

**OPPORTUNITÉ ET POSSIBILITÉ DE POURSUIVRE LES TRAVAUX MENÉS DANS LE CADRE DU
PROJET FILIATION / MATERNITÉ DE SUBSTITUTION**

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**THE DESIRABILITY AND FEASIBILITY OF FURTHER WORK
ON THE PARENTAGE / SURROGACY PROJECT**

*Document préliminaire No 3 B d'avril 2014 à l'attention
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 3 B of April 2014 for the attention
of the Council of April 2014 on General Affairs and Policy of the Conference*

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I. INTRODUCTION¹

The background to this project, including the mandates provided to the Permanent Bureau

1. The topic of “the private international law issues surrounding the status of children” has been on the Hague Conference work agenda since 2010 when it was suggested by Members of the Organisation that the Permanent Bureau produce a preliminary note on the subject and, “in particular, on the issue of [cross-border] recognition of parent-child relationships (filiation)”.² At this time, Members also acknowledged “the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements”.³ The requested Preliminary Note⁴ described the inter-relationship between private international law rules concerning legal parentage and some of the issues arising in the context of international surrogacy arrangements (hereinafter, “ISAs”), and also identified some of the broader issues which concern international surrogacy specifically.⁵

2. In 2011, Members invited the Permanent Bureau to intensify its work in this area, with emphasis on the broad range of issues arising from ISAs, and to produce a Preliminary Report on progress in 2012.⁶ Whilst the *Preliminary Report on ISAs*⁷ was welcomed by Members, it was decided that the scope of the work should remain broad at this stage and the Permanent Bureau should continue its examination of the issues arising in relation to the recognition of parent-child relationships and not limit its work to international surrogacy alone. To this end, the Permanent Bureau was requested to “continue the current work under the 2011 Council mandate”.⁸ This included gathering information on “the practical needs in the area, comparative developments in domestic and private international law, and the prospects of achieving consensus on a global approach”, as well as consulting “with the legal profession as well as with health and other relevant professionals concerning the nature and incidence of the problems occurring in this area.”⁹ In addition, the Permanent Bureau was asked to prepare and distribute a Questionnaire for Members and non-Member interested States in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to legal parentage, including in the context of international surrogacy. The Questionnaire was also requested “to seek views on the needs to be

¹ The Permanent Bureau would like to thank Hannah Baker (Senior Legal Officer), the author of this Preliminary Document and the attached “Study on legal parentage and issues arising from international surrogacy arrangements”. The Permanent Bureau would also like to thank Laura Martinez-Mora (Principal Legal Officer) and William Duncan (Consultant to the Permanent Bureau) for their advice and assistance, as well as Anna Bertram (Intern) for her research assistance and Lukas Rass-Masson for his assistance regarding French law.

² Conclusions and Recommendations of the Council of April 2010 on General Affairs and Policy of the Conference, pp. 3-4, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” and “General Affairs”. This was a suggestion which was first proposed during the informal consultations which took place regarding the future work programme of the Hague Conference on Private International Law in 2001 (*Observations concerning the Strategy of the Hague Conference – Observations made by other international organisations and observations made in a personal capacity in response to the Secretary General’s letter of 30/31 July 2001* (Prel. Doc. No 20 for the attention of the Nineteenth Session)).

³ *Ibid.*

⁴ “Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements”, Prel. Doc. No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under the “Parentage / Surrogacy Project” (hereinafter, the “2011 Preliminary Note”).

⁵ See Section VI of the 2011 Preliminary Note (*ibid.*).

⁶ Conclusions and Recommendations of the Council of April 2011 on General Affairs and Policy of the Conference, paras 17 to 20, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” and “General Affairs”.

⁷ “A preliminary report on the issues arising in relation to international surrogacy arrangements”, Prel. Doc. No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under the “Parentage / Surrogacy Project” (hereinafter, the “2012 Preliminary Report”).

⁸ Conclusions and Recommendations of the Council of April 2012 on General Affairs and Policy of the Conference, para. 21.

⁹ See note 6 above.

addressed and approaches to be taken” as regards any future international work.¹⁰ The Permanent Bureau was invited to present a report to Council in 2014.¹¹

The work undertaken since 2012: the consultation process

3. In response to this mandate, the Permanent Bureau has undertaken a broad consultation process intended to elicit information from key stakeholders across the globe. This consultation process has included the drafting and circulation of four questionnaires addressed to: (1) Members and non-Member interested States;¹² (2) expert legal practitioners in the field; (3) expert health professionals; and (4) surrogacy agencies.¹³ In addition, the Permanent Bureau has continued its co-operation and consultations with leading international inter-governmental and non-governmental organisations working in related areas¹⁴ and has undertaken its own research and monitoring work.

4. This wide-ranging consultation process has resulted in the Hague Conference receiving the following information: 46 State responses to Questionnaire No 1, from 40 Members and six non-Member States,¹⁵ representing six different regions;¹⁶ 50 lawyer responses to Questionnaire No 2 from 20 different States,¹⁷ representing six different regions,¹⁸ as well as two legal practitioner association responses;¹⁹ 11 health professional responses to Questionnaire No 3 from six States;²⁰ and six surrogacy agency responses to Questionnaire No 4 from four States.²¹ In addition, three associations of intending parents based in France, Germany and Spain, co-ordinated the provision of 31 submissions from individuals / couples who have personally undertaken ISAs.²² Furthermore, the Permanent Bureau received two submissions from social work professionals: one from the International Social Service and another from a group of social work academics, researchers and practitioners,²³ as well as information from other leading non-governmental organisations.²⁴ Responses to the consultation process therefore represent the views of an extensive range of stakeholders, with different professional expertise, from a diverse geographical area. The information which has been gathered has enabled a far

¹⁰ See note 8 above.

¹¹ *Ibid.*

¹² “Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (Questionnaire No 1)”, Prel. Doc. No 3 A of April 2013 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, available on the Hague Conference website at < www.hcch.net > under the “Parentage / Surrogacy Project”.

¹³ Questionnaires Nos 2 to 4 were also made available for online completion through the new specialised section dedicated to the project: go to < www.hcch.net >, then “the Parentage / Surrogacy Project”. They remain available in Word format on this specialised section.

¹⁴ Described in para. 4 below. In some cases, where experience was advanced in a particular State, *national* non-governmental organisations or practitioner associations have also come forward to share their experience with the Permanent Bureau.

¹⁵ Responses were received from: Australia, Belgium, Brazil, Canada, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Hungary, Iceland, Ireland, Israel, Japan, Korea, Republic of, Latvia, Lithuania, Madagascar, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland (UK), United States of America (USA) and Uruguay. Unless expressly requested not to do so, these responses have been placed on the website of the Hague Conference, in the specialised “Parentage / Surrogacy Project” section (see note 13 above).

¹⁶ Africa, Asia, Europe, Oceania, North and South America.

¹⁷ Responses were received from lawyers in: Albania, Argentina, Australia, Canada, Denmark, Ethiopia, France, India, Ireland, Israel, Japan, Mexico, Netherlands, New Zealand, Spain, Sweden, UK, Ukraine, USA and Venezuela.

¹⁸ Africa, Asia, Europe, Oceania, North and South America.

¹⁹ From the American Bar Association (hereinafter, the “ABA”) and the American Academy of Assisted Reproductive Technology Attorneys (hereinafter, “AAARTA”) respectively.

²⁰ Responses were received from medical professionals in: Brazil, Czech Republic, Denmark, Latvia, India and Spain.

²¹ Responses were received from agencies based in: Canada, India, UK and USA.

²² The individuals / couples are habitually resident in the three countries in which the intending parent associations are based: that is, France (14 responses), Germany (7 responses) and Spain (10 responses). However, one of the couples previously habitually resident in Spain relocated following the ISA to another State.

²³ Three social work experts (two from the UK and one from Australia) working in the fields of assisted reproduction and non-traditional family formations, including surrogacy.

²⁴ Including the European Association of Registrars (EVS), CLARA (based in France) and Families Thru Surrogacy (based in Australia).

richer picture to emerge regarding the approaches of States to legal parentage, internally and in private international law, as well as to the phenomenon of international surrogacy. The Permanent Bureau wishes to express its sincere appreciation to those who have taken the time to provide valuable information, expertise and sometimes personal experience to assist the work of the Hague Conference.

5. The following limitations in terms of the responses to, in particular, Questionnaire No 1 (addressed to States) must, however, be borne in mind: (1) inevitably, it has not always been possible for each State to answer every question. It may therefore be that whilst a response to the Questionnaire has been provided from a particular State, information from that State was not available in certain areas; (2) the information provided in responses has been taken as accurate and has not been verified against primary source material due to time and resource constraints; (3) whilst information has been obtained from States from many different regions of the world with different legal, as well as social and political, cultures, there are certain geographic areas which are not well represented in the responses. For example, only two States in Africa have responded to Questionnaire No 1²⁵ and States with a legal system which is, in whole or in part, based on Sharia law have generally not responded; (4) lastly the Permanent Bureau is aware that, despite its best efforts, States representing a particular category of approach in some areas (*e.g.*, a liberal approach to for-profit surrogacy arrangements) are not represented (at all, or well) in the responses. Where possible, the Permanent Bureau has supplemented and addressed any gaps in information with its own research or information, as well as with the responses received from other questionnaires. In such instances, it is always clearly indicated that the information is not from the State itself.

The aims, scope and structure of this Preliminary Document

6. This Preliminary Document aims to provide Members with: (1) a concise and easily digestible analysis of the desirability and feasibility of further work at the Hague Conference concerning the private international law aspects of legal parentage and the issues arising from ISAs, and (2) recommended “next steps” for discussion. In this way, this document takes a practical approach and seeks to focus its attention on the decisions which Members are requested to make at the upcoming 2014 Council meeting.²⁶

7. However, this desirability / feasibility analysis and the recommendations for future work are founded upon the detailed “Study on legal parentage and the issues arising from international surrogacy arrangements”²⁷ (hereinafter, the “Study”) which has been undertaken of the (hundreds of pages of) data resulting from the broad consultation process described above,²⁸ as well as the independent research and monitoring work undertaken by the Permanent Bureau, including in relation to existing regional and (other) international work in the field. Indeed, this Study is the evidence-base for this Preliminary Document and, in this regard, should be considered as utterly integral to it.²⁹

8. In light of the volume and the breadth of scope of the data received as a result of the consultation process,³⁰ presenting this foundational Study in full for Members *within* a Preliminary Document for Council would have resulted in an extremely lengthy, technical document. Nevertheless, the fundamental importance of this work for Members, both as the evidence-base for this document but also, more broadly, as significant information (not available elsewhere) which may be of use to Members in their own policy and legislative work, has led the Permanent Bureau to consider it important to also make this work

²⁵ Madagascar and Mauritius.

²⁶ The meeting of the Council on General Affairs and Policy of the Hague Conference (8 – 10 April 2014).

²⁷ Attached to this Prel. Doc.

²⁸ See paras 3 to 4 above.

²⁹ As has been noted elsewhere, “systematic comparative analysis of existing rules is a basis for informed debate” and provides a sound foundation for the informed consideration of possible future international work in this area (see *Birthright Citizenship: Trends and Regulation in Europe*, M. P. Vink and G-R. de Groot (November 2010) for the EUDO Citizenship Observatory, available at < www.eudo-citizenship.eu >).

³⁰ Covering internal and private international laws concerning legal parentage, as well as laws and practices concerning ISAs.

available.³¹ The Permanent Bureau has therefore adopted the approach of presenting a very brief overview of the Study in Section III of this document, whilst attaching the full Study. It is anticipated that Members interested in considering, in depth, the comparative, regional and international analysis behind this Preliminary Document will consult the Study. This Study is also cross-referenced in the appropriate places in this document and, in that respect, should be consulted alongside this document for a thorough reading.

9. The scope of this Preliminary Document, as well as the Study upon which it is based, remains broad, as requested by Members:³² that is, it examines the establishment and contestation of legal parentage with a private international law focus, and is not confined to an examination of ISAs. However, the scope of work has been limited insofar as the private international law issues arising in relation to legal parentage (and some of the legal consequences resulting from this) are examined, but other effects (*e.g.*, concerning children's names) are not covered due to the need to keep the topic within manageable bounds. Issues of authenticity of civil status documents (*i.e.*, legalisation and / or apostillisation³³) and the formal practicalities of the cross-border exchange of civil status documents³⁴ (*e.g.*, requirements for translation) are also not dealt with at this stage.

10. This Preliminary Document adopts the following structure:

- 1) It starts by providing the context of the discussion on legal parentage and recalls why legal parentage has become an issue of international interest (**Section II**);
- 2) It continues with a very brief overview of the Study (**Section III**), providing a short account of the conclusions of the Study in relation to States' internal and private international laws concerning legal parentage, and approaches to ISAs, as well as regarding relevant bilateral, regional and international developments in these areas;
- 3) It lastly turns to a consideration of the desirability and feasibility of future international work in light of the Study and the views expressed by Members and other stakeholders in the consultation process (**Section IV**) before providing some recommended "next steps" for Members to consider (**Section V**).

11. It is important to emphasise that this Preliminary Document and the Study are not considered "final" documents:³⁵ rather, they might be seen as further steps in a process. Whilst a tremendous amount of information has been obtained, there are still important gaps and more work is required to take this project forward.³⁶ In addition, due to the fast-paced developments in national and regional laws in this area, both legislatively and jurisprudentially,³⁷ it is impossible to present a document which could be considered "final" in the sense of providing a completed, enduring account of the topic.

12. Finally, it should be noted that the Glossary produced in 2012 has been revised in light of the feedback received from the consultation process and has been supplemented, as required for this document: the updated version can be found at **Annex A**. Further, maps providing a pictorial account of the responses received to Questionnaires Nos 1 and 2 are attached at **Annex B**.

³¹ If work in this field does go forward, it is also considered that the Study will be foundational work for any Experts' Group which might be formed.

³² See para. 2 above.

³³ As to which, see the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (the "Apostille Convention").

³⁴ As to which, see the work of the International Commission on Civil Status < www.1ccic.org > (hereinafter, "ICCS").

³⁵ The Conclusions and Recommendations of the Council of April 2012 on General Affairs and Policy of the Conference (see note 8 above) mentioned a "final" report.

³⁶ See further, **Section V**: in addition, it is suggested in this Section that the Study might be considered a "living" document, to be updated as further information is gathered.

³⁷ Evidenced in the **Study**: see, *e.g.*, Part A, Section 1(g) and Part C, Section 3.

II. THE ESTABLISHMENT AND CONTESTATION OF LEGAL PARENTAGE: AN ISSUE OF INTERNATIONAL INTEREST, WITH IMPLICATIONS FOR HUMAN RIGHTS

13. As identified in the 2011 Preliminary Note,³⁸ demographic, societal and scientific developments have converged in recent decades to make the question of whom the law should identify as the parents of a child a more complex and challenging question today than ever before.³⁹ The trends recognised in 2011 have continued in the past three years and additional patterns can be identified which evidence that the increased complexity of this question is set to endure into the future.

14. Demographically, the continued growth in the diversity of family forms in many States means that, in 2014, children are living in a greater variety of family households than could even be imagined only a few decades ago. For example, births out of wedlock have continued to increase in many States, with 50% or more of births now falling within this category in some States.⁴⁰ Associated with this, a “noticeable decline” in the marriage rate across many States has been accompanied by a “significant increase in the prevalence of other forms of partnership” (e.g., unmarried cohabitation).⁴¹ The divorce rate has also continued to rise in many States,⁴² contributing further to the increase in the number of children living in single-parent households or step-families, or a combination of the two. Furthermore, since 2011, more States, albeit still a minority, have passed legislation allowing the legal formalisation of relationships outside marriage, whether for opposite or same-sex couples or both, or have passed legislation permitting same-sex marriage.⁴³ As more diverse forms of family household exist, questions arise as to the legal status which should be accorded to the adults caring for the children within them. For example, what is the significance of marriage or any other relationship status in terms of establishing legal parentage for children? Does the intention to parent a child, or the act of parenting a child, have a role to play in establishing legal parentage? How should the law deal with situations where more than two adults have a long-term parental role in a child’s life? Are these questions of allocation of parental *responsibility* or should they affect the legal *status* of those persons vis-à-vis the child (and vice versa)?⁴⁴

³⁸ Paras 6 to 9 of the 2011 Preliminary Note (see note 4 above).

³⁹ Certain issues concerning legal parentage, or matters of “descent”, are not new: e.g., questions arising from births out of wedlock. However, with demographic changes, the challenges arising from these issues are more prevalent today than in previous decades and, added to the more long-standing issues in the law of descent, are the host of new challenges which arise from developments in family forms and in medical science.

⁴⁰ OECD Family Database < www.oecd.org/social/family/database >, “SF2.4: Share of births out of wedlock and teenage births” (last updated 31 January 2013). This figure may include children born to unmarried couples or to single-parent families. The Family Database reports that out of wedlock births have increased in many OECD countries but “by no means all”. Further, large differences in this respect exist across OECD countries with, for example, less than 10% of children being born out of wedlock in Korea, Japan and Greece and 50% or more being born out of wedlock in France, Slovenia, Mexico and the Nordic countries (except Denmark).

⁴¹ OECD Family Database (*ibid.*), “SF3.1: Marriage and divorce rates” (last updated 31 January 2013). The noticeable decline in the marriage rate was noted across almost all OECD and EU States. See also “SF3.3: Cohabitation rate and prevalence of other forms of partnership” (last updated 31 January 2013).

⁴² OECD Family Database (*ibid.*), “SF3.1: Marriage and divorce rates” (last updated 31 January 2013) which reports that divorce rates increased in most OECD States from 1970 to 2010.

⁴³ E.g., since early 2011, same-sex civil unions or registered partnerships have become legal in Brazil (May 2011); Liechtenstein (September 2011) and Chile (April 2013). Moreover, 16 countries and 17 states within the USA, an increase of 16 jurisdictions from 2011, now permit same-sex *marriage* (as at January 2014, with England & Wales to be added in March 2014). However, of course, it must be noted that this is still a minority of States and, in fact, in 2011 it was reported that homosexuality remains a criminal offence in 76 States (see the Report of the UN High Commissioner for Human Rights on “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (A/HRC/19/41, submitted to the Nineteenth session of the Human Rights Council, available at < <http://www2.ohchr.org/> >).

⁴⁴ In some respects, it is not easy to draw a clear distinction between the attribution of parental responsibility and the “status” of legal parentage because, in some States, the acquisition of parental responsibility may, *de facto*, imply the acquisition of a type of “status”. However, many legal systems do draw the distinction and whilst multiple individuals may have parental responsibility for a child, usually only two persons are considered the legal parents (but cf. in Canada where one province has determined that a child may have more than two legal parents). The distinction is also drawn in regional and international child law: e.g., see the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (the “1996 Convention”) which explicitly includes within its material scope measures dealing with parental responsibility and excludes issues concerning legal parentage (see Arts 3 and 4 a)), as well as *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning*

15. Scientific developments have led to questions concerning legal parentage which are no less challenging. The advent of DNA testing continues to cause legislatures and courts around the world to have to grapple with the role genetics should play in the ability to establish or contest legal parentage, particularly where this has to be balanced against family stability. At the same time, the arrival of Assisted Reproductive Technology (hereinafter, "ART") has complicated the picture further and affects a significant and increasing number of families.⁴⁵ This is due to rates of infertility, particularly in developed countries with women waiting longer to start a family, changing perceptions of ART (as the concept becomes more familiar), a decrease in costs in some States (or the ability to travel to find a lower cost destination), as well as those who are socially infertile looking to start a family through such techniques.⁴⁶ Indeed, it is estimated that, "around 5 million babies have been born worldwide since the first IVF baby ... in 1978" and today, "around 1.5 million ART cycles are performed each year worldwide, with an estimated 350,000 babies born".⁴⁷ Moreover, as "[t]he number of [ART] cycles performed in many developed countries has grown by 5 to 10% per annum over the last few years", it might be concluded that this growth in the use of ART will continue into the future.⁴⁸ If so, it is likely that there will be more children born as a result of ART in 2014 than in any year before in history.⁴⁹ Aside from the *a priori* question of whether to permit ART and, if so, in which forms and under which (if any) regulatory system, legal systems are also faced with challenging questions concerning the legal parentage of children born as a result of ART, including the relative importance of intention and genetics in the establishment of legal parentage in such circumstances.

16. Family law often lags behind societal and scientific developments and this area of family law has proved no exception. Many States have only begun to tackle questions concerning the establishment and contestation of legal parentage in these new situations in more recent years and others have yet to commence.⁵⁰ Moreover, legal responses in

jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (the "Brussels II a Regulation", see Art. 1).

⁴⁵ Including even the most traditional family forms: *i.e.*, heterosexual, married couples. These couples, in fact, appear to form the majority of the intending parents entering into ISAs today – see the **Study** at para. 140.

⁴⁶ In 2010, an estimated 48.5 million couples worldwide were said to be infertile (defined as being unable to have a child after five years): see Mascarenhas et al. (2012), "National, Regional, and Global Trends in Infertility Prevalence Since 1990: A Systematic Analysis of 277 Health Surveys", *PLoS Med* 9(12): e1001356. In addition, it has been estimated that one in six couples worldwide "experience some form of infertility problem at least once during their reproductive lifetime" (see the "ART Fact sheet" published by the European Society of Human Reproduction and Embryology, "ESHRE", available at < <http://www.eshre.eu/Guidelines-and-Legal/ART-fact-sheet.aspx> >. It is also interesting to note that the average age of a woman at first birth has increased in all developed countries since the 1990s and this is now one of the most common explanations of infertility (*ibid.*). In addition, persons may now seek to use ART to have a child as a result of so-called "social infertility" (*i.e.*, the fact that such persons would otherwise be unable to have a child due to their single status or sexual orientation).

⁴⁷ See the "ART fact sheet" published by ESHRE (*ibid.*). See also, Sullivan EA et al., "International Committee for Monitoring Assisted Reproductive Technologies (ICMART) world report: assisted reproductive technology 2004" *Hum Reprod* 2013; 28: 1375-90 and, for the USA specifically, "Assisted Reproductive Technology Surveillance – United States, 2010", published 6 December 2013, by the National Center for Chronic Disease Prevention and Health Promotion (CDC) which states: "[s]ince the first U.S. infant conceived with Assisted Reproductive Technology (ART) was born in 1981, both the use of advanced technologies to overcome infertility and the number of fertility clinics providing ART services have increased steadily in the United States" and, "during 1996-2010, the number of ART procedures performed in the United States doubled while the number of infants born as a result of these procedures nearly tripled" (p.10). It must be noted that ART in this report was defined as not including treatments in which only sperm were handled (*e.g.*, intrauterine insemination). If such treatments were included, the figures would be even higher.

⁴⁸ *Ibid.* Although some reports state that growth has slowed (see the "ART Fact sheet", note 46 above), other figures indicate that IVF treatment, in particular, is continuing to grow: *e.g.*, on 24 February 2014 it was reported by Society for Assisted Reproductive Technology (SART) that more than 61,000 babies were born in the USA to IVF in 2012, a record high.

⁴⁹ And this is not to mention the *informal* arrangements which adults may enter into in order to have a child (*e.g.*, men who agree, informally, with a couple or individual to be a sperm donor and a child is conceived either through artificial insemination at home or through sexual intercourse) and how the law should respond to such arrangements. In addition, science has not finished complicating matters yet. In 2013, it was reported that it may be possible, in future, for a child to have *three genetic* parents. Children born as a result of "mitochondrial transfer" will possess DNA from three sources, over 99.9 percent from the intending parents but also some DNA from the mitochondria inherited from the egg donor.

⁵⁰ See, generally, Part A of the **Study** and, in particular concerning recent legal developments in States, Part A, Section 1(g).

this field are often strongly influenced by the social, cultural and political milieu within the State.

17. If one adds to this complex picture the continuing increase in the international mobility of persons resulting from globalisation, the potential for *cross-border* complexities and problems is clear. Additionally, the diversity in States' internal legal approaches is also *a driver for* increased cross-border movement, as, for example, prospective parents search for a medically, financially and legally favourable State in which to undertake ART or surrogacy arrangements.⁵¹ "Cross-border reproductive care", described as "procreative tourism" by some, is now a simple fact of our globalised world and has been described as a "well entrenched" practice.⁵² In legal terms, it could also, in some cases, be described as an example of "forum shopping".⁵³ However, often prospective parents are not aware (and nor are they made aware) that what is established in terms of their (and the child's) legal status in one State may not be recognised in another and that this, in turn, may have serious legal consequences for the child.⁵⁴

18. Indeed, it is worth recalling and emphasising this point: children's legal parentage has become an issue of international concern precisely because it is *not* a mere legal nicety for children. It is the gateway, today, through which many of the obligations owed by adults to children flow, and it is therefore a legal status from which children derive many important rights, including rights established in international law. Whether one is talking of the identity of those responsible for looking after children (parental responsibility), their financial support (maintenance), inheritance or nationality, in many States, the identity of those against whom children can enforce such rights (or, in some cases, whether they can enjoy such rights at all – *e.g.*, nationality by descent), may often depend upon the answer to the simple question: who is / are your parent(s)?⁵⁵

19. There is, therefore, a children's rights imperative to work concerning legal parentage. Indeed, the word "parent" appears 36 times in the *UN Convention on the Rights of the Child* (hereinafter, the "UNCRC"), often in the context of setting out the rights which the State should respect so that a child may form and enjoy a relationship with his / her parents,⁵⁶ or in the context of identifying who is responsible for ensuring a child can exercise a particular right.⁵⁷ In either context, it is clear that certain parentage is a prerequisite to a child's enjoyment of many of his / her rights. Of course, drafted in the 1980s and before many of the complexities discussed in the previous paragraphs had fully come to light, the term "parent" is used in the UNCRC without any indication as to whether the term refers to the child's genetic, social or legal parents and, in this respect, simply begs the question as to how States should determine "parentage" for these purposes.⁵⁸

⁵¹ Or even, potentially, look for a favourable State to move to, on a long-term basis, in order to found a family: *e.g.*, potentially for same-sex couples who may come from a State in which it is not possible for a same-sex couple to both be legal parents of a child (whether the child is adopted or conceived by ART or by informal arrangements with others), moving to a more legally favourable State in order to have a family might be considered.

⁵² Shenfield F. et al., "The European Society for Human Reproduction and Embryology (ESHRE) Taskforce on Cross border reproductive care. Cross border reproductive care in six European countries", *Human Reproduction*, 2010, Vol 25: 1361–1368.

⁵³ Whilst legal restrictions "at home" are by no means the only reason why persons travel abroad for ART services, the ESHRE European Study (*ibid.*) found, based on their data, that "[t]he main reasons for travelling were legal restrictions based on prohibition of the technique, *per se*, or because of inaccessibility due to the characteristics of the patients (like age, sexual orientation or civil status)" (p. 1367).

⁵⁴ Whilst there have been some regional initiatives to try to improve the quality of medical services / care provided to patients in the CBRC context (*e.g.*, the ESHRE's Good Practice Guide for CBRC – as to which, see further Part C, Section 3 of the **Study**), far less attention seems to have been paid to the *legal* consequences for children and their families of ART abroad.

⁵⁵ It is purposely not stated "legal parents" here because, for example, in some States, children's acquisition of nationality by descent will be dependent upon *genetic* parentage and not *legal* parentage: see Part A, Section 1 (f) of the **Study**.

⁵⁶ *E.g.*, Arts 9 and 10, referring to the child's right not to be separated from his / her parents and to enjoy personal relations and contact with them.

⁵⁷ *E.g.*, Art. 27(2) which states that "[t]he parent(s) or others responsible for the child have the primary responsibility to secure [...] the conditions of living necessary for the child's development".

⁵⁸ Although the recent UN Committee on the Rights of the Child "General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3(1))", adopted by the Committee

Nonetheless, this ambiguity cannot detract from the fact that, in a cross-border context, if a child has uncertain or “limping” parentage (as a result of two States answering the question “who is / are your parent(s)?” in a different manner), this will likely seriously compromise the child’s ability to enjoy many of these rights (aside from the fact that the situation, in itself, is likely to breach Arts 7 and 8 of the UNCRC⁵⁹). In fact, if this situation arises it may, in turn, breach another of the child’s fundamental rights, not only found in the UNCRC, but in many international and regional⁶⁰ human rights treaties: that is, his / her right not to be discriminated against simply because of the complexities and challenges surrounding his / her birth and status.⁶¹

20. These issues are at the heart of the high level of international interest and, in many quarters, international concern which has developed concerning ISAs since the Hague Conference first reported the challenges arising from the phenomenon in 2011. In fact, the combination of the continued dramatic increase in the numbers of ISAs being undertaken globally,⁶² and the serious nature of the issues being encountered in these cases,⁶³ has only served to increase the intensity of global interest in the subject. The engagement of several international, regional and State bodies in the field, with whom the Hague Conference is actively co-operating, demonstrates this.⁶⁴ At a national level, multiple States have now drawn up specific guidance for those considering ISAs⁶⁵ and, across

at its 62nd session (14 January to 1 February 2013) (hereinafter, “General Comment No 14 on Art. 3(1) UNCRC”), makes clear that, in the context of the right of the child to family life, protected under Art. 16 of the UNCRC, the term “family” must be “interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community...” (para. 59).

⁵⁹ Art. 7 of the UNCRC states: “(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.” Art. 8 states: “(1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

⁶⁰ At the regional level, other rights such as “the right to respect for ... private and family life” (Art. 8 of the 1950 European Convention on Human Rights (hereinafter, the “ECHR”)) will also be engaged in this situation. Within the EU, such a situation may also implicate and pose a hindrance to the free movement of persons.

⁶¹ States Party to the UNCRC are required to “respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s ... birth or other status” (Art. 2(1)). In relation to this provision, the UN Committee on the Rights of the Child, in its recent General Comment No 14 on Art. 3(1) UNCRC (see note 58 above), has stated that this “is not a passive obligation...but also requires appropriate proactive measures...to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality” (para. 41). In addition, a non-discrimination provision in similar terms is also found in, *e.g.*, the *Universal Declaration of Human Rights* (Art. 2) and the *International Covenant on Civil and Political Rights* (Art. 2), as well as in regional instruments, *e.g.*, Art. 14 of the ECHR. Indeed, consultation with children in the context of work on their legal status in the European context has noted the impact of the lack of legal recognition on the lives of children and the stigma and discrimination they have felt: see the report by Dr Kilkelly in the context of the Council of Europe’s work on legal status (mentioned in CJ-FA (2011) RAP 5).

⁶² Explored in Part C, Section 1 of the **Study**.

⁶³ Explored in Part C, Section 2 of the **Study**.

⁶⁴ For example, one can mention the International Social Service (“ISS”, with its 2013 “Call for Action” which states that “the global ISS casework load is increasingly dealing with individual surrogacy cases but must work in the absence of a consistent, coordinated legal framework” - see the ISS/IRC Monthly Review Special Issue on “International Surrogacy and children’s rights”, No 174 (July-August 2013), available via < www.iss-ssi.org >), the ICCS (with a 2014 comparative study on the subject), the report on surrogacy requested by the Legal Affairs Committee of the EU Parliament (which concludes that, “all Member States appear to agree on the need for a child to have clearly defined legal parents and civil status”), the UN Committee on the Rights of the Child (children’s rights issues concerning ISAs have arisen in State reporting procedures concerning Israel, Germany and India in 2013 and 2014 – see further Part C, Section 3 of the **Study**) and the European Court of Human Rights (hereinafter, the “ECtHR”) (with four ISA cases currently pending before it, and possibly more to follow – see further Part C, Sections 2 and 3 of the **Study**), and leading legal practitioner bodies (*e.g.*, the International Law Association, the International Academy of Matrimonial Lawyers, the ABA and AAARTA have been actively engaged in the field).

⁶⁵ See para. 216 of the **Study**.

several States, specific governmental⁶⁶ and non-governmental⁶⁷ initiatives have been commenced to assist families with the current problems and / or to consider ways of improving the situation. Perhaps unsurprisingly in light of this level of interest and concern, there have already been several calls for the Hague Conference to undertake global legislative action concerning international surrogacy.⁶⁸ As is demonstrated in the Study (and mentioned in **Section III (C)** below), the broad consultation process undertaken by the Permanent Bureau, including information from States, specialist lawyers, clinics and agencies, as well as 30 submissions from intending parents who have themselves undertaken ISAs, has also revealed a high level of concern across several key areas in international surrogacy cases.⁶⁹

III. A BRIEF OVERVIEW OF THE “STUDY ON LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS”⁷⁰

A. The establishment and contestation of legal parentage in internal law

21. The Study, in Part A, Section 1, starts by considering how States approach the establishment of legal parentage in the various factual matrices which exist today, how they determine challenges to legal parentage and how these matters affect (if at all) the acquisition of nationality by children. This analysis is undertaken for the purpose of determining the degree of harmony or diversity in legal approaches to these issues across the world,⁷¹ and the resulting potential for conflicts of law issues, in addition to assessing how far laws in this area are in a state of flux. Part A, Section 2 of the Study continues with a brief discussion of some of the relevant work which has been undertaken at a federal, regional or international level concerning legal parentage, including towards a harmonisation of internal, *substantive* laws, and analyses how the success or failure of these initiatives may be of relevance for private international law work in the field.

22. The Study concludes that, over the past century, the internal laws of many States concerning the establishment and contestation of legal parentage have been, sometimes dramatically, influenced by social, scientific and demographic changes. In a very broad way, it is possible to identify two primary “shifts” in legal thinking and approaches to the status of children over this period brought about by these changes: (1) First, the shift from a focus on the marital status of a child’s parents in determining the obligations owed to a child (and therefore the rights a child acquired), to an approach which rejected this as discriminatory and re-defined the grounds upon which parental obligations were owed to children, instead using the establishment of a parent-child relationship, something thought to be available equally to all children.⁷² As a result of this shift in thinking, the focus of

⁶⁶ *E.g.*, the working groups established in Sweden and Switzerland to examine the issues arising from ISAs; the temporary legislation enacted in Norway; the cross-departmental working group established in the UK; the work being undertaken by the Family Law Council in Australia: see further the **Study** at Part C, Section 3.

⁶⁷ *E.g.*, the establishment of specialist non-governmental organisations such as those in Spain, France and Australia.

⁶⁸ *E.g.*, ISS, in its 2013 “Call for Action” (see note 64 above) stated that it was intending to “create a network-wide campaign to advocate in favour of a new ... Hague Convention on international surrogacy”. In addition, a Report written for the consideration of the Legal and Parliamentary Affairs Committee of the EU Parliament (“A comparative study on the regime of surrogacy in EU Member States”, by Brunet et al (2013), available at <

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf) >, concluded that, “[t]he territorial limitations of a purely intra-EU regime signal the desirability of a more global response...” and that “consideration should be given to the desirability of a global solution, *e.g.*, on a Hague Convention basis” (see pp.191 and 194). Further, at an International Family Law and Practice Conference on “Parentage, Equality and Gender” held in London from 3 to 5 July 2013, international family law expert participants concluded: “We recognise that there is an urgent need for a multi-lateral, worldwide convention on surrogacy” (at para. 4). Many academic commentators have also called for international legislation in the field, some specifically mentioning work under the auspices of the Hague Conference.

⁶⁹ See the **Study** at Part C, Section 2.

⁷⁰ Attached: see paras 7 to 8 above concerning the fact that this **Study** should be consulted in full for an in-depth analysis of the data received and the research undertaken concerning internal and private international laws regarding legal parentage and the approaches to ISAs.

⁷¹ Though note the geographic limitations to the responses received from States, noted in para. 5 above.

⁷² As is described in Part A, Section 1 of the **Study**, whilst children born out of wedlock can today establish their legal parentage, different methods of establishment will often apply from those used for children born in wedlock

many laws became how to efficiently establish a legal relationship between the child and his / her parents (which meant the “natural” or genetic parents of the child since, at this time, there were few, if any, other possibilities); (2) A second shift occurred for many States decades later, at the end of the 20th century, when it was realised that scientific developments had enabled genetic parentage to be determined with near certainty but, paradoxically, genetics were no longer the sole determining criterion in terms of the identity of persons bringing children into existence and, moreover, socially exercising the function of a “parent”. Science and societal developments had led to a changed reality once more in which, in certain circumstances, persons could intend to, or consent to, becoming a “parent”, irrespective of their genetic connection with the child to be born.

23. Whilst many (but certainly not all) States’ internal legal approaches have developed through the first ideological “shift”, whether a particular State has undertaken legislative or other legal reform to take into account the second stage of developments to any extent often depends upon the State’s cultural, social and sometimes religious context. This results in a global picture today which is far from uniform and in which, despite some homogeneity in terms of the basic principles applicable to the establishment of legal parentage, considerable diversity exists, in particular concerning the establishment and contestation of legal paternity (in particular, for children born out of wedlock), and the establishment and contestation of legal parentage generally for children born as a result of new technologies or within newer family forms. This remains the case despite the regional and international work undertaken in the area of legal parentage which has, in some cases, proved controversial. It is also the case that many States are still in a period of adjustment, in particular as concerns the second set of developments described above, and hence internal laws remain in a considerable state of flux. As described in the Study, this instability in internal laws need not prevent work at the international level but the overall picture emphasises the importance of focusing on building bridges *between* legal systems, based on internationally established common principles,⁷³ rather than work which might attempt any harmonisation of substantive laws concerning legal parentage.

24. Importantly, the consequence of the above-described diversity in internal law approaches, is, of course, that cross-border problems may result in terms of children’s legal parentage for families connected with more than one State *if* the private international law approaches of States to these questions are not broadly similar.⁷⁴ Part B of the Study turns to consider precisely this issue: do States have broadly similar private international law rules in this area and, if not, do their approaches reveal trends which might be harnessed for work towards the harmonisation of private international law?

B. Private international law and co-operation rules concerning legal parentage

25. Part B of the Study is broken down into three parts: (1) it first undertakes a comparative analysis of States’ private international law rules, principally drawn from States’ responses to Questionnaire No 1,⁷⁵ (2) it continues by examining any efforts which have been undertaken at a bilateral, regional or international level either towards cross-border co-operation in this area or towards a unification of private international law rules, before (3) turning to examine whether any cross-border difficulties are resulting for families and children concerning the establishment of legal parentage (outside the international surrogacy context – since this is examined in Part C of the Study). This analysis is undertaken with a two-fold purpose: (i) to establish the degree of diversity or similarity in States’ private international law rules in this field (including in light of any regional and international work already undertaken towards co-operation or unification of such rules), in order to provide the scientific basis for an analysis of the *feasibility* of further international work in this area;⁷⁶ and (ii) the cross-border problems are considered in Part

and, as such, it may be more difficult for, in particular, legal paternity of such a child to be established. The current situation therefore still reveals a distinction in treatment for children born in and out of wedlock.

⁷³ *E.g.*, the children’s rights found in the UNCRC. As well as based on an acceptance of legal diversity.

⁷⁴ *E.g.*, if all States have the same applicable law rules, for example, and no public policy or other exception which applies, there may not be “conflicts” in terms of outcomes, despite the difference in internal laws.

⁷⁵ Save where expressly stated otherwise.

⁷⁶ See **Section IV** below.

B, Section 3 in order to assess the *desirability* of, or the need for, further work outside the international surrogacy context.

26. In relation to States' private international laws concerning legal parentage, the Study concludes that whilst significant variation exists in the approaches of States to many issues (*e.g.*, such as when State authorities will assume jurisdiction to register – and therefore determine the legal parentage – of a child born *outside* the State territory, when jurisdiction will be assumed to accept a voluntary acknowledgement of legal paternity, and the applicable law rules to the establishment of legal parentage arising by operation of law), significant congruity in approaches exists in other areas (*e.g.*, concerning the assumption of jurisdiction when a child is born on the territory of the State) and in further areas common themes can be deduced (*e.g.*, in relation to the interpretation and application of the public policy exception in this field). In addition, in relation to the approaches of States to legal parentage established abroad, there is an important contrast in the congruity of States' approaches depending upon whether a foreign authentic act (*e.g.*, birth certificate or voluntary acknowledgement) or a foreign judicial decision is being considered. In relation to foreign authentic acts, States have adopted a variety of private international law approaches from recognition (subject to varying conditions), through to methods which simply determine legal parentage *de novo* based on applicable law rules (which may involve a consistent application of the *lex fori*). In relation to foreign *judicial* decisions, however, there is far more congruity in States' approaches with many more States adopting a recognition approach, often subject to indirect rules of jurisdiction and certain procedural safeguards (expressed usually as grounds for non-recognition).

27. The analysis of bilateral, regional and international initiatives in the area (Part B, Section 2 of the Study) concludes that, whilst there is much relevant work to consider when reflecting upon whether and, if so, how to unify private international law rules regarding legal parentage,⁷⁷ no work has yet been undertaken at the global level towards comprehensive unification of such rules, including towards establishing cross-border co-operation in this area, particularly in light of the new, prevailing global reality concerning legal parentage. The Hague Conference could therefore seek to draw upon the existing expertise at the national, regional and international levels in the knowledge that it is not duplicating the work of other bodies.

28. Part B, Section 3 of the Study provides several case examples of the cross-border problems concerning legal parentage and nationality reportedly occurring *outside* the international surrogacy context.⁷⁸ It concludes that these cross-border problems are arising because of the difference not only in internal approaches to the question of legal parentage, but also as a result of the different private international law approaches of States. Moreover, problems seemingly arise whether a "conflicts approach" (*i.e.*, an approach using applicable law rules, including if this is always an application of the *lex fori*) or, but perhaps to a lesser extent, whether a "recognition approach" is used in the State's private international law rules.⁷⁹ The result, however, is often the same for the child: either "limping" legal status or an uncertain situation in which his / her legal status (legal parentage and / or nationality) is founded on an incorrect factual basis in one State and may, at any point, be challenged.

⁷⁷ See the **Study** at Part B, Section 2.

⁷⁸ Reported to the Permanent Bureau during the consultation process by States, lawyers and non-governmental organisations.

⁷⁹ In the former case, if the multiple States connected with a child use different connecting factors to determine the applicable law, this may lead to different outcomes for the child in each State (and public policy may anyway apply to prevent the application of certain foreign laws). However, if the "recognition approach" is adopted there is the risk, particularly in this area of law, that the public policy exception may apply to prevent recognition of the legal relationship(s) established abroad. That said, in light of the fundamental rights implicated in a consideration of the cross-border recognition of a child's legal status, some national and regional jurisprudence has also evidenced a nuanced approach to the public policy exception, with rights such as Art. 3 UNCRC and Art. 8 ECHR being relied upon. See further, the **Study** at Part B and Part C, Section 2 (a).

C. International surrogacy arrangements: a closer analysis of a specific phenomenon

29. In 2011, the Hague Conference reported the reality that international surrogacy had become a “booming, global business” with multiple challenges which had not yet been fully brought to the attention of the international community, including those surrounding the legal status of children born as a result of such arrangements.⁸⁰ In 2014, this reality is widely accepted and international surrogacy has now become an issue of international interest and, in many quarters, one of international concern.⁸¹ As the Study recalls, however, insofar as the legal status of children and intending parents (*i.e.*, legal parentage and its consequences, such as nationality) are in issue in international surrogacy cases, Parts B and C of the Study, analysing the internal and private international laws of States concerning legal parentage and nationality, are of direct relevance since the underlying problem in international surrogacy cases, insofar as status issues are concerned, is this very conflict in States’ approaches to legal parentage and nationality. It is important to recognise this and to place the problems in international surrogacy cases in this broader context. Nonetheless, it cannot and should not be ignored that there are also multiple broader policy considerations in international surrogacy cases beyond the issue of the child and intending parents’ legal status, even when focusing solely on the *cross-border* aspects of this topic.⁸² These broader concerns arise with different frequencies and dimensions across different States but include issues of child welfare, reproductive freedom, exploitation of the vulnerable (particularly in the context of global socio-economic disparities), health policy and regulation (in light of globalisation and the increased use of cross-border medical, including reproductive, services), as well as equality issues. Therefore, international surrogacy is a particular phenomenon which demands a related, but independent, analysis.

30. Using the wealth of information provided as a result of the consultation process, the Study draws a clearer and richer picture than ever before of the numbers, nature and geographical scope of ISAs taking place today, as well as the parties and intermediaries involved in these arrangements.⁸³ In light of this detailed picture, the Study analyses some of the key problems identified in ISA cases:⁸⁴ that is, the legal status of children and intending parents;⁸⁵ child welfare concerns; the position of the surrogate mother, as well as gamete donors; concerns for intending parents; the competency and conduct of some intermediaries; the financial aspects of ISAs and criminal activity concerning ISAs. Lastly, it considers developments in States’ approaches to ISAs, including any bilateral, regional and international efforts at co-operation.⁸⁶ The conclusions of this work, insofar as they are relevant for an analysis of the desirability and feasibility of further work on ISAs, are discussed in **Section IV** below.

⁸⁰ See the 2011 Preliminary Note (note 4 above) and the 2012 Preliminary Report (note 7 above).

⁸¹ See para. 20 above. It should be noted, however, that these concerns can vary significantly depending upon the States involved in the particular ISA.

⁸² See “A comparative study on the regime of surrogacy in EU Member States”, by Brunet et al (2013) (note 68 above) at section 1.2.

⁸³ See the **Study** at Part C, Section 1.

⁸⁴ See the **Study** at Part C, Section 2: as reported by States, lawyers, health professionals, surrogacy agencies, non-governmental organisations and intending parents.

⁸⁵ A detailed analysis of some of the jurisprudence in this area is undertaken at paras 147 et seq.

⁸⁶ See the **Study** at Part C, Section 3.

IV. THE DESIRABILITY AND FEASIBILITY OF FURTHER WORK ON THE PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS

31. Whether work on this topic should continue at the Hague Conference can be answered by reference to two key questions:

- (1) **Is there a need for further international work?** *i.e.*, Are there practical, cross-border problems which can be remedied or ameliorated by multilateral action and, if so, what is the scale, impact and geographical spread of the problems? Is it such that the investment of resources at the international level is warranted?
- (2) If yes, **might it be possible to reach consensus**, in future, on a binding multilateral instrument in this area and / or on non-binding measures or other practical outcomes which would have a significant impact on the problems identified?

32. This section answers each question in turn by reference to (1) the comparative analysis undertaken in the Study, and (2) the particular responses from Members and other interested stakeholders to the questions asked in the respective Questionnaires concerning future work.

A. Desirability: is there a need for further international work?

"The world is much smaller than it used to be.

People are looking over the borders, so States have to do the same."

Comment by a Dutch lawyer in his response to Questionnaire No 2 concerning the desirability of future international work.

33. The broad consultation process undertaken by the Permanent Bureau, the results of which are set out in the Study, has demonstrated that:

(i) States' internal law approaches to the question of legal parentage vary significantly, in particular in areas such as the (dis)establishment of legal paternity, legal parentage following ART procedures (including surrogacy) and same-sex parenting. The challenges which have arisen in federal and regional work seeking to harmonise substantive laws in this area make clear the importance of remaining focused in international work on building bridges *between* (differing) legal systems, rather than seeking to harmonise laws in this area;⁸⁷

(ii) States' private international laws concerning the establishment and contestation of legal parentage also vary significantly in important respects, whether one is considering questions of jurisdiction, applicable law or the recognition of legal parentage already established abroad (if applicable). Despite some relevant bilateral, regional and international efforts towards unification, there has been no comprehensive global examination of unifying the private international law rules in this area;⁸⁸

(iii) Where children are connected with more than one State or move cross-border, the diversity in internal and private international law rules can cause real, practical problems in terms of the establishment and / or recognition of their legal parentage, as well as concerning their acquisition of nationality;⁸⁹

(iv) Children left with "limping" legal parentage (and, of course, children left stateless) are at risk of suffering serious legal disadvantages throughout their lives due to the myriad of legal consequences which flow from a determination of legal parentage in most States. Indeed, the exercise of children's fundamental rights may be impeded in this situation and they may be in a position in which they are, in effect, discriminated against because of the circumstances of their birth (contrary to multiple international human rights treaties).⁹⁰

34. In terms of the **scale** and **impact** of this issue, whilst the information obtained from the consultation process shows that cross-border problems concerning legal parentage are

⁸⁷ See Section III.A above and the **Study** at Part A.

⁸⁸ See Section III.B above and the **Study** at Part B.

⁸⁹ See Section III.B above and the **Study** at Part B, Section 3, as well as at Part C, Section 2(a).

⁹⁰ See para. 20 above and the **Study** at Part B, Section 3, as well as at Part C, Section 2(a).

already occurring in multiple different contexts including in *non*-surrogacy cases,⁹¹ the problems occurring for children in the context of ISAs are undoubtedly the most acute and urgent. This is due to: (1) the number of ISA cases taking place today and the likely thousands of children implicated;⁹² (2) the fact that cross-border legal status issues arise in the overwhelming majority of these cases due to their factual specificities;⁹³ and (3) the serious broader concerns, implicating the fundamental rights of children and women, which also arise in ISA cases.⁹⁴

35. That said, it is clear that even outside the ISA context, the cross-border problems evidenced in the Study are only an (early) indication of what will likely be a growing global issue. This is because the demographic, societal and medical trends outlined in Section II above are set to continue into the future, meaning that the number of children born to, for example, unmarried couples, or following ART procedures, or to non-traditional families will continue to rise in the coming years. This will take place against a backdrop of ever-increasing globalisation and cross-border movement, including movement driven by the difference in States' laws in this area (*i.e.*, movement for cross-border reproductive services). Meanwhile, whilst there are some developments in similar directions, on the whole, States' laws on these issues do not seem to be quickly converging. The potential for cross-border problems concerning legal parentage in general to occur with even greater frequency in future therefore cannot be ignored.

36. In terms of the **geographic spread** of the problems, as one State response expressed, "[i]ssues regarding legal parentage ... are likely to be encountered in all States, regardless of ... their domestic regimes; such issues are therefore of global interest and concern."⁹⁵ The results of the consultation process support this view in that the problems encountered in relation to legal parentage are demonstrably not confined to one region of the world, or one legal approach or culture. It is the *difference* in the approaches of States which drives the problems, combined with the increasing internationalisation of family life (whether through cross-border movement or multi-nationality families), as well as the strong human desire to have children. This is particularly true in the ISA context. Information provided by the specialist lawyers shows that the phenomenon is touching every region of the world and the internal approach of a State to surrogacy will make no difference to whether it is touched by the phenomenon or not.⁹⁶

37. The responses of States to Questionnaire No 1⁹⁷ demonstrate that many States already acknowledge the needs which could be addressed by future international work and, in fact, a large degree of agreement exists between the States which answered this part of the Questionnaire. Several States emphasised, as expressed by Canada, the need to "ensure greater predictability and legal certainty regarding the legal parentage of children in cross-border situations generally".⁹⁸ However, the majority of responses focused on what were seemingly considered the most urgent needs; that is, those arising in the ISA

⁹¹ See the **Study** at Part B, Section 3.

⁹² See the **Study** at paras 125 to 129.

⁹³ See the **Study** at Part C, Section 2, paras 147 to 184.

⁹⁴ See the **Study** at Part C, Section 2, paras 185 to 215.

⁹⁵ See response of Canada to Question 87. This was acknowledged by several States which may have strict (or no) legislation concerning matters such as ART and / or surrogacy: *e.g.*, see the response of Lithuania to Question 87.

⁹⁶ See the **Study**, paras 130 to 134, in relation to the vast number of States implicated in the phenomenon of ISAs, including the geographic spread of such States, touching all regions of the world, and the diversity of legal cultures and approaches represented therein. Indeed, even in States in which there is an extra-territorial prohibition on seeking certain ART services abroad, with penal consequences, persons resident in those States are still seemingly entering into ISAs in other States.

⁹⁷ Which sought views on the needs which should be addressed by any future global work: see, *e.g.*, Question 86.

⁹⁸ *E.g.*, this general need for more certainty concerning legal status issues for children was also emphasised by: Chile, Colombia, Portugal, Slovakia, and Spain. A Report commissioned by the EU Parliament (see note 68 above), albeit in the ISA context, also concluded that "what all Member States appear to agree on is the need for a child to have *clearly defined legal parents and civil status*; however such is eventually facilitated in legal terms" (at section 5.3; emphasis added).

context.⁹⁹ In this context, the issues surrounding the legal status of children born to ISAs, and in particular the need to eliminate “limping” legal parentage and statelessness, were the most acute needs identified by States. However, in addition, many States mentioned the need to ensure respect for the rights and welfare of all parties to an ISA, including surrogate mothers and children, in any future international work. Indeed, as may be expected, the specific needs highlighted by States as those which should be addressed by future work echoed the areas of concern identified,¹⁰⁰ *i.e.*; the need to ensure surrogate mothers’ free and informed consent to ISAs;¹⁰¹ the need to ensure appropriate standards of medical care for surrogate mothers and children, including ensuring the surrogate mother’s ability to retain decision-making over her own body; the need for some minimum checks concerning the intending parents’ suitability to enter into the arrangement, and the need to establish standards concerning the child’s right to know his / her genetic and birth origins.

38. This broad acceptance concerning the needs to be addressed was also apparent between different categories of stakeholders. For example, many lawyers (from both receiving States and States of birth) identified the same needs, noting that international work should ensure that children have a secure legal status within their family unit worldwide. Whilst some noted these concerns generally, many responses raised these issues in the ISA context specifically, stating that these are the “most frequent problems associated with ISAs”, observing that “these issues are rarely...disputes amongst the actual parties to ISAs – these are disputes among States...[which] stand in the way of the safety and security of the world’s most vulnerable population: children”. Several lawyers also emphasised the need to address the complex and emotionally and financially draining processes, as well as considerable bureaucracy, which families and children must currently navigate immediately following the birth of a child to secure the child’s legal status (if possible). Many also acknowledged the need to go beyond status issues and ensure minimum standards which would protect the rights of all parties to the arrangement.¹⁰² Whilst the overwhelming majority of lawyers identified the needs in the ISA context, as “urgent” or “very urgent”, some also highlighted that, due to the complexity and sensitivity of the area, it was preferable to reach the right result in terms of international legislation than to rush through the process due to the urgency of the needs and possibly make the situation worse for children and families.¹⁰³

39. In addition, the intending parents who have themselves undertaken ISAs all¹⁰⁴ expressed a desire for future international legislation in the ISA context, with many expressing the urgent need to ensure the establishment or recognition of children’s legal statuses in terms of their nationality and legal parentage. They also commented, however, upon the need to ensure that the rights of the surrogate mother were protected in international work, some contrasting States of birth in which they consider there is better practice in this regard, with other States of birth in which concerns are heightened.

40. In light of the above, as well as the detailed analysis undertaken in Parts B and C of the Study, it is considered that the **need** for further international work in this area is plain, both urgently in the ISA context, but also beyond in terms of legal parentage in general. Indeed, as stated above, it is considered that there is a children’s rights imperative to this work.

⁹⁹ *E.g.*, the following States identified the needs arising from ISAs as those which should be addressed by future global work: Canada (as well as identifying the broader need concerning legal parentage), Chile (as for Canada), Colombia (as for Canada), Finland, Germany, Guatemala, Ireland, Israel, New Zealand, Norway, Portugal (as for Canada) and Spain (as for Canada).

¹⁰⁰ See the **Study** at Part C, Section 2.

¹⁰¹ Including consideration of punitive contractual clauses which may undermine such free consent.

¹⁰² In this respect, issues of the surrogate mother’s free and informed consent, the (mis)information currently provided to intending parents by some intermediaries (and the need for better education of some intermediaries), the child’s right to know his / her origins, and some basic minimum checks concerning the intending parents frequently identified as specific areas of need.

¹⁰³ As one UK lawyer put it: “[i]ncreasing numbers of children are being born through ISAs and their needs should be urgently addressed. However...any regulation which is ill-thought through would be worse for children and families than the current arrangements.”

¹⁰⁴ Save one where this question was not answered.

B. Feasibility: might it be possible to reach consensus on a multilateral approach in future?

41. The far more difficult questions remain in the realm of feasibility: that is, whether, bearing in mind the diverse approach of States to questions concerning legal parentage in internal and private international law, as well as the difficult questions of public policy raised in an area traditionally strongly connected with States' cultural and social milieu, common ground can be found to move forward towards a multilateral approach to the cross-border aspects of legal parentage. The answer to this question may depend, first, on the **scope** of what it is sought to achieve: for example, whether a single issue instrument on ISA is being considered or a broad private international law regime for legal parentage (as discussed tentatively in the 2011 Preliminary Note and the 2012 Preliminary Report), or a combination of the two, or something entirely different. It may also depend upon the **nature** of what it is sought to accomplish: that is, whether binding solutions are sought or whether soft law measures might be considered, even as a preliminary step.

42. The responses of Members and other stakeholders to the question of the approach which should be taken to possible future work, as well as the priority which should be given to such work, were revealing in terms of the overall feasibility of the continuation of the project. These responses will be summarised first, before giving a brief analysis of some of the possible future approaches in light of Members' views in particular.

(1) Views expressed concerning the approaches to be taken to future work and the priority to be given to such work

43. In general,¹⁰⁵ where provided, the views of Members and non-Member interested States concerning the approaches which might be taken to future work were marked by their flexibility, openness and willingness to consider multiple different options to resolve the needs they had identified as requiring resolution at the international level. This flexibility was demonstrated both in relation to the scope of any future work, as well as in relation to the particular approach which might be adopted and the binding (or non-binding) nature of any future work.¹⁰⁶

The scope of any future work

44. In terms of the scope of any future international work, support was expressed by several States for an approach which looks to unify private international law rules concerning legal parentage generally.¹⁰⁷ In some of these States, this was stated to be something which could be considered either prior to, or alongside, specific consideration of the issues arising in the ISA context. Within such an approach, some States affirmed their willingness to consider a unification of applicable law rules or to examine the possibility of recognition of legal parentage by operation of law, particularly in relation to foreign judicial decisions concerning legal parentage. However, concerning the latter point, several States considered that any "recognition by operation of law" would need to be based on a "trustworthy procedure" conducted in the State of origin and, in this regard, adequate safeguards and common minimum standards would be crucial, in particular, in order to restrict the application of the public policy clause in some cases.¹⁰⁸ As Serbia observed, "[t]he precondition of recognition by operation of law is mutual trust between States, and safeguards could be of great importance in building it."¹⁰⁹

¹⁰⁵ It should be noted that this was not exclusively the case: see para. 51 below.

¹⁰⁶ Such an approach is illustrated by the response of the Czech Republic which, whilst noting that surrogacy is a highly sensitive topic, stated: "[w]e cannot be detailed in our future expectation at this stage; we can only confirm our readiness to start a serious discussion and willingness to find solutions" (see response of Czech Republic to Question 89 g)).

¹⁰⁷ *E.g.*, see the responses of Canada, Germany, Poland, Lithuania, and Slovakia.

¹⁰⁸ *E.g.*, see the responses of Germany, Latvia, Lithuania and Serbia.

¹⁰⁹ See Serbia's response to Question 88 c).

45. In relation to ISAs, several States expressed the need to focus specifically on the challenges arising in this context, whether within the context of the broader work discussed above or as a “stand-alone issue”. Whilst there was considerable support for work towards transnational co-operation and minimum standards in this context, some States (as with other stakeholders)¹¹⁰ expressed their hesitation at drawing too heavily from the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, the “1993 Hague Convention”) when considering international legislation in this area. As Canada expressed in relation to intercountry adoption and international surrogacy, whilst there are undoubtedly some lessons which can be drawn from the 1993 Convention, “the two situations [...] present important differences that may make the transfer of the framework provided by the 1993 Convention [...] to international surrogacy undesirable and / or not feasible without further review and necessary adaptation”.¹¹¹

46. In terms of a co-operation framework concerning ISAs, a number of States identified that a key aim should be, “to consider the possibility of drafting an international instrument that would introduce a mechanism for co-operation between the competent authorities of the States of parents and surrogate mothers of children born by using such method, which would allow resolving any legal matters related to the child’s filiation and citizenship ex-ante, i.e. before conception” [*sic*; emphasis added].¹¹² Concerning the minimum standards, as stated by Serbia, “determining...the elements which ought to be minimum standards must be based on practical problems experienced in States”.¹¹³ In relation to the possible establishment of Central Authorities in any new instrument, States were of the view that whether there is a need for Central Authorities will depend upon the scope and nature of any instrument being considered and that this issue warrants further discussion in that context.¹¹⁴

47. Other stakeholders again articulated very similar views to those expressed by States in terms of the approach to be adopted. For example, several specialist lawyers pointed out that since a harmonisation of substantive laws in this area is impossible, an approach which looks to unify private international law rules is the best hope for a solution in an area with a demonstrated urgent need. Although some lawyers considered the best approach to be a “single-issue instrument” focused on ISAs, the majority of support was for a broad scope instrument that perhaps deals with ISAs as one (specific) aspect of a greater issue. However, several lawyers stated that, if this was the route adopted, there was also an urgent need for specific best practice guidelines / guidance in the ISA context. This work would need to be pragmatic and take into account the realities on the ground. Some lawyers expressed that it was important for any international legislation concerning legal status not to add layers of bureaucracy for families to an already overly-bureaucratic process. Caution was also voiced by lawyers that an overly restrictive approach to ISAs would only drive “determined” intending parents “underground”. In addition, as with States, many saw important lessons which could be learnt from the experience with the 1993 Hague Convention (whether positive or negative). All agreed on the need to avoid conflating intercountry adoption with international surrogacy.

The nature of any future work

48. Due to the nature of the needs identified, all States which expressed an opinion on the point preferred an approach which might lead towards the creation of a binding international instrument in future.¹¹⁵ However, several States acknowledged that, particularly in the ISA context, soft law measures, such as non-binding principles or

¹¹⁰ *E.g.*, the submissions from legal practitioner associations also evidenced this hesitation.

¹¹¹ See Canada’s response to Question 87.

¹¹² See Lithuania’s response to Question 87.

¹¹³ See Serbia’s response to Question 89 d).

¹¹⁴ *E.g.*, a broader instrument which seeks to harmonise private international law rules generally may have less need for Central Authorities than a co-operation framework in the specific ISA context, in which case Central Authorities might be a useful focal point for cross-border communications.

¹¹⁵ *E.g.*, Canada, Colombia, Finland, Ireland, Israel and Serbia.

guidelines, might be contemplated as a useful first step.¹¹⁶ The same view was expressed by many specialist lawyers.¹¹⁷

Prioritisation of future work¹¹⁸

49. Questionnaire No 1 also asked Members and non-Member interested States to consider the priority which should be given to future work in this area, either in relation to a future instrument on the private international law issues concerning the status of children generally (in particular, the cross-border recognition of legal parentage), or concerning a future instrument addressing the challenges arising in the ISA context specifically. Twenty-five States responded to the questions concerning the prioritisation of future work.¹¹⁹ Of these 25 States:

1) 22 States accorded working towards a future instrument on the private international law issues concerning the status of children and, in particular, the cross-border recognition of legal parentage, some level of priority (*i.e.*, as opposed to “no priority – no further work should be done in this field”): five States responded that it was a high priority (urgent): Chile, Colombia, Czech Republic, Finland and Mexico; 11 States responded that it was a medium priority (desirable but not urgent): El Salvador, Germany, Guatemala, Ireland, Lithuania, New Zealand, Philippines, Portugal, Serbia, Slovakia and Spain; and seven States responded that it was a low priority (possibly desirable but not urgent): Dominican Republic, Hungary, Republic of Korea, Latvia, Netherlands, Poland and Sweden.

2) 20 States accorded working towards a future instrument specifically on the challenges occurring as a result of ISAs some level of priority: 10 States responded that it was a high priority (“urgent”): Chile, Colombia, Finland, Ireland, Israel, Republic of Korea, Mexico, Philippines, Portugal and Serbia; six States responded that it was a medium priority (“desirable but not urgent”): Czech Republic, El Salvador, Germany, Guatemala, Netherlands and New Zealand; and four States responded that it was a low priority (“possibly desirable but not urgent”): Dominican Republic, Lithuania, Spain and Sweden.

50. Moreover, three States which did not tick the prioritisation boxes made positive comments concerning the prioritisation of work in response to the relevant questions. Canada stated that it “views the establishment of a Group of experts to assist the Permanent Bureau in considering options for the development of a private international law instrument on the legal parentage of children as a high priority” and Australia expressed a similar opinion, supporting and prioritising the establishment of a working group. Switzerland stated that it “supports further work of the Hague Conference on this topic and feels that such work is necessary in order for the Member States to take an informed decision”.

51. Three States (Israel, Monaco and the USA) responded that no further work should be undertaken towards an instrument on the private international law issues concerning legal parentage generally. However, Israel stated that further work towards a multilateral instrument specifically on ISAs was a “high priority”. Five States (Hungary, Latvia, Poland, Slovakia and USA) responded that no further work towards a multilateral instrument specifically on ISAs should be undertaken and Monaco commented it was “*inopportun*”, but four of these States (Hungary, Latvia, Poland and Slovakia) stated that work in relation to

¹¹⁶ *E.g.*, Colombia, Finland, New Zealand, Mexico and Uruguay also mentioned the possibility of a model law.

¹¹⁷ Whilst most lawyers stated that a binding instrument was required and should be the ultimate goal of work, some acknowledged the time-consuming and complex international legislative process and suggested that work on best practice guidance / guidelines in the ISA context would be, practically speaking, very helpful in the meantime and could perhaps take place alongside work towards a binding instrument.

¹¹⁸ It should be noted that this section deals with questions of “absolute” priority: *i.e.*, whether it is considered by Members that work should continue on this project at the Hague Conference *at all*. In contrast, paras 74 to 75 below, deal with questions of “relative” priority: *i.e.*, if work is to continue in this area, what priority should it be given *as against other areas of work*.

¹¹⁹ Questions 90 and 91.

legal parentage more generally should be accorded some form of priority. Sweden commented that work on both areas may be premature.¹²⁰

(2) Brief analysis of some possible future approaches

52. In light of the views expressed by Members and other stakeholders concerning possible future international work and the Study undertaken, this section provides some tentative thoughts regarding the feasibility of the two main approaches which responses focused upon. It should be noted, however, that these thoughts are only tentative in nature and, as discussed in **Section V** below, it is considered that more information-gathering and discussion with Members is required before any conclusion can be reached on the feasibility of further work.

a. Broad unification of private international law rules concerning legal parentage¹²¹

53. It is clear that a key policy objective of undertaking work towards the unification of private international law rules concerning legal parentage would be to ensure (international) legal certainty and security of status for children and families. However, to achieve this goal, as was stated by the Permanent Bureau in 2011,¹²² due to the nature of legal parentage and the numerous ways in which it can be established in most, if not all, internal laws (*e.g.*, by operation of law, by voluntary acknowledgement and by court decision), it seems unlikely that a comprehensive future instrument concerning the private international law aspects of the establishment and contestation of legal parentage could, in line with recent private international law debates, see unification of applicable law rules and the establishment of a recognition procedure for decisions and situations arising by operation of law, as alternative approaches. In fact, it seems likely that both approaches would be required in any international instrument, in particular in light of the various ways in which legal parentage can arise (and be contested).¹²³

54. For example, whilst the relative congruity in States' approaches to the recognition of court decisions concerning legal parentage¹²⁴ might mean that "recognition by operation of law" of certain *judicial* decisions concerning legal parentage could be envisaged in a future global instrument (clearly only if subject to certain safeguards – see below), uniform rules concerning the law applicable to the *establishment* of legal parentage by operation of law would still likely be required. This is in view of the fact that only a minority of States currently appear to recognise the underlying *decision* of a competent registrar evidenced by a foreign birth certificate, with the majority giving foreign certificates only evidential (if any) weight.¹²⁵ In addition, the same approach might be required for the issue of voluntary acknowledgements in light of the fact that many States still apply a "conflicts of law" (applicable law) approach to such acknowledgements, rather than a recognition approach.¹²⁶ However, further information should be sought on this issue and the latter

¹²⁰ It should be noted that, whilst not in response to the Questions concerning prioritisation of future work, Poland and Hungary also expressed that, concerning work on ISAs, in the words of Hungary, "possible global work in this field seems to be a bit premature, since we lack the experiences on international surrogacy matters" (see the responses of both States to Question 86).

¹²¹ It should be noted that whilst it is acknowledged that issues concerning the cross-border recognition of legal parentage could be said to form part of a bigger debate concerning the cross-border recognition of the effects of civil status documents / acts, it is considered that, due to the complexity and specificities of legal parentage / filiation, there is a need for this civil status event to be considered separately. This was, in fact, the approach recommended by some States in response to the 2010 EU Green Paper, "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records" COM(2010) 747 final.

¹²² See the 2011 Preliminary Note (note 4 above), at para. 50.

¹²³ This would be akin to the approach adopted, for example, in the 1996 Convention, in which direct unification of jurisdiction rules enables "recognition by operation of law" to take place concerning measures directed to the protection of the person or property of the child but a unification of applicable law rules is still required to cover situations where parental responsibility arises by operation of law.

¹²⁴ See the **Study** at paras 92 to 97.

¹²⁵ See further the **Study** at paras 85 to 87. However, further explorative work should be undertaken in this regard since there were a number of State responses in which the approach to foreign birth certificates was not entirely clear (see para. 86.4) of the **Study**).

¹²⁶ See the **Study** at paras 88 to 91.

approach might be explored in future discussions since States were more evenly balanced on this issue and there was some indication of perhaps a trend towards recognition.¹²⁷

55. When considering the feasibility of the unification of applicable law rules in relation to the establishment of legal parentage by operation of law, it cannot be denied that, due to the apparent (at this stage) variation in the connecting factors currently applied by States,¹²⁸ unification of these rules poses challenges.¹²⁹ Moreover, the difference in approach between civil law and common law States, with the latter seemingly often applying the *lex fori* to these questions, would need to be addressed since it could be perceived as unduly onerous by these States for their authorities to have to apply foreign law. In addition, questions of access to foreign law and proof of foreign law will likely arise.¹³⁰ Further, depending upon the connecting factor(s) identified, issues of “mobile conflict” (*i.e.*, the connecting factor varying over time – such as would be the case with “habitual residence”), would need to be addressed. Moreover, even if it is possible to unify connecting factors in this area, it is hard to envisage that the application of foreign law would not be subject to a public policy clause (indeed, a restriction to the public policy clause in these circumstances has allegedly been the primary factor causing some existing treaties to fail to attract (more) ratifications / accessions¹³¹). This issue would need to be considered carefully and attention should be paid to how the public policy clause might be crafted in view of the need to balance the ability of States to uphold their public order, with the need for children’s rights and welfare to be adequately taken into account.

56. In terms of the possibility of establishing recognition “by operation of law” in relation (at least¹³²) to legal parentage established by a foreign *judicial* decision,¹³³ bearing in mind the existing approaches of States and the fact that States are unlikely to accept the unconditional acceptance of rights acquired abroad with no safeguards (particularly in view of the context), consideration may need to be given to establishing: (1) direct or indirect rules of jurisdiction; and (2) safeguards to the recognition process, which might be expressed as grounds upon which non-recognition of a foreign decision may be based.

57. In relation to the first point, if feasible, it might be considered preferable to try to establish unified *direct* rules of jurisdiction.¹³⁴ However, whether this is feasible requires further study since the connecting factors used by States to found jurisdiction in relation to declarations and contestations of legal parentage appear, to date, many and varied.¹³⁵ If it were possible to unify direct rules of jurisdiction, thought would also need to be given to whether a unified applicable law rule would need to be established concerning the law applicable to contestations of legal parentage or whether general unified applicable law rules (*e.g.*, concerning the law applicable to legal parentage arising by operation of law, or by voluntary acknowledgement) would suffice.¹³⁶ If establishing unified direct jurisdiction rules proves impossible, however, it might be hoped that agreement could be reached concerning *indirect* rules of jurisdiction, possibly looking to an approach which seeks to

¹²⁷ See, *e.g.*, para. 90 of the **Study**.

¹²⁸ Described in the **Study**: see Part B, section 2 at paras 74 to 81.

¹²⁹ Perhaps some inspiration could be drawn, in this regard, from the 1965 *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions* (no longer in force).

¹³⁰ In this regard, see previous Hague Conference work on accessing the content of foreign law, available on the Hague Conference website at < www.hcch.net > under “Work in Progress” and “General Affairs”.

¹³¹ See the discussion of this in the **Study** at para. 111.

¹³² Although further explorative work might also still consider a recognition approach for decisions of other competent authorities concerning legal parentage (*e.g.*, registration authorities), depending upon the outcome of further comparative research on this issue: see note 125 above. Establishing unified direct jurisdiction rules in relation to these authorities might, in fact, pose fewer challenges bearing in mind the near universal adoption by States of the principle that the competent authorities should register a child born on the territory of their State (in line with the requirements of Art. 7 UNCRC: see the **Study** at paras 3 et seq and 67 et seq). However, the approach to be taken to the question of the jurisdiction of authorities to register (*e.g.*, national) children *born abroad* would require further discussion in light of the variation in States’ approaches (see para. 68 of the **Study**).

¹³³ Discussion would need to take place as to whether this would include judicial “declarations” of legal parentage (*e.g.*, given following an uncontested application), as well as judicial decisions following a contested procedure.

¹³⁴ As was undertaken in the 1996 Convention.

¹³⁵ See the **Study**, Part B, at para. 103.

¹³⁶ See the varied State approaches to this issue described in the **Study** at para. 104.

ensure a connection between the child and the State which is determining legal parentage, but without imposing overly onerous requirements concerning that connection.

58. In relation to the second point, in view of the fact that States' current approaches appear to display a significant degree of congruity concerning the grounds for non-recognition of foreign judicial decisions concerning legal parentage,¹³⁷ the following can already be envisaged as possible unified grounds for non-recognition – for example: the foreign decision was rendered in contravention of fundamental due process principles (e.g., a party was not served or did not have the chance to be heard in the foreign proceedings; the foreign decision is not final / conclusive); the foreign decision contradicts an earlier final decision of the recognising State or a decision of a third State which has already been recognised, or may be recognised, by the State; the same action between the same parties is pending in the recognising State (or, in some cases, in a third State) and this action was commenced prior to the foreign proceedings (*lis pendens*); and the foreign decision is manifestly contrary to the public policy / order of the State, *taking into account the best interests of the child*.¹³⁸ In relation to the last point, it is to be hoped that if there were agreement concerning direct or indirect rules of jurisdiction, as well as safeguards to the process in terms of grounds for non-recognition, recognition by operation of law of a foreign judicial decision concerning legal parentage might be less likely to infringe a State's public policy, particularly when taking into account the best interests of the child (as, in any event, required for many States by Art. 3 of the UNCRC¹³⁹).¹⁴⁰ This would *a fortiori* be the case if the purpose of the instrument were taken into account in such a determination: *i.e.*, to ensure the cross-border continuity and legal certainty of children's legal parentage.

59. Consideration would also need to be given to the scope of any "recognition by operation of law" in this context: *i.e.*, whether any recognition would also extend to recognising the *effects* (*i.e.*, consequences) of the legal status under the foreign law. In this respect, it might be that Article 26 of the 1993 Convention could provide some inspiration in that a future instrument might provide some minimum legal effects which would derive from the recognition of legal parentage without subjecting the entire question of the effects to the foreign law which might be unduly onerous for the recognising State. Indeed, in this way, the recognising State would be able to control the potentially far-reaching effects in internal law which the determination may have since determinations as to legal parentage, of course, affect the rights and responsibilities of those involved,¹⁴¹ as well as potentially having an impact on immigration and nationality matters.¹⁴² Indeed, whilst these policy matters will need to be continually borne in mind during further discussions as to the feasibility of future international work, it will be important to also remain aware of the reality that these cases are occurring anyway, both in the ISA context,

¹³⁷ See the **Study**, paras 92 to 97.

¹³⁸ Drawing inspiration from Art. 24 of the 1993 Convention, as well as Arts 22 and 23(2) *d*) of the 1996 Convention, and taking into consideration Art. 3 of the UNCRC (see note 139 below).

¹³⁹ The UN Committee on the Rights of the Child has, in its General Comment No 14 on Art. 3(1) UNCRC (see note 58 above), confirmed that "[t]he expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations" (para. 37) and "[v]iewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned" (emphasis added, para. 40).

¹⁴⁰ Inspiration concerning provisions regarding recognition "by operation of law" might also be drawn from existing international conventions which adopt this approach, such as: ICCS Convention No 32 on registered partnerships (2007); ICCS Convention No 31 on the recognition of surnames (2005); and ICCS Convention No 29 on the recognition of decisions recording sex reassignment (2000). Also, the 1978 *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages* contains interesting provisions in this regard and the 1993 Convention provides for recognition of adoptions "by operation of law" based on an agreed co-operation framework and division of responsibility between States.

¹⁴¹ *E.g.* matters concerning parental responsibility, maintenance, inheritance, marriage, *etc.*

¹⁴² In relation to immigration / nationality matters, inspiration might also be drawn from Art. 18 of the 1993 Convention and its subsequent interpretation at Special Commission meetings, following which it has been held that, "[t]he policy of Contracting States regarding the nationality of the child should be guided by the overriding importance of avoiding a situation in which an adopted child is stateless" (see Recommendation No 19 of the 2010 Special Commission Conclusions and Recommendations). This policy objective would also be in line with international and regional human rights law which confirms the need to prevent and reduce statelessness, as well as with the interpretation of Art. 3 provided by the UN Committee on the Rights of the Child: see further, paras 58 et seq of the **Study**.

as well as outside this context, and ultimately have to be resolved for children and families.¹⁴³ At the current time, this is happening in a (resource-intensive) piecemeal fashion and following processes which are frequently time-consuming and complex - legally, financially and emotionally - for all involved.

60. When considering the problems arising in the context of ISAs, however, it is important to recognise that an approach which focuses on a pure unification of private international law rules concerning legal parentage will not address the broader policy concerns arising as a result of the phenomenon, concerns which many Members and other stakeholders have identified as worthy of consideration in any future international work. Moreover, even in relation to the legal status problems arising in the ISA context, due to the particular public policy issues which surrogacy raises, it may be that a separate (but related) consideration of ISA cases must anyway be undertaken. This connected discussion might consider, in light of the progress of discussions on a broader instrument, whether the issues arising in ISAs could be addressed *within* any broader instrument (perhaps as an optional part of such a broader instrument) or whether ISA cases need to be addressed separately. The next section briefly highlights some of the key issues which would need to be discussed in this context.

b. Future work concerning International Surrogacy Arrangements

61. In the ISA context, there seems to be, in general terms, broad agreement between a number of States (and other stakeholders)¹⁴⁴ on two key policy objectives which should be borne in mind when considering future international work in this area:¹⁴⁵

- (1) The first objective is identical to that expressed in relation to the broader work on the private international law aspects of legal parentage, only in the specific ISA context: *i.e.*, to ensure that children born as a result of ISAs have certain and secure legal status, recognised in all States involved with the family and beyond, insofar as is possible.¹⁴⁶
- (2) However, beyond this, a second objective of international work identified in the ISA context is to ensure that ISAs are conducted in a manner which respects the human rights and welfare of all those involved with the arrangement, including the child(ren) to be born as a result.

62. In light of these key objectives, there also seems to be considerable agreement between many States and other stakeholders that any future work looking to include coverage of ISAs (*e.g.*, a “stand-alone” instrument, or work as part of a broader instrument) should include:

- 1) Fundamental minimum¹⁴⁷ substantive safeguards concerning ISAs;
- 2) Combined with an international co-operation framework to enable States to ensure: (i) compliance with those safeguards and (ii) that the child’s legal status is secure prior to the commencement of any medical procedures (*i.e.*, prior to conception).

¹⁴³ Alternatively, families are placed in situations in which they feel they have to misrepresent the truth of the situation to the competent authorities: see the examples provided in the **Study** at Part B, Section 3.

¹⁴⁴ As noted in para. 51 above, however, it should be recalled that not all Members are agreed on work progressing in this area and the agreement described in this paragraph is between those that consider work should continue (with whatever degree of priority).

¹⁴⁵ Furthermore, as mentioned in para. 47 above, whilst not ignoring any important transferable lessons (positive and negative) from the intercountry adoption context and the years of experience with drafting and operating the 1993 Convention across the globe, there seems to be a broad acceptance that any future international legislative approach should respect the difference between intercountry adoption and international surrogacy since, “[i]n adoption, a government entity is sanctioning the placement of an already existing child in a new parental home; in surrogacy the intended parents are initiating the conception of their own child and a government entity is being asked [...] to help protect the integrity of the process and to ensure the security of the resulting child” (from the submission of AAARTA).

¹⁴⁶ A related goal would be to prevent statelessness of children and ensure their right to a nationality is upheld, a right affirmed by international and regional human rights instruments: see the **Study** at Part A, Section 2.

¹⁴⁷ *I.e.*, additional, higher standards may still be imposed by States.

63. In relation to the minimum substantive standards, the aim of international work would not be to engage in a process which would seek to create a uniform law in relation to surrogacy - something which would not be desirable or feasible.¹⁴⁸ Nonetheless, it is apparent from both the international case law on ISAs¹⁴⁹ and the State responses that it may well be necessary to identify, and ensure the satisfaction of, key minimum substantive safeguards in order to provide the necessary basis for international co-operation in this area. These substantive minimum safeguards would also go towards achieving the objective identified above concerning the protection of the rights (and welfare) of all parties to the ISA. From the needs identified to date by States, echoing the areas of concern mentioned by many, it could be envisaged that this might include minimum standards to ensure (in no particular order):

- 1) The free and informed consent of surrogate mothers to any ISA;¹⁵⁰
- 2) That all parties are appropriately informed and educated about any ISA, both legally, in all relevant States, as well as medically and psychologically;¹⁵¹
- 3) The medical and psychological suitability of a woman to become a surrogate mother;¹⁵²
- 4) The welfare of any child born to an ISA:¹⁵³ *e.g.*, this may include some basic checks in relation to the intending parents, including child abuse and criminal background checks and possibly upper age restrictions,¹⁵⁴ as well as provisions concerning the child's right to know his / her origins. This latter issue will need further discussion to determine what minimum standards might involve (due to the diversity of State approaches to the issue). However, international and regional human rights standards will need to be kept closely in mind.¹⁵⁵
- 5) The appropriate competency and conduct of intermediaries:¹⁵⁶ again, the precise standards which might be included here would require further discussion but it may be unnecessary to include provisions akin to the accreditation requirements of the 1993 Convention. Whilst it is clear that problems are occurring based on the competency / conduct of some intermediaries, it is also clear that experienced and competent intermediaries are providing vital support to parties and can be an important safeguard to the ISA process. Consideration therefore needs to be given

¹⁴⁸ Nor would the process therefore seek to, in effect, legislate for those States which, it might be considered, should legislate internally concerning surrogacy.

¹⁴⁹ See the **Study** at paras 147 et seq.

¹⁵⁰ Such a requirement would also be in line with international bioethics standards as expressed in, *e.g.*, the *Universal Declaration on Bioethics and Human Rights* (adopted on 19 October 2005 by the 33rd session of the General Conference of UNESCO) which, in Art. 6(1), states, "Any [...] medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice." See further the **Study** at Part A, Section 2. For example, requirements for independent legal representation for surrogate mothers (in the State of birth, at least), to be paid for by the intending parent(s), might be considered, as well as any necessary translation / interpretation support to ensure that the surrogate mother fully understands the ramifications of any agreement she is signing.

¹⁵¹ *Ibid.* *E.g.*, this may include requirements concerning legal advice in the States concerned, as well as requirements concerning informative counselling for all parties by an appropriately qualified medical and / or mental health professional prior to the commencement of any ART procedures (not to focus on "screening" parties but to educate and inform parties).

¹⁵² *E.g.*, possible age, medical / health and previous live birth requirements.

¹⁵³ Such a standard could ensure compliance with Art. 3(2) of the UNCRC: that is, "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being [...]". The UN Committee on the Rights of the Child in its General Comment No 14 on Art. 3(1) UNCRC (see note 58 above) confirmed that the terms "protection and care" must be "read in a broad sense" in terms of ensuring the child's well-being and development and "[c]hildren's well-being, in a broad sense includes their basic material, physical, educational and emotional needs, as well as needs for affection and safety" (para. 71). It might also be considered in accordance with Art. 3(1) since the General Comment also states that "assessment of the child's best interests must also include consideration of the child's safety [...]" (para. 73).

¹⁵⁴ This is not suggesting an approach akin to a "home study" in the intercountry adoption context but rather some basic, minimum checks.

¹⁵⁵ It might be that Art. 30 of the 1993 Convention (subject to appropriate modifications) could be some inspiration in this respect, in particular in view of the diversity of internal laws concerning these questions and the fact that agreement on standards beyond this might be challenging.

¹⁵⁶ Consideration would also need to be given as to which intermediaries would be subject to which standards since, in the ISA context, many different intermediaries are involved (*e.g.*, surrogacy agencies, fertility clinics / hospitals, ART banks *etc.*): see further the **Study** at paras 139 to 145.

as to whether and, if so, how standards could be set without introducing prohibitive costs and overly burdensome processes for intermediaries.¹⁵⁷

64. Some further areas identified by stakeholders which might also be explored to determine whether minimum standards at the international level are warranted include:

- 1) Basic medical safeguards:¹⁵⁸ how far any instrument should establish minimum standards concerning ART medical procedures leading to conception, and how far this should be an issue left to regulation in the State of birth, is an issue which requires further discussion. Nevertheless, due to the serious concerns regarding these issues in some States of birth (and the fact that other “new” States may become States of birth in future and similar concerns may arise¹⁵⁹), some very basic minimum standards might be envisaged concerning, for example, the maximum number of embryos to be transferred to any surrogate mother and the number of surrogate mothers who can be impregnated at one time for one set of intending parents.¹⁶⁰
- 2) Provisions in case of breakdown of the ISA to protect all parties: *e.g.*, such that, once an agreement is entered into, the intending parents will be responsible for any child born, including but not limited to circumstances in which the child has any special needs and / or if there are any errors by clinics providing medical services (*e.g.* due to gamete or embryo mix-ups).
- 3) Limitations to contract terms (including identifying impermissible terms): *e.g.*, an ISA shall not include provisions that unduly coerce the surrogate mother to terminate or reduce a pregnancy, or provisions which would unduly penalise a surrogate mother for breach of an ISA, effectively economically coercing her to continue with an arrangement when she no longer wishes to do so.¹⁶¹
- 4) The financial aspects of the arrangements:¹⁶² *e.g.*, compensation should be linked with the surrogate mother’s time, effort and risk and not with the outcome of the pregnancy.

65. In terms of a co-operation framework, the primary need is for any co-operation between States to work *ex-ante* and before conception takes place in order that the parties and the States involved can be apprised of potential difficulties concerning a child’s legal status *before* the child is (even) conceived. One issue which will require further discussion

¹⁵⁷ The AAARTA submission identifies the concerns in this regard in the USA following implementation of the 1993 Convention.

¹⁵⁸ See further the **Study** at Part C, Sections 2(b) and (c) concerning the problems which can arise in this regard for women and children. From the child’s perspective, this should be considered in light of Art. 24 of the UNCRC which states that, “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health [...]”. Further, the right to maternal, child and reproductive health contained within Art. 12 of the *International Covenant on Economic, Social and Cultural Rights* (hereinafter, the “ICESCR”) should also be considered. The UN Committee on Economic, Social and Cultural Rights’ General Comment No 14 (2000) on Art. 12 ICESCR makes clear that this provision requires measures to improve “child and maternal health”.

¹⁵⁹ *E.g.*, one can imagine that as medical advances take place in other less economically developed countries, they may begin to seek to provide ISA services to foreign intending parents. The concerns seen today in States such as India and Thailand may then come to light in these States. Indeed, as has been evidenced over the years in intercountry adoption in terms of the shifting global picture (*i.e.*, concerning the key States of origin and receiving States), it is unlikely that the world picture will remain static in the ISA context in terms of the key States involved. Instead, as medical and legal positions develop and change in States, so too will the identity of the States most heavily implicated in the phenomenon (although it will likely remain a truly global picture due to the strong human desire to have children).

¹⁶⁰ In this respect, existing national and regional guidance on such matters might be considered in the drawing up of such standards. Issues such as the number of times a woman can be a surrogate mother, as well as the number of IVF cycles one woman should undergo as a surrogate mother might also be considered. More complex issues such as whether to prohibit foetal reductions and sex-selective abortions, and whether to include provisions concerning the storage of gametes / embryos, would require further discussion.

¹⁶¹ Again, standards in this respect could also draw from international bioethical principles, such as autonomy and prior, free and informed consent (see Arts 5 (autonomy) and 6 (consent) of the *Universal Declaration on Bioethics and Human Rights*, note 150 above).

¹⁶² In this respect, close attention would need to be paid to Art. 35 of the UNCRC and its *Optional Protocol on the sale of children, child prostitution and child pornography*. The UN Committee on the Rights of the Child has emphasised the need for clear regulation of surrogacy to guard against it amounting to the “sale of children” within the meaning of the Optional Protocol (see, *e.g.*, Concluding Observations on the 2nd periodic report of the USA submitted under Art. 12 of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (62nd sessions, 14 January – 1 February 2013), para. 29 b)).

is whether a co-operation framework, combined with adherence to key substantive minimum standards, could build enough mutual trust between States Parties to lead to a system whereby the legal parentage established in the child's State of birth could be automatically recognised in other States Parties.¹⁶³ Even with the potential for minimum standards to satisfy some of the public policy concerns of some receiving States,¹⁶⁴ it may be challenging for some receiving States to accept such an approach.¹⁶⁵ This matter would need to be further explored, however, in light of the progress of feasibility discussions concerning the unification of private international law rules in this area since these discussions may impact significantly upon the issue. It is also a question which should be considered in light of the requirements of the UNCRC (e.g., Arts 2, 3, 7 and 8)¹⁶⁶ and which may be affected, at least for receiving States within Europe, by pending human rights decisions at the regional level. These developments need to be closely monitored.¹⁶⁷

66. Another issue which will need to be carefully considered in any future feasibility discussions concerning ISAs is the material scope of any potential future instrument in the area (whether within a broader instrument or as a "stand-alone" instrument): that is, should any future instrument cover *all* ISAs within the definition of that term adopted to date (see the Glossary – the definition to date focuses simply on the different residences of the primary parties, combined with the fact of a surrogacy arrangement, and does not limit further the arrangements covered¹⁶⁸)? Alternatively, should the ISAs which benefit from an international instrument be further prescribed with requirements, for example, as to the necessity of a genetic link between the child and one intending parent (a requirement of many internal laws of States in which surrogacy regulation has taken place), or concerning the *absence* of a genetic link between the surrogate mother and the child (*i.e.*, covering only gestational, and not traditional, arrangements: again a requirement seen in some, but not all, internal laws on surrogacy)? The risk, of course, is that the more one restricts the scope of any future instrument, the greater the possibility that international arrangements outside the scope of the instrument continue, or even increase (due to the absence of legislation concerning them), without the protections which any new instrument provides. Another option, therefore, would be for the instrument to define the arrangements to which it applies whilst at the same time prohibiting (amongst States Parties) other ISAs. However, the risk with this approach is two-fold: (1) that intending parents wishing to undertake these arrangements simply look to States not Party to the international instrument to undertake them (again avoiding the protections of the instrument);¹⁶⁹ or (2) that such arrangements are simply driven "underground". These complex questions will need to be considered further in the future discussions concerning the feasibility and shape of future work.

67. Related to the issue of material scope, as well as to the establishment of safeguards, consideration might also be given as to whether there should be more explicit requirements concerning the surrogate mother's residence in any potential future instrument in order to safeguard against concerns regarding the trafficking of women for the purposes of

¹⁶³ Another issue would be the question of the effects of the establishment / recognition of legal parentage and, in this regard, para. 59 above is relevant.

¹⁶⁴ *E.g.*, if there were requirements concerning the child's right to know his / her origins, some of the States in which public policy concerns are raised concerning the child's ability to know his / her birth mother when this is not stated on the birth certificate, may consider recognition of the child's legal parentage established in the State of birth possible in light of the guarantees given under the international framework in this regard. However, in other States, the determination of the State of birth that a non-birth mother is the legal mother of the child may prove problematic on broader public policy grounds (see Part B of the **Study** and, in particular, paras 98 et seq).

¹⁶⁵ Particularly in view of the fact the intending parents are often closely connected with the receiving State in terms of their habitual residence and / or nationality and in view of the legal consequences which attach to a determination of legal parentage.

¹⁶⁶ In particular, in light of General Comment No 14 on Art. 3(1) UNCRC (see note 58 above).

¹⁶⁷ See the **Study** at para. 170 concerning the four cases concerning ISAs currently pending before the ECtHR.

¹⁶⁸ Consideration might also be given to the impact of ART treatment or other parts of the arrangement being carried out in third States (as discussed in "International Surrogacy Arrangements: Legal Regulation at the International Level", by Trimmings and Beaumont (eds), 2013, Hart Publishing, at pp. 537-538).

¹⁶⁹ A trend which has been seen in the intercountry adoption context with some intending parents looking to adopt children from States of origin which are not Party to the 1993 Convention.

international surrogacy.¹⁷⁰ In addition, consideration might be given, when defining an ISA for the purposes of any future instrument, to the need for a *pre-conception* agreement between the parties¹⁷¹ in order to safeguard against arrangements taking place under the “guise” of international surrogacy which are, in fact, illegal intercountry adoptions.¹⁷²

V. RECOMMENDED “NEXT STEPS”

The policy objectives of further work

68. In light of the Study and the above analysis, it is considered that the *desirability* of further international work – *i.e.*, the *need* for such work - both in relation to legal parentage generally, as well as concerning ISAs specifically, is clear. Indeed, the views expressed by Members, non-Member interested States and other stakeholders have enabled two broad sets of “needs” to be identified which might be considered a useful guide to future work in this area. That is, further international work might have as its objective to:

- 1) Ensure legal certainty and security of legal status for children and families in international situations; and
- 2) Protect the rights and welfare of children, parents and other parties involved with the conception of children in international situations, in line with established global human rights standards.

Formation of an Experts’ Group to facilitate further exploration of the feasibility of a binding multilateral instrument (or possible non-binding measures) in this area

69. To this end, it is considered that further work needs to be undertaken to explore the questions which remain surrounding the *feasibility* of international work in this area. It is considered that, in this regard, further discussion with Members is necessary and this ought to now progress to structured, in-person discussions, to take place in the context of an Experts’ Group. In light of the nature of the problems and the complexity of the questions raised, the Permanent Bureau considers that the Group should, whilst having as its primary goal further exploring the feasibility of *binding* multilateral options, also have in mind the scope for various degrees of action by the Hague Conference, depending upon the progress of discussions.

70. In terms of the *scope* of the discussions to take place within the Experts’ Group, the Permanent Bureau recommends, as suggested by some Members, that the Group commence by further exploring the feasibility of international work towards the first objective outlined above: that is, towards achieving legal certainty for children in cross-border / international situations in terms of their legal status. This work might include further exploration of the feasibility of unifying the private international law rules concerning the establishment and contestation of legal parentage, whilst also paying special attention to the problems of legal status which arise for children in the context of ISAs. Indeed, the starting point when considering work on the legal status issues in the ISA context might be analysing whether there are reasons to apply different rules to ISA cases than those which might be developed more generally. The presumption might be that it would be best to develop a consistent set of principles concerning children’s legal statuses which also work in the ISA context, perhaps with additions or specifications as

¹⁷⁰ See the **Study** at para. 211 for some of the concerns in this regard, as well as the 2012 Preliminary Report (note 7 above) at note 11. Some commentators have suggested a minimum residency requirement for surrogate mothers who are not nationals of the State of birth, in line with the approach adopted in the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*: see further Trimmings and Beaumont (note 168 above).

¹⁷¹ With further safeguards, such as, an agreement concluded following the receipt of legal advice by all parties in all relevant jurisdictions – see also para. 63 above.

¹⁷² See the case reported in the **Study** at note 767, as well as the reports by the Philippines of such cases discussed in the **Study** at note 783. This issue will also be affected by the outcome of discussions concerning whether *traditional* surrogacy arrangements should be included within the scope of any possible future instrument. Such a requirement should also prevent the “Theresa Erickson scandal” (discussed in the **Study** at para. 211) from occurring between States Parties.

necessary.¹⁷³ Experts should also consider the form which any possible future instrument in this area might take.

71. In light of the second objective of further international work, it is considered that the broader concerns which arise particularly in the ISA context (some of which also may arise in non-ISA legal parentage cases), should also be considered carefully by the Group once discussions have progressed concerning the legal status questions and thus there is more clarity concerning the direction of future work and the shape it might take. In this respect, the feasibility and desirability of developing, at the international level, mechanisms, including possible co-operation structures, to help ensure protection for the rights and safety of the child and other persons involved in the process might be considered. Experts might consider both binding and non-binding options in this respect.¹⁷⁴

72. In relation to the *composition* of the Experts' Group, it is considered that the core participants should be experts designated by Members. Moreover, the Members participating in the Group should be both geographically representative, as well as representative of different legal cultures and traditions (*e.g.*, just one example is that it will be important for there to be a balance between civil and common law jurisdictions). In terms of the identity of the particular experts, whilst private international law and policy experts will be central to the Group, it is considered that there is a strong need for a group of multidisciplinary experts and, in particular, for the Group to include experts with practical, "on the ground" experience of the cross-border problems arising in relation to legal parentage. For example, specialist legal practitioners and social work professionals with practical experience of these issues should be included, as should other leading international governmental and non-governmental organisations with practical expertise in the field.

73. In order to facilitate the discussions and work of the Experts' Group, it is considered that the Permanent Bureau should continue information-gathering with two particular goals in mind: (1) to obtain responses to Questionnaire No 1 (or key information) from Members and non-Member interested States which have yet to respond to the Questionnaire, particularly where the particular legal culture or position of a State is not yet well-represented in the responses / information obtained;¹⁷⁵ and (2) to keep updated with the fast-moving jurisprudential and legislative developments in the field to be able to fully apprise the Experts' Group of such developments prior to the Group commencing its work. In this regard, it might be considered useful for the Permanent Bureau to update the Study prior to the first meeting of the Experts' Group.

Resource implications of recommended "next steps"

74. In 2013, this project has been allocated, in terms of personnel, one Senior Legal Officer (0.8 FTE for the past year and, prior to March 2013, far less due to competing priorities), and one Principal Legal Officer (approximately 0.2 FTE)(*i.e.*, 1 FTE for the parentage / surrogacy project). Along with one ICATAP co-ordinator (1 FTE, currently financed under the Supplementary Budget until October 2014), this is the entirety of the legal team which is also responsible for servicing the 1993 Hague Convention (*i.e.*, the equivalent of 0.9 FTE under the Regular Budget for adoption matters). No specific travel budget or other resources have been allocated to the project to date.

75. If Members wish for the project to continue as recommended, decisions will therefore have to be taken concerning the prioritisation of organisational resources, in particular in light of the upcoming Special Commission on the practical operation of the 1993 Convention which has been mandated for the first half of 2015 at the latest.¹⁷⁶ If no further

¹⁷³ In this regard, work might include consideration of any special rules or procedures which may be needed in the ISA context.

¹⁷⁴ In particular and depending upon the progress of discussions in this regard, experts might consider whether best practice guidance or principles in this area might be of assistance.

¹⁷⁵ See para. 5 concerning some of the "gaps" in the current information.

¹⁷⁶ See the Conclusion and Recommendation of the 2013 Council on General Affairs and Policy at para. 20 c). It should be noted that this section deals with questions of "relative" priority: *i.e.*, if work is to continue in this area,

resources are allocated to the team, it may be that any Experts' Group meeting will need to wait until the Intercountry Adoption Special Commission has been completed: *i.e.*, that the first meeting of the Experts' Group would take place in the second half of 2015 at the earliest. However, if Members wish to prioritise this work (*i.e.*, if Members consider that a meeting should take place more quickly), further resources would need to be allocated to the project. It is considered that the information-gathering by the Permanent Bureau should, however, continue in the interim.

what priority should it be given *as against other areas of work*. In contrast, the discussion at paras 49 to 51 above deals with questions of "absolute" priority: *i.e.*, whether it is considered by Members that work should continue on this project at the Hague Conference at all.

A N N E X E S

ANNEX A – REVISED GLOSSARY

International surrogacy arrangement	A surrogacy arrangement entered into by intending parent(s) resident ¹ in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State. Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or for-profit ² in nature (see below).
Traditional surrogacy arrangement	A surrogacy arrangement where the surrogate provides her own genetic material (egg) and thus the child born is genetically related to the surrogate. Such an arrangement may involve natural conception or artificial insemination procedures. This may be an altruistic or for-profit arrangement (see below).
Gestational surrogacy arrangement	A surrogacy arrangement in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate. Such an arrangement will usually occur following IVF treatment. The gametes may come from both intending parents, one, or neither. This may be an altruistic or for-profit arrangement (see below).
For-profit surrogacy arrangement	A surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her "reasonable expenses". This may be termed "compensation" for "pain and suffering" or may be simply the fee which the surrogate mother charges for carrying the child. This may be a gestational or a traditional surrogacy arrangement. N.B. It is often difficult to draw the line between what is an altruistic surrogacy arrangement and what is a for-profit arrangement. For example, if a surrogate is unemployed prior to conception but can claim "reasonable expenses", including loss of earnings, for the arrangement, is this arrangement still "altruistic"?
Altruistic surrogacy arrangement	A surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her "reasonable expenses" associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate. This may be a gestational or a traditional surrogacy arrangement. Such arrangements often (but not always) take place between intending parent(s) and someone they may already know (e.g., a relative or a friend).
Receiving State	The State in which the intending parents are resident and to which they wish to return with the child, following the birth.

¹ The term habitually resident is purposely not used here. It may usually be the case that both the intending parent(s) and the surrogate are "habitually resident" in these States. However, the definition has been drawn broadly (even including those cases where a surrogate is merely "present" in the other State) to include all possible cases where problems are occurring: e.g., this would include situations where women have been 'trafficked' to a permissive State for the purposes of being surrogates.

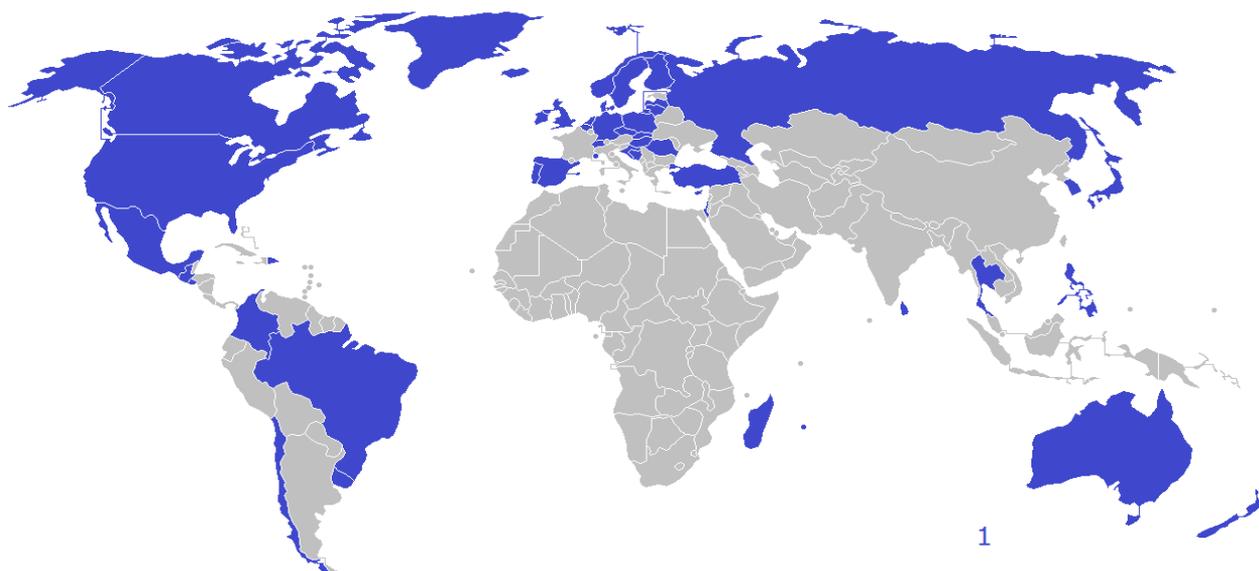
² Following feedback from intending parents that the word "commercial" (as used in the Glossary attached to Prel. Doc. No 10 of March 2012) was offensive for some intending parents that have undertaken these arrangements and that, whilst such arrangements may involve compensation beyond expenses for a surrogate mother, they are not usually "commercial" in nature, this term has been replaced with the term "for-profit".

State of the child's birth	The State in which the surrogate gives birth to the child and in which the question of the child's legal parentage usually first arises. This will usually be the State in which the surrogate is resident. However, in some cases the surrogate may move to a State specifically for the birth. ³
Surrogate (mother)	The woman who agrees to carry a child (or children) for the intending parent(s) and relinquishes her parental rights following the birth. In this paper, this term is used to include a woman who has not provided her genetic material for the child. In some States, in these circumstances, surrogates are called "gestational carriers" or "gestational hosts".
Intending parent(s)	The person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement.
Gamete (egg) donor	The woman who provides her eggs to be used by other person(s) to conceive a child. In some States, such "donors" may receive compensation beyond their expenses. The question of the anonymity of "donors" also varies among States.
Gamete (sperm) donor	The man who provides his sperm to be used by other person(s) to conceive a child. In some States, such "donors" may receive compensation beyond their expenses. The question of anonymity of "donors" also varies among States.
"Legal parentage" or the legal parent(s)	The person(s) considered to have acquired the legal status of being the "parents" of the child under the relevant law, and who will acquire all the rights and obligations which flow from this status under that law. In surrogacy situations, this may not (indeed, often will not) coincide with the genetic parentage of the child (<i>i.e.</i> , those who have provided their genetic material).
"Genetic parentage" or the genetic parents	The person(s) who have provided their genetic material for the conception of the child. In some languages, this is referred to as "biological parentage". In surrogacy situations, such person(s) may not be (and often will not be), the legal parent(s) of the child.

³ Or may have been "trafficked" there for this purpose.

ANNEXE B – GEOGRAPHICAL REPRESENTATION OF THE ANSWERS RECEIVED BY THE PERMANENT BUREAU TO THE QUESTIONNAIRES NOS 1 AND 2

RESPONSES TO QUESTIONNAIRE NO 1



RESPONSES TO QUESTIONNAIRE NO 2

