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FILIATION ET ALIMENTS INTERNATIONAUX ENVERS LES ENFANTS
REPONSES AU QUESTIONNAIRE DE 2002
ET ANALYSE DES DIFFERENTS POINTS

Rapport établi par Philippe Lortie, Premier secrétaire

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PARENTAGE AND INTERNATIONAL CHILD SUPPORT
RESPONSES TO THE 2002 QUESTIONNAIRE
AND AN ANALYSIS OF THE ISSUES

Report drawn up by Philippe Lortie, First Secretary

Document préliminaire No 4 d'avril 2003
à l'intention de la Commission spéciale de mai 2003
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille

Preliminary Document No 4 of April 2003
for the attention of the Special Commission of May 2003
on the International Recovery of Child Support
and other Forms of Family Maintenance

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CHAPTER I INTRODUCTION

1. As stated in Preliminary Document No 3, "Towards a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance", Report drawn up by William Duncan, Deputy Secretary General, for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms Family Maintenance, a number of specific matters not covered in that Report would be the subject of separate studies.[1] This document will deal with various issues, especially in relation to the rules of private international law, surrounding the establishment of parentage in the context of international maintenance recovery.[2] However, before turning to the examination of the rules of private international law issues, it is important to consider the state of national laws. This analysis draws mostly from answers to the Questionnaires of 1998[3] and 2002[4].

2. Throughout this study, it is important to remember that the international recovery of child support and other forms of family maintenance will generally arise from two different scenarios. The first situation consists of the creditor taking measures for the international recovery of maintenance granted, initially, in a purely domestic context, when both the creditor and the debtor were in the same jurisdiction. The second situation is where the creditor is claiming maintenance and seeking a maintenance decision against a debtor situated in another jurisdiction. In both cases, a question of parentage may arise implicating at least two jurisdictions.

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[1] "Towards a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance", a Report drawn up by William Duncan, Deputy Secretary General, Preliminary Document No 3 of April 2003, for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance, at paragraph 11, available at: < http://hcch.net/e/workprog/maint.html >.

[2] In public international law, issues of parentage and child support are included in the *United Nations Convention of 1989 on the Rights of the Child*, done at New York on 20 November 1989, U.N.T.S., vol. 1577, p. 3, to which 191 States are Parties. *See* Articles 7, 8 and 27 of the Convention. More specifically, Article 27(4) of the Convention provides that "States Parties shall take all appropriate measures to secure the recovery of maintenance for the child …".

[3] "Questionnaire on Maintenance Obligations", drawn up by William Duncan, First Secretary, Preliminary Document No 1 of November 1998 for the attention of the Special Commission of April 1999, available at: < http://hcch.net/e/workprog/maint.html >.

[4] "Information Note and Questionnaire concerning a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance", drawn up by William Duncan, Deputy Secretary General, Preliminary Document No 1 of June 2002 for the attention of the Special Commission on Maintenance Obligations, available at: < http://hcch.net/e/workprog/maint.html >.

CHAPTER II OVERVIEW OF THE DIFFERENT DOMESTIC SYSTEMS IN RELATION TO THE ESTABLISHMENT OF PARENTAGE (QUESTION NOS 17 AND 18 OF THE 2002 QUESTIONNAIRE)

A) The different legal methods for establishment of parentage

3. For the purpose of child support, parentage may be established by presumptions provided by law, by acknowledgment, or by a decision of a competent authority.[5]

a) Establishment of parentage by presumption

4. The term presumption, as used in this document, describes situations where legal effects are achieved by simple operation of the law. Presumptions are generally used in the case of children born within wedlock. Usually, the child conceived before or during the marriage and born during the marriage will be presumed to be the child of the mother's husband. Furthermore, the child conceived during the marriage and born after the end of the marriage will be presumed the child of the former husband. Other presumptions may be provided in the case of a child conceived during a first marriage and born during a second, or for a child conceived before marriage and born after the end of the marriage. In some cases, the law setting such presumptions may provide timelines, according to the period of gestation, within which the conception and birth should occur. Finally, some States may not apply these presumptions if the child is born after the factual or legal separation of the spouses or after the dissolution of the marriage or the divorce. Special rules may also apply to cases of nullity of marriage.

5. Sometimes, presumptions are used in the case of children born out of wedlock. With the necessary adjustments they may apply to those cases where the mother of the child is living or has been living with a man without being married during the period of gestation.

6. It is usually possible to rebut a presumption of parentage before a competent authority. Procedural limitations in the child's interests may apply. Generally, the competent authority will be a court of law. It could also be an administrative authority.

b) Establishment of parentage by acknowledgement

7. The term acknowledgement, as used in this document, describes situations where parentage is established on the basis of a voluntary act of the parent or parents. Such acknowledgement may have different forms, for example expression of will before an administrative authority (*e.g.* civil register), in a protocol before a court or administrative authority, by a joint written agreement or by joint registration or certificate.

8. In some States, the mother and / or the child may be given the possibility to oppose the establishment of parentage by voluntary acknowledgement of the person alleging to be the father. In other States, the acknowledgement of parentage requires the simultaneous consent of father, mother and child. However, in this latter situation, the consent of the child could be conditional upon her or him reaching a certain age. If an age has not been fixed, a competent authority, depending on the nature of the case, may assess if the child is capable of expressing her or his own views.

9. In most situations, it is possible to contest the acknowledgement before a competent authority. Generally, the competent authority will be a court of law. It could also be an administrative authority.

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[5] For a more detailed presentation of issues regarding the establishment of parentage, *see* "White paper on Principles concerning the Establishment and Legal Consequences of Parentage", Council of Europe, Strasbourg, 15 January 2002, CJ-FA (2001) 16 rev., available at: < http://www.legal.coe.int/family > (last consulted on 24/03/2003).

c) Establishment of parentage by judicial decision

10. In a number of States, determination of parentage by a judicial decision has a subsidiary character; recourse to the courts is available in order to contest parentage established by presumption or by acknowledgement. Usually, it is also possible to request the establishment of parentage by a competent authority, if it is not possible to establish it otherwise. The judicial determination of parentage is usually based on a presumption, oral or documentary evidence, or bio-medical evidence, including blood and genetic (DNA) testing.

11. The judicial determination of parentage may be "*erga omnes*" (*i.e.* parentage is established for all purposes) or for the purposes only of specific proceedings, *e.g.* maintenance proceedings.

d) Cases where legal procedure and methods for the establishment of parentage may differ

12. There are cases where different approaches have been adopted with regard to the establishment of parentage, namely, where a child is born anonymously ("*accouchement sous X*") or of a surrogate mother or as a result of an incestuous relationship or of medically assisted procreation. It is important to note that rules on all these matters differ around the world and that many States have not yet legislated or may not legislate in this respect.

B) The different use of the methods for the establishment of parentage in relation to the different systems for the establishment of child support

13. The different use of the legal methods for the establishment of parentage and their possible different combinations may vary according to whether the system for the establishment of child support is administrative in nature,[6] court driven[7] or a combination of the two.[8] The same can be noted with regard to the "Commonwealth" scheme of reciprocal enforcement of maintenance orders[9] or, its derivative, the "application system",[10] both designed to coordinate the cross-border establishment of child support through the use of domestic systems.

a) Administrative system for child support and the establishment of parentage

14. In most cases, under an administrative system a competent administrative authority will grant child support on the basis of a presumption or an acknowledgement of parentage. Usually, in these systems, the use of presumptions will be limited to children born within wedlock. In most cases, it will be possible to contest parentage before a court or to have parentage established by a judicial decision if it is not possible to establish otherwise.

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[6] For example, in relation to child support, Australia, Denmark, Norway and Sweden have systems that rest mostly on an administrative procedure. In Finland, if there is an agreement between the parents in relation to child support, the procedure will be an administrative one.

[7] The determination of child support is court driven in most of the Continental European States as well as the Central and South American States that have answered the 2002 Questionnaire. The procedure for child support in Japan is also court driven.

[8] In the case of Finland, *see*, *supra*, note 6, the procedure will either be administrative or judicial depending on whether the parents can agree on child support. In the United States, some states have opted for an administrative system whereas other states operate court driven systems.

[9] The United Kingdom - England & Wales and Scotland, as well as many other members of the Commonwealth, have bilateral arrangements in place for the reciprocal enforcement of maintenance orders. *See* Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraphs 115-118, for a description of the "Commonwealth" scheme, and, *infra*, paragraphs 20-21 of this Document.

[10] During recent years, provinces and territories in Canada have been developing an "application system" in view of modernising their bilateral arrangements for the reciprocal enforcement of maintenance orders. *See*, *ibid*., Preliminary Document No 3 and this Document.

b) Court driven system for child support and the establishment of parentage

(i) The establishment of parentage erga omnes *as a condition of the determination of child support*

15. In States such as Germany, Japan and Luxembourg, only judicial authorities can decide on child support.[11] Furthermore, in these States, the establishment of parentage is *erga omnes*. Parentage being related to personal status, it will be relevant to all associated matters such as succession, custody and child support. Child support will be conditional upon the establishment of parentage.[12] If parentage has not been established previously, the issues of parentage and child support may be joined in the same action,[13] where parentage could be dealt with as a preliminary question, or there could be two different proceedings.[14]

(ii) The establishment of parentage by presumption for child support, the exception to the erga omnes *principle*

16. In France, where the determination of child support is under the responsibility of the judicial authorities, the voluntary acknowledgement of parentage by the parents is the main procedure used to establish parentage. Parentage *erga omnes* can also be established by a judicial decision through a paternity action, but only if there is strong evidence or presumption. However, the establishment of parentage *erga omnes* is not necessarily a condition of the establishment of child support.[15] Where parentage *erga omnes* is not established, a court, on the basis of a presumption, may grant child support ("*subsides*").

c) Systems where administrative and court driven systems co-exist

(i) The example of Finland

17. In Finland, if the parents can reach an agreement on the maintenance to be paid and the municipal social welfare board approves the agreement, the matter will be handled through an administrative process. However, if the parents cannot reach an agreement, the matter is handled through a judicial process. The judicial process, which will focus on the question of parentage, offers two types of proceedings: either a formal *paternity trial*, in which all the evidence will be produced before a court, or a judicial process for *paternity acknowledgement*. An administrative process aimed at getting an acknowledgement of parentage, to be confirmed by a court, will precede this latter process. Further to a *paternity acknowledgement* judicial decision, the parties can agree on the maintenance to be paid or institute separate judicial

[11] Answers to Questions 1, 5, 16, 17 and 18 of the 2002 Questionnaire, seem to indicate that States such as Croatia, the Czech Republic, China (Hong Kong Special Administrative Region), Estonia, Malta, Panama, Romania and Switzerland would fall within this category, subject to some minor differences. In Croatia parentage will not have to be established if a child support agreement between parents is registered with an administrative authority responsible to assess whether the agreement is in the best interest of the child. In Switzerland, child support could be the subject of an agreement between the parents verified by an administrative authority.

[12] It is interesting to note that in China (Hong Kong Special Administrative Region) where the parties are husband and wife and child support is sought in proceedings for divorce, nullity of marriage or judicial separation no establishment of parentage is required. The relevant factor is whether the child is a "child of the family" and not whether the respondent is the natural father of the child.

[13] In Croatia, child support is usually addressed in parentage proceedings.

[14] In Luxembourg, two different courts deal with the issues of child support and parentage respectively.

[15] *See*, for further information, Herzfelder, F., "*Les obligations alimentaires en droit international privé conventionnel – Les deux Conventions de La Haye du 2 octobre 1973*", L.G.D.J., Paris, 1985, at pp. 146-147.

proceedings to this effect. In the case of a *paternity trial* the same court can resolve the maintenance issues after having decided the parentage issue.

(ii) The example of the United States

18. In the United States, some states have opted for an administrative system whereas other states still operate court driven systems. It appears that in all the states an emphasis has been made on the acknowledgement procedure.[16] If an acknowledgement of paternity becomes a finding of paternity it will create the basis for a child support order.[17] However, a final support order against the father cannot be established for a child who is born to unmarried parents until paternity has been established. Paternity will be established either through the use of presumptions, applicable to both married couples and common law couples, or by genetic tests ordered upon the request of a party. In contested cases, the administrative authority can order such tests.[18]

(iii) The example of the United Kingdom

19. At the domestic level, the United Kingdom also combines an administrative process and a judicial process. The administrative process applies only to a "qualifying child"[19] where as the court process deals, for example, with maintenance paid otherwise than on a periodic basis, maintenance for children between the age of 18 and 25 continuing their education, or maintenance in relation to divorce, matrimonial and inheritance proceedings. It is interesting to note that under this administrative process, which is based on an "application system",[20] parentage will be an issue only if it is denied. If it is denied before a maintenance assessment has been made, the administrative authority will examine whether a presumption of paternity can be made; if not the parties will be offered scientific paternity tests. If parentage is denied following a maintenance assessment, the onus will be on the alleged parent to provide evidence of non-parentage. Again, scientific paternity tests may be offered. Either parent can apply at any time to a court for a declaration of parentage.

d) Systems designed to co-ordinate the cross-border establishment of child support through the use of domestic systems - Description of the "Commonwealth" scheme, with an emphasis on the Canadian "application system" (common law jurisdictions)

20. The "Commonwealth" scheme[21] usually rests on a judicial system.[22] In summary, under this scheme an order (provisional in nature) will be granted in the State of origin, without

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[16] According to the answer of the United States to Question 17 of the 2002 Questionnaire "[a]ll states have programs in which birthing hospitals provide unmarried parents of a newborn the opportunity to acknowledge the father's paternity of the child. States must also assist parents to acknowledge paternity up until the child's eighteenth birthday through vital records offices or other entities designated by the State. Before a mother and a putative father can sign an acknowledgement of paternity, they are given notice of the legal consequences of, and the rights (including, if one parent is a minor, any rights afforded due to minority status) and responsibilities that arise from signing the acknowledgement."

[17] *Ibid*. "[a]n acknowledgement of paternity becomes a finding of paternity unless the man who signed the acknowledgement subsequently denies that he is the father within 60 days or the date of legal proceedings relating to the child, whichever occurs first."

[18] *See* the United States response to Questions 16-18 for more details.

[19] The *Child Support Act 1991*, which is in force throughout the United Kingdom, applies to a child under the age of 16, or in full time education and under the age of 19, or under 18 and available for either work or youth training while the parent is still claiming child support for that child.

[20] *See* Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraphs 115-118, for a description of the "application system" and paragraphs 20-21 of this Document.

[21] *Ibid.*

[22] In the United Kingdom, overseas child support cases not covered by the scheme described under paragraph 19 would be covered by the "Commonwealth" scheme under a judicial process. In New Zealand, overseas orders covered by the "Commonwealth" scheme are treated under an administrative process.

personal appearance, and later confirmed in the receiving State where the respondent can present a defence.[23] The Canadian "application system" is similar, except that it is an administrative authority, not a court,[24] which will review the application in the State of origin before it will be sent to the receiving State for a court or administrative authority to decide upon.

21. It appears that under the "Commonwealth" scheme, parentage will be an issue only if "the father during the hearing of the confirmation proceedings raises the defence that he is not the father of the child and that the proceedings in which the affiliation order was made were not brought to his notice".[25] In that case, the authority in the receiving State may remit the case to the authority of the State of origin for the taking of any further evidence.[26] A somewhat similar process for additional information, documents or evidence is also provided for under the Canadian "application system",[27] under which the applicant must provide *prima facie* evidence of parentage. Under the "application system", the competent authority in the receiving State may make a decision with regard to parentage the effect of which will be limited to the maintenance application at issue (*i.e.* without establishing parentage *erga omnes*).[28] In deciding the issue of paternity, the authority will examine whether a presumption of paternity can be made, if not the parties could be ordered to undergo scientific tests.

C) The scientific or medical methods used for the establishment of parentage

22. According to the answers to the 2002 Questionnaire, DNA testing may be used in court proceedings in all States.[29] DNA testing methods are able to establish parentage with 99% certainty and to exclude parentage with 100% certainty.[30] In a good number of States, DNA testing may be done on a voluntary basis.[31] In most cases, it is for the courts to order DNA testing whether the child support system is administrative based or court based.[32] Depending on the States, a court may order, compel or give direction to DNA testing. It can be at the

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[23] For more details, *see*, Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraphs 115-118.

[24] Unless the reciprocating jurisdiction requires a provisional order from a Canadian court.

[25] *See* the response of New Zealand to Question 16 of the 2002 Questionnaire.

[26] *Ibid*.

[27] *See* Sub-sections 6(3) and 7(4) of the Manitoba *Inter-jurisdictional Support Orders Act*, C.C.S.M. c. I60

[28] *Ibid*. Sub-sections 11(1)-(2).

[29] Of all the States that have answered the 2002 Questionnaire, it is only in Romania that the use of DNA testing in court proceedings is not standard. In Switzerland, it is the exclusive scientific method used. Few States, such as the Czech Republic, Germany and the Slovak Republic still use conventional blood tests on some occasions. In Germany, Serostat tests and genetic engineering tests (DNS) are also used in court proceedings. It is interesting to note that depending on the States, the tests can be conducted by government services such as the forensic services or through private entities.

[30] The Czech Republic and the United States indicated these percentages in their answers to Question 17. DNA testing is usually done using bodily tissues or fluids (*e.g.* mouth swab).

[31] In Australia and Canada, authorities will invite interested parties to voluntarily agree to DNA testing prior to ordering the tests.

[32] In Finland, under *paternity acknowledgement* proceedings, *see*, *supra*, paragraph 18, the administrative authority will require consent from all parties as a condition before submitting to DNA testing. In the United States a Child Support Agency can order DNA testing upon the request of a party, if the request is supported by a sworn statement of the party. *See* the United States response to Question 17 for more details. It seems that in France, DNA testing will be ordered only for the establishment of parentage *erga omnes*.

request of one of the parties or at the discretion of the courts. In some States, the courts can draw inferences from the refusal of a party to submit to a test.[33]

D) The cost issues in relation to the establishment of parentage

23. Among States responding to the 2002 Questionnaire, the average costs of DNA testing covering both parents and one child ranges from €300[34] to €1500[35] in a domestic situation. In the case of international situations there may be extra costs involved. In some States, DNA testing is paid for by the State.[36] Generally the party against whom the finding was made will pay the costs.[37] In some States, the applicant pays for the test in advance; if the test is positive the presumed parent will pay the costs of the test.[38] In Australia, the party contesting parentage has to pay first; if parentage is not established *vis-à-vis* this party, the State will pay the costs of DNA testing.[39] This procedure is aimed at discouraging false denials of parentage. In a few States the applicant will have to pay for the test.[40] In a small number of States, the court will invite or order the parties to come to an arrangement.[41] Finally, in one jurisdiction, the decision as to who will pay the costs of the test will be left to the discretion of the court.[42]

24. Except where the State covers the costs of the test,[43] legal aid is usually available and will cover the costs of DNA testing.[44] In almost all the responding States the treatment of costs in relation to DNA testing is the same with regard to residents and non-residents.[45] In some cases, this treatment would be available only on a reciprocity basis.[46]

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[33] That is the case, for example, in Australia, China (Hong Kong Special Administrative Region), Malta, the Netherlands and in the United Kingdom.

[34] Lowest cost according to Canada's answer to Question 18 of the 2002 Questionnaire.

[35] Highest cost according to Germany's answer to Question 18 of the 2002 Questionnaire.

[36] This is the case in States where child support rests on an administrative process such as in Denmark, Finland and Norway. In Croatia and in the United States, the competent authority will support the costs with the possibility to seek reimbursement from the presumed parent if the test is positive.

[37] This would include Croatia, the United States and also Australia, Czech Republic, Estonia, France, Japan, Panama, Romania and the United Kingdom.

[38] That is the case in States such as France, Japan, Panama and the United Kingdom.

[39] The Czech Republic has a similar rule, except that the presumed parent does not have to pay the costs in advance.

[40] This is the rule in Chile and in New Zealand, in the latter case the rule only operates for applications under the *New York Convention of 1956 on the Recovery Abroad of Maintenance*.

[41] That is the case for the Netherlands and Canada. However, in Canada the court will make an arrangement between the parties only if the parties cannot come to an understanding on their own.

[42] That is the case of China (Hong Kong Special Administrative Region).

[43] *See*, *supra*, note 36.

[44] Only the Netherlands has indicated that DNA tests would not be covered by legal aid.

[45] In Croatia, France and Japan non-residents cannot benefit from legal aid. In Croatia there is a special provision on the coverage of judiciary costs by the applicant if it is a foreign national. In France legal aid is granted to French nationals, EU citizens and foreigners residing in France. Unfortunately, in their responses to Question 18 of the 2002 Questionnaire, Canada, Germany, Luxembourg, and Romania have not indicated whether there is any distinction between residents and non-residents in this matter.

[46] Finland, the Slovak Republic and the United States provide for such reciprocity in bilateral arrangements.

CHAPTER III THE LAW APPLICABLE TO THE DETERMINATION OF PARENTAGE IN THE CONTEXT OF CHILD SUPPORT PROCEEDINGS (QUESTION NO 16 OF THE 2002 QUESTIONNAIRE AND QUESTION NO 1A (PART III) OF THE 1998 QUESTIONNAIRE)

A) General considerations

25. This Part of the study is supplemental to the discussion of the applicable law in Preliminary Document No 3 for the attention of the Special Commission of May 2003.[47] The issue of establishment of parentage with regard to applicable law is twofold. First, there is the issue of the law applicable to the determination of parentage as a main issue that may have a bearing on child support proceedings. As it was observed earlier,[48] in a number of States, this translates into the law applicable to the determination of parentage *erga omnes* because the determination of parentage may not be limited to the issue of child support.[49] Secondly, there is the issue of the law applicable to the determination of parentage, where it arises as an incidental question in child support proceedings.[50] This is the approach that was retained under the 1956 and the 1973 Hague Conventions on the law applicable to maintenance obligations.[51]

B) The law applicable to the determination of parentage as a main issue

26. At present, there is no international instrument of a global scope establishing rules directly and specifically applicable to the determination of parentage as a main issue.[52] In its response to the 2002 Questionnaire, Switzerland rightly notes that the law applicable to the establishment of parentage *erga omnes* may lead, in some situations, to a different law than the one applicable to parentage as an incidental question in a child support proceeding. In this respect, in their reply to the 2002 Questionnaire, Luxembourg doubts whether a new instrument should undertake to provide an applicable law framework for both issues of maintenance and affiliation between the debtor and the creditor.

27. For most of the jurisdictions of common law tradition, the law applicable to the establishment of parentage is the law of the forum.[53] In jurisdictions of civil law tradition, the application of foreign law is more common. In Quebec, the Canadian jurisdiction of civil law tradition, the law applicable will be the law of the State of the domicile or nationality of the

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[47] *See* Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraphs 135-151. For a summary of the Hague Conventions on the Law Applicable to Maintenance Obligations *see* "Note on the Desirability of revising the Hague Conventions on Maintenance Obligations and including in a new instrument rules of judicial and administrative co-operation", drawn up by William Duncan, First Secretary, for the attention of the Special Commission of April 1999, Preliminary Document No 2, January 1999, paragraphs 18-24.

[48] *See*, *supra*, paragraphs 15-16, which provided a description of the judicial based system.

[49] *See*, *supra*, paragraph 15, Croatia, the Czech Republic, Germany, China (Hong Kong Special Administrative Region), Japan, Luxembourg, Malta, Panama and Switzerland.

[50] *See* Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraph 140.

[51] In this respect, Germany's response states that: "According to the Federal Court of Justice, the preliminary question of paternity emerging in the context of a duty to support is to be joined in a connected manner, meaning the establishment of paternity is to be adjudicated in accordance with the law stated to apply by international private law of the maintenance status." Japan and the Netherlands both refer to the *Hague Convention of 1973 on the Law Applicable to Maintenance Obligations* to determine the law applicable.

[52] It should be noted that the Council of Europe has been working on the issue of parentage for a number of years. Consultations on this matter are still ongoing. *See* "White paper on Principles concerning the Establishment and Legal Consequences of Parentage", *supra*, note 5. The subject of the law applicable to establishment of filiation and recognition of decisions concerning the establishment of filiation was one the subjects proposed for consideration by the Thirteenth Session of the Hague Conference. However, the subject was not retained on the Work Programme of the Conference. *See* "Proceedings ("*Actes et documents*")" XIII (1976), Vol. I, pp. 125-130.

[53] Australia, China (Hong Kong Special Administrative Region), New Zealand, the United Kingdom and the United States. It appears that Finland would also fall into this category.

child or of one of his / her parents, at the time of the birth of the child, whichever is the more beneficial to the child. Austria and the Slovak Republic would apply the law of the State of the nationality of the child whereas Estonia would apply the law of the State of residence of the child at the time of birth. In Switzerland, the law provides for a cascade approach. The law applicable would be the law of the State of the habitual residence of the child at the time of birth unless a prevailing interest requires that the law of the State of the habitual residence at the time of proceedings applies. However, if neither of the parents is domiciled in that State and the three individuals involved share the same nationality the law of the State of the nationality will apply.

28. Finally, it is interesting to note that in Sweden, where the child support system is administrative, the law applicable to the establishment of parentage will differ whether it is established by presumption, acknowledgement or judicial decision. In the first situation, it will be the law of the State where the child initially had his or her habitual residence. If no one is considered to be the father according to that law, the law of the State of the nationality of the child will be applicable. In relation to acknowledgement, the law applicable will be the law of the forum. When parentage is determined by a judicial decision, the law applicable will be the law of the State where the child has his or her habitual residence at the time of the decision.

29. In the light of this preliminary study, it would appear that the development of a common approach to the law applicable to the determination of parentage as a main issue would be a challenge. However, if a decision was made to include in the instrument an optional regime for applicable law,[54] the idea could be pursued but would require a considerable amount of time and could slow the pace of the negotiations.[55] A decision could also be made to rely on rules limited to law applicable to the determination of parentage, where it arises as an incidental question, as it is being done at present under the 1956 and the 1973 Hague Conventions on the law applicable.

C) The law applicable to the determination of parentage, where it arises as an incidental question in child support proceedings

30. At the time the *1956 Hague Convention on the Law Applicable to Maintenance Obligations in Respect of Children* was developed there were major differences – both at the substantive level and at the conflicts rules level – between the various States.[56] This was equally the case in 1973 and remains true today. In 1956, the negotiators had wished to distinguish between the maintenance obligation itself and the family relationship from which that obligation arose. The negotiators felt that priority should be given to the provision of child support assistance and that the establishment of parentage was secondary.[57] Thus, child support obligations were given an autonomous and distinct connecting factor. However, child support obligations are not independent obligations *per se*. As described under Part II of this study, the establishment of child support is usually conditional upon some kind of establishment of parentage. Thus, the difficulty of the incidental question arises.

31. Both the 1956 and the 1973 Conventions provide that "[the] Convention shall govern only conflicts of laws in respect of maintenance obligations".[58] Furthermore, both Conventions

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[54] *See* Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraph 137.

[55] One possibility under this optional framework would be to provide both for a cascade approach and a law of the forum scheme and for States Parties to opt for either one of those two regimes. This possibility would also require further analysis and more time to develop. This was the approach devised under the *1956 Hague Convention on the Law Applicable to Maintenance Obligations in Respect of Children*. However, in the case of the 1956 Convention this approach was limited to the law applicable to maintenance obligations. It did not encompass the law applicable for the establishment of parentage.

[56] Alfred E. von Overbeck, *"La contribution de la Conférence de La Haye au développement du droit international privé"*, Recueil de cours de l'Académie de droit international, 1992-II (Vol. 233), at pp. 65-69.

[57] *Ibid*.

[58] Article 5 of the 1956 Convention and Article 2 of the 1973 Convention.

provide that "[d]ecisions rendered in application of this Convention shall be without prejudice to [questions of affiliation or to family relationships between the claimant and the respondent]."[59] However, Article 1 of the 1973 Convention provides additional language, in comparison to the 1956 Convention, which states that "the Convention shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity …". At first glance, this provision seems to contradict the rules set out in the Convention. In fact, it is not paradoxical to state that the Convention will apply to maintenance obligations arising from such relationships and then to go on to say that decisions rendered in application of the Convention shall be without prejudice to the existence of any of these relationships. That is because the Convention's objective is not to resolve conflicts of laws in respect of matters other than those expressly defined therein.[60]

32. Against this background, it is then necessary to ascertain which law will be applied to the incidental question. Neither Convention provides a direct reply to this question; but they both offer an indirect answer. Article 1 of the 1956 Convention provides that "[our TRANSLATION] the law of the habitual residence of the child shall determine whether, to what extent and from whom a child may claim maintenance."[61] Similarly, Article 10 of the 1973 Convention provides that "the law applicable to a maintenance obligation shall determine *inter alia* (1) whether, to what extent and from whom a creditor may claim maintenance".[62]

33. The issue of the incidental question in relation to the 1956 and 1973 Conventions was discussed in both Special Commission of 1995 and 1999. "The Special Commission [of 1995] … noted with satisfaction and unanimously approved the convergence of the national court rulings of the States Parties to the Conventions, by which the incidental question is governed by the law applicable to the maintenance obligation."[63] Furthermore, that same Special Commission approved that "the question of the parent / child relationship may be treated as an incidental question, even if the law designated to govern the maintenance obligation requires that the question of status should be decided as a main issue."[64] In turn, the Special Commission of 1999 noted "that several countries, such as the Netherlands, Italy, Germany and Switzerland, accept that the applicable law is that which governs the maintenance obligation. Nevertheless, the issue remains uncertain in other States such as France and Portugal, and in Spain in respect of the 1973 Convention. The conclusion of the Special Commission of 1995, which supported the former approach, appears not to have affected the situation."[65] If it were decided to include applicable law rules in the new instrument, it may now be possible to include a provision stating expressly that the law applicable to a maintenance obligation shall also govern the incidental question in relation to the establishment of parentage.[66] If it were decided not to include applicable law rules in the new instrument, States Parties to the 1973 Convention could reaffirm the principle agreed to in by the Special Commission.

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[59] *Ibid*. the *Inter-American / Montevideo Convention of 15 July 1989 on Support Obligations* (hereinafter the Montevideo Convention) uses similar language in Article 5.

[60] *See* Michel Verwilghen, "Explanatory Report to the 1973 Conventions", in "Proceedings ("*Actes et documents*")" XII (1972), Vol. IV, *Obligations alimentaires*, at paragraph 126, p. 436.

[61] Articles 1 and 2 of the 1956 Convention then provide further possibilities as to the law applicable. Article 1 provides for the law applicable in the case of a change of habitual residence. Article 2 allows Contracting States to declare the law of the forum applicable under certain conditions.

[62] Article 7 of the Montevideo Convention provides that "the applicable law pursuant to Article 6 shall determine: … (c) any other conditions necessary for enjoyment of the right to support".

[63] *See* "General Conclusions of the Special Commission of November 1995 on the operation of the Hague Convention relating to maintenance obligations and of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*", drawn up by the Permanent Bureau, Preliminary Document No 10, May 1996, at paragraph 29.

[64] *Ibid*. at paragraph 30.

[65] *See* "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", drawn up by the Permanent Bureau, December 1999, at paragraph 6.

[66] It is interesting to note that in 1973, such a provision was almost included in the text. However, "[t]his proposal was rejected, after reflection, mainly because of fears that the desired solution would be drafted in an ambiguous manner." *See* Michel Verwilghen, *supra*, note 60, at paragraph 127, p. 437.

CHAPTER IV THE RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS WITH REGARD TO CHILD SUPPORT IN RELATION TO ESTABLISHMENT OF PARENTAGE ISSUES (QUESTION NO 19 OF THE 2002 QUESTIONNAIRE)

A) General considerations

34. The *1973 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* provides that the rules of the Convention shall apply only to the body of the decision, or the part of a settlement, which relates to the maintenance issue. According to the Report of Michel Verwilghen, the "recognition and enforcement of that part of a foreign decision which relates to maintenance should, in principle, be independent of the effectiveness, in the State addressed, of that part of the said decision which concerns the status of persons or any other matter. The authority charged with taking the necessary steps relating to enforcement (*exequatur*) need not, therefore, systematically refuse to apply the Convention for the reason that the maintenance obligation is subordinate to, or results from a family or 'quasi-family' relationship which is settled, in accordance with the law of the State of origin, in the judgment which is submitted for enforcement. Certainly the able litigant will invoke the plea of public policy (*ordre public*) supported by the same reasoning in order to bring about a refusal of recognition and enforceability. But … the authority addressed can only accept this plea if the part of the decision relating to maintenance is manifestly incompatible with the public policy of the State to which that authority belongs."[67]

B) The refusal to recognise and enforce a child support decision if it entails a determination of parentage

35. The question of the recognition and enforcement, under the Hague Conventions of 1958 and 1973, of foreign child support decisions which entail a finding of parentage was discussed by the Special Commission of 1999. It was clear then, as it is now, that in most States no enquiry is made into the basis for that determination. In 1999, Chile, Germany, Italy, the Netherlands, Portugal and Switzerland were supportive of this statement. In their answers to the 2002 Questionnaire, Australia, Austria, Estonia, Finland, Germany, Japan, Luxembourg, Panama, Romania, Switzerland, Sweden, the United Kingdom and the United States are also supportive of this statement. Chile, Denmark and Norway have pointed out that they will refuse to recognise and enforce a child support decision if parentage has not been previously determined. The Slovak Republic has answered that if the determination relates to a child who is a Slovak national and such decision was not previously recognised by the Supreme Court of the Slovak Republic, the recognition and enforcement of a child support decision that entails a determination of parentage not recognised by the Supreme Court will be refused. During the Special Commission of 1999, Morocco and Spain were the only States that stated that recognition of a decision may be refused if it entails a determination of paternity.[68]

36. At this juncture, it may be possible to include in the new instrument a provision stating that the recognition of a child support decision cannot be refused on the basis that the decision entails a finding of paternity. In 1999, the Special Commission agreed to what could be described as a fallback position. The recommendation then was to include a provision stating that "in a case where recognition is refused on the basis that the decision entails a finding of paternity, the refusing State should at least facilitate proceedings to establish paternity anew in that State."[69] It might be decided that this principle could be included in a co-operation provision. In closing, it is worth noting that in the adaptation of the *Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters* into the *Brussels I Regulation of 22 December 2000 on jurisdiction and the recognition and*

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[67] *Ibid*. Michel Verwilghen, at paragraph 38, p. 399.

[68] *See*, "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", drawn up by the Permanent Bureau, December 1999, at paragraph 7, p. 11.

[69] *Ibid*.

enforcement of judgments in civil and commercial matters Article 27(4) of the 1968 Convention has been set aside.[70]

C) The refusal to recognise and enforce a child support decision if a law or a method is applied to the determination of parentage different from that applied in the requested State

37. A majority of the States answering Question 19 of the 2002 Questionnaire clearly indicated that they will not refuse to recognise and enforce a child support decision if a law or a method applied to the determination of parentage is different from that applied in the requested State.[71] Some States have indicated that they would refuse recognition and enforcement if the method used is contrary to public policy (*ordre public*).[72] Japan indicated in its response that if, *e.g.* the recognition of a foreign decision which applied a foreign law or method for the establishment of parentage brings about a situation incompatible with public order and good morals, the court will refuse to recognise and enforce the decision.[73] In the case of Switzerland, if paternity has been established according to a method contrary to public policy, *e.g.* no use of DNA testing and evidence relying on just one witness, there will be refusal of recognition and enforcement.[74] Other States have indicated in their response that they would apply the grounds for refusal found in Article 5 of the Hague Convention of 1973.[75]

38. In summary, it may be possible to include in the new instrument a provision stating that the recognition of a child support decision cannot be refused on the basis that a law or a method is applied to the determination of parentage different from that applied in the requested State. Furthermore, a fallback position could be to include a co-operation provision stating that in a case where recognition is refused on the basis that a law or a method is applied to the determination of parentage different from that applied in the requested State, the refusing State should at least facilitate proceedings to establish paternity anew in that State.

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[70] Under Article 27(4), a judgment should not be recognised "if the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State." It was noted, with regard to Article 27(4), that the enforcement of a decision relating to maintenance due to a child born out of wedlock was more advantageous under the Hague regime than the Brussels / Lugano Conventions. *See* Note on the operation of the Hague Conventions relating to maintenance obligations and the New York Convention on the Recovery Abroad of Maintenance, drawn up by Michel Pelichet, Deputy Secretary General, Preliminary Document No 1, September 1995, at paragraphs 126-128, p. 77 and 79.

[71] In the Czech Republic, the court does not reassess the rationale of a foreign judgment, *i.e.* it does not compare whether the law or the method applied in determining the paternity in the foreign country is identical to Czech judicial practice. On the other hand, it seems that Danish authorities will examine if paternity has been determined correctly according to the law and method of the requesting State.

[72] Australia, Canada, Japan, Norway, Switzerland and the United Kingdom - Scotland.

[73] *See* Article 118 of the Code of Civil Procedure of Japan.

[74] In the United Kingdom - England & Wales, it is open to the person denying paternity to request scientific tests if the evidence obtained from the other State is less reliable than DNA testing.

[75] France and the United Kingdom - Scotland. The United States has indicated in its response "that a successful contest must be based upon one of the following: the issuing tribunal lacked personal jurisdiction over the contesting party; the order was obtained by fraud; the order has been vacated, suspended, or modified by a later order; the issuing tribunal has stayed the order pending appeal; there is a defense under state law to the remedy sought; full or partial payment has been made; or the statute of limitation precludes enforcement of some or all of the arrearages."

CHAPTER V THE PROVISION OF CO-OPERATION MECHANISMS IN THE ESTABLISHMENT OF PARENTAGE (QUESTION NOS 33G AND 34 OF THE 2002 QUESTIONNAIRE)

A) General considerations

39. As mentioned in paragraph 15 of Preliminary Document No 3 for the attention of the Special Commission of May 2003,[76] "the system established by the New York Convention of 1956, though still providing the only global framework for administrative co-operation in the international recovery of maintenance, suffers from major operational problems. It remains clear that a large number of States Parties do not fulfil even their most basic obligations under the Convention. Among those that do, there exist divergences in interpretation and practice under the Convention relating to a wide range of issues."

40. According to Article 6 of the New York Convention, the role of the receiving authority is to take, on behalf of the claimant, "all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance". There are different views as to whether the obligation stated in Article 6 also includes actions for the establishment of paternity.[77] Certainly, co-operation in relation to procedures for the determination of parentage is not an explicit requirement under the New York Convention and is often in practice unsatisfactory.[78] In the United States' bilateral arrangements, a strong emphasis has been put on the establishment of parentage. It is viewed as essential to an effective system of international enforcement.[79]

B) Constructing the new instrument – administrative co-operation with regard to the establishment of parentage

41. A majority of the States that responded to Question 33 of the 2002 Questionnaire were of the view that provisions concerning co-operation in the establishment of parentage should be a key element in the new instrument.[80] On the other hand, the Slovak Republic, the United Kingdom - England & Wales and Scotland stated that this is not an important feature. In the case of the Slovak Republic, the rationale could be because parentage issues are always dealt with outside the context of child support proceedings.[81] The answers of the United Kingdom - England & Wales and Scotland, may be explained by the fact that under their child support systems parentage becomes an issue only when it is denied.[82] Only Luxembourg and Switzerland are of the view that such co-operation would fall outside the scope of an instrument on the recovery of child support. In relation to Question 34, almost one third of the States indicated that the establishment of parentage should be a core element where another third of the States indicated that it should be an optional element. A little more than a third of the States did not have any comments in relation to this issue under Question 34.

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[76] *See* Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraph 15.

[77] *See* the answer of Sweden to Question 33. *See* also Preliminary Document No 3 of April 1999, at p. 48, where the United States indicated that "[they] would ratify the New York Convention of 1956 if the Convention made it clear that all cases, including those cases where paternity was an issue, were included within its procedures with either recognition of an existing order or the obtaining of a new order as automatic alternatives."

[78] *See* Preliminary Document No 3 for the attention of the Special Commission of May 2003, *supra*, note 1, at paragraph 24.

[79] *See* Preliminary Document No 2, January 1999, *supra*, note 47, at paragraph 55, p. 28.

[80] Five States did not have any comment in this respect, namely Finland, France, Japan, Malta and Romania.

[81] *See*, *supra*, paragraph 35.

[82] *See*, *supra*, paragraph 21.

42. Co-operation with regard to the establishment of parentage may be necessary when an action for the establishment of child support is initiated where the creditor and the debtor habitually reside in two different States or where the child is born in a State other than the State or States where the creditor and debtor habitually reside. Assistance from a requested authority may be needed by a judicial or administrative authority in order to obtain evidence for the purpose of determining parentage prior or during child support proceedings[83] or by a requesting authority prior to initiating an application for child support.[84] A requested authority could also offer assistance for the establishment of parentage when deciding on an application for child support from a requesting authority.[85] However, these possibilities refer to the question posed in paragraph 31 of Preliminary Document No 3 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms Family Maintenance. Should the assistance arise only in the context of applications for the recovery of maintenance or, on the other hand, should it arise from the making of a "limited service request" for the purpose of determining whether the application will be appropriate?

43. Co-operation provisions with regard to the establishment of parentage could include, at a minimum, the following functions:

- to discover the whereabouts of the debtor; and,
- to provide assistance in establishing the parentage of a child for the purpose of maintenance proceedings in Contracting States.[86]

44. From these general principles could follow more specific functions in line with the different procedures and methods for the establishment of parentage described in Part II of this document. Where applicable a Central Authority could assist in obtaining:[87]

- the relevant documents (*i.e.* marriage certificates, documents relating to divorce, marriage annulment, legal separation, etc.) in relation to the establishment of parentage by presumption;
- a voluntary acknowledgement of parentage from the debtor;
- the relevant oral and documentary evidence required for the establishment of parentage by a judicial authority in the State of origin (requesting State); and,
- a voluntary DNA test of the presumed parent.

45. Finally, a co-operation provision could be included to the effect that residents and non-residents should be treated equally, either on a reciprocal basis or not, with regard to the use of DNA testing and the treatment of its associated costs.

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[83] This would be for the purpose of administrative or court based domestic child support proceedings.

[84] *See* the United States response to Question 31 of the 2002 Questionnaire. "The vast majority of requests from U.S. states to foreign countries are for the recognition and enforcement of a U.S. decision, *i.e.*, paternity has been established and a decision entered in a U.S. tribunal. But occasionally a U.S. state will ask a foreign country to establish paternity and enter an initial child support decision. Some states are not able to do either of these things, leaving the U.S. applicant faced with having to go to the foreign country, hire private counsel, and initiate litigation there."

[85] This would be the case for the purpose of the "Commonwealth" scheme, the Canadian "application system" or the 1956 New York Convention system.

[86] *See* Preliminary Document No 2, January 1999, *supra*, note 47, at paragraph 79, p. 35.

[87] The taking of evidence described here could amount to a co-operation using the channels established under the *1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*.

CHAPTER VI CONCLUSION

A) General considerations

46. Given the importance of establishing parentage in child support proceedings, the absence of any provision within the new instrument to facilitate establishment of parentage might be seen as a lost opportunity.

B) Issues of law applicable in relation to the establishment of parentage

47. It appears that the development of a common approach to the law applicable for the establishment of parentage as a main issue that may have a bearing on child support proceedings would be a challenge.[88] However, if a decision was made to include in the instrument an optional regime for applicable law, the idea could be pursued but would require a considerable amount of time and could slow the pace of the negotiations.[89]

48. Ultimately, a decision could be made to remit to rules limited to law applicable to the determination of parentage, where it arises as an incidental question. A decision to pursue this direction would confirm the approach agreed to in 1956 and in 1973. In that case, it may be that it would now be possible to reaffirm the principle to the effect that the law applicable to a maintenance obligation shall also govern the incidental question in relation to the establishment of parentage.

C) Issues of recognition and enforcement in relation to the establishment of parentage

49. It may be possible to include in the new instrument a provision stating that the recognition of a child support decision cannot be refused on the basis that the decision entails a finding of paternity or that a law or a method is applied to the determination of parentage different from that applied in the requested State.

50. Furthermore, a fallback co-operation provision could be included in a new instrument stating that in a case where recognition is refused on the basis that the decision entails a finding of paternity or that a law or a method is applied to the determination of parentage different from that applied in the requested State, the refusing State should at least facilitate proceedings to establish paternity anew in that State.[90]

D) Issues of co-operation in relation to the establishment of parentage

51. Co-operation provisions with regard to the establishment of parentage could include, at a minimum, the following functions: to discover the whereabouts of the debtor; and, to provide assistance in establishing the parentage of a child for the purpose of maintenance proceedings in Contracting States. More detailed functions could include assistance to obtain: the relevant documents in relation to the establishment of parentage by presumption; a voluntary acknowledgement of parentage from the debtor; the relevant oral and documentary evidence required for the establishment of parentage by a judicial authority; and, a voluntary DNA test of the presumed parent.[91]

52. Finally, a co-operation provision could be included to the effect that residents and non-residents should be treated equally, either on a reciprocal basis or not, with regard to the use of DNA testing and the treatment of its associated costs.[92]

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[88] A description of the different domestic regimes can be found, *supra*, at paragraphs 13-21.
[89] *See*, *supra*, paragraph 29.
[90] *See*, *supra*, paragraphs 36 and 38.
[91] *See*, *supra*, paragraphs 43-44.
[92] *See*, *supra*, paragraph 45.