

**Part I:**  
**Introduction and methodology**

## I.1 Introductory remarks

*Act Two of the opera Madame Butterfly by Giacomo Puccini*

GORO and YAMADORI (to Sharpless)  
*She believes she is still married.*

BUTTERFLY  
*I don't believe so – I am. I am.*

GORO  
*But the law ...*

BUTTERFLY  
*I don't know that law.*

GORO  
*... for the wife, abandonment is equivalent to divorce.*

BUTTERFLY  
*Maybe in Japanese law ... not so in the law of my country*

GORO  
*Which country?*

BUTTERFLY  
*The United States.*<sup>1</sup>

1. The fragment above is from the opera *Madame Butterfly* by Giacomo Puccini. The setting of this opera is Japan in the 1900s. It is the story of Cio-Cio-San, also known as Madame Butterfly, a Japanese geisha. The marriage broker Goro arranges a marriage between her and the American naval lieutenant Pinkerton, who is stationed in Japan. Just before the marriage ceremony, Butterfly admits that she is 15 years old. Despite the fact that she is a minor, the marriage is concluded. Shortly after the wedding, Mr Pinkerton returns to the United States. Three years after his departure, there are rumours that the marriage has ended under Japanese

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1. The original text of this fragment is in Italian. This translation is based on R. H. Elkin, 'Madam Butterfly. A Japanese Tragedy. Founded on the book by John L. Long and the drama by David Belasco. Italian Libretto by L. Illica and G. Giacosa', <<https://dn790009.ca.archive.org/0/items/madambutterflyja00puccuoft/madambutterflyja00puccuoft.pdf>>; and The Dallas Opera, 'madame butterfly', <[https://dallasopera.org/wp-content/uploads/2022/02/Butterfly-Libretto\\_Castel.pdf](https://dallasopera.org/wp-content/uploads/2022/02/Butterfly-Libretto_Castel.pdf)>.

law. According to that law, as soon as the husband leaves the marital home, this is considered a repudiation and thus a divorce. As the above fragment illustrates, *Madame Butterfly* argues that it is not Japanese but American law that applies to the (dissolution of her) marriage, based on her husband's nationality.

2. Although this opera is set and was performed 120 years ago,<sup>2</sup> a similar situation could still arise today. UNICEF figures show that between 2015 and 2023, 18.7% of women between the age of 20 and 24 around the world had got married before the age of 18, while 4.3% of them had been married before the age of 15. In the period 2015–2022, 2.7% of men aged between 20 and 24 years had got married before the age of 18.<sup>3</sup> Consequently, the question of whether a marriage is valid if one of the spouses is a minor remains an important one. Furthermore, the questions that are raised in *Madame Butterfly*, such as the effect on the legal status of a child marriage if one of the spouses migrates or is a foreign national, remain pertinent today.

3. As the story of *Madame Butterfly* illustrates, migration is a constant in history. Migration can be defined as the international movement of persons.<sup>4</sup> Within the European Union (EU), a distinction is made between the movement of EU citizens and the movement of third-country nationals.<sup>5</sup> According to article 20(1) of the Treaty on the Functioning of the European Union (TFEU), every national of an EU Member State is a citizen of the Union. Third-country nationals can be defined as citizens of non-EU Member States. In 2022, 8% of the EU population were citizens of a country other than their country of residence, 3% were citizens of another EU Member State and 5% were nationals of a third country.<sup>6</sup>

4. Although migration is a timeless phenomenon, there are fluctuations in migration flows. When I started this research in 2019, the aftermath of Europe's

2. The Metropolitan Opera, 'Synopsis: *Madama Butterfly*', <<https://www.metopera.org/discover/synopses/madama-butterfly/>>.

3. UNICEF, 'Childmarriage', <<https://data.unicef.org/topic/child-protection/child-marriage/>>; and UNICEF, 'UNICEF Data Warehouse', <[https://data.unicef.org/resources/data\\_explorer/unicef\\_f/?ag=UNICEF&df=GLOBAL\\_DATAFLOW&ver=1.0&dq=PT\\_F\\_20-24\\_MRD\\_U15+PT\\_M\\_20-24\\_MRD\\_U18+PT\\_F\\_20-24\\_MRD\\_U18+PT\\_M\\_15-19\\_MRD+PT\\_F\\_15-19\\_MRD..&startPeriod=2016&endPeriod=2023](https://data.unicef.org/resources/data_explorer/unicef_f/?ag=UNICEF&df=GLOBAL_DATAFLOW&ver=1.0&dq=PT_F_20-24_MRD_U15+PT_M_20-24_MRD_U18+PT_F_20-24_MRD_U18+PT_M_15-19_MRD+PT_F_15-19_MRD..&startPeriod=2016&endPeriod=2023)>.

4. Pieter Boeles, Maarten Den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Intersentia, second edition, 2014), p. 3-5.

5. In this book, I use the terms 'citizenship' and 'nationality' interchangeably.

6. Eurostat, 'Migration and asylum in Europe – 2023 edition', <<https://ec.europa.eu/eurostat/web/interactive-publications/migration-2023#:~:text=migration%2D2023%2Dch13%2Dcitizen,ships%2Din%2Dthe%2DDeu&text=In%202022%2C%20whilst%20most%20people,of%20a%20non%2DEU%20country.>>>.

refugee crisis of 2015 was being felt in the EU Member States. Conflicts in the Middle East were the main cause of an influx of refugees and migrants from Syria, Afghanistan and Iraq at that time.<sup>7</sup> Germany was the Member State that received the highest number of asylum applications. In 2015, Germany received around a third of all asylum applications made in the EU that year.<sup>8</sup> In 2021, Germany and Belgium – the two countries examined in the research for this book – were among the top 10 European destinations for migrants.<sup>9</sup> The next section discusses how this flow of migrants, and more generally the migration of people to Belgium or Germany, raises questions not only under migration law, but also in other areas of law.

## I.2 Background, problem statement and state of the art

5. When a person migrates from one State to another, it involves not only the physical movement of that person and their possessions, along with their language and culture, but also the movement of that person's personal status or legal institutions relating to them. It is possible that a legal institution relating to the migrant **does not exist or does not exist in the same specific form** in the host country. For example, one legal institution that does not exist in the same form in Germany as it does in Syria is a child marriage. The German legal system knows the institution of marriage, but not the specific form of child marriage. Section I.4.2 provides a definition of a child marriage. Another example is a polygamous marriage, which exists when a person is married to two or more spouses;<sup>10</sup> such marriages can be concluded in Kenya, among other countries, but do not exist in the substantive family law of the EU Member States.<sup>11</sup> Not only may a specific form of a legal institution not exist in the host State's legal system; the legal institution itself may not exist at all in that system. In the EU,

7. William Spindler, '2015: The year of Europe's refugee crisis', <<https://www.unhcr.org/news/stories/2015-year-europes-refugee-crisis>>; and European Asylum Support Office, 'Latest asylum trends – 2015 overview', <<chrome-extension://efaidnbmnnnibpcajpglclefndmkaj/https://euaa.europa.eu/sites/default/files/public/LatestAsylumTrends20151.pdf>>

8. Pew Research Center, 'Number of Refugees to Europe Surges to Record 1.3 Million in 2015. Recent wave accounts for about one-in-ten asylum applications since 1985', <<https://www.pewresearch.org/global-migration-and-demography/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/>>.

9. IOM, 'Migration and Migrants: Regional Dimensions and Developments. Europe', <<https://worldmigrationreport.iom.int/what-we-do/world-migration-report-2024-chapter-3/europe>>.

10. A distinction can be made between a situation where a person consciously enters into a marriage with a second spouse and one in which they do so unknowingly. It is possible for a polygamous marriage to occur unintentionally, for example because a divorce is not recognised and a person remarries.

11. Article 3(1) of the Kenyan Marriage Act 2014.

such cases often occur in the context of legal institutions that are established in a legal system based on or influenced by Islamic law. *Kafala*, which is a child protection measure established in a country with legislation influenced by Islamic law, is an example of a legal institution that does not exist in Belgium.<sup>12</sup> A second example is the *talaq*, a form of marriage repudiation that is possible in Pakistan, among other countries, but which does not exist within the substantive family law of the EU Member States.<sup>13</sup>

6. When a person moves to another State, the question arises of how the host State should deal with the legal institutions that concern that person. This question is particularly likely to arise when the legal institution is unknown in the legal system of the receiving State. The recognition of (unknown) legal institutions is important both for **family law purposes**, such as parenthood, name and inheritance, and for **migration law purposes**, such as family reunification and the qualification as an unaccompanied minor. Family law is made by the national legislature. Migration law, on the other hand, has been partly harmonised at the EU level, and is regulated by both the national legislature of the Member States and the EU legislature itself. The recognition of a legal institution for family law purposes and migration law purposes overlaps but can also sometimes collide. If a legal institution is not recognised at all, or is recognised differently for family law purposes than for migration law purposes, or vice versa, this may lead to legal uncertainty. An example is the situation where a couple is considered married for family reunification purposes but not for inheritance purposes, or vice versa.

7. The recognition of legal institutions established abroad or, more generally, of a personal status, by the State to which the migrant moves is considered a matter of **private international law**. Private international law aims to solve the conflicts that may arise from the application of different (national) legal systems, and regulates the relationship between those legal systems. Different national legal systems may apply because a person has a foreign nationality or lives in a country other than that of their nationality. Private international law covers four functions. First, it determines which national court or official has jurisdiction in an international case. The jurisdiction rules determine, for example, which country's registrar is competent to marry a couple. Second, private international law determines which law is applicable to an international situation.

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12. Section I.4.1 explains the concept of kafala in more detail.

13. Article 7 of the Pakistani Muslim Family Ordinance 1961.

This includes, for example, the question of which law governs the validity and consequences of a marriage concluded abroad. Third, private international law seeks to resolve the question of whether a legal institution or a judgment established abroad is valid and can be recognised in another State. This includes, for example, the question of whether a kafala can be recognised in the receiving State. Fourth, private international law deals with administrative and judicial cooperation between countries in civil and commercial matters.<sup>14</sup>

8. The recognition of a legal institution or personal status is therefore in principle governed by private international law. In the case of a legal institution which does not exist (in the same form) in the legal system of the host Member State, questions may arise regarding the exact application of private international law. One example of this is the recognition of a kafala.<sup>15</sup> Nevertheless, the role of private international law in regulating the recognition for family law purposes of a legal institution or a personal status established abroad does not seem to be questioned. By contrast, the role of private international law to determine whether a legal institution can be recognised for migration law purposes is less well established and clear. The (possible) interaction between private international law and migration law, also with regard to unknown legal institutions, has received greater attention in the past decade.<sup>16</sup>

14. Thalia Kruger and Jinske Verhellen, *Internationaal privaatrecht. De essentie* (Die Keure 2023), p. 5-9.

15. For example, see Marcel Zühlsdorff, 'Matters Involving Third Country Nationals: A Comparative Analysis Concerning Personal Status Changes of Third Country Nationals' in Thomas Pfeiffer, Quincy C. Lobach and Tobias Rapp (eds), *Facilitating Cross-Border Family Life – Towards a Common European Understanding. EUFams II and Beyond* (Heidelberg University Publishing 2021), p. 246-257; International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020); Diego Zannoni, 'How to balance respect for diversity and the rights of the vulnerable? (Non-)recognition of forced and underage marriage under the lens of the European Convention on Human Rights' (2023) *Journal of Private International Law*, p. 277-301; and Jinske Verhellen and Patrick Wautelet, 'The Treatment of Diversity in Family Law in Belgium: Between Acknowledgment and Indifference' in Nadjma Yassari and Marie-Claire Foblets (eds), *Normativity and Diversity in Family Law* (Springer Cham 2022), p. 246-247.

16. For example, see Jinske Verhellen, *Het Belgisch Wetboek IPR in familiezaken. Wetgevende doelstellingen getoetst aan de praktijk* (Die Keure 2012); Jinske Verhellen, 'Real-life International Family Law. Belgian Empirical Research on Cross-Border Family Law' in Katharina Boele-Woelki, Nina Dethloff and Werner Gephart (eds), *Family Law and Culture in Europe. Developments, Challenges and Opportunities* (Intersentia 2014), p. 323-333; Sanna Mustasaari, 'The Married Child Belongs to No One: Legal Recognition of Forced Marriages and Child Marriages in the Reuniting of Families' (2014) *Child and Family Law Quarterly*, p. 261-282; Julie Malingreau, 'International Kafala: A Right for the Child to Enter and Stay in the EU Member States?' (2014) *European Journal of Law Reform*, p. 401-429; Wojciech Burek, 'Family Reunification Regulations and Women: The Perspective of International Law' (2016) *Polish Yearbook of International Law*, p. 83-108; Giacomo Biagioni (ed), *Migrant Children. Challenges for Public and Private International Law* (Editoriale Scientifica 2017); Christine Budzikiewicz, Bettina Heiderhoff, Frank Klinkhammer and Kerstin Niethammer-Jürgens (eds), *Migration und IPR* (Nomos 2018); Alessandra Lang, 'Kafala and Family Reunification of Third-Country Nationals' in Elisabetta Bergamini and Chiara Ragni (eds), *Fundamental Rights and Best Interests of the Child in Transnational Families* (Intersentia 2019), p. 97-114; Nicole Stybnarova,

9. Legal scholars have stressed the need for more research on the interaction and alignment between private international law and migration law.<sup>17</sup> This research aims to contribute to answering that need. In particular, it seeks to build on the studies *Private International Law in a Context of Increasing International Mobility: Challenges and Potential* and *Children on the Move: A Private International Law Perspective*, both of which were conducted by CORNELOUP, HEIDERHOFF, HONORATI, JAULT-SESEKE, KRUGER, RUPP, VAN LOON and VERHELLEN. These two studies were commissioned by the European Parliament's Policy Department for Citizen's Rights and Constitutional Affairs, at the request of the JURI Committee. These two studies have identified a lack of coordination between private international law and migration law. According to the eight scholars mentioned above, these two areas of law exist and operate largely in parallel, but there are not enough institutionalised links between them, and the awareness of those links is also insufficient. The two studies stressed the need for in-depth (empirical) research to be conducted on the interaction between private international law and migration law, including refugee and asylum law. This research should also include comparisons between the law and practice of the various EU Member States.<sup>18</sup>

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'Teleology Behind the Prohibition of Recognition of Polygamous Marriages Under the EU Family Reunification Directive: A Critique of Rule Effectiveness' (2020) *Journal of Muslim Minority Affairs*, p. 104-116; Gülüm Bayraktaroğlu-Özçelik, 'SDG 5: Gender Equality' in Ralf Michaels, Veronica Ruiz Abou-Nigm and Hans van Loon (eds), *The Private Side of Transforming our World. UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia 2021), p. 159-188; and Sarah Den Haese and Jinske Verhellen, 'Personal status across borders. Family reunification procedures meet private international law' in Ellen Desmet, Milena Belloni, Dirk Vanheule, Jinske Verhellen and Ayse Gündük (eds), *Family Reunification in Europe. Exposing inequalities* (Routledge 2024), p. 43-61.

17. See inter alia Hans van Loon, 'De verhouding tussen internationaal privaatrecht en migratierecht in verband met de waardigheid van het kind' (2019) *Tijdschrift voor Familie- en Jeugdrecht*, p. 154-160; Jinske Verhellen, 'Cross-Border Portability of Refugees' Personal Status' (2017) *Journal of Refugee Studies*, p. 427-443; Sabine Corneloup, Bettina Heiderhoff, Costanza Honorati, Fabienne Jault-Seseke, Thalia Kruger, Caroline Rupp, Hans van Loon and Jinske Verhellen, 'Private International Law in a Context of Increasing International Mobility: Challenges and Potential' (Study for the European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs 2017); and Sabine Corneloup, Bettina Heiderhoff, Costanza Honorati, Fabienne Jault-Seseke, Thalia Kruger, Caroline Rupp, Hans van Loon and Jinske Verhellen, 'Children on the Move: a Private International Law Perspective' (Study for European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs 2017).

18. Sabine Corneloup, Bettina Heiderhoff, Costanza Honorati, Fabienne Jault-Seseke, Thalia Kruger, Caroline Rupp, Hans van Loon and Jinske Verhellen, 'Private International Law in a Context of Increasing International Mobility: Challenges and Potential' (Study for the European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs 2017); and Sabine Corneloup, Bettina Heiderhoff, Costanza Honorati, Fabienne Jault-Seseke, Thalia Kruger, Caroline Rupp, Hans van Loon and Jinske Verhellen, 'Children on the Move: a Private International Law Perspective' (Study for European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs 2017).

10. The study *Children on the Move: A Private International Law Perspective* paid special attention to the protection of migrant children and the principle of the best interests of the child in this context. The study concluded that EU private international law and migration law instruments regulate child protection in an uncoordinated way.<sup>19</sup> With regard to the legal institution of kafala, both studies emphasised the need for more alignment between private international law recognition rules and migration law. The studies also stressed that in the current refugee and migration context, particular attention should be paid to child marriage.<sup>20</sup>

### 1.3 Research objective and central research question

11. As the previous section indicated, the recognition of an unknown legal institution raises questions. Whether and how a legal institution is recognised are important questions for family law and migration law purposes. This book examines how two unknown legal institutions in Belgium and Germany – namely, kafala and child marriage – are dealt with for family law and migration law purposes, and how the recognition of these two institutions in these two areas of law is aligned. This research focuses on the role of private international law in the recognition of these two institutions and on whether private international law can contribute to the alignment of that recognition for family law and migration law purposes.

12. Based on the above, the **central research question** of this book is:

*How can private international law address the disjunction between family law and migration law, specifically with regard to the recognition of kafala and child marriage?*

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19. Sabine Corneloup, Bettina Heiderhoff, Costanza Honorati, Fabienne Jault-Seseke, Thalia Kruger, Caroline Rupp, Hans van Loon and Jinske Verhellen, 'Children on the Move: a Private International Law Perspective' (Study for European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs 2017).

20. Sabine Corneloup, Bettina Heiderhoff, Costanza Honorati, Fabienne Jault-Seseke, Thalia Kruger, Caroline Rupp, Hans van Loon and Jinske Verhellen, 'Private International Law in a Context of Increasing International Mobility: Challenges and Potential' (Study for the European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs 2017); and Sabine Corneloup, Bettina Heiderhoff, Costanza Honorati, Fabienne Jault-Seseke, Thalia Kruger, Caroline Rupp, Hans van Loon and Jinske Verhellen, 'Children on the Move: a Private International Law Perspective' (Study for European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs 2017).



## I.4 Concepts

**13.** This research focuses on the recognition of unknown legal institutions. More specifically, it examines kafala and child marriage. Before defining the concepts of kafala and child marriage for the purposes of this research, it is relevant to note that both institutions exist in legal systems influenced by, or based on, **Sharia or Islamic law**. Sharia is a collection of rules of behaviour of a religious, moral, social and legal nature. According to the Islam, these norms, which were revealed by Allah through the Prophet Muhammad, concern the relationships between people, between people and the State, and between the individual and Allah.<sup>21</sup> Sharia or Islamic law is not a legal system in itself; it only influences the legislation of States. Furthermore, it only influences certain legal areas, such as family and inheritance law. The interpretation of Sharia and its norms varies across the Islamic world. Consequently, the impact of these norms on the legislation of countries varies.<sup>22</sup>

### I.4.1 *Kafala*

**14.** Adoption or *tabanni*, which leads to the creation of a legal filiation link between the adoptee and their adoptive parents and, in the case of a full adoption, to the termination of the adoptee's filiation links with their biological family, is prohibited by Sharia (or Islamic law). This was not always the case; the Prophet Muhammad had an adopted son called Zayd. Zayd married Zaynab, but the marriage did not work out, and Zayd wanted a divorce. The Prophet Muhammad also fell in love with Zaynab and wished to marry her himself. However, this was not legally possible, because Islamic law at the time prohibited a marriage between a father-in-law and his daughter-in-law. After Zayd repudiated Zaynab, the Prophet Muhammad married her. The Quran verses 33:37–40 and 33:4–5, which were revealed to the Prophet Muhammad legalised the marriage between the Prophet and Zaynab. Since these verses prohibited adoption, Zayd could not be considered the Prophet's son, and Zaynab was not his daughter-in-law. Consequently, the Prophet could legally marry Zaynab.<sup>23</sup>

21. Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford University Press 2005), p. 3-20; and Frans van der Velden, *Inleiding in de Shari'a: Een Kennismaking Met Het Recht van de Islam-Georiënteerde Wereld* (BoomJuridisch 2015), p. 25-28.

22. Maurits Berger, *Klassieke sharia en vernieuwing* (Amsterdam University Press 2006), p. 13; Lena Salaymeh, 'Islamic Law' in James D. Wright (ed), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, second edition, 2015), p. 746-753; and Frans van der Velden, *Inleiding in de Shari'a: Een Kennismaking Met Het Recht van de Islam-Georiënteerde Wereld* (BoomJuridisch 2015), p. 25-28.

23. International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020), p. 14-16; Andrea Büchler and Eveline Schneider Kayasseh, 'Fostering and Adoption in Islamic Law

15. The previous paragraph set out what is considered to be the origin of the prohibition of adoption in Islamic law. Related to the prohibition of adoption, Islamic law also prohibits the transfer of the name of one person to another person not related to them by blood. Moreover, the creation of inheritance rights that are not based on biological and legitimate descent is not allowed. Thus, maintaining biological filiation links is important in Islamic law, and adoption is considered *haram* (prohibited). This ban on adoption still exists in the majority of countries whose legal systems are influenced by Islamic law.<sup>24</sup> This does not mean that orphans or children without caretakers are without protection under Islamic law. According to the Quran, the protection of children, including orphans, is a moral duty. One form of care for a child who is an orphan, abandoned or in need is *kafala*.<sup>25</sup>

16. **Kafala** is a child protection measure in countries whose legal system is influenced by or based on Islamic law. Literally translated, *kafala* means to care for someone, sponsor someone or respond on someone's behalf.<sup>26</sup> The term *kafala* is often used in North African countries to describe the transfer of the care of a child, also known as the *makful*, from the biological parents to another person or persons, also known as the *kafil(s)*. *Kafala* can refer to the care of an abandoned child or to a situation whereby parents temporarily hand over the care of their child to someone else.<sup>27</sup>

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– Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates' (2018) Electronic Journal of Islamic and Middle Eastern Law, p. 31-56; Alegría Borrás, 'The protection of the rights of children and the recognition of *kafala*' in the Permanent Bureau of the Hague Conference on Private International Law (ed), *A commitment to Private International Law. Essays in honour of Hans van Loon* (Intersentia 2013), p. 77-87; and Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) The American Journal of Comparative Law, p. 927-962. For a more detailed explanation how the prohibition on adoption originated, see the article by YASSARI mentioned above.

24. For example, see article 149 of the Moroccan Moudawana (Family Code). Nevertheless, some States with a legal system influenced by Islamic law allow and regulate adoption. One example is Tunisia. Andrea Büchler and Eveline Schneider Kayasseh, 'Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates' (2018) Electronic Journal of Islamic and Middle Eastern Law, p. 31-56; and International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020), p. 14-16.

25. International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020), p. 14-16.

26. International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020), p. 4. *Kafala* in the sense of sponsorship does not always refer to an adult-child relationship, but in some States, such as Qatar, it refers to sponsorship from an employer to an employee. This form of *kafala* is not examined in this book. For more information, see for example Amanda Garrett, 'The End of *Kafala*? Evaluating Recent Migrant Labor Reforms in Qatar' (2020) Georgetown Journal of International Affairs, p. 201-208.

27. Nadjma Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) The American Journal of Comparative Law, p. 927-962; and Frans van der Velden, *Inleiding in de Shari'a: Een Kennismaking Met Het Recht van de Islam-Georiënteerde Wereld* (BoomJuridisch 2015), p. 192.

17. In general, it is required that the kafil is a Muslim. The kafil commits himself/herself to protecting and educating the child as if that child were their own biological child. The exact legal, moral, educational and financial obligations of the kafil vary from country to country. The legal regime of kafala therefore varies likewise. For example, a kafala arrangement established in Morocco does not have the same legal consequences as one that is established in Algeria. Moreover, the ways in which a kafala can be established varies between countries. A distinction can be made between a kafala that is established in a judgment, and thus before a court, and a kafala that is established in a notarial deed before a notary. The notarial kafala, also called *adoulair* kafala in Morocco, is often a kafala where the kafils are family members of the child. The judicial kafala often concerns an abandoned child.<sup>28</sup>

18. Islamic law attaches great importance to the fact that a child is born within a marriage. In principle, filiation (*nasab*) with the father can only be established if the parents were married at the time the child was conceived. The social stigma that is attached to both children born out of wedlock and their mothers means that single mothers often see abandonment of the child as their only option. Kafala aims to protect these abandoned children.<sup>29</sup>

19. In EU Member States, the first reflex when confronted with a kafala is often to regard it as an adoption. However, it is important to distinguish between the two. Adoption, unlike a kafala, can terminate the filiation links with between the child and their biological family and can create filiation links between them and the adoptive family. Another difference is that, unlike an adoption, a kafala creates no inheritance rights. Furthermore, kafala is a temporary and revocable institution. In principle, the kafala ends when the child reaches the age of majority or when a judge terminates the kafala. The exact conditions for the termination of a kafala depend on the law governing that kafala.<sup>30</sup>

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28. The difference between a judicial and notarial kafala is discussed in more detail in Chapter 1. Nadjima Yassari, 'Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law' (2015) *The American Journal of Comparative Law*, p. 927-962; Andrea Büchler and Eveline Schneider Kayasseh, 'Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates' (2018) *Electronic Journal of Islamic and Middle Eastern Law*, p. 31-56; and International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020), p. 17-18.

29. International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020), p. 14-16.

30. International Social Service, 'Kafalah. Preliminary analysis of national and cross-border practices' (2020); Julie Malingreau, 'International Kafala: A Right for the Child to Enter and Stay in the EU Member States?' (2014) *European Journal of Law Reform*, p. 401-429; and Andrea Büchler and Eveline Schneider

20. Kafala is mentioned in two international instruments as a child protection measure. Article 3(e) of the 1996 Hague Child Protection Convention explicitly states that kafala as a form of care falls within the scope of the Convention.<sup>31</sup> In addition, article 20(3) of the United Nations Convention on the Rights of the Child (hereafter CRC) refers to kafala as an alternative form of care.<sup>32</sup>

#### 1.4.2 *Child marriage*

21. Article 1 UNCRC states that the term ‘child’ applies to every human being below the age of 18 years, unless the age of majority is attained earlier under the law applicable to that child. The definition of a **child marriage** for the purposes of this research corresponds to this age limit of 18 years and refers to a formal or informal marriage in which one or both of the parties were under the age of 18 at the time the marriage was concluded. If one of the spouses was a minor at the time of the conclusion of the marriage but is an adult at the time when the recognition of the marriage is examined, this research still considers it a child marriage.<sup>33</sup> The definition of child marriage used in this book corresponds to the definition of the Parliamentary Assembly of the Council of Europe.<sup>34</sup>

22. Some figures on child marriage have already been presented in paragraph 2. Child marriage is more common among girls than boys. UNICEF figures from 2022 show that most child marriages occur in West and Central Africa, where the percentage of women aged 20–24 who were married by age 18 is 37%. This figure is 32% in Eastern and Southern Africa, 28% in South Asia and 21% in Latin America and the Caribbean.<sup>35</sup> Child marriages exist for a variety of reasons, including economic, political, social, religious and cultural ones.<sup>36</sup> Con-

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Kayasseh, ‘Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates’ (2018) *Electronic Journal of Islamic and Middle Eastern Law*, p. 31-56.

31. This will be discussed in more detail in Chapter 1.2.

32. This will be discussed in more detail in Chapter 4.4.4.

33. This book uses the term ‘child marriage’ rather than ‘early marriage’, the latter of which is also sometimes used to describe a marriage where one of the spouses was under the age of 18 at the time of the marriage.

34. Parliamentary Assembly Council of Europe, ‘Resolution 1468 (2005). Forced marriages and child marriages’, <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17380>>; and Parliamentary Assembly Council of Europe, ‘Resolution 2233(2018). Forced marriage in Europe’, <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25016&lang=en>>.

35. UNICEF, ‘Child marriage’, <<https://data.unicef.org/topic/child-protection/child-marriage/>>.

36. UNICEF, ‘Child marriage’, <<https://www.unicef.org/protection/child-marriage>>; and Girls Not Brides, ‘Why it happens’, <<https://www.girlsnotbrides.org/about-child-marriage/why-child-marriage-happens/>>. For more background on the reasons for a child marriage, see inter alia Harald Baum, Raphael de Barros Fritz, Konrad Duden, Reinhard Ellger, Shéhérazade Elyazidi, Dörthe Engelcke, Gunnar Franck, Louisa Sophia Hadadi Awal Bajestani, Christa Jessel-Holst, Dominik Krell, Rainer Kulms, Dieter Martiny, Ralf Michaels,

licts, such as the war in Syria, also lead to an increase in child marriages. Marriage is seen as a way of protecting (the honour of) girls.<sup>37</sup>

**23.** In recent years, there have been increased attempts to reduce the number of child marriages worldwide. Child marriages are condemned in several international instruments. The UN Sustainable Development Goal (SDG) 5.3 is aimed at the elimination of all harmful practices, such as child marriages, early and forced marriages and female genital mutilation.<sup>38</sup> Article 16(2) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that a child marriage shall have no legal effect. This Convention also encourages States to specify a minimum age for marriage and to require that marriages are recorded in an official registry.<sup>39</sup> In the General Recommendation No. 21, the CEDAW Committee indicates that the minimum age for marriage should be 18 years for both men and women.<sup>40</sup> Similar to article 16(2) CEDAW is article 2 of the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, also initiated by the United Nations General Assembly. Article 2 of this Convention encourages States to include a minimum age for marriage in their legislation. However, article 2 allows for exceptions if the said marriage is in the interest of the future spouses.<sup>41</sup> Moreover, this Convention does not specify what the minimum age for marriage should be. The same applies to the CRC, which contains a definition of the term

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Lena-Maria Möller, Jakob Olbing, Dorothée Perrouin-Verbe, Jan Schmidt, Christoph Schoppe, Kurt Siehr, Antonia Sommerfeld, Christine Toman, Denise Wiedemann, Nadjma Yassari and Samuel Zeh, 'Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht' (2020) *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, p. 705-785; Hoko Horii, 'Walking a thin line: Taking children's decision to marry seriously?' (2020) *Childhood*, p. 254-270; Dina Zbeidy, 'Vroege huwelijken onder vluchtelingen in Jordanië. Depolitisering ondermijnt preventie' (2020) *Recht van de Islam*, p. 1-18; and Susan B. Schaffnit, Mark Urassa, David W. Lawson, "'Child marriage' in context: exploring local attitudes towards early marriage in rural Tanzania' (2019) *Sexual and Reproductive Health Matters*, p. 93-105.

37. UNFPA, 'New study finds child marriage rising among most vulnerable Syrian refugees', <<https://www.unfpa.org/news/new-study-finds-child-marriage-rising-among-most-vulnerable-syrian-refugees>>; and Nina Dethloff, 'Child Brides on The Move: Legal Responses to Culture Clashes' (2018) *International Journal of Law, Policy and the Family*, p. 302-315.

38. United Nations Department of Economic and Social Affairs Sustainable Development, '5 Achieve gender equality and empower all women and girls', <[https://sdgs.un.org/goals/goal5#targets\\_and\\_indicators](https://sdgs.un.org/goals/goal5#targets_and_indicators)>.

39. There are 189 State parties to the CEDAW, including Belgium and Germany. United Nations Treaty Collection, '8. Convention on the Elimination of All Forms of Discrimination against Women', <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg\\_no=IV-8&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-8&chapter=4&clang=en)>.

40. Committee on the Elimination of Discrimination against Women, *General recommendation No. 21: Equality in marriage and family relations*.

41. There are 56 State parties to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, including the former German Democratic Republic. United Nations, '3. Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages', <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtidsg\\_no=xvi-3&chapter=16&clang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtidsg_no=xvi-3&chapter=16&clang=en)>.