30 May 1997,<sup>63</sup>
- **Tunisia-Belgium:** *Protocole d'accord instituant une commission consultative Tuniso-Belge en matière civile*, 1989,<sup>64</sup>
- **Tunisia-France:** *Convention entre le gouvernement de la République Française et le gouvernement de la République Tunisienne relative à l'entraide judiciaire en matière de droit de garde des enfants, de droit de visite et d'obligations alimentaires*, Paris 18 Mars 1982,<sup>65</sup>
- **Tunisia-Sweden:** *Protocole d'accord instituant une commission consultative Tuniso-Suédoise en matière civile*, 1994,<sup>66</sup>

17. Besides the above mentioned international, regional and bilateral instruments and the work undertaken in the context of the Malta Process, the Euromed Justice III Working Group, while developing the Handbook, paid particular attention to Good Practices recommended in the following Guides to Good Practice drawn up by the Hague Conference on Private International Law:

- Guide to Good Practice on Central Authority Practice;<sup>67</sup>
- Guide to Good Practice on Preventive Measures;<sup>68</sup>
- Guide to Good Practice on Transfrontier Contact Concerning Children<sup>69</sup>
- Guide to Good Practice on Enforcement;<sup>70</sup>
- Guide to Good Practice on Mediation.<sup>71</sup>

<sup>62</sup> French text available at the website of the Moroccan Ministry of Justice at < <http://adala.justice.gov.ma/FR/Conventions/ConventionsPays.aspx> > under “France” (last consulted 15 May 2013).

<sup>63</sup> 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 15 May 2013).

<sup>64</sup> French transcript of the text available at < <http://www.hcch.net/upload/2tu-be.pdf> > (last consulted 15 May 2013).

<sup>65</sup> French transcript of the text available at < [http://www.hcch.net/upload/2fr-tu\\_f.pdf](http://www.hcch.net/upload/2fr-tu_f.pdf) > (last consulted 15 May 2013).

<sup>66</sup> French transcript of the text available at < <http://www.hcch.net/upload/2se-tu.pdf> > (last consulted 15 May 2013).

<sup>67</sup> Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice, Jordan Publishing, 2003 (hereinafter “Guide to Good Practice on Central Authority Practice”), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Guides to Good Practice”.

<sup>68</sup> Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures, Jordan Publishing, 2005 (hereinafter “Guide to Good Practice on Preventive Measures”), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Guides to Good Practice”.

<sup>69</sup> General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children, Jordan Publishing, 2008 (hereinafter “Guide to Good Practice on Transfrontier Contact”) available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Guides to Good Practice”.

<sup>70</sup> Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, Jordan Publishing, 2010 (hereinafter “Guide to Good Practice on Enforcement”), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Guides to Good Practice”.

<sup>71</sup> Guide to Good Practice under the Hague Convention of 25 October 1980 on Mediation, 2012 (hereinafter, “Guide to Good Practice on Mediation”), available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Child Abduction Section” then “Guides to Good Practice”.

## HANDBOOK

### **IMPORTANT NOTE ON THE CONTENT OF THIS HANDBOOK**

18. This Handbook sets forth Principles and Good Practices of importance in the resolution of cross-border family disputes taking into account the specifics of the European and non-European Mediterranean region.
19. The content of this Handbook is marked by a spirit of mutual respect of the cultural diversity and the differences between legal traditions in the Euro-Mediterranean region.
20. The Handbook is structured as follows: Each set of Principles and Good Practices is followed by a reflection of the Working Group discussions surrounding the Principles and Good Practices under the heading “Description of the discussions”. Further background information on the relevant subject matters is included under “Background remarks”.
21. The Principles and Good Practices contained in this Handbook are not binding but advisory in nature. States are encouraged to consider implementing these Principles and Good Practices and to use the Handbook as a source of inspiration. It is understood, that due consideration needs to be given to the specifics of each legal system and the different legal traditions when examining how and whether the implementation of certain Principles and Good Practices suggested in this Handbook is feasible in a given State.

## TERMINOLOGY

22. Taking into account the legal and cultural diversity of the Euro-Mediterranean region, some central terms used in this Handbook need to briefly be defined.

### A. Parents' rights and duties towards their children

23. 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 Euro-Mediterranean region do not use a uniform terminology.

#### Parental responsibility:

24. This Handbook 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*".<sup>72</sup> 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 Handbook 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.

25. It should be noted that recent years have brought a change in terminology employed to describe the legal parent-child relationship in many legal system 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

26. 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, rights of custody of a child is 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).

27. 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

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<sup>72</sup> See Article 1(2) of the 1996 Hague Child Protection Convention; see also the similar definition in Article 2(7) of the Brussels II a Regulation.

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 Convention<sup>73</sup> as well as in the Brussels II *a* Regulation.<sup>74</sup>

28. The Handbook 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

29. The term “contact right”<sup>75</sup> is used in this Handbook 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. A central topic of the Handbook is the securing of “parent-child contact”, which serves at the time the protection of the parental right to contact with the child as well as the protection of child’s right to contact with the parent. But the Handbook also makes reference to other persons’ contact rights regarding the child that exist in a number of legal systems. The exact content of the contact right as defined by the law applicable to the family relationship may differ.
30. The Handbook refers to the term “direct contact” with the child as meaning face-to-face contact. In contrast, the Handbook uses the term “indirect contact” to mean contact by way of distance communication or through intermediaries.

### Hadana and Wilaya

31. The Islamic law influenced family legislations in the Mediterranean region distinguishes regarding parents’ rights and duties traditionally between: “**hadana**” and “**wilaya**”.
32. “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 Handbook. 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 different developments.<sup>76</sup> It is therefore always necessary to verify how the relevant family law

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<sup>73</sup> Article 3 *b*) of the 1996 Hague Child Protection Convention.

<sup>74</sup> Article 2(9) of the Brussels II *a* Regulation.

<sup>75</sup> 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”).

<sup>76</sup> 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

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.

33. 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”.

## **B. International wrongful removal or retention of a child**

34. The Handbook 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 II *a* 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”.<sup>77</sup> 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”.<sup>78</sup>

## **C. Mechanisms to bring about an amicable resolution of a dispute**

35. Among the different mechanisms to bring about an amicable resolution of a dispute mentioned in this Handbook, the terms “mediation” and “conciliation” require a brief definition, because these 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 Handbook; *i.e.* these definitions do not represent an attempt to find a common definition of these

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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.

<sup>77</sup> 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 II *a* Regulation.

<sup>78</sup> See Article 2(11) of the Brussels II *a* 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 for the use in the region. This also means that whenever the Handbook 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 “Handbook” definitions.

### **Mediation**

36. For the purposes of the Handbook 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.<sup>79</sup> As used in this Handbook, 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 Handbook employs the term “mediation” to refer to both out-of-court and court-annexed mediation schemes.

### **Conciliation**

37. The terms “mediation” and “conciliation” are sometimes used as synonyms, which can cause confusion. For the purpose of the Handbook, 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 Handbook, 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 Handbook 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.

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<sup>79</sup> This is also how the term “mediation” is defined for the purpose of the Guide to Good Practice on Mediation, *supra* footnote 71.

**I. CUSTODY AND CONTACT - FUNDAMENTAL PRINCIPLES**

**A. Importance of contact with both parents**

- 1. All possible steps should be taken to secure the rights of children to maintain personal relations and direct contact with both parents on a regular basis and the rights of parents to maintain personal relations and direct contact with their children on a regular basis, unless it is established that due to exceptional circumstances such contact is contrary to the best interests of the child.**
- 2. These rights of children and parents must be secured independent of whether the parents and children reside in the same State or in different States.**

*Description of the discussions*

38. All delegations emphasised the importance of securing the rights of children and parents to maintain personal relations and direct contact in both a national and international context. The Working Group in this regard reiterated the obligations under Articles 9 and 10 of the UNCRC.
39. Legal provisions to protect contact rights are in place in all participating jurisdictions, as indicated by the Working Group members.
40. The Working Group emphasised that the facilitation of “direct” personal contact between parents and children was essential and that all steps should be taken to allow for and support such direct contact. At the same time, the Working Group acknowledged that indirect forms of contact, by long distance communication or contact through intermediaries in addition to the direct contact, was often an important additional feature in maintaining a personal relationship. With regard to such indirect contact, several delegations, including the Jordanian delegation, highlighted the benefits of the use of modern technologies, such as the Internet and, in particular, Internet communication means such as skype. They underlined, more specifically, that where the parent and the child would not live in the same State and where direct parent-child contact was only possible at limited periods throughout the year due to the geographical distance, the use of modern technology was crucial to maintain the parent-child contact (see also below Good Practice No. 9 and the description of the discussions under para. 64 regarding the suggestion to make Internet and other means of long-distance communication for parent-child contact available in “family visiting facilities”).
41. The Working Group members emphasised that legal restrictions to direct parent-child contact should only be made where exceptional circumstances resulted in such contact being contrary to the best interests of the child concerned (see further below Good Practices Nos. 3 and 4).
42. The Working Group pointed to the practical difficulties of securing parent-child contact in the situation of a family conflict following or surrounding the parent’s separation or divorce and emphasised the particular challenges which a cross-border context can impose in such a situation. The delegations acknowledged the need for increased

cooperation between States in securing the rights of children and parents to maintain direct contact on a regular basis.

43. It should be noted that several delegations, such as the Jordanian delegation, indicated that in their legal system there was a distinction between “viewing” and “visiting rights”. The Jordanian delegation indicated that “viewing rights” meant a right to see the child for some hours and “visiting rights” by contrast meant a right to have the child stay over night or a whole weekend.
44. Furthermore, several delegations, such as the delegations from Jordan, Morocco, Tunisia and Palestine, indicated that in their legal systems a number of other family members may have or may be granted a right of contact with the child. In some legal systems, family members, other than father and mother of a child, can have or be granted a right to contact in their own right. In other legal systems, such as Morocco,<sup>80</sup> a grandparent can obtain a contact right only in case one of the parents deceases; their contact right then “replaces” that of the deceased parent.

Background remarks

45. The right of children to “maintain personal relations and direct contact with both parents on a regular basis“ is a fundamental principle set forth by Articles 9 and 10 the UNCRC. The same fundamental principle is promoted by Article 19(2) of the African Charter on Children’s Rights and Article 24(3) of the EU Charter on Fundamental Rights. Mirroring this children’s right is the right of parents to maintain personal relations and direct regular contact with their children.<sup>81</sup>
46. These rights are, at the same time, part of the greater “right to family life” as protected by Article 8 of the European Convention on Human Rights.
47. Several international and regional instruments aim to secure parent-child contact in cross-border situations. In the European Union this is in particular the Brussels II *a* Regulation.<sup>82</sup> The Regulation unifies in the European Union Member States<sup>83</sup> the rules on jurisdiction and recognition and enforceability of decision and enforceable agreements in the field of parental responsibility and establishes a system of administrative State cooperation through Central Authorities supporting individuals in need of assistance in cross-border family disputes concerning parental responsibility.
48. At the global level, it is the 1996 Hague Child Protection Convention,<sup>84</sup> which sets up common rules on jurisdiction and recognition and enforcement in the field of parental responsibility and establishes a Central Authority system. In addition to the issues dealt with by the Brussels II *a* Regulation with regard to child protection matters, the 1996 Convention also unifies rules on the law applicable to such matters in the Contracting States.

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<sup>80</sup> See Article 185 of the Moroccan Family Code (Code de la Famille, version consolidée en date du 5 Aout 2010) available online at < <http://adala.justice.gov.ma/production/legislation/fr/Nouveautes/Code%20de%20la%20Famille.pdf> > (last consulted 15 May 2013).

<sup>81</sup> See also Section 1.1 of the Guide to Good Practice on Transfrontier Contact, *supra* footnote 69.

<sup>82</sup> See *supra* footnote 32.

<sup>83</sup> The Brussels II *a* Regulation does not apply to Denmark.

<sup>84</sup> See *supra* footnote 12.

49. Another major international instrument securing parent-child contact is the 1980 Hague Child Abduction Convention.<sup>85</sup> In securing the speedy return of wrongfully removed or retained children to the State of their habitual residence, the Convention safeguards the rights of the child to maintain personal relations and direct contact with both parents. The Convention avoids the establishment of conflicting decisions on custody in the situation of a wrongful removal or retention of a child, by forbidding the courts of the State to which the child was wrongfully removed (or in which the child is wrongfully retained) to take a decision on the merits of custody while return proceedings are ongoing. At the same time, the Central Authority system created by the Convention assists parents in child abduction cases as well as in cross-border contact cases in which no wrongful removal or retention has occurred.
50. Furthermore, at the regional level, two Council of Europe Conventions are of particular importance with regard to securing children's rights to contact with their parents: the European Custody Convention<sup>86</sup> assisting in restoring custody of wrongfully removed children and the Council of Europe Contact Convention,<sup>87</sup> which sets forth general principles for contact decisions as well as safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact.
51. In addition, a number of bilateral instruments in force between some of the ENPI South Partner Countries and some European States assist in securing contact rights.<sup>88</sup>
52. An important reference for Principles and Good Practices in the field of transfrontier contact concerning children is the Guide to Good Practice on Transfrontier Contact<sup>89</sup> prepared by the Hague Conference on Private International Law with the general endorsement of the Special Commission to review the operation of the 1980 Hague Child Abduction Convention and the practical implementation of the 1996 Hague Child Protection Convention. Further important reference documents are the three Malta Declarations<sup>90</sup> elaborated to improve the protection of cross-frontier rights of contact of parents and their children and to find solutions to problems posed by the cross-border wrongful removal or retention.

## **B. Restrictions no more than necessary to protect the best interests of the child**

- 3. Legal restrictions on parent-child contact should not be imposed unless exceptional circumstances make restrictions necessary to protect the best interests of the child.**
- 4. Any such restriction must be proportionate; a complete interdiction of contact between child and parent can only be the last resort.**

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<sup>85</sup> See *supra* footnote 16.

<sup>86</sup> See *supra* footnote 42.

<sup>87</sup> See *supra* footnote 46.

<sup>88</sup> See para. 16 of the Introduction above for relevant bilateral arrangements.

<sup>89</sup> See *supra* footnote 69.

<sup>90</sup> See *supra* footnote 6.

Description of the discussions

53. The Working Group members highlighted that, as a general principle, no legal restrictions to parent-child contact should be imposed unless exceptional circumstances made restrictions necessary to protect the best interests, including the welfare of the child.<sup>91</sup> The Working Group emphasised the importance of proportionality should such restrictions of contact become necessary. Among the different means suitable in the individual case to protect the child, the “mildest” and the one least affecting the continuation of the parent-child relationship should be chosen. Such means may include supervised direct contact or indirect contact by telephone or other long-distance communication *etc.* A complete interdiction of a child’s contact with a parent can only be the last resort and must find its justification in the very exceptional circumstances of the individual case.
54. Several delegations expressed concerns about disproportionate contact restrictions and their harmful effect on the children concerned.<sup>92</sup> The Working Group underlined, that the very fact that a parent resides in a State other than the State of habitual residence of the child cannot by itself justify an interdiction of direct contact. Where the circumstances of an individual case indicate the threat of a wrongful removal of the child, the implementation of certain preventive measures accompanying the direct contact might be necessary. Such measures can include the surrender of passport or travel documents for the duration of the contact, or the supervision of contact by a professional or a family member.<sup>93</sup>

Background remarks

55. The demand that no legal restrictions to parent-child contact be made unless restrictions are necessary to protect the best interests of the child is essential in securing the right to continuing parent-child contact. See also Article 9 of the UNCRC, which provides that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”. This good practice is also endorsed in the Guide to Good Practice on Transfrontier Contact.<sup>94</sup>

C. Contact in child friendly environment

- 5. There should be no restrictions as to where direct contact with the child should take place unless such restrictions are required with regard to the best interests of the child. This means that contact should generally be allowed to take place in a natural environment, such as a parent’s home or another location with which the child is familiar or in which the child feels comfortable.**

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<sup>91</sup> Limits on parental contact may, for example, be indicated where the child’s safety is endangered by domestic violence or abuse.

<sup>92</sup> Concerns were expressed that an unreasonable contact restriction may lead a parent to extreme reactions such as wrongful removal of the child from the State of habitual residence to another State.

<sup>93</sup> See for further details Section 6.3. of the Guide to Good Practice on Transfrontier Contact concerning Children, *supra* footnote 69.

<sup>94</sup> See Section 1.2. of the Guide to Good Practice on Transfrontier Contact concerning Children, *supra* footnote 69.

- 6. An obligation to have contact take place under supervision, for example in a public facility, should only be imposed where necessary to protect the best interests of the child.**
- 7. Should supervised contact in a public facility be necessary, contact should take place in a child friendly environment, such as a location particularly designed for meetings of parents and children.**
- 8. States in which facilities offering a child friendly environment for supervised parent-child contact do not yet exist are encouraged to promote their establishment.**
- 9. In addition, States should give due consideration to the idea of establishing voluntarily usable “family meeting facilities” offering a child friendly environment for contact visits with children. Particularly in family cases where practical difficulties in organising the contact are induced by the unavailability of an appropriate location for the contact, such “family meeting facilities” would be a valuable alternative. Such “family meeting facilities” could also be equipped with technical support for long-distance contact by telephone or Internet.**

*Description of the discussions*

56. The Working Group members unanimously emphasised the importance of contact taking place in a child friendly environment, *i.e.* an environment in which children are likely to feel well.
57. All delegations highlighted that the question of where a contact-visit will take place should generally be left to the individuals involved to decide in accordance with the circumstances. There was a consensus among the delegations that the courts should only intervene with ordering restrictions regarding the contact location where necessary in the best interests of the child. This demand is in line with the Good Practices Nos. 3 and 4 above.
58. In particular, that contact be supervised should only be ordered where required to protect the child. For cases in which a supervision of contact with the child in a public facility is necessary, the Working Group considered it of high importance that contact should take place in a child friendly environment. Ideally, this contact should take place in a facility particularly established and equipped (for example with toys) for contact visits with children.
59. The Jordanian delegation highlighted that, where a court would be seized to determine or refine a contact arrangement, the court needs to take into consideration also the interests of the parents. The Jordanian delegation stated, that for example, when a court is deciding on the terms of contact between the non-custodial parent and the child, the court should in addition also protect the rights of the custodial parent, whether this is the father or the mother.
60. Some delegations, including the delegations from Jordan and Morocco, indicated that in their States so called “visiting centres” for supervised contact exist. Other delegations, such as the Algerian and Tunisian delegations, indicated that they currently do not have

any such facilities, but indicated that the establishment of such facilities was desirable, since contact taking place in a police station or courtroom would often not provide an appropriate setting.

61. The Working Group further discussed the desirability of establishing facilities for visits with children, which could be used on a voluntary basis, *i.e.* on the initiative of the individuals involved. Several delegations indicated that the existence of such facilities would be extremely helpful. The Working Group discussed examples of cases in which practical difficulties in organising the contact arose due to the lack of an appropriate visiting location. One delegation referred to cases of parental visits with young infants of 2 or 3 years where the only place available for the visit was the apartment of the parent with whom the child was living - a setting, which bears further potential for conflict between the separated parents. Also cases, in which the visiting parent is living in a different city or country and is travelling to the place of the child's residence to exercise his or her contact rights were identified as cases in which finding an appropriate location for the contact could pose difficulties. Here the availability of meeting facilities usable on a voluntary basis would be particularly helpful.
62. The question of an appropriate name for such a voluntarily usable facility was discussed at some length. The Working Group highlighted that since the whole idea of establishing a voluntarily usable facility was that people would feel well with the idea of using them, choosing a neutral name would be important. The term visiting "centre" was considered inappropriate, since in the States in which "visiting centres" existed their usage was connected with supervised contact particularly in grave risk cases. Generally, any term containing the word "centre" was considered disadvantageous by several delegations, since it implied State supervision facilities and the delegates considered that families would refrain from frequenting any facility that was to give the impression something was severely wrong in their family relationship.
63. For the purpose of this Handbook the term "family meeting facilities" will be used as an attempt of a neutral description of such facilities.
64. In the course of the discussions the idea of "family meeting facilities" further evolved. Besides the essential provision of a child friendly environment for contact visits with children, further possible details of organisation were discussed. It was suggested that such a "family meeting facility" could employ social workers and could be connected with other services such as services for alternative disputes resolution by mediation or similar means. Furthermore, it was considered a valuable idea to use such "family meeting facilities" also to support families in arranging long-distance contact besides direct contact. For example, where direct contact between child and parent can only take place a few times a year due to the great geographical distance between their residences, additional long distance contact by telephone or Internet is essential in maintaining a regular contact. Where the child does not have access to the Internet or a landline telephone to be contacted at, it would be of considerable assistance if a "family meeting facility" could provide such technical support for long-distance communication.
65. The existence of structures in each State supporting the exercise of cross-border parent-child contact through facilitation of child-friendly environment for in-person visits and also available means for long-distance communication would be of great assistance. It might even be considered that such "family meeting facilities" could facilitate the hosting of a foreign parent for the period of his or her visit for an affordable price. The

Jordanian delegation explained, that in Jordan three shelters existed, which could be used by visiting parents. The Jordanian delegation explained that the parents staying at the shelter would be assisted in arranging for the parent-child visits, *inter alia*, by the embassies. (See regarding the collection and the making available of relevant information on structures assisting in cross-border family cases the Good Practices on the establishment of a Central Contact Point Nos. 33 *et seq.*)

Background remarks

66. The need for facilities for family contact has already been acknowledged in the first Malta Declaration, where States were requested to give consideration to the „establishment of contact centres“.<sup>95</sup> Following the very detailed discussion of the Working Group, this idea has been further developed.

**D. Securing transfrontier exercise of parental responsibility - Facilitation of visas and other travel documents**

- 10. States should take all appropriate measures to secure transfrontier parent-child contact and the transfrontier exercise of parental responsibility.**
- 11. States should, in particular, take all appropriate steps to facilitate the swift provision of necessary travel documents, such as visas, to ensure that parents and children residing in different States can maintain personal relations and direct contact on a regular basis.**
- 12. Visa procedures should be non-bureaucratic, simple, swift and transparent.**
- 13. Parents wishing to visit their minor children abroad should have privileged access to visas.**
- 14. Visa renewals for such parent-child visits should be granted in a non-bureaucratic, simplified and speedy way. Ideally, States should offer the possibility of issuing visas within 24 hours.**
- 15. States should provide administrative support assisting parents with applications for the purpose of such parent-child visits.**
- 16. States should within their Foreign Ministry or within their embassies or consulates abroad appoint a contact person for visa-matters and transmit the contact details of this person to the host States, who should then make this information available to their respective Central Contact Points (see Good Practices Nos. 33 *et seq.*) or other bodies assisting parents in cross-border family cases.**

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<sup>95</sup> See First Malta Declaration, recommendation 9, *supra* footnote 6.

**17. States should cooperate with each other to improve processes surrounding the issuance of travel-documents, such as visas. At the same time, States should implement legal framework guaranteeing cooperation between relevant authorities within their State to efficiently secure transfrontier parent-child contact and the transfrontier exercise of parental responsibility.**

*Description of the discussions*

67. The Working Group underlined that in cases where a parent and his or her child reside in different States, the feasibility of transfrontier contact and, seen from the parent's point of view more generally, the transfrontier exercise of parental responsibility depends to a great extent on States not imposing insurmountable travel restrictions.
68. The Working Group unanimously highlighted the crucial importance of efficient and speedy access to the necessary travel documents, such as visas. The discussions returned on various occasions to this subject. It was emphasised that lengthy and cumbersome procedures to acquire necessary travel documents constitute a major obstacle to cross-border contact between a parent and his or her child living in different States.
69. Several delegations expressed their discontent with the current situation regarding visa procedures and stated that, in particular, with regard to visa applications for the purpose of cross-border parent-child visits, reforms were urgently needed. The Algerian delegation highlighted the importance of giving parents who wish to visit their minor child abroad a privileged access to necessary travel documents in order to better protect the child's right to direct contact and maintaining a continuing relationship with both parents. According to the report of the Algerian delegation, a father applying for a visa to visit his minor child abroad would fall within the broad category "visa application for family visit" and would be treated as any other family member applying for a family visit, which, as the Algerian delegation highlighted, is an inappropriate treatment.
70. Besides the complaint about a lacking privileged category of visa applications for parent-child visits, the Working Group also expressed their discontent about lengthy, bureaucratic and intransparent procedures. It was highlighted, that in transfrontier family situations, where one parent was residing in a State other than that of the child's habitual residence, safeguarding the child's right to maintain personal relations and direct contact with both parents meant that parents need to be supported more efficiently in the process of acquiring necessary travel-documents. The Moroccan delegation highlighted that parents should receive administrative assistance in the filling of visa applications. The Jordanian delegation underlined that States should in their embassies and consulates abroad appoint a contact person for visa matters, whose contact details should be made known to the host States, for example, through the Ministry of Justice. Alternatively, States could appoint a contact person for visa matters in their Ministry of Foreign Affairs. In the host State, the information on the contact person should then be shared with relevant bodies assisting parents in cross-border family cases, such as a Central Contact Point (see Good Practices Nos. 33 *et seq.*). The Jordanian delegation explained that for example, the French embassy in Amman had appointed a French judge working at the embassy as contact point for visa matter and that this would be extremely helpful. The Working Group also highlighted that parents in need of a renewal of a visa for a parent-child visit should not be forced to undergo the same visa-application procedure as when first applying but that a renewal should be granted in a speedy and non-

bureaucratic way. The Jordanian delegation called for making available visas within a 24-hour period. The Jordanian delegation explained that for visas for travels from Jordan to the United States of America a “single entry” visa was obtainable within 24 hours.

71. The Working Group emphasised the importance of cooperation between States to extinguish obstacles to the transfrontier exercise of parent-child contact.
72. At the same time, the discussions surrounding the issuing of travel documents, such as visas, revealed the widespread perception among the experts in the Working Group that in practice the different authorities of individual States were not sufficiently linked to guarantee an effective cooperation. Several delegations referred to the significance of improving interaction between judicial authorities deciding on the civil aspects of a cross-border family cases and the authorities responsible for deciding on an entry visa for a parent involved in the conflict. The Working Group members drew attention to the fact that a defective interaction could in individual cases lead to the inability of a parent to attend relevant proceedings and could pose a major obstacle to the implementation of a court decision on transfrontier contact with a child. A number of delegations knew of concrete examples where court orders regarding matters of parental responsibility could not be complied with and implemented due to visa problems. There was agreement in the Working Group that this was insupportable and that States would have to develop strategies to secure that what had been ordered by a civil court with a view to protecting transfrontier parent-child contact would not be hampered by cumbersome visa processes put in place and operated by other authorities of that same State.

*Background remarks*

73. The speedy provision of necessary travel documents is crucial in supporting the transfrontier exercise of contact between a parent and a child residing in different States. The discussions in the course of the “Malta Process” (see above para. 7) have shown that in practice the provision of necessary travel documents and in particular, the issuing of visas, continues to be cause of major concern. All three Malta Declarations take up this subject and call for an improvement of the situation.<sup>96</sup> Also the UNCRC underlines the importance of this matter: With a view to securing the right of the child to direct contact with both parents Article 10 (1) of the UNCRC states that: “[...] applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. [...]”

**E. Best interests of the child – a primary consideration in decisions concerning parental responsibility**

**18. In decisions concerning parental responsibilities, including custody and contact rights, the best interests of the child should be a primary consideration.**

*Description of the discussions*

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<sup>96</sup> See Recommendation 11 of the Third Malta Declaration; see Recommendation 8 of the Second Malta Declaration; see Recommendation 9 of the First Malta Declaration, *supra* footnote 6.

74. The Working Group acknowledged the importance of making the best interests of the child a primary consideration in all actions concerning children and reiterated the relevant obligations under Article 3 of the UNCRC. All delegations reported that in their respective jurisdictions courts give consideration to the best interests of the child when deciding on matters of parental responsibility. In some States, such as Tunisia<sup>97</sup>, the term “interests of the child” is expressly referred to in the relevant family law provisions, as the criterion in accordance with which a court decision in the field of parental responsibility has to be made. In other States, as the Working Group participants reported, the consideration of the child’s best interests comes in particular into play when deciding of whether to deviate, in view of the circumstance of the individual case, from a certain general rule, such as, for example, a provision generally granting the “hadana”<sup>98</sup> of a child to the mother up to a certain age of the child.
75. As to the definition of the term “best interests of the child” the discussions in the Working Group have shown a certain number of commonalities and differences. According to the Working Group, none of the States represented has an express legal definition of the term “best interests of the child”.
76. Referring to their State’s jurisprudence, the delegations indicated a number of matters considered important by courts in defining what is in the best interests of the child. Common factors of consideration are: the health and welfare of the child, the child’s education and environment. Some delegations, such as the Israeli delegation, highlighted the importance of considering the child’s feelings and views and the relationship with the parents as matters of importance. Many delegations reported that in their jurisdiction, religion plays an important role when determining the child’s best interests. However, the discussions have shown, that the weight, which is given to religious aspects in deciding what is in the best interests of the child, differs from jurisdiction to jurisdiction. Several Working Group members explained that in their jurisdiction it is considered important that the religious education of the child can be guaranteed (see also below para. 250).

Background remarks

77. Good Practice No 18 reiterates a major principle included in Article 3 UNCRC<sup>99</sup>, which calls for making the child’s best interests “a primary consideration” in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. This fundamental principle is equally included in the African Charter on Children’s Right<sup>100</sup> and the EU Charter on Fundamental Rights.<sup>101</sup>

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<sup>97</sup> See for example Article 67 of the Tunisian Personal Status Law (Code du Statut personnel, du 13 août 1956, modifié par la loi n°93.74 du 12 juillet 1993) available online at < [http://www.e-justice.tn/fileadmin/fichiers\\_site\\_francais/codes\\_juridiques/Statut\\_personel\\_Fr.pdf](http://www.e-justice.tn/fileadmin/fichiers_site_francais/codes_juridiques/Statut_personel_Fr.pdf) > (last consulted 15 May 2013).

<sup>98</sup> See the Terminology section *supra* paras. 32 and 33.

<sup>99</sup> See Articles 9(3) and 10(2) UNCRC.

<sup>100</sup> See Article 4 of the African Charter on Children’s Rights.

<sup>101</sup> See Article 24(2) of the EU Charter on Fundamental Rights.

**F. Encouraging and supporting of agreements regarding matters of parental responsibility**

**19. When seized with matters of parental responsibility courts should encourage agreed solutions.**

**20. When deciding on matters of parental responsibility courts, as far as feasible and appropriate, should support and respect agreed solutions suggested by the parents of the child concerned, unless it is established that the agreed solution is contrary to the best interests of the child or otherwise in conflict with the law. Where the agreed solution suggested by the parents does not address all the necessary details or where there are other reasons for the court to believe that a modification of the agreement is necessary to reach a sustainable solution of the conflict, the court should, as far as feasible, consider the parent's wishes regarding a modification of or addition to the agreement when drafting the decision.**

*Description of the discussions*

78. The Working Group highlighted the importance of promoting amicable solutions in international, and equally in national family disputes concerning custody and contact. Acknowledging the importance of promoting agreed solution, a separate Chapter of this Handbook it dedicated to this matter, see Chapter X below.

79. All delegations indicated that in their legal systems mechanisms exist to promote amicable resolutions of family conflicts. In most of these legal systems it is, according to the Working Group reports, conciliation rather than mediation that is available to assist in finding an amicable resolution to a family conflict. Only few delegations, such as the Israeli, Lebanese and Palestinian delegations, referred to the availability of mediation in family disputes (the Palestinian delegation referred to social mediation being available besides the possibility of conciliation). See for further details also para. 293 below.

80. Several delegations, such as the Algerian, Jordanian, Moroccan and Tunisian delegations, indicated that in divorce proceedings an attempt of conciliation is mandatory in their State: A judge seized with divorce proceedings is obliged to initiate a conciliation procedure, for which a period of two months (Morocco) or three months (Jordan) is set aside. In some States, for example Morocco, there is a possibility that additional persons, such as a family member of the husband's family and a family member of the wife's family or a religious leader, can be asked to participate in the conciliation process. Certain delegations explained that the conciliation process in the context of divorce has in their legal system the main objective of avoiding the divorce and to lead to "reconciliation" of the spouses. However, should a reconciliation fail, the conciliation process may still provide a good basis for an agreed solution for post-divorce custody and contact arrangements. Some delegations indicated that in their legal system, the "conciliation report" can become enforceable (Algeria) and have the same effect as a judgement (Jordan).

81. The Working Group members unanimously highlighted the importance of supporting parental agreements on custody and contact. All delegations indicated that their judicial authorities would when deciding on matters of parental responsibility, were feasible, respect the agreed solution of the conflict found by the parties unless the relevant

agreement was contrary to the best interests of the child or otherwise in conflict with the law. However, it was highlighted that the judicial or administrative authorities requested to approve a parental agreement in a cross-border family case should, in the interest of a sustainable conflict resolution, assist the parties in further refining their agreement where necessary for it to be workable (“reality check”). Further clarification or elaboration could, for example, be necessary where the parents present the judge with an agreement on a cross-border contact arrangement, which does not address the question of travel-expenses.

Background remarks

82. As recognised in many States, in family disputes over custody and contact, amicable disputes resolution is particularly advantageous with a view to enabling parents to cooperate with each other on a continuing basis in the interest of their child. Encouraging and supporting parental agreement on matters of parental responsibility following the couple’s separation or divorce, assists in securing the “child’s right to maintain on a regular basis [...] personal relations and direct contacts with both parents” as set forth by the UNCRC. In international family disputes, in addition, sometimes the lacking applicability of relevant international legal framework, can lead to situations, where the resolution of a dispute by agreement is the only recourse.
83. Several international and regional instruments encourage amicable dispute resolution in international family disputes. These instruments include:
- the Brussels II *a* Regulation,<sup>102</sup>
  - the 1996 Hague Child Protection Convention,<sup>103</sup>
  - the 1980 Hague Child Abduction Convention,<sup>104</sup>
  - the Council of Europe Contact Convention<sup>105</sup> and
  - the European Exercise of Children’s Rights Convention.<sup>106</sup>
84. Furthermore, several bilateral instruments in force between some of the ENPI South Partner Countries and some European States are based on the idea of promoting an amicable resolution of cross-border family disputes.
85. The Guide to Good Practice on Mediation<sup>107</sup> drawn up by the Hague Conference on Private International Law deals with the specific challenges of the use of mediation and other amicable dispute resolution mechanisms in cross-border family disputes. Although drawn up with a focus on mediation in international child abduction cases falling within the scope of the 1980 Hague Child Abduction Convention, the Guide contains many good practices equally applicable to the amicable dispute resolution of cross-border family disputes in general.

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<sup>102</sup> See *supra* footnote 32.

<sup>103</sup> See *supra* footnote 12.

<sup>104</sup> See *supra* footnote 16.

<sup>105</sup> See *supra* footnote 46.

<sup>106</sup> See *supra* footnote 44.

<sup>107</sup> See *supra* footnote 71.

**G. Opportunity to know and respect the cultures and traditions of both parents**

**21. Children should be given the opportunity to learn to know and respect the cultures and traditions of both parents.**

**22. In the case of a separation or divorce, parents should be encouraged to continue educating their children in a way that allows them to stay in connection with both parents' cultures and traditions. This includes allowing children to continue developing language skills in both parents' languages.**

*Description of the discussions*

86. Many delegations emphasised that in family law the child's education is in general a matter of parental decisions with which the State will not interfere. Therefore, in families with mixed cultural backgrounds, including mixed religious backgrounds, it is generally up to the parents to educate their child in a way, which is in harmony with their values and traditions. The Working Group noted that problems arise in particular in the case of a separation or divorce of a couple with different cultural and religious backgrounds. Suddenly, religious and other cultural matters may become a "battlefield". The Working Group considered it important to raise the parents' awareness of that their children need to be given the opportunity to continue to stay in touch with the cultures and traditions of both parents. Where the parents speak different mother tongues and have so far educated the child in the two languages, a continuing education in the two languages should be encouraged.

*Background remarks*

87. The importance of giving children an opportunity to get acquainted with and to learn to respect both parents' cultures and traditions has already been acknowledged in first Malta Declaration.<sup>108</sup> This is in line with the UNCRC, which requests that a child's education should be directed towards the "development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own".<sup>109</sup>

**II. HEARING THE VOICE OF THE CHILD – CHILDREN'S PROCEDURAL RIGHTS**

**23. States should take all appropriate measures to secure that children of sufficient age and maturity are given the opportunity to express their views freely in all matters affecting them.**

**24. In particular, in all proceedings concerning custody and contact as well as other matters of parental responsibility children of sufficient age and maturity should be given an opportunity to be heard. This includes both purely national and international family law cases.**

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<sup>108</sup> See First Malta Declaration, recommendation 1c), *supra* footnote 6.

<sup>109</sup> See Article 29 UNCRC.

- 25. In cross-border family cases, in which a decision on matters affecting the child needs to be rendered in a State other than the State in which the child is currently present, measures to inquire into the views of children of sufficient age and maturity might include the use of judicial cooperation through judicial networks as well as adequate use of long-distance communication.**
- 26. The views of children should be given due weight in accordance with the children's age and maturity.**
- 27. The views of children of sufficient age and maturity should also be taken into consideration in processes of amicable dispute resolution.**
- 28. As concerns the way the child's views are heard in the course of proceedings, procedural rules might favour a direct hearing of the child by the judge or a hearing through an intermediary, such as the child's representative or an expert appointed to interview the child. In any case, the hearing of the child should be conducted in a child-friendly environment, in a way that the child can express him- or herself freely and in a manner that assures that the interview does not have harmful effects on the child.**
- 29. Children of sufficient age and maturity should, in case of ongoing proceedings affecting them, have a right to receive information about the proceedings, the possible consequences of the proceedings and about the children's rights.**
- 30. It is desirable that the person interviewing the child should have received appropriate training or be experienced in interviewing children and should shield the child from the burden of decision making.**

*Description of the discussions*

88. The Working Group acknowledged the importance of giving children, who are of sufficient age and maturity to form their own views, the opportunity to be heard in matters affecting them, such as matters that relate to custody and contact. The Working Group in this regard reiterated the obligations under Article 12 of the UNCRC.<sup>110</sup>
89. The Working Group members reported on the current practice in their States concerning the hearing of children in legal proceedings related to matters of parental responsibility. Several delegations reported that their States' laws provide for the hearing of children of sufficient age and maturity when deciding on the child's residence in the course of custody proceedings. The Moroccan and Egyptian delegations reported that in accordance with their family laws, a child of 15 years of age or older would have to be asked in custody proceedings with which parent he or she preferred to live. The Moroccan delegation further explained that beyond this explicit legal obligation, it was up to the judge to decide in proceedings affecting the child whether or not to hear the child. The Tunisian delegation stated that the Tunisian law did not stipulate a clear age limit for hearing the child and that it was up to the discretion of the judge whether to consider the child mature enough to be heard or not. The Tunisian delegation further

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<sup>110</sup> See below under background remarks para. 100.

highlighted, that should a child insist on being heard, the judge would not reject this request. The Tunisian delegation mentioned in this regard a case of an 8-year-old girl insisting to be heard. The Tunisian delegation, however, stated that in Tunisia in general children would more regularly be heard as of the age of 14 or 15 years. The Lebanese delegation explained that the situation in Lebanon was similar to that in Morocco and Tunisia and that also in Lebanon the hearing of children at an early age was possible. The Israeli delegation highlighted that in their State matters of parental responsibility fell equally under the jurisdiction of religious and civil family courts and explained that in proceedings concerning custody and contact the voice of the child would be heard and the wishes of the child considered in accordance with the child's age and maturity. The Jordanian delegation reported that in Jordan children of the age of 13 years would generally be considered old and mature enough to form their own views.

90. A number of delegations were concerned about possible negative effects a hearing of the child might have on the wellbeing of the child. The Moroccan delegation highlighted that hearing a child was a very delicate matter and that this could bear certain risks for the wellbeing of the child if the hearing was conducted in an inappropriate way. The Working Group underlined that it was important to hear the child in a child-friendly environment, *i.e.* in an environment where the child can feel well. There was agreement, that interviewing the child in the course of a regular court hearing in the court room would be intimidating and inappropriate, in particular, if the interview was conducted in the presence of the parents. Several delegations pointed out that it was in the responsibility of the judge to choose the appropriate setting for the hearing of the child.
91. The Working Group exchanged in some detail on the options available for hearing the voice of the child in their jurisdictions. The Tunisian delegation reported that in Tunisia, the judge would often hear the child directly, but also had the possibility to request an interview of the child by a psychologist or social worker. Similarly, the Egyptian and Moroccan delegations stated that it was within the discretionary powers of the judge to hear the child directly or to ask for the support of a psychologist to interview the child. Also the Lebanese delegation explained that in Lebanon, the hearing of the child would not necessarily be conducted directly by the judge and that the judge could ask for a social report to be made or request a psychologist to hear the child. The Lebanese delegation reported on the practice in Lebanon of drawing up a social report including inquiries into the child's habitual environment in custody proceedings and suggested to make such reports obligatory. Several delegations reported that the hearing of the child's views through the mother or father was also an option. The Israeli delegation explained that similarly to the situation in a number of other States, in Israel it was within the judges' discretionary powers to decide how the child should be heard and children would regularly be heard with the assistance of the so-called "support units" of the family courts run by social workers. The Israeli delegation explained that in Israel recent legislation had given more emphasis to the importance of considering the child's view in custody and contact proceedings. The Israeli delegation also drew attention to a recent pilot project in the family court of Jerusalem with the aim of assessing whether children of an age younger than 15 years should more regularly be heard and whether the direct hearing or the hearing through intermediaries was to be favoured. The Israeli delegation further highlighted that in Israel it was also common practice in custody and visitation cases to draw up a social report following a home visit and including interviews with the parents and other related persons.

92. All delegations underlined that the direct hearing of the child by the judge would always take place “in camera” and never in the presence of the parents in order to avoid a conflict of loyalty for the child during the hearing. In many instances the judge would hear the child alone, or sometimes in the presence of a psychologist, social worker or court clerk.
93. The Working Group acknowledged that it was important that the hearing of the child - be it by the judge or an intermediary - would be conducted in a manner that would not be harmful to the child. In particular, it was understood, that the child should be freed from any decision-making pressure. It was noted that the person interviewing the child should explain to the child that while his or her views would be taken into consideration, the final decision was that of the judge. Several delegations highlighted that even where their States’ laws<sup>111</sup> stipulated that as of a certain age the child has the right to choose whether the father or the mother should be granted the “hadana”<sup>112</sup>, it was ultimately up to the judge to render a decision that was compatible with the best interests of the child. The delegations reported that in the course of the child’s hearing, the child would be informed that the judge, while giving due consideration to the child’s wishes, was the one responsible for the decision. It was noted that appropriate training and experience of the person(s) interviewing the child was important. Several delegations, including the Egyptian, Moroccan and Tunisian delegations, highlighted that matters relating to parental responsibility are in their countries dealt with by specialised family judges experienced in arranging for the direct or indirect hearing of a child in an appropriate way.
94. The Working Group further considered the specifics of cross-border family disputes, which sometimes can bring about a situation where, at the time the proceedings affecting the child are ongoing, the child is not present in the State of proceedings. There was agreement that hearing the voice of the child was equally important in cross-border family disputes. The Working Group underlined that use should be made of all appropriate measures to introduce into the proceedings the views of the children of sufficient age and maturity. The Working Group noted that use could be made of judicial networks and other structures of cooperation that would assist in obtaining possible social or other reports on the hearing of the child from the other State. Hearing the child through video-conferencing facilities was also considered an option, however, the Working Group highlighted that the above-mentioned conditions for the setting of a hearing of the child would have to be fulfilled to protect the child from harm. The Israeli delegation expressed their concerns as to whether in the already stressful situation of being interviewed a child would feel comfortable to talk to a person on a screen. Several delegations, including the Lebanese, Jordanian, Moroccan and Tunisian delegations, reported that in their States, judges were free to use all means necessary to render a decision in the best interests of the child, which could include the use of information technology, video-conferencing, communication with courts of another State by email or letter, as well as making use of a foreign social report and reports on an interview with the child. The Moroccan delegation highlighted that the principle, that the judge could make use of all appropriate means derived from the Shariah.
95. The Working Group emphasised that due consideration should be given to the child’s wishes in accordance with the child’s age and maturity in proceedings affecting the

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<sup>111</sup> See, for example, Article 166(2) of the Moroccan Family Code (Code de la Famille), *supra* footnote 80.

<sup>112</sup> See the Terminology section *supra* paras. 32 and 33.

child. The delegations, however, highlighted that it was the responsibility of the judge to explore whether the views expressed by the child were the child's own views or rather the reflection of parental influence and that it was up to the judge to consider, taking into account all the necessary circumstances, whether the child's wishes were compatible with the child's best interests in the individual case.

96. Several delegations, including the Egyptian and Jordanian delegations, highlighted the possible positive effects of introducing children's views in legal proceedings and reported from their own experiences as judges that the child would often be the positive element, which made parents arrive at an amicable resolution of the dispute. The Working Group acknowledged that in the course of conciliation and similar processes the views of the child would therefore also play a considerable role. It was noted that the views of children of sufficient age and maturity should generally also be taken into consideration in processes of amicable dispute resolution.
97. The Working Group discussed the possibility of providing for separate legal representation of the child in high conflict family cases, such as high conflict international child abduction cases. Very few delegations indicated that a possibility for a separate legal representation of the child currently existed in their legal system. The Israeli delegation reported that in their legal system it was possible to appoint a so-called "legal guardian" for the child for the purpose of a court proceeding in cases where the child was not mature enough to be heard directly and where the court considered that due to the circumstances of the case the parents were not capable of introducing the child's voice into the proceedings. The Israeli delegation explained that the "legal guardian" talks to the child, makes inquiries into the child's habitual environment, *i.e.* talks to the teachers *etc.* and will in the course of the court proceedings communicate the child's views and assist the court in assessing what is in the best interests of the child. The Egyptian delegation explained that there would not be an exact equivalent in their legal system but that children of 15 years of age and older would, in court proceedings affecting them, have the right to be represented separately by an advocate. Apart from that, the Egyptian delegation highlighted that other effective protection mechanisms would secure that children would never be left alone in the course of proceedings affecting them but would receive assistance through social workers or psychologists, who would raise the court's awareness to the child's needs. Equally, other delegations, in whose legal system the appointing of a separate legal representative of the child was currently not an option, reported on other protection mechanisms for children's rights in the course of proceedings. These included, according to the reports of the Working Group, in a number of States an active role of the prosecutor in civil proceedings affecting the child with a view to protecting the child's best interests. In some States, such as Morocco and Tunisia, the prosecutor can attend the proceedings and can appeal a decision he or she considers against the best interests of the child. In other legal systems, such as Egypt, the prosecutor can provide a written opinion but does not participate in the court hearings.
98. The Working Group acknowledged that a child of sufficient age and maturity should have access to information about the proceedings affecting him or her as well as information about the possible consequences of these proceedings and about his or her rights with regard to the proceedings. It was noted that regularly the child would receive the relevant information in the course of being heard either directly by the judge or through the intermediary interviewing the child.

*Background remarks*

99. When it comes to international and regional instruments promoting the child's right to be heard and children's procedural rights in matters affecting the child, the following aspects can be distinguished: (1) the right of the child of sufficient age and maturity to express his or her views, feelings and wishes; (2) the right of the child of sufficient age and maturity to have his or her views taken into consideration in matters affecting the child; (3) the right of the child of sufficient age and maturity to be informed about ongoing proceedings concerning the child and his or her rights; (4) the right to separate representation.
100. The rights of children to have their views heard and to have their views taken into consideration in accordance with their age and maturity in matters affecting them, are provided by Article 12 of the UNCRC, which states:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.  
2. For this purpose, the child shall in particular be provided the 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.”

101. A number of further multilateral and regional instruments underpin and further elaborate children's procedural rights. The European Exercise of Children's Rights Convention, which promotes the rights of the children, in particular in family proceedings before judicial authorities, supports all of the above mentioned four aspects of children's procedural rights, see Article 3, 4, 5, 6, 9 and 10 of the European Exercise of Children's Rights Convention:

**Article 3 – Right to be informed and to express his or her views in proceedings**

“A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

- a to receive all relevant information;
- b to be consulted and express his or her views;
- c to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

**Article 6 – Decision-making process**

In proceedings affecting a child, the judicial authority, before taking a decision, shall:  
a consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities;

- b in a case where the child is considered by internal law as having sufficient understanding:
- ensure that the child has received all relevant information;
  - consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;
  - allow the child to express his or her views;

c give due weight to the views expressed by the child.”

102. With regard to a separate representation of the child, the European Exercise of Children’s Rights Convention states:

“Article 4 – **Right to apply for the appointment of a special representative**

1 Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.

2 States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.

Article 5 – **Other possible procedural rights**

Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular:

a the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;

b the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;

c the right to appoint their own representative;

d the right to exercise some or all of the rights of parties to such proceedings.

Article 9 – **Appointment of a representative**

In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings.

Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.

**Role of representatives**

Article 10

In the case of proceedings before a judicial authority affecting a child the representative shall, unless this would be manifestly contrary to the best interests of the child:

a provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;

b provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative;

c determine the views of the child and present these views to the judicial authority.

Parties shall consider extending the provisions of paragraph 1 to the holders of parental responsibilities.”

103. The right of the child to be heard and to have his or her views considered is furthermore supported by the following multilateral and regional instruments in the field

of international family law: the Brussels II *a* Regulation,<sup>113</sup> the 1996 Hague Child Protection Convention<sup>114</sup> and the 1980 Hague Child Abduction Convention.<sup>115</sup>

104. Furthermore, it should be noted that the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention at its Sixth Meeting in June 2011 further emphasised the importance of hearing the child's views by concluding:

“50. 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.

51. The Special Commission notes that an increasing number of States provide for the possibility of separate legal representation of a child in abduction cases.”<sup>116</sup>

105. Already, the 2001 Special Commission to review the operation of the 1980 Hague Child Abduction Convention noted that it was “desirable that the person interviewing the child should be properly trained or experienced and should shield the child from the burden of decision-making.”<sup>117</sup>

106. Finally, it should be noted that hearing the child's views and giving weight to the child's wishes in accordance with the child's age and maturity as well as informing the child are matters to which due attention is given when it comes to solving family disputes by means of mediation and similar amicable dispute resolution mechanisms. The Committee on the Rights of the Child stated in its 2009 General Comment regarding the effective implementation of the right of the child to be heard under Article 12 UNCRC that the right “to be heard in any judicial and administrative proceedings affecting the child” also needed to be respected where those proceedings “involve

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<sup>113</sup> See Recital 19 and Article 41 and 42 of the Brussels II *a* Regulation, see for further information *supra* footnote 32.

<sup>114</sup> See Article 23 of the 1996 Hague Child Protection Convention, which names as a ground for refusal of a foreign child protection measure, “if the measure was 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”, see for further information regarding the Convention *supra* footnote 12.

<sup>115</sup> See Article 13(2) of the 1980 Hague Child Abduction Convention, see for further information regarding the Convention, *supra* footnote 16.

<sup>116</sup> See Recommendations Nos. 50 and 51 of the Conclusions and Recommendations of Part I of Sixth Meeting of the Special Commission to Review the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011), available at < [http://www.hcch.net/upload/concl28sc6\\_e.pdf](http://www.hcch.net/upload/concl28sc6_e.pdf) > (last consulted 15 May 2013).

<sup>117</sup> See Recommendation No. 3.8 of the Conclusions and Recommendation of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22–28 March 2001), available at < [http://www.hcch.net/upload/concl28sc4\\_e.pdf](http://www.hcch.net/upload/concl28sc4_e.pdf) > (last consulted 15 May 2013).

alternative dispute [resolution] mechanisms such as mediation and arbitration”.<sup>118</sup> Also the Hague Conference Guide to Good Practice on Mediation<sup>119</sup> promotes the consideration of the “child’s views [...] in mediation in accordance with the child’s age and maturity”.<sup>120</sup>

### **III. IMPORTANCE OF INTER-STATE AND INTRA-STATE COOPERATION AND COORDINATION - INTERNATIONAL LEGAL FRAMEWORK FOR CHILD PROTECTION IN CROSS-BORDER FAMILY DISPUTES**

#### **A. Importance of Inter-State and Intra-State cooperation and coordination**

**31. Cooperation between States is crucial to protect children from the harmful effects of cross-border family disputes and assist families in the resolution of such disputes.**

**32. At the same time, it is necessary that the relevant authorities and bodies inside each State closely cooperate with each other and coordinate their work to guarantee an efficient assistance in cross-border family cases.**

#### *Description of the discussions*

107. The Working Group acknowledged the crucial importance of State cooperation on a governmental, administrative and judicial level to assist families and protect children and children’s rights in cross-border situations. Several delegations, such as the Algerian, Israeli, Moroccan and Tunisian delegations, referred to the positive examples of existing cooperation in the framework of bilateral and multilateral instruments highlighting the usefulness of existing structures of State cooperation in assisting with the resolution of cross-border family disputes. The Working Group emphasised the need to further extend State cooperation by joining relevant international or regional instruments or establishing further bilateral arrangements or through other means.

108. At the same time, the Working Group emphasised the high importance of effective “Intra-State” cooperation and coordination, *i.e.* cooperation and coordination inside a State between all authorities and bodies involved in the resolution of an individual cross-border family dispute. Some delegations explained that even under the existing international or regional frameworks a further improvement of intra-State cooperation was necessary. For example, where an amicable resolution of a cross-border parental conflict promoted by the assisting Central Authority requires the entry of a foreign parent into the State, a speedy response from the State body issuing the necessary entry visa is required, but in practice the communication with the other State body can, as several delegations reported, be a lengthy process (see also above Good Practice No. 17 and para. 72).

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<sup>118</sup> See paras. 32, 51, 52 and 59 of the General Comment No 12 (2009) – The right of the child to be heard, drawn up by the Committee on the Rights of the Child, available at < <http://www2.ohchr.org/english/bodies/crc/comments.htm> > (last consulted 15 May 2013).

<sup>119</sup> See *supra* footnote 71.

<sup>120</sup> See Section 7.2 of the Guide to Good Practice on Mediation, *ibid.*

**B. Establishment of centralised structures facilitating the provision of information and assistance – Establishment of a Central Contact Point**

**33. With a view to improving the protection of children concerned by cross-border family disputes and with a view to promoting sustainable solutions to such disputes, centralised and coordinated structures of assistance are essential. States are encouraged to engage in building and maintaining such structures of assistance.**

***(i) Establishment of a Central Contact Point – Tasks***

**34. States should in particular designate a Central Contact Point assisting in the resolution of cross-border family disputes.**

**35. The Central Contact Point should be an impartial body that facilitates the speedy provision of necessary information and swiftly directs individuals in need for assistance to the relevant authorities or bodies. Where feasible, the Central Contact Point should be tasked to provide further assistance in international family cases (see below Good Practice No. 43).**

**36. The Central Contact Point should cooperate with and assist in the coordination between all authorities and bodies engaged in the resolution of cross-border family disputes. These authorities or bodies could, depending on the State concerned, for example, include:**

- a. The departments of different ministries dealing with cross-border family matters, including the ministry dealing with visa and immigration matters;**
- b. The prosecutor's office;**
- c. The police;**
- d. The social services bodies, including child or domestic violence protection bodies;**
- e. Other relevant NGOs;**
- f. The judicial authorities;**
- g. Relevant judges networks;**
- h. Associations of practitioners;**
- i. Other States' embassies and consulates; and**
- j. Other States' Central Contact Points or Central Authorities assisting in the resolution of cross-border family disputes.**

**37. The Central Contact Point should serve as a networking point and assist in resolving difficulties in the interaction of different authorities and bodies involved in the resolution international family disputes.**

**38. All requests to the Central Contact Point should be handled swiftly: The requesting person or body should without delay receive an acknowledgement of receipt. The response to the request should be sent promptly within a reasonable time. The requesting person or body should be kept updated and be informed about any delay in dealing with the request.**

39. Communication with the Central Contact Point should be made possible in the official language of the relevant State and in addition in either English or French. Should language problems be an obstacle for the individual concerned in accessing the legal system or the necessary services to resolve the family dispute, the Central Contact Point should, as far as feasible, assist to overcome the language problems.

*(ii) Facilitation of provision of information & direction to relevant authorities and services*

40. The information provided should comprise in particular:
- a. Information on how to locate the child / the other parent in the State concerned;
  - b. Information on the legal system and the law applicable;
  - c. Information on available legal proceedings, including information on how to obtain urgent and protective measures;
  - d. Information on the exercise of children's rights in legal proceedings;
  - e. Information on how to access court and / or other relevant authorities;
  - f. Information on how and where to obtain the recognition and enforcement of a foreign family law decision, including the provision of contact details of the competent bodies;
  - g. Information on the duration and costs of legal proceedings and recognition and enforcement processes;
  - h. Information on how to obtain legal aid;
  - i. Information on how to find a lawyer and / or otherwise obtain legal advice;
  - j. Information on child protection / welfare authorities and services;
  - k. Information on NGO's and other authorities or bodies which could be of assistance;
  - l. Information on the availability of mediation, conciliation or similar means to bring about an amicable dispute resolution;
  - m. Information on how to access mediation, conciliation or similar services, including information on costs, duration and further details regarding the process;
  - n. Information on how to render an agreement on custody and contact and other child related matters legally binding and enforceable;
  - o. Information regarding available infrastructure supporting the exercise of contact with the child, such as voluntarily usable "family meeting facilities" or centres for supervised contact *etc.*; and
  - p. Information on conditions and procedures regarding necessary travel documents such as visas to enter the State for the purpose of parent-child visits or for the purpose of participating in legal proceedings or in mediation or conciliation sessions *etc.*

41. The above information should be made available to any person or body free of charge.

**42. Individuals in need of assistance in international family disputes should be directed speedily to the relevant authorities or bodies in the Central Contact Point's State unless the Central Contact Point itself is in a position to give or arrange for the requested assistance. Should, due to language problems, making contact with the relevant authority or body be difficult for the individual concerned, the Central Contact Point should assist in making the contact and, where necessary, assist in the further communications.**

*(iii) Additional assistance in international family cases*

**43. Where feasible, the Central Contact Point should provide further services in assisting individuals in the resolution of cross-border family disputes. In particular, States are encouraged to task the Central Contact Point to proactively assist in:**

- a. Locating the child / other parent concerned;**
- b. Arranging for protective / provisional measures to prevent harm to the child and / or parent concerned;**
- c. Bringing about an amicable resolution of the dispute;**
- d. Rendering a foreign decision on custody or contact or other measures of child protection legally binding and enforceable;**
- e. Securing contact arrangements;**
- f. Obtaining of necessary travel documents such as visas to enter the State for the purpose of parent-child visits or for the purpose of participating in legal proceedings or in mediation or conciliation sessions *etc.* to resolve a cross-border family dispute concerning children.**

**44. If the extension of the Central Contact Point's activities to include one or more of the above mentioned additional services cannot be effectuated at the time of the Central Contact Point's establishment, States should periodically review the feasibility and desirability of a progressive extension of the Central Contact Point's activities.**

*Description of the discussions*

109. The Working Group emphasised the importance of improving the protection of children concerned by cross-border family disputes and promoting sustainable solutions to such disputes. There was a consensus that to achieve this aim centralised and coordinated structures of assistance are necessary. Several delegations, such as the Algerian, Israeli, Moroccan and Tunisian delegations, highlighted the usefulness of existing cooperation in the framework of bilateral and multilateral treaties and the important role of a central body in the resolving of cross-border family disputes falling within the scope of these treaties. All delegations acknowledged that it would be highly desirable to provide structures of assistance for all cross-border family disputes concerning children, not only those falling within the scope of bilateral or other instruments currently in force in the relevant jurisdictions.

110. Several delegations described the non-availability of structures of assistance for a (large) number of cross-border family disputes concerning children as a frustrating experience for all concerned. The individuals involved would often desperately go from

place to place in seeking information or services urgently needed to resolve the cross-border family dispute. Those authorities or bodies (randomly) addressed by these individuals would not be in a position to provide all the information needed, they would at best be able to provide the individual with the part of the “puzzle” that related to their work. The Working Group noted that this very unsatisfactory *status quo* would result in uncoordinated parallel efforts, leave individuals in need of assistance in uncertainty and result in the unnecessary loss of precious time for the resolution of cross-border family disputes often contributing to an aggravation of these conflicts and an amplification of their negative impact on the children concerned.

*Establishment of a Central Contact Point – Tasks - Facilitation of provision of information & direction to relevant authorities and services*

111. The Working Group identified as one of the main obstacles to a speedy resolution of cross-border family disputes outside the scope of relevant multilateral or bilateral legal frameworks the difficulty for individuals (in particular for foreign individuals) to obtain crucial information on what steps to take, where to turn to and in particular how to access legal proceedings or find assistance regarding an amicable dispute resolution. The Working Group considered it would be a step of major impact and progress if all States were to establish a central body facilitating the provision of all necessary information and taking over the task of promptly directing individuals in need of assistance to the relevant authorities or bodies in the State. The central body could, for example, put the individual in contact with the police or prosecutor’s office for assistance to locate a child; direct the individual to the Bar association for assistance with finding specialist (pro bono) legal advice; or refer the individual seeking to enforce a foreign decision to the competent court or authority *etc.*
112. For the purpose of the Handbook the term “Central Contact Point” is used as a neutral term for such a body.
113. The Working Group discussions regarding the establishment of a central body of assistance in cross-border family disputes were, *inter alia*, informed by the presentations given by a number of “short term experts” on the work of the Central Authorities under the 1980 Hague Child Abduction Convention in Germany, Italy and Spain as well as on the work of the Tunisian central body under the Tunisian bilateral agreements with Belgium, France and Sweden.
114. Referring to the experiences with the operation of a Central Authority under relevant international or bilateral legal frameworks, several delegations highlighted the importance of an effective cooperation of the “Central Contact Point” with all the relevant authorities and bodies in the legal system concerned. In the discussions, the Working Group identified as authorities or bodies with which the Central Contact Point should cooperate, *inter alia* (with slight differences in each legal system): the ministry of the interior, the ministry for family affairs, the ministry for foreign affairs as concerns visa and immigration matters, the police, the prosecutor’s office, the judicial authorities as well as practitioners’ associations, such as the Bar association, and relevant NGOs. In view of the fact that in international family disputes falling outside the geographical scope of relevant bilateral, regional and international legal frameworks often embassies and consulates get involved in assisting their nationals, the Working Group considered it important to promote a cooperation of the Central Contact Point also with the diplomatic missions. Furthermore, a cooperation with Central Contact Points of other States and

similar central bodies assisting in the resolution of cross-border family disputes, such as Central Authorities operating under the relevant Hague Conventions was considered important.

115. Several delegations, such as the Tunisian and Moroccan delegations, pointed to the important role that the Central Contact Point could play in awareness raising and in assisting in coordinating efforts between the different authorities and bodies involved avoiding unnecessary parallel efforts or incompatible steps taken by different authorities or bodies. The Tunisian delegation referred to the positive experience under the three bilateral instruments in force for Tunisia and emphasised the important role of the central body in cooperating with other State bodies. The Tunisian delegation referred to the cooperation between the central body and the prosecutors at the first instance courts (*procureurs de la république auprès du tribunal de premier instance*) regarding the locating of children concerned by cross-border family disputes and explained how the cooperation relationship had evolved over the years and how the link between the central body and the prosecutors at the first instance courts had positively influenced the effectiveness and speed of locating children.
116. The Working Group elaborated a list of information considered essential to assist individuals involved in cross-border family disputes. In particular, the Working Group considered it necessary to provide information on how to locate the child concerned and / or the other parent, information about the legal system, the law applicable, the legal proceedings available and their duration and costs as well as information on how and where to obtain urgent measures, including protective measures.
117. The Working Group exchanged on available centralised information structures in the ENPI South Partner Countries. A number of delegations, including the Moroccan and Tunisian delegations, reported on available information structures under existing multilateral and bilateral legal frameworks. The Tunisia delegation furthermore highlighted that information on laws and jurisprudence as well as answers to frequently asked questions are available in both French and Arabic through the e-portal of the Ministry of Justice.<sup>121</sup> The Moroccan delegation reported on the availability of legislation and other helpful materials through the website of the Judicial Portal of the Ministry of Justice,<sup>122</sup> accessible in French and Arabic. The Egyptian delegation reported that an online information database<sup>123</sup> had recently been established in Egypt with the financial support of the UN and that this database makes available in Arabic language legal information on family matters including answers to frequently asked questions and a Guide for litigants.
118. Several delegations, such as the Algerian, Israeli and Palestinian delegations, highlighted the importance of providing information on how to access legal aid in the State concerned. The Israeli delegation reported that in their legal system, the legal aid board already provides any person seeking legal aid with support and indicated that even those applicants not entitled to legal aid for legal representation would receive advice or be transferred to other relevant bodies. Furthermore, the Israeli delegation highlighted

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<sup>121</sup> See the website of the e-Justice Portal of Tunisia < <http://www.e-justice.tn> > (last consulted 15 May 2013).

<sup>122</sup> See the Judicial Portal of the Moroccan Ministry of Justice < <http://adala.justice.gov.ma/FR/home.aspx> > (last consulted 15 May 2013).

<sup>123</sup> See the website of the Egyptian legal Aid and Dispute Settlement office in Arabic language at < <http://www.ladsegyp.org/book.pdf> > (last consulted 15 May 2013).

that the service provided by the legal aid board was available also for persons under the age of 18 years and suggested that the Central Contact Point too, should be open to deal with requests of individuals under the age of 18, if mature enough. For example, a child of sufficient age and maturity who is involved in a cross-border family dispute should be able to receive information through the Central Contact Point and be directed to relevant bodies. Following this intervention there was agreement that when using the term “individual” for the recipient of assistance from the Central Contact Point in the Good Practices this could also include a child of sufficient age and maturity. The Israeli delegation furthermore referred to a recent reform in Israeli family law promoting the child’s right to be heard in court proceedings and children’s rights to legal aid and legal representation. The Israeli delegation underlined the importance of making accessible information on children’s rights to be heard or to have separate representation (see further above “II. Hearing the voice of the child – children’s procedural rights”).

119. In view of the crucial importance of access to necessary travel documents, such as visas, the Working Group furthermore considered it important for the Central Contact Point to provide information on entry visa for the purpose of parent-child visits or for the purpose of participating in legal proceedings or in mediation or conciliation sessions *etc.* (see also above “I. D. Securing transfrontier exercise of parental responsibility - Facilitation of visas and other travel documents”).

120. Several delegations referred to language problems of foreign individuals as an obstacle to accessing the information necessary to resolve a cross-border family dispute. It was therefore considered crucial that the Central Contact Point would be able to communicate also in one or more commonly used (foreign) languages, such as English or French, ideally, in both English and French. Some delegations, such as the Lebanese delegation, suggested that the Central Contact Point could also assist with the translation of certain documents urgently needed to access the Central Contact Point’s legal system. The Working Group discussed that the Central Contact Point should, as far as feasible, assist in solving language related problems the individuals might have in the communication with other authorities or bodies.

121. Acknowledging the importance of expeditiousness in resolving cross-border family disputes concerning children, the Working Group considered that all requests to the Central Contact Point should be handled swiftly. The Tunisian delegation, for example, reported about their experience under the bilateral agreements with France, Belgium and Sweden highlighting that the availability of the person(s) in charge to work on cases on a daily basis was indispensable. The Tunisian delegation reported that the currently 19 open cases with France, 9 open cases with Belgium and 7 open cases with Sweden would, for example, mean an average activity of 2-3 hours daily of the work time of the one person in charge. The Tunisian delegation emphasised that, for example, an incoming request for the location of a child had to be transmitted immediately to the prosecutor at the first instance courts.

*Additional assistance in international family cases*

122. Several delegations, such as the Tunisian, Lebanese, and Israeli delegations, were in favour of giving the Central Contact Point further tasks and a more active role in the resolution of cross-border family disputes.

123. Besides the provision of information and the direction of individuals to relevant other authorities or bodies in the State, it was suggested that the Central Contact Point should actively assist in the locating of the child, *i.e.* be in contact with the relevant other bodies (for example police or prosecutor's office) and take charge of the matter for the individual. Similarly, a more active role was requested with regard to arranging for protective / provisional measures and assistance with rendering a foreign decision on custody or contact legally binding and enforceable and with regard to securing contact arrangements. The Algerian delegation suggested that the Central Contact Point could be linked to the "family meeting facility", which, as describes above, is a structure meant to offer a voluntarily useable space for contact visits (see above Good Practice No. 9 and paras. 61 *et seq.*).
124. Furthermore, the Moroccan delegation suggested, that the Central Contact Point could give administrative support for filing visa applications necessary to enter the Central Contact Point's State for the purpose of parent-child visits benefiting a minor child or for a parent wanting to attend legal proceedings or mediation or conciliation in order to resolve a cross-border family dispute concerning children.
125. All delegations wanted the Central Contact Point to play a more active role with regard to promoting an amicable dispute resolution. Several delegations, such as the Tunisian delegation, suggested that the Central Contact Point could itself offer mediation services.
126. The Jordanian delegation highlighted that no activity of the Central Contact Point should affect the right of a person to commence legal proceedings and to apply for the enforcement of an obtained decision. The Jordanian delegation further highlighted that no activity of the Central Contact Point should lead to a delay of ongoing proceedings.

### Background remarks

127. Major progress in the resolution of cross-border family disputes in the past decades has been accomplished by the introduction of central structures in States assisting individuals in the resolution of such disputes and securing continuing State cooperation on the administrative level. This is indeed an approach that has been, since several decades, promoted by the Hague Conference on Private International Law. This approach is a major pillar of all modern Hague family conventions, all based on the introduction of a "Central Authority system" in Contracting States. Equally, several of the European family law instruments are based on a "Central Authority system".
128. With the creation of "Central Authority systems" under these multilateral instruments, individuals in need of information and assistance in the resolution of a cross-border family dispute falling within the scope of these instruments now have access to central points in each Contracting State channelling relevant information for them, answering their questions in a language they can understand and giving further assistance as provided for by the relevant instruments.
129. Even though the Central Authorities established under a particular multilateral instrument serve the main purpose of assisting in the resolution of disputes falling within the scope of the instrument, their operation has brought with it a general improvement for the resolution of family disputes. First of all, it has brought about a general awareness raising and sensitisation and a promotion of a spirit of cooperation among all relevant authorities and other bodies concerned. Furthermore, the Central Authorities

collect and make available all information regarding the access to their legal system and other information relevant with regard to the resolution of the cross-border family dispute (on the subject matters treated by the instrument). This information, often disseminated through the authorities' websites or other forms of publications, benefits also those involved in cross-border family disputes outside the geographical scope of the relevant instrument and assists in the prevention of cross-border family disputes.

130. The Euromed Justice III Working Group acknowledged that the lack of central structures of assistance in the resolution of cross-border family disputes can cause hardship for the individuals concerned who often find themselves in a time-consuming, costly and, due to language difficulties, oftentimes frustrating search of how to access the foreign legal system.

131. Already in the first Malta Process discussions, one of the measures identified to bring about a significant improvement for the resolution of cross-border family disputes that concern States for which the relevant Hague Convention are not in place; was the introduction of central structures in the non-Contracting States.

132. The First Malta Declaration stated in this regard:

“Efficient and properly resourced authorities (Central Authorities) should be established in each State to co-operate amongst one another in securing cross-frontier rights of contact and in combating the illicit transfer and non-return of children. Such co-operation should include at least:

- assistance in locating a child;
- exchange of information relevant to the protection of the child;
- assistance to foreign applicants in obtaining access to local services (including legal services) concerned with child protection.”<sup>124</sup>

133. The idea was again taken up in the Second Malta Declaration, which stated:

“The centralised administrative authorities (sometimes called Central Authorities) which act as a focal point for cross-border co-operation in securing cross-frontier contact rights and in combating the illicit transfer and non return of children should be professionally staffed and adequately resourced. There should be continuity in their operation. They should have links internally with child protection, law enforcement and other related services, and externally they should have the capacity to co-operate effectively with their counterparts in other countries. Their role in promoting the amicable resolution of cross-frontier disputes concerning children is emphasized.”<sup>125</sup>

134. The Third Malta Declaration reinforced the idea, stating that:

“[c]ontinuing efforts should be made, in the interests of international child protection, to improve co-operation at the judicial and administrative levels between States which are, and States which are not, Parties to the relevant Hague Conventions. “Non-Hague State Parties” should be encouraged and assisted in developing the capacities and structures (including Central Authorities) which enable such co-operation to take place.”<sup>126</sup>

135. The Third Malta Declaration further specified that:

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<sup>124</sup> See Recommendation No 2 of the First Malta Declaration, *supra* footnote 6.

<sup>125</sup> See Recommendation No 2 of the Second Malta Declaration, *supra* footnote 6.

<sup>126</sup> See Recommendation No 2 of the Third Malta Declaration, *supra* footnote 6.

“[t]he administrative authority (the Central Authority) is an essential structure in each country to facilitate effective access to legal and administrative procedures for parents and children affected by cross-border family disputes.

The Central Authority has a vital role as:

- the first point of contact for parents needing information, advice and assistance in cross-border disputes;
- the first point of contact for co-operation and exchange of information between countries and between national authorities and agencies;
- the national body with expertise and experience in managing cross-border family law cases.

The benefits of co-operating within a global network of Central Authorities are emphasised.

The Technical Assistance Programme of the Hague Conference on Private International Law may be able to provide advice and assistance to countries wishing to establish and consolidate their Central Authority.<sup>127</sup>

136. The idea to promote central structures assisting in the resolution of cross-border family disputes has further been taken up again in the discussions around the establishment of structures for international family mediation in the context of the Malta Process. The “Principles for the Establishment of Mediation Structures in the context of the Malta Process”<sup>128</sup> call for the establishment of a “Central Contact Point for international family mediation” in each State. This Central Point is, in accordance with the Principles, meant to:

- “- Provide information about family mediation services available in that country, such as:
  - List of family mediators, including contact details and information about their training, language skills and experiences;
  - List of organisations providing mediation services in international family disputes;
  - Information on costs of mediation;
  - Information on the mediation models used / available; and
  - Information on how mediation is conducted and what topics may be covered in mediation.”
- Provide information to assist with locating the other parent / the child within the country concerned.
- Provide information on where to obtain advice on family law and legal procedures.
- Provide information on how to give the mediated agreement binding effect.
- Provide information on the enforcement of the mediated agreement.
- Provide information about any support available to ensure the long-term viability of the mediated agreement.
- Promote cooperation between various experts by promoting networking, training programmes and the exchange of best practices.
- Subject to the principle of confidentiality, gather and make publicly available on a periodic basis information on the number and nature of cases dealt with by central contact points, actions taken and outcomes including results of mediation where known.<sup>129</sup>

<sup>127</sup> See Recommendation No 5 of the Third Malta Declaration, *supra* footnote 6.

<sup>128</sup> See *supra* the Introduction para. 9 and footnote 7.

<sup>129</sup> See Part A of the Principles, *supra* footnote 7.

137. It is important to note that the “Principles for the Establishment of Mediation Structures in the context of the Malta Process” also acknowledge the need to extend existing structures in the Hague Convention Contracting States. Contracting States to the 1980 Hague Child Abduction Convention and / or the 1996 Hague Child Protection Convention that implement these Principles and establish a Central Contact Point for cross-border family mediation provide information referred to in the Principles (including basic information on the access to the legal system) to all individuals involved in cross-border family disputes independent of whether the family conflict falls within the geographical scope of the Hague Conventions or not.
138. It is to be highlighted that the commitments made by States in implementing the “Principles for the Establishment of Mediation Structures in the context of the Malta Process” and in establishing a “Central Contact Point for international family mediation” in their State are not conditioned upon a requirement of reciprocity. Acknowledging the importance of protecting children from the harmful effects of cross-border family disputes, States implementing the Principles establish or extend, on a voluntary basis, structures assisting in the resolution of cross-border family disputes benefiting children.
139. The work undertaken by the Euromed Justice III Working Group and reflected in the Good Practices Nos. 33 *et seq.* is particularly significant, because it lays down in great detail the cornerstones for the establishment of efficient structures of assistance taking into consideration the regional particularities.

*(iv) Organisation, staff and equipment of the Central Contact Point*

- 45. The Central Contact Point needs to be organised in a way that guarantees its impartiality.**
- 46. States need to give the Central Contact Point a sufficiently broad mandate to fulfil all its tasks effectively. In particular, the Central Contact Point should have sufficient mandate to collect and pass on the relevant general information referred to above (see Good Practice No. 0) and to cooperate with and assist in the coordination between different authorities and bodies engaged in the resolution of cross-border family disputes. In addition, any further tasks entrusted to the Central Contact Point (see above Good Practice No. 43) need to be accompanied by a corresponding mandate.**
- 47. At the same time, States need to provide the Central Contact Point with sufficient resources enabling that Contact Point to fulfil all its tasks in a speedy and efficient manner. Should it be difficult to allocate sufficient State resources for the Central Contact Point’s establishment and operation, States should inquire into other possibilities of funding, including funding through in kind contributions and personnel on secondment.**
- 48. The personnel working for the Central Contact Point needs to be qualified, should have expertise in national and international family law, be independent, impartial, culture-sensitive and have relevant language skills. Precautions should be taken to guarantee at least a minimum amount of continuity in personnel.**

**49. The Central Contact Point needs to be equipped with adequate material resources, including means that allow for speedy communications, such as Internet connection, fax and telephone.**

**50. States should consider how to best use synergies between the Central Contact Points and structures of assistance in the resolution of cross-border family disputes and the protection of children.**

*Description of the discussions*

140. All delegations repeatedly referred to the importance of ensuring that the Central Contact Point be organised in a way, that assistance to individuals in the resolution of cross-border family conflicts is provided without taking sides. Several delegations, such as the Algerian delegation, therefore highlighted that they would not want the Central Contact Point to be representing one of the parties in court. Some Working Group members furthermore pointed out that guaranteeing the “impartiality” of that point would also mean that the personnel working for the Central Contact Point would have to be open minded and culture sensitive.

141. The Working Group highlighted the crucial importance of giving the Central Contact Point a sufficiently broad mandate to fulfil all its tasks efficiently and to secure the Central Contact Point’s access to appropriate human and material resources. The Working Group discussed in some detail how and where a Central Contact Point could be established in their State. Some delegations, such as the Jordanian delegation, indicated that they could imagine this point to be established in form of a NGO while others considered that for their legal system the organisation in form of a State authority was more appropriate. There was agreement to the effect that in whatever form a Central Contact Point would be established safeguards would have to be taken to guarantee that the Central Contact Point, besides having an appropriate mandate, had access to well trained personnel with appropriate language skills and that a certain continuity of personnel was secured. Several delegations, such as the Moroccan, Jordanian and Algerian delegations, explained that they could imagine having a judge with expertise in international family law appointed to head the Central Contact Point. Furthermore, there was a wide support for favouring interdisciplinary personnel for the Central Contact Point possibly including a psychologist and social worker, of course trained in the relevant aspects of national and international family law. Those favouring an active role of the Central Contact Point in bringing about an amicable resolution of cross-border family disputes by offering mediation suggested that also a mediator should be part of the Central Contact Point personnel.

142. The Working Group acknowledged that budget implications regarding the establishment and maintenance of a Central Contact Point might pose problems. The Working Group therefore encouraged an innovative approach to fundraising including the consideration of options such as in kind contributions for material and the inclusion of personnel on secondment. Also it was highlighted that the services of the Central Contact Point could be extended progressively over time. For example, the Central Contact Point could be established with the minimum material and human resources to guarantee a swift access to necessary information and speedy direction of individuals to the relevant authorities and bodies in the State and then step by step be extended to provide further services such as proactive assistance with the location of the child concerned *etc.*

143. The Working Group also considered that the connection of the Central Contact Point with other centralised structures of assistance in international family disputes could be advantageous with a view to using synergies, while, of course, safeguarding the impartiality of the Central Contact Point and the functionality of the relevant other structures (see also below Good Practice No. 139 and para. 334).

*Background remarks*

144. In the discussions of Good Practices for the organisation of a centralised structure of assistance, the Euromed Justice III Working Group took into consideration the experiences made by States in the operation of Central Authority structures and in particular the recommendations made in the Guide to Good Practice on Central Authority Practice<sup>130</sup> under the 1980 Hague Child Abduction Convention.

*(v) Awareness raising – Establishment of a website - Networking*

**51. The contact data of the Central Contact Point, including the contact data of the staff members and their languages of communication, should be made available to the public and published on the Internet in the relevant official language(s) and in either English or French.**

**52. States should consider setting up a website for the Central Contact Point and to provide access to an overview of the general information referred to above (see Good Practice No. 0) through that website in the relevant official language(s) and in either English or French.**

**53. States need to raise awareness of the Central Contact Point's existence and services among all relevant authorities and bodies, including the ministries, the judiciary, legal practitioners, the police and social services.**

**54. The Central Contact Point should serve as a networking body connecting relevant actors, promoting cooperation, and actively engaging in improving communications between the different authorities and bodies implicated in international family disputes.**

**55. States should consider the possibility to designate their Central Contact Point also as “Central Contact Point for international family mediation” in the sense of the Hague Conference “Principles for the establishment of mediation structures in the context of the Malta Process” and to publish the contact data on the Hague Conference's website.**

*Description of the discussions*

145. The Working Group agreed that once a Central Contact Point was established in a State all steps possible should be taken to raise awareness of its existence and the services it provides. This included making the contact data available to the public but also raising awareness among all relevant authorities and bodies including the ministries, the

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<sup>130</sup> See *supra* footnote 67.

judiciary, legal practitioners, the police and social services. The Central Contact Point itself should engage in making its existence and services better known by networking with all relevant actors and engaging in improving the communications between them.

146. The delegations were in favour of establishing a website for the Central Contact Point. Besides the contact information of the Point itself and of the staff members indicating their languages of communication, the website could display an overview of the information described above (see Good Practice No. 0), for example in the form of a list of “frequently asked questions”. The Working Group emphasised that the information about and from the Central Contact Point should be disseminated also in English or French.

147. Finally, with a view to further raise awareness but also with a view to using synergies, the Working Group considered it helpful to designate the Central Contact Point, at the same time, also as “Central Contact Point for international family mediation” in the sense of the Hague Conference “Principles for the Establishment of Mediation Structures in the context of the Malta Process”<sup>131</sup> and to use the opportunity of publishing the contact data on the Hague Conference’s website.

#### Background remarks

148. The “Principles for the Establishment of Mediation Structures in the context of the Malta Process” make reference to the offer of the Permanent Bureau of the Hague Conference on Private International Law to make available through the Hague Conference website the contact details of “Central Contact Points for international family mediation”<sup>132</sup> and to display information collected by the Central Contact Point on the subjects referred to in the Principles should the Central Contact Point have no possibility to itself make this information available on the Internet.<sup>133</sup>

149. Currently six States have designated a Central Contact Point for international family mediation under the “Principles for the Establishment of Mediation Structures in the context of the Malta Process”, namely: Australia, France, Germany, Pakistan, the Slovak Republic and the United States of America (status 15 May 2013).<sup>134</sup>

### **C. Encouraging regional cooperation**

#### **56.States are encouraged to increase regional cooperation to assist in the resolution of cross-border family disputes.**

#### Description of the discussions

150. The Working Group strongly supported the encouraging of regional exchange and cooperation with a view to improving the legal and practical frameworks for cross-border family disputes. The Jordanian delegation suggested the establishment of a

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<sup>131</sup> See *supra* para. 9 and footnotes 7-9.

<sup>132</sup> The contact details of the “Central Contact Points for international family mediation” are available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) >, under “Child Abduction Section”, then “Cross-border family mediation” and then “Central Contact Points for international family mediation.”

<sup>133</sup> See Part A of the Principles, *supra* footnote 7.

<sup>134</sup> See further *supra* para. 9 and footnotes 7-9.

regional body to solve international family disputes, however, other delegations, such as the Tunisian delegation, did not see a benefit in establishing a new body and rather favoured regional exchange and cooperation. There was agreement that much could be gained from expanding regional cooperation. Such a regional cooperation could, for example, include regular meetings on an annual or biennial basis to exchange experiences in resolving cross-border family disputes and to discuss solutions to commonly emerging problems. The Tunisian delegation reported on the experience with the “Commissions mixtes” under the bilateral instruments, which include annual meeting to discuss the ongoing cases and exchange experiences, and highlighted the usefulness of that kind of networking in the improving of inter-State cooperation (see also Good Practice No. 150).

### Background remarks

151. It cannot be highlighted enough how much the effective operation of a multilateral instrument is supported by on an ongoing exchange between Contracting States showing their continuing commitment to the multilateral treaty by steadily working on the improvement of the treaty’s implementation.
152. Multilateral instruments operating on the basis of Central Authority cooperation already provide for one forum of continuing exchange between States. However, a further exchange of Contracting States at a governmental level to improve the operation of the instruments can be extremely helpful. This idea is at the very essence of the Hague Conference’s servicing of Hague Conventions through the holding of periodic Special Commission meetings on the practical operation of the different Conventions.
153. Since the entry into force of the 1980 Hague Child Abduction Convention six Special Commission meetings to review the practical operation of the Convention were held, the last two of which dealt, at the same time, with the 1996 Hague Child Protection Convention’s implementation and operation. All Contracting States to these Conventions as well as all Members of the Hague Conference on Private International Law are invited to discuss the operation of the Conventions at Special Commission meetings. During the recent years, a practice has emerged where States attending Special Commission meetings have used the occasion to hold a number of smaller side meetings with a regional focus.<sup>135</sup>
154. Among the ENPI South Partner Countries, Morocco and Israel participated in the latest, the Sixth Special Commission meeting, which exceptionally took place in two parts: Part I in June 2011 and Part II in January 2012. Noting that also Egypt and Jordan, who are members to the Hague Conference on Private International Law have the right to participate in Special Commission meetings, the Hague Conference Special Commission meetings could already under the current conditions offer to some extent a possible forum for regional exchange.

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<sup>135</sup> A development that has favoured the custom of separate meetings with regional focus in the course of Special Commission meetings is the European Union’s extension of competencies in the field of Private International Law, a development which is also the reason for the European Union becoming a member of the Hague Conference on Private International Law in its own rights. However, besides the European Union coordination meetings a number of other smaller, regionally focused meetings, including meetings of the Latin American States have taken place in the course of Special Commission meetings.

155. However, for an effective exchange and regional cooperation of the ENPI South Partner Countries regarding the resolution of cross-border family disputes a forum would have to be found which allows for a more frequent exchange in the region. The model employed under a number of bilateral arrangements, such as the one in place between Tunisia and France, creating mixed committees, might be one that could be used to arrange for regional meetings among the ENPI South Partner Countries. At the same time, regional meetings including countries from the Euro-Mediterranean region could be arranged for. To have the greatest possible impact in practice, such regional meetings should not only involve all relevant stakeholders but also have governmental support, *i.e.* allow for a State supported implementation of possible recommendations flowing from these regional meetings.

#### IV. IMPORTANCE OF PROVIDING SPEEDY AND APPROPRIATE PROCESSES

##### A. Time sensitivity of cross-border family disputes concerning children

**57.States should take all measures possible to guarantee that cross-border family disputes concerning custody and contact are dealt with in a speedy manner by the judicial and administrative authorities concerned.**

##### *Description of the discussions*

156. The Working Group highlighted the importance of speedy procedures for dispute resolution in international child protection matters. Particularly in the life of young children a few months time can be a long period and a complete interruption of contact between the child and one parent for such a period can be harmful for the child and may lead to an alienation, which can be difficult to reverse. All measures possible should therefore be taken to guarantee that cross-border family disputes concerning custody and contact are dealt with as swiftly as possible by the relevant authorities. Should a longer duration of proceedings be inevitable, interim contact arrangements should be put in place, to prevent harmful effects on the child.

157. Several delegations, including the Israeli and Tunisian delegations, reported the availability of urgent interim measures to preserve parent-child contact (see also below para. 199).

##### *Background remarks*

158. The importance of expeditiousness in the resolution of disputes on custody and contact is generally recognised. Several international and regional instruments explicitly call on States to ensure that of child protection matters are deal with swiftly by the relevant authorities.

159. For example, Article 7 of the European Exercise of Children's Rights Convention provides, that "[i]n proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced. In urgent cases the judicial authority shall have the power, where appropriate, to take decisions which are immediately enforceable."

160. As concerns the 1980 Hague Child Abduction Convention, the expeditiousness of procedures to bring about the return of a wrongfully removed or retained child is the central theme of the Convention, see Articles 1, 2 and 12 of the Convention.

## **B. Specialisation of judges and officials / concentration of jurisdiction**

**58. States should promote the specialisation of judges and officials dealing with cross-border family cases and engage in providing adequate training.**

**59. States should consider the introduction of concentrated jurisdiction for cross-border family cases to assist in securing that these cases are dealt with by specialised judges only.**

### *Description of the discussions*

161. Several delegations called for raising further awareness that cross-border family cases needed special attention and treatment due to the much more complex practical and legal aspects of such disputes. Several Working Group members highlighted that a specialisation of judges and other professionals dealing with cross-border family cases was highly desirable. States should promote such a specialisation supported by adequate training. Particularly relevant for such specialised training would be the transmitting of knowledge on relevant international, regional and bilateral instruments as well as on how to access the possibly necessary additional information on other legal systems, including foreign law. With regard to the obtaining of information on a foreign legal system, the use of judges' networks and direct judicial communications can be of considerable assistance (see below the Chapter "VI. Judges' networks and direct judicial communications").

162. The Working Group considered that a measure, which can be very effective in ensuring that cross-border family cases are dealt with by specialised judges, was the introduction of concentration of jurisdiction. Jurisdiction in cross-border family disputes can be concentrated in a certain court or a certain number of courts in one State and / or within the courts by assigning a smaller number of judges as those primarily responsible for family law cases with a cross-border aspect. The latter option was mentioned by one of the delegations as a more easily achievable option. Several delegations, including the Algerian, Egyptian, Moroccan and Tunisian delegations reported that in their State, family matters are dealt with by specialised family judges. In all these States specialised family courts or respectively (in Morocco and Tunisia) specialised family sections of the first instance courts exist.

## **V. AVOIDING CONFLICTING DECISIONS IN THE FIELD OF PARENTAL RESPONSIBILITY – COMMON GROUNDS OF INTERNATIONAL JURISDICTION, ACCESSIBLE AND SPEEDY PROCESSES OF RECOGNITION AND ENFORCEMENT**

### **A. Avoiding conflicting decisions**

**60. With a view to protecting children from the harmful effects of cross-border family disputes all possible steps should be taken to avoid conflicting decisions in different States regarding matters of parental responsibility.**

**61. States are encouraged to give careful consideration to joining relevant multilateral treaties that assist in the avoiding of conflicting decisions in child protection matters.**

**62. An international instrument aiming to avoid conflicting decisions in child protection matters that non-Contracting States could consider examining is 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*.**

**63. Dialogue between Contracting States to the 1996 Hague Child Protection Convention and non-Contracting States should be encouraged.**

*Description of the discussions*

163. The Working Group highlighted that it is of uttermost importance in cross-border family cases to avoid “conflicts” between different legal systems. A conflicting legal situation regarding custody and contact in an individual case due to conflicting decisions taken in different States is a major obstacle to the cross-border exercise of custody and contact and may, in the worst case, lead to a complete interruption of direct contact between a child and his or her parent living in the other State.

164. The Working Group acknowledged the usefulness of international, regional and bilateral instruments on matters of international jurisdiction, applicable law and / or recognition and enforcement of foreign decisions in avoiding such conflicts between legal systems in child protection matters. Introduced and discussed in this regard as instruments of particular importance was the 1996 Hague Child Protection Convention.<sup>136</sup> Also the Brussels II *a* Regulation was discussed, even though, of course, regionally restricted in its application to the European Union. Both, the 1996 Hague Convention and the Brussels II *a* Regulation are based on the principle of mutual respect of different legal traditions. They do not envisage a harmonisation of the substantive family law of different States, but provide for uniform rules of jurisdiction and rules for a simplified recognition and enforcement of decisions.

165. Among the ENPI South Partner Countries, Morocco is currently the only State, which is a Contracting State to the 1996 Hague Child Protection Convention. When discussing the question of whether further ENPI South Partner Countries might consider the joining of this multilateral treaty, the views were very widespread. The Israeli delegation indicated that Israel was currently exploring steps needed for the implementation of the Convention and explained that certain provisions were difficult to implement in Israel due to the complex structure of the Israeli legal system with side-by-side operation of religious and civil court systems. The Egyptian delegation referred to the Convention’s rules on jurisdiction and applicable law noting that the rules contained in the Convention differed from the rules provided currently by Egyptian autonomous private international law and stated that an implementation of the 1996 Hague Convention in the Egyptian

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<sup>136</sup> See *supra* footnote 12.

law would require a considerable change in the law. Also regarding the rules on recognition and enforcement included in the 1996 Hague Convention, the Egyptian delegation underlined the difference to the current Egyptian law. The Egyptian delegation explained that the Egyptian law, in general, only provided for rules on the recognition of foreign “court decisions” and not of decisions of other bodies such as administrative bodies. The Egyptian delegation was supportive of a Good Practice suggesting to non-Contracting States to the Convention to further examine this Convention, but highlighted, at the same time, the importance of continuing dialogue between Contracting States and non-Contracting States to the 1996 Hague Child Protection Convention with a view to protecting children from the harmful effects of cross-border family disputes. The Jordanian delegation was hesitant regarding the inclusion of a Good Practice mentioning the 1996 Hague Child Protection Convention and stated that Jordan, at this stage, had reservations regarding the joining of the 1996 Hague Convention.

166. With regard to avoiding conflicting decisions in child protection matters, the Working Group, furthermore, took note of the provisions of the 1980 Hague Child Abduction Convention<sup>137</sup> preventing that a decision on the merits of custody is rendered in the State to which the child has been abducted while the return proceedings are ongoing (see with regard to the further discussions of the Working Group regarding the 1980 Hague Child Abduction Convention below paras. 217 *et seq.* and paras. 233 *et seq.*).

Background remarks

167. Widely implemented multilateral treaties setting up common rules on jurisdiction, applicable law and recognition and enforcement in a given area of law are an ideal means to avoid the rendering of conflicting decisions in different States in this field of law. In a nutshell, the harmonisation of rules on international jurisdiction avoids conflicts of jurisdiction and deters “forum shopping”; common applicable law rules prevent “forum shopping” or respectively make “forum shopping” less attractive and assist in achieving predictability and legal certainty; and finally, common rules on recognition and enforcement secure the cross-border viability of decisions in the relevant field of law.

168. An international instrument with a worldwide growing importance in the field of international child protection is the 1996 Hague Child Protection Convention. The Convention is open for signature by all States and is currently (status 15 May 2013) in force for 39 States with 3 further States, including the United States of America, having signed the Convention and preparing its ratification (see for further information on the status, the Introduction at para. 11).

169. If between the two States in question no relevant international, regional or bilateral instrument is applicable, it will depend on these States’ autonomous private international law rules whether a conflicting legal situation regarding custody and contact in an individual case can arise or not. Already the existence of matching rules on international jurisdiction regarding custody and contact decisions in the two States concerned will be extremely helpful by avoiding conflicts of jurisdiction. Furthermore, conflicts between legal systems can be avoided through the mutual recognition of decisions. Should the recognition of a foreign custody or contact decision be impossible, a conflicting legal

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<sup>137</sup> See Article 16 of the 1980 Hague Child Abduction Convention, *supra* footnote 16.

situation can be avoided through the replication of the foreign decision in the State in which recognition was refused.<sup>138</sup>

170. It should be highlighted that the promotion of agreed solutions to cross-border family disputes may, in fact, contribute considerably to avoiding conflicts between legal systems in child protection matters, since such conflicts are regularly induced or aggravated by the parties conflicting positions and their applications for conflicting orders in different States.

**B. Promoting common grounds of jurisdiction for matters of parental responsibility, avoiding competing jurisdiction and reducing the risk of parallel proceedings**

- 64. An ideal basis for international legal cooperation in child protection matters is the application of common grounds of jurisdiction concerning custody and contact and the mutual recognition of decisions made on the basis of those rules.**
- 65. When deciding which grounds of international jurisdiction should be used in domestic rules of private international law in relation to child protection matters, States should take into consideration which jurisdictional rules may most appropriately serve the protection of the best interests of the children concerned by cross-border family disputes and also how the jurisdictional rules favoured interact with those most commonly applied in other States.**
- 66. A widely observed trend in the determination of international jurisdiction in child protection matters is the use of the connecting factor of “habitual residence” of the child. The use of this connecting factor is based on the consideration that the authorities in the State of the habitual residence of the child are often the ones best placed to make all inquiries into the child’s habitual environment necessary to assess the best interests of the child.**
- 67. With a view to improving international legal cooperation in child protection matters by supporting common grounds of jurisdiction, consideration may be given to promoting, insofar as appropriate, the use of the connecting factor: “habitual residence of the child” in the determination of international jurisdiction regarding child custody and contact and other matters of child protection.**
- 68. However, if employed in determining international jurisdiction in child protection matters, the connecting factor “habitual residence of the child” should not be used in an inflexible way, *i.e.* not as the only possible connecting factor disregarding the possibility that courts in a State other than that of the child’s habitual residence may be better placed to decide on matters of child protection in the individual case.**

*Description of the discussions*

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<sup>138</sup> See also para. 4 of the Third Malta Declaration, *supra* footnote 6.

171. The Working Group noted the usefulness of common grounds of jurisdiction in child protection matters and acknowledged that competing jurisdictions can contribute to aggravating cross-border family conflicts. Competing jurisdictions invite parallel proceedings and open a path to conflicting decisions unrecognisable in the relevant other legal systems. As a result, a cross-border family conflict can become an irresolvable conflict between legal systems (see also above paras. 163 and 167).
172. The Working Group acknowledged the important role that rules on international jurisdiction play in the protection of children concerned by international family disputes and recognised the significant influence that the interaction of different States' jurisdictional rules can have. Several delegations, such as the Jordanian delegation, highlighted the importance of considering the best interests of the child in deciding which court should have jurisdiction in matters of child protection. With a view to avoiding parallel proceedings and conflicting decisions in international child protection matters, the Working Group acknowledged that it was important for States to also consider the interaction of their domestic rules of international jurisdiction in this field of law with the rules of international jurisdiction most commonly used in other States. It was noted that the possibility of parallel proceedings in different States in matters of parental responsibility with the likely outcome of conflicting decisions could in itself be detrimental to the child's best interest, since the conflicting legal situation in two States will in practice often constitute an impediment to the child's travelling from one State to the other and will as a consequence affect the child's contact with the parent and / or the greater family living in the other State. The Working Group highlighted that States should take appropriate steps to prevent parallel proceedings leading to conflicting decisions in child protection matters (see also below "V. C. Conflicts of jurisdiction").
173. The Working Group members took note of the internationally growing use of the connecting factor "habitual residence of the child" in determining the international jurisdiction in child protection matters. This trend is reflected in the autonomous private international law rules of many States as well as in several recent international and regional instruments and comes in many civil law jurisdictions with a general movement away from the formerly often used connecting factor of "nationality" in international family law. The delegations summarised the rules on international jurisdiction in family matters currently used in their State. The Algerian, Egyptian and Jordanian delegations highlighted that in their States a number of connecting factors are currently used side by side in the determination of international jurisdiction. In Egypt and Jordan courts assume international jurisdiction for proceedings brought against a national of their State or a person having his or her residence or residence of choice in the territory of the State. The Tunisian delegation reported that in their legal system the reform of the private international law rules had resulted in moving away from the predominance of the connecting factor of "nationality". International jurisdiction in Tunisia is, in civil matters, now linked to the residence of the defendant and in child protection matters to the residence of the child.<sup>139</sup> The Moroccan delegation reported that the connecting factor of "habitual residence" was already used to some extent in Morocco in child protection matters and made reference to bilateral and multilateral treaties in force in Morocco.

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<sup>139</sup> See Article 3 and 6 of the Tunisian Private International Law Code (Code de Droit International Privé, Loi N° : 98-97 du 27 Novembre 1998) available online at <[http://www.e-justice.tn/fileadmin/fichiers\\_site\\_francais/codes\\_juridiques/code\\_droit\\_intern\\_privé\\_fr.pdf](http://www.e-justice.tn/fileadmin/fichiers_site_francais/codes_juridiques/code_droit_intern_privé_fr.pdf)> (last consulted 15 May 2013).

174. The Working Group discussed at length the advantages and disadvantages of applying the connecting factor of “habitual residence of the child” in determining international jurisdiction in international child protection matters. The Working Group acknowledged the practical and procedural advantages resulting from the proximity to the child’s habitual environment, recognising that the court in the State of the child’s habitual residence is often the best placed to make all inquiries necessary into the child’s habitual environment to assess the best interests of the child. At the same time, a number of challenges were raised with regard to the use of “habitual residence” as connecting factor: The Tunisian delegation, who recalled that the connecting factor of “habitual residence” is to some extent already used in Tunisia in determining international jurisdiction, noted that in practice deciding where the child’s “habitual residence” was situated could in some cases pose problems. The Tunisian delegation cited an example where the question, of whether the family concerned had moved to Tunisia only temporarily or had indeed relocated to Tunisia with the intention to establish their new habitual residence in that country, was disputed between the parties. The Israeli delegation agreed that in practice the determination of where the habitual residence is situated could in certain cases pose problems. A number of other delegations, such as the Algerian, Jordanian and Lebanese delegations, highlighted the importance of securing a clear terminology and interpretation of the connecting factor of “habitual residence” and considered it important to have a common definition of the term of “habitual residence”.
175. When discussing, whether the connecting factor of “habitual residence of the child” should be recommended as a primary connecting factor for jurisdiction in international child protection matters, a number of delegations, such as the Jordanian delegation, had strong hesitations. Most delegations considered the “habitual residence of the child” was an acceptable connecting factor for international jurisdiction in child protection matters. However, several delegations highlighted that a number of other connecting factors could, depending on the circumstances of the case, be appropriate. As a result Good Practice No. 67 suggests a consideration of the use of the connecting factor “habitual residence of the child “insofar as appropriate” only.
176. Some delegations, such as the Algerian delegation, drew particular attention to the interaction between international jurisdiction and applicable law. The Algerian and Tunisian delegations highlighted that a State’s decision on the introduction of a connecting factor for international jurisdiction could not be made without considering the consequences on the applicable law side (see also below “V. D. Promoting common applicable law rules in international child protection matters”). The Egyptian and Algerian delegations expressed some hesitations regarding the perspective that a change of the child’s habitual residence would bring about a change of international jurisdiction and with it a change of law applicable on child protection matters. The Algerian delegation therefore concluded that further in depth discussions including a discussion of connecting factors for the determination of the law applicable on child protection matters were needed before taking a decision on the matter.
177. The Jordanian delegation underlined that the best interests of the child should be taken into consideration when deciding on the determination of international jurisdiction and said that the inflexible use of a connecting factor would be counterproductive. Several other delegations also emphasised the importance of States using international jurisdictional rules in child protection matters in a way capable of ensuring that the child’s best interests are protected. The Working Group members underlined that using solely and in an inflexible way the connecting factor of “habitual residence of the child”

would not accommodate this purpose. The Lebanese delegation gave the example of divorce proceedings stating that the court competent to decide on the divorce would regularly be in a good position to decide on questions of custody and contact. There was agreement that a balanced application of connecting factors was needed in the determination of international jurisdiction in child protection matters.

Background remarks

178. A cornerstone of many international and regional instruments aiming to protect children from the harmful affects of cross-border family disputes is the introduction of common grounds of jurisdiction in child protection matters. Both the 1996 Hague Child Protection Convention as well as the Brussels II *a* Regulation follow this logic and introduce common rules of jurisdiction as a basis to bring about effective legal cooperation between States in child protection matters. The Brussels II *a* Regulation thereby reinforces, on a regional level, the jurisdictional rules of the earlier adopted 1996 Hague Child Protection Convention.<sup>140</sup>

179. The important role that common rules of jurisdiction in child protection matters can play in improving State cooperation regarding the resolution and prevention of cross-border family disputes has also been acknowledged in the Malta Process discussions. The Third Malta Declaration states: “The ideal basis for international legal cooperation in child protection matters is the mutual recognition of decisions based on common grounds of jurisdiction.”<sup>141</sup> The Second Malta Declaration states “It is in the interests of children that courts in different States should apply common rules of jurisdiction and that custody and contact orders made on the basis of those rules should as a general principle be recognised in other States. Competing jurisdictions add to family conflict, discourage parental agreement, and can encourage the unlawful removal or retention of children.”<sup>142</sup>

180. The international trend towards the use of the connecting factor of “habitual residence of the child” in determining the international jurisdiction in child protection matters is reflected in several recent international and regional instruments including the 1996 Hague Child Protection Convention and the Brussels II *a* Regulation. Acknowledging the dangers attached to parallel proceedings and attempting to avoid competing jurisdiction, the 1996 Hague Child Protection Convention’s uniform rules on jurisdiction introduce as a basic principle the centralisation of jurisdiction on child protection measures in the authorities of the State of the “habitual residence of the child”.<sup>143</sup> However, the connecting factor of “habitual residence of the child” is not the only connecting factor the 1996 Hague Child Protection Convention refers to regarding international jurisdiction. Recognising that the courts in the State of the habitual residence of the child may not in all cases be the most appropriate to decide in the matter of child protection, the 1996 Hague Child Protection Convention provides for a number of exceptions guaranteeing a flexible and balanced use of the connecting factor of habitual residence. See regarding the Convention’s jurisdictional rules also Chapters 4-8

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<sup>140</sup> The jurisdictional rules of the 1996 Hague Child Protection Convention and those of the Brussels II *a* Regulation are not completely identical.

<sup>141</sup> See Recommendation No 4 of the Third Malta Declaration, *supra* footnote 6.

<sup>142</sup> See Recommendation No 5 of the Second Malta Declaration, *supra* footnote 6.

<sup>143</sup> See para. 37 of the Explanatory Report on the 1996 Hague Child Protection Convention, *supra* footnote 14.

of the Practical Handbook<sup>144</sup> on the operation of the 1996 Hague Child Protection Convention.

### **C. Conflicts of jurisdiction**

- 69. With a view to preventing conflicting decisions concerning parental responsibility, all possible steps should be taken to avoid that the same cause of action between the same parties is dealt with in parallel proceedings in different States.**
- 70. An ideal measure to avoid parallel proceedings concerning parental responsibility is the joining of multilateral treaties, introducing in this field of law common grounds of jurisdiction and rules that avoid conflicts of jurisdiction.**
- 71. In the absence of relevant international or bilateral legal framework, the resolution of conflicts of jurisdiction concerning custody and contact may, if the autonomous private international law does not remedy the conflict in the individual case, considerably depend on a proactive approach of the judges involved.**
- 72. Acknowledging that the best interests of the child concerned could be compromised should conflicting decisions result from parallel proceedings, the judges seized with the same child protection matter between the same parties in the two States are encouraged to take all steps possible to avoid that the parallel proceedings continue, while safeguarding their independence and respecting their national procedural laws. The judges could, for example, where feasible and appropriate, consider:**
- a. Drawing attention of the relevant other court to the existence of parallel proceedings as soon as learning of the other State's proceedings.**
  - b. Using the means of direct judicial communication in the resolution of the jurisdiction conflict. International or regional Judges' Networks can assist in the exchange of necessary practical information and in establishing direct judicial communication between the relevant judges.**
  - c. Addressing the matter of competing jurisdiction and the inconveniences of conflicting decisions with the parties and encouraging the parties' understanding and cooperation in resolving the jurisdiction conflict in an amicable way in the interest of the child concerned.**

#### *Description of the discussions*

181. The Working Group highlighted the importance of avoiding parallel proceedings concerning child protection matters in different States. The Working Group

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<sup>144</sup> See *supra* footnote 15.

acknowledged that parallel proceedings on custody and contact, which are likely to bring about conflicting decisions, could lead to a stalemate in the resolution of a cross-border family conflict to the disadvantage of the children concerned. The Working Group recognised that the likelihood of parallel proceedings rises where States use differing grounds of jurisdiction in determining international jurisdiction in child protection matters and also where a bigger number of different grounds of jurisdiction stand side by side without any hierarchical order, both opening a path to “forum shopping” (see also above paras. 167, 171 and 172).

182. The Working Group acknowledged that an ideal way to avoid conflicts of jurisdiction is the implementation of the relevant multilateral legal framework. The Lebanese delegation drew attention to the fact that where common rules on jurisdiction offer the choice between different grounds of jurisdiction regarding a legal action between the same parties a rule giving priority to the court first seized can be an effective means to avoid parallel proceedings. Such a rule giving priority to the court first seized with the same cause of action between the same parties can be found in a number of multilateral and regional instruments in different fields of law. (See further regarding the possible usefulness of direct judicial communications with regard to exchanging necessary factual information to determine which court had been first seized, below under “VI. B. Direct judicial communications”).
183. The Working Group acknowledged that where no relevant bilateral or international legal frameworks are in force between the two States concerned, the situation is much more complex. The Working Group discussed in great detail, which measures could be taken in practice in the absence of applicable bilateral or international legal frameworks. Several delegations, such as the Moroccan delegation referred to their State’s autonomous private international law rules indicating that their law included rules on how to deal with conflicts of jurisdiction referring, *inter alia*, to the commonly used rule of giving precedence to the jurisdiction of the court first seized. However, the Working Group acknowledged that the rules of autonomous private international law would not be able to solve all conflicts of jurisdiction. For example, where the court first seized based its jurisdiction on a ground of jurisdiction not recognised in the other State, in which parallel proceedings are ongoing, the latter State’s court would simply consider the other State’s court as not having jurisdiction on the matter and the jurisdiction conflict would persist.
184. Acknowledging that in the absence of relevant international or bilateral legal framework a certain amount of conflicts of jurisdiction would subsist, the Working Group discussed which role the judges concerned might be able to play in avoiding that parallel proceedings would continue and possibly lead to the conflicting decisions, which is a result contrary to the best interests of the child concerned. The Working Group considered a proactive role of the judges concerned possible, as long as the applicable procedural laws were safeguarded as well as the judges’ independence.
185. A matter that was discussed in this regard was the question of how to make sure that the judges seized in different States with the same child protection matter between the same parties would be aware of the ongoing parallel proceedings. The knowledge of ongoing parallel proceedings might arise out of the information being given by one of the parties upon the judges’ question or be revealed on the parties’ own initiative. However, the fact that one judge has the knowledge of the ongoing parallel proceedings does not necessarily mean that the relevant other judge is informed. Several delegations

highlighted that whether a judge who learns about ongoing parallel proceedings could him- or herself play an active role in informing the relevant other judge would depend on the applicable procedural law. A number of delegations considered an active role of the judge in informing his colleague judge in the other State possible. However, some Working Group members highlighted that the procedural law might require the agreement of the parties with that measure. The Israeli delegation highlighted that their procedural law in family matters is based on “adversarial principles” and not on “inquisitorial principles”, which made it impossible for a judge to make contact with the judge in another State on his or her own initiative without a request from the parties. When discussing the question on how, if at all, the information about ongoing parallel proceedings could be passed on to the court in the other legal system, some Working Group members considered a direct contact between judges possible while others considered the involvement of an intermediary necessary. The Egyptian delegation highlighted that steps taken by the judges concerned and in particular any possible communications between judges through intermediaries or directly should not lead to a delay in the overall resolution of the cross-border family dispute.

186. Another subject discussed in this context was the usefulness of direct judicial communications in the resolution of international jurisdiction conflicts in child protection matters. Several delegations, such as the Lebanese delegation, were open to the idea of direct judicial communications in this context, while highlighting that the judges’ independence needed to be safeguarded and the applicable procedural law rules respected. A number of delegations, such as the Jordanian delegation, emphasised that safeguarding the judges independence also meant that the decision of whether to stay or terminate proceedings would remain a matter to be decided by the judge in accordance with the applicable procedural law.

187. As a further possible measure to avoid the continuation of parallel proceedings, the Working Group discussed the possibility of the judge encouraging the parties to resolve in an amicable way the conflict of jurisdiction in the interest of the child concerned drawing to their attention the inconveniences of conflicting decisions. The comments of the delegations regarding the feasibility of the judge actively engaging in resolving the conflict of jurisdiction differed again. However, there was agreement that such an active engagement of the judge could be advantageous if in line with the relevant procedural law and provided that the independence of the judges is not compromised. The Algerian delegation drew attention to the “human factor” as a central aspect in all international family conflicts on custody and contact which would give these conflicts a very special position amongst other civil law cross-border conflicts. The Egyptian delegation supported a proactive approach in informing the parties of the negative consequences of conflicting decisions and stated that this would be in line with the judges’ obligation under Egyptian law to inform the parties about their rights and the legal consequences of their actions. Also the Moroccan and Lebanese delegations highlighted the compatibility of the judge’s drawing attention to the negative consequences of conflicting decisions with their procedural laws.

### **D. Promoting common applicable law rules in international child protection matters**

**73. The promotion of common applicable law rules regarding matters of parental responsibility and other child protection matters assist in the avoiding of conflicting decisions and in deterring forum shopping.**

**74. States should consider the promotion of such common applicable law rules.**

*Description of the discussions*

188. The Working Group discussed the important impact of applicable law rules with regard to avoiding conflicting decisions in international child protection matters. In the course of the discussions on international jurisdiction, a number of delegations, such as the Algerian and the Tunisian delegations, had highlighted that the decision on appropriate jurisdiction rules could not be made without a decision on appropriate applicable law rules. In particular the Tunisian delegation highlighted the importance of the promotion of common applicable law rules in the field of international child protection matters and suggested the discussion of objective criteria for applicable law rules. The Working Group agreed that this was an important matter. Due to the limited time available, the Working Group could not exchange views in more detail on the matter. See regarding the Working Group's further encouragement of a greater regional exchange below Good Practice No. 150.

*Background remarks*

189. The 1996 Hague Child Protection Convention sets up common applicable law rules for international child protection matters. According to Article 15 of the Convention, as a general rule, the competent courts apply their own law when seized with a child protection matter falling within the scope of the Convention. Since the principal connecting factor for international jurisdiction under the Convention is the habitual residence of the child, in many cases the law applied to matters covered by the Convention will be the law of the State of the habitual residence of the child. The general applicable law rule of the 1996 Hague Child Protection Convention thus combines two important objectives that conflict of law rules strive to achieve: (1) being practicable, *i.e.* easy to apply and not prone to bring about delays in the proceedings and, at the same time, (2) leading to the application of a law with a close connection to the subject matter and / or the person concerned.<sup>145</sup> The objective (1) is achieved by allowing the courts seized with child protection matters to generally apply the "*lex fori*", *i.e.* their own law and thus the law they know best. Consequently, no possibly time-consuming inquiry into the content of foreign law is necessary. At the same time, the Convention favours the application of a law with an objectively close connection to the subject matter and the person concerned (2) by, as a general principle, leading to the application of the law of the child's habitual residence as law applicable to child protection matters.

190. When referring to the law applicable, the Convention refers to the substantive law of a State excluding that State's choice of law rules.<sup>146</sup> Should in the State whose law has been appointed as applicable by the Convention different systems or sets of substantive law exist, be it because the State has different legal territorial units or because the States

<sup>145</sup> See also para. 86 of the Explanatory Report the 1996 Hague Child Protection Convention, *supra* footnote 14.

<sup>146</sup> See Article 21(1) of the 1996 Hague Child Protection Convention.

differentiates between different categories of persons, a further determination is needed. In the latter case, *i.e.* where the State has “two or more systems of law or sets of rules of law applicable to different categories of persons”, such as different religious laws, the Convention sets forth that the law applicable is to be identified by the inter-personal conflict of laws rules of the State concerned.<sup>147</sup> Taking the example of a State with different religious family laws, it would be up to that State’s rules which of the religious laws would be applied on the subject matter.

191. As a further very important aspect of the applicable law rules of the 1996 Hague Child Protection Convention it has to be highlighted that the Convention contains rules that secure that the change of habitual residence of the child and consequently the change of the law applicable to child protection matters cannot lead to an extinction of parental responsibility existing under the former law of habitual residence of the child. Article 16(3) of the Convention provides that “[p]arental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State”.<sup>148</sup>

### **E. Recognition and Enforcement**

**75. States should take all measures possible to secure that procedures for the recognition and enforcement of foreign decisions on custody and contact or other foreign measures of child protection be simple, swift, transparent and inexpensive.**

**76. Of assistance in achieving this aim may be, depending on the organisation of the legal system concerned, the concentration of jurisdiction for the recognition of foreign child protection measures in one court or in a limited number of courts as well as the introduction of other measures of concentration of jurisdiction, such as a concentration of jurisdiction at the enforcement level.**

**77. In view of the time-sensitivity of child related matters, States that have not yet done so are encouraged to introduce speedy procedures for the recognition and enforcement of foreign child protection measures ensuring that the competent State bodies deal with requests for recognition and enforcement in an expeditious manner. In particular, where the foreign order concerns the return of a child who has been wrongfully removed or retained, expeditious procedures for the recognition and enforcement should be available.**

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<sup>147</sup> See Article 49 of the 1996 Hague Child Protection Convention; Article 49 further notes that should in the State concerned no such inter-personal conflict of laws rules exist, “the law of the system or the set of rules of law with which the child has the closest connection” should be applied.

<sup>148</sup> See for further details paras. 105-108 of the Explanatory Report the 1996 Hague Child Protection Convention, *supra* footnote 14.

- 78. There should be clear and strict timeframes in the recognition and enforcement process for the authorities concerned, including timeframes for the processing of any possible remedies against the recognition and enforcement of the foreign child protection measure.**
- 79. With a view to protecting children concerned by cross-border family disputes from further harm and with a view to avoiding parental alienation, States should provide parents applying for the recognition and enforcement of a foreign child protection measure with an easy access to urgent procedures for protective measures and provisional measures such as an interim contact order.**
- 80. All information relevant concerning the process of recognition and enforcement of a foreign measure of child protection, including information on the conditions and necessary steps for recognition and enforcement, the approximate duration, the costs, possibly available legal aid, as well as information on the availability of protective and urgent measures, should be made easily accessible to any person in need of this information. Ideally, this information should be made available through a centralised structure, such as a Central Contact Point (see above Good Practices Nos. 33 *et seq.*).**
- 81. Recognising the considerable assistance that the international legal framework can provide in securing the recognition and enforceability of child protection measures across borders, States are encouraged to consider joining relevant multilateral instruments.**

*Description of the discussions*

192. The Working Group unanimously emphasised the importance of securing that procedures for the recognition and enforcement of decisions on custody and contact or other measures of child protection be simple, swift, transparent and inexpensive. The Jordanian delegation highlighted that, however, any procedure employed must be compatible with the cultural specifics of the relevant legal system.
193. As one possible measure of simplification and / or acceleration of recognition and enforcement procedures, the Working Group discussed at some length the desirability and feasibility of a concentration of jurisdiction with regard to the organisation of the recognition and enforcement process of foreign child protection measures.
194. Among a number of different measures of concentration of jurisdiction that were discussed was the “geographical” concentration of jurisdiction of procedures for the recognition of foreign child protection measures in one court or in a limited number of courts. It was mentioned that such a concentration of jurisdiction could possibly also include the enforcement process. Besides measures of “geographical” concentration of jurisdiction the Working Group also discussed measure of “subject matter” concentration of jurisdiction by limiting the number of judges responsible for the recognition and enforcement of foreign child protection measures and by a centralisation of responsibilities for the different steps of the recognition and enforcement process in as few bodies as possible.

195. Several delegations noted that a geographical concentration of jurisdiction could be helpful with regard to accelerating and simplifying procedures and with a view to the building of expertise concerning the processing of foreign child protection measures. At the same time, the Working Group highlighted that any measure introducing a geographical concentration of jurisdiction would have to take into consideration the geographical characteristics of the State concerned and would have to be in line with the basic principles regarding the protection of procedural rights. A number of delegations, such as the Moroccan and Lebanese delegations, considered a geographical concentration as a feasible measure as long as procedural rights could be safeguarded. The Algerian delegation referred to the huge size of their State's territory and reported that in their legal system a recent reform had shifted the emphasis from a geographical concentration of jurisdiction regarding the recognition of foreign decisions towards a concentration of competences for recognition and enforcement procedure in the same body. The Algerian delegation explained that the formerly existing concentration of jurisdiction for the recognition of foreign civil and commercial law decisions in one single court had caused a huge amount of delay in the processing of the recognition requests. The Algerian State had therefore decided to decentralise the competency for the recognition procedure. Regarding the recognition of foreign custody and contact decisions or other child protection measures now the specialised family courts would be competent which, at the same time, are the bodies responsible for the enforcement process. Several delegations, including the Algerian and Jordanian delegations, highlighted the advantages of involving as few judges as possible in the different steps of the recognition and enforcement process, *i.e.* the same judge deciding on the recognition of a foreign child protection measures could be in charge of the enforcement process and be the judge competent for the ordering of any protective or provisional measures while the recognition and enforcement is pending.
196. The Working Group reiterated the time-sensitivity of child protection matters and recognised the importance of providing expeditious procedures for the recognition and enforcement of foreign orders in this field of law. The Working Group recognised, that especially in cases where a cross-border dispute had escalated into a wrongful removal or retention of a child by one of the parents or other relatives, expeditious procedures to deal with request for recognition and enforcement of a foreign return order are crucial.
197. The delegations' exchange on the general conditions<sup>149</sup> and approximate duration of current recognition and enforcement procedures regarding child protection measures in their States revealed big differences. The estimated duration for the recognition process reported by the delegations varied from one to two weeks in Algeria and Lebanon to a duration of one or one and a half months in other States, with some delegations highlighting that in difficult cases where not all relevant documents would be provided by the applicant the procedure could last up to 4 or 6 months. Some delegations, such as the Jordanian delegation, underlined that urgency of cases of a wrongful removal or retention of a child would be taken into account.
198. Among the measures that States could consider to possibly speed up the recognition and enforcement procedures discussed by the Working Group was the introduction of clear and strict timeframes for the recognition and enforcement process, where such timeframes were not yet existing.

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<sup>149</sup> For example, the Tunisian delegation referred to Article 11 of the Tunisian Private International Law Code, see *supra* footnote 139.

199. Particularly in view of the fact that depending on the circumstances of the case the process of recognition and enforcement of a foreign child protection order can be lengthy, several delegations underlined the importance of availability of protective and provisional measures. In cases where a cross-border family conflict concerning children had led to an interruption of contact between a parent and his or her child, expeditious procedures for the decision on interim contact should be available. Several delegations, such as the Egyptian, Israeli and Tunisian delegations, reported that their legal systems offered the possibility for an applicant to apply for a number of protective or provisional measures while awaiting the recognition and enforcement of a foreign child protection measure. Some delegations, such as the Lebanese delegation, highlighted that urgent measures to hinder a removal of the child concerned from the jurisdiction are available in their State.

200. Recognising that a major obstacle to the speedy cross-border recognition and enforcement of child protection measures is the lacking knowledge of applicants of the required steps to take and recognising that incomplete applications for recognition and enforcement can cause huge delays, the Working Group emphasised the importance of making easily accessible all information necessary about the recognition and enforcement process to any interested person. The Working Group highlighted in this context again the usefulness of a central information providing structure in each State (see Good Practices Nos. 33 *et seq.* above). The information considered particularly important for individuals wishing to obtain the recognition and enforcement of foreign child protection measures included: information regarding the contact details of the body / bodies competent for the recognition and enforcement, the documentation to be provided and the formalities to be fulfilled, information on the estimate duration and costs of the recognition and enforcement process, possibly available legal aid as well as information on the availability of protective or provisional measure while the recognition and enforcement process is pending.

201. The Working Group acknowledged that recognition and enforcement of foreign child protection measures can be considerably simplified and accelerated where international, regional or bilateral legal framework is in place between the relevant States. The Working Group took note of relevant multilateral instruments, in particular the 1996 Hague Child Protection Convention, and drew attention to the Riyadh Agreement for Judicial Cooperation<sup>150</sup> and a number of bilateral instruments assisting in the recognition and enforcement of decisions in international child protection matters.

#### Background remarks

202. A multilateral instrument of particular relevance when it comes to simplifying recognition and enforcement of international child protection measures is the 1996 Hague Child Protection Convention.<sup>151</sup> In accordance with Article 23 of the Convention any measure of child protection taken by the authorities of a Contracting State is recognised in any other Contracting State by operation of law. That means, if, for example, a court in a Contracting State renders a decision on custody or contact this decision will automatically be recognised in all other Contracting State without the need of any recognition procedures. The Convention, however, provides a number of grounds

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<sup>150</sup> See *supra* footnote 51.

<sup>151</sup> See *supra* para. 11.

of refusal of recognition. Recognition can, *inter alia*, be refused if the authority that took the child protection measure lacked international jurisdiction under the Convention or if the recognition of the child protection measure would be “manifestly contrary to public policy of the requested State, taking into account the best interests of the child”.<sup>152</sup> To dispel any doubts regarding the recognition of a child protection measure, the Convention’s advance recognition mechanism can be used: Article 24 of the Convention offers any interested person the possibility “to request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State”. When it comes to the enforcement of a child protection measure originating from another Contracting State, Article 26 of the Convention obliges Contracting States to use simple and rapid procedures for granting the declaration of enforceability or, where applicable, registering the child protection measure for the purpose of enforcement. For further details on recognition and enforcement under the 1996 Hague Child Protection Convention see the Practical Handbook on the operation of the Convention.<sup>153</sup>

## VI. JUDGES’ NETWORKS AND DIRECT JUDICIAL COMMUNICATIONS

### A. Judges’ networks

**82. Judicial cooperation, general judicial communications and judges’ networks on a national, regional and international level are of valuable assistance for the handling of cross-border family disputes. Networks assist judges in building expertise and provide a platform for exchange with colleague judges on a national, regional and international level respectively. Judges’ networks promote judicial cooperation, foster mutual trust, confidence, and respect and can assist in effectuating direct judicial communications.**

**83. States should encourage judicial cooperation, general judicial communications and support the establishment and maintenance of a national network of judges specialising in international family matters. Such a network should comprise judges from all different types of courts likely to deal with international family matters, including, where relevant, judges from religious courts.**

**84. States should also promote and support the establishment and maintenance of a regional network of judges specialising in international family matters.**

**85. In addition, States are strongly encouraged, if they have not already done so, to designate a judge to the International Hague Network of Judges.<sup>154</sup> In accordance with the “Emerging Guidance Regarding the Development of the International Hague Network”:<sup>155</sup>**

<sup>152</sup> See Article 23(2) of the 1996 Hague Child Protection Convention.

<sup>153</sup> See Chapter 10 of the revised Draft Handbook, *supra* footnote 15.

<sup>154</sup> For further information on the International Hague Network of Judges see below “Background remarks”.

<sup>155</sup> See Preliminary Document No 3A Revised of July 2012 – “Emerging guidance regarding the development of the International Hague Network of Judges and general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges” available at < <http://www.hcch.net/upload/wop/abduct2011pd03ae.pdf> > (last consulted 15 May 2013).

- a. any State can designate a judge to the Network independent of whether that State is a party to one of the Hague Family Law Conventions or not;**
- b. the judge designated should be a sitting judge with appropriate authority and experience in the area of international child protection;**
- c. where feasible, designations should be for as long a period as possible in order to provide stability to the network while recognising the need to have new members join the Network on a regular basis.**

*Description of the discussions*

203. The Working Group acknowledged the particular usefulness of judicial cooperation, general judicial communications and judges' networks. In the course of the different Working Group meetings, experienced network judges from four different European jurisdictions, namely Czech Republic, Germany, Spain and the United Kingdom reported on their work. The intervening judges, specialised in international family law, were at the same time members of the "International Hague Network of Judges"<sup>156</sup> as well as members of the "European Judicial Network in civil and commercial matters"<sup>157</sup> and oftentimes also members of a national network of judges working in international family law.

204. The Working Group exchanged on the situation in their States regarding judges' networks. Few of the delegations, including the Algerian and Israeli delegations, reported about existing judicial cooperation and network activity. There was agreement among the Working Group members that this was an area to further explore and that establishing a national network of specialised judges would be extremely valuable. The Israeli delegation suggested that such a network should also include judges from religious courts promoting exchange and cooperation between civil and religious courts. At the same time, the Working Group highlighted the importance of enlarging regional cooperation and favoured the establishment of a regional judges' network.

205. Finally, the Working Group encouraged the designation of a judge to the International Hague Network of Judges, noting that any State can designate a member to the network without a need for that State to be a party to one of the Hague Family Law Conventions. The Working Group further took note of the "Emerging rules regarding the development of the International Hague Network of Judges and general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases within the context of the International Hague Network of Judges"<sup>158</sup>. The Israeli delegation reported on the positive experiences regarding the International Hague Network of Judges to which Israel has designated a judge. Furthermore, it should be noted that in May 2013, *i.e.* in the course of the ongoing Euromed III project, the Moroccan Court of Cassation has notified the Hague Conference on Private International Law of the designation of two judges to the International Hague Network of Judges.

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<sup>156</sup> For further information on the International Hague Network of Judges see below "Background remarks".

<sup>157</sup> For further information on the European Judicial Network in civil and commercial matters see below "Background remarks".

<sup>158</sup> See *supra* footnote 155.

206. Several delegations, including the Algerian delegation, drew attention to the importance of providing means for judges to communicate and exchange with each other in a simple and secure way. The Algerian delegation suggested the use of a secured platform or forum for judges on the Internet.
207. The Jordanian delegation referred to the Riyadh Agreement for Judicial Cooperation<sup>159</sup> as a basis for judicial cooperation among Arab States.

*Background remarks*

208. The operation of international, regional and national networks of judges specialised in international family matters has over the past decade considerably contributed to facilitating the resolution of cross-border family conflicts.
209. The International Hague Network of Judges is a network of judges specialised in family matters, which was established following a proposal at the 1998 De Ruwenberg judicial conference on the international protection of children. The International Hague Network of Judges facilitates communications and co-operation between judges at the international level and assist in ensuring the effective operation of a broad range of international instruments, both regional and multilateral, in the field of international child protection. The International Hague Network of Judges is growing continuously and comprises today, after 15 years of operation, more than 80 judges from over 50 different States. The network is open to judges from all States, independent of whether these States are Contracting States to one of the Hague Children's Conventions or a Member State of the Hague Conference on Private International Law. So far, three States that are not a State Party to the Hague Children's Conventions, namely Kenya, Pakistan and Rwanda, have designated judges to the International Hague Network of Judges. See for further information on the Network the Hague Conference website.<sup>160</sup>
210. The European Judicial Network in civil and commercial matters has been established following the European Council decision of 28 May 2001.<sup>161</sup> In implementation of the Council decision, each Member State<sup>162</sup> has designated a central contact point for the purposes of the network. The European network comprises liaison judges with responsibility in the field of judicial cooperation in civil and commercial matters from each Member State and also other authorities, "whose membership of the network is considered useful by Member States" as well as "professional associations that represent legal practitioners participating in the application of Community and international civil justice instruments".<sup>163</sup>

<sup>159</sup> See *supra* footnote 51.

<sup>160</sup> A list of members of the network is available at < <http://www.hcch.net/upload/haguenetwork.pdf> > (last consulted 15 May 2013); further information on the network can be found in the Report on Judicial Communications in Relation to International Child Protection, drawn up by Philippe Lortie, Preliminary Document No 3B, April 2011, available at < <http://www.hcch.net/upload/wop/abduct2011pd03be.pdf> > (last consulted 15 May 2013).

<sup>161</sup> Council decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:174:0025:0031:EN:PDF> > (last consulted 15 May 2013); later amended by the Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009, available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0035:0040:EN:PDF> > (last consulted 15 May 2013).

<sup>162</sup> Denmark is not participating in the Network.

<sup>163</sup> See for further information the European Union websites at < [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33129\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33129_en.htm) > (last consulted 15 May 2013) and also the website of the European Judicial Network < [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm) > (last consulted 15 May 2013).

211. It should be noted that the International Hague Network of Judges and the European Judicial Network in civil and commercial matters are closely cooperating with each other. Often the Judges designated by European States to the International Hague Network of Judges are at the same time members of the European Judicial Network in civil and commercial matters. In January 2009, the European Commission and the Hague Conference on Private International Law held a joint conference on “Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks”, which emphasised that the “different networks should operate in a complementary and coordinated manner in order to achieve synergies, and should, as far as possible, observe the same safeguards in relation to direct judicial communications”.<sup>164</sup>

## **B. Direct judicial communications**

**86. Direct judicial communications can be of considerable assistance in the resolution of individual cross-border family disputes concerning children. Direct judicial communications can assist in avoiding conflicting decisions, assist in resolving practical issues in accessing relevant foreign law and assist in bringing about an amicable resolution of the dispute.**

**87. When engaging in direct judicial communications every judge has to respect the law of his or her own legal system. The communications must not compromise the judge’s independence. It is important to take note of commonly accepted procedural safeguards for direct judicial communications; however, the domestic procedural rules of the judge concerned prevail.**

### *Description of the discussions*

212. The Working Group took note of the usefulness of direct judicial communications in the resolution of cross-border family disputes. The report from a German family judge with long-standing experience in international family matters active in judges’ networks at the national, regional and international level on the functioning of direct judicial communications inspired several delegations to call for an encouragement of direct judicial communications in their jurisdiction. The Israeli delegation reported on their State’s experiences with international judges cooperation in the context of the International Hague Network of Judges. Following the recent designation of two Moroccan judges to the International Hague Network of Judges, a second State among the ENPI South Partner Countries is now participating in international judges cooperation through judicial networks.

213. The delegations reported that they were not aware of any experiences with direct judicial communications in individual cases in their legal system. Having never heard of direct judicial communications before, a number of Working Group members were indeed hesitant regarding the question of whether such an activity would require an explicit legal basis in their procedural law. The Working Group took note of the fact that

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<sup>164</sup> See No. 6 of the Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference, available at the Hague Conference website under < [http://www.hcch.net/upload/judcomm\\_concl2009e.pdf](http://www.hcch.net/upload/judcomm_concl2009e.pdf) > (last consulted 15 May 2013).

in a number of States it was more and more common for judges to engage in direct judicial communications and that in many of these States such an activity was considered in line with the principles of domestic procedural law even though their procedural law did not contain an explicit legal basis for direct judicial communications. The Working Group further took note of the existence of the General principles for judicial communications including the commonly accepted procedural safeguards for direct judicial communication accumulated and elaborated in the context of the activities of the International Hague Network of Judges.<sup>165</sup>

Background remarks

214. The direct interaction between judges from different legal systems through direct judicial communications to assist in the resolution of cross-border family disputes is a groundbreaking recent development in international family law. The apparently first record of direct judicial communications between two judges of different countries with regard to a specific case in the context of the 1980 Hague Child Abduction Convention dates back to the year 1996.<sup>166</sup> Direct judicial communications with regard to an individual case can assist the competent judges who are seized in two different States with connected matters in the same family dispute in obtaining necessary information about the legal or factual situation, including the status of proceedings, in the other State and can assist in avoiding conflicting decisions.<sup>167</sup> The past years of evolvement of direct judicial communications have shown that it can also assist in bringing about an amicable resolution of the cross-border family dispute.

215. Also in the context of the European Judicial Network in civil and commercial matters, direct judicial communication is facilitated and encouraged. The Conclusions and Recommendations of the Joint Conference of the Hague Conference on Private International Law and European Commission on “Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks” emphasise “the value of direct judicial communications in international child protection cases, as well as the development of international, regional and national judicial networks to support such communications”.<sup>168</sup>

216. As result of the Hague Conferences’ work with regard to promoting direct judicial communications and as a result of the personal engagement of many experienced specialised family judges from States all over the world who are active in the International Hague Network of Judges “General principles for judicial communications including the commonly accepted procedural safeguards for direct judicial communication” have been accumulated and elaborated.<sup>169</sup>

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<sup>165</sup> See *supra* footnote 155.

<sup>166</sup> See the description of the first case reported by the Permanent Bureau of the Hague Conference on Private International Law at page 4 of the Report on Judicial Communications in Relation to International Child Protection, drawn up by Philippe Lortie, *supra* footnote 160.

<sup>167</sup> See for further information on direct judicial communications the documents referred to in footnotes 155 and 160.

<sup>168</sup> See *supra* footnote 164.

<sup>169</sup> See *supra* footnote 155.

**VII. CROSS-BORDER WRONGFUL REMOVAL OR RETENTION OF CHILDREN**

**A. Preventing the illicit removal or retention of children**

- 88. All measures possible should be taken to prevent cross-border wrongful removal or retention of children.**
- 89. States need to cooperate with each other to achieve this aim.**
- 90. States should promote a legal environment that reduces the risk of international wrongful removal or retention of children.**
- 91. Rules on mutual recognition, including advance recognition, and enforcement of foreign decisions on matters of custody and contact contribute to a legal environment deterring international child abduction.**
- 92. States should take all steps possible to enable their authorities to respond rapidly and effectively where there is a credible risk of a wrongful removal. In particular:**
- a. “Either parent fearing abduction should have effective access to preventive legal remedies, including, where appropriate, the ability to seek an order clarifying a parent’s legal status vis-à-vis the child.”<sup>170</sup>**
  - b. “Relevant court orders should be acted upon and enforced without delay.”<sup>171</sup>**
  - c. “In emergency situations access to courts should be available expeditiously and, if necessary, out-of-hours.”<sup>172</sup>**
  - d. The expeditious implementation of effective barriers to international travel should be made possible.**
- 93. Raising awareness of the risk of international child abduction among the general public as well as among relevant groups of professionals is in itself an important measure in the prevention of wrongful removal or retention of children.**
- 94. Judges deciding on matters of custody or contact in family disputes with an international character, should, insofar as appropriate, include in their decisions an explanation of the legal situation as to the parents’ rights regarding a removal of the child from the jurisdiction of the child’s habitual residence.**
- 95. Legal provisions and decisions relating to transfrontier contact should include safeguards designed to reduce the risk of wrongful retention of a child during contact visits abroad.**

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<sup>170</sup> See Section 3.2. of the Guide to Good Practice on Preventive Measures, *supra* footnote 68.

<sup>171</sup> See Section 3.3. of the Guide to Good Practice on Preventive Measures, *supra* footnote 68.

<sup>172</sup> *Ibid.*

**96. States are encouraged to establish and disseminate a “Prevention Document”<sup>173</sup> for parents and other individuals summarising preventive measures available in the State concerned and providing contact details of competent authorities and bodies, which can assist with particular measures. Included in the document should be information on available emergency procedures and on practical steps a parent or other individuals can take where there is a threat of an international wrongful removal or retention of a child. If feasible, this document should also be made available in English or French.**

**97. States should take all steps possible to promote appropriate training of professionals with a view to preventing the international wrongful removal or retention of children.**

*Description of the discussions*

217. The cross-border wrongful removal or retention of children was identified by the Working Group as one of the most problematic matters in international family law.

218. It should be noted that the used of the term “child abduction” has, in the course of the Working Group discussions, repeatedly caused confusion. Some delegations, including the Jordanian delegation, highlighted that the term “child abduction” (in Arabic) implied as understood by them a criminal law meaning and that a removal or retention of a child by the child’s parent could, according to their law, not constitute a child “abduction” in the criminal law sense. In order to avoid misunderstanding, it shall once more be highlighted that any mention of the term “child abduction” in this Handbook is to be understood as synonym of the term “wrongful removal or retention of the child” as defined above under the Terminology section (see para. 34). The term “child abduction” as used in this Handbook and indeed as used in the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention and in the Brussels II *a* Regulation is not meant to have any criminal law connotation.

219. All delegations highlighted the crucial importance of preventing the international wrongful removal or retention of children. The Working Group acknowledged that effective State cooperation is indispensable in this regard. The Working Group took note of the Guide to Good Practice on Preventive Measures,<sup>174</sup> which, although drawn up in the context of the 1980 Hague Child Abduction Convention, is of considerable assistance with regarding to the prevention of international child abduction in general.

220. The Working Group recognised the importance of a legal environment that reduces the risk of international wrongful removal or retention of children. Contributing to such a legal environment deterring international child abduction can be rules on mutual recognition and enforcement of foreign decision on custody and contact (see also above “V. E. Recognition and Enforcement”). A particularly helpful means in the prevention of a wrongful retention can be the speedy advance recognition of decisions relating to

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<sup>173</sup> See also the encouragement to establish a “Prevention Document” in Section 4.2.1 of the Guide to Good Practice on Preventive Measures, *supra* footnote 68.

<sup>174</sup> See *supra* footnote 68.

cross-border contact in the foreign State to which the child is to travel before the child commences the journey.

221. The Working Group emphasised the importance of States making available urgent measures where there is the credible risk of a wrongful removal and supported the urgent measures recommended in the Guide to Good Practice on Preventive Measures<sup>175</sup> in this regard. A number of delegations, including the Lebanese and Egyptian delegations reported on available urgent measures in their States to prevent the removal of a child from their jurisdiction.
222. The Working Group recognised the important role that “awareness raising” can play in the prevention of international child abduction.
223. The Working Group discussed in some detail a number of measures that a judge seized with a matter of custody or contact in a family dispute with an international connection could take to prevent a cross-border wrongful removal or retention. Several delegations highlighted that putting parents under general suspicion of planning a wrongful removal or retention would be a contra-productive approach. However, the Working Group considered as a helpful measure if judges rendering a decision on custody or contact following a parental separation or divorce would include in their decision an explanation of the legal situation as to the parents’ rights regarding a removal of the child from the State of habitual residence. For example, in a case where in accordance with the relevant applicable law, the parent having sole custody can generally determine the child’s place of residence within the State’s territory, however, this parent needs to have the other parent’s agreement for a relocation with the child to another State; this should be spelled out in the decision. Even though this legal situation will be evident for the judge, the situation might not be clear for laypersons. In this regard a clarification of each parent’s rights regarding a temporary or long-term removal of the child from the State of habitual residence can be of assistance in the prevention of international child abduction. Several delegations, including the Egyptian delegation, pointed out that the way in which the judge would be able to make this clarification, for example, in what part of the decision such an explanation could be mentioned, would depend on the applicable procedural law, which the judge has to respect.
224. The Working Group recognised further that it can be of particular assistance if legal provisions and decisions relating to the exercise of transfrontier contact include safeguards designed to reduce the risk of wrongful retention of a child during contact visits abroad.
225. As important safeguard, the “advance recognition” of a contact order in the country to which a child is to travel in accordance with the order was discussed (see also above para. 220). Another possible safeguard is the establishment of a so-called “mirror order” in the relevant State mirroring the content of the contact order, granted in the first State. The Working Group took also note of the relevant sections in the Guide to Good Practice on Transfrontier Contact.<sup>176</sup> As a result of an advance recognition or respectively the establishment of a mirror order, the legal situation as to the duration of the child’s cross-border visit and the perception that the child is to return to the other State is clear in both States concerned prior to the child’s travelling. Should the child nonetheless be

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<sup>175</sup> *Ibid.*

<sup>176</sup> See in particular sections 3.4.2 and 3.4.3 of the Guide to Good Practice on Transfrontier Contact, *supra* footnote 69.

wrongfully retained in the other State, a speedy return of the child can most likely be brought about much easier based on the recognised legal situation in the State of retention.

226. The Jordanian delegation referred to a number of measures employed in their legal system to safeguard the return of a child from a visit abroad, which included measures of imprisonment or the provision of a non-financial bail with the possibility of the bailman being imprisoned in case of a wrongful retention of the child until the child's return.
227. Several delegations, including the Tunisian and Algerian delegations, referred to the discussions held around the subject of securing cross-border parent-child contact and highlighted that the unreasonable restriction of contact aiming to meet an abstract risk of international child abduction was not appropriate. The Tunisian delegation explained that, on the contrary, in the extreme case where a court decided to completely deprive a parent from direct contact with the child based on the reasoning that direct contact might bear an abstract risk of abduction, the court might unwillingly give an incentive for parental child abduction. There was agreement in the Working Group that while safeguards reducing the risk of a child's wrongful removal would be extremely important they would have to be reasonable and proportionate.
228. The Working Group unanimously supported the idea of encouraging States to establish and disseminate a "Prevention Document" for parents and other individuals. Such a document should include a brief overview of preventive measures and emergency procedures available in the relevant State and should provide contact information of competent authorities and bodies, which can assist with particular measures. The document should give guidance to parents and other individuals on what practical steps to take where there is an acute threat of an international wrongful removal of a child. Ideally, the document should also be made available in English or French.

Background remarks

229. The combating of international wrongful removal or retention of children has since decades been a major concern for governments all over the world. The UNCRC provides in Article 11:
- “1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.  
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.”
230. The 1980 Hague Child Abduction Convention was drawn up with the aim to “protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access”.<sup>177</sup>
231. Much of the Hague Conference's work in the field of international family law has in the past decades been dedicated to the combating and the prevention of wrongful removal and retention of children. The Guide to Good Practice on Preventive

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<sup>177</sup> See Preamble of the 1980 Hague Child Abduction Convention, *supra* footnote 16

Measures<sup>178</sup> accumulates recommendable measures assisting the in prevention of international wrongful removal or retention of children.

232. The combating of international wrongful removal or retention of children has also been a major objective of the so-called Malta Process,<sup>179</sup> in which nearly all of the ENPI South Partner Countries are actively involved.

#### **B. Once an international wrongful removal or retention of a child has occurred**

**98. States should provide for a legal environment protecting children from the harmful effects of international child abduction.**

**99. States should examine the possibility of joining or concluding multilateral or bilateral treaties with a view to achieving this aim.**

**100. Once a child has been wrongfully removed or retained internationally, all steps possible should be taken to protect the child from any further harm and to bring about a speedy return of the child.**

**101. States should provide for speedy measures to locate within the State's territory a child that has been wrongfully removed or retained.**

**102. States should promote a speedy and effective cooperation of all relevant stakeholders.**

**103. In case a wrongful removal or retention of a child has occurred all relevant stakeholders need to be informed without delay. States should have a central body, such as a Central Authority or Central Contact Point (see Good Practices Nos. 33 *et seq.*), to which parents can address that information. Parents are encouraged to provide the central body with all relevant information and documents regarding the grounds for the parents' claim as speedily as possible. The central body should facilitate the informing of other relevant stakeholders of the wrongful removal or retention or respectively instruct the parent whom to address. Should a central body that can play such a coordinating role not yet exist in a given State, that State is strongly encouraged to disseminate, in a way easily accessible for those in need, contact information of all relevant stakeholders a parent should approach in the acute situation of an international child abduction.**

#### *Description of the discussions*

233. The Working Group underlined the importance of protecting children from the harmful effects of international child abduction. The Working Group recognised that effective cooperation between States is crucial to provide effective remedies where a cross-border wrongful removal or retention of a child has occurred. A number of delegations, such as the Tunisian and Algerian delegations, referred to the success of existing bilateral

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<sup>178</sup> See *supra* footnote 68.

<sup>179</sup> See *supra* para. 7.

arrangements in force for their States. The Working Group recognised the usefulness of bilateral and multilateral treaties dealing with the civil aspects of international child abduction.

234. Among the ENPI South Partner Countries, Israel and Morocco are Contracting States to the 1980 Hague Child Abduction Convention, which is open for signature by all States and currently in force for 89 States (status 15 May 2013).
235. When discussing the question of whether further ENPI South Partner Countries might consider the joining of this multilateral treaty, the responses differed considerably. The Tunisian delegation indicated that the bilateral agreements with France, Belgium and Sweden currently in force in Tunisia already implemented a number of important principles contained in the 1980 Hague Child Abduction Convention. The Tunisian delegation therefore stated that, at this stage, they would see no obstacle in the provisions of the Convention hindering Tunisia's joining the Convention. However, the Tunisian delegation reported that despite the fact that Tunisia was currently examining the 1980 Hague Convention it remained still to be seen whether Tunisia might, for the time being, continue the path of bilateral arrangements and possibly establish further bilateral treaties with other States.
236. The Lebanese delegation noted that the numbers of child abduction cases were increasing in Lebanon and that besides the existing bilateral agreements with France, Canada and Switzerland effective remedies were needed. The Lebanese delegation stated, however, that the 1980 Hague Child Abduction Convention was an instrument difficult to implement in Lebanon due to specifics of the Lebanese legal system with parallel operation of religious courts and civil courts applying different rules.
237. The Jordanian delegation stated that Jordan had reservations with regard to the 1980 Hague Child Abduction Convention and indicated that Jordan would currently see no pressing reason to examine the possibility of joining multilateral or further bilateral legal frameworks remedying the wrongful removal or retention of children since Jordan had very few international child abduction cases.
238. The Algerian delegation explained that a big part of Algeria's international relations were relations with France and that up to 80 or 90 % of the child abductions concerning Algeria were French-Algerian cases and would therefore fall under the French-Algerian bilateral arrangement. The Algerian delegation noted that the Algerian State currently might not see an urgency regarding the joining of a multilateral treaty in this field of law. However, the Algerian delegation indicated that the French-Algerian bilateral arrangement included a number of provisions lend from the 1980 Hague Child Abduction Convention and that the Algerian judiciary was therefore currently already to some extent applying principles contained in the 1980 Convention. The Algerian delegation, hence, could, at this stage, not see any concrete obstacles in the Convention's content to Algeria's possible joining the Convention.
239. The Working Group acknowledged the importance of speed in dealing with cases where international child abduction has occurred. Besides the crucial importance of facilitating measures to bring about a speedy return of the child, protective measures might become necessary in the acute situation of abduction. Such measures could include the prevention of the child's removal to yet another State or interim contact

orders securing the continuing contact or respectively the speedy re-establishment of contact between child and left-behind parent.

240. The Working Group recognised the importance of a speedy location of the wrongfully removed or retained child as well as the speedy and effective cooperation of all relevant stakeholders.

241. When discussing jurisdiction matters, the question was addressed whether the courts of the State to which the child had been abducted should in the acute situation of an abduction refrain from making any decisions on the merits of custody. It was discussed whether such a “blockage” of jurisdiction regarding the merits of custody could be imposed while, for example, a request for recognition of a foreign custody or return order was dealt with by the courts of the State to which the child had been abducted. The views of the delegations on whether such a mechanism could, outside the framework of an international instrument of cooperation, realistically be introduced and whether such mechanism was desirable differed immensely, so that no agreement could be found on that matter.

242. The Tunisian delegation stated that such a temporary blockage of jurisdiction on the merits of custody might be a good idea but that it was unrealistic. The Tunisian delegation noted that in practice a regular scenario was as follows: a Tunisian parent returns to Tunisia with the child to settle again in Tunisia and soon after the arrival files the divorce proceedings in Tunisia. The court deciding on the divorce then takes all necessary measures, including those concerning maintenance and custody. For cases where the bringing of the child to Tunisia constitutes a wrongful removal, *i.e.* if, for example, the parent has removed the child from the State of the habitual residence without the agreement of the other parent, who has the joint or sole custody of the child, the Tunisian delegation highlighted that the most important issue was to make known the fact that a child abduction had occurred without delay to all relevant stakeholders, including the court dealing with the divorce. The Tunisian delegation emphasised that, ideally, there should be a central body, such as a Central Authority or Central Contact Point as exists in Tunisia under the bilateral arrangements, to which parents can address that information. The Tunisian delegation underlined that it was crucial that the information on the abduction was shared as early as possible and that the left-behind parent would provide the central body with all details and documentation that could be of assistance, such as, for example, a marriage certificate, a possibly existing decision on custody, or a schooling certificate and other documents indicating that the child habitually resided in the other State. The central body could then take necessary steps and inform other stakeholders such as the prosecutor’s office assisting with the location of the child *etc.* The Tunisian delegation stated that inspiration could be taken from the 1980 Hague Child Abduction Convention and existing bilateral agreements in this regard.

243. The Egyptian, Jordanian and Lebanese delegations stated that they would not be in favour of restricting the jurisdiction of the courts in the State to which the child had been abducted regarding the merits of custody in the acute phase of a child abduction. The delegations explained that they considered it difficult to determine under which conditions such a blockage of jurisdiction should, if at all, apply. The Jordanian delegation highlighted, that already the very question of whether a wrongful removal or retention had occurred could pose difficulties. The Jordanian delegation stated that this was an evaluation that only a court could make. The Jordanian delegation, noted as a

further difficulty with regard to a blockage of jurisdiction that there would come a time when the child would get settled in the State to which he or she had been taken. The Lebanese delegation emphasised that custody decisions were by nature temporary decisions, which depending on the individual circumstances of the case might need adaptation in the best interests of the child and stated that the courts should be free to take appropriate measures where necessary. Also, the Egyptian delegation expressed concerns that such a blockage might prevent the courts in the State to which the child had been taken to efficiently protect the best interests of the child.

244. The Jordanian delegation noted that any court seized to decide on the merits of custody would take all circumstances of the individual case into consideration including the allegation that the presence of the child in the jurisdiction was the result of a wrongful removal and the court might when seeing that another court had recently examined the merits of custody simply refrain from modifying the well-balanced decision of the other court. The Jordanian delegation referred to the spirit of the Good Practices No. 72 in this regard. As a matter of crucial importance, the Jordanian delegation referred to the promotion of amicable solutions in cross-border family conflicts involving a cross-border wrongful removal or retention of a child.

245. The Tunisian delegation's suggestion regarding a Good Practice on the speedy information of relevant stakeholders once a child abduction has occurred was supported by all delegation.

### Background remarks

246. Once an international wrongful removal or retention of a child has occurred, time is of the essence. This is where effective structures of inter-State and intra-State cooperation play a crucial role in protecting the child concerned.

247. The 1980 Hague Child Abduction Convention<sup>180</sup> establishes such effective structures in all Contracting States and provides for expeditious proceedings securing the prompt return of wrongfully removed or retained children to their State of habitual residence. The 1980 Hague Child Abduction Convention is reinforced by the provisions on international wrongful removal or retention of children contained in the 1996 Hague Child Protection Convention and, in the European Union, the Brussels II *a* Regulation.<sup>181</sup> Furthermore, a number of bilateral instruments are in force in the Euro-Mediterranean region that create the necessary structures of State-cooperation and provide effective remedies for cross-border child abduction.<sup>182</sup>

## VIII. CROSS-BORDER FAMILY RELOCATION

**104. A parent wishing to relocate with his or her child to another State, should, where the other parent or possible other holder(s) of parental responsibility object to the child's relocation, have access to proceedings regarding the relocation of the child.**

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<sup>180</sup> See for further information *supra* para. 11.

<sup>181</sup> See for further information on these instruments *supra* paras. 11 and 12.

<sup>182</sup> See for the list of relevant bilateral agreements *supra* para. 16.

- 105. In proceedings regarding a request for cross-border relocation of a child the best interests of the child should be a primary consideration.**
- 106. Cross-border relocation of a child with one of his or her parents should be arranged for in a way that secures the child's right to maintain personal relations and direct contact with both parents.**
- 107. In particular, all steps possible should be taken to secure that the terms of a contact order or agreement made in the context of a cross-border relocation should be given maximum respect in the State to which the relocation occurs. Ideally, the terms of the contact order or agreement should be rendered legally binding in the State of relocation before the relocation occurs, for example, by means of advance recognition or through the establishment of a mirror order. Direct judicial communications can be of particular assistance with a view to achieving this aim.**

*Description of the discussions*

248. The topic of international family relocation was addressed on several occasions in the course of the Working Group meetings. Unfortunately, due to the limited time available, the Working Group could not explore the subject in great detail.
249. There was agreement among the members of the Working Group that all steps possible should be taken to secure that a cross-border relocation of a child with one parent does not lead to insurmountable obstacles in the exercise of contact with the other parent. The Working Group reiterated that the child's best interests must be a primary consideration in all decisions concerning matters of parental responsibility, including decisions on the cross-border relocation of a child.
250. In the course of the discussions on custody and contact decisions following a divorce or separation, many Working Group members described situations, in which a parent had asked to relocate to another State together with the child. Several delegations, including the Jordanian delegation, reported that where a mother having the "hadana"<sup>183</sup> of a child wished to relocate with the child to another State, the child's relocation would either have to be agreed upon by the father or permitted by the court. Some delegations, including the Moroccan delegation, indicated that also with regard to the child's relocation inside a State an agreement could be needed. With regard to court decisions on a child's cross-border relocation, a number of delegations, such as the Jordanian delegation, indicated that the judge would consider whether the relocation of the child was in the child's best interests by applying the principles generally used to determine the best interests of the child in custody decisions. The Jordanian delegation highlighted that in their legal system safeguarding the religious education of the child was an important factor in the best interests of the child consideration and therefore also an important matter in international relocation cases. The Jordanian delegation underlined, however, that the religious education of a Muslim child could also be guaranteed by a the non-religious mother who arranged for the child's religious education and that the fact that the mother was not a Muslim herself would therefore in Jordan not be an obstacle to granting the "hadana" to the mother or allowing her to internationally

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<sup>183</sup> See the Terminology section *supra* paras. 32 and 33.

relocate with the child, provided that the appropriate education of the child was safeguarded.

251. The Israeli delegation reported that the Israeli Ministry of Justice was currently working on a law dealing with the matter of international family relocation as well as national relocation to distant locations (more than 600 km away). The Israeli delegation highlighted that it was important to give parents access to court proceedings for the request of cross-border relocation of a child and noted that procedures to allow for a lawful relocation of a child were also important to prevent the wrongful removal of children. The Israeli delegation reported that the draft law contained provisions on relocation proceedings, provisions on the encouragement of mediation and similar processes to assist parents in finding an agreement, and also a sample agreement for relocation. The Israeli delegation expressed the hope that the new law would assist in raising awareness that parents need to cooperate in the exercise of parental responsibility and that generally the permission of the other parent is needed to leave the country with the child.
252. Several delegations, such as the Israeli and Jordanian delegations, underlined the importance of encouraging agreement between the parents in international relocation cases. The Israeli delegation added that if a judge would, in the course of a relocation proceeding, be presented with a parental agreement on terms of contact following the relocation, the judge needed to safeguard the best interests of the child by assisting the parents in verifying whether the suggested terms were realistic and workable. The Israeli delegation reported on a case where the judge had approved an agreement, which did not contain any provisions on travel-expenses for the cross-border contact, which later in the implementation of the terms of contact constituted an obstacle to contact (see also para. 81).
253. The Algerian delegation raised the issue of child maintenance in the context of cross-border relocation of the child. The Algerian delegation was concerned about the possibility of overcharging a father with a considerable increase in the amount of child maintenance claimed when mother and child would relocate to a State with considerably higher living expenses. The Algerian delegation explained that this topic needed further exploration.
254. The Working Group highlighted the crucial importance of securing that visa-matters do not become an obstacle to cross-border contact following the international relocation of the child (see further “I. D. Securing transfrontier exercise of parental responsibility – Facilitation of visas and other travel documents”).
255. The matter of recognition and enforcement of foreign contact orders was discussed in some detail in the greater context of the topic of recognition and enforcement of child protection measures in general (see above the Good Practices Nos. 75 *et seq.* and the description of the discussions) and also in the context of the prevention of child abduction (see above Good Practices Nos. 91 and 95). The Working Group emphasised the importance of securing that contact provisions agreed upon by the parents or ordered by the court before the relocation are given maximum respect in the State to which the relocation occurs. The Working Group noted that, ideally, the terms of contact should be rendered legally binding in the State of relocation prior to the relocation. This could be achieved, for example, by means of advance recognition or through the establishment of a mirror order. The Working Group noted the usefulness of international, regional and

bilateral legal framework with regard to securing the recognition and enforceability of a foreign contact order in the State of relocation. The Working Group further noted that direct judicial communications can assist with the identification and the taking of necessary steps to secure that the terms of the contact arrangement will be respected in the State of relocation (see further with regard to direct judicial communications “VI. B. Direct judicial communications“).

Background remarks

256. International family relocation is a matter of increasing importance in international family law. More and more family relationships have an international element in today’s globalised world and one can observe a growing number of cases where, following a separation or divorce, one parent wishes to permanently relocate with the child to another State. Frequent reasons for a parent’s intention to relocate with the child, are the wish to return to the State of origin, better professional perspectives in the other State or joining a new partner in the other State. As a result of the cross-border relocation the child will regularly live at a greater distance from the other parent, who is remaining in the State from which the child relocates, and the child’s contact with that parent is likely to become more difficult and often more expensive.

257. The matter of international family relocation has already been in the focus of the Hague Conference’s work and work of other bodies engaged in international family law for some time.

258. In the Hague Conference Guide to Good Practice on Transfrontier Contact, a full Chapter is dedicated to the matter of relocation and contact.<sup>184</sup> The Guide highlights that the

“[a]pproaches to relocation under national law differ in several respects. These differences relate, *inter alia*, to –

- the circumstances in which it may be necessary for a parent to obtain a court order for permission to relocate with a child. This will depend on how parental responsibilities are attributed, and how they may be exercised, within particular States;
- the factors to be taken into account by a court in determining whether relocation should be permitted; and
- the approach taken by the court to guaranteeing and securing the contact rights of the “left-behind” parent.”<sup>185</sup>

259. The Guide to Good Practice on Transfrontier Contact emphasises the importance of taking all appropriate measures to preserve the contact between child and “left-behind” parent and highlights that “[i]t is important that the terms and conditions of a contact order made in the context of relocation are given maximum respect in the country in which relocation occurs.”<sup>186</sup>

260. In 2010 the Hague Conference on Private International Law co-organised a Conference on “Cross-border family relocation” together with the International Centre for Missing and Exploited Children in Washington, D.C., USA, as a result of which the so-called

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<sup>184</sup> See Chapter 8 of the Guide to Good Practice on Transfrontier Contact, *supra* footnote 69.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

“Washington Declaration on International Family Relocation”<sup>187</sup> was concluded. In the Washington declaration the participating 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law laid down some general principles on international family relocation. The Washington Declaration states, *inter alia*, that “States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.”<sup>188</sup>

261. The Washington Declaration emphasises that “[i]n all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration” and suggests a number of factors that could be taken into consideration when deciding on cross-border relocation.<sup>189</sup>
262. It has to be highlighted that international, regional and bilateral legal frameworks can be of particular assistance in securing that a relocation decision containing contact arrangements for the time following the relocation will be respected in the State to which relocation is taking place. A global instrument of particular importance in this regard is the 1996 Hague Child Protection Convention, which provides international legal framework for the establishment and recognition (including advance recognition) and enforcement of measures of child protection, which include contact orders in the context of international relocation. See for further information on the assistance that the 1996 Convention can provide in international relocation cases, the Practical Handbook on the operation of the Convention.<sup>190</sup>
263. Besides securing that contact arrangements made prior to the relocation in the State from which the child is relocating can be recognised in the State of relocation, it is also important to secure that the contact arrangements are not too easily altered by the courts in the State of relocation, which after a certain time following the relocation may assume jurisdiction on matters of parental responsibility. The Guide to Good Practice on Transfrontier Contact recommends in this regards that “a court in the State to which the child has been relocated, when dealing with an application made shortly after relocation has occurred to review or vary a contact order, should be very slow to disturb arrangements concerning contact made by the court which decided upon the relocation”.<sup>191</sup>
264. It should also be mentioned that the Council of Europe’s recent work on rights and legal status of children and parental responsibilities includes considerations of the matters of international family relocation.<sup>192</sup>

<sup>187</sup> See for the text of the Washington Declaration < [http://www.hcch.net/upload/decl\\_washington2010e.pdf](http://www.hcch.net/upload/decl_washington2010e.pdf) > (last consulted 15 May 2013); see for the contributions of experts at the Washington Conference, the Special Edition of the Hague Conference’s Judges Newsletter (English only) < [http://www.hcch.net/upload/jn\\_special2010.pdf](http://www.hcch.net/upload/jn_special2010.pdf) > (last consulted 15 May 2013).

<sup>188</sup> See Recommendation No. 1 of the Washington Declaration, *ibid*.

<sup>189</sup> See Recommendation Nos. 3 *et seq.* of the Washington Declaration, *ibid*.

<sup>190</sup> See pp. 94, 95 of the revised Draft Handbook, *supra* footnote 15.

<sup>191</sup> See Good Practices 8.5.3 and similarly Good Practice 8.5.5. of the Guide to Good Practice on Transfrontier Contact, *supra* footnote 69.

<sup>192</sup> See Principle 31 of the Council of Europe Draft recommendation on the rights and legal status of children and parental responsibilities and paras. 128-133 of the Explanatory Memorandum, available at < <http://eclj.org/PDF/Draft-recommendation-rights-legal-status-children-CDCJ-2011-15.pdf> > (last consulted 15 May 2013).

**IX. PROTECTION FROM DOMESTIC VIOLENCE IN CROSS-BORDER FAMILY DISPUTES**

- 108. States should take all necessary measures to provide for effective protection from domestic violence.**
- 109. Noting that a considerable number of national and international family disputes involve domestic violence, a sensitive approach to domestic violence allegations in family disputes should be promoted.**
- 110. Emergency procedures should be available providing emergency protection measures for victims of domestic violence.**
- 111. States should take all appropriate measures to secure that protection orders are complied with in practice.**
- 112. Information on domestic violence protection should be made easily accessible to all in need.**
- 113. Considering that in international family disputes, a person might need domestic violence protection in another State with whose language and legal system he or she is not familiar, ideally, information on domestic violence protection should also be made available through a centralised structure, such as a Central Contact Point in English and / or French (see Good Practices Nos. 33 *et seq.*).**
- 114. For an effective protection from domestic violence in cross-border family disputes, the recognition and enforcement of foreign protection orders can become necessary. States should provide for speedy procedures for the recognition and enforcement of a foreign protection order and / or provide foreign applicants with an easy access to domestic protection procedures. For example, a person applying for the recognition of a foreign protection order could immediately be informed about the available domestic violence protection mechanism, which may be of assistance while the recognition process is pending and in case the recognition of the foreign order is rejected.**

*Description of the discussions*

265. The Working Group noted that domestic violence plays a part in a considerable number of family disputes, both in national and international family disputes. The Working Group acknowledged the importance of a sensitive approach to domestic violence allegations in family disputes. All delegations emphasised that effective protection measures need to be in place to guarantee sufficient and appropriate protection from domestic violence. The Working Group underlined that this included the availability of emergency procedures and emergency protection measures.

266. The Working Group exchanged on available domestic violence protection structures and mechanism, including available protection measures and procedures, in their legal systems.
267. The Jordanian delegation reported that the issue of domestic violence was taken very seriously in Jordan and indicated that the Jordanian government had established an administrative structure exclusively dedicated to deal with domestic violence cases. The Jordanian delegation reported that units of this administration exist in every municipality. These units consist out of civil servants appointed by the court and also include members of the dedicated civil society. The Jordanian delegation further detailed that any family member could contact the units and that, following an accusation of domestic violence, an assessment process would commence, which included a home visit and an inquiry into who committed the violence and an assessment of the gravity of the violence. Following the assessment appropriate protective measures would be put in place.
268. The Moroccan delegation reported that in Morocco the issue of domestic violence was also given high attention. The Moroccan delegation explained that within each first instance courts specialised domestic violence units exist, which are composed of a social worker, a judge and court registrar and which provide psychological support and assistance. The Moroccan delegation further referred to civil society organisations, which sometimes provide also free of charge legal assistance, for example by professors at law working pro bono. With regard to the protection of children from domestic violence, the Moroccan delegation referred to the obligations under the UNCRC ratified by Morocco and all other States in the Euro-Mediterranean region. The Moroccan delegation reported on the availability of urgent provisional measures at the first instance court to protect children from domestic violence. The Moroccan delegation further explained that depending on the circumstances of the case a placement of the child in another family or institution can be necessary.
269. The Tunisian delegation explained that, similarly to the situation in Morocco, in Tunisia the civil society organisations provide assistance for victims of domestic violence. The Tunisian delegation reported on the availability of domestic violence protection under both the civil and criminal law and highlighted that procedures for civil protection measures can be taking place in parallel to ongoing criminal procedures. The Tunisian delegation reported that the Tunisian Criminal Code penalises any violence. The Tunisian delegation further highlighted a change in legislation with a view to better protecting children against domestic violence. The Tunisian delegation explained that their law used to include a provision justifying "light violence" by the father or the mother to discipline the child. However, this provision was abandoned since it was considered to conflict with the UNCRC. As a consequence, any violence against a child can be prosecuted under Tunisian criminal law. The Tunisian delegation explained that the Tunisian Criminal Code provides for a punishment of imprisonment of up to 5 years for cases of child abuse and maltreatment committed by the person responsible for the child. As concerns the civil protection of children against domestic violence, the Tunisian delegation referred to the Child Protection Act. The Tunisian delegation reported that a child threatened by domestic violence is considered a child in danger in accordance with that Act, which means that the judge can take any necessary measure, including the placement in a foster family or specialised centre. The judge can also order supervision by the delegate for children's rights.

270. The Israeli delegation explained that the Israeli criminal law distinguished between violence committed by family members and external violence, and thus specifically addressed the issue of domestic violence, for which grave sanctions are foreseen. The Israeli delegation further reported on specific legislation for the protection of women or elderly persons from domestic violence. The Israeli delegation highlighted that the Israeli law provided for a number of preventive and protective measures and explained that any person, the victim or any relative, can ask for a protection order. As one possible measure of protection the Israeli delegation referred to the availability of a restraining order forbidding the perpetrator of violence to approach the victim that can be requested from the competent court. The Israeli delegation drew attention to the importance of expeditious procedures for domestic violence protection and explained that the Israeli government has taken steps to accelerate domestic violence protection procedures. The Israeli delegation, furthermore, reported on the existence of shelters in Israel, which offer protection for women threatened by severe domestic violence. The Israeli delegation detailed that the women would normally be hosted in a shelter distant from the family home and that her whereabouts would be kept secret from the perpetrator of violence. The Israeli delegation explained that depending on the circumstance of the case it was possible for the shelters to host mother and child. In addition, the Israeli delegation highlighted, that as reported by Tunisia, civil and criminal procedures with regard to domestic violence protection are independent from each other and can be pursued in parallel. The Israeli delegation drew attention to the fact that effective domestic violence protection required besides the speedy availability of protection orders also efficient mechanisms for the enforcement of these orders, *i.e.* mechanisms that guarantee that the orders are complied with in practice.
271. The Egyptian delegation reported on available domestic violence protection in Egypt highlighting the possibility of courts to issue restraining order to protect domestic violence victims. The Egyptian delegation furthermore indicated that a domestic violence hotline was available in Egypt. The Egyptian delegation reported that this hotline is run by the national council for mothers and children in Egypt and that it can be contacted by any person in need for assistance in a domestic violence case.
272. The Lebanese delegation reported in detail on the domestic violence protection of children in Lebanon. The Lebanese delegation referred to a law specifically created to secure the protection of “minors in danger”.<sup>193</sup> According to that law a minor is considered in danger if, for example, the minor is in an environment where his or her security, health, morality or education are endangered or in cases of sexual or physical assault. A protection order can be requested from the judge for a “minor in danger” by the minor him- or herself, one of the parents, the curator, the social service or the prosecutor. The Lebanese delegation reported that the judge will regularly request a social report and will hear the child and the parents except in cases of urgency. The Lebanese delegation explained that the judge could take all measures necessary for the protection of the minor. The judge will try to leave the minor, where possible, in his or her natural environment. He can, for example, order the supervision of the family by a social worker. The Lebanese delegation further explained that the judge could, where necessary, also order the placement of child in foster care. The Lebanese delegation further referred to available protection mechanisms under criminal law. Furthermore, the Lebanese delegation reported on draft legislation on domestic violence, currently under

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<sup>193</sup> The Lebanese delegation referred to the law No 422/2002 of 6 June 2002.

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discussion, aiming to protect any member of the family, including the wife and also the grandparents living in the household, from domestic violence.

273. Several delegations, including the Egyptian and Moroccan delegations, underlined that even though the Islamic tradition accords the father and husband the responsibility to correct his child and wife, this was not to be misread as a provision permitting domestic violence. There was agreement among the Working Group members that effective measures needed to be put in place to protect all potential victims of family violence. Several delegations, including the Egyptian, Moroccan and Tunisian delegations, highlighted that domestic violence was a recognised ground for divorce in their legal systems.
274. The Working Group noted that it was of high importance to provide the public with information on available domestic violence protection, allowing victims of domestic violence to take note of available procedures and protection measures. Acknowledging the particular difficulties that those involved in cross-border family disputes may face in accessing a foreign legal system, the Working Group considered it particularly helpful to make information on domestic violence protection also available through a centralised structure, such as a Central Contact Point in English and / or French (see also Good Practices Nos. 33 *et seq.*).
275. With regard to the eligibility for domestic violence protection and available protection measures, several delegations, including the Lebanese and Moroccan delegations, highlighted that there was no difference between domestic violence protection in purely national family cases and international family cases in their legal systems.
276. The Working Group noted that in cross-border family disputes it might become necessary to enforce in a State the domestic violence protection order rendered in another State. A number of delegations pointed out that the question of whether a foreign protection order would be recognisable in their State could not be answered in a general way due to the different natures of protection orders. Several delegations stated that should the measures in question be a decision of a civil court, the general provisions on the recognition and enforcement of foreign civil decisions would apply. The Working Group reiterated the usefulness of international, regional and bilateral legal frameworks with regard to simplifying the recognition and enforcement of foreign decision. The Tunisian delegation highlighted the possible problem that a foreign civil protection order may have no equivalent in the legal system in which recognition is sought. However, there was agreement in the Working Group that should the recognition of a foreign protection order not be possible, appropriate protection measures under domestic law should be made available to the person in need of protection from violence.

### Background remarks

277. Several important international and regional instruments call for an effective protection from violence, including domestic violence.
278. With regard to the protection of children from violence Article 19 of the UNCRC provides:
- “1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including

sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

279. The UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)<sup>194</sup> demands the protection of women from gender-based violence. In the Euro-Mediterranean region all States have ratified this Convention.<sup>195</sup>

280. The Council of Europe Combating Domestic Violence Convention<sup>196</sup> of 2011 aims to protect women against all forms of violence (see for further information on the Convention above para. 13).

281. It should be noted that the matter of recognition and enforcement of foreign civil protection orders has been a topic on the agenda of the Hague Conference on Private International Law for several years. The Permanent Bureau of the Hague Conference has undertaken some comparative research regarding available civil protective orders in different legal systems and their enforceability abroad. At the meeting of the Council on General Affairs and Policy of the Hague Conference in April 2013, the Permanent Bureau presented the summary of Member State responses to a questionnaire aiming to assess the need and desirability of an international instrument facilitating the recognition and enforcement of foreign civil protection orders.<sup>197</sup> The questionnaire responses have identified a number of gaps and difficulties with regard to the current status. One difficulty identified in the summary of the questionnaire responses of particular relevance for cross-border family disputes is the difficulty to obtain a civil protection order for a temporary visit or multiple short-stays in a foreign legal system.<sup>198</sup>

282. The European Union has recently adopted a new Regulation to simplify and accelerate the recognition and enforcement of foreign civil protection orders. The **Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters**<sup>199</sup> will apply to protection measures ordered on or after 11 January 2015. The Regulation is meant to supplement the **Directive 2011/99/EU of the European Parliament and of the Council of 13**

<sup>194</sup> Text of the Convention available online at < <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> > (last consulted 15 May 2013).

<sup>195</sup> See for the status table of the Convention < [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec) > (last consulted 15 May 2013).

<sup>196</sup> See *supra* para. 13 and footnote 48.

<sup>197</sup> See Questionnaire on the recognition and enforcement of foreign civil protection orders: summary of Member response and possible ways forward, drawn up by the Permanent Bureau, available at < [http://www.hcch.net/upload/wop/genaff2013pd04b\\_en.pdf](http://www.hcch.net/upload/wop/genaff2013pd04b_en.pdf) > (last consulted 15 May 2013).

<sup>198</sup> See p. 19, *ibid.*

<sup>199</sup> The text of the Regulation is available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0004:0012:EN:PDF> > (last consulted 1 July 2013).

*December 2011 on the European protection order*,<sup>200</sup> which applies to protection measures adopted in criminal matters.

**X. PROMOTION OF AGREED SOLUTIONS – PROMOTION OF MEDIATION, CONCILIATION AND SIMILAR MEANS - DEVELOPMENT OF SPECIALISED MECHANISMS ASSISTING IN THE AMICABLE RESOLUTION OF INTERNATIONAL FAMILY DISPUTES – INTERNATIONAL FAMILY MEDIATION - SECURING THAT AGREED SOLUTION FOUND IN CROSS-BORDER FAMILY DISPUTES BECOME LEGALLY BINDING AND ENFORCEABLE**

**A. Promoting agreed solutions**

**115. The amicable resolution of international family disputes involving children should be a major goal.**

**116. States should take all steps possible to create a legal environment which promotes the amicable settlement of international family disputes involving children, while safeguarding the parties' rights to access to justice and protecting the best interests of the child.**

**117. States should engage in awareness raising among the legal and other relevant professions. For example, States may consider including information on the functioning of mechanisms and methods assisting in the amicable settlement of family disputes in the training curriculum for legal and other relevant professions.**

**118. States could consider including provisions in their procedural law calling on judges to encourage the amicable settlement of family conflicts. Such an encouragement could include the provision of information on available amicable dispute resolution mechanisms. Judges could also be authorised by the procedural law to refer the parties to appropriate available amicable dispute resolution mechanisms, such as mediation, conciliation or similar means, provided that the case is considered suitable for such a referral.**

*Description of the discussions*

283. The importance of promoting the amicable settlement of international family disputes has been a recurring theme throughout the discussions at all the Working Group meetings. Highlighting that a solution of a parental conflict by agreement is an ideal solution benefiting all involved, particularly the children concerned, the Working Group strongly supported that all should be done to encourage the amicable resolution of international family disputes (see also above Good Practices Nos. 19 and 20 and paras. 78 *et seq.*).

284. At the same time, several delegations highlighted the importance of protecting the parties' rights to access to justice and protecting the child's best interests.

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<sup>200</sup> The text of the Directive is available at < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:338:0002:0018:EN:PDF> > (last consulted 15 May 2013).

285. The Working Group took note of the Guide to Good Practice on Mediation<sup>201</sup> drawn up by the Hague Conference on Private International Law. Although the Guide focuses on mediation in the context of international child abduction cases falling within the scope of the 1980 Hague Child Abduction Convention, a great number of Good Practices contained in this Guide can be of assistance with regard to the use of mediation and similar means in international family disputes in general.
286. The Working Group discussed different means that could be employed to promote the amicable settlement of international and, at the same time, national family disputes.
287. The Working Group underlined the importance of awareness raising among the relevant professions. Furthermore, the introduction of mandatory information meetings on mediation was discussed, provided that appropriate mediation services were available in the relevant legal system. A number of delegations, including the Lebanese delegation were in favour of including a Good Practice to this extent. The Israeli delegation indicated that mandatory meetings in which information on mediation is provided and in which the suitability of a case for mediation is assessed had been recently introduced in Israel with regard to national family law conflicts. A number of delegations, such as the Tunisian and Moroccan delegations raised concerns regarding the introduction of mandatory mediation information meetings in international family disputes and favoured an encouragement of a voluntary engagement in mediation. The Tunisian delegation referred to an example case of international child abduction, stating that a mother whose child had been wrongfully removed to another State should not be “forced” to mediate. Concerns were raised that particularly where no specialised mediation services for international family disputes existed in a legal system, pressure put on a parent to engage in mediation could lead to an undesirable imbalance between the parties. For example, a foreign parent obliged to attempt mediation in a purely national mediation scheme, which is not able to accommodate the special language needs of the foreign parent could be contra-productive (see regarding the discussions on specialised mediation services below under “X. B. Promoting the use of mediation, conciliation and similar means – Development of specialised mechanisms assisting in the amicable resolution of international family disputes”).
288. Several delegations, including the Israeli delegation, highlighted the importance of assessing the case’s suitability for the use of a certain dispute resolution mechanism. There was a common understanding that, for example, not all family cases are suitable for mediation.

Background remarks

289. All of the modern Hague Family Conventions, including the 1980 Hague Child Abduction Convention<sup>202</sup> and the 1996 Hague Child Protection Convention promote the amicable resolution of cross-border family disputes. Similarly, several European instruments, such as the European Brussels II *a* Regulation, as well as several bilateral instruments in force in the Euro-Mediterranean region encourage the amicable settlement of cross-border family disputes.

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<sup>201</sup> See *supra* footnote 71.

<sup>202</sup> See Article 7(2) c) of the 1980 Hague Child Abduction Convention, *supra* footnote 16.

**B. Promoting the use of mediation, conciliation and similar means – Development of specialised mechanisms assisting in the amicable resolution of international family disputes**

119. States should promote the use of mediation, conciliation and similar means to bring about agreed solutions of family disputes concerning children.
120. Different mechanisms to bring about an amicable resolution of family disputes can work side by side.
121. The availability of more than one such mechanism in a legal system can be advantageous offering a greater spectrum of means to assist in the amicable resolution of disputes. States may therefore consider extending their spectrum of available amicable dispute resolution mechanisms and, for example, encourage the establishment of mediation structures where no such structures exist.
122. Safeguards should be put in place to avoid that the engagement in mediation and similar means may result in disadvantages for either of the parties or the children concerned.
123. Such safeguards could be set up through the introduction of legal framework regulating important features of a given amicable dispute resolution mechanism.
124. In view of the time-sensitivity of child related matters, mediation and similar processes when used in family disputes concerning children should be organised in a way that allows for a timely dispute resolution. For example, timeframes for the attempt of an amicable settlement could be set.
125. Mediation and similar means should generally be seen as a complement to legal proceedings, not as a substitute. Access to legal proceedings should not be restricted.
126. With a view to promoting the use of mediation and similar means, States may wish to consider facilitating the affordability of such mechanisms also for parties with limited financial resources.
127. In view of the special challenges of international family disputes, specialised amicable dispute resolution mechanisms should be made available for those cases.
128. States should promote the development of such specialised amicable dispute resolution mechanisms for international family disputes and the development of specialised training.

*Description of the discussions*

290. The Working Group recommended that States should promote the use of mediation, conciliation and similar means to bring about agreed solutions of family disputes

concerning children. The promotion of means assisting in the amicable resolution of disputes would benefit the resolution of international family disputes as well as that of purely national family disputes. In view of the special challenges of international family disputes, the Working Group highlighted that the dispute resolution mechanisms employed in these international disputes will have to meet some additional conditions.

291. The Working Group made it clear that there was no necessity in a legal system to choose between conciliation and mediation. On the contrary, there was agreement that different mechanisms to bring about an amicable dispute resolution could work side by side and that offering a number of such mechanisms would only be beneficial. Several delegations, such as the Israeli and the Jordanian delegations, highlighted in this regard that offering different types of mechanisms to bring about an amicable resolution would increase the chances for the parties to a dispute to find among the mechanisms available an appropriate mechanism that best suits their needs.
292. The Working Group highlighted that it will depend on the specifics of each individual legal system and also on relevant cultural influences, which amicable dispute resolution mechanisms can be promoted in a State, how such mechanisms can be organised and linked in with legal proceedings and how different co-existing amicable dispute resolution mechanisms might interact. The Lebanese and the Jordanian delegations drew attention to their legal system's particularity of side-by-side operation of religious and civil courts which influences the organisation of amicable dispute resolution mechanisms in their States.
293. The exchanges in the Working Group on the current situation in the ENPI South Partner Countries regarding amicable dispute resolution mechanisms (see also above paras. 78 *et seq.*) showed that mandatory conciliation in divorce proceedings is a common feature in many States in the region, such as in Algeria, Jordan, Morocco and Tunisia. Mediation is still a mechanism less used in the region. The Israeli delegation explained that private mediation services are available in their legal system. The Lebanese delegation reported that a number of mediation centres exist in Lebanon, one of which is the "LAMAC" mediation centre of the Saint Joseph University. The Palestinian delegation referred to the availability of social mediation.
294. A number of delegations, such as the Moroccan and Tunisian delegations indicated that it would be desirable if besides other existing amicable dispute resolution mechanisms, family mediation would become available in their legal system. The Moroccan delegation noted as considerable advantage of mediation that the intimacy of the family concerned was protected in this confidential process. The Moroccan delegation further stated that Morocco was currently considering the inclusion of mediation methodology and techniques in the conciliation processes giving those conducting the conciliation specific training. The Egyptian delegation indicated that in their legal system mediation skills would be promoted in the training of psychologists and social workers.
295. The Working Group reported about a number of other mechanisms and means used in their legal systems aiming to encourage the amicable settlement of family disputes.
296. The Egyptian delegation highlighted the success achieved by the work of the "International Cooperation Committee for Custody Disputes Related to Children Born from Mixed Marriages", the so-called "Good Office Committee", which is promoting the amicable settlement of cross-border family disputes in cases of mixed marriages. The

Egyptian delegation explained that the Committee includes all important stakeholders, such as representatives from the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Interior and the public prosecution. The Egyptian delegation underlined that those working for the Committee must be multilingual, since the committee members try to use in the exchange with the non-Egyptian parent that parent's language. If approached for assistance in the resolution of an international family conflict, *ad hoc* sessions of the Good Office Committee are set up. In a first meeting, the case is examined. Then the parties are separately invited and heard. Also an involvement of embassy or consular representatives is possible. The Egyptian delegation highlighted that all steps possible are taken to support parent-child-contact throughout the process. The Egyptian delegation explained that no legislation governs the Committee and indicated that the way the Committee was set up it had some discretion with regard to what it can suggest in the individual case in the best interests of the child; the Committee could, for example, proactively suggest mediation or conciliation and issue non-binding recommendations. The Egyptian delegation indicated that the "Committee-process" does not prevent the parties from seizing the courts if they prefer. Also in national family law cases in Egypt a "committee" model is used in trying to assist the parties in achieving an amicable solution of the dispute. The Egyptian delegation explained that the 2004 Family Law brought about the creation of a number of "offices of family dispute resolution" which report to the family courts. These committees consist out of a psychologist, a jurist and a social worker. In custody disputes, once an application is filed with the committee's president, the committee sets up *ad hoc* meetings. The Egyptian delegation detailed that the committee hears the parents, and that each member of the committee will contribute to the bringing about of an amicable solution using their professional skills, *i.e.* the jurist will explain the legal situation, the psychologist may make a personality analysis and give psychological support *etc.* Should the parents reach an agreement, the jurist will draw up the written terms of the agreement. Should the parents not be satisfied with the process, they can at any time seize the court.

297. The Israeli delegation explained that in family law proceedings assistance in finding an amicable resolution of a dispute is given by the courts' so called "support units" run by social workers. The assistance of the support units is State funded and therefore provided free of charge to the parties of a family dispute. Furthermore, the Israeli delegation highlighted that questionnaires were used in Israeli civil court family law procedures as a means to facilitate an amicable resolution of the dispute. The Israeli delegation explained that each parent would be asked to answer a long list of detailed questions indicated their wishes and concerns with regard to a future contact and custody arrangement.
298. The Working Group highlighted that the engagement in mediation and similar means should not result in disadvantages for either of the parties or the children concerned and that safeguards need to be put in place in this regard.
299. A number of delegations, such as the Jordanian delegation, highlighted that they would be in favour of introducing a clear legal framework regulating the important questions regarding the organisation of mediation and its interaction with legal proceedings, including timeframes (see also Good Practice No. 124). Several delegations highlighted that it was important that mediation and similar means would not delay the dispute resolution. The Lebanese delegation recalled the time-sensitivity of family disputes concerning children and emphasised that safeguards need to be taken to ensure that mediation and similar means are not used as a "delaying tactic" by one of the parents. Several delegations, including the Jordanian, Lebanese, Moroccan and Tunisian

delegations, therefore stated it would be important to set clear timeframes for the attempting of an amicable settlement. Should upon expiration of a set deadline no progress be made, the court should decide.

300. A further matter that might need regulation mentioned by the Lebanese delegation was the question of whether the engagement of mediation might bring about a stay of judicial proceeding. Also the guarantee of confidentiality of communications in mediation might need legal implementation. Furthermore, several delegations considered legal framework important to safeguard the quality of mediation and guarantee that those conducting mediation had undergone appropriate training and possessed the necessary skills (see also below under "X. C. International Family Mediation"). A number of delegations, such as the Egyptian and Jordanian delegations, stated that it was important to define the profile of a mediator. The Jordanian delegation stated that in their view mediators should have a legal background. The Jordanian delegation explained that they would consider this necessary if the outcome of the mediation was to become legally binding and enforceable without the further intervention by a court.
301. The Working Group underlined that access to court proceedings should not be restricted through the introduction of mediation and similar means in a legal system (see already above regarding the safeguarding of access to justice under "X. A. Promoting agreed solutions"). The Lebanese delegation highlighted that while it was desirable that mediation would become the first resort in the resolution of family disputes, mediation should not replace legal proceedings, *i.e.* mediation should complement legal proceedings.
302. The Working Group acknowledged that high costs of mediation and similar services might deter parties from using these mechanisms. With regard to mediation, the question was discussed whether it might be conceivable to use the legal aid system to fund mediation costs for individuals with limited financial resources. A number of delegations, such as the Israeli and Tunisian delegations, stated that they could not imagine a legal aid support for out of court mediation services. The Israeli delegation highlighted that in Israel mediation was offered by private entities outside the legal proceedings and indicated that the costs for mediation were borne by the parties. The Israeli delegation explained that since the State had no influence on the mediation prices on the free market, State funding for mediation was, in the current circumstances, no option in Israel. But the Israeli delegation recalled that for the assistance given by the courts' support units with regard to finding an amicable solution no costs would be charged. The Egyptian delegation was in favour of keeping costs for mediation to a minimum and stated that the Good Office Committee was offering mediation at low costs. The Moroccan delegation indicated that when looking at the possible promotion of mediation in Morocco in the future, the cost question would have to be analysed too. The Moroccan delegation drew attention to the fact that in their legal system women would be granted free legal aid in all family proceedings and indicated that this special feature of the Moroccan legal system aiming to protect women's rights would have to be taken into consideration when looking at the cost question of possible future mediation services in Morocco.
303. The Working Group discussed in detail the special challenges of international family disputes such as the often differing cultural backgrounds of the parties, language differences and geographical distance as well as the complex legal situation due to the links with different legal systems. There was agreement among the delegations that

amicable dispute resolution mechanism promoted for the use in international family disputes should be able to meet these special challenges. The Working Group therefore strongly recommended the development of specialised mechanism. The Israeli delegation noted that one could think of establishing different kinds of mediation schemes: mediation schemes for national family disputes and specialised mediation schemes for international family mediation.

304. Several delegations, including the Egyptian, Jordanian and Moroccan delegations, highlighted the crucial importance of the development of specialised training.

*Background remarks*

305. Several international and regional instruments and initiatives promote the use of mediation, conciliation and similar means to assist in the amicable settlement of cross-border family disputes.<sup>203</sup> Among these different mechanisms in particular mediation has received major attention in the past years.

306. In the European Union, the European Mediation Directive<sup>204</sup> aims to promote the use of mediation assisting in the amicable settlement of cross-border disputes concerning civil and commercial matters, including cross-border family disputes. Several Member States of the European Union have introduced legislation applicable to cross-border family mediation in implementation of the Directive.<sup>205</sup>

307. Also, the Hague Conference's work in the recent decades reflects the growing use of mediation in international family disputes. Over the past years a Guide to Good Practice on Mediation<sup>206</sup> has been drawn up by the organisation, published in summer 2012, which accumulates good practices for the use of mediation in cross-border family disputes. Even though drawn up with a particular focus on the use of mediation in cases of international wrongful removal or retention of children falling within the scope of the 1980 Hague Child Abduction Convention, many good practices apply to mediation in cross-border family disputes in general. In parallel to the development of the Guide to Good Practice, the Hague Conference worked, in the context of the Malta Process,<sup>207</sup> on the promotion of the use of mediation in cross-border family disputes falling outside the geographical scope of relevant multilateral legal frameworks. Resulting from this work are the "Principles for the Establishment of Mediation Structures in the context of the Malta Process",<sup>208</sup> which encourage the creation of specialised mediation services for cross-border family disputes and promote the setting up of Central Contact Points for international family mediation in all States.

**C. International Family Mediation**

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<sup>203</sup> See also above para. 289.

<sup>204</sup> See *supra* para. 0 and footnote 38.

<sup>205</sup> For national legislation implementing the Directive and further information on the Directive, see the European Judicial Atlas at < [http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm) > (last consulted 15 May 2013).

<sup>206</sup> See *supra* footnote 71.

<sup>207</sup> See *supra* para 7.

<sup>208</sup> See *supra* footnote 7.

**129. States are encouraged to promote the development of specialised services for international family mediation and to promote structures of mediation for the resolution of cross-border family disputes.**

**130. States are encouraged to consider the implementation of the “Principles for the Establishment of Mediation Structures in the context of the Malta Process”<sup>209</sup> and to designate a Central Contact Point for international family mediation in accordance with the Principles.**

**131. Information on available specialised international family mediation services and related information should be made accessible through a centralised structure, such as a Central Contact Point.**

*Description of the discussions*

308. The Working Group supported the development of specialised mediation services for cross-border family disputes and encouraged the development of structures for cross-border family mediation.

309. The Working Group took note of the Hague Conference’s work with regard to promoting the establishment of structures for international family mediation in the context of the Malta Process, introduced by two representatives of the Hague Conference on Private International Law in the course of the Working Group meetings. The Working Group discussed in great detail the “Principles for the Establishment of Mediation Structures in the context of the Malta Process”.<sup>210</sup> Giving their general endorsement of the Principles, the Working Group encouraged the Principle’s implementation.

310. The Working Group was in favour of encouraging States when setting up specialised mediation services for international family mediation to take into consideration the special characteristics of mediators / mediation organisations listed under Section B.1 of the *Principles* and the general principles regarding the mediation process listed under Section B.2:

**B. MEDIATION**

**1. Characteristics of Mediators / Mediation Organisations identified by Central Contact Points**

The following are among the characteristics the Central Contact Point should take into account when identifying and listing international family mediators or mediation organisations:

- A professional approach to and suitable training in family mediation (including international family mediation).
- Significant experience in cross-cultural international family disputes.
- Knowledge and understanding of relevant international and regional legal instruments.
- Access to a relevant network of contacts (both domestic and international).
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions.

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<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

- Access to administrative and professional support.
- A structured and professional approach to administration, record keeping, and evaluation of services.
- Access to the relevant resources (material / communications, etc) in the context of international family mediation.
- The mediation service is legally recognized by the State in which it operates, *i.e.* if there is such a system.
- Language competency.

It is recognized that, in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and can not, at this point, be realistically insisted upon.

### **2. Mediation Process**

It is recognised that a great variety of procedures and methodology are used in different countries in family mediation. However, there are general principles, which, subject to the laws applicable to the mediation process, should inform mediation:

- Screening for suitability of mediation in the particular case
- Informed consent
- Voluntary participation
- Helping the parents to reach agreement that takes into consideration the interests and welfare of the child
- Neutrality
- Fairness
- Use of mother tongue or language(s) with which the participants are comfortable
- Confidentiality
- Impartiality
- Intercultural competence
- Informed decision making and appropriate access to legal advice”

311. In the discussions surrounding the desirable characteristics for mediators, a number of additional issues were raised. The Lebanese delegation highlighted that it was important to determine who would choose the mediator in a given case, the judge or the parties. The usefulness of bi-cultural co-mediation in international family disputes was raised by a number of delegations, including the Lebanese delegation, indicating that parents with differing cultural backgrounds might feel more at ease in mediation when mediators with their respective cultural backgrounds conduct mediation together. On the other hand, one delegation mentioned that it might be advantageous to have the mediator come from a different cultural background having no link with the parties’ backgrounds. In any case, there was a common understanding that mediators conducting mediation in international family disputes should have intercultural competence and should have knowledge and understanding of the relevant cultures concerned. There was agreement among the delegations that the intercultural competence must play a central role in specialised mediation training for international family mediators.

312. The Working Group underlined the importance of collecting and making accessible to those in need information on available specialised international family mediation services and related information as suggested in Section A of the “Principles for the Establishment of Mediation Structures in the context of the Malta Process”<sup>211</sup>

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<sup>211</sup> *Ibid.*

313. The Lebanese delegation suggested that an international mediation organisation should be established, offering mediation services for cross border family disputes. The Lebanese delegation proposed that funding for such an organisation might be sought from other international bodies or NGOs. The Lebanese delegation explained that the idea of establishing an international mediation organisation could be pursued besides the efforts on a national level to establish mediation structures and link them to an international network.

*Background remarks*

314. The Hague Conference on Private International Law continues work on the establishment of structures for international family mediation. The Working Party, which drew up the “Principles for the Establishment of Mediation Structures in the context of the Malta Process” now assists in promoting a wide implementation of the Principles. It should be noted, that any State can implement the Principles. So far, six States have set up a Central Contact Point for international family mediation in accordance with the Principles (see for further details para. 9).

**D. Securing that agreed solutions found in cross-border family disputes become legally binding and enforceable**

**132. With a view to supporting a sustainable solution of cross-border family disputes, all steps possible should be taken to secure that the agreed solution will become legally binding and enforceable in the two or more legal systems concerned.**

**133. Particularly in cross-border family disputes concerning custody and / or contact it is important that the agreement is rendered legally binding and enforceable in the relevant legal systems in a speedy way to allow for the agreement’s implementation in a secure legal framework.**

*Description of the discussions*

315. The Working Group acknowledged the importance of securing that the outcome of an amicable dispute settlement can obtain a binding form. In order to support the sustainability of the solution to the cross-border family dispute found in mediation or otherwise, the agreed solution should be rendered legally binding and enforceable in the two or more legal systems concerned. The Working Group supported Sections B.3 and C of the “Principles for the Establishment of Mediation Structures in the context of the Malta Process”<sup>212</sup> with regard to mediated agreements.

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<sup>212</sup> Parts B.3 and C of the *Principles for the Establishment of Mediation Structures in the context of the Malta Process* (see *supra* para. 9) state:

“B.3. Mediated Agreement

When assisting the drafting of the agreements the mediators in cross-border family disputes, should always have the actual exercise of the agreement in mind. The agreement needs to be compatible with the relevant legal systems. Agreements concerning custody and contact should be as concrete as possible and take into consideration the relevant practicalities. Where the agreement is connected to two jurisdictions with different languages, the agreement should be drafted in the two languages, if that simplifies the process of rendering it legally binding.

316. It was highlighted that the question of how an agreed solution of a cross-border family dispute can be rendered legally binding and enforceable, will depend on the legal systems concerned and on the organisation of the relevant dispute resolution mechanism and its possible linkage with legal proceedings.
317. The Tunisian delegation explained that in accordance with Article 242 of the Tunisian Civil Obligation Act (*Code des Obligations et des Contrats*) agreements validly concluded between two persons operate as law between them. The Tunisian delegation highlighted that the rules of this law were also applicable to agreements on family law matters, including agreements on contact and custody. The Tunisian delegation explained that, of course, if the agreement would be contrary to public policy it would be null and void. The Tunisian delegation noted that an agreement between parents on matters of custody, whereby the father would be granted custody of the child, when normally it would be the mother having custody, was not contrary to public policy and would be valid and legally binding provided the agreement was not contrary to the best interests of the child. Similarly, the Israeli delegation explained that agreements were, in accordance with Israeli law, by nature binding. A number of delegations indicated that the content of an agreed solution of a family dispute could be made part of a court decision and as such become legally binding and enforceable in the State where the decision was rendered. The Egyptian delegation stated that this was the way in which the agreed outcome of conciliation was rendered legally binding, with the written agreement annexed to the decision. It was underlined by a number of delegations that once the content of an agreement had become part of a court decision the rules on the recognition and enforcement of foreign decisions applied in the relevant other State would be decisive regarding the question of how the decision might be rendered legally binding and enforceable in that other State.

Background remarks

318. Recognising the importance of rendering the outcome of mediation legally binding and enforceable, the European Mediation Directive calls upon Member States to take the “ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.”<sup>213</sup>
319. As the “Principles for the Establishment of Mediation Structures in the context of the Malta Process”, the Guide to Good Practice on Mediation recommends the “measures necessary to give legal effect to the agreement and render it enforceable in the relevant jurisdictions [...] with due speed and before the agreement’s implementation”<sup>214</sup>

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C. RENDERING MEDIATED AGREEMENT BINDING

Mediators dealing with international family disputes over custody and contact should work closely together with the legal representatives of the parties.

Before starting the implementation of the agreement, the agreement should be made enforceable or binding in the relevant jurisdictions.

The Central Contact Points in the jurisdictions concerned should assist the parties with information on the relevant procedures.

Where needed, countries may examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements.”.

<sup>213</sup> See Article 6 of the European Mediation Directive, *supra* para. 0.

<sup>214</sup> See Chapter 12 of the Guide to Good Practice on Mediation, *supra* footnote 71.

320. It should be noted that the Hague Conference on Private International Law is currently carrying out “exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention.”<sup>215</sup> According to the mandate given by the Council on General Affairs and Policy of the organisation the work of the Expert’s Group set up for this purpose “shall comprise the identification of the nature and extent of the legal and practical problems, including jurisdictional issues, and evaluation of the benefit of a new instrument, whether binding or non-binding, in this area.”<sup>216</sup>

## **XI. FAMILY DISPUTES CONCERNING MAINTENANCE, IN PARTICULAR CHILD SUPPORT CASES**

**134. Children should have “access to a standard of living adequate for the child's physical, mental, spiritual, moral and social development”.**<sup>217</sup>

**135. “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”.**<sup>218</sup>

**136. States should “in accordance with national conditions and within their means, [...] take appropriate measures to assist parents and others responsible for the child to implement [the child’s right to an adequate standard of living] and shall in case of need provide material assistance and support programmes”.**<sup>219</sup>

**137. States should “take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the [State] and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, [States] shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements”.**<sup>220</sup>

**138. States should facilitate easy access to information on available judicial / and or administrative procedures to recover maintenance, including information on the cross-border recovery of maintenance.**

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<sup>215</sup> See No. 7 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (17-20 April 2012), available at < [http://www.hcch.net/upload/wop/gap2012concl\\_en.pdf](http://www.hcch.net/upload/wop/gap2012concl_en.pdf) > (last consulted 15 May 2013).

<sup>216</sup> *Ibid.*

<sup>217</sup> See Article 27(1) UNCRC.

<sup>218</sup> See Article 27(2) UNCRC.

<sup>219</sup> See Article 27(3) UNCRC.

<sup>220</sup> See Article 27(4) UNCRC.

- 139. States are encouraged to establish centralised structures facilitating information for the cross-border recovery of maintenance. Ideally, these centralised structures should also provide further assistance to persons seeking to recover maintenance. Synergies between these centralised structures and other existing centralised structures assisting in the resolution of international family disputes, for example, Central Contact Points (see Good Practices Nos. 34 *et seq.* above), should be promoted.**
- 140. States should take all appropriate measures to provide applicants with effective access to procedures.**
- 141. Children should not be obliged to take part in court hearings on child maintenance matters in the role of the creditor.**
- 142. States should take all appropriate steps to encourage a voluntary payment of maintenance.**
- 143. States should provide effective mechanisms to enforce maintenance claims.**
- 144. When deciding which grounds of international jurisdiction should be used in domestic rules of private international law in relation to child maintenance matters, States should take into consideration which jurisdictional rules may most appropriately serve the protection of the best interests of the children concerned and also how the jurisdictional rules favoured interact with those most commonly applied in other States in child maintenance matters.**
- 145. States should take all appropriate steps to improve State cooperation and to introduce accessible, prompt, efficient, cost-effective, responsive and fair procedures for the cross-border recovery of maintenance, in particular child maintenance.**
- 146. States are notably encouraged to examine the possibility of joining the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.<sup>221</sup>**
- 147. States should consider the promotion of common applicable law rules regarding maintenance matters with a view to avoiding conflicting decisions and to achieve predictability and legal certainty.**
- 148. When deciding which applicable law rules should be used in child maintenance matters, States should take into consideration which rules may most appropriately serve the protection of the best interests of the children concerned.**

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<sup>221</sup> For further information on the 2007 Hague Maintenance Convention see *supra* para. 11 and footnote 19.

**149. States are encouraged to examine the possibility of joining the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*.<sup>222</sup>**

*Description of the discussions*

321. The Working Group recalled the obligation embodied in Articles 3 and 27 of the UNCRC, to which all ENPI South Partner Countries are parties, acknowledging
- that “[i]n all actions concerning children, [...] the best interests of the child shall be a primary consideration”,
  - that every child has a right “to a standard of living adequate for the child's physical, mental, spiritual, moral and social development”,
  - that “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”,
  - that States shall “in accordance with national conditions and within their means”, ...”take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing” and
  - that States “shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.”
322. The Working Group emphasised that, while the financial responsibility for the child was primarily that of the child's parents or others responsible for the child, it was crucial that the State would provide the necessary structures and procedures to establish and enforce maintenance decisions. The Working Group also acknowledged that the State had a responsibility to secure the maintenance of children where maintenance could not be obtained from those primarily responsible for the child. In this regard a number of delegations, including the Egyptian, Jordanian, Moroccan and Tunisian delegations, reported on the availability of a State-supported fund in their legal systems that provides for child maintenance in case the maintenance from those primarily responsible for the child could not be obtained. The Tunisian delegation detailed that the State-fund did not only have the objective to advance maintenance while proceedings for the recovery of maintenance were ongoing, but also to grant maintenance in case the maintenance debtor(s) did not have sufficient means to provide maintenance. The Israeli delegation indicated that in Israel a maintenance creditor could obtain maintenance through the social security system in cases where the debtor's income was under a certain threshold.
323. The Working Group exchanged on the maintenance laws in place in their States for both child and spousal support. A number of delegations, including the Israeli, Jordanian and the Lebanese delegations, highlighted that as for other family matters different religious groups applied their own religious laws on matters of maintenance. The Israeli

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<sup>222</sup> For further information on the 2007 Hague Protocol see *supra* para. 11 and footnote 26.

delegation explained that where the parties did not belong to a religion, the civil law applied to maintenance matters. The Tunisian delegation stated that in Tunisia the rules on child support and spousal support applied independent of the religion of those concerned.<sup>223</sup> The Moroccan delegation explained that spousal and child maintenance are regulated in Morocco in the Family Law Code of 2004 and the Civil Procedure Code.

324. The Working Group exchanged in some details on the entitlement for maintenance and how the amount of maintenance is determined in the different legal systems. As concerns child support, all delegations reported that their laws stipulated the primary responsibility of parents to provide maintenance for their children. The Working Group explained, that in the Islamic tradition, it is generally the father who is obliged to pay child support, while the mother can, if at all, only in very exceptional circumstances be asked to contribute financially to child maintenance.
325. The Working Group discussed the question of child support for children born out of wedlock and several delegations, including the Israeli and Tunisian delegations, indicated that maintenance according to their laws was owed to all children independent of the marital status of their parents. The Tunisian delegation explained that in their legal system, children born out of wedlock had the same rights as children born within wedlock; as long as paternity was proven, maintenance would be owed. The Tunisian delegation stated that the only difference still made by the Tunisian law between legitimate and illegitimate children concerned rights of succession. The Tunisian delegation further clarified that under Tunisian law adopted children had the same rights as legitimate children, including rights of succession. The Lebanese delegation explained that certain religious laws in Lebanon would, regarding children born out of wedlock, distinguish between natural children and adultery children. The latter would not have any rights to maintenance under these religious laws while natural children would be granted the same rights to maintenance as children born within wedlock. The Lebanese delegation highlighted however, that the Lebanese Penal Code did not make that difference and would imply an obligation of parents to pay child maintenance independent of the marital status. The Lebanese delegation explained further that should a religious court decision conflict with a civil court decision, there was a possibility to apply to the Assembly General of the Cassation Court to solve the conflict.
326. Some delegations, such as the Tunisian delegation, indicated that in their States also the grandparents can be under an obligation to pay child maintenance, in case the parents cannot provide for the child.<sup>224</sup>
327. As concerns spousal support, the delegations reported about the traditional Islamic approach according to which the husband owes maintenance to the wife but not *vice versa*. Several delegations, including the Moroccan and Tunisian delegations, reported that this remained a basic principle in their family law. Some Working Group members indicated that this principle was so deeply rooted in the Islamic based legal systems that a foreign decision ordering a woman to pay spousal maintenance to her ex-husband might be considered in conflict with the public policy (“*order public*”).

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<sup>223</sup> In Tunisia maintenance matters are regulated in Chapter 35, Articles 37-53 *bis* of the Tunisian Code on Personal Status, *supra* footnote 97.

<sup>224</sup> See for Tunisia Article 43 of the Tunisian Code on Personal Status, *supra* footnote 97.

328. Several of the delegations, including the Egyptian, Israeli, Moroccan and Tunisian delegations, reported that in addition to the possibility of a monthly maintenance payment for the wife for a certain period after the divorce, their legal systems provided for the possibility of granting maintenance in form of a “compensatory pension” (“*pension compensatoire*”) or “compensatory allocation” (“*prestation compensatoire*”). The delegations explained that the general purpose of such a pension or allocation was to compensate the wife for her long years of dedication to the family life and also allowing the wife to start her life as a divorced woman from a living standard equivalent to the marital living standard. The reports of the delegations showed that the family laws differed with regard to the question under which conditions such a compensatory pension or allocation can be granted and to what level. The factors mentioned by the different delegations included the duration of the marriage, the standard of living during the marriage, the content of the marital contract and the question of who filed the divorce and based on what grounds.
329. The Working Group furthermore exchanged on the questions of how and by whom the amount of maintenance is determined. All delegations present reported that in their legal systems it was generally up to the courts to determine the amount of maintenance. The Tunisian delegation stated that the competent court in Tunisia is the first instance court. The Israeli delegation explained that in Israel both the religious courts and the civil family courts have jurisdiction and that it is the court first seized that will decide on the matter. The Lebanese delegation indicated that in their State maintenance matters fall under the exclusive jurisdiction of religious courts in the case of religious marriages and under the jurisdiction of the civil courts in the case of mixed marriages or civil foreign marriages. Similarly, in Jordan, the civil courts only have competency to decide in maintenance matters where the parties do not belong to the same religion.
330. Regarding the basis of calculation of maintenance by the court, all delegations reported that the amount of maintenance owed was generally determined taking into consideration the resources of debtor and needs of creditor.<sup>225</sup>
331. Several delegations, such as the Israeli, Lebanese, Moroccan and Tunisian delegations, explained that according to their laws maintenance agreements were possible in their legal systems. They highlighted that this was also an option with regard to child maintenance, provided the agreement was not detrimental to the child’s best interests. The Lebanese and Jordanian delegations emphasised that with regard to maintenance agreements courts needed to be cautious to check whether such agreements might have possibly been concluded under pressure by the maintenance debtor.
332. Some delegations, including the Moroccan and Israeli delegations, reported on guidelines or estimation tables for judges assisting in the determination of child support. The Israeli and Moroccan delegations reported a number of factors their courts considered in determining maintenance, which included the needs of the individual child, the income of the parents and the standard of living of the child when the parents were still cohabiting. The Israeli delegation highlighted that there was a minimum amount of maintenance owed in any case. Furthermore, the Israeli delegation reported on a draft law including rules assisting in the calculation of maintenance amounts. The Jordanian delegation indicated that they did not have any tables assisting the judge in the determination of the child maintenance but that their laws provided a minimum amount

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<sup>225</sup> See, for example, Article 52 of the Tunisian Code on Personal Status, *supra* footnote 97.

of child maintenance to be paid as well as a maximum cap. The Jordanian delegation furthermore explained that the Jordanian Shariah courts were currently working on an e-justice project with the aim to accelerate the recovery of maintenance and make it more cost-effective.

333. The Working Group noted the importance of making information on the recovery of maintenance and in particular on how to establish and enforce maintenance claims easily accessible to all concerned, which was identified as a matter equally important for national cases and international cases. Several delegations, including the Egyptian, Moroccan and Tunisian delegations, reported on available information structures in their States. In Tunisia, information on laws and jurisprudence as well as forms and answers to frequently asked questions are available in both French and Arabic through the e-portal of the Ministry of Justice.<sup>226</sup> The Tunisian delegation explained that information could also be obtained from the legal advisors of the public prosecutors office providing guidance to litigants at the court of first instance and the court of appeal. Furthermore, the Tunisian delegation reported about so-called “permanent windows” at the courts, which are spaces where a public prosecutor representative and a family judge specialised in children’s rights is available for questions. The Moroccan delegation highlighted that their State provided brochures and information material on maintenance matters and underlined that through the website of the Judicial Portal of the Ministry of Justice<sup>227</sup> legislation and other helpful materials can be accessed in French and Arabic. Moreover, the Moroccan delegation referred to the support available through social workers in courts and through civil society NGOs, which play an important role in Morocco. The Egyptian delegation referred to an information database<sup>228</sup> recently established in Egypt with the financial support of the UN making available legal information on family matters including answers to frequently asked questions and a Guide for litigants. Furthermore, the Egyptian delegation drew attention to assistance given by legal aid offices in courts and to the family dispute settlement offices, which were established following a law of 2004 and which can be addressed with questions and which give assistance to bring about an amicable solution at a pre-trial stage.

334. The Working Group noted the usefulness of centralised structures providing information and possibly further assistance in cross-border maintenance cases. A number of delegations referred to existing structures under the 1956 UN Maintenance Convention<sup>229</sup> and under bilateral agreements. The Israeli delegation noted that in Israel, the legal aid office was the Central Authority under both the 1956 UN Maintenance Convention and under the Memorandum of Understanding on maintenance matters with the USA (see further regarding multilateral, regional and bilateral agreements applicable to maintenance matters currently in force in the region below para. 342). Reference was made to the discussion on establishing centralised structures assisting families in the resolution of cross-border family disputes discussed in the context of Good Practices Nos. 34 *et seq.* It was noted that a Central Contact Point established in accordance with these Good Practices could either be used at the same time as centralised structure to provide information on the cross-border recovery of maintenance or that the Central

<sup>226</sup> See the website of the e-Justice Portal of Tunisia < <http://www.e-justice.tn> > (last consulted 15 May 2013).

<sup>227</sup> See the Judicial Portal of the Moroccan Ministry of Justice < <http://adala.justice.gov.ma/FR/home.aspx> > (last consulted 15 May 2013).

<sup>228</sup> See the website of the Egyptian legal Aid and Dispute Settlement office in Arabic language at < <http://www.ladsegyp.org/book.pdf> > (last consulted 15 May 2013).

<sup>229</sup> See *supra* footnote 22.

Contact Point and the centralised structure for maintenance cases could be linked insofar as to refer persons in need of information or assistance to the relevant other structure.

335. The Working Group acknowledged that it was important to provide maintenance creditors with effective access to procedures in maintenance matters. This includes the removing or easing of any possibly existing practical burdens on the creditor imposed by the way maintenance procedures are conducted that could deter the creditor from claiming maintenance. The Jordanian delegation noted that due to their cultural background maintenance creditors may feel embarrassed to claim their rightful maintenance. Hence, in some small communities creditors may not claim maintenance, since due to the way the procedure is organised their request would become known to the community. There was agreement among the Working Group that States should inquire into such practical hurdles to claiming maintenance and should try to remove them. The Jordanian delegation also mentioned that a requirement for the child to appear in court proceedings on child maintenance as the creditor can be extremely stressful for the child and can therefore constitute a deterrent to claiming maintenance. Several other delegations, such as the Lebanese, Moroccan and Tunisian delegations, indicated that in their legal systems children would not have to appear in court hearings in child support proceedings as creditors. There was agreement in the Working Group that children, including older children between 15 and 18, should not be forced to participate as creditors in the court hearings of child support proceedings and that representation of the child creditor by, for example, the primary carer or a legal representative of the child should be possible. A number of delegations highlighted the important role of the prosecutor in child maintenance proceedings. Some delegations, such as the Moroccan and Tunisian delegations, indicated that the prosecutor can, for example, represent the child where there is no other representative and that the prosecutor can also appeal a decision which he considers to conflict with the best interests of the child.
336. The Working Group emphasised the importance of providing for effective means to enforce the payment of maintenance. There was agreement that States should as a priority take all appropriate measures to encourage the voluntary payment of maintenance. The Jordanian delegation suggested, for example, the encouragement of the setting up of a saving account in the child's name from which the monthly maintenance could be withdrawn. The Working Group exchanged about enforcement mechanisms and means available in their legal systems. The Tunisian delegation explained that in their legal system maintenance would be paid monthly by post or through an intermediary (notary *etc.*). The Jordanian delegation also indicated that maintenance in Jordan was regularly paid through an intermediary. Moreover, several delegations, including the Israeli, Jordanian, Moroccan and Tunisian delegations, stated that the maintenance owed could be withdrawn from the monthly wages of the debtor. The Moroccan delegation furthermore indicated that the confiscation of the debtor's property was possible. Several delegations, including the Egyptian, Israeli, the Lebanese, Moroccan and Tunisian delegations, explained that a means used to enforce maintenance payments in their legal system was imprisonment.<sup>230</sup> The Working Group noted however, that the imprisonment of the debtor could have reverse effects on the debtor's financial capability due to the debtor's inability to pursue his work activities when imprisoned. The Israeli delegation highlighted that in Israel maintenance debts had

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<sup>230</sup> For example, in Tunisia the debtor not paying maintenance can face three months up to one year imprisonment and a fine of 100 to 1000 Dinar, Article 53 *bis* of the Tunisian Code on Personal Status, see *supra* footnote 97.

priority over other debts and that it was impossible to erase maintenance debts by bankruptcy.

337. The Working Group further exchanged on autonomous private international law rules currently in place in their States. The report of the delegations on currently employed connecting factors for the determination of international jurisdiction regarding maintenance matters showed considerable differences between the legal systems. The Israeli delegation explained that international jurisdiction of courts in Israel in maintenance matters would be assumed in all cases that had a connection with Israel. The Tunisian delegation, indicated that international jurisdiction of Tunisian courts was given in all cases, where the creditor was residing in Tunisia.<sup>231</sup> The Lebanese delegation stated that the courts at the place of residence of the debtor or creditor were considered to have international jurisdiction in maintenance matters. In other legal systems, such as Egypt the connecting factor of nationality is used besides other connecting factors in maintenance matters.
338. The Working Group acknowledge that the importance of considering the best interests of children in child support cases affected all aspects of child support proceedings including private international law aspects. The Working Group therefore noted that the rules of international jurisdiction employed in child maintenance matters should be compatible with the best interests of the child considerations. This included not only the grounds of jurisdiction employed but also how the interaction with jurisdictional rules of other States was regulated and in particular how jurisdictional conflicts were dealt with. Reference was made to the parallel discussions regarding the importance of avoiding conflicting decisions in matters of parental responsibility (see above Good Practice Nos. 60 *et seq.* and Nos. 69 *et seq.* as well as the description of the discussions).
339. Several delegations reported on their States' autonomous applicable law rules with regard to maintenance obligations. The Tunisian delegation stated that in their legal system the law applicable to child maintenance is either that of the State of the creditor's nationality or domicile or the law of the State of the debtor's nationality or domicile; the judge will apply the law most favourable to the creditor.<sup>232</sup> The Tunisian delegation reported further that during a marriage the law applicable to spousal maintenance was the law generally applicable to the marriage and that regarding maintenance of ex-spouses, the law applicable was that applicable to the dissolution of the marriage.<sup>233</sup> The Israeli delegation explained that regarding the law to be applied by Israeli courts there was no difference between national and international maintenance cases, *i.e.* the religious or civil law would be applied to the case depending on the religion(s) of the parties. The Lebanese delegation explained that the law applicable to maintenance was the law applicable to the marriage, which for a civil marriage celebrated abroad, was the law of the place where the marriage was concluded. The Egyptian delegation stated that the law applicable to maintenance was the law of the State of the husband's nationality.
340. As concerns the recognition and enforcement of foreign maintenance decisions under the autonomous rules of private international law all delegations referred to their State's general rules on the enforcement of foreign decisions.

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<sup>231</sup> See Article 6(2) of the Tunisian Private International Law Code, *supra* footnote 139.

<sup>232</sup> See Article 51 of the Tunisian Private International Law Code, *supra* footnote 139.

<sup>233</sup> See Articles 47 and 51 of the Tunisian Private International Law Code, *supra* footnote 139.

341. The Working Group underlined the crucial importance of multilateral, regional and bilateral agreements with regard to the cross-border recovery of maintenance and recognised that the effective and speedy cross-border recovery of maintenance was impossible without an efficient State cooperation.
342. The Working Group reported on a number of multilateral, regional and bilateral currently in force for their States applicable in maintenance cases. Four States among the ENPI South Partner Countries are State Parties to the 1956 UN Maintenance Convention,<sup>234</sup> namely: Algeria, Israel, Morocco and Tunisia. Furthermore, a number of delegations made reference to the Riyadh Agreement for Judicial Cooperation,<sup>235</sup> a regional instrument today in force for more than 20 legal systems including the ENPI South Partner Countries: Algeria, Jordan, Lebanon, Morocco, Tunisia, and Palestine. Among the bilateral instruments mentioned by the different delegations were instruments on judicial cooperation between the following States: Algeria-Tunisia (1966); Egypt-Tunisia (1976); Egypt-Morocco (1998); Jordan-Lebanon; Jordan-Tunisia (1966); Lebanon-Tunisia (1966); Morocco-France (1981); Morocco-Tunisia (1965); Germany-Tunisia (1969); Spain-Tunisia (2002); Italy-Tunisia (1970); Tunisia-France (1982); Tunisia-Czech Republic (1979); Morocco-Bahrain (2001); Morocco-Belgium; Jordan-United States of America; Israel-United States of America.
343. The Working Group noted that the overall situation for cross-border recovery of maintenance needed improvement. In particular, the Algerian delegation had in the course of two earlier meetings suggested that the Working Group should address the matter of cross-border recovery of maintenance. The Algerian delegation had indicated that the situation under the international legal framework currently in force for Algeria, including the 1956 UN Maintenance Convention, was insufficient and needed modernisation. The Working Group emphasised that State cooperation regarding cross-border recovery of maintenance should be improved and acknowledged the need for the introduction of accessible, prompt, efficient, cost-effective, responsive and fair procedures. The Working Group took note of the solutions offered by the 2007 Hague Maintenance Convention,<sup>236</sup> presented to the Working Group in detail by a representative of the Hague Conference on Private International Law. The Working Group noted that the 2007 Hague Maintenance Convention, in force since January 2013, aims to modernise and considerably simplify and accelerate the cross-border recovery of maintenance, in particular child support, by introducing “accessible, prompt, efficient, cost-effective, responsive and fair”<sup>237</sup> procedures.
344. The Israeli delegation stated that the Israeli government was in the course of exploring the implementation of the 2007 Hague Maintenance Convention. The Tunisian delegation indicated that their State might be favourable to joining an international instrument that modernises 1956 UN Maintenance Convention currently in force for Tunisia, but that a more detailed examination was needed.

<sup>234</sup> See for the link to the text of the Convention *supra* footnote 22 and for the status table < [http://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XX-1&chapter=20&Temp=mtdsg3&lang=en](http://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XX-1&chapter=20&Temp=mtdsg3&lang=en) > (last consulted 15 May 2013).

<sup>235</sup> See *supra* footnote 51.

<sup>236</sup> See *supra* para. 11 and footnote 19.

<sup>237</sup> See Preamble of the 2007 Hague Maintenance Convention, *supra* footnote 19

345. The Working Group furthermore underlined the desirability of States considering the promotion of common applicable law rules regarding maintenance obligations noting that common applicable law rules considerably contribute to avoiding conflicting decisions, assist in achieving legal certainty and in deterring forum shopping. The exchange on the connecting factors currently applied in the autonomous applicable law rules of the different ENPI South Partner Countries (see above para. 339) had shown that the approaches differed considerably. However, the Working Group considered it important to continue dialogue between States with a view to possibly finding agreement on common rules of applicable law. The Working Group underlined that States when deciding on applicable law rules for child support should take into consideration, which rules may most appropriately serve the protection of the best interests of the children concerned. The Working Group took note of the 2007 Hague Protocol on the law Applicable to Maintenance Obligations<sup>238</sup> and recommended that States should examine this instrument as a possible basis for common applicable law rules.

### Background remarks

346. The cross-border recovery of maintenance, in particular child maintenance, is a subject of high importance in international family law. Each year, tens of thousands of child support claims need to be recovered cross-border and for many of them the recovery fails due to cumbersome, lengthy and costly proceedings. The 2007 Hague Maintenance Convention holds the promise of a new area of cross-border recovery of maintenance, particularly with regard to child support, through the introduction of simplified, swift, accessible, cost-effective and fair procedures. The work on the establishment of this new modern instrument for the cross-border recovery had followed a thorough phase of analysis of the operation of existing international maintenance instruments, including the 1956 UN Maintenance Convention. This analysis had revealed that the existing instruments were not or no longer operating efficiently enough and that many of the problems associated with some of these conventions were of a chronic nature. In practise, the cross-border recovery of maintenance often remained cumbersome, slow and costly. The decision of the Hague Conference Member States in 2002 to embark on establishing new global rules in the field of international maintenance was followed by five years of drafting and negotiations, in which more than 70 States from all continents and legal traditions, including Egypt, Israel, Jordan and Morocco, participated.

347. Modernised applicable law rules were included in a separate Hague instrument, the 2007 Hague Protocol, developed and adopted alongside the 2007 Hague Maintenance Convention.

348. In parallel to the negotiations in The Hague, the European Community prepared a new European instrument on the cross-border recovery of maintenance following the objectives set forth at the Tampere Meeting of the European Council in October 1999.<sup>239</sup> The European Community waited for the adoption of the new Hague instruments to finalise the European Maintenance Regulation<sup>240</sup> in order to make the new European provision as far as possible compatible with the new international rules. It is important to note that the European Regulation takes the simplification and acceleration of cross-

<sup>238</sup> For further information on the 2007 Hague Protocol see *supra* para. 11 and footnote 26.

<sup>239</sup> See the conclusions of the Tampere meeting available online at < [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm) > (last consulted 15 May 2013).

<sup>240</sup> See for further information on the Regulation *supra* para 0 and footnote 35.

border maintenance recovery inside Europe even a step further, by providing for direct rules of jurisdiction and abolishing the *exequatur*.

## XII. FUTURE COOPERATION IN THE EURO-MEDITERRANEAN REGION

**150. States in the Euro-Mediterranean region should promote regional exchange and cooperation to continuously improve the legal and practical frameworks for the resolution of cross-border family disputes, to develop common solutions and to strengthening mutual respect between the different legal systems in the region.**

**151. Regional exchange and cooperation can be of considerable assistance in the implementation of the Principles and Good Practices recommended by this Handbook.**

**152. States in the Euro-Mediterranean region should cooperate with each other with a view to reforming and improving visa law and procedures (see also Good Practices Nos. 10 *et seq.*).**

### Description of the discussions

349. At the final Working Group meeting the delegations emphasised once more the crucial importance of continuing cooperation and exchange between States in the Euro-Mediterranean region with a view to improving the legal and practical frameworks for the resolution of cross-border family disputes (see also above Good Practice No. 56 and paras. 150 *et seq.*). The Working Group highlighted the necessity of developing common solutions and strategies and of strengthening the mutual respect between the different legal systems in the region. Several delegations, including the Jordanian and Tunisian delegations, highlighted that besides a regional exchange among the Southern Mediterranean States a continuing dialogue with the European States was crucial, since a large number of cross-border family disputes involve both, States from North and South of the Mediterranean.

350. The Working Group underlined that the implementation of the Principles and Good Practices recommended in this Handbook would be greatly benefitting from States' engagement in further regional exchange and cooperation.

351. Having identified visa-problems as an issue of major impact in cross-border family disputes involving the Southern and the Northern Mediterranean States, the Working Group considered it crucial that States should cooperate with each other to discuss how visa law and procedures can be improved (for further details regarding suggestions made by the Working Group, see the Good Practices Nos. 10 *et seq.* and the description of the discussions at paras. 67 *et seq.*).

352. The Working Group noted that exchange between States could be promoted on different levels and in different way and could, for example, include the encouragement of regular conferences allowing for an exchange between different States' family judges or members of other professions involved in the resolution of cross-border family disputes, the encouragement of judges engaging in regional or international judges

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networks, such as the International Hague Network of Judges, as well as the holding of common training programmes and study visits.

353. A number of delegations, including the Tunisian delegation, suggested that a dialogue between States could furthermore be particularly helpful with a view to exchanging on current domestic private international law rules regarding jurisdiction and applicable law in international family matters and to assess the feasibility of working towards an, at least, partial rapprochement of domestic rules of private international law in this field of law. When discussing the general usefulness of promoting common grounds of jurisdiction and common applicable law rules in international family law, it was noted that States could for their domestic rules on private international law draw inspiration from commonly used rules in this field of law, including rules promoted by widely applied international and regional instruments.

"The information contained in this handbook is based on the information which has been provided by the experts and representatives of the concerned beneficiary countries in the framework of the work carried out under the Euromed Justice III Project. The Consortium implementing the project cannot be held responsible for its accuracy, actuality or exhaustiveness, nor can it be made liable for any errors or omissions contained in this report."