

AFFAIRES GÉNÉRALES ET POLITIQUE
GENERAL AFFAIRS AND POLICY

Doc. pré. No 3 C (L'étude)
Prel. Doc. No 3 C (The Study)

mars / March 2014

(Édition provisoire dans l'attente
de l'achèvement de la version française /
Provisional edition pending completion
of the French version)



**ÉTUDE SUR LA FILIATION JURIDIQUE ET QUESTIONS DÉCOULANT DES CONVENTIONS DE
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

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**A STUDY OF LEGAL PARENTAGE
AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS**

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

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

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INTRODUCTION¹

This Study is the evidence-base for, and hence is integral to, Preliminary Document No 3 B of March 2014² and should be consulted alongside it. Preliminary Document 3 B considers the desirability and feasibility of future work at the Hague Conference on the “Parentage / Surrogacy Project”³ and provides recommended “next steps” in the area for the consideration of Members at the 2014 meeting of the Council on General Affairs and Policy of the Organisation.⁴

This Study is based upon the responses to the four Questionnaires circulated by the Permanent Bureau in 2013 to: (1) Members and non-Member interested States (Questionnaire No 1);⁵ (2) specialist legal practitioners (Questionnaire No 2); (3) health professionals (Questionnaire No 3); and (4) surrogacy agencies (Questionnaire No 4), as well as the other submissions received by the Permanent Bureau in response to the global consultation process undertaken.⁶ It is supplemented by the Permanent Bureau’s own research and monitoring work, including in relation to the relevant bilateral, regional and international developments in this field.

This Study is divided into three main parts:

Part A: The establishment and contestation of legal parentage in internal law

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

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

Each part commences with a comparative analysis of States’ laws (mainly drawn from responses to Questionnaire No 1) and subsequently turns to examine any relevant bilateral, regional and international developments in the area.

*Please note: the definitions of terms used in this Study, as well as in Preliminary Document No 3 B, can be found in the updated **Glossary** at **Annex A** of Preliminary Document No 3 B.*

¹ The Permanent Bureau would like to thank Hannah Baker (Senior Legal Officer), the author of this Study and Prel. Doc. No 3 B of March 2014 (see note 2 below). 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 Prel. Doc. No 3 B of March 2014, “The desirability and feasibility of further work on the Parentage / Surrogacy Project” for the attention of the 2014 Council on General Affairs and Policy of the Hague Conference (available on the website of the Hague Conference: www.hcch.net, under “Work in Progress” and “General Affairs”).

³ All information concerning the “Parentage / Surrogacy Project” can be found on the specialised section of the Hague Conference website: www.hcch.net, then “Parentage / Surrogacy Project”.

⁴ In this respect, it should be noted that information concerning the background to the “Parentage / Surrogacy Project” and why legal parentage has become an issue of international interest is contained within Sections I and II of Prel. Doc. No 3 B (*ibid.*).

⁵ Prel. Doc. No 3 A of April 2013, “Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (Questionnaire No 1)”, available on the website of the Hague Conference: www.hcch.net, go to “the Parentage / Surrogacy Project”. Hereinafter, “Questionnaire No 1”.

⁶ A full explanation of the broad consultation process undertaken by the Permanent Bureau, along with the information obtained as a result, is provided in Prel. Doc. No 3 B of March 2014 in Section I. In addition to responses received to the 4 Questionnaires (46 State responses to Questionnaire No 1; 50 legal practitioner responses to Questionnaire No 2; 11 health professional responses to Questionnaire No 3; 6 surrogacy agency responses to Questionnaire No 4), 31 submissions from intending parents who have undertaken ISAs, 2 submissions from social work organisations/professionals, 2 legal practitioner association responses and information from leading non-governmental organisations in the field was provided to the Permanent Bureau.

A. THE ESTABLISHMENT AND CONTESTATION OF LEGAL PARENTAGE IN INTERNAL LAW

1. The comparative analysis which follows in **Part A, Section 1** below seeks to examine 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,⁷ 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. The information in the comparative overview is drawn principally from State responses to Questionnaire No 1, save where expressly stated otherwise.⁸

2. **Part A, Section 2** 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.

1. A comparative overview of the internal laws and procedures of States in relation to legal parentage

(a) Birth Registration

3. The clear obligation placed on States Parties to multiple international human rights instruments to register all children immediately after birth⁹ was apparent in the Questionnaire replies of States in that, across all States which responded to this issue, it is mandatory to register a birth which takes place on the territory of the State and penalties are usually prescribed in legislation for non-compliance.¹⁰ For example, in most States, it is a criminal offence to fail to notify or register a birth if one is under an obligation to do so according to the particular State's law. The penalty for failing to comply with these rules may be a fine, imprisonment, or both sanctions. In most States, it is also an offence knowingly to make false or misleading representations to the authorities in an application or notification for birth registration. Nevertheless, despite strict international and national laws, in reality, timely, accurate and non-discriminatory birth registration remains a significant issue in many parts of the world.¹¹

⁷ Though note the geographic limitations to the responses received to Questionnaire No 1 from States, explained in para. 5 of Prel. Doc. No 3 B of March 2014 (note 2 above). Note also the other limitations to the responses which are explained in para. 5, including that information provided in the responses has not been verified against primary source material due to time and resource restrictions.

⁸ Prel. Doc. No 3 A of April 2013 (see note 5 above).

⁹ *E.g.*, Art. 24(2) of the *International Covenant on Civil and Political Rights* (hereinafter, the "ICCPR") and Art. 7 of the *United Nations Convention on the Rights of the Child* (20 November 1989, hereinafter, the "UNCRC"). It should also be noted that the UN Committee on the Rights of the Child, in its "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 at its 62nd session (14 January to 1 February 2013), hereinafter "General Comment No 14 on Art. 3 UNCRC", has confirmed that birth registration authorities are "public or private social welfare institutions" within the meaning of Art. 3 UNCRC and hence should consider the best interests of the child as a primary consideration in all actions concerning them.

¹⁰ In federal States, the obligation to register a birth arose where the birth took place on the territory of that state or province.

¹¹ In 2007, UNICEF reported that, despite the legal obligations placed on States, 51 million children a year are still not registered at birth and, in 2009 it was reported that, in some areas of the world 90% of children remained unregistered. The failure to register children is caused by geographic, social, ethnic and economic barriers, as well as by sometimes overly complex or remote administrative procedures: see further Cody, C. (2009), "Count Every Child: the right to birth registration", PLAN International. The UN General Assembly and the Human Rights Council have adopted resolutions on this subject, the most recent of which reminds States of their obligation to undertake birth registration "without discrimination of any kind" and urges them to "identify and remove ...barriers that impede access to birth registration" (see the resolution of the Human Rights Council during its 19th Session, "Birth registration and the right of everyone to recognition everywhere as a person before the law", dated 16 March 2012 (A/HRC/19/L.24)).

4. In the vast majority of States which responded to the Questionnaire, civil registry offices (or officials)¹² are the authorities of the State responsible for registering the birth of a child.¹³ In many cases, registry offices are established at a local or municipal level, with oversight by a national civil registry authority. This may be a government agency or an office which works directly with or under the responsibility of a Ministry.¹⁴ In two States,¹⁵ however, the tax authorities are responsible for registering population-related information. In most federal States which responded,¹⁶ birth registration is governed by state (or provincial) law and hence the requirements for birth registration may vary from state to state (or province to province).

5. The responses revealed diversity in terms of the identity of those responsible for notifying the authorities of a birth in order that registration may take place. For example, in some States, in circumstances where the child has been born in a medical institution, the medical institution is responsible for notifying the relevant authorities of the birth of the child.¹⁷ In other States, the medical institution or professional(s) attending the birth must provide the authorities (directly or via the parents) with a certification of birth but the parents must also notify the authorities of the child's birth either in person or in writing (often through a prescribed form).¹⁸ In a minority of States, there is no need for any medical certification and notification of birth is the sole responsibility of the parents.¹⁹ The responses also revealed considerable diversity in terms of the timeframes

¹² Albeit with varying names: *e.g.*, the Vital Statistics Agency (Canada), Registrar of Civil Status (Canada (Quebec), Mauritius), Registry Offices for Birth, Marriage and Death (Czech Republic, Australia), National Register of persons and civil registration (Iceland), General Registry Office (Latvia), Office of the Civil Registrar General (Philippines) and the National Registry of Persons (Guatemala).

¹³ Questionnaire No 1 did not ask States for more general details concerning their civil status registration systems as this was considered outside the scope of the project at this stage. However, it should be noted that civil status registration systems in general can vary considerably in nature: *e.g.*, they may be "event-based" systems (where all relevant changes to the civil status of a person occurring in the State are registered at the place where the event occurred only), "person-based" (recording all relevant changes to the civil status of a person occurring the respective State at a central place), or based on a "population register" (such a register records civil status events and changes but goes beyond this, recording other selected information concerning each resident of a country). The type of system a State has will influence not only the administrative structure, but also the operation of the civil status registration system, including in the context of birth registration. For further information, albeit within an EU context, see the "Final Report for the European Commission, DG JLS on the project No JLS/2006/C4/004" by von Freyhold, Vial & Partner Consultants (2008). The more recent study for the Legal Affairs Committee of the European Parliament, "Life in Cross-Border situations in the EU (a comparative study on civil status)" by Dr Eliantonio, Ms Brunello and Mr von Freyhold (2013) (available at < www.europarl.europa.eu/studies >) explains that some States can be considered to have a combination of types of civil status registration systems as they may have different registers for different purposes (see page 42 et seq).

¹⁴ *E.g.*, Denmark (the civil records officer is under the Ministry for Gender, Equality and Ecclesiastical Affairs), Japan (local governments are responsible for registration, under the guidance of the Legal Affairs Bureaus which have jurisdiction over the area and the Civil Affairs Bureau of the Ministry of Justice), Uruguay (the Civil Status Registry is under the Ministry of Education and Culture). However, in some State responses it was clear that notification of births should be sent directly to a central registry, *e.g.* New Zealand (where it is sent directly to the Birth, Deaths and Marriages Group in the Department of Internal Affairs) and Israel (where notification of a live birth within Israel to Israeli residents must be sent directly to the Population and Immigration Authority in the Ministry of the Interior).

¹⁵ Norway and Sweden.

¹⁶ *E.g.*, Australia, Canada and the USA.

¹⁷ In all of these States, where the child is *not* born in a medical institution or with medical professionals attending the birth, there are contingency rules usually for the mother or parents to notify the authorities of the birth: *e.g.*, Croatia, Denmark, Finland, Hungary, Israel, Norway, Philippines, Serbia, Slovakia, Sweden and Switzerland.

¹⁸ Again, there are contingency rules where the child is not born in a medical institution or with medical professionals attending the birth. See the responses to Questions 2 and 3 from, *e.g.*, Australia (NSW, VIC, SA), Canada (Alberta, BC, Quebec), Czech Republic, Dominican Republic (if the Civil States Registrar has any doubts about the notification provided by the parents, he can require the child to be brought to him or require a certification from the mayor or justice of the peace of the district), El Salvador, Germany, Guatemala, Ireland, Japan, Latvia, Lithuania, Madagascar, Mauritius, Mexico, Monaco, New Zealand, Poland, Portugal, Romania, Russian Federation, Spain, Thailand, United Kingdom, Uruguay. It should be noted, however, that, in some of these States, it seems that the hospital birth record may only be sought in case of doubt about the identity of the woman who gave birth to the child.

¹⁹ If the parents are unable to notify the registrar of the birth, in many States there is a list of others who may do so (*e.g.*, the medical professionals who attended the birth, close relatives or cohabitants). *E.g.*, Brazil, Canada (Manitoba, NWT – although the hospital is obliged to provide the birth registration form to the parents), the Netherlands (although, in case of doubt, the authorities can ask for a declaration of the medical professional which states that the putative mother is the woman who gave birth to the child).

within which a birth must be registered, with timeframes ranging from within one day of the birth to within six months, often depending upon the method of registration.²⁰

6. In terms of the *evidence* required for the authorities to register persons as the parents of a child in his / her birth record, in most States legal maternity is based upon the fact of birth²¹ and thus the evidence required is that which supports the assertion that the putative mother, in fact, gave birth to the child. In the vast majority of States, this is the certification of the medical institution or professionals attending the birth,²² supplemented, in some States, by the putative mother's own assertion of her maternity. Where the birth was not attended by medical professionals (in an institution, or otherwise), additional evidence may be required. However, in the minority of States where there is no requirement for certification to be provided by the medical professionals, the written or oral statement of the woman may be sufficient, although in cases of doubt further proof may be called for by the authorities.²³ Disputes may usually be settled by the judicial authorities.²⁴

7. In most States, the *evidence* of legal paternity required by the authorities for registration of a man as the father of a child depends upon the circumstances of the case and, in particular, the marital status of the putative parents. This is due to the fact that the marital status of the putative parents will often affect the way in which legal paternity is established.²⁵ For example, if the child is born at a time when the mother is married,²⁶ due to the fact that a presumption of paternity applies in most States,²⁷ the marriage certificate will be sufficient evidence of the legal paternity of the mother's husband for the authorities to automatically register him as the legal father of the child. In the case of a child born to an unmarried mother,²⁸ an acknowledgement of paternity will be required in many States.²⁹

8. In the overwhelming majority of States, once persons are registered as the parents of a child in the child's birth record, those persons are considered by the State as the legal parents of the child for all purposes (with the consequences which flow from this, as determined by the law of that State), *unless and until* the record is contested.³⁰ In two States,³¹ it was clarified that the registration alone has no constitutive effect and is merely equivalent to refutable (factual) evidence as to the birth and legal parentage of the child.

9. The concept of "anonymous" or "secret birth", where a birth mother can choose to give birth anonymously without revealing her identity, is only known in a minority of States which responded to the Questionnaire.³² In these States, the details of the birth

²⁰ Although there may be extensions in some States where there is deemed to be good cause for the delay. The shortest timeframe was in Finland where the notification is usually completed automatically by computer by the medical institution.

²¹ *I.e.*, the maxim *mater semper certa est* applies: see para. 11 below.

²² See para. 5 above.

²³ *E.g.*, witness testimony or medical proof obtained subsequent to the birth, including, in some cases, a DNA test.

²⁴ See the contestation of legal parentage section below.

²⁵ As to which, see para. 13 below.

²⁶ Or, in many States, within a defined number of days from the date of termination of the marriage – see further para. 13 below.

²⁷ The *pater est* rule, unless rebutted (see below).

²⁸ Where the *pater est* presumption does *not* apply, for example because a marriage was terminated less than 300 days previously.

²⁹ See para. 13 below: consent requirements (of the mother and / or child) may apply in this case.

³⁰ It should be noted, however, that the details recorded in the child's birth record may be very different across States: see further the 2013 EU Parliament Report (note 13 above).

³¹ Germany and Japan.

³² Czech Republic (it is only possible for women with permanent residence in the Czech Republic), France (information from the Report commissioned by the International Commission on Civil Status ("ICCS"), "*Surrogacy and the civil status of the child in the Member States of ICCS*", by Frédérique Granet (2014), available at < www.ciec1.org >, in French only), Germany (as of 1 May 2014), Slovakia and in some states in the USA. In Thailand, it is not regulated in law but is *de facto* possible due to the existence of places where women can deliver children anonymously ("Babyklappe"). This issue has been raised before the European Court of Human Rights (hereinafter, the "ECtHR"): see *Odievre v. France* (App. No. 42326/98, 13 February 2003), in which it was determined that Art. 8 ECHR was not violated in part because of the mother's right to privacy and

mother are not recorded in the medical notification or in the child's birth record. In the vast majority of States which responded, the woman giving birth must identify herself to the authorities and thus a "secret birth" is only possible, *de facto*, in circumstances where the birth mother abandons the child (and the State will consider the child a "foundling").

10. In conclusion, although civil status registration systems generally vary widely in terms of their administrative structure and operation,³³ similarities do exist between States in terms of the *fundamental* principles of *birth* registration specifically: *i.e.*, a birth in the territory of the State must be registered with the designated State authorities (with penalties for non-compliance), within a defined timeframe.

(b) The establishment of legal parentage: the basic principles³⁴

11. In the vast majority of States which responded to the Questionnaire, the woman who gives birth to a child is the legal mother of the child "by operation of law": that is, automatically, by virtue of the *mater semper certa est* principle.³⁵ This position results from legislation in some States, and in others it is deemed simply an established practice or the position at common law.³⁶ However, in some States of the civil law tradition, a subtly different approach is adopted.³⁷ In these States, a birth mother's legal maternity does not technically arise "by operation of law" but as a result of the relevant legislation which states that an "act of birth" (a registration of the birth), based upon the attestation and declaration of birth by the physician and mother respectively, must be made in order for the legal relationship to be established.

12. Whilst in a majority of States it is impossible for a birth mother to "voluntarily acknowledge" her legal maternity because maternity always arises by operation of law,³⁸ in a minority of States such an acknowledgement is possible. In some States, this is due to the fact that the declaration of birth to the registration authorities is seen as a form of "acknowledgement of maternity" since it is a necessary pre-condition to the legal relationship being established.³⁹ In other States, an acknowledgement may be made by a woman claiming to be the birth mother of a child where no mother was named in the original birth registration (*e.g.*, because the woman who gave birth was unknown) or if there was a mistake in terms of the legal maternity initially registered.

in part because the issue fell within the State's margin of appreciation in particular as the applicant was given non-identifying information about her mother and family. Cf. the more recent case of *Godelli v. Italy* (App. No. 33783/09, 25 September 2012) in which the Italian authorities were held to have overstepped the margin of appreciation because, following an anonymous birth, the applicant was not able, "to request either access to non-identifying information concerning ... her origins or the disclosure of the mother's identity" (para. 58).

³³ See the 2013 EU Parliament Report (note 13 above).

³⁴ *I.e.*, not including births following ART (as to which, see paras 15 et seq below).

³⁵ See the responses to Question 8 a): *e.g.*, Australia (NSW, VIC, QLD, WA, SA, TAS), Belgium, Canada (Alberta, BC, Manitoba, NWT), Chile, Croatia, Czech Republic, Denmark, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Hungary, Ireland, Israel, Japan, Latvia, Lithuania, Madagascar, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden, Switzerland, Thailand, Turkey and Uruguay.

³⁶ *E.g.*, in Finland and Sweden it is stated to be established practice. In the European context, this is in accordance with the 1975 *European Convention on the Legal Status of Children born out of wedlock* (Art. 2 of which states that "maternal affiliation of every child born out of wedlock shall be based solely on the fact of birth of the child"), as well as the subsequent principle in the "*Report on principles concerning the establishment and legal consequences of parentage – the 'White Paper'*" (hereinafter, the "White Paper"), adopted by the CDCJ at its 79th plenary meeting on 11-14 May 2004 (see CJ-FA 2006 4 e at p.7). The Council of Europe's 2011 *Draft Recommendation on the rights and legal status of children and parental responsibilities* (see paras 50 to 51 and note 253 below) goes further in that it clarifies that this principle applies regardless of whether there is a genetic connection between the birth mother and child or not. See also ECtHR jurisprudence such as *Marckx v. Belgium* (App. No. 6833/74, 13 June 1979).

³⁷ *E.g.*, Canada (Quebec) and this seems to be the same in France (information from the French Country Report by L.Rass-Masson, Annex III-B to the EU Parliament Report, cited in full at note 13 above). It also appears to be the case in the Republic of Korea since in order to be a legal mother the woman is required to file a report of the birth, accompanied by a certificate from the medical professionals which proves that she gave birth to the child (see Korea's response to Question 8).

³⁸ Here reference is not being made to consenting to (often joint) legal maternity following an ART procedure – as to which, see paras 15 et seq below – but to a *birth* mother acknowledging her legal maternity.

³⁹ *E.g.*, see note 37 above.

13. Three⁴⁰ primary methods were reported by the vast majority of States as the means by which a man may establish his legal paternity:

1) By legal presumption: in nearly all States which responded to the Questionnaire, a man will be presumed to be the legal father of a child (and registered as such) if that child is born during his marriage to the woman who gave birth to the child or within a defined period⁴¹ following its termination, whether by death, dissolution or annulment (i.e., the *pater is est quem nuptiae demonstrant* principle is applied: hereinafter, the "*pater est*" presumption).⁴² In many States, if the child is born within a defined period⁴³ following termination of a marriage and during this period the birth mother has remarried, the child will be presumed to be the child of the new marriage.⁴⁴ In a minority of States, this presumption of legal paternity extends to an *unmarried male cohabitant* of the birth mother under defined conditions.⁴⁵ The rationale for this long-standing legal presumption appears to be that it is considered more likely than not that the husband of the birth mother (or, in a minority of States, the male cohabitant) is the *genetic* father of the child and, from a child welfare perspective, it is better for the child to have a registered father, than not.⁴⁶

In light of this rationale, it is unsurprising that in most States it is possible to rebut this legal presumption by proving, on the balance of probabilities, that the husband is *not* the *genetic* father of the child.⁴⁷ However, there is some division between States as to whether it is possible to rebut the *pater est* presumption at the time of the initial registration of the child. In some States, it is possible for the mother to rebut the presumption through a simple declaration at the time of registration; in other States, it is possible if the mother registers the birth of the child together with a man other than her husband; in some States, a man other than the husband may acknowledge the child in these circumstances and thereby rebut the presumption. However, the husband's consent may be necessary for registration to take place in these circumstances.⁴⁸ In other States, it is not possible to register a man other than the husband where the *pater est* presumption applies unless and until the husband's paternity has been successfully challenged in court.⁴⁹ Where a court application is made to contest legal paternity,

⁴⁰ It should be noted that in Canada (Quebec), in certain circumstances, it is also possible to establish legal parentage (whether maternity or paternity) by "uninterrupted possession of status" (see the response to Question 8 d)).

⁴¹ Often 300 days but timeframes vary slightly.

⁴² In Republic of Korea and Japan, the presumption only applies if the child is born after the first 200 days of a marriage (as well as within 300 days of the termination of the marriage). However, the former timeframe is stated not to apply in Japan, in practice, under the current interpretation of Art. 772 of the Civil Code.

⁴³ See note 41 above.

⁴⁴ Although in some States an acknowledgement of paternity by the new husband may also be required.

⁴⁵ I.e., Australia (NSW – the man and woman must have cohabited at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth; SA – a child born to a woman during a "marriage like relationship between two people who are each a domestic partner (that is a person living with another person as a couple on a genuine domestic basis ...for a period of 3 years or 3 out of the previous 4 years) or within ten months after the marriage...like relationship has been dissolved" is presumed to be the legal father), Canada (BC – presumption applies if the male was living with the birth mother in a "marriage-like relationship" within 300 days before, or on the day of, the child's birth; NWT – the male must have been cohabiting with the mother in a "relationship of some permanence" at the time of the birth of the child or the child was born within 300 days after he and the birth mother ceased cohabiting) and New Zealand (the couple must have cohabited at any time during the period beginning with the conception of the child and ending with the birth).

⁴⁶ As was stated in the context of the Council of Europe's work in this area: "The presumptions resulting in paternal affiliation are based on the probability that the biological paternity coincides with a situation recognised by law..." (see the White Paper, note 36 above at p. 9).

⁴⁷ This reflects Art. 4 of the 1975 *European Convention on the legal status of children born out of wedlock* which states that, in the context of a child conceived by natural means, the only ground upon which legal paternity may be contested is the fact that the legal father is not the genetic father.

⁴⁸ E.g., Canada (Manitoba), Finland, Ireland, Latvia, Portugal. In Lithuania, it is possible for a man to acknowledge a child in these circumstances but the husband and court's approval (simplified procedure) must be obtained.

⁴⁹ In the past, in some States, only the presumed legal father could challenge a presumption of legal paternity. In *Kroon v. Netherlands* (App. No. 18535/91, 27 October 1994), the ECtHR stated that internal law should provide a wide range of possibilities to contest legal parentage established by legal presumption and respect for family life (Art. 8 ECHR) requires that biological and social reality prevail over legal presumptions in cases where family life between an unmarried man and child is established.

States' approaches vary as to whether, for example, conditions are placed on who can challenge legal paternity, whether DNA evidence may be relied upon, and whether a limitation period applies. These matters are explored further in the "contestation of legal parentage" section below.⁵⁰

2) By voluntary acknowledgement,⁵¹ either at the time of the child's birth registration or subsequently: in nearly all States which responded to the Questionnaire,⁵² it is possible for a putative legal father to voluntarily "acknowledge" his legal paternity where this has not arisen by operation of law (*i.e.*, by legal presumption). However, the conditions under which such an acknowledgement may be undertaken and the procedures used differ (in some cases, significantly) between States. For example, in some States a voluntary acknowledgement cannot be undertaken by a man if another man's paternity is in effect (*e.g.*, as stated above - if the mother is married and the *pater est* presumption applies), whilst in other States the mother (or in some cases, the mother, putative father and husband) may simply make the requisite declarations to the registrar.

In terms of procedure, in the majority of States, an acknowledgement at the time of birth registration will take the form of a joint written statement with the birth mother. The mother's consent is therefore required and the declaration must be in writing. However, there are some States in which the acknowledgement may be undertaken in person and /or the mother's consent is unnecessary.⁵³ There are also differences concerning whether the consent of the child is required for an acknowledgement and, in some States, age limits have been established beyond which a child's consent must be obtained.⁵⁴ Further, concerning the man acknowledging the child, whilst, in a majority of States, proof of a genetic connection with a child is not a necessary pre-condition to undertaking an acknowledgement, the genetic connection appears to be *presumed* by many States such that its absence will be a ground for subsequently challenging legal paternity if discovered.⁵⁵ In some States, it is possible to acknowledge paternity *before* the birth of the child, whilst in many States this is not permitted.

In many States, an acknowledgement of paternity is submitted to the authorities responsible for birth registration and, in some States, it may also be submitted to the court. In a minority of States, it need only be publicly recorded. In many States, whilst the authorities must accept the acknowledgement for it to be registered and hence verify that it is in accordance with the State's law, there is no need for a formal approval process.⁵⁶

In most States, whilst the acknowledgement may be irrevocable by the author⁵⁷ (once approved, where this is necessary in the State) and binds *erga omnes* whilst in effect, it serves merely as presumptive evidence of legal paternity and this presumption may be

⁵⁰ See para. 31 et seq.

⁵¹ In some States, this is called "recognition" of paternity: the term "acknowledgement" is used in this document to avoid confusion with the private international law concept of "recognition".

⁵² In Australia (VIC), if a man is not subject to a legal presumption, a DNA test or court order will be required for him to establish his paternity.

⁵³ *E.g.*, the mother's consent is not required in Chile, Denmark, Finland (unless the mother is married – in which case her consent and that of the husband is required), Madagascar, Mexico, Monaco, Portugal, Romania and Switzerland.

⁵⁴ Where the child has sufficient understanding, the issue of his / her consent should be considered in light of Art. 12 of the UNCRC. Some States, however, take the view that to make an acknowledgement conditional on consents (whether of the mother or child) impedes the establishment of legal paternity which is, in general terms, in the best interests of children.

⁵⁵ *E.g.*, see the response of Switzerland to Question 11 which states that "[d]e iure it should be the genetic father [who acknowledges the child], but de facto the declaration can be given by any man...To eliminate this parentage a challenge is necessary". The 1975 *European Convention on the legal status of children born out of wedlock* states that a voluntary acknowledgement of paternity may not be opposed or contested insofar as the internal law allows for such procedures unless the person seeking to acknowledge or having acknowledged the child is not the genetic father (Art. 4). However, it has been noted in work concerning the revision of this Convention that this principle needs to be amended in light of ART (see the White Paper above at note 36).

⁵⁶ Cf., in Finland, the voluntary acknowledgement of a man is subject to approval by the Local Register Office.

⁵⁷ Though not in all States: *e.g.*, in Poland a man who acknowledges paternity can file for invalidity of his declaration but only within one year from the date of acknowledgement.

able to be rebutted in accordance with the State's rules on contestation of legal parentage. In one State,⁵⁸ to the contrary, an acknowledgement of a man that he is the father of a child subsequent to birth registration binds only the person who made the acknowledgement and hence cannot be registered in the civil status register.⁵⁹

3) By judicial or administrative decision: in a majority of States, it is possible for a non-contentious (*i.e.*, unchallenged) application to be made to the relevant State authorities for a decision establishing or confirming the legal parentage of a child.⁶⁰ In some States, such an unchallenged application should be made to the birth registration authorities but, in others, the application is made to court for a "declaratory order". In all States, legal paternity may also be established by the court where there is a dispute as to the child's legal paternity.⁶¹

14. Regarding whether it is possible for a child to have two legal parents of the same sex, States were evenly divided on this question with more or less the same number of States responding that it is possible as those which responded that it is not. In those States in which it is possible, the methods by which this occurs vary. Adoption, whether joint⁶² or step-parent adoption,⁶³ was the most common method reported. In a minority of States, the legal parentage of two persons of the same-sex can result from ART treatment and, in some cases, following a surrogacy arrangement.⁶⁴

(c) Assisted Reproductive Technology

The regulation of ART in internal law

15. In relation to ART, only one State responded that all forms of ART are prohibited in the State.⁶⁵ For all other States, certain forms of ART are permitted, usually subject to regulation.⁶⁶ Increasingly in recent years, this regulation results from legislation, often supplemented by more detailed implementing regulations and / or professional guidelines. However, in some States, legislation does not yet exist and guidelines or codes of practice are still the only form of (non-binding) guidance for medical professionals. In eight States, there are no rules or guidance at all concerning the use of ART.⁶⁷

16. Where ART *is* regulated in States (in whatever form), the policy considerations which appear to have played a role in the way the regulation is framed in some States include (amongst others): the rights and interests of child(ren), the reproductive freedom

⁵⁸ Canada (Quebec).

⁵⁹ Cf. a consensual application with the mother to the civil status authorities at the time of the child's birth registration stating that the man is the father of the child, or a declaration by the court, both of which may be registered.

⁶⁰ Australia (NSW, VIC, WLD, WA, SA, TAS), Canada (Alberta, BC, Manitoba, Quebec, NWT), Czech Republic, Denmark, Ireland, Israel, Latvia, Lithuania, Madagascar, Mauritius, Mexico, Norway, Philippines, Portugal, Romania, Russian Federation, Slovakia, Spain, Sweden, Turkey, USA and Uruguay.

⁶¹ This is discussed further in paras 31 to 37 below on the contestation of legal parentage.

⁶² "Joint adoption" is taken to mean when two persons adopt a child together, as a couple. In some States, only *married or registered* same-sex partners may adopt jointly: *e.g.*, Denmark and New Zealand.

⁶³ "Step-parent adoption" is taken to mean when an individual adopts the child of his / her partner or spouse. In some States this is not possible if the partner adopted the child in the first place (*i.e.*, undertook a single person adoption).

⁶⁴ These matters are further discussed below (see paras 21 and 26 et seq), along with the legal approach adopted by many States if same-sex couples undertake more informal arrangements with the intention of both becoming legal parents.

⁶⁵ Monaco.

⁶⁶ In the EU context, some States made reference to the relevant provisions of *Directive 2004 / 23 of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells* (discussed further in **Part A, Section 2** below). In some federal States, ART regulation is dealt with at state level which can lead to significant variations in approach *within* the State: *e.g.*, in Mexico, it was reported that ART is permitted by legislation in Colima, Queretaro and Tabasco; there is the possibility of ART by interpretation of the law in Michoacan, Morelos, Puebla, Sonora and Zacatecas; prohibitive legislation on ART can be found in Coahuila and San Luis Potosi; and, in the rest of the states, ART is unregulated.

⁶⁷ Chile, Dominican Republic, Guatemala, Madagascar, Mauritius, Poland, Sri Lanka and Thailand.

of persons wishing to use ART and the limitations to this freedom,⁶⁸ the role the State should play in the provision of ART and, in some cases, the risks of reproductive tourism and / or the commodification of children and reproductive abilities.⁶⁹ However, how these issues are addressed in law or policy across States varies considerably depending upon the social and cultural context of the State, as is evidenced by the varying content of the rules and the conditions placed on treatment. For example:

1) First, the conditions placed on access to ART vary tremendously from State to State. For example, whilst fulfilling a relationship status criterion is a pre-condition to receiving ART in nearly all States with regulation,⁷⁰ the permitted categories of relationship status differ. In some States, only heterosexual, married couples are allowed to access ART;⁷¹ other States also allow single women to undergo treatment; others also permit heterosexual unmarried couples to use ART⁷² and, in a minority of States, same-sex couples may access ART.⁷³ Age is another condition for using ART in many States, with an upper age limit for women frequently applied (although the precise age differs).⁷⁴ In some States, ART treatment is not permitted unless there has been a diagnosis of infertility.⁷⁵ In others, informative counselling or medical and psychosocial assessments of applicants must be undertaken and importance will be attached to the applicant's capacity to provide parental care and cater for the best interests of any child born.⁷⁶ In Israel, an additional criterion mentioned for IVF was that the couple or woman must be childless.

2) In terms of who may perform ART, in all States which responded to this point, ART treatment providers must be registered medical practitioners. In addition, in the overwhelming majority of States which responded, the institutions / clinics which provide ART are subject to registration and / or licensing requirements, often overseen by an established licensing body operating which frequently operates under the responsibility of a Ministry.⁷⁷

⁶⁸ In the European context, it has been held by the ECtHR that "the right to procreation is not covered by Article 12 or any other Article of the Convention" (see *Sijakova v. Former Yugoslav Republic of Macedonia*, App. No. 67914/01, 6 March 2003 at para. 3). However, it has also been held that Art. 8 ECHR does encompass "the right to respect for ...[a] decision to become genetic parents" (see *Dickson v. the UK*, App. No. 44362/04, 4 December 2007).

⁶⁹ See "Gestación por sustitución: ni maternidad subrogada ni vientres de alquiler", by Eleonora Lamm (2013), at p. 193. The Swiss national advisory commission on biomedical ethics has announced that it will shortly publish a report on the prohibited ART practices in Switzerland and some of these considerations have been highlighted as the main policy concerns.

⁷⁰ New Zealand was the only State which adopted a different approach in that it was stated that all persons for whom ART services are medically appropriate and recommended could apply for ART. However, the surrogacy legislation excludes single men and male couples – see para. 26 et seq below.

⁷¹ *E.g.*, Germany (although exceptionally single women may receive ART in limited circumstances), Lithuania and Turkey.

⁷² *E.g.*, Croatia (heterosexual couples or single women), Czech Republic (heterosexual couples, whether married or not, but no single persons), Hungary (heterosexual couples or women who become single during the treatment), Latvia (heterosexual couples or single women), Russian Federation (heterosexual couples, whether married or not, and single women), Switzerland (whilst couples where a basis for a parent-child relationship exists in accordance with the Civil Code may access ART, only married couples may use donated sperm) and Serbia (only heterosexual couples and, exceptionally, single women).

⁷³ *E.g.*, Brazil (ART is also permitted for single women and homosexual couples), Iceland (married and registered couples and single women), Norway (woman must be married or living with a man or another woman in a stable relationship resembling marriage), Portugal (only heterosexual married couples or couples in a civil union for at least 2 years can access ART) and Sweden (couples only – married, cohabitants or registered partners).

⁷⁴ *E.g.*, Brazil (a woman over 50 cannot receive donated eggs), Croatia (women must be under 43), Czech Republic, Denmark (no treatment for a woman aged over 45), Hungary (woman must not exceed the upper age limit of reproductive ages), Israel (up to 44 for IVF and up to 54 for egg donation), Lithuania (not older than 45).

⁷⁵ *E.g.*, Australia (SA) (medical diagnosis of infertility), Croatia (history of infertility), Israel (woman has a medical problem justifying use of egg donation), Norway (decision undertaken by physician) and New Zealand (must be medically appropriate).

⁷⁶ *E.g.*, Norway, Serbia and Switzerland. Australia (VIC) responded that criminal records and child protection checks have to be undertaken prior to accepting persons for ART.

⁷⁷ *E.g.*, Australia (NSW), Canada (Quebec), Croatia, Czech Republic, Finland, Germany, Hungary, Ireland, Israel, Latvia, Lithuania, New Zealand, Norway, Philippines, Portugal, Russian Federation, Serbia, Slovakia, Switzerland. In many EU States, the EU Tissue and Cells Directive (see note 66 above) was specifically recalled which requires tissue establishments (as defined by the Directive) to be subject to licensing.

3) In most States, the State legislation / regulations contain specific restrictions concerning the type of ART treatments which may be provided.⁷⁸ In terms of third party gamete donation, 21 States responded that third party *egg* donation was permitted, albeit in prescribed circumstances,⁷⁹ whilst in 3 States, egg donation was said to be prohibited.⁸⁰ In only one State which responded is sperm donation prohibited;⁸¹ in the other 25 States which responded, it is permitted under certain conditions.⁸² In all but one State which replied on the point, gamete donation (egg or sperm) is uncompensated and the sale of gametes or embryos is prohibited.⁸³ In most States, certain expenses are permitted and, in some States, a set fee is prescribed to cover these expenses.⁸⁴

4) The issue of the anonymity of third party gamete donors highlights the diversity of approaches to these issues across States today. Of the States which responded to the question, eight jurisdictions confirmed that legislation guarantees the anonymity of gamete donors.⁸⁵ In five jurisdictions, in contrast, anonymous donations are no longer permitted and identifying information must now be provided by all donors.⁸⁶ In four States, a donor can choose whether to donate anonymously or not.⁸⁷ In one State,⁸⁸ the couple undergoing ART may not be provided with identifying information concerning a sperm donor but the child has a right to information concerning the donor's identity. The tensions in internal law which this issue raises were emphasised in the reply of one State in which it was stated that whilst the Constitution enshrines the child's right to know his / her genetic origins, the law on ART still guarantees anonymity concerning gamete donors, even in exceptional cases.⁸⁹ In some States, where anonymity is guaranteed, medical (non-identifying) information may be released to the child born as a result of the donation once the child has reached a certain age. For States where anonymity is not permitted, usually the identifying information is recorded in a donor register, accessible to the child at a prescribed age (usually 18 years).

Legal parentage following ART⁹⁰

17. There was considerable homogeneity in the responses in that, whether there is ART legislation in the State or not, in the vast majority of States the woman who gives birth to a child will always be considered the legal mother of the child at birth in the first instance, irrespective of any ART procedure which has led to the birth. This will be the case even if donor eggs have been used in the ART procedure. In this way, the *mater est* principle⁹¹ is reinforced for births following ART. In certain defined circumstances (usually the adoption or surrogacy contexts), it may be possible in some States for legal maternity to be transferred to an intending or adoptive mother subsequent to the birth. The exception to the above-stated rule is that, in a minority of States,⁹² following a

⁷⁸ *E.g.*, a common restriction is the prohibition on sex-selection of embryos.

⁷⁹ A common requirement is that the donor be subject to a medical assessment. In Israel, a donor must be approved by a certification committee (certification is then valid for one year).

⁸⁰ Germany, Lithuania and Norway.

⁸¹ Lithuania.

⁸² Again, one frequently mentioned condition is that the donor is appropriately medically screened. Further, in one State, only single men can donate sperm (Israel) and in one State only married couples may use donated gametes (Switzerland).

⁸³ *E.g.*, Croatia, Czech Republic, Finland, Hungary, Latvia, New Zealand, Norway, Portugal, Serbia, Slovakia and Switzerland. This is also a restriction contained in the EU Tissue and Cells Directive (see note 66 above).

⁸⁴ *E.g.* Norway, Slovakia and the UK.

⁸⁵ Belgium, Brazil, Czech Republic, Israel, Latvia, Serbia, Spain and Sweden.

⁸⁶ Australia (subject to some minor exceptions), Croatia, Netherlands, New Zealand and the UK.

⁸⁷ Denmark, Finland, Hungary and Iceland.

⁸⁸ Norway.

⁸⁹ Spain. In addition, in Canada (BC), the Court of Appeal recently determined that there is no constitutional right to know one's parents: see *Pratten v. British Columbia (Attorney General)* 2012 BCCA 480. Leave to appeal to the Supreme Court of Canada was denied. There is growing case law on this issue across all States: *e.g.*, the German Hamm Higher Regional Court, on 6 February 2013, granted a child conceived by artificial insemination, the right to be informed of the sperm donor's identity. This issue also has to be examined in light of international and regional human rights law: *e.g.*, Arts 7 and 8 of the UNCRC and Art. 8 of the ECHR (*e.g.*, see *Godelli v. Italy*, note 32 above, where the ECtHR stated that, "the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests" (para. 52)).

⁹⁰ Legal parentage following surrogacy arrangements is dealt with in the next section: see paras 26 et seq.

⁹¹ See para. 1311 above.

⁹² *E.g.*, Canada (BC), Russia and Ukraine (from the Permanent Bureau's own research).

surrogacy arrangement and the meeting of certain criteria, the intending parents may be considered the legal parents of a child *by operation of law at birth*.⁹³ This appears to be the only situation – across all States - in which a woman who gives birth to a child will not be the legal mother of the child born in the first instance.

18. In relation to legal paternity, the situation differs depending upon whether there are specific legislative or other provisions in a State concerning the effects of ART on legal parentage. In most States in which there are such provisions, the husband of a woman who gives birth to a child following ART is usually stated to be the legal father of the child by operation of law, irrespective of genetics but *provided that* he consented to the treatment. However, this rule is established in different ways across States which subtly affects how it operates.⁹⁴ In some States, it is provided that, in these circumstances, legal paternity cannot be denied, except on the basis that there was no consent to treatment.⁹⁵ Consent is evidenced across States in different ways but often written consent is required.⁹⁶ In States which permit *unmarried* heterosexual couples to access ART treatment,⁹⁷ in many cases the provisions stated above are extended and applied to the male partner with, in some States, an additional pre-condition that the relationship must meet qualifying criteria for the presumption to apply (*e.g.*, being “marriage-like”, or “a conjugal relationship of some permanence”). In some States in which unmarried couples are not permitted to access ART together, if ART is accessed by the woman on her own, the male partner must acknowledge his paternity in the usual way to establish his legal paternity.⁹⁸

19. In many States in which there is no specific ART regulation, the normal *pater est* presumption will apply if a woman gives birth to a child as a result of ART during a marriage, seemingly therefore, *whether or not* the husband has consented to the treatment which brought about the birth. However, in these States, the presumption will be able to be rebutted by the husband in the normal way, including through a contestation of paternity procedure involving DNA evidence.⁹⁹

20. In most States with ART legislation, third party gamete donors who donate in accordance with the rules of the State (*e.g.*, formally, through medical institutions) are specifically provided for in legislation and will not be the legal parents of a child born following use of their gametes.¹⁰⁰ However, in many of these States if “assisted reproduction” is undertaken in an informal fashion – *i.e.*, without third party medical intervention, by individuals following an agreement often with friends or arranged via the internet - the rules on legal parentage following ART may not apply. In some States, the distinction is drawn upon whether the conception resulted from sexual intercourse or not,¹⁰¹ whilst in others the important factor is whether the ART treatment was carried out

⁹³ Discussed in more detail at paras 26 et seq below.

⁹⁴ *E.g.*, in some States, this position derives from an extension of the usual *pater est* presumption and additional rules which either state that the presumption will not apply if the husband's consent has not been provided, or that the absence of consent to treatment is stated to be a ground upon which the presumption may be rebutted (*e.g.*, the former position is adopted in Norway where the Biotechnology Act supplements the usual presumption by stating that the husband's consent to the ART procedure is necessary for the *pater est* presumption to apply in these circumstances; cf. the latter position is adopted in Sweden where the presumption of paternity can be rebutted in circumstances where the husband did not formally consent to the treatment.) In other States, it derives from a specific provision in ART legislation stating that the husband will be the legal father if his consent to treatment has been provided. In some of these States, *e.g.*, Australia (WA, SA), Canada (Alberta, BC, NWT), this legislation specifies that it will be presumed that the husband has consented to the treatment unless and until he can prove that he did not consent (*i.e.*, the burden of proof is on the husband to show a lack of consent, rather than vice versa).

⁹⁵ *I.e.*, a lack of genetic connection with the child would not be a basis to contest paternity (cf. para. 13.1) above): *e.g.*, Czech Republic, Belgium and Spain.

⁹⁶ Many States commented that this is required, in any event, for ART treatment to commence.

⁹⁷ See note 72 above.

⁹⁸ *E.g.*, Switzerland and Romania.

⁹⁹ *E.g.*, Germany, Ireland, Japan and Mauritius.

¹⁰⁰ However, in some of these States, it is possible for a sperm donor to acknowledge his paternity in accordance with the usual rules on acknowledgement (*e.g.*, in some cases, the mother's consent will be necessary).

¹⁰¹ See Quebec (Canada) (CCQ, Art. 538(2) – if genetic material is provided by way of sexual intercourse, a bond of filiation may be established in the year following the birth).

by health professionals or not,¹⁰² or, whether it took place in a clinic licensed under the particular ART legislation or not.¹⁰³ Whichever route is adopted, if the persons involved have not complied with the relevant legislative requirements, legal parentage will be established in accordance with the basic legal principles described in paragraphs 11 to 14 above and this may result in those who have informally “donated” gametes acquiring the status of legal parent. In a 2007 Canadian (Ontario) case in which a same-sex female couple undertook such an informal arrangement with a male friend and the genetic parents were registered on the birth certificate, the birth mother’s female partner won a subsequent challenge to be declared a legal parent of the child, resulting in the child having three legal parents.¹⁰⁴

21. Lastly, as concerns same-sex couples who formally undertake ART, in a minority of States (all of which permit same-sex couples to access ART together), legislation provides that two women can become the legal parents of a child *by operation of law* following the use of ART, *provided that* the defined criteria of the legislation have been met, including, in all cases, that the female partner of the birth mother consented to the ART (*i.e.*, these rules operate in an identical fashion to those provided for heterosexual couples).¹⁰⁵ In some States, this result is achieved not by operation of law but by the partner of the birth mother acknowledging her legal parentage to the registration authorities after the birth or, in some States, by obtaining a court order after the birth. In some States it was noted that whilst same-sex couples cannot access ART together in the State, single women can and hence, *de facto*, it happens that same-sex couples have children together through ART in the State. In such circumstances, the woman who did not give birth will need to undertake a step-parent adoption to become a legal parent of the child. In other States, a step-parent adoption is not available for same-sex couples and hence the child will be registered as the child of a single mother.

(d) Surrogacy Arrangements

Approaches to surrogacy in internal law

22. In general, the answers to Questionnaire No 1¹⁰⁶ support the categorisation of the different internal law responses to surrogacy arrangements undertaken in the 2012 Preliminary Report.¹⁰⁷ For example, twelve jurisdictions responded that there is an express prohibition of all forms of surrogacy arrangements within their jurisdiction, often with criminal sanctions for third parties involved in facilitating such arrangements and / or for arrangements in which payments have been made.¹⁰⁸ Two States clarified that whilst surrogacy arrangements facilitated by third parties using ART are expressly prohibited in law, traditional surrogacy arrangements arranged solely between the parties are not (these remain unenforceable, however).¹⁰⁹ A second group of States reported that surrogacy arrangements remain unregulated in internal law (and hence are neither expressly permitted, nor prohibited), although, in most (but not all)¹¹⁰ of these States,

¹⁰² Denmark.

¹⁰³ UK (from the Permanent Bureau’s own research).

¹⁰⁴ See *A.A. v. B.B.* 2007 ONCA 2 (Ontario Court of Appeal). The approach of, exceptionally, permitting a court declaration such that a third person will be declared a legal parent of a child was also adopted in the Canadian 2010 Uniform Child Status Act (Art. 9).

¹⁰⁵ *E.g.*, Australia (NSW – if the de facto partner of the birth mother, VIC, SA – if in qualifying relationship, TAS), Brazil, Canada (Alberta, BC – if married or in marriage like relationship with birth mother, Quebec – if spouse of birth mother, NWT- if married or cohabiting with birth mother), Iceland, New Zealand and Norway (spouse/cohabitant of birth mother).

¹⁰⁶ Prel. Doc. No 3 A of April 2013 (see note 8 above).

¹⁰⁷ See Prel. Doc. No 10 of March 2012 at pp. 9 to 18 discussing the different responses in internal laws to surrogacy: from prohibitive, to unregulated, to regulated and liberal approaches.

¹⁰⁸ Quebec, Dominican Republic, El Salvador, Finland (since 2007), Germany (criminal sanctions apply for third parties involved in facilitating the arrangement), Iceland, Philippines, Portugal (criminal sanctions apply if there has been any payment), Serbia (criminal sanctions include imprisonment of 3 to 10 years, regardless of whether the arrangement was altruistic or for-profit), Slovakia, Spain (law expressly prohibits with criminal sanctions) and Switzerland (there is a Constitutional prohibition, with criminal sanctions).

¹⁰⁹ Finland and Norway

¹¹⁰ *E.g.*, Thailand has an absence of regulation concerning surrogacy but for-profit surrogacy arrangements appear to be flourishing (from the Permanent Bureau’s own research and lawyer responses to Questionnaire No 2).

general provisions of law might be said to have been breached in the case of a for-profit¹¹¹ surrogacy arrangement.¹¹² In a third group of States, varying degrees of regulation of surrogacy exist (explored more below in paras 23 to 25) but for-profit arrangements are expressly prohibited by legislation and often criminalised.¹¹³ States in the fourth grouping identified in the 2012 Preliminary Report (*i.e.*, States in which for-profit surrogacy is permitted), did not, in general respond to Questionnaire No 1 (or this section of it) but, as identified in the Report, this position usually results from either an absence of any regulation of surrogacy within the State (which is taken to be permissive by omission), or from permissive legislation or judicial precedent.¹¹⁴ It should be noted that in the federal States which responded to the Questionnaire, whilst there may be relevant, applicable federal legislative provisions, the validity and legality of surrogacy arrangements is generally a matter of state / provincial law and thus the rules can vary (sometimes considerably) from one state / province to another.¹¹⁵

Regulation of Surrogacy

23. In the States in which there is some form of regulation of surrogacy, the regulation tends to fall into one of two (very broadly categorised) approaches, as identified in the 2012 Preliminary Report: (1) in a minority of States, *pre*-approval of a surrogacy arrangement is required, for example, by a committee established for this purpose;¹¹⁶ (2) in a greater number of States, the legislation focuses less on the arrangement *per se* and more on the status of the child and intending parents once the child is born. However, whilst 'pre-approval' is not required in these States, this type of legislation will usually contain conditions which may in fact concern *pre*-conception matters, even though compliance with the criteria must only be evidenced *ex post facto* to obtain the transfer of legal parentage. The nature and number of these pre-conception criteria varies across States.¹¹⁷ Legislation or other rules regulating ART in general also often exist in these

¹¹¹ The term "for-profit surrogacy arrangement" is used in this document to replace the term used in the 2012 Preliminary Report of "commercial surrogacy arrangement". This is due to feedback from intending parent associations that use of the word "commercial" is offensive for some that have undertaken such arrangements. It was stated that whilst such arrangements may involve compensation beyond expenses for a surrogate mother, they are not usually "commercial" in nature. See further the updated **Glossary**, at Annex A of Prel. Doc. No 3 B of March 2014.

¹¹² *E.g.*, Belgium, Chile, Czech Republic, Guatemala, Ireland, Japan (but strict medical guidelines do exist), Latvia, Lithuania, Mauritius, Monaco, Netherlands (although there are criminal law provisions concerning facilitating arrangements), Poland, Sri Lanka and Uruguay (although a draft law is pending).

¹¹³ For-profit arrangements are prohibited in the following States which otherwise have some regulation of surrogacy: *e.g.*, Australia (NSW, VIC, SA, TAS), Brazil, Canada (federally), Denmark, New Zealand (for-profit prohibited, altruistic regulated to certain extent, not enforceable), UK (for-profit not allowed and regulated).

¹¹⁴ See further the 2012 Preliminary Report: Prel. Doc. No 10 of March 2012.

¹¹⁵ *E.g.*, in the USA, the full spectrum of global approaches to surrogacy is represented amongst the states. Whilst 9 states have adopted some part of the Uniform Parentage Act, of these, less than half have included a section specifically on surrogacy arrangements. In fact, the absence of legislation concerning surrogacy at the federal level in the USA has been commented upon by the UN Committee on the Rights of the Child (in its Concluding Observations on the 2nd periodic report of the USA submitted under Art. 12 of the *Optional Protocol to the Convention on the sale of children, child prostitution and child pornography* (62nd sessions, 14 January – 1 February 2013)). The Committee stated that it was concerned at, "[t]he absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children" (para. 29 b)). In Australia, there is more uniformity across states with many having legislated to expressly regulate surrogacy in the past few years (although important differences in the nature and detail of the legislation remain). In Canada, for-profit surrogacy is prohibited at the federal level, along with facilitating arrangements for-profit, but across the provinces, within the confines of federal law, approaches differ.

¹¹⁶ *E.g.*, Australia (VIC, QLD, WA, SA), Israel, Mexico (in the draft legislation), New Zealand (ethical approval from ECART is required for arrangements involving fertility services providers).

¹¹⁷ *E.g.*, in many States there is a requirement for a genetic link between one of the intending parents and the child in order for a transfer of legal parentage to be obtained: *e.g.*, Australia (SA – unless both intending parents are infertile), Canada (Alberta), Israel (sperm must always be that of intending father), New Zealand (by virtue of ECART guidelines). In some of these States, this, along with limited relationship status and age criteria for the parties, may be the only *pre*-conception criteria which must be fulfilled in order to obtain a transfer of legal parentage. In other States, however, the pre-conception conditions are far more stringent and the parties must establish *ex post facto* that, for example, the arrangement was entered into *before* the birth mother became pregnant, it was medically necessary as a result of the intending mother's health situation and all parties received independent legal advice and psycho-social counselling prior to entering into the arrangement: *e.g.*, Australia (TAS). See further the criteria discussed below.

States and hence the conception and pre-birth process, whilst not subject to specific pre-approval, will be undertaken in accordance with these general rules.¹¹⁸

24. Whichever category of approach is adopted, there are broad trends which can be identified in terms of the requirements of the legislation / rules, albeit that the precise rules vary. For example:

1) Certain criteria must be fulfilled by the intending parents in order either for pre-approval of the arrangement to be obtained or for legal parentage to be established *ex post facto* (depending upon the approach adopted). In several States, if a couple is undertaking a surrogacy arrangement, they must be either married or in a marriage-like relationship (defined in various ways).¹¹⁹ In some States this is defined without reference to whether the two intending parents are of the same sex, or not.¹²⁰ As with ART treatment generally,¹²¹ age requirements are also often placed on intending mothers, as are health requirements (*i.e.*, usually an inability to carry a pregnancy to term), and, in some States, psycho-social criteria must be fulfilled.¹²² In one State it was mentioned that there must be a “medical *or* social” need for the surrogacy: single males or a male couple will therefore automatically meet this criteria due to the fact that they cannot have a child without the assistance of another party. In another State, it was also reported that the court must be satisfied that the intending parents are fit and proper persons to assume the role of parents of the child, whilst in others the best interests of the child were said to be a guiding criterion in terms of determining whether the transfer of legal parentage should take place.¹²³

2) Age, health and psycho-social restrictions (usually having undertaken counselling) were also common criteria for women wishing to become surrogate mothers. In some States, a further condition was that the woman had already had at least one healthy pregnancy of her own.¹²⁴

3) In terms of the nature of the arrangements permitted in the legislation, the most common restriction was that the arrangement should be not-for-profit (*i.e.*, not for compensation beyond reasonable expenses).¹²⁵ In two States, it was reported that traditional surrogacy arrangements are not permitted,¹²⁶ whilst in other States the only criteria was that one intending parent must be genetically the parent of the child born.¹²⁷

4) In only one State was the surrogacy arrangement, in terms of its principal clause to transfer the child to the intending parents, said to be a binding and enforceable contractual obligation.¹²⁸ In all other States, this clause was stated to be unenforceable, although in some States, other obligations arising from the agreement (for example, to pay the surrogate mother’s expenses) could be enforced.¹²⁹

25. Interestingly, only four States responded that they had nationality, domicile or residency requirements in their legislation / regulation concerning surrogacy, whether in respect of either the intending parents or the surrogate, and nearly all had different connecting factors¹³⁰ which had to be satisfied at different points in time.¹³¹

¹¹⁸ *E.g.*, Australia (NSW), Brazil, Canada (Alberta, BC, Manitoba) and the UK.

¹¹⁹ Whilst in some of these States, single persons are permitted to undertake surrogacy arrangements too, couples must meet defined relationship status criteria.

¹²⁰ Though note that in New Zealand as Guidelines refer to an intending mother who must meet medical criteria, it is currently impossible for single males or same-sex male couples to undertake a surrogacy arrangement.

¹²¹ See para. 16 above.

¹²² Usually that counselling has been undertaken.

¹²³ *E.g.*, Israel and the UK.

¹²⁴ *E.g.*, Australia (VIC, TAS), Russian Federation.

¹²⁵ Although compensation in Israel can include amounts for pain and suffering: see further the 2012 Preliminary Report (Prel. Doc. No 10 of March 2012).

¹²⁶ Israel and Russia.

¹²⁷ See note 117 above.

¹²⁸ Brazil.

¹²⁹ *E.g.*, the principle clause is said to be unenforceable in: Australia (NSW, QLD, SA, TAS), Canada (Alberta, BC, Manitoba), New Zealand and the UK

¹³⁰ *E.g.*, regarding intending parents: in Australia (SA), it was stated that the intending parents must be domiciled within the state to benefit from the surrogacy legislation’s rules; in Australia (TAS) it was stated that the intending parents must be resident within the state; in Israel the intending parents must be Israeli nationals and in New Zealand, whilst there were no legislative requirements, guidelines require the residency of the intending parents to be examined. In the UK (England & Wales), the legislation contains a requirement that

Establishing Legal Parentage

26. In terms of establishing the legal parentage of the intending parents following a surrogacy arrangement, for the States in which surrogacy is either prohibited or, as yet, unregulated, the general provisions, explained in paragraphs 11 to 14 above, will apply if a surrogacy arrangement is, nonetheless, undertaken in the State. The birth mother will therefore always be the legal mother in the first instance, except for the States in which anonymous birth is possible or it is possible for the birth mother to choose not to register her name.¹³² Legal paternity may be established by legal presumption (*e.g.*, most commonly if the surrogate (birth) mother is married), by voluntary acknowledgement or by court order.¹³³ In some States, it may be possible for the intending parent(s) to subsequently adopt child(ren) born to a surrogate mother but whether this is a possibility may depend upon the circumstances of the case and there have been cases in which adoption has been refused, for example where the surrogacy arrangement was for-profit.¹³⁴

27. In States in which there is some regulation of surrogacy, whether a pre-approval or *ex post facto* system, the most common position is that the birth mother will still be the legal mother at birth and legal parentage will be transferred to the intending mother after the birth of the child (provided the legislative criteria have been met), either by a specific transfer of legal parentage procedure or by adoption.¹³⁵ In relation to legal paternity, again it is most common that the general provisions on legal parentage will apply at birth and hence the husband of the birth mother will be the legal father, or the intending father may, in some circumstances, be able to voluntarily acknowledge his paternity in accordance with the general rules of the State.¹³⁶ There are, however, notable exceptions to this, such as Russia and Canada (British Columbia): in these States, provided the surrogate mother still consents following the birth of the child and that any other conditions of the legislation have been met, the intending parents may be registered as the legal parents of the child directly.¹³⁷ Furthermore, in Brazil, the legal parentage of the intending parents is established by virtue of the contractual arrangement and the surrogacy contract is sufficient to register the intending parents upon the birth of the child as the legal parents.¹³⁸ In other jurisdictions (although none which answered the Questionnaire), it is possible, either by virtue of legislation or judicial precedent, to

one of the intending parents must be domiciled within the State in order to be able to obtain a parental order post-birth. Regarding surrogate mothers: Australia (TAS) stated that the surrogate must live in Tasmania at the time the agreement is made; in Israel, the surrogate must be a citizen of Israel; Mexico stated that there may be such requirements; in New Zealand, whilst there is no legislation, Guidelines state that such matters must be taken into account. In Australia (SA), the fertilisation procedure must be carried out in South Australia.

¹³¹ *E.g.*, in some cases residency or domicile in the jurisdiction was required *at the time of the hearing for a parental order*, whilst in others it was required *at the time the agreement was entered into*.

¹³² *E.g.*, in Canada (Quebec) where it is possible to choose not to do so and thus *filiation* with the father only will be established.

¹³³ See para. 13 above concerning the three primary methods of establishing legal paternity.

¹³⁴ Since there may be rules which prohibit adoption if remuneration has been paid to the birth mother (*e.g.*, this is the case in Finland). In Belgium there is divergent case law on the issue of adoption post-surrogacy. Whilst several cases have permitted adoptions (often in the context of altruistic arrangements), stating that the issue of adoption has to be distinguished from the validity of the surrogacy arrangement, in 2012, the Ghent Court of Appeal refused an intending mother's application to adopt a child born as a result of a traditional surrogacy arrangement where seemingly considerable sums of money had been paid for the arrangement (30 April 2012) (see further Belgium's response to Questionnaire No 1).

¹³⁵ In New Zealand, however, the regulation of the surrogacy arrangement does not extend to rules concerning the status of the child following the arrangement and a domestic adoption is therefore the only mechanism available to transfer legal parentage to the intending parents.

¹³⁶ However, in Canada (NWT), legislation specifically provides that, if a person is married or cohabiting with a woman who has a child as a result of ART and, at the time of conception, it was intended that she would relinquish the child to a person who provided their genetic material, then the partner will not be a legal parent of this child.

¹³⁷ In Canada (BC) it is also possible for a birth mother and intending parents to agree, pre-conception, to all be the legal parents of a child. This is not considered a surrogacy arrangement since the birth mother will not relinquish her legal parentage post-birth. The child will then have three legal parents.

¹³⁸ See Brazil's response to Questionnaire No 1, in particular Questions 24 to 27.

obtain a court decision *prior to* the birth stating that the intending parents will be the legal parents of the child immediately upon birth.¹³⁹

28. In most States in which surrogacy is prohibited or unregulated (in the sense of there being no surrogacy-specific mechanism to accord the intending parents legal parentage), the fact of a surrogacy arrangement will not be recorded anywhere in the birth records of a child born to a surrogate mother because the child's legal parentage will be established according to the generally applicable legal parentage rules, irrespective of the surrogacy arrangement. If an adoption subsequently takes place (often necessary for the intending mother to acquire legal parentage), in most States the child's birth certificate will be re-issued following the adoption and will not disclose the fact of adoption. However, the adoption will remain on the State records and most States provide avenues for a child to have access to the full record, often upon attaining majority. In most States in which it is possible to transfer legal parentage to intending parents following a surrogacy arrangement, similar principles apply to the birth records of the child as those which apply in adoption cases, thus meaning that the child will be issued a new birth certificate once the transfer of legal parentage has taken place with no mention of surrogacy (but the fact of surrogacy will remain on the State record, which will usually be confidential and accessible to the child upon attaining a defined age¹⁴⁰). In one of the States in which intending parents to a surrogacy arrangement are placed directly on the birth register, it was noted that whilst the register itself will not contain the name of the surrogate mother, the notice of birth (from the medical institution), filed with the registration authorities, will provide her name as the birth mother (which will obviously be different from the name of the parent on the application for birth registration form).¹⁴¹ There will also be statutory declarations from the surrogate mother and the intending parents filed with the authorities in which the parties declare that they have complied with the legislative requirements enabling them to be registered as the child's legal parents.

29. In the vast majority of States, the Questionnaire responses revealed that the number of surrogacy arrangements which take place within each State each year is not tracked in any way.¹⁴² In some of these States, surrogacy is prohibited. In others, however, surrogacy is permitted and regulated but it appears that often it is left to the individual clinics to record the numbers of arrangements being undertaken (if at all).¹⁴³ In some States, it was reported that it was possible to determine the number of "parental orders" made by the courts to give a proxy indication of the number of surrogacy arrangements entered into but these figures do not capture the arrangements following which intending parents never seek to regularise their legal status.¹⁴⁴ In Israel and New Zealand (both of which operate, domestically, a pre-approval system), it was stated that the Israeli Ministry of Health and the body in New Zealand responsible for approvals do keep records of numbers but this will not include informal arrangements which do not go through the legal process. A recent EU study also highlighted the problem that, in many States, data concerning the number of surrogacy arrangements entered into is not

¹³⁹ *E.g.*, USA (California).

¹⁴⁰ Often majority or older (*e.g.*, in New Zealand, the child must be 20 years). In some States, this is also available to the parties to the arrangement upon request (*e.g.*, Australia (TAS)).

¹⁴¹ Canada (BC).

¹⁴² 23 jurisdictions responded that this information is not tracked. Australia (VIC) was an exception and it was reported that 10 births had taken place to surrogate mothers in 2012.

¹⁴³ *E.g.*, in Brazil it is reportedly obligatory in law for clinics to maintain this information.

¹⁴⁴ *E.g.*, Australia (NSW) stated that since February 2012 the Registry of Birth, Deaths and Marriages has registered 29 surrogate births following the making of a parentage order under the Surrogacy Act 2010 but specially mentioned that these figures do not capture the arrangements not presented to the Supreme Court. Further, the UK stated that a record is kept of the number of parental orders which are applied for which gives a proxy indication. However, commentators have analysed this information and concluded that whilst the number of parental orders made "show[s] a sharp increase starting in 2008 through until the end of 2011", (p.269) "[t]he apparent increase in overseas arrangements that do not result in applications for Parental Orders is a matter of considerable concern" (p.275): see further Marilyn Crawshaw, Eric Blyth & Olga van den Akker (2012): "The changing profile of surrogacy in the UK – Implications for national and international policy and practice, *Journal of Social Welfare and Family Law*", 34:3, 267-277.

routinely recorded.¹⁴⁵ It was stated that, “only very limited data are available across the EU [concerning surrogacy] and improved systems need to be put in place to routinely record relevant information across all countries”.¹⁴⁶

30. Whilst several States reported that they were aware of criminal activity which had taken place within the State which related to surrogacy,¹⁴⁷ interestingly, much of the criminal activity reportedly occurred in the context of *international* arrangements. This is discussed in **Part C** below.

(e) The contestation of legal parentage

31. In all States which responded to this issue, the courts (either specialist family courts or civil courts) are responsible for determining disputes concerning legal parentage.¹⁴⁸ However, considerable diversity exists across States in terms of who may bring an action to contest legal parentage, whether there is a defined timeframe within which such an action must be brought (a “limitation period”) and, if so, its nature and duration, as well as under which conditions actions may be brought. The difference in States’ approaches to some of these issues may evidence a deeper ideological divide between States concerning how the best interests of children can best be promoted when it comes to their legal parentage. For example, States which place limitations (whether of timeframe or identity of those permitted to challenge legal parentage) on the contestation of legal parentage may take the view that, in certain situations (*e.g.*, beyond a certain age of the child, or where a person has acted as a legal parent towards them for many years), it is in the child’s best interests for legal certainty as to their status to prevail over biological reality.¹⁴⁹ Other States may take the view that parentage is a question of fact which can always be challenged and, in terms of conceptions of child welfare, it is generally in the interests of the child to know the “truth” about his / her parentage.

32. For example, in terms of who may bring an action to contest legal parentage, a multitude of different approaches is evidenced by the responses to the Questionnaire. In some States, only the individuals currently considered to be the legal parents and / or the child¹⁵⁰ may bring an action to contest legal parentage.¹⁵¹ In other States, any person claiming to be a legal parent can also bring such an action,¹⁵² although, in some States, there are additional criteria for such applicants (*e.g.*, in one State, the applicant must be seeking to have his / her legal parentage established).¹⁵³ In some of these States, however, who may contest legal parentage and under which conditions is dependent upon whether legal maternity or paternity is being challenged, the method which was used to establish legal parentage and the context in which legal parentage is being challenged.¹⁵⁴ For example, in several States, who may contest legal paternity may

¹⁴⁵ See “A comparative study on the regime of surrogacy in EU Member States”, by Brunet et al (2013) for the EU Parliament’s Committee on Legal Affairs (available at < www.europarl.europa.eu/studies >).

¹⁴⁶ *Ibid.* at p.22.

¹⁴⁷ *E.g.*, Australia (NSW), Canada, Czech Republic, Philippines and Portugal.

¹⁴⁸ Two jurisdictions reported that, in certain circumstances, the birth registration authorities can also determine such disputes (Australia (QLD) and Germany).

¹⁴⁹ For the ECtHR’s approach to such issues see, *e.g.*, the case of *Ahrens v. Germany* (App. No. 45071/09, 22 March 2012), discussed further in note 157 below.

¹⁵⁰ And usually the child’s legal guardian if the child has not reached majority. It should be noted that where proceedings are instituted by persons other than the child, the child’s participation must be considered in light of Art. 12 UNCRC.

¹⁵¹ *E.g.*, Brazil (except when a falsity or error on the record is proved), Denmark (but exactly who may bring the action will depend upon the factual situation and different conditions may apply), Finland, Hungary, Netherlands (only paternity may be challenged), Philippines, Poland, Portugal, Romania, Serbia, Slovakia and Turkey.

¹⁵² *E.g.*, Australia (NSW, VIC), Canada (Alberta), Guatemala, Mauritius, Monaco, Philippines, Portugal, Romania, Serbia, Czech Republic (and the public prosecutor / court), Lithuania and the Russian Federation.

¹⁵³ *E.g.*, Croatia (but a person claiming to be the legal parent of a child can challenge paternity or maternity only if they are seeking to establish their own parentage).

¹⁵⁴ *E.g.*, in Germany, Switzerland and Sweden, who may contest legal paternity will depend upon whether it arose by way of presumption or acknowledgement (with often a broader category of persons being able to challenge an acknowledgement) and in Spain it will depend upon whether ‘matrimonial’ or non-matrimonial parentage (and, within this, whether paternity or maternity); Madagascar has a separate rule for paternity

depend upon whether it was established in the first instance by legal presumption or by voluntary acknowledgement.¹⁵⁵ Furthermore, in some States (often those of the civil law tradition), it may not be possible to contest legal parentage in circumstances where the person whose legal parentage is being challenged has so-called “possession of status” in relation to the child. This is a legal concept which is often defined within the particular civil codes but usually involves the person acting and behaving as the parent of the child.¹⁵⁶ In one State, a similar concept is expressed in such a way that a person claiming to be the genetic father of a child may only challenge the already-established legal paternity where no “social and family relationship” exists between the child and the present legal father.¹⁵⁷

33. In other States, in contrast, any person determined by the court to have “sufficient interest” can bring an action to contest legal parentage¹⁵⁸ and, in a minority of States, any person at all can contest a child’s legal parentage.¹⁵⁹ In some States, it is also possible for third parties such as the Registrar, Public Trustee, Public Prosecutor, or executor / administrator of an estate to seek a determination concerning legal parentage.¹⁶⁰

34. In relation to limitation periods, the Questionnaire responses reveal a division between those States which have limitation periods within which actions must be brought and those which do not.¹⁶¹ In the States in which limitation periods apply, the specific timeframe often varies according to who is seeking to contest legal parentage and in which circumstances. For example, several States have specific (often more restrictive) periods within which an application by a presumed father to rebut the *pater est* presumption must be made.¹⁶² Moreover, as between States, the limitation periods vary tremendously, from a period of 6 months to within 30 years,¹⁶³ often from the time of birth and / or from the time the applicant discovered the facts which revealed that he / she may or may not be the legal parent, if later. However, in one State there is an upper age limit of the child beyond which legal parentage cannot be challenged¹⁶⁴ and, as

which arises by way of presumption; in Hungary and Norway, who may contest legal parentage will depend upon whether paternity or maternity is being contested; in Croatia and Chile, different statutory rules apply for each different applicant; in Canada (Quebec) and Romania, all persons interested, at any time, may contest filiation where the “possession of status” is not consistent with the act of birth, whereas only defined categories of persons, within defined timeframes may contest the presumption of paternity.

¹⁵⁵ *E.g.*, in Croatia and Finland (and see note above).

¹⁵⁶ *E.g.*, Canada (Quebec) and Romania (see note 154 above).

¹⁵⁷ Germany (pursuant to Article 1600 § 2 of the Civil Code, the genetic father has a right to challenge the paternity of the man who is the child’s legal father only if there is no “social and family relationship” between the legal father and the child). In the case of *Ahrens v. Germany* (note 149 above), it was claimed that the application of this provision by the German Court, such that a genetic father was prevented from challenging another man’s legal paternity, violated his right to respect for his family life and discriminated against him. In determining that the decision whether a genetic father should be allowed to challenge legal paternity fell within the State’s margin of appreciation, the ECtHR referred to “the lack of a consensus within the Member States on this issue” (para. 75).

¹⁵⁸ Often a defined category of persons (*e.g.*, the current legal parents and child) may be able to bring the action without requiring the court’s permission and all other persons will be required to obtain “leave” to apply by demonstrating their sufficient interest. Similar approaches to this are adopted in: *e.g.*, Australia (NSW, QLD, SA), Canada (Manitoba, Quebec), Chile, El Salvador, Ireland, Japan, Mexico, New Zealand and Romania. “Sufficient interest” may be defined in various ways in these States (*e.g.*, a person “affected by the result” or a person with “moral or financial interest”).

¹⁵⁹ Canada (BC, NWT) and Israel.

¹⁶⁰ *E.g.*, Australia (NSW), Czech Republic (since 1 Jan 2014, it is the court rather than the public prosecutor) and Poland.

¹⁶¹ *E.g.*, States which had some form of limitation period for certain contestations by certain categories of persons (not all) included: Australia (TAS), Belgium, Canada (Quebec), Chile Croatia, Czech Republic, Denmark, El Salvador, Finland, Germany, Hungary, Japan, Latvia, Lithuania, Madagascar, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Spain, Switzerland, Uruguay. States which did not have any limitation period included: Australia (NSW, VIC, QLD, SA), Brazil, Canada (Alberta, BC, NWT), Dominican Republic, Guatemala, Ireland, Israel, Mexico, New Zealand, Philippines, Turkey and the UK.

¹⁶² *E.g.*, in Canada (Quebec), this application can only take place within one year of the date on which the presumption of paternity takes effect, unless the man is unaware of the birth, in which case the time limit begins to run from the day he becomes aware of it. The mother may contest paternity of the husband for one year from the date of birth.

¹⁶³ Canada (Quebec) has a limitation period of 30 years, save for in the case of a presumed father who may only contest his paternity within a year (*ibid.*).

¹⁶⁴ *E.g.*, Czech Republic.

mentioned above, there may be circumstances in some States in which legal parentage cannot be challenged at all, regardless of time.¹⁶⁵ The limitation period will usually not start to run for an applicant child until he / she has attained majority. In some States, compliance with the limitation period may be waived if the applicant can demonstrate a good reason for the delay.¹⁶⁶

35. There is more similarity across States in terms of approaches to the *grounds* upon which legal parentage may be challenged (if identity and timeframe conditions are satisfied by an applicant). In relation to legal maternity established outside the ART, surrogacy or adoption contexts, in the vast majority of States, the only ground upon which legal maternity may be challenged is on the basis that the woman registered as the legal mother did not, in fact, give birth to the child (*i.e.*, the registration of birth is factually incorrect).¹⁶⁷ In some States in which legal maternity arises not by operation of law but from the act of birth, the ground of challenge is different in that maternity may be challenged where the “possession of status” is not consistent with the act of birth.¹⁶⁸ Several States, however, indicated that the possibility to challenge legal maternity is not provided for in law at all since it is assumed that, per the maxim, the mother will always be certain by virtue of the fact of birth.¹⁶⁹ In relation to legal paternity established outside the ART / adoption / surrogacy contexts, in the vast majority of States, where it is possible for an applicant to bring an application for contestation (*i.e.*, if timeframe and identity conditions are satisfied), the only ground upon which legal paternity may be contested is that the man is not, in fact, the genetic father of the child. It therefore appears to be the case that outside the adoption / ART / surrogacy contexts, genetic connection is still the foundation upon which legal parentage is based.¹⁷⁰ However, in some States, as the restrictions on the categories of persons who may challenge legal parentage and the limitation periods outlined above indicate, legislatures have decided to draw lines beyond which even genetics will not be sufficient to overturn an existing legal status (often based, as explained above, on child welfare considerations and a need for certainty for the child).¹⁷¹

36. Regarding legal co-maternity or paternity established following ART treatment, where this is possible in a State, most States responded that the non-birth mother or the father determined to be a legal parent (usually under the relevant ART legislation) may only challenge his / her legal parentage if he / she did not consent to the ART treatment, usually at the time of conception (or had withdrawn his / her consent prior to conception). Where it is possible in States for parentage orders to be made following surrogacy arrangements, specific grounds upon which the orders may subsequently be contested may be provided for in the legislation. For example, in Australia (Tasmania), it is possible for an application to be made by any interested person to discharge a parentage order on several grounds, including that it was obtained by fraud, duress or other improper means, or that consents were given for payment or for an exceptional reason. In these newer contexts, therefore, it might be said that consent and, in some respects, intention to become a parent, has replaced genetics as the foundation upon which legal parentage is established, usually in conjunction, however, with policy considerations which determine, amongst other matters, the *a priori* question of who the State permits to consent or intend to become a legal parent.

37. In the overwhelming majority of States, the court’s determination following a contestation of legal parentage is binding *erga omnes* (*i.e.*, on all persons, for all

¹⁶⁵ *E.g.*, in some States, where an existing legal parent has so-called “possession of status” in relation to a child.

¹⁶⁶ *E.g.*, in the Czech Republic the court may pardon the expiration of the term. In Poland, there is no limitation period for an action by the Public Prosecutor.

¹⁶⁷ In the European context, this is in accordance with, for example, the Principles adopted by the Council of Europe in its 2004 White Paper (see note 36 above).

¹⁶⁸ Canada (Quebec).

¹⁶⁹ *E.g.*, Germany, Finland, Latvia and Sweden.

¹⁷⁰ Since, if one is not considering the adoption / ART / surrogacy contexts, a woman giving birth will always be the genetic mother of the child born.

¹⁷¹ *I.e.*, in these cases, the court may refuse the admission of DNA evidence (see also note 149 above concerning the jurisprudence of the European Court of Human Rights on this issue).

purposes). A few States mentioned, however, that in context of child support (maintenance) cases, the court can make a determination of legal parentage which is only binding for the limited purpose of those proceedings.¹⁷² Two States also clarified that, if legal maternity or paternity has been established by a court, no further contestation is permitted.¹⁷³ In one State, it was reported that the determination of the court is only binding if the Attorney General has been joined to the proceedings.¹⁷⁴ In terms of the birth record of the child, in the majority of States, it was stated that, following a successful contestation of legal parentage, the old record will be retained but the record is updated and a new birth certificate will be issued to the child (and old certificates destroyed). In most States, the old record will only be accessible to certain, defined persons upon application. In a minority of States, the old record is permanently deleted.¹⁷⁵

(f) The acquisition of nationality by children¹⁷⁶

38. The *ius soli* principle,¹⁷⁷ that a child may acquire the nationality of a State automatically by birth within the territory of the State, was stated to apply in fifteen of the States which responded to the Questionnaire.¹⁷⁸ In some of these States, however, the *ius soli* principle is not applied in its strictest sense since additional criteria to the child's birth on the territory may have to be satisfied in order for a child to acquire nationality on this basis: for example, parental residency or birth requirements may need to be satisfied by children born on the territory to *non*-national parents.¹⁷⁹ However, a trend has been evidenced across some States with the *ius soli* principle being extended to enable children¹⁸⁰ born on the territory to *non*-national parents to acquire nationality after birth, often once the child has acquired a certain age and / or has satisfied certain residency requirements.¹⁸¹

39. The *ius sanguinis* principle, that a child acquires nationality by descent automatically from his / her parent(s), raises two questions in the context of the discussion on children's legal status:

- (1) Is nationality by descent derived from the child's genetic and / or legal parent(s) (where these do not coincide)? And;
- (2) If it is the child's *legal* parents, which law is applied to determine the identity of the legal parent(s) if the situation has foreign elements?

As a EUDO Citizenship Observatory Report recently stated, "[w]hereas some problematic 'descent' issues have been around as long as mankind, such as children born out of wedlock ... others have only recently become issues of citizenship law. In particular, medically assisted reproductive techniques force states to redefine the notion of descent

¹⁷² *E.g.*, Canada (Alberta, BC).

¹⁷³ Croatia and Spain.

¹⁷⁴ Ireland.

¹⁷⁵ *E.g.*, Brazil, Hungary, Lithuania, Madagascar, Mexico, Netherlands, Romania, Serbia and Turkey.

¹⁷⁶ This section does not discuss the acquisition of nationality by adopted children (whether adopted domestically or intercountry). It also does not discuss in detail the issues which arise for children from multiple nationalities.

¹⁷⁷ In a European context, it has been stated that the *ius soli* principle is a British tradition alien to continental Europe but that it has gradually been included into mainly West and Southern European countries: see the EUDO Citizenship Observatory report, "*Birthright Citizenship: Trends and Regulations in Europe*" by Vink and de Groot (November 2010), available at < www.eudo-citizenship.eu > (hereinafter, the "EUDO Report").

¹⁷⁸ Australia, Brazil, Canada, Chile, El Salvador, Germany, Guatemala, Hungary, Mauritius, Mexico, New Zealand, Portugal, Slovakia, USA, Uruguay. It should also be noted that some of these States (*e.g.*, Canada) will not allow a child to acquire nationality on this basis if the child is born to parents who are foreign diplomats and their employees or persons with diplomatic immunities. This is in accordance with the *1961 and 1963 Optional Protocols to the Vienna Conventions on Diplomatic relations concerning Acquisition of Nationality*. In addition, a Swedish Citizenship Inquiry submitted proposals for certain amendments to the Act on Swedish Citizenship in April 2013. The proposals include draft provisions on automatic acquisition of citizenship, under certain conditions, by children born in Sweden (*ius soli*).

¹⁷⁹ This is the case, for example, in Australia (where a child must be born to Australian citizens or permanent residents) and reportedly so in Germany, Ireland, Portugal and the UK (information from the EUDO Report).

¹⁸⁰ Or adults, if the rule applies after majority.

¹⁸¹ *E.g.*, Australia: if the child is born in Australia but not to Australian national parents or permanent residents, the child may acquire Australian citizenship on his / her 10th birthday if ordinarily resident in Australia for the first 10 years since birth.

and to determine the extent to which citizenship can be transmitted along ‘artificial’ blood lines.”¹⁸²

Nationality by descent: from the genetic or legal parents?

40. In relation to the first question, in thirty-one States, it was reported that a child may acquire the nationality of the State *by descent* if one or both of the child’s *legal* parents is / are a national of the State.¹⁸³ In contrast, in seven States, nationality by descent is acquired if one or both of the *genetic* parents are nationals of the State.¹⁸⁴ It should be noted, however, that in either case, in some of these States, if a child is born abroad, and /or if only *one* of the child’s “parents” is a national of the State, and / or if the child is born out of wedlock, additional criteria may have to be satisfied in order for the child to acquire nationality by descent.¹⁸⁵ Furthermore, some States have limited the application of the *ius sanguinis* principle to the first generation of children born abroad. Restrictions on the acquisition of nationality by descent may, in some States, be overcome by registration of the child with the national authorities within a defined timeframe.¹⁸⁶

41. One State’s response on this point, however, evidences an issue which may also be a challenge for other States: that is, the nationality legislation does not specify whether the word “parent” should be taken to mean the child’s genetic or legal parent(s). In this State it was reported that whilst the policy intention of the legislation was for nationality to pass by descent based upon a *genetic* connection with a national parent, the courts have interpreted the legislation in such a way that a genetic connection is not required and *legal* parentage suffices.¹⁸⁷ In another State in which legal parentage is also sufficient for *ius sanguinis* to apply, the effects of this approach can be seen in that a child born to a same-sex female couple, following artificial insemination, will acquire the nationality of the State even if the birth mother is a non-national, provided that the non-genetically related partner, who is a national, has established her *legal* parentage of the child (through acknowledgement or court order).¹⁸⁸ In a different State,¹⁸⁹ nationality by descent is automatically acquired if one or both of the child’s *genetic* parents is a national of the State, *provided he /she is also their legal parent*.¹⁹⁰

42. It is also interesting to note that modifications to enable unmarried fathers to pass their nationality, *ius sanguinis*, to children have been made over the past two decades in several States, seemingly premised on the establishment of the man’s legal parentage.¹⁹¹ Today, if the *legal* parentage of an unmarried father is established by acknowledgement (including therefore, in many States, by birth registration of the father), court order or

¹⁸² See the EUDO Report at p.7 (*op. cit.* note 177).

¹⁸³ In many States which apply the *ius soli* principle, this is an additional method of acquiring nationality.

¹⁸⁴ Croatia, Dominican Republic, Israel, Mexico, Poland, Slovakia, Uruguay (until proven otherwise, the genetic connection is presumed in the legal filiation).

¹⁸⁵ *E.g.*, in Latvia, if only one parent is a national of the State, the child must have also been born within the State, or the permanent place of residence of the parents must be the State, in order for nationality to be acquired by descent. In some States (*e.g.*, Finland, Sweden and Denmark), if an unmarried legal father is the only legal parent with nationality of the State (*i.e.*, the mother is a non-national) and the child is born outside the territory, nationality of that State will not be automatically acquired by the child at birth (there may be ways for the nationality to be subsequently acquired – for example, in Finland and Sweden if a declaration is made by the national father). See the EUDO Report (*op. cit.* note 177) which mentions the additional requirements imposed by several States across Europe on acquisition of nationality by descent if a child is born abroad or out of wedlock.

¹⁸⁶ Usually nationality will be acquired *ex lege* (*i.e.*, by operation of law) but in these circumstances registration is required: *e.g.*, in Belgium if a child is born abroad, three further conditions have to be specified for the child to acquire Belgian nationality, including that the Belgian parent registers the child as a national within 5 years of the child’s birth (information from the EUDO Report (*op. cit.* note 177)).

¹⁸⁷ Australia.

¹⁸⁸ Sweden: since 2005 (information from EUDO Report (*op. cit.* note 177)).

¹⁸⁹ Canada (see the Immigration and Refugee Protection Act).

¹⁹⁰ This is restricted to the first generation born abroad.

¹⁹¹ Information from the EUDO Report (*op. cit.* note 177) at p.12: States include Germany (1993), Luxembourg (1987), Iceland (1998), Denmark (1999), Sweden (2001), UK (2002), Finland (2003), Norway (2006) and the Netherlands (2009). This is in accordance with the 1997 *European Convention on Nationality* (Art. 6) – as to which, see **Part A, Section 2** below.

legitimation (*i.e.*, marriage to the child's mother subsequent to the child's birth), in many States this will enable the child to automatically acquire nationality by descent from his / her legal father (provided, in many States, that the establishment of legal parentage has taken place while the child is a minor).¹⁹²

Which law applies to determine legal parentage for the purposes of acquisition of nationality?¹⁹³

43. In relation to the second question concerning which law will apply to the question of who is / are the child's legal parents if legal parentage is the basis upon which nationality by descent is acquired, in many States the question of the child's legal parentage (or 'descent') appears to be determined according to the internal law of the State (*i.e.*, the *lex fori*), even if the situation has foreign elements. However, this was not always clear from State responses¹⁹⁴ and, in some States, it was reported that the private international law rules of the State would apply to determine the applicable law to this question.¹⁹⁵ In the State in which genetic *and* legal connections are required,¹⁹⁶ legal parentage established abroad (evidenced by a foreign birth certificate or court order from the State of birth) will satisfy the required legal connection but DNA tests will be required if the genetic connection is doubted. If no genetic connection exists, it may still be possible for the child to acquire nationality by descent if his / her legal parent (again established by reference to foreign documentation) is a national and the child can be sponsored to enter the State as a "permanent resident". This can be achieved if the child was born through ART *and was born to* the person making the application or his / her spouse, common law partner or conjugal partner. This last requirement excludes, however, children born following surrogacy arrangements from this second category.¹⁹⁷

44. Lastly, many States also have specific provisions on the acquisition of nationality by (domestic and intercountry) adopted children,¹⁹⁸ foundlings¹⁹⁹ and children who would otherwise be stateless.²⁰⁰ In some States, the acquisition of nationality where a child would otherwise be stateless, however, may be pre-conditioned upon birth within the territory of the State.²⁰¹

45. The approaches of States to the acquisition of nationality by children evidence that, in many States, nationality laws have not yet 'caught up' with developments in science

¹⁹² In some States, acquisition of nationality will also be subject to the child's consent and / or the consent of his / her legal guardian, if the child has reached a defined age.

¹⁹³ Although a question of private international law, this is dealt with in this Part to avoid fragmentation of consideration of issues relating to nationality.

¹⁹⁴ Since many States spoke of application of their law without specifying whether it was their internal or private international law.

¹⁹⁵ *E.g.*, Germany, Lithuania and the Netherlands.

¹⁹⁶ Para. 41 above.

¹⁹⁷ See the case of *Kandola v. Canada (Citizenship and Immigration)* 2013 FC 336, currently before the Federal Court of Appeal which highlights this problem in the context of an international surrogacy arrangement which took place in India where the child has no genetic link with either intending parent (one of which is Canadian). There is a further category in which the authorities may enable the child to enter the State through a discretionary immigration process and then file an application for permanent residence on humanitarian grounds and, once a permanent resident, apply for nationality. The Minister can also be directed by the Governor in Council to grant nationality to anyone in order to alleviate cases of special and unusual hardship: one application for a grant of nationality on this ground, following a surrogacy arrangement, is currently pending.

¹⁹⁸ In relation to the acquisition of nationality for children following *intercountry* adoption, see the Conclusions and Recommendations of the 2010 Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention at para. 19 (available in the "Adoption" specialised section of the Hague Conference website).

¹⁹⁹ See the *European Convention on Nationality*, Art. 6(1) b) which prescribes that a foundling found in the territory of a state has to acquire nationality of the State if he would otherwise be stateless. The wording of this provision is drawn from the 1961 *Convention on the Reduction of Statelessness* (Art. 1). The nationality acquired by a foundling may be lost in some States under certain conditions (some of which may not be in accordance with the principles of the European Convention): see further the EUDO Report (*op. cit.* note 177).

²⁰⁰ In accordance with international law principles: *e.g.*, Art. 15(1) of the *Universal Declaration of Human Rights* states that everyone has the right to at least one citizenship, and Art. 1 of the 1961 *Convention on the Reduction of Statelessness* which contains rules to avoid statelessness.

²⁰¹ This is in accordance with the *European Convention on Nationality* (*ibid.*, Art. 6(1) b)).

and, in some cases, family laws concerning the establishment and contestation of legal parentage. As a result, nationality legislation may often assume that the genetic and legal parent of a child will be one and the same person, causing difficulties where this is not the case. In addition, in some States, if legal parentage is determinative for the acquisition of nationality by descent and a case has foreign connections, it may not be clear which law should apply to determine the question of who is / are the child's legal parent(s). A further problem may be that, even if nationality legislation provides a clear definition of who is considered to be a "parent" *for nationality purposes*, this may not always coincide with the rules concerning the establishment of legal parentage in family law, leaving the possibility that a child has a legal parent according to the law of the State, but one who cannot pass his / her nationality to the child or vice versa. This is also, of course, a possibility in those States in which a genetic connection must be present for the child to acquire nationality by descent from a parent. Some of these issues, in particular in the context of ART, have already been discussed in regional work on nationality, as discussed below in **Part A, Section 2**.

(g) Legal developments

46. State responses to Questionnaire No 1 reveal that internal laws in the field of legal parentage are still in a considerable state of flux, in particular in relation to laws concerning the establishment and contestation of legal *paternity* (often outside marriage), ART, surrogacy arrangements and same-sex parenting, as well as the legal consequences of these matters (*e.g.*, including nationality). In many States, the law is struggling to catch up with an evolving social reality. For example, developments in legislation, case law and / or governmental guidance in recent years were reported in these and related areas in State responses to Questionnaire No 1 by: Australia (Federally,²⁰² as well as in NSW,²⁰³ VIC,²⁰⁴ QLD,²⁰⁵ SA,²⁰⁶ TAS²⁰⁷), Canada²⁰⁸ (Federally,²⁰⁹ as well as in Alberta,²¹⁰ BC,²¹¹ NWT²¹²), Croatia,²¹³ Czech Republic,²¹⁴ Denmark,²¹⁵ Germany,²¹⁶ Guatemala,²¹⁷ Israel,²¹⁸ Latvia,²¹⁹ Norway,²²⁰ Poland,²²¹

²⁰² The Family Law Act 1975 was amended in 2008.

²⁰³ ART legislation enacted in 2007 (entry into force, or "EIF": 2010), currently under review; Surrogacy Act 2010 (EIF: March 2011), a review is due after November 2013; amendments to the Births, Deaths and Marriages Registration Act 1995, including to allow same-sex couples to be registered as the parents of a child; government inquiries into the inclusion of donor details on the register of births and managing information related to donor conception.

²⁰⁴ ART Act operational in 2010: from this time, single women and same-sex couples could access ART.

²⁰⁵ Surrogacy Act 2010. Approval has also been given for a review of the Births, Deaths and Marriages Registration Act 2003.

²⁰⁶ Surrogacy Act 2009, amended in 2012. There has also been legislation concerning same-sex parenting (Family Relationships (Parentage) Amendments Act 2011).

²⁰⁷ Introduction of the Relationships Act 2009 and the Surrogacy Act 2012.

²⁰⁸ In 2010, the Uniform Law Conference of Canada adopted the Uniform Child Status Act 2010 to address the status of children born through ART, including surrogacy and recommended that provinces and territories amend their legislation accordingly. To date, Alberta and British Columbia have revised their laws in accordance with it.

²⁰⁹ In 2012, the Department of Citizenship and Immigration published a policy (Operational Bulletin 381) clarifying that the automatic acquisition of Canadian citizenship at birth for children born abroad through surrogacy and / or ART requires a genetic link between a Canadian citizen parent and the child.

²¹⁰ Family Law Act: parentage provisions concerning ART were updated and came into force in 2011.

²¹¹ The law concerning legal parentage changed in 2013 when the Family Law Act came into effect.

²¹² Amendments made to the Vital Statistics Act and consequential amendments to the Children's Law Act in 2011 concerning ART.

²¹³ In July 2012, a law was adopted on ART.

²¹⁴ The following relevant legislative amendments have been undertaken (EIF: 2014): new Civil Code, Act on the Citizenship of the Czech Republic; Amendment to the Act No 301/2000 on Registry Offices, name and surname and Act No. 373/2011 on Specific Health Services.

²¹⁵ In 2003, amendments were introduced regarding co-maternity.

²¹⁶ In a ruling of 15 July 2013, the Federal Court of Justice held that a sperm donor (genetic father) may, in certain circumstances, challenge another man's legal paternity, since sexual intercourse did not rule out paternity from a sperm donation being challenged.

²¹⁷ Introduction of a law on civil status.

²¹⁸ An egg donation law was introduced in 2010 and there was also an amendment to the IVF regulations.

²¹⁹ Changes have been introduced to legislation concerning the right of genetic fathers to challenge acknowledgements of paternity (previously this was not permitted). In addition, there have been changes to the Law on Citizenship and, in 2012, Latvia started the payment of infertility treatment from the state budget.

Spain,²²² and the UK.²²³ In addition, the following States reported being in the process of considering or enacting legislation in these areas: Dominican Republic,²²⁴ Finland,²²⁵ Ireland,²²⁶ Israel,²²⁷ Lithuania,²²⁸ Madagascar,²²⁹ Mauritius,²³⁰ Mexico (federal),²³¹ Netherlands,²³² New Zealand,²³³ Philippines,²³⁴ Portugal,²³⁵ Romania,²³⁶ Serbia,²³⁷ Slovakia,²³⁸ Sweden,²³⁹ Switzerland²⁴⁰ and Uruguay.²⁴¹

²²⁰ The law on parentage following international surrogacy has been interpreted and clarified by the Ministry of Children, Equality and Social Inclusion (discussed further in **Part C, Section 3** below). Furthermore, a temporary act on the transfer of legal parentage to the intending parents and a temporary regulation on recognition of paternity established under foreign law have been adopted. These apply to children residing in Norway with their intending parents without legal parentage established according to Norwegian law. Applications must be made before 1 January 2014 and the rules are applicable to cases which occurred before the current law was clarified.

²²¹ In 2009 comprehensive amendments to the Family and Guardianship Code entered into force. The changes included that the acknowledgement of paternity must be linked with the genetic origin of the child and cannot be based solely on the man's declaration; the woman who gave birth to the child is the legal mother; and challenging paternity is not permitted when the mother's husband consented to ART. There have been efforts to regulate ART but none of the proposals have gained sufficient support. The procedure for adopting a new law concerning the registration of civil status acts is underway (EIF planned for 2015).

²²² Including amendments to the Law on ART (2011) and to the parentage rules in the Civil Code and Civil Procedure Rules (2009).

²²³ The 1990 Human Fertilisation and Embryology Act was amended in 2008 following a review and public consultation.

²²⁴ A draft Family Code is in preparation which will address these issues.

²²⁵ Reform of the Paternity Act and new legislation concerning parentage is in progress. In addition, the question of surrogacy arrangements has been investigated in light of a 2011 opinion of The National Advisory Board on Social Welfare and Health Care Ethics which considered that in certain isolated cases surrogacy may be an ethically acceptable infertility treatment. A statement on surrogacy was issued by the Ministry of Justice in June 2013 stating that the question requires further investigation and the next government (2015-2019) should decide whether there should be further action on this topic. Until 2015, more information should be available to Finnish couples considering surrogacy abroad regarding the risks associated with such arrangements.

²²⁶ The Minister for Justice and Equality plans to bring legislative proposals to government in the coming months in relation to the assignment of parentage in cases of ART, including surrogacy.

²²⁷ In 2012, a public committee reported on the need for legislative amendments regarding fertility and procreation in Israel. The recommendations of the committee are now being implemented.

²²⁸ Whilst the birth registration procedure has already been amended in recent years, as has the law concerning the acquisition of a child's citizenship, draft laws concerning ART and surrogacy are still under discussion and no agreement has been reached as yet. The Ministry of Justice is also currently preparing a draft law amendment and supplementing the articles of the Civil Code, including on the legal parentage of children born to unmarried couples (see further Lithuania's response to Question 39).

²²⁹ Initiatives are underway in the government to modify the law concerning nationality and birth registration.

²³⁰ The Attorney General has requested the Law Reform Commission to study the issue of surrogacy and ART.

²³¹ A draft law from the Federal District Legislative Assembly is under discussion concerning ART.

²³² A bill is in progress which would enable the female spouse of a birth mother to acquire legal parentage without the need for adoption.

²³³ Same-sex marriage was introduced in 2013 (Marriage (Definition of Marriage) Amendment Act) and this has the effect of allowing same-sex couples to jointly adopt. Also, amended surrogacy guidelines will be issued by ACART following consultation with the Minister of Health (since they are currently discriminatory in not permitting single males and male couples to enter into surrogacy arrangements).

²³⁴ Legislation on surrogacy is pending before Congress.

²³⁵ The Ministry of Justice is currently preparing a law concerning joint adoption by same-sex couples and Parliament is discussing a law which may permit surrogacy in specific cases (amending Law n. 32/006 of 26 July).

²³⁶ A draft law on ART with third parties (not addressing surrogacy) is currently before Parliament. It has been adopted by the Senate and debates in the Chamber of Deputies will now take place.

²³⁷ A draft Serbian Civil Code is currently in process and in the third volume on family relations includes rules relating to surrogacy.

²³⁸ In 2008, the EU Tissues and Cells Directive (see note 66 above) was implemented but other initiatives concerning ART were cancelled due to pressure from certain lobby groups. In 2014, draft legislation will be prepared concerning the timeframe within which contestations of paternity by the husband of the birth mother must be brought.

²³⁹ In 2013, a government inquiry was established to consider ways to expand the possibilities for involuntarily childless people to become parents (report due by June 2015). The Swedish Citizenship Inquiry also submitted proposals for amendments to the Act on Swedish Citizenship in 2013 (see note 178 above).

²⁴⁰ Consideration is currently being given to reforms concerning joint adoption for same-sex couples, changes concerning pre-implantation genetic diagnosis (ART) and egg donation (parliamentary initiative). Parliament has also mandated the government to prepare a report on international surrogacy cases and the recognition in Switzerland of parent-child relationships resulting from them, as well as given a general mandate to present a report on the 'modernisation' of family law in Switzerland, including filiation.

²⁴¹ A draft law on ART is currently before the Chamber of Representatives.

47. Whilst the current instability in internal laws might be considered a reason not to advance international work at this stage, the contrary argument can be persuasively made when the international work does not seek to harmonise internal laws but instead focuses on private international law. In fact, in circumstances where it is well-evidenced that internal laws are not developing in a globally uniform manner, it might be said that private international law initiatives are even more critical and timely bearing in mind the unique role private international law can play in bridging the developing gaps between States. Whilst it is important in advancing this work to have a clear understanding of internal laws, moving forward with private international law is therefore not pre-conditioned on a steady and constant internal law picture.

2. Relevant federal, regional and international work concerning the establishment and contestation of legal parentage and related areas

48. The internal laws of States regarding the establishment and contestation of legal parentage described above may be influenced by federal, regional or international initiatives where work has been undertaken at these levels to establish common principles and / or move towards harmonisation of substantive laws. It is therefore interesting to briefly consider any trends evidenced at these levels concerning the establishment and contestation of legal parentage to see if there are movements towards uniformity and / or if experiences in these fora should inform the work of the Hague Conference.

The establishment and contestation of legal parentage

49. At a federal level, work has been undertaken in two States in relation to the establishment and contestation of legal parentage by the respective bodies charged with drafting uniform laws. In the USA, the 2002 Uniform Parentage Act (UPA)²⁴² has, to date, been adopted by nine states,²⁴³ whilst in Canada, the 2010 Uniform Child Status Act (UCSA)²⁴⁴ has led to two states amending their legislation thus far.²⁴⁵ Both modern uniform laws (replacing earlier versions of 1973 and 1992 respectively) could be said to be imbued with the philosophy that, “[w]e must recognise the obligations of parents in any possible combination and permutation of marriage of the parents, method for conception of the child, and arrangements that intended parents make to have children”²⁴⁶ and both might be said to have child-focused guiding principles (amongst other policy objectives), including promoting equality of treatment for children, regardless of their means of conception, as well as promoting certainty and clarity concerning their legal status at the earliest possible time in their lives.²⁴⁷ In this regard, both uniform laws contain all-encompassing provisions for the establishment of legal parentage: *i.e.*, provisions for the establishment and contestation of legal parentage both inside and outside wedlock (based on the principle of non-discrimination), following the use of ART for heterosexual and same-sex couples, as well as for single persons, and following surrogacy arrangements.²⁴⁸

50. At the regional level, within Europe, initiatives to establish common rules led to the Council of Europe’s 1975 *Convention on the Legal Status of Children Born out of Wedlock*.²⁴⁹ Whilst this Convention “assimilate[d] the legal status of children born out of wedlock with those born in wedlock”,²⁵⁰ said to be in line with trends across Europe at

²⁴² Drafted by National Conference of Commissioners on Uniform State Laws

²⁴³ Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming.

²⁴⁴ Drawn up by the Uniform Law Conference of Canada.

²⁴⁵ Alberta and BC.

²⁴⁶ From the US Uniform Law Commission’s “Parentage Act Summary”, available at < www.uniformlaws.org >.

²⁴⁷ *E.g.*, see the principles used to guide the work of the group preparing the UCSA at para. 7 of the introduction to the Act.

²⁴⁸ It should be noted that Art. 8 of the UPA (on surrogacy) is optional.

²⁴⁹ The 1975 European Convention currently has 23 States Parties and 3 signatories.

²⁵⁰ As well as common rules concerning some of the effects of such affiliation (e.g. concerning maintenance and inheritance for the child).

that time,²⁵¹ it could not foresee the social, medical and legal developments which were to come.²⁵² In light of these advances, as well as the perceived need for an all-encompassing instrument on family status in line with current European Court of Human Rights' ("ECtHRs'") jurisprudence, efforts to modernise this instrument were undertaken at the Council of Europe, resulting in a 2011 *Draft Recommendation on the rights and legal status of children and parental responsibilities*.²⁵³ As with the federal uniform law initiatives, this project had child-focused guiding principles. In particular, Article 3 of the UNCRC was relied upon and, in this context, the best interests of the child were taken to mean establishing legal parentage from the moment of birth where possible and giving stability over time to the child's established legal parentage. Further, as with the federal initiatives, the principles aimed to strike a balance between "biological truth" and "social parenthood", particularly in the context of legal parentage following ART.

51. This attempt at a basic level of harmonisation within Europe, however, has faltered, with permissive (not mandatory) provisions concerning same-sex legal parentage following ART (expressly aimed at only those States in which same-sex couples are permitted to access ART), and provisions concerning the establishment of legal parentage for heterosexual registered partners or cohabitants (*i.e.*, outside marriage) proving controversial between States.²⁵⁴ The controversy surrounding this Draft Recommendation demonstrates the lack of consensus which exists even between States within the same region concerning some issues relating to legal parentage and the difficulty in seeking to harmonise *substantive* laws in this field. In this respect, the Parliamentary Assembly of the Council of Europe's written declaration No. 522, dated 27 April 2012, signed by 22 MPs stating that "surrogacy is incompatible with women and children's dignity and constitutes a violation of their fundamental rights" should also be noted.²⁵⁵ These regional developments might be said to bring to the fore the need for work on private international law (in circumstances where harmonisation of internal laws is not feasible but cross-border problems result from divergent internal laws), but they also evidence the importance of remaining focused on the *cross-border* aspects of this subject.²⁵⁶

52. Aside from regional *legislative* work, regional human rights jurisprudence²⁵⁷ also has significance for the development and practical operation of national laws relating to the establishment and contestation of legal parentage.²⁵⁸ Whilst time and space do not permit a detailed analysis of this jurisprudence, recent ECtHR cases have dealt with pertinent issues such as, for example: whether preventing a genetic father from challenging the established legal paternity of another man breaches his Article 8 ECHR rights,²⁵⁹ how far a State is obliged to compel an alleged genetic father to undergo DNA

²⁵¹ See the Explanatory Report to the Convention at para. 2. The Convention itself notes, however, in its Preamble, that wide disparities between the laws of Member States still existed at that time.

²⁵² See Section II of Prel. Doc. No 3 B of March 2014. Legal developments include the conclusion of the UNCRC in 1989 and developments in the jurisprudence of the ECtHR.

²⁵³ See the Meeting Report of the 86th Plenary meeting of the European Committee on Legal Co-operation (CDCJ), Strasbourg, 12-14 October 2011, CDCJ 2011 15, which includes the text of the Draft recommendation and its Explanatory Memorandum.

²⁵⁴ As far as the Permanent Bureau is aware, the Draft Recommendation, whilst adopted by the Committee on Legal Co-operation, has therefore yet to be adopted by the Committee of Ministers.

²⁵⁵ Doc. 12934, available at < www.assembly.coe.int >.

²⁵⁶ As was stated in the Report of the CEFL Conference concerning "Family Law and Culture in Europe. New Developments, Challenges and Opportunities" (August 29-31, 2013, Bonn), "increased streams of migration and other effects of globalization increase the likelihood of legal-cultural conflicts. ... culture needs to be taken seriously as an important imprint on law... family law, too, is embedded in cultural contexts and national traditions, but ... this does not inevitably lead to a logic of unbridgeable cultural differences."

²⁵⁷ Whilst in case law which does not directly relate to issues of parental status (but which instead deals with custody matters), the Inter-American Court of Human Rights, in cases such as *Fornerón and Daughter v. Argentina* (Case No 12.584, 27 April 2012) and *Atala Riffo and Daughters v. Chile* (Case No 12.502, 24 February 2012), has demonstrated an evolving approach to what constitutes a family within the meaning of the *American Convention on Human Rights*.

²⁵⁸ States Parties to the ECHR found to have violated a right contained therein "must abide by the final judgment of the Court in any case to which they are parties" (Art. 46(1)). This means paying any compensation / damages / costs ordered but also ensuring that national law complies with the ruling in future. Whilst technically, it is only the State found to be in breach that is bound by the ruling, other States Parties will usually pay close regard to decisions to avoid being taken to the ECtHR.

²⁵⁹ See, *e.g.*, *Chavdarov v. Bulgaria* (3465/03, 21 December 2010), *Ahrens v. Germany* (App. No. 45071/09, 22 March 2012, see note 157 above) and *X and others v. Latvia* (App. No. 27773/08, pending – this case is the

testing,²⁶⁰ the need for particular diligence in ensuring the progress of civil status proceedings,²⁶¹ the availability of step-parent adoptions for same-sex couples²⁶² and the confidentiality of birth information.²⁶³

53. Lastly, at the international level, whilst well-known rights of the child contained within the UNCRC are of great importance to substantive laws on legal parentage, in particular in terms of setting a broad “rights framework” with which national laws should comply (*e.g.*, see Arts 2, 3, 7, 8, 12 of the UNCRC),²⁶⁴ this instrument obviously does not seek to harmonise substantive laws on the establishment and contestation of legal parentage. In this respect, there has been very limited work of this kind at the international level. The *Convention on the establishment of maternal descent of natural children*, drawn up by the International Commission on Civil Status in 1962,²⁶⁵ sought to harmonise normative rules relating to the maternal descent of children, notably by providing that maternal descent should be established by the mother being named in the birth record of the child. However, despite its very limited material scope, this Convention has, to date, only seven States Parties.

ART

54. It also must be noted that there has been work at the international and regional levels which is of relevance to issues of ART. First, internationally, relevant bioethics standards have been established in the *Universal Declaration on Bioethics and Human Rights*.²⁶⁶ Secondly, regionally, within Europe, the Committee on Bioethics of the Council of Europe has undertaken noteworthy work. The 1989 Principles set out in the report of the *Ad Hoc Committee of Experts on Progress in the Biomedical Sciences* (CAHBI) contain, amongst other provisions, interesting early standards concerning conditions for the use of ART. Further, the 1997 *Convention on Human Rights and Biomedicine*²⁶⁷ focuses on provisions to ensure respect for the dignity of the human being and establishes provisions aimed at safeguarding such dignity with regard to the application of biology and medicine.²⁶⁸ The Committee has also undertaken two questionnaires and studies, in 1998 and 2005, on different aspects of the use of ART within the Council of Europe Member States.²⁶⁹ Their current work programme does not appear to include further work in this area, other than on possible guidelines concerning pre-natal sex selection of children.²⁷⁰

converse in that DNA tests have been ordered by the national court and the mother and legal father are claiming that the decision to order testing on the facts of this case breaches Arts 6 and 8 ECHR).

²⁶⁰ See, *e.g.*, *Mikulic v. Croatia* (App. No. 53176/99, 7 February 2002) and *A.M.M. v. Romania* (App. No. 2151/10, 14 February 2012).

²⁶¹ See, *e.g.*, *Mikulic v. Croatia* (*ibid.*).

²⁶² See, *e.g.*, *Gas and Dubois v. France* (App. No. 25951/07, 15 March 2012) and *cf. X and Others v. Austria* (App. No. 19010/07, 19 February 2013). See also the pending case of *Bonnaud and Lecoq v. France* (App. No. 6190/11) concerning parental responsibility in these circumstances.

²⁶³ Where the Court has found that a balance must be struck between a child's right to know his / her origins and a parent's right to privacy: *e.g.*, see *Godelli v. Italy* (App. No. 33783/09, 25 September 2012), *Jaggi v. Switzerland* (App. No. 58757/00, 13 July 2006) and *Odièvre v. France* (App. No. 42326/98, 13 February 2003).

²⁶⁴ Other international human rights treaties also contain provisions which are relevant in terms of setting a broad “rights framework” with which substantive laws on legal parentage should comply: *e.g.*, the ICCPR (*e.g.*, Arts 2, 17 and 24) and the *International Covenant on Economic, Social and Cultural Rights* (hereinafter, the “ICESCR”, *e.g.*, Arts 2 and 10).

²⁶⁵ ICCS Convention No 6, signed in Brussels on 12 September 1962 (see < www.ciec1.org >).

²⁶⁶ Adopted on 19 October 2005 by the 33rd session of the General Conference of UNESCO, which, for example, states, “[a]ny ... 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” (Art. 6(1)).

²⁶⁷ Oviedo, 4 April 1997. This Convention also has several protocols.

²⁶⁸ *E.g.*, Art. 21 which states that “the human body and its parts shall not, as such, give rise to financial gain”.

²⁶⁹ See CDBI/INF (98) 8, 4 June 1998, “Medically Assisted Procreation and the protection of the human embryo: comparative study on the situation in 39 States and Cloning: comparative study on the situation in 44 States” and CDBI/INF (2005) 7, 12 July 2005, “Replies by the Member States to the questionnaire on access to medically assisted procreation and on the right to know about their origin for children born after MAP”.

²⁷⁰ The Committee on Bioethics has circulated a questionnaire on pre-natal sex selection among Member States and an analysis of the replies is being carried with a view to the possible preparation of guidelines: see < www.coe.int/bioethics >.

55. Within the EU,²⁷¹ legislative work has also been undertaken which impacts, to some degree, on EU States' internal laws concerning ART, most notably in the form of the EU "Tissues and Cells Directive" of 31 March 2004.²⁷² This Directive lays down standards of quality and safety for human tissues and cells (which includes reproductive cells – *i.e.*, egg and sperm) and establishes a procedure which must be followed to ensure that the donation, procurement, testing, processing, preservation, storage and distribution of such cells are controlled by accredited establishments. The Directive contains important provisions concerning gamete donation: for example, that donation should be voluntary and unpaid and that any compensation must be limited to "making good the expenses and inconveniences related to the donation" (Art. 12), that informed consent must be obtained prior to receiving a donation (Art. 13), as well as containing rules in relation to data protection and confidentiality obligations (Art. 14).

56. Regional human rights jurisprudence again has relevance in the ART field. Within Europe, the ECtHR has engaged with issues concerning access to various forms of ART,²⁷³ as well as concerning the parental responsibility of persons following ART.²⁷⁴ Moreover, the Inter-American Court of Human Rights, in the landmark case of *Artavia Murillo v. Costa Rica*,²⁷⁵ has ruled that the effective prohibition of in-vitro fertilization (IVF) within a State Party to the American Convention on Human Rights ("ACHR") violates numerous rights protected by the Convention.²⁷⁶ The Court observed that, "the decision to have [one's own] biological children using assisted reproduction techniques forms part of the sphere of the right to personal integrity and to private and family life"²⁷⁷ protected by Article 11(2) of the ACHR. In addition, the Court accepted the WHO characterisation of infertility as a disease and found that the legal prohibition of means to overcome its effects discriminates against those whom the disease disables. Beyond this, "the Court also found discrimination on grounds of financial means, since Costa Ricans were not prohibited from access to IVF services—of which the evidence showed that some had taken advantage—if they could afford the costs of travel to other countries".²⁷⁸

57. Also, at a national (federal) level, in the USA, efforts have been undertaken to provide guidance on law and practice in relation to ART. For example, the American Bar Association ("ABA") has developed a "Model Act Governing ART"²⁷⁹ and the American Academy of Assisted Reproductive Technology Attorneys ("AAARTA") has developed a "Code of Ethics" in order to "further the cause of ethical assisted reproductive technology law practice".²⁸⁰

²⁷¹ It should be noted that the Court of Justice of the European Union (CJEU) has very recently (18 March 2014) decided Cases C-363/12, *Z v. A Government Department and the Board of Management of a Community School* and C-167/12, *C.D. v. S.T.* These cases concerned the issue of whether EU law requires intending mothers to be entitled to paid leave equivalent to maternity leave or adoption leave: the CJEU held that EU law does not require such paid leave in surrogacy cases.

²⁷² See note 66 above.

²⁷³ *E.g.*, concerning access to ART, see cases such as *Costa and Pavan v. Italy* (App. No. 54270/10, 28 August 2012), *S.H. v. Austria* (App. No. 57813/00, 3 November 2011), *Dickson v. the UK* (App. No. 44362/04, 4 December 2007) and *Evans v. the UK* (App. No. 6339/05, 10 April 2007 – concerning the ability of a woman to use frozen embryos once the man had withdrawn his consent).

²⁷⁴ *E.g.*, see the case of *Bonnaud and Lecoq v. France* (note 262 above) which concerns a same-sex couple who each have had a child through assisted reproduction and wish to obtain parental responsibility concerning the other's child.

²⁷⁵ Decision dated 28 November 2012 (Case No 12.361).

²⁷⁶ *E.g.*, the right to private and family life, to found and raise a family, and to non-discrimination on grounds of disability, financial means or gender.

²⁷⁷ Para. 272.

²⁷⁸ "Human rights to in vitro fertilization", by Fernando Zegers-Hochschild, Bernard M. Dickens, Sandra Dughman-Manzur, *International Journal of Gynecology and Obstetrics* 123 (2013) 86–89 at p.88.

²⁷⁹ The *Model Act Governing Assisted Reproductive Technology*, formally adopted by the American Bar Association (ABA) on 11 February 2008 (see further www.americanbar.org). See also "Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology", by Charles P. Kindregan, Jr. and Steven H. Snyder [2008] 42 *Fam. L.Q.* 203 which states that the Act, "provides a framework by which issues such as parentage, informed consent, donor identity, control of cryopreserved gametes, mental-health consultation, privacy, gamete and embryo donation, insurance, and quality assurance can be addressed and resolved" (at p. 207).

²⁸⁰ See further < <http://www.aaarta.org/doc/AAARTA-CodeofEthics.pdf> >. This Code of Ethics contains many interesting standards with which AAARTA members must comply including, at Art. 2(a), that members of

The acquisition of nationality by children

58. Whilst a detailed study of the acquisition of nationality by children is beyond the scope of the project at this stage, it is worth recalling that considerable work has also been undertaken on this subject, both internationally and regionally, in particular concerning the avoidance of statelessness. Traditionally an issue generally considered to be within the sovereign power of States, there has been increasing recognition over recent decades, as international law has evolved, that State discretion in the field of nationality law must take into account the fundamental rights of individuals. Indeed, the fundamental right of children to acquire a nationality, derived from instruments including the *Universal Declaration of Human Rights*,²⁸¹ the *International Covenant on Civil and Political Rights*²⁸² and the *UNCRC*,²⁸³ was reaffirmed as recently as June 2012 by the Human Rights Council.²⁸⁴ The Council, whilst recognising “that it is up to each State to determine by law who its nationals are”, stated that, nonetheless, such a determination must be “consistent with its [the State’s] obligations under international law”, and, recalling the *1954 United Nations Convention Relating to the Status of Stateless Persons* and the *1961 United Nations Convention on the Reduction of Statelessness*,²⁸⁵ called upon all States to implement legislation “to prevent and reduce statelessness among women and children”.²⁸⁶ To this end, it encouraged States to “facilitate, in accordance with their national law, the acquisition of nationality by children born on their territories or to their nationals abroad who would otherwise be stateless”.²⁸⁷ However, it did not go on to consider the circumstances in which a child is “born to” a national abroad (*i.e.*, whether genetics, legal parentage or any other test should be applied).²⁸⁸ It should also be noted that the UN Committee on the Rights of the Child has recently confirmed, in its General Comment No. 14 (2013),²⁸⁹ that decisions concerning nationality are within the scope of the actions referred to in Article 3 of the UNCRC and, in this respect, “individual decisions ... must be assessed and guided by the best interests of the child...”²⁹⁰

59. Regionally, within the Council of Europe,²⁹¹ the 1997 *European Convention on Nationality*²⁹² contains more detailed principles on the acquisition of nationality by children, including mandating States Parties to provide for nationality to be automatically (*ex lege*) acquired by children, “one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party”, subject to any exceptions provided for in internal law for children born abroad.²⁹³ Furthermore, where “parenthood is

AAARTA “shall ensure ... that all parties to the assisted reproduction arrangement are aware of their right to separate legal counsel...” and, at Art. 3, “[a] member shall not represent multiple parties in the drafting and negotiation of an assisted reproduction arrangement...”

²⁸¹ Art. 15.

²⁸² Art. 24(3).

²⁸³ Arts 7 and 8. Relevant provisions can also be found in the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination*, the 1979 *United Nations Convention on the Elimination of All Forms of Discrimination against Women* and the 1990 *United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.

²⁸⁴ See the Resolution adopted by the Human Rights Council on “The right to a nationality: women and children” (28 June 2012) (A/HRC/20/L.8).

²⁸⁵ Also relevant is the *1973 Convention to reduce the Number of Cases of Statelessness* of the International Commission on Civil Status.

²⁸⁶ See A/HRC/20/L.8 at paras 2 to 3.

²⁸⁷ *Ibid.*, at para. 4. This paragraph has been criticised by some commentators for falling short of accepted treaty standards in that it does not reaffirm an obligation to grant nationality to children born on the territory of the State who would otherwise be stateless and nor does it acknowledge a right to nationality for children not born in the country where they habitually reside.

²⁸⁸ The “role that birth registration plays in preventing statelessness” was also noted.

²⁸⁹ General Comment No 14 on Art. 3 UNCRC (see note 9 above).

²⁹⁰ See *ibid.* para. 30.

²⁹¹ The Council of Europe has dealt with issues relating to nationality for over 30 years: *e.g.*, see the 1963 *Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality* (ETC No 43).

²⁹² ETS No. 166 (EIF: 1 March 2000). 20 States are Party to this Convention and 9 States have also signed but not yet ratified or acceded to it. The 2006 *Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession* (CETS No. 200) and *Recommendation 99(18) on the avoidance and the reduction of statelessness* are also important in this field.

²⁹³ Art. 6(1) of the 1997 *European Convention on Nationality*.

established by recognition, court order or similar procedures, each State Party may provide that the child acquires its nationality following the procedure determined by its internal law".²⁹⁴ In light of this second clause, it may be thought that, when the Convention speaks of "parents" and "parenthood", it refers to *legal* parentage and not to the genetic heritage of the child. However, this is not clear from the text of the treaty itself leaving it open to interpretation by States Parties (including as to which law to apply if legal parentage is determinative).

60. More explicit in this regard, is the Council of Europe's 2009 *Recommendation of the Committee of Ministers on the nationality of children*²⁹⁵ which aims to facilitate children's access to a nationality, including to the nationality of their parents, and which contains a dedicated section on nationality as a consequence of the establishment of parent-child relationships. The Recommendation reiterates the 1997 European Convention concerning the situation of children born whose parentage is established by acknowledgement, court order or similar procedures, but the Explanatory Report clarifies that whilst States may determine whether parentage has been successfully established in law (e.g., whether an acknowledgement was validly undertaken or whether a foreign decision on parentage can be recognised), additional *substantive* requirements for a child to acquire nationality by descent (e.g., the child must also be habitually resident in the State) are not permitted.²⁹⁶ Further, a specific provision for children born following ART (including surrogacy) is included which states that Member States should, "apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a *child-parent family relationship is established or recognised by law*" [emphasis added].²⁹⁷ Whilst the Explanatory Report makes clear that the establishment or recognition of the parent-child relationship is not obliged (being dependent upon the internal and private international law rules of the State), "the principle ... underlines that if recognition takes place this should also have consequences in nationality law".²⁹⁸ This is the first explicit mention in regional or international work²⁹⁹ which: (1) identifies that the relevant "child-parent family relationship" for the acquisition of nationality should be that established or recognised *in law* (i.e., legal parentage, not genetics, is determinative); and (2) identifies that where States establish or recognise such legal relationships, they should accord them the concomitant legal consequences in nationality law without discrimination.

61. The ECtHR has also emphasised the importance of non-discrimination in the context of children's acquisition of nationality. For example, in the case of *Genovese v. Malta* (2011),³⁰⁰ Article 14 (prohibition of discrimination) and Article 8 (right to respect for family and private life) of the ECHR were relied upon by the Court to recognise the right of a child, born out of wedlock, to obtain his mother's citizenship. The court did, however, rely upon the existing consensus on the question across Europe, as reflected by the 1975 European Convention.³⁰¹

62. In other regions, there are also relevant principles which establish the child's right to a nationality and provisions concerning statelessness: for example, Article 20 of the American Convention on Human Rights and Article 6 of the African Charter on the Rights and Welfare of the Child which, in Article 6(4), provides that States Parties must ensure that their Constitutional legislation recognises the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of birth, he is not granted nationality by any other State.³⁰²

²⁹⁴ *Ibid.*

²⁹⁵ Adopted by the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers' Deputies: Recommendation CM/Rec (2009) 13.

²⁹⁶ See Principle 11 and the Explanatory Report at para. 28.

²⁹⁷ *Ibid.*, at Principle 12.

²⁹⁸ Para. 33 of the Explanatory Report.

²⁹⁹ As far as the Permanent Bureau is aware at this stage.

³⁰⁰ *Genovese v. Malta* (App. No. 53124/09, 11 October 2011).

³⁰¹ See para. 50 above.

³⁰² These rights have also spawned litigation: for example, the 2005 case of *Yean and Bosico v. The Dominican Republic* in which the Inter-American Court of Human Rights ruled that the Dominican Republic had breached the right to nationality of the American Convention, amongst others. The African Committee on the Rights and

3. Conclusion on internal laws

63. 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 to all children.³⁰³ As a result of this shift in thinking, the focus of 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.

64. State responses to Questionnaire No 1, as well as the study of international, regional and federal initiatives concerning the establishment and contestation of legal parentage undertaken above, reveal that 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 federal, regional and international work undertaken in the area mentioned above 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 above, 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,³⁰⁴ rather than work which might attempt any harmonisation of substantive laws.

65. Importantly, the consequence of the above-described diversity in internal law, 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.³⁰⁵ **Part B** 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 unification of private international law?

Welfare of Children also has received a complaint concerning the right to nationality (and associated rights) of Nubian minors in Kenya.

³⁰³ However, as has been described in **Part A, Section 1** above, whilst children born out of wedlock can today establish their legal parentage, different methods will often apply to those used for children born in wedlock 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.

³⁰⁴ *E.g.*, the rights found in the UNCRC.

³⁰⁵ *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.

B. PRIVATE INTERNATIONAL LAW AND CO-OPERATION RULES CONCERNING LEGAL PARENTAGE

66. This Section 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 (save where expressly stated otherwise),³⁰⁶ (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** below). This analysis is undertaken to establish the degree of diversity or similarity in States' private international law rules in this field, as well as the work already undertaken towards co-operation or unification, in order to provide the scientific basis for a consideration of the *feasibility* of further international work in this area. The cross-border problems are analysed in section (3) in order to assess the *desirability* of further work. These matters are analysed in Section IV of Preliminary Document No 3 B of March 2014.³⁰⁷

1. A comparative overview of the private international law and co-operation rules of States in relation to legal parentage

(a) Birth registration and the establishment of legal parentage

(1) Jurisdiction of registration (and consular, where relevant) authorities

To register a child's birth³⁰⁸ and establish legal parentage by operation of law

67. In all States which responded to Questionnaire No 1, the competent State authorities will (mandatorily) register the birth of a child born on the territory of the State.³⁰⁹ In general, it seems that there is no discrimination between children born to nationals and non-nationals in this regard³¹⁰ save that, in some States with a "population register", if children are born on the territory to non-national residents who are themselves not in the register, the children may be registered in a different manner.³¹¹

68. If a child is born *outside* the State in which registration is sought, far more complex and diverse rules apply in relation to whether and, if so, the circumstances in which such births will be registered.³¹² Four broad approaches can be identified:

1) In a first group of States, birth on territory of the State was reported to be the *only* circumstance in which the competent authorities will assume jurisdiction to register a

³⁰⁶ Prel. Doc. No 3 A of April 2013 (see note 5 above).

³⁰⁷ See note 2 above.

³⁰⁸ It should be noted that some States also have specific rules for the registration of children following an intercountry adoption which will not be detailed here.

³⁰⁹ Often States also have penalties for non-compliance: see further **Part A, Section 1** (in particular, para.3), including in relation to Art. 7 of the UNCRC and the challenges which remain globally concerning timely, accurate and non-discriminatory birth registration.

³¹⁰ Whilst this applies to the States which provided answers to Questionnaire No 1, globally this may not be the case and, in some States, birth registration of certain non-national ethnic minorities may, in reality, be difficult (see further para. 3 above).

³¹¹ *E.g.*, this is the case in Sweden. Cf. Finland where the Finnish Population Information System contains basic information concerning Finnish citizens *and* foreign nationals, providing that they have their domicile and residence in Finland (there are exceptional circumstances in which registration of foreign nationals who are not domiciled or resident may take place).

³¹² This paragraph is focused on whether the competent State authorities will assume jurisdiction to undertake an *initial* birth registration of a child born abroad or registration of the birth *irrespective* of any foreign act. Beyond this, in some States, in certain circumstances, it is also possible to "transcribe" a *foreign* birth registration (usually birth certificate) into the State's own registry. This is mentioned in para. 68.2) and is something which is also in issue when these States are presented with a foreign birth certificate (see paras 85 et seq below).

child's birth.³¹³ The corollary of this is that registration will generally not be possible if a birth takes place abroad. This is the case, for example, in Canada (common law jurisdictions) save that, in some situations, if the parents reside in Canada but the child is born abroad they may be able to obtain a parentage order in their province which can be subsequently registered in the provincial vital records.³¹⁴

2) In another group of States, registration following a birth abroad is possible provided that one of the child's putative legal parents is a national of the registering State.³¹⁵ This may result from the fact that, if the child has a legal parent who is a national, the child will have an (often automatic) claim to nationality (by descent) of the State.³¹⁶ In this way, this category of response may, in fact, be similar to the group of States which reported that a child born abroad may be registered with the State authorities when considered a national of the State.³¹⁷ Where such registration is possible, often it is permissive rather than mandatory (*i.e.*, it may be possible but is not obliged by States, unlike the situation where the birth is on the territory of the State). It should also be noted that, in certain civil law jurisdictions, it may also be possible to request a "transcription" of a *foreign* civil status act (of birth) into the State register.³¹⁸ This is often possible when the child in respect of whom the foreign civil status act has been made is determined to be a national of the State in which transcription is sought and / or is born to a national, or, in one State, if the child is domiciled in the State.³¹⁹ In some of these States, transcription of foreign civil status acts will be undertaken in a central register in the capital (rather than at local, municipal level).

3) In a further group of States, registration following a birth abroad is, in general, not permitted but, in limited situations, may be possible. For example, in one State, it is possible to register a child born abroad in the State if there is an intention on the part of the parents to reside within the State.³²⁰ In other States, registration may take place following a birth abroad if the child has not been able to be registered in the State of birth or it is not possible to obtain copies of civil records relating to the birth.³²¹

4) Lastly, in one State, the competent authority used to register a birth abroad if the mother of the child was registered in the population register.³²² However, from 1 January 2014, children born outside of the State by mothers registered in the Swedish population register will not become part of this register at birth. The child will instead be registered in the Swedish population register when *residing* in Sweden.³²³

69. If it is possible to register the birth of a child born abroad, it may be possible (or, in some cases, mandatory³²⁴) to undertake this registration at the consulate or embassy of the State in which registration is sought, located in the State of the child's birth. This is possible in States in which diplomatic or consular officers are able to exercise the

³¹³ *E.g.*, Australia (SA), Canada (common law jurisdictions – subject to the exception discussed in para. 68.1)), Chile, Ireland (subject to the exception mentioned in note 321 below), Lithuania, Mauritius, Netherlands, New Zealand, Norway, Portugal, Slovakia and Turkey.

³¹⁴ See Canada's (common law jurisdictions) response to Question 41.

³¹⁵ *E.g.*, Australia (VIC), Colombia, Croatia, Dominican Republic, Japan, Latvia, Monaco, Portugal, Romania, Sri Lanka, Switzerland and Uruguay.

³¹⁶ See **Part A, Section 1(f)** above concerning the acquisition of nationality by children and, in particular, see para. 40 concerning the restrictions which may sometimes apply if the child is born abroad.

³¹⁷ *E.g.*, Belgium, Brazil, Colombia, Czech Republic, El Salvador, Hungary, Iceland, Israel, Latvia, Mexico, Monaco, Philippines, Portugal, Romania, Switzerland. In Iceland such registration is dependent upon the request being made by an Icelandic parent and, if the request is made by an unmarried Icelandic father, the legal paternity of the child must have already been established. In the UK (from the Permanent Bureau's own research), it is possible to register a child's birth with the UK authorities once the child has been registered in the State of birth if the child has an automatic claim to British nationality at birth.

³¹⁸ *E.g.*, Belgium (see Art. 48(1) of the Belgian Civil Code which provides that any Belgian or his / her legal representative may request that an act of civil status made abroad is registered in Belgium) and Canada (Quebec) (Art. 108 of the Civil Code).

³¹⁹ *E.g.*, in Belgium, nationality is determinative; in Canada (Quebec), domicile is the connecting factor in order for such a transcription to take place. In some States, the public prosecutor can also request such a transcription (*e.g.* in Belgium – Art. 48(2) of the Civil Code).

³²⁰ Australia (NSW, VIC, SA). In some cases, this is pre-conditioned on the birth not being registered in another Australian state / territory. This registration may be possible but is usually not mandatory.

³²¹ *E.g.*, in Ireland this is the case if the child was born to a citizen, domiciled in the State; and Latvia.

³²² Sweden: see further Sweden's response to Question 41.

³²³ See response to Question 39.

³²⁴ *E.g.*, Guatemala; Serbia – it is possible to register a Serbian child born abroad in the State register only if the birth has not been registered at the diplomatic mission or consular post of the State.

functions of a registrar, or where the officers are at least able to receive certain declarations and transmit them to the competent national registrar.³²⁵ In other States, only particular registrar functions may be exercised by such officers and sometimes only at a limited number of embassies or consulates. In others, the consulate or embassy can only act as a “postbox” or transmitter of the information, or simply provide parents with information concerning how to register a child with the competent authorities at “home”.

To accept a voluntary acknowledgement of legal parentage

70. The rules concerning when the competent State authorities will have jurisdiction to accept a voluntary acknowledgement of legal parentage (if applicable³²⁶) vary considerably between States. It should be noted that if the acknowledgement takes place at the time of the initial registration of the child, whether the authorities will have jurisdiction to accept such an acknowledgement may be connected with whether the authorities have jurisdiction to register the child at all.³²⁷

71. Otherwise, in some States, it is only possible to accept an acknowledgement if the child is registered in the birth register of the State.³²⁸ In many other States, multiple connecting factors exist in relation to when jurisdiction will be assumed to accept such an acknowledgement, including if the State is the State of: the child’s habitual residence,³²⁹ nationality,³³⁰ domicile³³¹ and / or birth;³³² or the author of the acknowledgement’s habitual residence,³³³ nationality³³⁴ and / or domicile.³³⁵ In addition, in some States, jurisdiction may also be based on the fact that the mother was habitually resident³³⁶ in the State, or on the fact that one of the child’s parents is domiciled in the State.³³⁷ There was again a divide between States in terms of the time at which these connecting factors have to be established, with a fairly equal division of States responding that the criteria must be fulfilled at the time of birth of the child, and others stating it must be the case at the time of the acknowledgement (or at the time the action is brought if it is in the context of a contestation).

72. It should be noted that in some States the rules outlined above are the general rules concerning international jurisdiction in matters of parentage / filiation which also apply in the case of acknowledgements, whereas in other States specific rules apply to an acknowledgement of legal parentage.³³⁸ Also, in the States in which it is possible to undertake a voluntary acknowledgement before the courts, jurisdiction of the courts to

³²⁵ *E.g.*, if registration is sought in Belgium of a birth abroad, this can be undertaken by the diplomatic agents or consuls general, if the functions of registrar have been entrusted to them by the Minister of Foreign Affairs. In this regard, Art. 1 of the Belgian Law of 12 July 1931 provides that diplomatic agents exercise, of right as regards Belgian citizens, the registrar’s function in all countries, in accordance with Belgian laws.

³²⁶ *E.g.*, this is not applicable if, in a particular State, there is no need for the competent State authorities to accept an acknowledgement (see para. 13.2) above concerning the States in which an acknowledgement need only be publicly recorded).

³²⁷ As to which see paras 67 to 69 above.

³²⁸ *E.g.*, Australia (VIC, QLD), Latvia and Serbia (whilst there are no specific rules, generally an acknowledgement should take place before the registrar in the place where the child was registered).

³²⁹ *E.g.*, Belgium, Brazil, Chile, Denmark, Finland, Mexico, Norway, Poland, Sweden, Switzerland and Uruguay.

³³⁰ Chile, Colombia, Croatia, Czech Republic, Dominican Republic, El Salvador, Finland, Hungary, Japan, Madagascar, Mexico, Monaco, Philippines, Poland (the author must also be a national) and Portugal.

³³¹ *E.g.*, Belgium, Canada (Quebec) and Poland.

³³² *E.g.*, Belgium and Switzerland.

³³³ *E.g.*, Belgium, Chile, Denmark, Dominican Republic, Finland, Japan (if acknowledging a child in Japan), Mexico, Norway, Portugal and Uruguay.

³³⁴ *E.g.*, Belgium, Chile, Colombia, Finland, Japan, Mexico, Philippines, Poland (the child must also be a national) and Portugal.

³³⁵ *E.g.*, Belgium.

³³⁶ *E.g.*, Denmark and Norway (the mother is always the woman who has given birth to the child).

³³⁷ *E.g.*, in Canada (Quebec), Hungary and Lithuania, the authority will have jurisdiction in matters of filiation if the child or one of his / her parents is domiciled in the jurisdiction (in Hungary, this is the case if the persons are not nationals). In Switzerland, the Swiss authorities at the domicile or place of origin (where ancestors come from) of the mother or father have jurisdiction to receive an acknowledgement (as well as those at the place of the child’s habitual residence and place of birth – see above).

³³⁸ *E.g.*, contrast Canada (Quebec) and Finland where the rules are general (save that additional specifics apply in Finland in the case of acknowledgement), with Belgium which has a specific rule for “recognitions”.

accept such an acknowledgement may depend upon the rules set out below concerning jurisdiction in matters of contestation of parentage.

73. The responses to the Questionnaire also reveal a fairly even divide between those States in which the consular and / or diplomatic officials of the State abroad are able to accept voluntary acknowledgements of legal parentage and those in which this is not possible. Whether it is possible will often depend upon whether the consular / diplomatic officials are able to exercise any registrar functions.³³⁹ In the States in which it is possible, often the author of the acknowledgement and / or the child must be nationals of the State for an acknowledgement to be accepted by the consulate or embassy.³⁴⁰

(2) Applicable law rules

Where legal parentage is established by operation of law³⁴¹

74. When registering a child's birth, many States reported that, regardless of any foreign elements in the case, their competent authorities will always apply the State's internal law (*i.e.*, the *lex fori*) to the question of who is / are the legal parent(s) of the child *by operation of law*.³⁴² Interestingly, these States represent the civil and common law traditions.

75. For many other States, if the situation has foreign elements, the applicable law rules of the State will apply to determine which law governs the question of the child's legal parentage (or, in some cases, legal paternity only³⁴³) arising by operation of law, with the child's nationality at the time of his / her birth being a common connecting factor.³⁴⁴ However, in most (but not all) of the States which apply this connecting factor, other connecting factors also may be relied upon and the determination as to which law will apply is often based on which law is more beneficial to the child (*i.e.*, the connecting factors are of equal rank and the applicable law is determined on the basis of which law serves the best interests of the child).³⁴⁵ For example, in the Czech Republic, if the child lives in the State, Czech law may be applied if it is beneficial to the child. In Canada (Quebec), the law of the domicile of the child, or the law of the domicile or nationality of one of the child's parents at the time of his / her birth could also apply to establish filiation, depending upon which is more beneficial to the child.³⁴⁶ The nationality of the person seeking to establish his / her legal parentage (also determined at the time of the child's birth) is also a common connecting factor, either as a stand alone applicable law rule or as one of the possible alternatives.³⁴⁷

³³⁹ See para. 69 above.

³⁴⁰ *E.g.*, Belgium, Chile, Japan and Poland. Cf. Norway where any man who is habitually resident in Norway may acknowledge his paternity to a Norwegian diplomatic or consular official.

³⁴¹ This will usually be same rule as where, in context of contestation or declaration of parentage, the judicial authorities (or other competent authority) are determining the establishment of legal parentage *by operation of law*.

³⁴² *E.g.*, including Australia (VIC, QLD, SA, TAS), Chile, Colombia, Croatia, Denmark, Dominican Republic, El Salvador, Guatemala, Iceland, Ireland, Israel, Latvia, Mauritius, Mexico, New Zealand, Norway, Philippines and Turkey.

³⁴³ It should be noted that, in some States, the applicable law rules only relate to a child's legal *paternity* (*e.g.*, Sweden and Finland): see further para. 78 below.

³⁴⁴ *E.g.*, this was reported to be a connecting factor in the Czech Republic, Canada (Quebec), Lithuania, Hungary, Madagascar and Poland. In Spain, the connecting factor is the personal law of the child which is interpreted as his / her national law and, if this cannot be determined, the law of his / her habitual residence applies.

³⁴⁵ Hungary reported a different situation in this respect in that it is the personal law of the child at the time of his / her birth which applies to the establishment of legal parentage. Personal law is established according to a cascade system which commences with the law of the State of which the person concerned is a national and then provides other options in the case of multiple nationals or displaced persons.

³⁴⁶ This is also the case in Lithuania where the law of the child's domicile at the time of birth, the law of one of the parents' domicile, or the law of the nationality of one of the parents at time of birth may also apply, whichever is more beneficial to child.

³⁴⁷ *E.g.*, in Belgium, this is a stand-alone rule: the establishment of maternity and paternity (as well as their contestation) are governed by the law of the State of which the person is a national at the time of the child's birth (or if the parentage results from a voluntary act, at the moment of the act) - see Art. 62 of the Code of Private International Law. However, in, *e.g.*, Canada (Quebec), Germany, Lithuania and Japan (though see the full response at Question 42), it is one of the possible options.

76. In several States, the applicable law rule depends upon whether the putative parents are married or not. For example, in the Netherlands, if the putative parents are married, the law of the State of their common nationality applies to determine legal parentage and, in the absence of such a common nationality, the law of the State of their common habitual residence and, in the absence of this, the law of the State of the habitual residence of the child applies.³⁴⁸ In Japan, if the putative parents are married, the national law of either of them at the time of the child's birth determines whether the child shall be considered to be born in wedlock. If a child is born out of wedlock, it is the national law of each parent which determines whether legal parentage arising by operation of law is established in relation to each.³⁴⁹ In Romania, if the putative parents are married, legal parentage is established in accordance with the law which, at the time of the child's birth, governs the general effects of the marriage. If the putative parents are not married, the law of the State of the child's nationality at the time of birth applies.

77. In some States,³⁵⁰ it is not nationality but the child's *habitual residence* which is the primary connecting factor for the determination of descent. However, in Switzerland, if neither parent is domiciled in the State of the child's habitual residence and the parents and child are nationals of the same State, the law of that State will apply instead.³⁵¹ In Germany, the child's descent can also be determined in relation to each parent by the law of the State of that parent's nationality or, if the mother is married, the law governing the general effects of the marriage. These connecting factors are of equal rank, with the child's best interests usually being determinative.³⁵²

78. In Finland and Sweden, applicable law rules are only established in relation to legal paternity since legal maternity is always established according to the *mater est* maxim (in this respect, the *lex fori* could be said to always apply to the question of legal maternity).³⁵³ In determining legal paternity, the primary connecting factor in Finland is the habitual residence of the mother but, if the child has, considering all the circumstances, a closer connection to another State, legal paternity may be determined by the law of that State. In Sweden, if the child is domiciled in Sweden at birth, the question is always determined in accordance with Swedish law.³⁵⁴

79. In some States, personal status issues, including legal parentage, are determined in accordance with the law of the person's domicile.³⁵⁵

80. It can therefore be seen that there are two main themes in the position of States regarding the applicable law rules in this context: (1) there is a division between those States which will consider applying foreign law where a situation has foreign elements and those which will always apply the *lex fori* when called upon to determine a child's legal parentage arising by operation of law; and (2) in those States in which foreign law may be applied, nationality remains a primary connecting factor in many States (often the nationality of the child, but also that of the putative parents) but this is not uniformly the case and many States also have multiple possible connecting factors and the choice of applicable law will be premised on serving the best interests of the child.

³⁴⁸ See response to Question 42. The situation is similar in Portugal in that the establishment of legal parentage is governed by the personal law of the parent at the time the relationship is established which, in the case of married putative parents, means their common national law or, failing this, the law of the State of their joint habitual residence and, failing this the personal law of the child (see Portugal's response to Question 42).

³⁴⁹ Specific rules apply concerning acknowledgements: as to which, see the response to Question 42 and paras 82 et seq below.

³⁵⁰ Germany and Switzerland.

³⁵¹ Switzerland: see the response to Question 42.

³⁵² Germany: see the response to Question 42.

³⁵³ See Finland's response to Question 42.

³⁵⁴ Otherwise, a man who is or has been married to the child's mother will be regarded as the child's father if it follows from the law of the State where the child at birth was a resident or, if no-one else is regarded as the father under that law, when it follows from the law of the State in which the child became a national at birth.

³⁵⁵ *E.g.*, Brazil and Canada (common law jurisdictions).

81. It should be noted that, in some of these States, the application of a foreign law designated by these applicable law rules will be subject to a public policy clause (or other exceptions).³⁵⁶

Where there has been a voluntary acknowledgement

82. In terms of the law applicable to an acknowledgement of legal parentage provided to the competent State authorities (where applicable³⁵⁷), again in a significant number of States, the *lex fori* was said to apply to determine the substantive and / or formal validity of the acknowledgement.³⁵⁸ In States in which applicable law rules have been established which may lead to the application of foreign law, some States, as with international jurisdiction rules, apply general applicable law rules concerning the establishment of legal parentage to acknowledgements of parentage,³⁵⁹ whereas other States have established specific rules. However, even where general applicable law rules apply, additional rules may exist in relation to voluntary acknowledgements concerning, for example: (1) which law governs the form of the acknowledgement, and / or, (2) which law governs the issue of consents to the acknowledgement.³⁶⁰

83. In general, whether as a result of general or specific applicable law rules, in many States the form of the acknowledgement must satisfy the law designated by the applicable law rule and / or the law of the State in which the act is undertaken.³⁶¹ In relation to the substantive validity of the acknowledgement, there is considerable diversity in the connecting factors reportedly used by States. For example, they include, amongst others:³⁶² the child's nationality,³⁶³ the child's habitual residence,³⁶⁴ the author's nationality³⁶⁵ or habitual residence³⁶⁶ and the personal law of the child.³⁶⁷ In some States, where multiple connecting factors are possible, these were said to apply either in the alternative or in a "cascade", in accordance with the principle "*favour recognitionis*".³⁶⁸ There was, again, an equal divide between States as to whether these

³⁵⁶ The interpretation of the public policy exception in matters concerning legal parentage is explored further in paras 98 et seq below.

³⁵⁷ See note 326 above.

³⁵⁸ *E.g.*, Australia (VIC, QLD), Chile, Colombia, Denmark, Dominican Republic, El Salvador, Finland, Guatemala, Iceland, Ireland, Israel, Latvia, New Zealand, Norway, Romania and Sweden. In addition, Hungary, Lithuania, Monaco, Serbia and Switzerland stated that the *lex fori* may apply to determine the *formal* validity of the acknowledgement.

³⁵⁹ *E.g.*, this is the case in Belgium, Canada (Quebec), Czech Republic, Germany and Poland (save that, in the case of an acknowledgment of an unborn child, the law applicable to the substantive validity of the acknowledgement is the mother's law of nationality at the time of acknowledgment).

³⁶⁰ *E.g.*, Belgium (in certain circumstances), Germany and Japan (when establishing a parent-child relationship by acknowledgment, if obtaining the consent of the child or a third party is required for the acknowledgement under the child's national law at the time of the acknowledgement, this requirement must also be satisfied).

³⁶¹ *E.g.*, this is the case in Belgium, Czech Republic and Germany. This was also the most common rule where specific applicable law rules were established to govern the formal validity of the acknowledgement (*e.g.*, Finland, Hungary (in Hungary the alternatives are that the formal requirements satisfy the *lex fori* or the law of the State in which the act is undertaken), Poland and Sweden).

³⁶² *E.g.*, in Japan, the father's national law at the time of the child's birth is applied, or the national law of the acknowledging person or of the child at the time of the acknowledgement. There are additional requirements as to consents (see note 360 above).

³⁶³ *E.g.*, Chile, Japan, Lithuania, Madagascar, Monaco, Poland, Slovakia, Sweden and Switzerland.

³⁶⁴ *E.g.*, Netherlands, Spain (for a stateless person), Switzerland and Uruguay.

³⁶⁵ *E.g.*, Croatia, Japan, Netherlands, Portugal, Serbia and Switzerland.

³⁶⁶ *E.g.*, Canada (Quebec) (general rules could apply), Lithuania (the parent's capacity to acknowledge parentage is governed by the law of the state of his or her domicile at the time of the acknowledgement) and Switzerland.

³⁶⁷ Usually specific rules determine which law is the personal law of the child and this may amount to the law of the child's nationality: *e.g.*, Hungary (although the acknowledgement of an unborn child shall be adjudged according to the personal law of the mother at the time of the acknowledgement).

³⁶⁸ *E.g.*, Czech Republic, Germany, Lithuania, Poland, Switzerland and the Netherlands. In the Netherlands, whether an acknowledgement by a man establishes legal familial relationships between him and a child shall, with regard to the ability of the man to proceed to such an acknowledgement and to the conditions for doing so, be determined by the law of the State of which the man has the nationality. If according to that law an acknowledgement is not or no longer possible, then the law of the State of the habitual residence of the child shall be decisive. If an acknowledgement also according to that law is not or no longer possible, then the law of the State of which the child has the nationality shall be decisive. If an acknowledgement also according to that law is not or no longer possible, then the law of the State of the habitual residence of the man shall be decisive (Art. 10:95 of the Dutch Civil Code).

connecting factors have to be satisfied at the time of the child's birth or at the time of the acknowledgement. In one State it was reported that, as the connecting factor (the child's habitual residence) might change, the applicable law might also change. In such circumstances, it is up to the new applicable law to determine whether the legal status acquired under the former applicable law will continue to exist.³⁶⁹

(b) Possible recognition of legal parentage already established abroad

84. A preliminary issue when examining the possible recognition of legal parentage already established abroad relates to the nature of the document emanating from the foreign State and relied upon as establishing or evidencing legal parentage. Depending upon the circumstances of the case, a variety of different documents may be submitted to the authorities in the State in which recognition is sought and the nature of the document may, in some States, affect the rules which are applicable to its recognition or whether it can be "recognised" at all.³⁷⁰ This section considers the approaches adopted by States to: foreign birth certificates, acknowledgements of legal parentage and judicial decisions.³⁷¹

(1) Foreign birth certificates

85. In many States, an initial matter which must be established when a person seeks to rely upon a foreign birth certificate is the *authenticity* of the document. Common methods used to establish authenticity include legalisation or apostillisation.³⁷² This issue will not be discussed in detail in this Study: it suffices to note that it is often a pre-condition to reliance upon a foreign birth certificate, whichever approach described below is adopted by a State. A second point which must be noted at the outset of this section is that the meaning of "recognition" in this context, and whether the term is appropriate at all, will often depend upon the view taken by a State of the nature of parentage and birth certificates.³⁷³ Moreover, in some States, different rules may apply depending upon the use which it is sought to make of a foreign birth certificate: for example, one rule may apply if the document is relied upon as *evidence* of the findings of fact of the foreign authority, and a different (more invasive) procedure may be required if "full recognition" of the document - *i.e.*, recognition of the legal relationship established or evidenced therein - is sought.³⁷⁴

³⁶⁹ Germany.

³⁷⁰ *E.g.*, see para. 86.3) below concerning how, in some States, it is not possible to "recognise" a foreign birth certificate - *i.e.*, in the sense of recognising the decision of the competent foreign authority concerning legal parentage which is evidenced by the certificate. Instead, the applicable law rules of the State are used to determine legal parentage, effectively determining legal parentage *de novo*. In contrast, in some of these States a "recognition approach" is possible if there is a foreign *judicial* decision (subject to conditions).

³⁷¹ It is acknowledged that, particularly in the context of ISAs (as to which, see **Part C** below), *adoption* orders may be made in order to resolve issues of legal parentage for a child. In this context, the issue of the cross-border recognition of an adoption order may arise, as well as complex questions concerning the applicability of the 1993 Hague Intercountry Adoption Convention. These issues have been discussed in the 2011 Preliminary Note (Prel. Doc. No 11 of March 2011: available on the website of the Hague Conference, under "Work in Progress", then "General Affairs" - see paras 2 (recalling the 2010 Special Commission Conclusion and Recommendation on this issue) and 43). These matters are not dealt with further in this document.

³⁷² There may also be (certified) translation requirements. Bilateral or multilateral agreements exist concerning these matters: *e.g.*, see the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* ("the Apostille Convention"), as well as the work of ICCS (www.ciec1.org). In addition, within the EU, the European Commission has proposed a regulation which would aim to abolish legalisation and apostillisation between EU Member States for certain categories of "public documents": see further "Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012" (COM(2013) 228 /2). The proposed new rules would not, however, have any impact on the recognition of the *content* or the *effects* of the documents concerned (see Art. 2 of the Proposal). These latter issues are being considered separately by the EU (see the 2010 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, emphasis added).

³⁷³ See note 70370 above.

³⁷⁴ *E.g.*, this is the case in Belgium (see para. 86.2) below).

86. The responses to Questionnaire No 1 reveal the following approaches to foreign birth certificates:

1) In a minority of States, it is possible to recognise a foreign birth certificate or, more commonly, the legal relationship(s) recorded therein (such that the relationship is able to produce its effects) if defined, limited (procedural) conditions are fulfilled.³⁷⁵ For example, in the Netherlands, a specific provision of the Private international law (Parentage) Act (“Wca”)³⁷⁶ stipulates the conditions which must be satisfied in order for a foreign “legal act or fact” to be recognised (a birth certificate being regarded as confirmation of a “legal fact”). The conditions are that the certificate must: (1) have been issued by a competent authority; (2) have been issued abroad; (3) be laid down in a legal document; (4) have been made in accordance with local law; and (5) not be contrary to Dutch public policy.³⁷⁷ In other States, the conditions which must be satisfied for a foreign civil status document to produce its effects include that the ground upon which the jurisdiction of the foreign authority was based must be one of the grounds of jurisdiction established by the recognising State’s private international law rules (*i.e.*, there is a “check” on jurisdiction, aside from the other defined conditions and exceptions which apply).³⁷⁸

2) In contrast, in other States, a foreign civil status document, or the legal relationship evidenced by it, can be “recognised” (sometimes by operation of law) but only if the foreign authentic act is valid *according to the applicable law designated by the State’s own private international law rules*. The application of foreign law may, however, be refused on certain defined grounds. This is the case, for example, in Belgium, where it is provided that a foreign authentic document concerning civil status can be transcribed into the civil status register or provide the basis for an entry in certain Belgian registers provided that its validity is established according to the applicable law designated by the Belgian private international law rule (save that this law may not be applied in circumstances where the “evasion of the law” or “public policy” exceptions are applicable).³⁷⁹ However, as stated above, a different (less invasive) procedure may be used in Belgium if the birth certificate is relied upon only as *evidence* of the finding of facts made by the foreign authority.³⁸⁰

3) In many other States, whilst a similar approach is adopted to that described in (2) above in that the State’s applicable law rules³⁸¹ will determine the law applicable to the determination of legal parentage, often subject to public policy (and possibly other) exceptions, the approach is subtly different in that the applicable law rules apply *irrespective* of any foreign birth certificate (*i.e.*, not to determine its validity) and in this sense, the determination of legal parentage is *de novo*, according to the designated

³⁷⁵ In Germany, for example, the recognition of a foreign decision is only possible if you have a foreign *court* decision and subject to the satisfaction of defined criteria (see paras 92 et seq).

³⁷⁶ Art. 10 Wca.

³⁷⁷ The latter condition has caused difficulties in some ISA cases (see further **Part C, Section 2** below).

³⁷⁸ *E.g.*, in Switzerland, the deed pertaining to civil status will be recorded in the Swiss register pursuant to a decision of the cantonal supervising authority, subject to grounds of non-recognition. The rules are the same whether recognition is sought of a foreign deed or judgment. In Finland, a foreign judgment or decision of paternity (legal maternity being always determined by the *lex fori* on the basis of the *mater est* rule) given in another State will be recognised without any special procedure if it is valid in the State in which it was given. A birth certificate has been determined to be a “decision” for the purposes of this legislation (*e.g.*, Helsinki District Court Decision 13/5720, H 13/1040). However, there are several grounds upon which recognition may be refused, including if jurisdiction was not based on (habitual) residence, nationality of any of the parties or any other connection that would have given the authority a valid reason to process the case, and if the decision is contrary to Finnish public policy. In Denmark, it seems that a foreign birth certificate will be recognised, subject to public policy exceptions, but only if “[p]aternity according to the foreign birth certificate ...[has] legal consequences equal to the legal consequences of paternity according to Danish law.” Specific rules also apply between the Nordic countries – discussed in paras 110 and 112 below.

³⁷⁹ Authenticity requirements (according to the law in which the act was established) must also be satisfied.

³⁸⁰ See Art. 28 of the Belgian Code of Private International Law. Even then, however, the finding of facts made by the foreign authority are not taken into account to the extent that they would produce an effect manifestly incompatible with public policy.

³⁸¹ Described in paras 74 to 83 above.

applicable law.³⁸² Moreover, for some States (whether by legislation or practice), as described in paragraphs 74 and 82 above, the *lex fori* will always be the designated applicable law to the question of the establishment of legal parentage (although some of these States may not perceive or describe this as a “choice of law” rule).³⁸³

It should be noted that, in some of these States, it may, nonetheless, be possible for the foreign birth certificate to be relied upon as *evidence* of the facts recorded therein. For example, in some States of the common law tradition,³⁸⁴ due to parentage being understood primarily as a factual issue,³⁸⁵ it seems that a foreign birth certificate is (routinely) treated as factual evidence of the parentage established by the foreign authority, rather than being seen as evidencing a conclusion of law, to be “recognised” or not. Whilst a foreign birth certificate may therefore be able to produce some effects in the State if unchallenged, as the *lex fori* is always applicable to the question of legal parentage in these States, if contrary evidence (*e.g.*, DNA evidence) proves that the birth certificate is not in accordance with the legal parentage which would be established by the *lex fori*, the latter will be determinative of the question who is / are the legal parents of the child.

4) Lastly, in other States,³⁸⁶ a birth certificate is considered a “public document” and, as such, if the document is valid in its State of origin and fulfils the legal requirements of that State, as well as any translation and legalisation requirements, it can be relied upon in the State of receipt and, in some States, will be entered into the civil registry on this basis.³⁸⁷ However, what was not always clear from some of these State responses was whether, in these States, this enables “full recognition” of the *content* of the certificate (*i.e.*, the legal relationship established therein), or whether this is only recognition for *evidential* purposes (and unless and until challenged). In some of these States, it was stated that there is no public policy criterion upon which the State can refuse to accept the foreign certificate,³⁸⁸ whilst in others public policy is stated to be a ground upon which the authorities can refuse to permit the birth certificate to produce its effects in the State.³⁸⁹

87. In many States in which recognition of the birth certificate is possible, this takes place by operation of law or without the need for any special procedure.³⁹⁰ However, in

³⁸² In these States, the birth certificate is often said to have no “constitutive effect”: *e.g.*, this is the case in Czech Republic, Germany and Sweden. In the Czech Republic, a foreign birth certificate, if legalised in accordance with required procedures, may be relied on for *evidential* purposes in the State. However, determination of descent is carried out according to the applicable law rules.

³⁸³ *E.g.*, Israel, New Zealand and Norway. Although the first two States might not perceive their approach as applying an “applicable law” rule, in some sense the choice of *lex fori* could be interpreted as such.

³⁸⁴ *E.g.*, Ireland; in Canada (common law jurisdictions), a slightly different approach is adopted in that a foreign birth certificate will only be admitted as evidence if expert evidence confirms that: (1) the certificate has been kept pursuant to a duty placed on a public authority; and (2) the certificate would be admitted as evidence in the foreign country (its authenticity may be proved through an affidavit of a lawyer practising in the foreign jurisdiction or a certificate of authentication by the Embassy of the foreign jurisdiction in Canada). If this is the case, the birth certificate constitutes evidence of the facts recorded therein (but presumably, therefore, only unless and until these facts are challenged by contrary evidence).

³⁸⁵ As opposed to, *e.g.*, the issue of legitimacy, which might be considered a conclusion of law in some common law States (if the concept still exists).

³⁸⁶ *E.g.*, Chile, Colombia, Dominican Republic, Guatemala, Hungary, Japan, Lithuania, Mauritius, Mexico, Portugal, Russian Federation, and Slovakia.

³⁸⁷ Depending upon whether the authority has jurisdiction to undertake such a transcription (see paras 67 et seq above). *E.g.*, in Lithuania it is stated that “where a foreign birth certificate indicates the parents of a child, the Registrar’s Office...does not question the origin of the child” and, moreover, a child’s parents may contact any Registrar’s Office and submit to it a foreign birth certificate containing new data about the father entered on the basis of a foreign voluntary acknowledgement and, provided that it is authenticated and translated, the Lithuanian birth record and birth certificate will be revised having regard to the new data.

³⁸⁸ *E.g.*, Chile and Colombia.

³⁸⁹ *E.g.*, Japan and Portugal.

³⁹⁰ *E.g.*, Belgium (no procedure is necessary for recognition if the conditions of the Code are satisfied but there is a procedure to declare the enforceability of such an instrument); the Netherlands (recognition is stated to be by “operation of law” if the conditions are fulfilled).

some States it was reported that a foreign civil status document can only be treated as valid within the State if it is recognised as such by a court.³⁹¹

(2) Acknowledgements of legal parentage undertaken abroad

88. In relation to voluntary acknowledgements of legal parentage undertaken abroad, the responses to the Questionnaire demonstrate that many States often apply the same basic approach to foreign acknowledgements as that which they apply to foreign birth certificates (*i.e.*, the four groupings of States' approaches described in para. 86 above also apply here).³⁹² Nevertheless, some variations do exist.³⁹³ For example, in the Netherlands, whilst recognition of a foreign acknowledgement is possible under the same conditions as for foreign birth certificates, in the context of acknowledgements the legislation details two particular circumstances in which they may be refused recognition on public policy grounds.³⁹⁴ Moreover, in relation to the States in which a form of recognition is possible subject to a "check" on international jurisdiction (see para. 86.1) above), different grounds of international jurisdiction may apply in the case of a foreign acknowledgement.³⁹⁵

89. In States in which applicable law rules concerning legal parentage apply to determine legal parentage *irrespective* of a foreign birth certificate, a subtly different approach may be said to be adopted in some States in relation to a foreign acknowledgement (more akin to the approach described in para. 86.2) above): that is, the State will examine whether the acknowledgement of legal parentage made abroad establishes legal parentage under the substantive law applicable pursuant to the private international law rule of the State (and specific rules may apply concerning the law applicable to the form of the legal act).³⁹⁶ Further, whilst in some States the applicable law rule is a general rule, in other States, specific applicable law rules apply to foreign voluntary acknowledgements.³⁹⁷ For example, in Sweden a foreign acknowledgement of paternity will be accepted if it is valid under the law of the State where the child or the

³⁹¹ *E.g.*, Brazil, Canada (Quebec) and the Philippines. In Canada (Quebec), a civil status act may be inserted into the register in Quebec (when jurisdiction to do so exists – see paras 67 et seq above) but will only be considered a fully authentic act once the validity of it has been recognised by the court in accordance with the conditions set down in the legislation.

³⁹² That is: (1) States which recognise acknowledgements subject only to limited, usually procedural conditions – see para. 86.1)); (2) States which recognise foreign acknowledgements based on their validity according to their own applicable law rules (but these rules may differ in the case of a voluntary acknowledgement – see paras 82 to 83); (3) States which determine the issue *de novo*, based on their applicable law rules (although some may change their approach for acknowledgements – see para. 90). In Canada (common law jurisdictions), a written acknowledgement of paternity stands in contestation proceedings as *prima facie* proof of the fact of parentage and it is thought that this would also apply to *foreign* voluntary acknowledgements. However, in one case, foreign (Polish) law was, in effect, applied to determine the question of paternity in the context of maintenance proceedings: see *Szostek v. Szostek*, 2012 ONCJ 254 (CanLII).); and (4) States which apply a "public document" approach (see para. 86.4)).

³⁹³ In the Netherlands, the provision explained in para. 86.1) above concerning recognition of foreign "legal facts", also applies to the recognition of foreign "legal acts" (a foreign acknowledgement constituting such an act). As with the foreign legal fact, the legal act must, however, have been "laid down in a certificate issued by a competent authority in accordance with local regulations". The same conditions set out in paragraph 86.1) above apply to the recognition.

³⁹⁴ These are: (1) if the child has been acknowledged by a person of Dutch nationality who under Dutch law would not have been a person able to do so; or (2) if, with regard to the consent of the mother of the child, the requirements established by the law applicable according to the Dutch private international law rules are not met.

³⁹⁵ *E.g.*, in Switzerland, the foreign authorities must have assumed jurisdiction to accept the acknowledgement based on being the State of the child's habitual residence or nationality, or the State of domicile or nationality of the mother or father.

³⁹⁶ *E.g.*, this is the approach in Germany which is subtly different since the acknowledgement itself is considered, albeit according to the applicable law designated by the German private international law rule. It is not the case for most of the States which always apply the *lex fori* (which continue to determine the issue *de novo*). Cf. Iceland which applies the *lex fori* but seemingly to determine the acknowledgement's validity (see the response to Question 50).

³⁹⁷ *E.g.*, Sweden, Hungary (the recognition of a child by the father shall be adjudged according to the personal law of the child prevailing at the time of recognition, while the recognition of a child already conceived but not yet born shall be adjudged according to the personal law of the mother prevailing at the time of recognition. The Ministry of Public Administration and Justice must also examine the acknowledgement and deliver an official position on its acceptability.)

author of the acknowledgement was domiciled or in a State in which either of them were nationals and if it satisfies the formal requirements of the State in which it was made.³⁹⁸

90. In some States, however, significantly different rules apply to foreign voluntary acknowledgements to those which apply to determine legal parentage arising by operation of law. For example, in Norway, whilst the *lex fori* will always apply to determine legal parentage arising by operation of law (irrespective of any foreign birth certificate), if a foreign voluntary acknowledgement exists, the Norwegian competent authorities may, if requested, take a decision concerning its recognition. In order for the foreign acknowledgement to be recognised, it must be “similar” to a Norwegian acknowledgement: that is, it must be able to “replace” a Norwegian acknowledgement. Recognition may be refused on public policy grounds.³⁹⁹ Moreover, in Finland, whilst there may be recognition (subject to defined exceptions) of a foreign decision, including a foreign birth certificate, a foreign acknowledgement will be considered valid if it complies with the form and proceedings stipulated by the law of the State in which it was undertaken.

91. As with foreign birth certificates, in many States in which recognition of a foreign acknowledgement is possible, recognition takes place by operation of law or without the need for any special procedure. However, in some States, it is necessary for a court order⁴⁰⁰ or an order of a superior authority to be made in order for transcription of a foreign acknowledgement to take place.⁴⁰¹

(3) Foreign judicial decisions

92. This section considers States’ approaches to foreign judicial decisions concerning legal parentage in circumstances where bilateral, regional or international instruments do not apply.⁴⁰² In general, the Questionnaire responses reveal that there is far more congruity in States’ approaches to foreign judicial decisions concerning legal parentage than is apparent in their approaches to foreign authentic acts (*i.e.*, foreign birth certificates and acknowledgements). This is because most States apply a form of “recognition” to foreign judicial decisions and there is a greater similarity in terms of the procedure and conditions for recognition.⁴⁰³

93. In relation to the procedural aspects, whilst in the majority of States a (usually judicial) recognition procedure must be undertaken in the absence of a bilateral or other agreement with the foreign State,⁴⁰⁴ in some States recognition may be by operation of law if the conditions of the legislation are met.⁴⁰⁵ In other States there may be a difference in the procedure required depending upon whether the proceedings in the foreign State were contested or took place by agreement,⁴⁰⁶ or depending upon whether

³⁹⁸ Certain exceptions also apply, including if the acknowledgement is “manifestly incorrect”.

³⁹⁹ However, due to strict basic rules/conditions for recognition according to Norwegian law, recognition will normally not be granted in surrogacy cases (but not necessarily on grounds of public order).

⁴⁰⁰ *E.g.*, Guatemala.

⁴⁰¹ *E.g.*, Hungary.

⁴⁰² These are discussed in **Part B, Section 2** below.

⁴⁰³ The following States may recognise a foreign judgment concerning legal parentage, subject to defined conditions / exceptions: Belgium, Brazil, Canada (common law jurisdictions, Quebec), Chile, Colombia, Czech Republic, Denmark, Finland, Germany, Hungary, Japan, Lithuania, Mauritius, Mexico, Monaco, the Netherlands, Norway (paternity only), Poland, Portugal, Serbia, Spain, Sweden, Switzerland and Uruguay.

⁴⁰⁴ *E.g.*, Brazil, Canada (Quebec) (to establish it as a fully authentic act), Colombia, Czech Republic, Guatemala, Hungary (no special procedure is required, though it may be requested), Lithuania, Madagascar, Mauritius, Mexico, Monaco, Portugal (if the decision concerns a Portuguese child), Serbia, Slovakia (the designated applicable law governs the procedure and conditions for recognition), Spain (if proceedings were contested), Switzerland (cantonal supervising authority), Turkey and Uruguay.

⁴⁰⁵ *E.g.*, Belgium (recognition is *ex lege* but a declaration of enforceability must be sought from the court to enforce a decision), Finland, Germany, Japan, the Netherlands, Poland, Portugal (if the decision concerns a foreign child), Spain (incidental control only applies if the proceedings were by consent) and Sweden (unless the State authority or a party requests judicial review).

⁴⁰⁶ *E.g.*, in Spain where different procedures apply depending upon whether the judgment was obtained by consent or after contested proceedings.

the foreign proceedings were in respect of a national of the recognising State or not.⁴⁰⁷ In many States, certain measures to establish the authenticity of the judgment may be required, as well as translation:⁴⁰⁸ in some States, it may be sufficient if the judgment satisfies the conditions necessary to establish its authenticity under the law of the State in which it was made.⁴⁰⁹

94. In relation to the conditions for recognition, in most States a primary requirement for recognition relates to the grounds upon which the foreign court based their jurisdiction.⁴¹⁰ If jurisdiction was assumed contrary to the requirements of the recognising State, the judgment may not be recognised. States have varying degrees of severity in their approach to this issue: for example, some States only demand that the case have a sufficient or reasonable connection with the foreign State,⁴¹¹ whilst others provide specific grounds of jurisdiction which must have been complied with or refer the issue to the grounds set out in their private international law rule for jurisdiction in parentage matters.⁴¹² In addition, in many States, if the State in which recognition is sought determines that it had “exclusive jurisdiction” over the dispute (which, in several States, will be the case if the civil status of a national is in issue), recognition of the foreign judgment may not be permitted.⁴¹³ This may be subject to the “principle of equivalence” in some States (*i.e.*, it might be possible to recognise the decision if the foreign law produced effects similar to that which would have been produced according to the applicable law which would have been designated in the recognising State).⁴¹⁴

95. Other common requirements may be described by States as conditions for recognition or as grounds for refusal of recognition and there is a significant degree of concurrence amongst States concerning them (if not always in the detail, at least in terms of which grounds apply). For example, recognition may be refused if:

- 1) The foreign decision was rendered in contravention of fundamental due process principles: for example, a party was not served or did not have the chance to be heard in the foreign proceedings;⁴¹⁵
- 2) The foreign decision is not final / conclusive;⁴¹⁶
- 3) 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;⁴¹⁷

⁴⁰⁷ *E.g.*, in Portugal, decisions concerning a foreign national's legal status do not require a recognition procedure in order to be registered. However, if a foreign decision concerns a Portuguese national, a recognition procedure is required. In the Czech Republic, if all the parties were at the time of the decision nationals of the foreign State, the decision shall have effect in the Czech Republic without the necessity of further proceedings (subject to a public policy exception).

⁴⁰⁸ *E.g.*, Brazil, Canada (Quebec), Colombia, Lithuania, Mexico, Monaco, Portugal, Serbia and Turkey.

⁴⁰⁹ *E.g.*, in Belgium (legislation also specifies the documents which must be produced for recognition which include a copy of the judgment which satisfies the conditions necessary to establish its authenticity under the law of the State in which it was made) and Brazil.

⁴¹⁰ This may be described as a condition for recognition or it may be described as a ground upon which recognition may be refused.

⁴¹¹ *E.g.*, the Netherlands (no “sufficient connection” with the foreign State) and Sweden (“reasonable grounds for the action to be tried in the foreign State”).

⁴¹² *E.g.*, Canada (Quebec), Canada (common law jurisdictions), Finland, Germany, Hungary (applies where the Hungarian court has jurisdiction; if it has no jurisdiction, there is no such “check” but the grounds for non-recognition still apply), Japan, Latvia, Madagascar, Monaco, Portugal, Spain and Switzerland.

⁴¹³ *E.g.*, Belgium, Colombia, Hungary (jurisdiction over cases concerning the status of nationals is exclusive unless the State of the decision is that of the father and child's domicile or residence), Lithuania, Poland, Portugal, Serbia, Slovakia and Turkey.

⁴¹⁴ *E.g.*, Czech Republic (if proceedings concerned a Czech national), Lithuania and Serbia. In Denmark and Norway, in relation to decisions concerning legal paternity, it is also a criteria that the foreign decision be “similar” (Norway) or have the same legal consequences (Denmark) as a paternity decision of their State.

⁴¹⁵ *E.g.*, similar rules apply in: Belgium, Brazil, Canada (common law jurisdictions, Quebec), Colombia, Czech Republic, Finland, Germany, Hungary, Japan, Latvia, Lithuania, Monaco, the Netherlands, Poland, Portugal, Serbia, Slovakia, Spain, Sweden, Switzerland and Turkey.

⁴¹⁶ *E.g.*, the same or similar rules apply in: Belgium, Canada (Quebec), Czech Republic, Hungary (a condition, rather than ground for non-recognition), Latvia, Lithuania, Madagascar, Monaco, Poland, Portugal, Serbia, Slovakia, Spain, Sweden and Switzerland.

⁴¹⁷ *E.g.*, similar rules apply in: Belgium, Canada (Quebec), Czech Republic, Finland, Germany, Hungary, Latvia, Lithuania, the Netherlands, Poland, Portugal, Serbia, Slovakia, Sweden and Switzerland.

4) 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*);⁴¹⁸

5) The foreign decision is contrary to the public policy / order of the State (discussed further in the next section).⁴¹⁹

In some States, there is also a requirement of reciprocity although, depending upon the particular State's rules, the absence of reciprocity may only affect the invasiveness of the recognition conditions and / or procedure.⁴²⁰ In others, in contrast, this is explicitly not a ground upon which a judgment may be refused recognition.⁴²¹ Further, in one group of States, recognition (in the sense of an amendment to an existing birth registration on the basis of a foreign judgment) is often conditioned upon a foreign order being "substantially equivalent" to a domestic declaration of parentage but might be refused if, in addition to some of the matters above, evidence becomes available that was not available during the foreign proceedings.⁴²² In one State, it was specifically mentioned that the foreign decision may be refused recognition if it was contrary to an earlier voluntary acknowledgement of parentage.⁴²³

96. Only in a small minority of States was it stated that recognition of a foreign judgment on parentage will be refused if the law applied by the foreign State was different to that which would have been applied under the recognising State's applicable law rules (or the result reached in the foreign court was different to that which would have been reached under the law designated by the recognising State's private international law rules).⁴²⁴ Furthermore, in the Netherlands, recognition explicitly cannot be refused on this basis on public order grounds, even where a Dutch national is involved.

97. It should be noted that in some States, it was stated that, even where a foreign judgment exists, the issue of legal parentage may still be determined *de novo* by the *lex fori*.⁴²⁵ This was also the case in some States in relation to judgments regarding legal maternity: it was stated that the *lex fori* will always apply to the issue of legal maternity such that the birth mother will always be considered the legal mother, no matter what a foreign judgment may say (this is also interpreted as a public policy issue in some States, rather than as a matter of applicable law – see below).⁴²⁶

(4) Interpretation of the "public policy" exception⁴²⁷

98. Common themes are evidenced across States concerning the interpretation of public policy when considering whether to recognise legal parentage established abroad or whether to apply foreign law to the question of legal parentage (depending upon the approach adopted by a State). In terms of its general purpose, for many States, the aim of the public policy exception is to prevent the recognition of legal acts or facts concluded abroad, or the application of foreign law, if the recognition or the effects of the foreign

⁴¹⁸ *E.g.*, similar rules apply in: Belgium, Canada (Quebec), Colombia, Finland, Germany, Hungary, Latvia, Madagascar, Poland, Sweden and Switzerland.

⁴¹⁹ *E.g.*, similar rules apply in: Belgium, Brazil, Canada (common law jurisdictions, Quebec), Colombia, Czech Republic, Denmark, Finland, Germany, Hungary, Japan, Latvia, Lithuania, Madagascar, Mauritius, Mexico (incompatible with internal laws or would be fraud), Monaco, the Netherlands, Norway, Poland, Portugal, Serbia (not applicable if the judgment concerns nationals of the foreign State), Slovakia, Spain, Switzerland and Turkey.

⁴²⁰ *E.g.*, in Monaco, where without reciprocity, the judgment can be reviewed as to its substance. An absence of reciprocity prevents recognition in: Chile, Germany, Japan and Spain (if foreign proceedings were contested).

⁴²¹ *E.g.*, in Serbia for judgments rendered in matrimonial matters or concerning paternity or maternity.

⁴²² Canada (common law jurisdictions): see response to Questions 51 and 52.

⁴²³ Sweden.

⁴²⁴ *E.g.*, see the responses to Question 51 of Latvia ("in the making the judgment of the foreign court, the law of such state was not applied as should have been applied in conformity with Latvian international private law conflict of law norms") and Madagascar ("if the application of the law designated by the rules concerning personal status had the same result" (translation)).

⁴²⁵ *E.g.*, Ireland and New Zealand.

⁴²⁶ *E.g.*, Norway.

⁴²⁷ The term "public policy" is used in this Study for ease of reference but it is recognised that States may use different terminology in their laws (*e.g.*, "public order"). The issue of public policy has proved a significant feature of some ISA cases and this case law is analysed below (see **Part C, Section 2**).

law would lead to a situation contrary to the fundamental principles and values of the State.⁴²⁸ However, the precise way in which the concept is interpreted in States will often depend on the “fundamental principles and values” of the particular legal system. In some States, it was reported that the concept of public policy is interpreted narrowly and, in particular, it is not sufficient that the case would be decided differently under the *lex fori*.⁴²⁹ Instead, the recognition of the foreign decision or the application of foreign law must violate *indispensable* principles / rights of the State, and / or must be *manifestly* incompatible with these principles, to be contrary to public policy.⁴³⁰

99. In some States, the application of public policy to individual situations will depend upon the intensity of connection which the situation has with the particular legal system and the gravity of effect the recognition or application of the foreign law would have.⁴³¹ For example, in the context of the establishment of legal parentage, in some States, if a foreign decision relates to the status of a national of the recognising State, it may be more likely that public policy will apply if the effect would be in breach of the fundamental principles of the State, as compared with the same decision concerning a non-national.⁴³² In other States, in the context of recognising foreign decisions or applying foreign law, “*international public order*”, as opposed to “*national public order*”, will apply and this may have a narrower meaning (in one State, being said to comprise “the principles which are distinguished for universality and protect the most important values”).⁴³³

100. In terms of the application of these general principles to legal parentage matters, in several States it was noted that a foreign decision or legal provision (depending upon the approach adopted) which held that a woman other than the birth mother was the legal mother of a child *at birth* would be considered in violation of public policy:⁴³⁴ that is, it is a matter of public policy that the woman who gives birth to a child is the legal mother of the child in the first instance.⁴³⁵ One State reported that, for this reason, *pre-birth* declaratory orders from the USA in surrogacy cases, finding the intending parents to be the legal parents of a child, will not be recognised.⁴³⁶ Another noted that, for this reason, foreign birth certificates have been denied recognition on the basis that the birth mother was not indicated on the birth certificate (*e.g.*, if two men are stated to be the legal parents on the certificate).⁴³⁷ It is interesting to note that in at least one of these States, it was reported that this is the position despite the fact that surrogacy itself is not considered to be in breach of public policy.⁴³⁸ Instead, the concern is the child’s right to know his / her origins. In other States, the same result is achieved through the

⁴²⁸ *E.g.*, in Sweden, a provision of foreign law will not be applied where it would be manifestly incompatible with the Swedish system to enforce the provision. In the Czech Republic, foreign law must not contradict the principles of the national social and state system. In Germany, foreign law will not be applied if it is manifestly incompatible with the fundamental principles of German law. In Belgium, foreign law will not be applied if it would produce an effect manifestly contrary to public policy. In Serbia, you cannot use a birth certificate to prove the facts therein if the effects would be contrary to the basic principles of social organisation laid down by the Constitution. In Lithuania, public policy amounts to “international public order encompassing the fundamental principles of fair process, as well as imperative legal norms”.

⁴²⁹ *E.g.*, Canada (common law jurisdictions) and Poland (a judgment must violate fundamental principles of law in Poland, which will be the case if, amongst other situations, its effect is incompatible with the very concept of a specific legal institution in Poland).

⁴³⁰ *E.g.*, Canada (common law jurisdictions), Germany, Poland and Turkey (public policy defines the rules which constitute the basis of the legal system and which are indispensable).

⁴³¹ *E.g.*, Belgium.

⁴³² *E.g.*, Serbia. However, in the Netherlands, even where a Dutch citizen is involved in a case, recognition cannot be refused for the sole reason that a law other than that which would be applicable according to the provisions of Dutch private international law has been applied to the decision.

⁴³³ *E.g.*, Lithuania (cf. Serbia – in which the law of a foreign State will not be applied if its effect is contrary to the *domestic* public order).

⁴³⁴ *E.g.*, Denmark, Germany, Japan, the Netherlands and New Zealand.

⁴³⁵ As these States accept subsequent transfers of legal parentage in the adoption context, it is interesting to consider whether a judgment concerning a transfer of legal parentage following a surrogacy arrangement (in States in which this procedure is adopted: *e.g.*, the UK) would be recognised in these States.

⁴³⁶ New Zealand.

⁴³⁷ The Netherlands.

⁴³⁸ The Netherlands.

mandatory application of the *lex fori* to the question of legal maternity (but the issue is not necessarily considered one of public order).⁴³⁹

101. Other situations mentioned by States in the parentage context in which a public policy violation has been held to have occurred include where: a man acknowledged legal paternity involuntarily; legal paternity was untruthfully acknowledged without the child's consent; legal paternity was established without the man being involved in the proceedings; legal paternity was established based on a witness statement and the man was refused the right to obtain expert evidence; and, in three States,⁴⁴⁰ where same-sex parents were indicated on a birth certificate as the legal parents of a child or were considered as such by the applicable foreign law.

102. In interpreting and applying public policy as a ground for non-recognition of legal parentage established abroad, however, States have to pay particular, close regard to international and regional human rights provisions.⁴⁴¹ Several national courts have acknowledged this in case law concerning the recognition of the legal status of children established abroad in the ISA context: this is discussed in more detail in **Part C, Section 2**.⁴⁴²

(c) Private international law rules concerning the contestation of legal parentage

103. In most States,⁴⁴³ a contestation of legal parentage will take place before the judicial authorities of the State. The circumstances in which the courts of a State will consider that they have (international) jurisdiction to determine a dispute concerning a child's legal parentage vary considerably, although there are common themes. In some States the rules derive from the general jurisdiction rules in civil matters, whilst other States have specific jurisdictional provisions relating to the contestation of legal parentage or issues relating to civil status more broadly.⁴⁴⁴ Either way, the primary connecting factors appear to be: the child's habitual residence⁴⁴⁵ (sometimes conditioned upon the child's birth having been registered in the State) and / or the child's nationality,⁴⁴⁶ or the habitual residence⁴⁴⁷ and / or nationality⁴⁴⁸ of a putative parent challenging legal parentage or a putative parent against whom legal parentage is challenged. Other connecting factors include: the child or one of his / her parents'

⁴³⁹ *E.g.*, Finland, Norway and Sweden. (Norway stated that this was not on public policy grounds).

⁴⁴⁰ *E.g.*, Hungary, Latvia and Czech Republic.

⁴⁴¹ *E.g.*, see the provisions mentioned in **Part A, Section 2**, including, internationally, the UNCRC, the ICCPR and the ICESCR, and, regionally, the ECHR, the ACHR and the *African Charter on the Rights and Welfare of the Child* (hereinafter, the "ACRWC"). See further the discussion of the particularly significant ECtHR jurisprudence concerning the cross-border recognition of the legal status of children established abroad in **Part B, Section 2** below.

⁴⁴² See paras 147 et seq.

⁴⁴³ Cf. Germany: in which a contestation may also be before the birth registration authorities (see response to Question 31).

⁴⁴⁴ *E.g.*, cf. Canada (Alberta), which has express statutory provisions, with Canada (BC, Saskatchewan and Nova Scotia) where general jurisdictional rules determine the issue.

⁴⁴⁵ *E.g.*, Australia (VIC, QLD – provided the birth is registered in QLD), Belgium, Brazil, Canada (common law jurisdictions), Chile, Denmark, Finland, Germany, Guatemala (provided the birth is registered in Guatemala), Lithuania, Madagascar, Mexico, Netherlands, Norway, Poland, Serbia, Slovakia, Spain, Sweden, Switzerland, USA (depending upon state law) and Uruguay.

⁴⁴⁶ *E.g.*, Australia (VIC, QLD), Belgium (if the person's whose parentage is in question is also Belgian), Croatia, Czech Republic, Dominican Republic, El Salvador, Finland (the child or the man is or was before their death a Finnish citizen and the matter cannot be ruled in the State where the child or man has habitual residence and there is a specific reason to rule the matter in Finland), Germany, Guatemala, Hungary, Mexico, Monaco, Philippines, Portugal, Serbia (if child is also domiciled or resident in the State, jurisdiction is exclusive) and Slovakia.

⁴⁴⁷ *E.g.*, Australia (VIC, QLD – provided the birth is registered in QLD), Belgium, Canada (Alberta), Denmark (residence), Germany, Guatemala (if the child is also habitually resident), Hungary, Mexico, Norway (habitual residence of legal parents), Philippines, Portugal and Spain (seemingly only the claimant).

⁴⁴⁸ *E.g.*, Australia (VIC), Belgium (if the child is also Belgian), Czech Republic, Finland (see *ibid.*), Germany, Guatemala, Mexico, Philippines, Poland (if both parties are Polish nationals), Portugal, Serbia (if both parties are nationals, or plaintiff is a national and domiciled in the State), Slovakia (if one of parents or child has Slovak nationality) and Spain (seemingly only the claimant).

domicile,⁴⁴⁹ the State of the child's birth,⁴⁵⁰ the defendant's (habitual) residence or domicile,⁴⁵¹ the mother's residence,⁴⁵² paternity or co-motherhood having been established in the State,⁴⁵³ or a "real and substantial connection" being evidenced with the State.⁴⁵⁴ In some States, some / all of these connecting factors may apply in the alternative. In some States, exclusive jurisdiction may rest with the courts of the State if the validity or voidance of records made in the State's Register is in question, or if the recognition / enforcement of a foreign judgment is in issue.⁴⁵⁵ In most States, the connecting factors must be fulfilled at the time the court is seised with the dispute.⁴⁵⁶

104. In relation to the law to be applied by the court in a legal parentage dispute with foreign connections, the nature of the dispute will usually determine the particular rules which are applicable and a combination of the provisions explained above may be relevant. For example, and depending upon the approach adopted in a State, a determination of legal parentage arising by operation of law may be required according to the State's applicable law rules.⁴⁵⁷ However, a dispute might (instead or also) involve questions concerning the recognition of legal parentage established in another State, whether by foreign birth certificate, acknowledgement or judgment.⁴⁵⁸ However, it should be noted that whilst, in most States, the rules are the same as those set out above, some States do have specific applicable law rules for a contestation of legal parentage.⁴⁵⁹

(d) Legal effects of recognition

105. One further question concerning the recognition of a foreign fact, act or judgment concerning legal parentage is which law governs the *effects* of that relationship: for example, which law governs whether maternity / paternity leave is accorded to the recognised legal parents (if relevant), whether they receive social security or tax benefits, whether parental responsibility is acquired, which individuals have maintenance obligations, and what the inheritance consequences are for the child (to name but a few consequences of legal parentage)?

106. In the majority of States which responded to the Question, the responses evidence that the legal effects of the recognised status will be governed by the *lex fori*.⁴⁶⁰ However, in some States, there is a separate private international law rule for the

⁴⁴⁹ *E.g.*, Canada (common law jurisdictions – putative parent's domicile, Quebec), Hungary and Switzerland.

⁴⁵⁰ *E.g.*, Canada (Alberta) and Ireland. In addition, in Canada (common law jurisdictions), if a declaratory order concerning parentage is sought under the vital statistics legislation of the jurisdiction, the child must have been born in the jurisdiction.

⁴⁵¹ *E.g.*, Latvia, Poland, Sweden and Slovakia (domicile of plaintiff will also suffice).

⁴⁵² *E.g.*, Denmark.

⁴⁵³ *E.g.*, Denmark and Norway.

⁴⁵⁴ *E.g.*, Canada (common law jurisdictions) – for declarations of parentage. In some provinces, such a connection will be presumed if the question for determination relates to the personal status of a person ordinarily resident in the province (*e.g.*, this is the case in BC). In the Netherlands, if the child is not habitually resident in the State (primary rule), jurisdiction may be assumed if the case is "to a sufficient degree connected with the Dutch legal sphere". In New Zealand, case law has established a test of a "sufficient nexus" with New Zealand grounding jurisdiction (*Re P* [2000] NZFLR 181). In Sweden, if the previous grounds of jurisdiction do not apply, jurisdiction may be assumed if, having regard to any of the parties' connection with Sweden, "special reasons" exist for the case to be heard there.

⁴⁵⁵ *E.g.*, Spain.

⁴⁵⁶ Although in Germany, it was stated that jurisdiction must be established at the time the decision is taken. However, it may be sufficient for the circumstances grounding jurisdiction to have been established at another time (*e.g.*, at the time the court is seised) so that the fact that they do not apply at a later date is not detrimental (*i.e.*, *perpetuatio fori* would be held to apply): the interests must be balanced on case-by-case basis with regard to whether *perpetuatio fori internationalis* is to be assumed.

⁴⁵⁷ See paras 74 to 83 above.

⁴⁵⁸ As to which, see paras 84 to 102 above.

⁴⁵⁹ *E.g.*, in Germany, a specific provision states that the descent of a child can be challenged according to any one of the laws that govern its preconditions. The child, in any event, can challenge the descent under the law of his or her habitual residence. In Sweden, an action before a court concerning the establishment of paternity or the termination of paternity established by operation of law should be examined according to the law of the State where the child habitually resides when the case is decided. The question whether paternity established by operation of law shall be deemed terminated by an acknowledgement is assessed according to the same law as that which is applied to the acknowledgement (see further, the response to Question 54).

⁴⁶⁰ *E.g.*, Canada (common law jurisdictions), Colombia, Denmark, Dominican Republic, Latvia, Madagascar, Mexico, Monaco, the Netherlands, Serbia and Spain.

effects: for example, in two States, the effects of the status are subject to the law of the domicile of the child.⁴⁶¹ In other States, it was reported that the approach undertaken will determine which law is applicable to the effects of the recognised status. For example, in one State,⁴⁶² if recognition of a foreign court judgment is undertaken, the effects of the recognised relationship will be determined in accordance with the law of the State from which the decision came.⁴⁶³ If, however, the validity of a foreign act (*e.g.*, a voluntary acknowledgement) is determined according to the State's applicable law rules, the effects of the relationship may be left to the designated applicable law (including its own rules of private international law). In another State,⁴⁶⁴ the legal effects of the relationship will be determined according to the general applicable law rule applied to legal parentage.

(e) Legal developments in private international law

107. Except in the international surrogacy context (as to which, see **Part C** below), unlike the position in internal law, few significant developments were reported by States concerning their private international law rules relating to legal parentage in recent years.⁴⁶⁵ In particular, it is interesting to note that the private international law rules of several States focus solely on issues of legal *paternity*. In some States this may be due to the fact that a specific policy decision has been taken that the birth mother should always be the legal mother *at birth* (and as the *lex fori* guarantees such a result, it should always apply). However, in other States it may be that this approach is the result of the fact that, when the law was drafted, it was not scientifically possible for there to be any doubt concerning maternity (*i.e.*, the maxim held true because the rules were drafted before the advent of ART and surrogacy) and private international laws, like some internal laws, have not kept pace with scientific developments.

108. In line with this observation, it should be noted that, in the overwhelming majority of States it was reported that there are no special rules of private international law concerning legal parentage resulting from ART which takes place abroad,⁴⁶⁶ meaning that the general rules which are described above will also apply in these cases. In two States, it is, however, specifically provided in legislation that the internal rules of the State will apply whether or not the pregnancy resulted from an ART procedure undertaken in the State and / or whether or not the child was born in the State.⁴⁶⁷

2. Bilateral, regional or international efforts towards greater co-operation or unification of private international law rules concerning legal parentage and / or related areas⁴⁶⁸

109. In relation to cross-border co-operation in matters concerning civil status, including birth registration and / or subsequent determinations concerning a child's legal parentage, whilst most States reported that they have no agreements in force with other States, several States reported that they do have such agreements.⁴⁶⁹ A few States also reported that, in the absence of bilateral agreements, the transfer of information may occur in practice.⁴⁷⁰ Where bilateral agreements are in force between States, the scope of the agreements varies, from addressing co-operation in the transfer of information

⁴⁶¹ Canada (Quebec) and Lithuania.

⁴⁶² Germany.

⁴⁶³ In Hungary and Poland, the effects of the relationship recognised as a result of a foreign judgment will also usually be subject to the law of the State from which the decision came.

⁴⁶⁴ Portugal.

⁴⁶⁵ See responses to Question 57.

⁴⁶⁶ *I.e.*, "cross-border reproductive care" or CBRC: see responses to Question 55.

⁴⁶⁷ *E.g.*, New Zealand and the UK. Cf. Iceland, where certain of the rules concerning the legal parentage consequences of ART only apply if the ART was undertaken in Iceland: *i.e.*, if a female same-sex couple conceive a child through ART abroad, the non-birth mother will have to adopt the child, whereas if the ART took place in Iceland, she would be a legal parent by operation of law.

⁴⁶⁸ Bilateral, regional or multilateral treaties or initiatives relating to abolition or modification of requirements of legalisation are not dealt with here, since they are considered beyond the scope of the project.

⁴⁶⁹ *E.g.*, Belgium, Czech Republic, Finland, Germany, Hungary, Latvia, Lithuania, Madagascar, Monaco, Serbia and Switzerland.

⁴⁷⁰ *E.g.*, Dominican Republic, Philippines, Romania, Sweden, Uruguay.

only,⁴⁷¹ to establishing a unification of private international law rules as between the States concerned.⁴⁷² For example, in relation to the former, in some States an agreement may involve notification of the civil status event of a foreign national, resident in the State, to the embassy / consulate of the foreign State.⁴⁷³ In relation to the latter, in one State, nine bilateral agreements exist, all of which contain the main principle that matters related to the establishment, recognition or contestation of legal parentage should be decided according to the law of the State in which the child is a national from birth or in which the legal mother is a national at the time of the child's birth.⁴⁷⁴

110. Some States also have regional agreements or understandings concerning these issues. For example, the *Nordic Agreement on Population Registration*, which operates between Denmark, Finland, Iceland, Norway and Sweden, entails these States reciprocally, and by request, giving each other population register information about a person moving from one State to another. Also at the regional level, the European Commission is considering the issue of cross-border recognition of the effects of civil status records within the EU, including birth certificates.⁴⁷⁵

111. At the international level, under the auspices of the International Commission on Civil Status, several multilateral agreements concerning co-operation in the exchange of information concerning civil status matters have been concluded.⁴⁷⁶ Most recently, the *Convention on the use of the International Commission on Civil Status Platform for the international communication of civil-status data by electronic means* (No 33) and the *Convention on the issue of multilingual and coded extracts from civil status records and multilingual and coded civil status certificates* (No 34: an update of the 1976 instrument) have been concluded. Further, in relation to private international law issues, the *Convention on the voluntary acknowledgement of children born out of wedlock* (1980), establishes uniform rules concerning the law applicable to voluntary acknowledgements.⁴⁷⁷ However, it has never entered into force, perhaps due to the restrictive approach to the public policy exception adopted in the instrument.⁴⁷⁸

112. In relation, more specifically, to the cross-border recognition of foreign *judgments* concerning legal parentage, some States also reported bilateral agreements in this regard. For example, Poland has multiple bilateral agreements with third States providing for the recognition of foreign judgments by operation of law, or following court proceedings (depending upon the State). At the regional level, in accordance with the *Nordic Act on Acknowledgement of Nordic Paternity Decisions* (352/1980), a final decision concerning legal paternity given in Iceland, Norway, Sweden or Denmark or Finland is valid in the other States mentioned if the decision is established with the contribution of the authorities in the other States, subject to a public policy exception.

⁴⁷¹ *E.g.*, Belgium's bilateral agreements provide for the automatic transmission of certain acts of civil status; the Czech Republic has agreements concerning the mutual exchange of birth, death and status documents concerning nationals of another State; Hungary has 21 bilateral agreements in force which have a provision on mutually sending extracts from the birth register (either on request or automatically); in Serbia, multiple bilateral agreements are in force concerning forwarding certificates on the civil status of nationals of the other State.

⁴⁷² *E.g.*, Latvia.

⁴⁷³ Switzerland, Austria, Germany and Italy also have an agreement to this effect. Sweden undertakes this as a matter of practice when registering a child who also has another nationality.

⁴⁷⁴ Latvia: the agreements are with Russian Federation, Ukraine, Republic of Belarus, Republic of Uzbekistan, Kyrgyzstan, Estonia, Lithuania, Poland and with the Republic of Moldova.

⁴⁷⁵ See the 2010 EU Green Paper cited at note 372 above.

⁴⁷⁶ To name but a few: the *Convention No 1 on the issuance of certain acts of civil status for use abroad* (1956), *Convention No 3 on the international exchange of information relating to civil status* (1958) and its Protocol, *Convention No 5 extending the competence of authorities empowered to receive acknowledgements of natural children* (1961) and *Convention No 16 on the issuance of multilingual extracts from civil status acts* (1976).

⁴⁷⁷ Its provisions provide that the substantive conditions for an acknowledgement are to be governed by the national law or law of the habitual residence of the author of the acknowledgement or the child; and the formal conditions are governed by this law or the law of the place where the acknowledgement is made. Acknowledgements made in accordance with these rules are to be recognised, by operation of law, in all Contracting States, subject to a limited number of reservations.

⁴⁷⁸ See the Explanatory Report to ICCS Convention No 18, adopted by the General Assembly in Munich on 3 September 1980, concerning Art. 4 of the Convention.

113. Additionally at the regional level, the ECtHR has provided important guidance for States Parties to the ECHR concerning the requirements of its Article 8 when States are faced with questions concerning the recognition of the legal status of children established abroad, albeit in the adoption context. In *Wagner et JMWL v. Luxembourg*,⁴⁷⁹ in finding Luxembourg to have violated Article 8 ECHR as a result of the refusal to recognise a full adoption undertaken by an unmarried woman in Peru, the ECtHR held that, “[b]earing in mind that the best interests of the child are paramount in such a case ..., the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention. However, the national authorities refused to recognise that situation, making the Luxembourg conflict rules take precedence over the social reality and the situation of the persons concerned in order to apply the limits which Luxembourg law places on full adoption” [emphasis added].⁴⁸⁰ Pending cases involving ISAs are set to test this regional jurisprudence further and will need to be closely monitored.⁴⁸¹

114. Whilst it is therefore clear that there is much relevant work to consider when reflecting upon whether and, if so, how to unify private international law rules regarding legal parentage, it is also apparent that no work has yet been undertaken at a global level which comprehensively looks to unify such rules, as well as to establish 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 levels⁴⁸² in the knowledge that it is not duplicating the work of other bodies.

3. Problems reported (*outside* the international surrogacy context)

115. It is not difficult to envisage that, in light of the considerable diversity which exists in the internal *and* private international law rules of States in this area,⁴⁸³ combined with the absence of comprehensive regional and / or international agreements,⁴⁸⁴ difficulties may result for children and families in terms of the establishment and recognition of legal parentage, particularly for those families connected with multiple States (whether through their cross-border movement and / or multiple nationalities). The difficulties arising in the specific context of ISAs are dealt with in **Part C** below. This section considers whether problems are arising *outside* this context.

116. The responses of several States and lawyers to the Questionnaires demonstrate that difficulties can and do arise for children in terms of their legal parentage beyond the international surrogacy context. This is often the result of a child’s birth being registered in two or more States or being transcribed into a second State’s register as a result of the child’s connection with that State.⁴⁸⁵ In some States, it was reported that the combination of different internal laws and applicable law rules concerning the determination and denial of legal *paternity*, in particular, can cause problems in this regard.⁴⁸⁶ For example, several States described that problems may arise when a man is registered as the legal father in one State and the second State in which registration or transcription is sought reaches a different conclusion concerning legal paternity and registers a different man. This situation was confirmed as a problem by the European Association of Registrars (“EVS”) in informal consultations with the Permanent Bureau. Indeed, a 2012 report by EVS called for the unification of private international law rules in this area and stated, “[i]t happens too often that one man is recorded as the father of a child in one country; however, the same child has a different father in another

⁴⁷⁹ App. No. 76240/01, 28 June 2007. See also *Negreponitis-Giannisis v. Greece* (App. No. 56759/08, 3 May 2011).

⁴⁸⁰ *Ibid.* at para. 133.

⁴⁸¹ Discussed further in **Part C, Section 2**: see para. 170 and note 673 below.

⁴⁸² Including, of course, through continued consultation and co-operation with other international and regional bodies working in the field.

⁴⁸³ See **Part A** and **Part B, Section 1** above.

⁴⁸⁴ See **Part B, Section 2** above.

⁴⁸⁵ Usually on the basis of the child’s nationality – see **Part A** above: *e.g.*, Belgium, Czech Republic, Germany, Hungary, Israel, Poland, Portugal, Sweden and the USA.

⁴⁸⁶ *E.g.*, Czech Republic, Germany, Hungary and Poland. This was also reported by the Vice-President of EVS.

country."⁴⁸⁷ This problem was confirmed in the 2013 Study on Civil Status undertaken for the EU Parliament, which also concluded that "harmonisation of private international law ... may possibly solve some of the problems".⁴⁸⁸ An example provided by EVS (which corresponds with the difficulties expressed by several States, as well as in the EU Study) illustrates the problem:⁴⁸⁹

Case example 1:

A bi-national couple, the mother (M) being a national of State A and the husband (H) being a national of State B, are habitually resident in State B. One month before a child is born to the mother, the couple divorce. The child acquires the nationality of State A upon birth from the mother. The child is registered in State B upon birth and its applicable law rules state that the law of State B, as the State of the child's habitual residence, will apply to determine legal parentage. The law of State B permits the mother to attend the birth registry with the man she says is the father (X) and register him as the child's legal father, with H's consent.

Subsequently, M seeks to register the child with the authorities in her State of origin, State A. This is possible following the child's birth abroad due to the fact that the child is a national of State A. When M produces the birth certificate of State B, however, State A says that this has no "constitutive effect" in the State and it must apply its applicable law rules to determine the child's legal parentage. Its rules state that the national law of the child at birth will apply, which is the law of State A.

State A's law provides that if a child is born within 300 days of the divorce of a woman, the ex-husband will be presumed to be the legal father of the child unless and until this legal paternity is challenged before a court in State A. Therefore, despite the foreign determination of legal parentage and the foreign birth certificate, M, H and X have to issue proceedings in State A for a declaration that H is not the father of the child and that X is the legal father, with all the concomitant emotional and financial costs and delay this entails.

Only once the court has determined the question (and provided a favourable outcome is achieved) will the competent authorities in State A be able to register the legal parents, already established as such, in State B.

117. Moreover, in a State which adopts a different approach to the private international law aspects of the question,⁴⁹⁰ it was reported that problems still arise in this regard since, as the *lex fori* determines legal parentage, it may also reach a different conclusion concerning legal paternity than that which was reached abroad.

118. In terms of problems concerning the establishment or recognition of legal parentage (or its consequences) arising as a result of persons undertaking CBRC, several States reported that this may also give rise to difficulties.⁴⁹¹ In some States, particular difficulties are encountered when ART procedures are accessed abroad which are not available in the State. For example, in Sweden single woman may not currently use ART procedures to become parents and hence they sometimes travel abroad to do so. According to Swedish law, paternity of a child should always be determined but, if a single mother uses donor insemination abroad, there may be foreign law provisions concerning the anonymity of the donor. In Australia, there have been difficulties in some cases concerning the establishment of paternity for the purposes of immigration when claims have been made that the child resulted from the use of donor sperm. Moreover,

⁴⁸⁷ "Civil status documents – challenges for civil registrars to circumvent problems stemming from the legal void", Note for the European Parliament's Legal and Parliamentary Affairs Committee (November 2012), by Dr Bojana Zadavec, Vice-President of EVS.

⁴⁸⁸ See p. 75 of "Life in cross-border situations in the EU (a comparative study on civil status)", for the European Parliament's Legal and Parliamentary Affairs Committee (note 13 above).

⁴⁸⁹ Provided to the Permanent Bureau during informal consultations with EVS.

⁴⁹⁰ Israel.

⁴⁹¹ E.g., Australia (federal), Israel, Netherlands, Norway, Sweden and the USA.

some lawyers reported dealing with cases in which there have been problems concerning the cross-border establishment or recognition of legal parentage in a CBRC context (non-surrogacy). The following example is based upon a case reported by a lawyer:⁴⁹²

Case Example 2

A married bi-national couple, living in State C, have a child through ART in State C at a licensed ART clinic and following the correct procedures under the law of that State. The husband (national of State C) provides his sperm and an egg donor is used due to the wife's (national of State D) medical condition. The wife carries the child and gives birth to the child in State C. According to the law of this State, she is considered the legal mother of the child and her husband is the legal father and, upon registration in State C, the child acquires a birth certificate in these terms.

The wife wishes for the child to acquire the nationality of her State of origin, State D (in particular because their plan is to return to State D to live in a couple of years' time). However, due to the fact that a donor egg was used, she learns that, under the law and policy of State D, she is not able to pass her nationality, by descent, to a non-genetically related child born abroad. It is also not clear that she will be able to be recognised as a legal parent under the law of that State.

The wife therefore decides that she has no option but to lie to the authorities of State D and not reveal that the child was born following an egg donation. She feels uncomfortable about this as she wanted to be open with the child about the circumstances concerning his conception. She also now fears that if the authorities of State D ever discover the truth, the child's legal parentage and / or nationality could be revoked.

119. A further example provided by a lawyer highlights the challenges arising from the different approaches of States to same-sex parenting:

Case Example 3

A female same-sex couple live in State X but are nationals of State Y. They have undertaken a civil partnership in State X. They use a licensed ART clinic in State X to conceive a child with the assistance of sperm donation and following the correct procedures under the law of State X. They ensure that, as required by State X, the non-birth mother formally consents to the ART procedure and to becoming a legal parent of any child born.

Under the law of State X, upon birth, the child therefore has two legal mothers by operation of law, the birth mother and her female civil partner. This will be registered on the child's birth certificate and there is no option not to register both women if the legal criteria establishing their legal maternity have been fulfilled.

Following conception, upon taking legal advice in their State of origin, State Y, the women learn that having a birth certificate with two mothers registered could cause significant problems in State Y. They are advised that, whilst State Y has recognition rules for foreign birth certificates, it is highly likely that recognition of a birth certificate with two women on it will be considered contrary to public policy. As a result, the child's legal parentage will not be recognised and the child may not be able to acquire the nationality of State Y. The child cannot acquire the nationality of State X as this State does not have an *ius soli* rule and neither of the women has this nationality.

As a result, the women feel they have no choice but to misrepresent the situation to the authorities in State X and initially register the birth in State X (incorrectly) as a birth to a single mother. They therefore receive a birth certificate with only her name on it. This is actually a criminal offence in State X. They then seek transcription of this birth certificate

⁴⁹² Although the key issue in the "real life" case was the same, the facts have been slightly modified for the purposes of the case example.

in State Y and seek the nationality of State Y on this basis. Once this process is finalised in State Y, they write to the registration authorities in State X and state that there has been a mistake and they seek rectification of the child's registration in State X to include the two women as legal parents. Again, however, they fear the situation for the child in future if the authorities in State Y ever discover the truth about the child's conception and / or legal parentage in State X.⁴⁹³

120. In a slight variation on the above scenario, a lawyer also reported a similar example in which, under the law of the State of which the female same-sex couple were nationals (State Y in the above example), the *birth* mother was able to be recognised as the legal mother of the child (following an application of the relevant applicable law rules) and it was stated that, if the *non-birth* mother undertook a step-parent adoption in the State in which they were living (State X in the above example), this could be recognised in State Y. However, under the law of State X, a step-parent adoption was not possible because the non-birth mother was *already* a legal mother of the child, by operation of law.

121. As these examples demonstrate, problems concerning the legal status of children can and do arise outside the surrogacy context. They arise 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. It is also interesting to note that problems arise whether a "conflicts approach" (i.e., 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. 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 apply to prevent the application of certain foreign laws). However, if the recognition approach is adopted there is always 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.⁴⁹⁴ 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.

⁴⁹³ As well as fearing the consequences for themselves if State X ever discovers their deliberate misrepresentation to its registration authorities.

⁴⁹⁴ 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 also, in this regard, **Part C, Section 2(a)** below).

C. INTERNATIONAL SURROGACY ARRANGEMENTS:⁴⁹⁵ A CLOSER ANALYSIS OF A SPECIFIC PHENOMENON

122. 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.⁴⁹⁶ In 2014, this reality is widely accepted and, as explained in Preliminary Document No 3 B of March 2014,⁴⁹⁷ international surrogacy has now become an issue of international interest and, in many quarters, one of international concern.⁴⁹⁸

123. It is important to recall at the outset of this Part, however, that, insofar as the legal status of children and intending parents (*i.e.*, legal parentage and its consequences, such as nationality) are in issue in ISA cases, **Parts A** and **B** above analysing the internal and private international laws of States concerning legal parentage and nationality are of direct relevance. As has been emphasised in a number of specialist lawyer responses to Questionnaire No 2,⁴⁹⁹ the underlying problem in these cases insofar as the legal status of children and intending parents is concerned, is this very conflict in States’ approaches to legal parentage and nationality. This also means that the problems arising concerning legal parentage and nationality are not unique to ISAs and problems can, and do, occur more broadly.⁵⁰⁰ It is important to recognise this and to place the problems in international surrogacy cases in this broader context. That said, due to the factual specificities of ISAs and the significant and increasing number of cases, it is undoubtedly the case that it is in this particular factual matrix that problems are most acutely seen at the current time.⁵⁰¹ Furthermore, 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.⁵⁰² 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 gender equality issues. Therefore, international surrogacy is a particular phenomenon which demands a related, but independent, analysis.

1. ISAs: setting the scene

124. In 2011 and 2012, in its Preliminary Note and Report, the Permanent Bureau attempted to provide an early, preliminary picture of the number and nature of ISAs being undertaken globally, as well as the geographical scope of the phenomenon. Following the responses to the Questionnaires,⁵⁰³ it is possible to update and detail this

⁴⁹⁵ International surrogacy arrangements are referred to in this Study as “ISAs” for short. The definition of the term used for the purposes of this Study and Prel. Doc. No 3 B of March 2014 can be found in the **Glossary** at **Annex A** of Prel. Doc. No 3 B.

⁴⁹⁶ See, generally, “Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements”, Prel. Doc. No 11 of March 2011, as well as “A preliminary report on the issues arising from international surrogacy arrangements”, Prel. Doc. No 10 of March 2012, (both available on the website of the Hague Conference < www.hcch.net >, under “The Parentage / Surrogacy Project”).

⁴⁹⁷ At para. 20.

⁴⁹⁸ See *ibid.* concerning the multiple international, regional and national bodies which have expressed concern. It should be noted, however, that these concerns may vary significantly depending upon the States involved.

⁴⁹⁹ Questionnaire No 2 addressed to legal practitioners, available on the website of the Hague Conference < www.hcch.net >, under “The Parentage / Surrogacy Project”.

⁵⁰⁰ As illustrated in **Part B, Section 3** above.

⁵⁰¹ Supporting the statements made to this effect in the 2011 and 2012 Prel. Docs (note 496 above).

⁵⁰² See “A comparative study on the regime of surrogacy in EU Member States”, by Brunet et al (2013) for the EU Parliament’s Committee on Legal Affairs (note 145 above) at Section 1.2, “Policy Matters”.

⁵⁰³ Questionnaires Nos 1 to 4, addressed to (1) Members and non-Member interested States, (2) legal practitioners, (3) health professionals and (4) surrogacy agencies. Other submissions provided to the Permanent Bureau as a result of the broad consultation process have also been very useful in this regard and, in particular, the 31 submissions received from intending parents. See further note 6 above and Section I of Prel. Doc. No 3 B of March 2014 (note 2 above).

picture. However, it should be remembered that whilst the information obtained provides an extremely useful “snapshot” of the phenomenon, due to the absence of central data collection in most States it is not possible to provide a comprehensive picture. Moreover, many of the primary “States of birth”⁵⁰⁴ did not respond to the Questionnaire (or, in some cases, not in detail on these points) and hence official information from these States is largely absent. Nevertheless, some information concerning these States has been provided by specialist lawyers and / or by those “receiving States”⁵⁰⁵ which have had cases involving these States of birth.

(a) The numbers and geographical scope of ISAs

Numbers

125. The first issue of note is that, in the overwhelming majority of States which responded to Questionnaire No 1, official information concerning how many cases of ISAs the State authorities have been involved with in recent years is not available.⁵⁰⁶ However, several States provided general comments to the effect that, based on the experience of the competent authorities, the prevalence of ISA cases has increased over the past five years, in some cases significantly.⁵⁰⁷ Moreover, a small minority of receiving States did provide specific figures concerning the number of incoming cases of ISAs. In particular, the data from Israel was striking: from 12 cases pre 2009, the authorities dealt with 128 cases in 2012 (a percentage increase of 967%).⁵⁰⁸ In Australia, the Department of Immigration and Citizenship was aware of approximately 430 “incoming ISA cases”⁵⁰⁹ in the period 2009 to 2012.⁵¹⁰ Sweden reported approximately 100 cases from 2007 to 2012.⁵¹¹ However, in most receiving States in which figures were available, responses indicated that the figures were highly likely to be significantly lower than the number of cases occurring in reality. This is because, as explained in these responses,⁵¹² in some cases couples are (still) able to present a birth abroad following an ISA as a “normal overseas birth” and not mention the surrogacy arrangement to the authorities.⁵¹³ In other cases, if children are born following ISAs in States in which they acquire a passport from the State of birth,⁵¹⁴ the authorities in the receiving State may never become aware of the case since the intending parents may never seek to regularise their position once “home”.⁵¹⁵

⁵⁰⁴ See the **Glossary** at Annex A to Prel. Doc. No 3 B of March 2014 for the definition of the terminology used in this Study.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ The absence of reliable data concerning the number of ISAs being entered into has been lamented by many commentators: in the UK context see, *e.g.*, “The changing profile of surrogacy in the UK – Implications for national and international policy and practice”, by Marilyn Crawshaw, Eric Blyth and Olga van den Akker, in *Journal of Social Welfare & Family Law*, Vol. 34, No. 3, September 2012, 267-277 which, at p.274, states, “[i]t is now well over a decade since the first calls were made for improved monitoring and regulation of practices surrounding surrogacy...[d]espite this, only limited data remain available ... the apparent rise in overseas arrangements ...adds urgency to the need for data to be kept that allows any changes to be more readily understood and monitored and to inform policy and practice interventions...”.

⁵⁰⁷ *E.g.*, Israel, New Zealand, Switzerland, Canada, Ireland, Norway and Spain. Canada also provided information as a State of birth and stated that the limited information at government level also suggested that the number of “outgoing cases” has also increased in the past 5 years. In contrast, in New Zealand “outgoing cases” of ISAs have not increased (but due to the immigration arrangements between Australia and New Zealand, movement between these countries for ISA may take place if the ISA is privately arranged).

⁵⁰⁸ And had already dealt with 114 at the time of responding to Questionnaire No 1 in 2013.

⁵⁰⁹ See the **Glossary** at Annex A to Prel. Doc. No 3 B of March 2014 for the definition of the terminology used in this Study.

⁵¹⁰ See para. 126 below regarding the much higher *non-official* Australian figures.

⁵¹¹ Ireland and New Zealand also reported modest figures which increased over the past five years, and Finland and Switzerland also had some modest data.

⁵¹² *E.g.*, Ireland, New Zealand and Switzerland.

⁵¹³ Of course, this is only possible for *heterosexual* couples. In Germany this used to be possible but the application form for the acquisition of nationality for a child following an overseas birth now expressly asks whether a surrogacy arrangement has been involved thus removing the possibility to fail to mention it.

⁵¹⁴ On the basis of the *ius soli* principle: *e.g.*, the USA (see **Part A, Section 1(f)** above).

⁵¹⁵ The child can travel “home” on the passport of the State of birth. As the Swiss response explained: if a young couple enters Switzerland with a child born abroad, there is no investigation of the circumstances of the birth abroad, save in the presence of clear grounds to suspect surrogacy (*e.g.*, if the woman has exceeded reproductive age or a same-sex couple is involved). Switzerland’s officially recorded figures were therefore very modest but the response acknowledged the significant understatement of these figures and mentioned a

126. Indeed, the degree to which official figures, where available, represent a significant understatement of the true number of ISA cases can be seen from some available, non-official, Australian figures. Whilst authorities were aware of 430 cases in a *three* year period (2009-2012), unofficial information⁵¹⁶ suggests that, in just *one* year, ended 30 June 2012, approximately 1,000 children were born to Australian intending parents in ISAs in India and Thailand alone. This tallies with what was reported in the UK recently where, following a multi-disciplinary roundtable on the issue of international surrogacy, it was reported that, “[t]he potential scale of international surrogacy in the UK became evident as the meeting was advised that more than 1,000 babies may be brought into the UK each year, thus confirming media reports”.⁵¹⁷ This is in stark contrast to the number of parental order applications which have been made in the UK following ISAs and this is the case despite judicial warnings that such orders must be sought to secure the legal status of these children in the UK.⁵¹⁸

127. The responses of specialist lawyers also demonstrate the extent to which most State figures do not represent the reality of the number of ISA cases now being undertaken globally. Whilst again no comprehensive picture can be painted from the information, individual “snapshots” provide an indication of the global growth in numbers. For example, one specialist Australian lawyer reported that he provided legal assistance in 2 incoming ISA cases in 2008, whilst in 2012 he dealt with 100 such cases, with this trend set to continue in 2013. Similarly, looking at the figures provided by four leading UK specialist lawyers in this area, they reported dealing with 3 incoming ISA cases between them in 2009, but this had increased to 90 cases by 2012, with trends again set to continue into 2013 with 104 cases already undertaken between the four at the date of answering the Questionnaire. A German practitioner’s figures also supported this dramatic increase: from 1 ISA case in 2008, he dealt with 20 such cases in 2012 and 25 at the date of answering the Questionnaire in 2013. A leading French practitioner also evidenced this trend, reporting an estimate of 10 cases in 2008, with an estimate of 50 in 2012. In fact, across the 19 practitioner responses which provided figures concerning the number of “incoming ISA cases” they had dealt with, the growth in cases was startling: from a combined total of 26 in 2008, (last complete data year), the same relatively small group of practitioners dealt with 328 cases in 2012: that is a **percentage increase of 1,162 % in a 5 year period**.⁵¹⁹ In terms of “outgoing ISA cases”, one US lawyer reported an increase from approximately 40 cases in 2012, to 175 in 2013⁵²⁰ and another reported an increase from an estimate of 100 cases in 2008, to 200 in 2013.

128. Reliable information from many States of birth concerning the number of children being born as a result of ISAs is not readily available. However, one doctor, employed in a fertility clinic in India, responded to Questionnaire No 3⁵²¹ and stated that 735 babies have been born as a result of ISAs in the clinic which opened in mid-2010 and deals with intending parents from all over the world.⁵²² This is also in line with an Indian surrogacy

journal report which claimed that physicians in the Ukraine (alone) indicated that they had treated 80 Swiss couples so far.

⁵¹⁶ Source: Professor Jenni Millbank at the University of Technology, Sydney who undertook research within the documents of the Australian Department of Immigration and Citizenship, including freedom of information requests.

⁵¹⁷ See “What are the best interests of the child in international surrogacy?”, by Professor Eric Blyth, Dr Marilyn Crawshaw and Professor Olga van den Akker, available at < http://www.bionews.org.uk/page_397263.asp >.

⁵¹⁸ See the judicial warning by Theis J in *J v. G* [2013] EWHC 1432 (Fam). Concerning the number of parental orders made by the court and the apparent increase in ISAs which do not result in such applications, see: “The changing profile of surrogacy in the UK – Implications for national and international policy and practice”, by Marilyn Crawshaw, Eric Blyth and Olga van den Akker (note 506 above).

⁵¹⁹ It should be noted that these figures are only used to indicate a trend. For example, not all cases were necessarily completed through to a live birth (*e.g.*, the lawyers may have been requested for advice and the case may not have proceeded). However, they do correlate with the percentage increase seen in the statistical information obtained by the Aberdeen University research project (kindly shared with the Permanent Bureau) – see Prel. Doc. No 10 of March 2012 at para. 6.

⁵²⁰ With another established US lawyer showing a more modest increase from 71 cases in 2008 to 90 in 2013.

⁵²¹ Addressed to health professionals.

⁵²² At the time of responding in late 2013.

agency⁵²³ which, in response to Questionnaire No 4,⁵²⁴ stated that it has been involved with the birth of over 1,000 children from 2009 to 2013 for clients worldwide. These figures are also in line with some media reports concerning the numbers of ISAs currently being undertaken in India.⁵²⁵ Furthermore, in terms of how many clinics may be providing fertility services in India, according to the Indian Council of Medical Research, whilst there are no definite numbers, “[w]e estimated about 200 clinics in 2002. Today, we have identified over 1100 IVF clinics from public sources. Of them, 600 clinics have confirmed they are either working as IVF clinic or as ART bank. This number is increasing every day”.⁵²⁶ Of course, not all of these clinics will necessarily offer surrogacy services or have the same number of international clients. However, if just a fraction of these clinics are undertaking ISA cases at the same rate, the number of children born as a result of ISAs in India alone in 2013 could easily be several thousand (if not significantly more). And this is just India: it does not include the children born in other key States of birth such as the USA, Ukraine, Thailand and beyond.

129. If one places the available information from receiving States and States of birth together, it can be concluded that: (1) the number of ISAs taking place globally has grown significantly (if not, dramatically) over the past 5 years and is continuing to grow; and (2) today, several thousand children are likely being born each year as a result of ISAs to intending parents from all regions of the world (and this could well be a significant understatement).

Geographical scope

130. In terms of the geographical spread of the phenomenon, the USA and India were mentioned most frequently as popular “States of birth” in ISA cases by receiving States, lawyers and individuals who have undertaken ISAs. These States were followed by Thailand, Ukraine and Russia, with Georgia and Canada also being mentioned frequently in responses. There were, however, regional variations, depending upon the location of the receiving State. For example, Thailand featured more strongly as a State of birth for intending parents resident in Australia and New Zealand, whilst Ukraine and Russia were more significant for European-resident intending parents. In addition, trends were reported to be closely linked with the internal legal situations in States. As an example, the changes to the Indian visa rules, which seemingly now prevent foreign same-sex and unmarried couples from accessing surrogacy services in India,⁵²⁷ have reportedly led to more same-sex couples turning to Thailand and the USA for ISAs.

131. Also mentioned as States of birth, although less frequently, were: Armenia, Australia, Belgium, Brazil, Cambodia, China, Cyprus, Czech Republic, Greece, Israel, Italy, Indonesia, Kazakhstan, Kenya, Philippines, Poland, South Africa, Malaysia and Mexico.⁵²⁸ As one lawyer recalled, some of these were States in which clients had undertaken altruistic surrogacy arrangements with family members resident there: *i.e.*, they became ISAs as a result of the fact that the family member lived abroad, rather

⁵²³ An ART bank which also operates as an agency (intermediary) in surrogacy cases.

⁵²⁴ Addressed to surrogacy agencies.

⁵²⁵ See < <http://tribune.com.pk/story/512264/wombs-for-rent-commercial-surrogacy-big-business-in-india/> > and < <http://www.dw.de/indian-surrogacy-industry-sets-take-home-baby-trend/a-16579078> >

⁵²⁶ See interview with Dr RS Sharma, Deputy Director General of the Indian Council of Medical Research (ICMR): < <http://www.hindustantimes.com/comment/interviewsnews/icmr-has-not-delayed-surrogacy-law-rs-sharma/article1-1031633.aspx> >.

⁵²⁷ See the letter from the Indian Ministry of Home Affairs, dated 9 July 2012, available at < http://icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf >: persons wishing to enter into an ISA in India must now apply for a medical visa (and can no longer rely on a tourist visa). The criteria to obtain such a visa (which mirror some provisions of the still pending *Assisted Reproductive Technologies (Regulation) Bill*) include that the applicants should be a heterosexual, married couple, having been married for at least 2 years, and that the foreign ministry (or embassy in India) of the State of the intending parents (it is not clear if it is the State of their residence or nationality but, bearing in mind the immigration evidence required, might be presumed to be their State of residence) must provide a letter stating that the State recognises surrogacy and that the child(ren) to be born following the ISA will be permitted entry to the State as the “biological child/children” of the intending parents.

⁵²⁸ There have also been (unconfirmed) media reports of for-profit surrogacy arrangements being offered in Nepal.

than the more common scenario of intending parents intentionally seeking for-profit surrogacy services in a foreign State.

132. In terms of receiving States, the lawyer and surrogacy agency responses to the Questionnaires evidence that intending parents travel from all regions of the world to undertake ISAs. Lawyers and agencies working in States of birth reported that they had provided assistance in ISA cases involving intending parents resident in: Argentina, Australia, Austria, the Bahamas, Bahrain, Bangladesh, Belgium, Brazil, Brunei, Canada, Chile, China (mainland and Hong Kong SAR), Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Greece, Hungary, Iceland, India,⁵²⁹ Indonesia, Iran, Ireland, Israel, Italy, Japan, Kenya, Lebanon, Luxembourg, Malta, Mauritius, Mexico, Monaco, Mongolia, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Poland, Portugal, Republic of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand,⁵³⁰ Turkey, Ukraine,⁵³¹ United Arab Emirates, United Kingdom, Uruguay, USA⁵³² and Venezuela.

133. Generally, responses from States, lawyers and surrogacy agencies indicated that, save in exceptional circumstances,⁵³³ surrogate mothers are not moving (or being moved) in order to give birth in favourable jurisdictions. However, one lawyer response indicated that this may be becoming more prevalent in some States in light of their particular legal situation. This lawyer reported six pending cases, three in which the surrogate may (consensually) move to give birth in light of international legal issues, and three in which the intending parents may move to live in the State in which the surrogate resides to fit the requirements of various laws. Moreover, one State reported its concern that women resident in the State are accessing ART services in other States and returning to the State to give birth in what seem to be ISA cases.⁵³⁴

134. Responses also highlighted the true international nature of ISAs in that frequently *more than two* States are implicated in such arrangements: for example, a bi-national couple may enter into an ISA in a third State;⁵³⁵ a surrogate mother, intending parents and gamete donor may all be resident in different States (not to mention the possibilities concerning their nationalities); and of course, families may, and have, moved following the completion of an ISA and subsequently require the child's legal status to be recognised in the new State of residence.

(b) The nature of the arrangements

135. In terms of the type of surrogacy arrangements being undertaken in an international context, the Questionnaire responses demonstrate that by far the most common ISAs are: (1) gestational,⁵³⁶ using either a donor egg (most commonly)⁵³⁷ or the

⁵²⁹ Reported by a lawyer from the USA – thus showing the trend of Indian intending parents travelling overseas for ISAs (perhaps due to some of the problems associated with Indian ISAs).

⁵³⁰ Reported by a lawyer from the USA.

⁵³¹ Reported by a lawyer from the USA.

⁵³² Reported by a lawyer from Ukraine – thus showing the trend of US intending parents travelling overseas for ISAs (usually due to lower costs abroad).

⁵³³ Often illegal, trafficking-related incidents such as those referenced in Prel. Doc. No 10 of March 2012 (at note 11). However, Hungary reported that there have been cases in which surrogate mothers, resident in the State, have gone to a neighbouring country where surrogacy is legal to give birth. Such cases are illegal in Hungary but the authorities may not find out about them (see response to Question 70).

⁵³⁴ *I.e.*, involving foreign-resident intending parents: see the response of New Zealand to Question 82.

⁵³⁵ And ultimately want the child to acquire the nationality of each of the intending parents.

⁵³⁶ *E.g.*, 30 of 31 submissions from intending parents involved *gestational* surrogacy arrangements (*i.e.*, using an egg donor or the intending mother's egg but not the egg of the surrogate mother). In the 1 other case, it was not clear (but likely involved a gestational arrangement). In 1 case it was reported that the couple had tried a self-arranged traditional surrogacy arrangement first (with a surrogate they found themselves online) but this had not worked out. In another case, they undertook a gestational arrangement through an agency first and had twins but for their third child, they undertook a traditional arrangement with a surrogate they found themselves (feeling able to do this after the research / work they had done the first time).

⁵³⁷ In 20 of the submissions from intending parents, an egg donor was used: the donor was often found through the agency (with the agency sometimes having their own egg donor database) or, in some cases, the fertility clinic had its own database. More rarely, intending parents used a separate egg donor agency / database. In

egg of the intending mother (where possible);⁵³⁸ and (2) for-profit, rather than altruistic.⁵³⁹ Whilst seemingly more rare, traditional ISAs (*i.e.*, using the egg of the surrogate mother) do take place in some States of birth.⁵⁴⁰ One UK lawyer reported that the traditional ISAs she deals with often involve family members and these arrangements are more likely to be altruistic and usually do not involve an agency.⁵⁴¹ However, a Canadian lawyer reported that traditional arrangements seem to be becoming more popular recently due to the costs associated with gestational arrangements. In most cases, responses stated that the sperm of the intending father is used in such arrangements, where possible.⁵⁴²

136. In terms of the costs involved in for-profit ISAs,⁵⁴³ lawyers and intending parents reported the following:⁵⁴⁴

1) Medical costs: fertility treatment costs vary significantly according to the State in which the fertility treatment takes place and the type of treatment which is required by the intending parents and the surrogate mother (*e.g.*, whether an egg donor is involved, the number of cycles required, whether there will be a multiple birth). This makes it very difficult to provide an accurate range of figures. The significant diversity in medical costs depending upon the factual matrix of the case was evidenced in the responses from intending parents who have undertaken ISAs. They reported medical costs which ranged from \$2,818 in a case in which the child was born in Canada, to \$271,099 in a case in which the child was born in the USA and there was a problem with medical insurance cover.⁵⁴⁵ The majority of intending parents reported medical costs of \$20,000 - \$30,000, and US lawyers reported a range of \$20,000 – \$80,000. In one case in which the child was born in India, the medical costs were not significantly lower at \$31,176. However, the twins in this case were born prematurely and needed intensive care treatment, adding to the medical costs. In Ukraine, one lawyer reported that, on average, medical costs (where an egg donor is required) will be in the region of \$11,600.

2) Legal fees: again, these costs appear to vary significantly depending upon the States involved and the need for legal advice in multiple jurisdictions. In many cases, intending parents will require (or should receive) legal advice both in the State of birth and the receiving State.⁵⁴⁶ One lawyer provided the example that in US-UK arrangements (*i.e.*, where the US is the State of birth and the UK, the receiving State), intending parents can pay approximately \$13,400 to \$16,800 for UK legal fees (to obtain a

only 1 case, egg *and* sperm donors were used (in 2 cases it was not clear). The high prevalence of the use of egg donors in this sample could be due to the fact that 11 of the couples who provided responses were same-sex male couples.

⁵³⁸ *E.g.*, in 8 of the 31 submissions from intending parents, it was stated that no donor gametes had been used: *i.e.*, the intending parents used their own sperm and egg and the child was (or would be) genetically related to both of them. There was a high prevalence of this in the German responses with 4 of 7 couples using only their own genetic material. This could be coincidence, or it could be a trend caused by the cultural and legal situation in Germany (it was also the case that more of the German couples were married, heterosexual couples).

⁵³⁹ Many intending parents felt uncomfortable describing their arrangement as “commercial”, clarifying that the money was paid to the surrogate for pain and discomfort and as compensation but that did not make the arrangement “commercial”. However, in the overwhelming majority of cases the ISA was for compensation beyond reasonable expenses in terms of the money paid to the surrogate and significant agency fees were involved (see below under costs for figures). There were, however, a small minority of altruistic arrangements reported.

⁵⁴⁰ Although it should be recalled that in some States of birth traditional surrogacy arrangements are prohibited and hence ISAs involving these States of birth will always be gestational (*e.g.*, Ukraine).

⁵⁴¹ Although cases have been reported where such arrangements have been facilitated by a for-profit agency, despite the fact the surrogate mother is only being paid her expenses: see the English case of *Re P-M* [2013] EWHC 2328 (Fam).

⁵⁴² *I.e.*, this will depend upon the medical situation of the intending father and obviously this is not the relevant if the intending parent is a single female. Again, it should be recalled that some States of birth require a genetic connection with one intending parent (*e.g.*, Ukraine).

⁵⁴³ See the **Glossary** at Annex A of Prel. Doc. No 3 B of March 2014 concerning the change in terminology from “commercial” to “for-profit”.

⁵⁴⁴ *I.e.*, this information is principally drawn from the lawyer responses to Questionnaire No 2 and the submissions received from intending parents.

⁵⁴⁵ In another US case, costs were extremely high (\$119,622) because two cycles of treatment had to be undertaken.

⁵⁴⁶ As well as possibly in any third State involved: *e.g.*, if the intending parents are a bi-national couple and want the child to be able to acquire both of their nationalities.

parental order post-return), plus \$3,400 for UK immigration advice, as well as \$12,000 for US legal advice.⁵⁴⁷ Intending parents who had undertaken an ISA in the USA reported legal costs in the USA of between \$3,000 and \$15,000. In the case of birth in India, the legal costs reported were not significantly lower at \$6,777.

3) Agency fees: in some States of birth, agency fees are difficult to determine because they are included in a “package” of costs which intending parents pay to the fertility clinic.⁵⁴⁸ In the USA, since surrogacy agencies are usually independent from fertility clinics, a separate fee is paid and can be identified more clearly. However, those who undertook ISAs in the USA reported widely varying US agency fees with a range of between \$6,000 and \$54,220. US lawyers reported a range of \$15,000 to \$30,000. Interestingly, the intending parents of the children born in India reported paying \$13,555 as an “agency fee” which was within the range of the US cases.⁵⁴⁹ Lastly, a Canadian lawyer reported agency fees of between \$5,000 to \$7,500.

4) Surrogate mothers: the amount of financial compensation paid to surrogate mothers in for-profit arrangements, beyond their actual expenses (which are always paid), again varied significantly depending upon the State in which the surrogate resided and, in some States, the experience of the surrogate mother, whether she had a multiple birth and / or caesarean section and the agency used (amongst other factors). For example, intending parents who had undertaken ISAs in the USA reported paying surrogates from \$1,316 to \$69,000,⁵⁵⁰ with the majority reporting fees of over \$30,000. In the case involving India, the intending parents reported paying \$10,844. Lawyers reported average fees (*i.e.*, beyond expenses) for surrogates of \$20,000 – \$55,000 in the USA,⁵⁵¹ \$835 – \$11,700 in India and \$13,800 – \$37,120 in Russia and Ukraine.⁵⁵² In Canada, a lawyer reported that reimbursable expenses (only) are paid to surrogate mothers of up to \$20,000.

5) Egg Donors: information concerning the amounts paid to egg donors appears to be only readily available from the USA where amounts of approximately \$5,000-\$15,000 were reported by lawyers and intending parents. Again due to the fact that some States present a “package” of costs to clients, lawyers reported that, in such cases, it was more difficult to separate out, transparently, the precise elements of the overall figure. One intending parent reported paying a sum of \$2,711 to an Indian egg donor and a Ukrainian lawyer reported that \$1,000 approximately is paid to egg donors in Ukraine.

6) Other costs: the other costs frequently reported by intending parents were the health insurance costs which can often be significant, in particular in the USA, with four responses providing figures of between \$7,000 and \$25,000.

137. Overall, it must be noted that the figures provided were marked by their significant diversity, even when ISAs were undertaken in the same State. This may be the result of two factors (amongst others): (1) self-reporting and differences in categorisation could mean that responses have included different amounts under different headings and thus one is not always comparing “like with like”; and (2) costs vary significantly in ISA cases depending upon the particular factual matrix of the case (*e.g.*, do intending parents want an experienced surrogate mother; do the children require particular medical care following birth; which services does the agency provide?). Nonetheless, despite these factors and the small sample, the variation might still (tentatively) be described as significant.

⁵⁴⁷ Note: all figures have been converted from the currency in which they were provided into USD for ease of comparison. This has involved rounding the figures and using a (fluctuating) exchange rate. The figures are therefore approximate.

⁵⁴⁸ *E.g.*, this is often the case in India, and may be the case in the Ukraine and Russia.

⁵⁴⁹ Due to the different way in which intermediaries are established in the surrogacy context in India, described at para. 138 et seq below, often the fertility clinic will undertake the functions which are performed by independent “agencies” in other States.

⁵⁵⁰ Although only two figures provided were under \$10,000.

⁵⁵¹ Although it should be noted that *within* the USA costs may also vary significantly depending upon the state in which the surrogate resides.

⁵⁵² One lawyer reported that from her research, in the US the surrogate appears to receive approximately 20% of the overall cost of the ISA, whereas in India it is 10% or less. A Ukrainian lawyer reported that surrogate mothers in Ukraine often receive approximately \$400 pcm and \$15,000 final remuneration for one child.

138. In terms of overall comparisons, one lawyer stated that intending parents undertaking an ISA in Thailand or India could expect to pay global costs of approximately \$63,000 – \$72,300 whereas, in the USA, costs may be in the region of \$90,400 – \$226,000. In the figures provided by intending parents, total US costs ranged from \$70,918 to \$454,091.⁵⁵³ The average was approximately \$122,000. Approximately half of the responses which provided figures fell within the \$100,000 to \$150,000 range, with another eight responses in the range \$80,000 to \$99,999. In the Indian case, the total costs were reported as \$71,841. The evidence therefore supports the common understanding that ISAs in the USA are usually more expensive than in other States of birth (but how much more so will depend upon the facts of the case).⁵⁵⁴ Moreover, highlighting the difference in the transparency of costs between States, one lawyer commented, “[i]n the US cases usually there is a very detailed breakdown of the purpose of payments made by intended parents. In Indian cases there appears to be a belief that it is helpful to shroud the detail of the payments in secrecy, often the applicants do not know how their payments were applied.” This may prove problematic if court procedures are required to establish or recognise the legal parentage of the intending parents in the receiving State since the court may wish to have clear information concerning the costs paid for the different aspects of the ISA. Indeed, the financial aspects of ISAs were highlighted as an area of concern by several States.⁵⁵⁵

(c) The parties and intermediaries involved

139. Many different parties and intermediaries may be involved in arranging and carrying out an ISA. The primary parties are usually the intending parents, the surrogate mother and her husband / partner (if relevant) and any gamete donors. In addition, intermediaries regularly include surrogacy agencies,⁵⁵⁶ fertility clinics (or other health institutions⁵⁵⁷) and, more rarely, medical tourism companies. Key challenges concerning the parties and intermediaries are discussed in **Part C, Section 2** below: this section aims to provide some further factual information concerning these “actors”.

140. In relation to the intending parent(s), responses to the Questionnaires revealed that, whilst the full spectrum of relationship statuses are represented in those entering into ISAs (e.g., lawyers and agencies reported clients who are married and unmarried heterosexual couples, married and unmarried same-sex couples,⁵⁵⁸ as well as single males and females), in general, the most frequent clients in ISA cases remain married, heterosexual couples with a medical need for surrogacy.⁵⁵⁹ This profile of intending parents was also supported by the information obtained from individuals who had undertaken ISAs. In 29 of 31 responses, the intending parents were couples,⁵⁶⁰ with approximately one third stating that they were same-sex couples.⁵⁶¹ Three couples also clarified that they were bi-national.⁵⁶² Some lawyer responses recalled that, in some States of birth, relationship status requirements are placed on intending parents by legislation.⁵⁶³

⁵⁵³ The latter figure being a case in which insurance problems resulted in exceptionally high medical costs.

⁵⁵⁴ However, the service provision may, of course, be very different (as to which see para. 139 et seq below).

⁵⁵⁵ E.g., Finland, Ireland, Israel, New Zealand, Norway, Philippines, Sweden and Switzerland. See further para. 213 et seq below.

⁵⁵⁶ This term is used in the Study for ease of reference but it should be noted that some US service providers do not agree with this term and prefer the use of “surrogacy programme”.

⁵⁵⁷ Including gamete “banks” which may or may not be separate from the clinic / agency.

⁵⁵⁸ As several lawyer responses indicated, whether same-sex couples are married may depend upon whether it is possible legally in their State of residence to marry.

⁵⁵⁹ E.g., one lawyer who was able to provide figures stated that she had had 149 married heterosexual couple clients, 9 unmarried heterosexual couple clients, 20 married same-sex couple clients, 15 unmarried same-sex couple clients, 15 single male clients and 4 single female clients.

⁵⁶⁰ I.e., in only 2 cases did individuals undertake an ISA.

⁵⁶¹ Whilst 11 couples voluntarily stated that they were same-sex male couples, 9 of these were from a Spanish intending parent association (9 out of 10 of these responses) and this may be a disproportionately high number due to the profile of this association. In comparison, none of the German responses involved same-sex couples and only 2 of the French responses specified that they were same-sex (in 2 French cases it wasn't clear and 2 involved individuals).

⁵⁶² One French-US couple and two Spanish-Italian couples.

⁵⁶³ E.g., intending parents must be heterosexual married couples to enter into an ISA in Ukraine.

141. In general, it is clear that the life circumstances of surrogate mothers may be significantly different depending upon the State of birth concerned and they should not therefore be seen as a “uniform category”.⁵⁶⁴ Moreover, the relationship between surrogate mothers and intending parents, as evidenced by the submissions from intending parents, may be very different depending upon the State of birth concerned. In general, in India, it seems that there is frequently very little contact between the surrogate mother and intending parents, both during the pregnancy and surrounding the birth. In contrast, in the USA, relatively frequent contact between intending parents and surrogate mothers was described, including at the stage of “matching”,⁵⁶⁵ during the pregnancy and, in some cases, following the birth of the child.

142. Gamete donors are again not a uniform category and their life circumstances and motivations may vary considerably depending upon the State in which they are resident, as well as multiple other factors. As mentioned above, it is not uncommon in ISA cases for a gamete donor (often an egg donor) to be resident in a different State to the surrogate mother. This appears to be the case more frequently if intending parents undertake an ISA in India or Thailand and wish the child to share certain of their characteristics (*e.g.*, if the intending parents are Caucasian, they may opt for a Caucasian egg donor from another State).⁵⁶⁶ Indeed, in response to Questionnaire No 3, an Indian doctor stated that the clinic she is employed by works with egg donors from many different States. One State reported its concern that this can result in a situation where “high quality” Caucasian eggs are sought from one destination, whilst cheap labour is used for the surrogacy arrangement in another.⁵⁶⁷ This Study does not examine the cross-border movement of third party donor gametes for ART procedures: however, it should be noted that the consultation process undertaken has highlighted that the apparent lack of international oversight in this area may also be a cause for concern.⁵⁶⁸

143. In terms of the intermediaries involved in ISA cases, the Questionnaire responses revealed that the identity of such intermediaries, their role and the services they provide may be (very) different depending upon the State of birth concerned and whether any regulation of such intermediary services exists and, if so, the nature of the regulation. For example, in the USA, in most cases, a surrogacy agency is the main intermediary which assists intending parents and the agency is usually independent of any fertility clinic / medical service provider.⁵⁶⁹ Whether, and if so how, such agencies are regulated will vary from state to state within the USA. Agencies provide services including: recruiting, assessing and selecting surrogate mothers, matching intending parents with a surrogate mother,⁵⁷⁰ putting intending parents in contact with other intermediaries (*e.g.*, independent lawyers and clinics / hospitals),⁵⁷¹ in some cases supplying a database of

⁵⁶⁴ See “A comparative study on the regime of surrogacy in EU Member States”, by Brunet et al (2013) for the EU Parliament’s Committee on Legal Affairs (note 145 above), in particular at pp. 33-35. Specific concerns in relation to the position of surrogate mothers are discussed in **Part C, Section 2(c)** below.

⁵⁶⁵ Some intending parents described an interview of each other to see if they agreed with the match.

⁵⁶⁶ Popular States in which to seek egg donors include the USA and Ukraine, amongst others.

⁵⁶⁷ Switzerland.

⁵⁶⁸ Indeed, one response to Questionnaire No 3, from a leading sperm bank which provides sperm globally, stated that it was a cause for concern for them that although the law of the State in which they are based provides for donor anonymity, this is not the case in all the States to which sperm is sent.

⁵⁶⁹ In all the submissions from intending parents who undertook ISAs in the USA or Canada, a US or Canadian surrogacy agency was involved in the case and was usually the first point of contact for the intending parents and was the overall coordinator of the process. Often the agency was found either through an association of intending parents, following the recommendation of a friend or via advertisements in the newspapers or meetings/events in the State of habitual residence of the intending parents. It should also be noted, however, that these agencies may not be in the same state / province within the State as the surrogate mother (it seems more rare to be based in a different country, however). Agencies may have a database of surrogate mothers from several different states / provinces and the mother may travel for the medical procedures. Usually a surrogate will give birth in her home province however.

⁵⁷⁰ Again, in the vast majority of submissions from intending parents (28 of 31), the agency “matched” the intending parents with a surrogate from their database and undertook the assessments of the surrogate mother. Many intending parents mentioned medical examinations and psychological assessments of the surrogate as standard tests undertaken by the agency.

⁵⁷¹ In the vast majority of submissions from intending parents (27 of 31), it was reported that the surrogacy agency recommended the other intermediaries to the intending parents: *e.g.*, the fertility clinic and law firm /

gamete donors⁵⁷² and holding monies for the intending parents in escrow / trust accounts to deal with the payments of bills to the various actors.⁵⁷³ In contrast, in India, it seems that usually the fertility clinic is the primary intermediary and may be responsible for the selection of surrogate mothers and egg donors, as well as for the matching and ultimately providing the required medical services.⁵⁷⁴ In some cases in India, gamete banks may be involved and may provide a surrogacy (matching) service in addition to a gamete donation service.⁵⁷⁵ These banks may have formal arrangements with the fertility clinics.⁵⁷⁶ In Russia and Ukraine, it seems that law firms are also undertaking agency functions in some cases (*e.g.*, assisting with finding a surrogate mother for intending parents).⁵⁷⁷

144. In relation to the lawyers involved in ISA cases, most lawyers who responded to the Questionnaire were either self-employed or employed legal practitioners (in law firms), working independently from any other actor in the ISA process and acting solely for their clients (usually the intending parents). However, a minority of lawyers confirmed that they work on an informal referral basis from surrogacy agencies or fertility clinics. Moreover, one lawyer reported being approached by Indian lawyers who stated that if he paid a referral fee, they would send him regular ISA work from India. He declined due to the possible "conflict of interest". Another response received was from a lawyer who is employed by a surrogacy agency in the USA. He stated that the agency represents only the intending parents in legal matters and independent legal counsel will have to be retained by surrogate mothers and any gamete donors (paid for by the intending parents). However, practice regarding the issue of separate legal representation for parties varies considerably from one State of birth to the next and even within States.⁵⁷⁸ In addition, in many cases, intending parents may require multiple lawyers in different jurisdictions.⁵⁷⁹

145. In relation to fertility clinics or other health institutions providing fertility treatment in ISA cases, the quality of such clinics and their medical care again appears to vary tremendously from one State of birth to another and may depend upon the level of regulation of such clinics in the State of birth and / or the level of self-regulation in the absence of national legislation (*e.g.*, through professional guidance and codes of conduct). It has to be noted that concerns in relation to fertility treatment providers appear to be much more acute in particular States of birth, with the vast majority of concerns expressed concerning India, and with some concerns also reported in relation to Thailand and Ukraine. The particular concerns raised in relation to fertility treatment are discussed in the relevant sections below but include issues concerning: high number embryo transfers (resulting in multiple births with the consequent increased risks for children), multiple surrogates being impregnated for the same intending parents, gamete mix-ups (and storage of unused gametes), routine caesarean section births, the deaths

attorneys. In only one case did the intending parents describe piecing this together themselves and selecting their own clinic and egg donor agency (in 2 cases, it wasn't clear). However, one US lawyer described that it can also be that intending parents make contact with a medical facility and are then referred by the clinic to an agency to recruit the surrogate mother and / or egg donor.

⁵⁷² In the majority of submissions from intending parents, the agency also, where necessary, supplied the database of egg donors. In selecting egg donors, some intending parents described an important factor as being whether the donor was willing to be "known" such that the child could contact her in future.

⁵⁷³ The vast majority of submissions from intending parents also stated that the agency held the monies for them in escrow / trust accounts and dealt with all payments of bills to the various actors.

⁵⁷⁴ See "Surrogate Motherhood: Ethical or Commercial", by the Centre for Social Research (India), available online at < www.csindia.org >. This report is based on interviews with 100 surrogate mothers and 50 sets of intending parents. The report states, at p.25, that "[a] noticeable trend is that the ART clinics are becoming the central hub of all surrogacy-related activities."

⁵⁷⁵ An agency response was received from one gamete bank which stated that, in their experience, intending parents are looked after by the IVF clinic and surrogate mothers and egg donors by the ART bank.

⁵⁷⁶ This was the case for one gamete bank which responded to Questionnaire No 4.

⁵⁷⁷ See, *e.g.*, the UK case of *Re C (A Child)* [2013] EWHC 2413 involving an ISA in Russia and an organisation which functioned both as a matching agency and a law firm.

⁵⁷⁸ This was highlighted as an area of concern for some States and lawyers (discussed below in **Part C, Section 2**).

⁵⁷⁹ *E.g.*, lawyers in the State of birth, and family and immigration lawyers in the receiving State.

of surrogate mothers in or following child-birth, foetal reductions and sex-selective abortions.⁵⁸⁰

2. Some key problems identified in ISA cases

146. The key problems resulting from ISA cases, described below, are drawn from the Questionnaire responses received (primarily those of States, lawyers and intending parents who have undertaken ISAs), as well as from the legal and social work practitioner bodies who submitted observations to the Permanent Bureau, and from the case law of multiple jurisdictions from which certain common concerns can be deduced.

(a) The legal status of children and intending parents

147. The information obtained as a result of the broad consultation process supports the provisional conclusion of the 2011 and 2012 Preliminary Documents that a serious and significant problem in many (if not most) ISA cases is the legal status of the children born as a result of ISAs.⁵⁸¹ This problem is resulting in children frequently being left with “limping” legal parentage (*i.e.*, different legal parentage established according to the laws of different States) and being cared for by persons not recognised as their legal parents in the State in which they live (and possibly third States with which they may be connected). In the worst (albeit minority) cases, children are left “stateless”, trapped in the State of birth, unable to leave and sometimes with no permission to stay. The severe legal consequences of this situation are explored below but we first consider, briefly, the causes of this situation.

148. The primary cause of this situation is the simple “conflict” in the legal approaches, including the private international law approaches, of States of birth and receiving States in ISA cases concerning the child’s: (1) legal parentage; and (2) nationality / immigration status (two issues which may or may not be inextricably linked, depending upon the State concerned). However, whilst this overarching conflict may seem simple, it in fact hides a myriad of different State approaches which may vary even further depending upon the particular factual matrix of the case being considered. In this section, the approach of States of birth to these questions will be briefly considered, before turning to consider the more complex (and varied) situation amongst receiving States.

States of birth

149. In the most popular States of birth, there are usually established procedures, based on legislation, case law or practice, which result in legal parentage being accorded to the intending parents to an ISA either before or after the birth of the child.⁵⁸² Moreover, from a private international law perspective, the fact that the child is born (or to be born) in the State founds jurisdiction to determine legal parentage and register the child⁵⁸³ and, due to the particular legal systems involved, the *lex fori* is applied to the determination of legal parentage, despite the foreign habitual residence (and usually nationality) of the intending parents.⁵⁸⁴ The only State in which it seems there is some account taken of the position under foreign law is in India where, as a result of the visa rules issued by the

⁵⁸⁰ *E.g.*, the Centre for Social Research (India) reported that in India sex-selective abortions take place in the surrogacy context, despite the fact they are illegal (see note 574 above, at p.45).

⁵⁸¹ The following States expressed that the uncertainty of the legal status of children and the nationality of children born to ISAs was an area of concern for them: Australia, Canada, Finland, Germany, Ireland, Israel, Netherlands, New Zealand, Norway, Philippines, Spain, Sweden and Switzerland.

⁵⁸² See para. 130 above concerning the most frequently used States of birth. *E.g.*, Russia and Ukraine (upon registration, with the surrogate mother’s consent, providing the other conditions of the legislation are fulfilled); USA (procedure depends upon the state involved but, for example, a pre-birth order may be obtained in California); India (whilst not entirely clear, registration of one or both intending parents seems to happen as a matter of practice). However, the situation appears to be different in Thailand and it seems that the surrogate mother is considered the legal mother at birth and will be registered as such.

⁵⁸³ See **Part B, Section 1** above.

⁵⁸⁴ *Ibid.*

Ministry of Home Affairs in July 2012,⁵⁸⁵ intending parents must, in order to acquire the necessary medical visa to undertake an ISA in India, establish that their State accepts surrogacy and that they will (immigration-wise) be able to take the child(ren) born as a result of an ISA back to this State.⁵⁸⁶ Whilst it is clear that these visa requirements have caused problems in several cases in light of another of the requirements,⁵⁸⁷ it is not fully clear yet how the requirement of (effectively) proof of foreign law is impacting upon intending parents, particularly those from receiving States in which surrogacy is prohibited. Preliminary research indicates that at least the Netherlands and New Zealand already advise on their embassy websites in India that they are unable to provide the letter required for the medical visa application.⁵⁸⁸ The consequences of this would seem to be that intending parents resident in those States can no longer access surrogacy services in India: however, this is not clear as yet.

150. From a nationality perspective, in most States of birth, the determination that the intending parents are the legal parents of the child, combined with the absence of a pure *ius soli* rule for the acquisition of nationality, means that the child will not acquire the State of birth's nationality.⁵⁸⁹ The USA and Canada stand as exceptions to this rule since children born on the territory of these States, including those born following ISAs, will acquire US / Canadian nationality.⁵⁹⁰ Thailand may be another exception but for a different reason: it seems that the surrogate mother is considered the legal mother at birth under Thai law and hence the child may acquire Thai nationality by descent from the surrogate mother.⁵⁹¹

151. The result, according to the law of the State of birth, is therefore often that: (1) the intending parents are considered the legal parents of the child;⁵⁹² and (2) the child cannot acquire the nationality of the State of birth (save for in the USA, Canada and Thailand). In certain States of birth, it seems that the established procedures mean that the acquisition of legal parentage according to that law (and / or the acquisition of nationality where possible) is completed relatively quickly.⁵⁹³ Further, there is often no difficulty according to the law of the State of birth with the child and intending parents exiting the State.⁵⁹⁴ An exception is India since several lawyers reported that there are often lengthy delays (6 to 7 months) in order for children to acquire the necessary exit visas.⁵⁹⁵

⁵⁸⁵ See note 527 above. The introduction of these rules followed requests, in 2010, from the Consul Generals of some receiving States asking that surrogacy options cease being provided to their nationals unless the intending parties had consulted with their embassy first (see further para. 45 of Prel. Doc. No 10 of March 2012). See also "Surrogacy: imported from India – the need for a regulatory law", by Anil and Ranjit Malhotra in the ISS Monthly Review Special Issue on "International Surrogacy and children's rights", No 174 (July-August 2013), available at < www.iss-ssi.org >.

⁵⁸⁶ Cf. USA and Canada which confirmed that there are no special visa requirements for intending parents to enter the State for the purposes of an ISA.

⁵⁸⁷ *I.e.*, the requirement limiting the categories of intending parents who may undertake an ISA in India to heterosexual couples who have been married for at least 2 years. Indeed, this requirement is being challenged in the case of *Shihabeldin v. Union of India* (Petition No: 15490 of 2013) in which a Sudanese national is seeking judicial review of this provision of the visa rules brought in by the Indian Ministry of Home Affairs on the grounds of infringement of the right of privacy (Art. 21 of the Indian Constitution), equal treatment and discrimination.

⁵⁸⁸ The UK, whilst providing a letter on its relevant website, has indicated in the letter that UK law does not permit money beyond reasonably incurred expenses to have been paid for the arrangement. It is not clear yet whether, and if so how, this will impact UK residents seeking to undertake surrogacy arrangements in India.

⁵⁸⁹ Save, potentially, on grounds of "statelessness", as to which see **Part A, Section 1(f)** above.

⁵⁹⁰ See **Part A, Section 1(f)** above and Canada's response to Question 38 of Questionnaire No 1.

⁵⁹¹ This information results from the Permanent Bureau's own research.

⁵⁹² But not, *e.g.*, in Thailand where an intending mother may have difficulties establishing her legal maternity.

⁵⁹³ *E.g.*, in the US, lawyers reported that these procedures can often be completed within a matter of weeks of the birth and certainly within 2 months. In Ukraine, as the intending parents (if the requirements of Ukrainian law are fulfilled) will be directly registered on the child's Ukrainian birth certificate, this can be done very quickly. The child will not acquire Ukrainian nationality however, due to the legal parentage of the intending parents according to Ukrainian lawyer, and hence exiting the State will be far more complex since it depends upon the approach taken by the receiving State to immigration / nationality issues.

⁵⁹⁴ Of course, in the States of birth in which nationality of the State is not acquired by the child, the serious difficulties relating to travel will arise if the child cannot acquire the nationality of the receiving State or a visa to travel there.

⁵⁹⁵ There have also been problems with same-sex couples obtaining exit visas since the change in the visa rules, even though the ISAs had been entered into prior to the change.

Receiving States

152. In most receiving States, many variables affect the determination of the legal status of a child born following an ISA (both legal parentage and nationality), as well as the procedure which must be undertaken to resolve these questions and the timeframe within which an outcome may be achieved where possible. These variables include: whether the surrogate mother is married, the intending parents' nationality (and how their nationality was acquired),⁵⁹⁶ whether the child is genetically related to one of the (national) intending parents, the State in which the child was born and the process used in that State to accord legal parentage to the intending parents (and the resulting document establishing or evidencing legal parentage). In addition, further complications may arise if third States are involved: for example, if the case involves a bi-national couple who wish the child to acquire each of their nationalities, or an expat couple who wish to reside with the child in a receiving State of which both are not nationals.

153. In the States of birth⁵⁹⁷ in which a child born following an ISA will automatically acquire the nationality of this State at birth, the child is theoretically able to travel "home" with the intending parents on this passport. In such cases, it might be thought that the return to the receiving State can take place quickly, before sorting out any legal issues in that State. However, a number of receiving State and lawyer responses to the Questionnaires emphasised that, if a child travels to a receiving State on a foreign passport with the intention of permanently residing in the receiving State, failure to obtain the appropriate visa or permit *prior to* travel may breach the immigration rules of the receiving State and, in some States, amount to a criminal offence.⁵⁹⁸ Children have been turned away at the border in such cases.⁵⁹⁹ Intending parents are therefore advised to seek immigration advice before attempting to travel, even if the child has a passport of the State of birth.

154. In the States of birth in which the child will not acquire that nationality by dint of birth on the territory, intending parents will have to apply for a passport or visa / permit from the receiving State for the child in order to be able to travel "home". This application may be made via the consulate / embassy of the receiving State in the State of birth.⁶⁰⁰ The approaches of receiving States to such applications vary significantly and only very broad groupings can be identified. Further, even within such groupings, important variations between States' approaches exist.

Federal approach: disconnection

155. First, in several federal States,⁶⁰¹ the immigration status and nationality of the child will be determined by the competent authorities somewhat separately (to a greater or lesser extent) from the question of the child's status in terms of his / her legal parentage. Therefore, whilst the authorities will decide whether nationality by descent has been acquired by the child by reference to whether one or both of the national intending parents can be said to be a "parent" of the child, the question, "who is /are the parents of the child?", is examined *according to nationality legislation and policy* and this may result in a different test applying, and ultimately a different outcome for the child, than that which would be reached under the family status legislation of the State. This seems to be the case in federal jurisdictions in particular since the question of nationality

⁵⁹⁶ *E.g.*, in some States, if the parent's nationality was acquired by descent following a birth abroad, nationality cannot be passed by descent again in these circumstances: see **Part A, Section 1(f)** above concerning children's acquisition of nationality by descent.

⁵⁹⁷ *E.g.*, USA and Canada.

⁵⁹⁸ *E.g.*, this is the case in New Zealand. For example, if the child is to travel "home" to the UK on a US passport, the intending parents should apply to the British immigration authorities for entry clearance for 12 months on the basis that they will apply for a parental order once home (and will then be able to acquire British nationality for the child).

⁵⁹⁹ Reported by a UK lawyer.

⁶⁰⁰ It should be noted that these procedures will also apply to children if they have travelled "home" on a foreign passport and apply for nationality of the receiving State once home.

⁶⁰¹ *E.g.*, Australia, Canada and the USA.

is an issue of federal law and policy, whereas issues such as birth registration and the legal parentage of the child are matters under the legislative authority of the states / provinces. The disconnection of the two questions, however, can lead to situations in which the child acquires the nationality of the State but is (still) left with “limping” legal parentage.

156. As an example, in Australia, whilst the acquisition of Australian citizenship by descent depends upon whether the child has an Australian “parent”,⁶⁰² the question of who is / are the child’s parents *for nationality purposes* is held to be a pure “question of fact”⁶⁰³ to be determined in each case by the authorities in light of all the circumstances, including whether the Australian intending parent has a genetic connection with the child.⁶⁰⁴ If a genetic connection is proved, this will be given substantial weight.⁶⁰⁵ If there is no genetic connection, the Australian intending parent has to show that he/she was “*in fact*” the parent of the child at the time of the child’s birth: evidence to establish this fact may include the surrogacy agreement and the “lawful transfer of parental rights in the country in which the surrogacy was carried out” (*i.e.*, any foreign judgment may form part of the *evidence* used to establish the *fact* of parentage for nationality purposes).⁶⁰⁶ However, even if the application for nationality is successful, as has been confirmed by the Australian court, “it does not automatically follow that Federal and State laws recognise [this intending parent] as [the child(ren)’s] parent”.⁶⁰⁷ The question of the identity of the *legal* parents of the child must be determined according to the relevant state law⁶⁰⁸ and it may ultimately prove impossible for either intending parent, under this law, to establish their legal parentage.⁶⁰⁹ Whilst many children born abroad following ISAs to Australian intending parent(s) may therefore be able to acquire Australian nationality or a visa to travel to Australia, often they will not be able to establish their legal parentage under Australian law and, according to one lawyer response, many do not try to do so anymore. Where applications are made, the Australian courts ultimately resolve the cases by granting orders conferring “parental responsibility” on the intending parents: these do not confer legal status as a parent and expire when the child reaches 18.

157. Another example of this approach is Canada. Canada’s rules are more definite in that, to acquire Canadian nationality automatically at birth, federal law / policy requires a genetic *and* legal connection between the child and national intending parent.⁶¹⁰ For this purpose, foreign law is usually relied upon to evidence the legal connection (a foreign birth certificate or court order from the State of birth)⁶¹¹ and DNA tests will be required if the genetic connection is doubted. Moreover, if no genetic connection exists, it may still be possible for the child to acquire nationality by descent if his / her legal parent (again established by reference to foreign documentation) is a national and the child can be

⁶⁰² See Australia’s response to Questions 38 and 61. See also the Australian Citizenship Act 2007 and the policy guidelines in the Australian Citizenship Instructions.

⁶⁰³ See “Factsheet 36a – International Surrogacy Arrangements” (available at www.immi.gov.au/media/factsheets/36a_surrogacy.htm), at p.3.

⁶⁰⁴ This will be subject to DNA testing, governed by strict rules.

⁶⁰⁵ The genetic connection is therefore seemingly not always determinative.

⁶⁰⁶ If Australian nationality cannot be acquired by the child, it may still be possible for the child to enter Australia on a visa, if the visa requirements can be satisfied (see response to Question 61).

⁶⁰⁷ See *Mason v. Mason* [2013] FamCA 424 at para. 12, and *Dudley & Chedi* [2011] FamCA 502.

⁶⁰⁸ This determination will be recognised under federal law. However, seemingly the status acquired under the foreign law will not be determinative under state law (*ibid.*).

⁶⁰⁹ *E.g.*, because surrogacy laws in the state only permit the transfer of legal parentage under certain strict conditions which may not have been fulfilled in an ISA case. The route of domestic adoption may be possible but does not appear to have been tested yet.

⁶¹⁰ In 2012, the Department of Citizenship and Immigration published a policy (Operational Bulletin 381) clarifying that the automatic acquisition of Canadian citizenship at birth for children born abroad through a surrogacy arrangement and / or assisted human reproduction technologies requires a genetic link between a Canadian citizen parent and the child. This has resulted, for example, in a case in which a US court declared two (Canadian) intending fathers to be the legal parents of a child to be born following an ISA but Canadian nationality was denied in the absence of proof of a genetic link between the child and one of the intending fathers.

⁶¹¹ Interestingly, it is described as *evidential* reliance for the limited purpose of establishing nationality, rather than applying foreign law to the question of the child’s legal parentage (since legal parentage will be a question determined by provincial law).

sponsored to enter the State as a “permanent resident”. This can be achieved if the child was born through ART and was born to the person making the application or his / her spouse, common law partner or conjugal partner.⁶¹² This last requirement obviously excludes children born following surrogacy arrangements from this category, a matter which is currently being challenged before the Federal Court of Appeal in a case in which an ISA took place in India and the child has no genetic connection with either intending parent (one of which is Canadian).⁶¹³ There is also a discretionary procedure such that nationality can be granted to anyone in order to alleviate cases of special and unusual hardship: an ISA case has already resulted in an application for a grant of nationality on this basis (currently pending).⁶¹⁴

158. However, despite these detailed rules concerning the acquisition of nationality, as with Australia, even if the child ultimately acquires Canadian nationality, it seems that this does not entail recognition of the legal parentage of the child (in particular with the second intending parent) under Canadian law for family status purposes. This is an issue which, if the intending parents wish to pursue, would need to be resolved under provincial law once the child is back “home”.⁶¹⁵ Depending upon provincial law, birth registration in Canada based on the foreign birth certificate (or other document) and / or an order declaring or establishing the legal parentage may not be possible.⁶¹⁶

159. This approach is also adopted in “incoming cases” to the USA where the issue of acquisition of US nationality is determined at federal level and the issue of legal parentage will be left to state law. However, the determination of nationality at the federal level in the USA, unlike in Australia and Canada, is solely dependent on genetics and, without a genetic connection to a US national, a child born abroad cannot acquire US nationality.⁶¹⁷ This has resulted in difficult cases. One case, cited by a Ukrainian lawyer, involved a bi-national couple, resident in the USA. The intending mother was a US national but the ISA involved a donor egg. Due to the absence of a genetic connection with a US national, the child was refused US nationality. Ultimately, the matter was resolved through the child acquiring the nationality of the intending father (and presumably acquiring the necessary visas/permit to reside long-term in the USA).⁶¹⁸

Common law approach: the *lexi fori* determines all

160. In a second group of common law States,⁶¹⁹ the question of whether the child can acquire nationality by descent of the receiving State is instead determined by asking

⁶¹² It also applies if the child was adopted abroad.

⁶¹³ *Kandola v. Canada (Citizenship and Immigration)* 2013 FC 336, currently before the Federal Court of Appeal: this case challenges the policy clarification published in 2012 (see note 610).

⁶¹⁴ There are also a few other routes to acquire Canadian nationality: as to which, see Canada’s response to Question 38.

⁶¹⁵ See Canada’s response to Question 61 c): “[i]ntending parents wishing to regularise the child’s legal status under Canadian law could apply to the competent provincial or territorial court”.

⁶¹⁶ Either at all, or due to the particular circumstances of the case: see **Part B, Section 1** above which mentions the position in some Canadian provinces concerning registration of an overseas birth certificate and / or recognition of a foreign judgment.

⁶¹⁷ See, *e.g.*, 7 FAM para. 1446.2-2(c)(4) (2009): “[T]he basic rule is that citizenship should be determined based on the man who provided the sperm and the woman who provided the egg.” For further details, including the more complex immigration situation in the USA, see “Immigration and Citizenship for Children Conceived through ART”, by Scott Titshaw, presented to the AAARTA mid-year conference, “The World of Assisted Reproductive Technology - A Global Approach to Family Formation” (November 2013).

⁶¹⁸ In another difficult case involving a US (non-national) resident (green card holder in the USA for 21 years), an ISA was undertaken in India using the intending father’s sperm, a donor egg and a gestational surrogate mother. However, the intending parents did not take US immigration advice before entering into the ISA and subsequently learnt that, under US immigration law, a father holding a US Green Card can only bring a child born outside the USA into the USA if the child was born to a woman who also holds a US green card. As a result the child was not able to travel to and reside in the USA and the father and child are now living in India. This case has further complex dimensions due to the marital difficulties subsequently experienced by the intending parents, as a result of which the intending mother and first child of the relationship still reside in the USA, whilst the father and daughter live in India.

⁶¹⁹ *E.g.*, Ireland, NZ and the UK. Whilst Israel’s approach seems distinct in that a pure genetics test is applied to the issue of nationality (see response to Question 61), it seems that this may, as with Ireland, be as a result of the internal law approach to legal parentage which is based on genetics (other requirements must also be fulfilled: *e.g.*, proof of the surrogate mother’s consent to the departure of the child, and proof that the

“who is / are the *legal* parents of the child?” and that question is answered by reference to the *lex fori* (i.e., the *internal* law of the receiving State), seemingly whatever foreign documents are produced to the authorities establishing or evidencing the legal parentage established abroad.⁶²⁰ Therefore, whether the child can automatically acquire nationality will depend upon whether, in the circumstances of the case, the internal law of the receiving State determines that the child has a *legal* parent who is a *national*.⁶²¹ In some of these States, this will depend upon the marital status of the surrogate mother since, if the surrogate is unmarried, the intending father (if a national and if genetically related to the child) might be considered to be the legal father of the child under the internal law of the receiving State.⁶²² If this claim is made, a DNA test will usually be required (by accredited providers) to prove the genetic connection, as well as evidence that the surrogate mother is unmarried and has provided her informed consent to the passport application (since she is considered to be the legal mother under internal law). As government guidance makes clear, fraudulent documentation concerning these matters has been provided by some clinics in certain States of birth in the past⁶²³ and therefore documentation will be scrutinised closely.

161. In other States in this grouping, in contrast, if the child is born abroad following a surrogacy arrangement, the intending parents will never be considered the legal parents of the child under internal law and hence a different procedure is required.⁶²⁴ In such States (as well as in States in which, if the child does not have a national legal parent in the first instance according to the internal law, a transfer procedure is available⁶²⁵), it may be possible for a transfer of legal parentage to one or both intending parents or an adoption to take place under internal law once the child is back in the State. If this is the case, a visa / permit may be granted to permit the child to enter the State so that such a transfer or adoption can be undertaken. Nevertheless, as these procedures have their own (sometimes strict) conditions, it may be that the visa is conditional upon provision of proof that these conditions can be fulfilled (e.g., a genetic connection may be required, the informed consent of any donors and the surrogate mother may be scrutinised and it may be necessary to show that the intending parents are likely to be assessed as suitable carers for the child).⁶²⁶ If legal parentage is subsequently successfully transferred to the national intending parents (by transfer or adoption), the child will then usually acquire the nationality of the receiving State, by descent.

162. It is not difficult to see, however, that (insurmountable) problems can occur in these States in terms of the legal status of children born abroad following ISAs in particular factual matrices. For example, if the intending father is *not* a legal parent under the internal law of the receiving State in the first instance and there is no transfer of parentage mechanism,⁶²⁷ the child will be left with “limping” legal parentage and may be unable to acquire the nationality of the receiving State. Moreover, the second intending parent (often an intending mother) will always be unable to acquire legal parentage in that State. However, even if a transfer / adoption mechanism exists,⁶²⁸ if

procedures in the foreign State were legal). However, even if the child can travel to Israel on this basis, it seems that to establish legal parentage according to Israeli law, a declarative judgment will still be required from an Israeli court (see response to Question 61 c)).

⁶²⁰ See the rules described in **Part B** above.

⁶²¹ There is also a first generation limit (see **Part B, Section 1(f)** above).

⁶²² E.g., this is the case in Ireland and the UK (although in Ireland the intending father will still need to apply to court for guardianship since he will not acquire this automatically). In the UK, it may also be possible for the intending mother or second female parent to be considered a legal parent under s.42 and 43 of the Human Fertilisation and Embryology Act 1990 (as amended in 2008).

⁶²³ E.g., this is made clear in the recent UK Foreign and Commonwealth Office guidance, “Surrogacy Overseas”.

⁶²⁴ This appears to be the case in New Zealand where a domestic adoption once the child is in New Zealand is always required for *both* intending parents.

⁶²⁵ E.g., the UK.

⁶²⁶ E.g., see New Zealand’s response to Question 61 a) in which it is stated that to support the necessary visa application for New Zealand, intending parents must provide evidence of their genetic relationship with the child (if there is one), evidence of the ISA agreement and evidence that both intending parents have been assessed and approved by the statutory agency as fit and proper for the purpose of adoption. This assessment is undertaken prior to the travel overseas for the birth.

⁶²⁷ E.g., seemingly the case in Ireland.

⁶²⁸ E.g., such as in New Zealand or the UK.

the requirements of the legislation cannot be fulfilled in the particular case (*e.g.*, because there is no genetic connection with an intending parent, or due to the for-profit nature of the transaction, or because domicile requirements cannot be satisfied⁶²⁹), there may be no way for the intending parents to establish their legal parentage under the law of the receiving State (with the concomitant nationality consequences).

Civil law approaches: variation with common themes

163. Many civil law receiving States also determine whether the child has automatically acquired nationality by descent by looking to whether the child has a legal parent who is a national. However, the primary difference in many of these States is that the child's legal parentage will be determined by an application of the State's private international law rules (that is, their applicable law and / or recognition rules, depending upon the State concerned), rather than simply by reference to internal law.⁶³⁰ As can be seen from **Part B**, however, there are considerable differences in the private international law rules of civil law States in this area and this necessarily affects the approach adopted.⁶³¹ Moreover, exactly which rules of the State will apply to a particular case will depend upon the procedure used to establish legal parentage in the State of birth and thus the document with which the receiving State authorities are presented.⁶³² However, as will be analysed below, the differences in the rules of these States do not necessarily lead to significantly divergent outcomes for children (although there are some important distinctions which must be drawn).⁶³³

164. One trend in outcomes which can be clearly evidenced across several of these States, despite the different private international law approaches, is that the legal paternity of an intending father, usually one genetically related to the child, can be recognised or established (*de novo*) in these receiving States in certain cases, whereas the intending mother or second intending father will have to subsequently adopt the child (if possible - as to which, see below). For example:

1) In Belgium, whilst the administrative authorities seem to routinely refuse applications for Belgian nationality following ISAs no matter the factual circumstances of the particular case,⁶³⁴ when this decision is challenged in court, the judicial authorities have, in general, held that the legal paternity of a genetically related Belgian intending father, evidenced by an authenticated foreign birth certificate, may be recognised and nationality by descent may pass to the child on this basis.⁶³⁵ This results from the fact

⁶²⁹ All of these are possibilities: concerning the issues which can arise in relation to domicile requirements, see *A and another v. C and another* [2011] EWHC 3181 and *A & B (Parental Order Domicile)* [2013] EWHC 426.

⁶³⁰ Cf. the application of internal law by many common law States, described above.

⁶³¹ One example is that some States will apply a "recognition method" to a foreign birth certificate and others will ignore the foreign certificate and determine legal parentage *de novo* according to the law designated by their applicable law rules.

⁶³² *E.g.*, if legal parentage is established in the State of birth by *judgment*, recognition of the judgment might be able to be sought in a receiving State. If, however, legal parentage arose by operation of law in the State of birth, legal parentage may be determined in the same receiving State, *de novo*, according to law designated by the applicable law rules.

⁶³³ See note 515 above: in some States and in some cases, if a birth certificate with a heterosexual couple is submitted to the embassy with a request for nationality and transcription in the State's registry, unless the embassy suspects surrogacy, it may take place as if the birth were a "normal overseas birth". However, embassies / consulates in the primary States of birth are, today, far more aware of the likelihood of surrogacy having been used and it has become less common to succeed with this approach. Moreover, some States have now revised their application form (see note 513 above).

⁶³⁴ It seems that no effect is given to foreign documentation as a matter of policy if a surrogacy arrangement is presumed to have taken place (and this will be presumed in the absence of medical documentation proving that the intending mother gave birth to the child). The intending parents usually therefore have to seek a court decision.

⁶³⁵ Cases have related both to the issuance of travel documentation, as well as to the recognition of foreign birth certificates: see, *e.g.*, *Civ. Antwerp*, 19 December 2008 (Hanne and Elke); *Civ. Brussels*, 15 February 2011 (Samuel); *Civ. Nivelles*, 6 April 2011 (Amelie and Nina) and, most recently, the decision of the Court of Appeal of Brussels, dated 31 July 2013, in a case which is now pending before the ECtHR, see *D and R v. Belgium* (App. No. 29176/13). Cf., however, *Civ. Brussels*, 18 December 2012, in which the court refused to recognise an Indian birth certificate, even insofar as it established the legal parentage of a genetically related intending father, on the basis that to do so would contravene fundamental principles of the protection of the interests of all children because the certificate stems from a commercial transaction not concerned with the interests of the child. However, ultimately the court confirmed the legal paternity on the basis that the

that Belgian private international law refers the question of the validity of a foreign authentic act to the Belgian applicable law rule which, in turn, applies the law of the State of which the putative parent is a national at the moment of the child's birth to this question: *i.e.*, the national law of the intending parent. Consequently Belgian law applies to determine whether a Belgian intending father is a legal parent of the child. Since it is possible under Belgian law for a genetically related putative father to voluntarily acknowledge his legal paternity,⁶³⁶ the foreign birth certificate can be accepted, not as a birth certificate, but as an authentic and legally valid certificate which establishes the acknowledgement of legal paternity of the intending father. In contrast, an intending mother cannot establish her legal maternity based on the certificate since, under (the applicable) Belgian law, the surrogate mother is the legal mother. An intending mother or a second (non-genetically related) intending father will therefore have to apply to undertake a step-parent adoption of the child. It is worth noting that whilst the concept of the "best interests of the child", as well as Art. 8 ECHR, have been invoked by the Belgian courts in several cases, often in the context of an assessment of the requirements of Belgian public policy and in particular to "neutralise" the illegality of the surrogacy arrangement such that an intending father's legal paternity can be established,⁶³⁷ the notion will not independently found recognition of the legal parentage established overseas, which is dependent upon the application of the Belgian private international law rules.

2) In the Netherlands, it is possible to recognise a foreign "legal fact", *i.e.*, the legal relationship evidenced by a foreign birth certificate, if certain procedural conditions are fulfilled.⁶³⁸ However, in ISA cases this provision has not assisted with the recognition of the child's legal status since recognition has been frequently rejected by the Dutch authorities on public policy grounds. This has not been on the basis that surrogacy *per se* is contrary to public policy but rather on the basis that the birth certificate did not mention a mother's name or the "mother" named was not the birth (surrogate) mother, something which is considered an issue of public order.⁶³⁹ In some cases, in these circumstances, the Dutch courts have applied Dutch choice of law rules to determine the law applicable to paternal filiation and the legal paternity of the intending father has been established *de novo* based upon this law (Dutch law), interpreted in light of Article 8 ECHR.⁶⁴⁰ However, the approach of the courts appears inconsistent since, in a 2012 decision, an Indian birth certificate *did* name the birth (surrogate) mother and the intending father but was still denied recognition for the purposes of the acquisition of Dutch nationality. The intending father therefore had to acknowledge the child under Dutch law to establish his legal paternity.⁶⁴¹ The Dutch courts have, however, placed strong reliance on Article 8 ECHR and *de facto* family ties in order to issue travel documentation to children born abroad to ISAs to enable them to travel to the Netherlands, even in circumstances in which their legal parentage with a Dutch intending parent has not yet been established according to Dutch law.⁶⁴²

3) In Germany, the recognition rules concerning foreign *judgments*⁶⁴³ enabled the Kammergericht Berlin to hold recently that a Californian judgment which stated that two German intending fathers were the legal parents of a child born to a US surrogate mother could be recognised in Germany but *only insofar as the legal paternity of the genetically related intending father was concerned* (who had also acknowledged his paternity).⁶⁴⁴ The decision could not be recognised in relation to the second man since, in this respect,

intending father was the genetic father, had "possession of status" and this outcome would ensure the legal paternity was the same as that established in India and be in the best interests of the child.

⁶³⁶ See **Part A** above.

⁶³⁷ *E.g.*, in the 2013 decision, the Brussels Court of Appeal held that, in light of the family life which existed between the child and the intending father (citing Art. 8 ECHR), and in the absence of a Belgian domestic law concerning surrogacy, when balancing public policy considerations against the interests of the child and intending father, the latter considerations had to prevail.

⁶³⁸ See para. 86.1) above.

⁶³⁹ *E.g.*, Rechtbank 's-Gravenhage, 23 November 2009; Rechtbank 's-Gravenhage, 14 September 2009; and Rechtbank 's-Gravenhage, 24 October 2011.

⁶⁴⁰ See Rechtbank 's-Gravenhage, 24 October 2011.

⁶⁴¹ See Rechtbank Haarlem, 28 November 2012.

⁶⁴² *E.g.*, see Rechtbank 's-Gravenhage, 9 November 2010; and Rechtbank Haarlem, 10 January 2011.

⁶⁴³ See paras 92 et seq.

⁶⁴⁴ A decision of 1 August 2013, case ref. 1 W 413/12.

the foreign decision was held to be in violation of German public policy. Interestingly, the court held that even the “best interests of the child” did not lead to a different conclusion since the interests of the child did not require the establishment of a legal parent-child relationship with a non-genetically related man outside the adoption procedure (which enabled the person to be assessed for their suitability to become a parent and enabled the best interests of the child to be taken into consideration). An adoption process was held to be better suited to consider the child’s interests than the procedure for recognition of a foreign judgment. Moreover, the court held that full transcription of the foreign judgment would also infringe the child’s right to know his identity due to the fact it would not contain any information concerning the surrogate mother.

4) In Spain, the recent Supreme Court decision⁶⁴⁵ has, in effect, achieved the same outcome for the children concerned.⁶⁴⁶ This is as a result of the fact that transcription into the Spanish civil registry of a Californian birth certificate naming two intending fathers as the legal parents of twins following an ISA has been refused on the basis that the registry has to examine not only the authenticity of the document but also whether the certificate is contrary to Spanish public order. Whilst the best interests of the children were held to be a factor to take into account in this analysis, the court held that this had to be balanced against the State’s interest in preventing the commodification of children and motherhood. Nonetheless, despite the refusal to transcribe the US birth certificate, it was held that the children could still acquire Spanish nationality and consequent rights as the genetically related intending father could, as any genetic father, register (*i.e.*, acknowledge) the children under Spanish law. His husband, however, will have to adopt the children. It should be noted that it was a majority decision (5 to 4) and there was a strong dissenting opinion which held that a distinction should be drawn between the illegality of surrogacy in Spain and the effects of surrogacy agreements in the State. Transcription should only be denied if it is contrary to public policy *taking into account the best interests of the children* in light of the UNCRC and other international and national instruments. Further, the minority stated that the right of children not to be discriminated against is an issue of public order and the illegal contract which brought about the legal parentage should not justify a discriminatory outcome.

5) In some Scandinavian States this outcome has been achieved as a result of the fact that the *lex fori* always governs the determination of legal maternity, resulting in the birth mother always being the legal mother of the child. In contrast, the general private international rules of the State will apply to the question of legal paternity.⁶⁴⁷ As a result, in Finland, in two court decisions concerning ISAs undertaken in Russia and India respectively,⁶⁴⁸ the legal paternity of Finnish intending fathers, evidenced in the foreign birth certificates, has been recognised.⁶⁴⁹ It is noteworthy that, in the case involving the Indian ISA, the court specifically relied upon Articles 2 and 7 of the UNCRC to find that the Indian birth certificate should not be considered against Finnish public policy (in relation to legal paternity).⁶⁵⁰ In Sweden, it has been stated that legal paternity can be difficult to establish under Swedish law in ISA cases but the procedure is faster if there is

⁶⁴⁵ Decided on 6 February 2014 by a majority, 5 votes to 4. This decision may be appealed to the Spanish Constitutional Court.

⁶⁴⁶ It is not yet clear how this Supreme Court decision will affect the “Directive of 5 October 2010 by the Directorate General of Registers and Notaries” which established a procedure for the recognition of a foreign judgment concerning legal parentage following an ISA.

⁶⁴⁷ *E.g.*, see Finland’s response to Question 61 a) of Questionnaire No 1: “Due to the lack of regulation on recognition on maternity, the recognition of a foreign paternity decision is therefore essential for the incoming couple.”

⁶⁴⁸ Helsinki District Court (Decision 13/5720, H 13/1040) and Helsinki Court of Appeal (Decision number 2064, H 13/1327, 5 July 2013)

⁶⁴⁹ The court seemingly undertook recognition of the birth certificates in relation to paternity (only). See the Finnish private international law rules in this regard mentioned in **Part B** above. The genetic connection between the intending fathers and the child appears to be required by immigration/nationality policy/legislation (see response to Question 61 a). A step-parent adoption was subsequently granted to the intending mother in one case following the provision of consent by the surrogate mother and based on the best interests of the child.

⁶⁵⁰ The court also made some interesting comments concerning the connection between the financial payments and the respect for the human dignity of the surrogate mother and stated that, “the question of the influence of financial compensation on the free will of the surrogate mother in surrogacy arrangements on the one hand and remuneration in adoption on the other hand are not legally comparable when the gametes of the intended parents are used ... and the compensation is agreed before the surrogacy arrangements.” See further Finland’s response to Question 66 g).

a foreign acknowledgement of paternity or court decision concerning the intending father's legal paternity which can be recognised in Sweden.⁶⁵¹ In Norway, establishment of the legal paternity of the intending father according to Norwegian law will also be crucial as a result of the fact that legal maternity is always accorded to the birth mother (since Norwegian law will always be applicable to this question).⁶⁵²

6) In Switzerland, whilst transcription of a foreign birth certificate in an ISA case will frequently be refused on public policy grounds, as will recognition of a pre-birth court judgment concerning legal parentage,⁶⁵³ it is possible for a Swiss genetic intending father to acknowledge his paternity according to Swiss law and pass his nationality by descent to a child born following an ISA in this fashion.⁶⁵⁴ Whilst an adoption may be possible for an intending mother in certain circumstances, the Swiss response to the Questionnaire confirms that "[t]here are couples living in Switzerland where legal parentage is only established in relation to the genetic father".⁶⁵⁵

165. The reliance placed by these States on recognising or establishing the legal parentage of a genetically related, national, intending father means, however, that the outcome of cases is highly fact-dependent and acute problems may arise in particular factual scenarios: for example, if (1) the child is *not genetically related* to the intending father, (2) the genetically related intending father is *not a national* of the receiving State, (3) there is *only a single intending mother*,⁶⁵⁶ or (4) the *surrogate mother is married* and, according to the approach adopted in the State, the designated applicable law will not permit establishment of an intending father's legal paternity in circumstances where another man's legal paternity is in effect and has not been contested. Indeed, this last issue was part of the difficulty in two recent German cases,⁶⁵⁷ in which children born abroad following ISAs (in Ukraine and India) were held not to have acquired German nationality by descent as a result of the fact that, according to German law including German private international law, they did not (and do not) have a German legal parent.⁶⁵⁸ The result of these cases is that the children are stuck "stateless" in their State of birth, with uncertain, "limping" legal parentage.⁶⁵⁹

⁶⁵¹ *E.g.*, see Sweden's response to Part III of Questionnaire No 1 and see **Part B** above.

⁶⁵² Recognition of a foreign voluntary acknowledgement of paternity and / or a foreign court decision concerning legal paternity, whilst theoretically possible, is often not a route available in surrogacy cases due to the strict conditions applied (see response to Question 50). Legal paternity will generally therefore also be established according to the *lex fori*. The situation in Norway has also caused difficulty in cases involving single women who enter into ISAs abroad. On 8 March 2013, a temporary law was passed in Norway after a series of difficult surrogacy cases. This law facilitates the transfer of legal parentage to Norwegian intending parents in certain cases so that children may have certainty of status and acquire Norwegian nationality. However, the law is only temporary, pending a permanent legal solution to be determined by the Norwegian Parliament, and applications must have been made prior to 1 January 2014.

⁶⁵³ On the grounds that the *pre-birth* consent of the surrogate mother violates public order (New Zealand also describes a similar approach).

⁶⁵⁴ See Switzerland's response to Question 61 a).

⁶⁵⁵ Response to Question 61 b).

⁶⁵⁶ See Norway's response to Question 64 d): "single intending Norwegian mothers have limited chances for entering into Norway with a child born by a surrogate mother".

⁶⁵⁷ See the Administrative Court of Berlin case of 15 September 2012 (ref. 23 L 283.12); and the Administrative Court of Cologne case of 20 February 2013 (ref. 10 K 6710/11). Cases often reach the German courts when German intending parents are refused passports for children born following ISAs at the local embassy in the State of birth. In such circumstances, it is possible to appeal this refusal to the local *Administrative* Court in Germany which was the case in these decisions.

⁶⁵⁸ In the 2013 Cologne case (ref. 10 K 6710/11), this was held to be the case despite the fact that the German intending parents (of a child born in September 2010 to a married Indian surrogate mother) presented to the German authorities: (1) an Indian birth certificate naming them as the legal parents of the child; (2) the judgment of an Indian court stating that the intending father was the genetic father of the child; and (3) an acknowledgement of paternity by the intending father, with the notarised consent of the surrogate mother. The Court held that the child did not have a German legal parent since: (1) the Indian birth certificate was not constitutive of legal parentage and the German applicable law rules had to be applied instead to determine the law applicable to the question of the child's descent (see **Part B** above). German law was therefore applicable as the intending parents were German and under German law the surrogate mother and her husband were the legal parents of the child. (2) Moreover, the acknowledgement of paternity was not valid under German law because the paternity of the surrogate's husband was still in effect when the acknowledgement was undertaken and had not been challenged: a challenge was no longer possible since the two year deadline for contestation of paternity had expired. Moreover, *even if* Indian law was held to apply to the question of the child's descent (an alternative possibility due to the child's habitual residence in India – see Art. 19 (1) of the EGBGB), the court found that, according to Indian law, the surrogate and her husband were also considered the legal parents, despite the birth certificate to the contrary (although in other cases where Ukrainian law was relevant and

166. Moreover, of course, this is not to mention the problems which a second intending parent may face in these States in order to establish their legal parentage in relation to the child.⁶⁶⁰ Whilst adoption may sometimes be available to an intending mother or second intending father, this may not be possible in some States, for example, if the ISA was “for-profit” or if the intending parents are an unmarried or same-sex couple.⁶⁶¹ In fact, there are already examples of situations in which an intending mother’s application for an adoption following an ISA has been refused.⁶⁶²

167. It should also be noted, however, that in some States and / or in certain cases, a more liberal approach is evidenced and this has included recognition of the intending mother’s legal status. The outcome in these cases has been justified by reference to the children’s best interests and the consequences of non-recognition for the children. First, the Austrian Constitutional Court, in two cases involving ISAs which centred on the issue of the children’s acquisition of Austrian nationality,⁶⁶³ held that the legal parentage of the intending parents should be recognised such that the children acquired Austrian nationality by descent. In the first case, reliance was placed on a US judgment to grant Austrian nationality by descent to a child born to a surrogate mother in the USA.⁶⁶⁴ Overturning the competent authority’s refusal to grant nationality, the Constitutional Court held that Austrian law prohibiting surrogacy was not part of Austria’s public order.⁶⁶⁵ Moreover, to fail to recognise the US judgment would not be in the child’s best interests as it would force the surrogate into the position of the legal mother, even though she is not their genetic mother and is not their mother according to US law. The authority was held to have neglected the welfare of the children as a key concern when determining their nationality and to have infringed the intending parents’ right to equal treatment by law.⁶⁶⁶ In the 2012 case, the legal parentage evidenced by an apostilled Ukrainian birth certificate, naming the Austrian (genetically connected)⁶⁶⁷ intending parents as the legal parents of the child, was recognised based upon Article 8 ECHR and the welfare of the children involved. The court emphasised that, in the case of non-recognition, the children would not be able to establish a legal relationship with their genetic parents, would have no rights of care, maintenance and other proprietary rights against the intending parents and would be stateless.

clearly establishes legal parentage for the intending parents, the provisions of foreign law in this regard were held to be contrary to public policy in any event and not applied on this basis). (3) Lastly, the Indian judgment could not assist the German intending couple because it only issued a statement concerning the child’s *genetic*, and not *legal*, parentage. A judgment concerning legal parentage would likely not have assisted the intending parents in any event, however, since, in a 2012 case (ref. 23 L 283.12), the court held that recognition of a Ukrainian judgment stating that the German intending parents were the *legal* parents of the child was contrary to public policy because of the prohibition on surrogacy in Germany.

⁶⁵⁹ The distinction with the later Berlin case (ref. 1 W 413/12) mentioned at para. 164.3) above appears to be the marital status of the surrogate mother and the availability therefore of the acknowledgement of paternity to the intending father in the latter case.

⁶⁶⁰ See note 661 above concerning the difficulty in some States and in some cases with adoptions in these circumstances.

⁶⁶¹ Many States have adoption legislation which prohibits an adoption following a commercial transaction (*e.g.*, in Finland, an adoption cannot be granted if any remuneration for the adoption has been given or promised). Some States also only permit step-parent adoptions (*i.e.*, the adoption of a child of a partner) if the couple are heterosexual and married (*e.g.*, this is the case in Switzerland – see response to Question 61 c)).

⁶⁶² *E.g.*, see a case of the local court of Hamm, Germany (22 February 2011, case ref. XVI 192/08).

⁶⁶³ From the Permanent Bureau’s own research: see the Austrian Constitutional Court decisions of 14 December 2011 (ref. B 13/11-10) and 11 October 2012, (ref. B 99/12)). It should be noted that these cases centre on the child’s acquisition of nationality by descent (which, in turn, depends upon having an Austrian legal parent).

⁶⁶⁴ Since the intending parents were an Austrian-Italian couple, the Austrian intending mother was the only intending parent who could pass Austrian nationality to the child, and hence the acceptance of the intending father’s legal paternity would not have assisted the child in this case.

⁶⁶⁵ Since it does not have constitutional status or protect fundamental rights.

⁶⁶⁶ This approach could be said to be in line with the UN Committee on the Rights of the Child’s General Comment No 14 on Art. 3 UNCRC, at para. 30 (see para. 58 above).

⁶⁶⁷ It is interesting to note that in both these cases, the intending parents have also been the *genetic* parents of the child(ren) and this has been specifically mentioned by the Constitutional Court. It will be interesting to see if the same outcome is reached in a case in which the genetic connection is not established.

168. Secondly, contrary to the German *Administrative* Court's approach, in the German *family* court of Friedberg,⁶⁶⁸ a Ukrainian judgment determining a German married couple to be the legal parents of a child born to a married Ukrainian surrogate (using their genetic material) was recognised. The court relied upon Article 8 ECHR⁶⁶⁹ to hold that it would be contrary to the well-being of the child not to recognise the foreign judgment in light of the consequence that the child would be deprived of his genetic mother and the surrogate mother would be forced to be a legal mother against her will. The interests of the child were held to outweigh the reservations of the German legislator concerning surrogacy. Moreover, the court mentioned that, particularly with regard to the legal paternity of the intending father, if the surrogate had been unmarried or her husband had contested his paternity, the intending father would have been able to acknowledge his paternity under German law without difficulty. Taking this into account, a foreign decision establishing his legal paternity could not be contrary to public policy.

169. In the opposite direction, however, jurisprudence from the French *Cour de Cassation*⁶⁷⁰ evidences a considerably more restrictive approach which does not permit the transcription into the French civil status registry of a foreign birth certificate naming intending parents as the legal parents of a child born abroad following an ISA. In three decisions of 2011,⁶⁷¹ the court held that there is an obligation to deny transcription of a foreign birth certificate in ISA cases as a result of the fact that the birth resulted from an arrangement which is contrary to public policy.⁶⁷² However, in more recent decisions, the court has gone even further by holding that intending fathers' acknowledgements of legal paternity under French law also must also be cancelled in light of the fraud which has taken place and neither the best interests of the children (Art. 3 UNCRC), nor respect for private and family life (Art. 8 ECHR), can be invoked to reach a different outcome. Even though this decision was welcomed by part of the relevant literature in France, it has also been subject to strong criticism, including on the basis that it may be contrary to Article 8 ECHR to state that fraud committed by *parents* prevents *children* from invoking their fundamental rights.

170. With four ISA cases, involving three States, now pending before the ECtHR (two against France, one against Belgium and one against Italy), it will be important to monitor whether, and if so how, the European Court influences this evolving jurisprudence.⁶⁷³

Taking into account the broader concerns when considering legal status issues

171. Another clear and important trend, apparent across all the different State approaches identified above, is that many of the broader concerns arising in ISA cases, discussed in sections (b) to (h) below, are cited by the competent authorities in some receiving States not only as issues of concern but also, in some cases, as issues which may directly impact upon the decision-making concerning the recognition or establishment of the child's legal status and / or the child's acquisition of nationality.

172. This is apparent, first, in the governmental guidance documents concerning ISAs issued by some States. These documents often emphasise, in broad terms, the particular

⁶⁶⁸ *I.e.*, this was not an *Administrative* Court decision following a refusal of nationality but a family court decision following an application for recognition of the Ukrainian judgment concerning legal parentage. Decision of 1 March 2013.

⁶⁶⁹ As well as citing the Austrian Constitutional Court decision in this regard: see below.

⁶⁷⁰ Arrêts Nos 1091 and 1092 of 13 September 2013; and Arrêt No. 281 of 19 March 2014 (13-50.005), *Cour de cassation*, First Civil Chamber.

⁶⁷¹ Arrêts Nos 369, 370 and 371 of 6 April 2011, *Cour de cassation*, First Civil Chamber. Two of these cases are now pending before the ECtHR: see *Menesson and others v. France* (App. No. 65192/11, introduced 6 October 2011) and *Labassee and others v. France* (App. No. 65941/11, also introduced 6 October 2011).

⁶⁷² In relation to the acquisition of French nationality following ISAs, see the Ministry of Justice circular, dated 25 January 2013, concerning the delivery of certificates of French nationality to children born abroad following surrogacy.

⁶⁷³ See: *Menesson and others v. France*, *Labassee and others v. France* (note 671 above), *Paradiso and Campanelli v. Italy* (App. No. 25358/12, introduced 27 April 2012), and *D and R v. Belgium* (see note 635 above: introduced 30 April 2013).

State's international obligations (e.g., under the UNCRC) and highlight the caution which will be exercised by the authorities in ISA cases to ensure that individual decisions are taken "in accordance with the legal rights of everybody involved, with the rights of the child being a paramount consideration".⁶⁷⁴

173. The ISA case law also evidences this trend, although the concerns are revealed in different ways depending upon the receiving State's approach to ISA cases. For example, in some common law receiving States, in the legal proceedings required to accord the intending parents legal parentage for the child, issues such as the surrogate mother's free and informed consent to the arrangement, the treatment and care provided to the surrogate mother and the suitability of the intending parents to care for the child have been important factors in the court's decision-making. Indeed, as one English lawyer has put it, whilst the English court will, with an increasingly forensic approach, examine the financial aspects of the arrangement (including the amount paid to any agency) during parental order proceedings,⁶⁷⁵ ultimately "the figure involved is less important than being able to show that there are no wider concerns about the suitability of the parents, the exploitation of the surrogate or how the arrangement has been handled".⁶⁷⁶ Satisfactorily allaying such judicial concerns has also frequently been crucial to the success of the necessary court applications in New Zealand and Australia.⁶⁷⁷

174. In civil law States, whilst the different nature of proceedings means that broader concerns have not featured so strongly in the case law, concern for the subject child's rights and welfare certainly has been an important factor leading to the recognition or establishment of legal parentage between a child and at least one of his / her intending parents, and / or the grant of travel documentation or nationality, in court decisions in States such as Austria, Belgium, Finland and the Netherlands. Moreover, even in cases in which ultimately the legal status of the child has not been able to be recognised or established in relation to one or both parents in these States, this position too has, on occasion, been justified either by reference to the child's interests on the particular facts of the case⁶⁷⁸ or due to the general concerns of the State regarding surrogacy which may, in turn, be based upon these broader issues (e.g., where concern is expressed regarding the commodification of women and children, or the exploitation of women).

175. Across States, therefore, there appears to be a desire on the part of governmental and judicial authorities, to ensure, insofar as possible, that "respect for the surrogacy mother's and child's human dignity and the conditions and quality of the treatment behind the surrogacy should be ensured before recognition of foreign ... decisions" takes place, something which is an important consideration for future international work.⁶⁷⁹

Timeframes and Outcomes

176. The common features of much of the case law described above in terms of timeframes and outcomes for children and families, whichever approach is adopted by States, are: (1) the lengthy, complex, financially and emotionally draining processes which families may face following ISAs to get "home" and establish the child's legal parentage and nationality (one State response described a "wall of bureaucracy that may

⁶⁷⁴ From the Irish governmental guidance. In addition, the Australian guidance states that, "*Australia is committed to protecting the fundamental rights of children. .. Extreme caution is exercised ...to ensure that Australia's citizenship provisions are not used to circumvent either adoption laws or other child welfare laws*" whilst the New Zealand guidance states that "*all decisions regarding international surrogacy should be made in order to uphold the best interests of the child*".

⁶⁷⁵ See, e.g., *Re P-M* [2013] EWHC 2328 (Fam).

⁶⁷⁶ From "LGBT Family Formation: national and international perspectives" by Natalie Gamble, at p.5 (presented to the AAARTA Conference, November 2013 – see note 617 above).

⁶⁷⁷ However, in Australia, the outcome has often been the granting of "parental responsibility orders" rather than "parental orders" (see para. 156 and note 607 above).

⁶⁷⁸ E.g., see the decisions in the Netherlands where birth certificates which do not mention the birth mother are stated to contravene public policy due to the child's right to know his origins; and the German decision described at para. 164.3) above in which adoption was considered a better route, from the perspective of the interests of the child, to the establishment of legal relationship between a child and non-genetically related intending father.

⁶⁷⁹ See Finnish response to Question 66 g).

not be consistent with the superior interests of children”),⁶⁸⁰ (2) combined with a highly-fact dependent and uncertain outcome and the real risk that the child may be left with “limping” legal parentage and, in the worst cases, trapped “stateless” in the State of birth.⁶⁸¹

177. In terms of the length of proceedings, the Questionnaire responses (State and lawyer) confirmed that the length of time it may take to complete the immigration and legal parentage aspects of ISA cases will be highly dependent upon the particular facts of the case. In relation to just the immigration processes, best case scenario timeframes of a few weeks were reported.⁶⁸² However, in several States it was reported that it could take several months,⁶⁸³ a year or significantly longer to resolve these issues, depending upon the factual matrix.⁶⁸⁴ Several lawyers reported that timeframes for immigration procedures also vary considerably according to the State of birth since immigration authorities may apply more exacting standards if they have experienced problems with evidence from particular States of birth in the past.⁶⁸⁵ In terms of the time taken to establish or recognise the child’s legal parentage (where separate procedures are required in a State), again responses indicated that this may take additional months, and in some cases, years, of court or administrative procedures.⁶⁸⁶

178. Regarding the outcome of ISA cases, the serious problems clearly evidenced by the case law were confirmed by the State, lawyer and individual responses to the Questionnaires. Several State responses verified that, depending upon the factual matrix of the case, there may be immigration and nationality difficulties for the child⁶⁸⁷ and even more States confirmed that they had experienced problems concerning the child’s legal parentage in ISA cases.⁶⁸⁸ In addition, whilst the majority of lawyer responses reported that most intending parents and children generally find a way to get “home” (even if it is lengthy and expensive), two lawyers reported that they had had cases where this was not possible.⁶⁸⁹ Further, eleven lawyers from seven different jurisdictions reported that they had dealt with “incoming cases” where one or both of the intending parents were not able to establish their legal parentage in the receiving State.⁶⁹⁰ In fact, one UK lawyer reported that she had dealt with 23 cases where it was known that intending parents had decided not to pursue an application for a parental order (to establish their

⁶⁸⁰ Canada also highlighted the delays and complexities for determining nationality due to the legal uncertainty concerning the establishment of legal parentage.

⁶⁸¹ It should be noted that children born in States of birth which do not accord nationality to the children by dint of birth on the territory will frequently be born “stateless”.

⁶⁸² *E.g.*, Finland and Israel (3 to 6 weeks for immigration); New Zealand (2 to 3 months for immigration); and Switzerland (varies but one couple had to live in India for 4 months).

⁶⁸³ A Ukrainian lawyer reported that in her experience the most lengthy procedure to ensure the child’s exit from Ukraine lasted 5 months.

⁶⁸⁴ *E.g.*, Australia (passport can be 14 days but frequently cases are complex and so take longer and for a visa the application may take up to 12 months); the Netherlands (it can take 1.5 years); Canada (may well take over 2 years). Again, much depends upon the two States involved and the particular factual matrix of the case.

⁶⁸⁵ *E.g.*, concerning the evidence relating to the surrogate mother’s marital status or concerning the genetic link with the intending parents. This appears to be the case with India for several receiving States.

⁶⁸⁶ *E.g.*, in the UK, once the immigration aspects of the case are dealt with, the necessary parental order proceedings may take somewhere between 4 to 12 months. In New Zealand, the required domestic adoption process once back “home” (following successful completion of the visa process) will usually take approximately a year. In the Netherlands, the domestic adoption procedure required in some cases can take anything from 1.5 to beyond 2 years. In Germany, the further court proceedings (*e.g.*, concerning a step-parent adoption for an intending mother) may also take years. And this is not to mention the fact that, in some States, proceedings concerning guardianship / custody / parental responsibility may be required in addition to proceedings concerning legal parentage.

⁶⁸⁷ *E.g.*, Denmark, Finland, Germany, Ireland, Netherlands, Norway, Sweden, Switzerland and the USA all reported having encountered problems concerning a child entering the State following an ISA abroad. Further, all these States except Norway reported encountering problems concerning the child’s acquisition of nationality.

⁶⁸⁸ *E.g.*, Australia, Finland, Germany, Ireland, New Zealand and Switzerland reported that it will not always be possible for one / both intending parents to establish their legal parentage in the receiving State. And in response to Question 66 e), Australia, Denmark, Finland, Germany, Ireland, Israel, Netherlands, New Zealand, Norway, Sweden, Switzerland and the USA stated that they had encountered problems concerning legal parentage for children born to ISAs.

⁶⁸⁹ Lawyers from Germany and Argentina.

⁶⁹⁰ Some lawyers from States of birth reported that, in their experience, this was more common for same-sex couples where the receiving State did not permit two persons of the same sex to be recognised as the legal parents of a child.

legal parentage according to English law). This may have been because they did not satisfy the criteria for such an order and so could not regularise their position⁶⁹¹ or because they chose to “stay under the radar” rather than resolve the issues properly. She stated, “[t]hese parents are currently caring for their children in the UK without being the legal parents, and we anticipate that this will create legal difficulties in the future, something which concerns us greatly.”

179. The responses of intending parents also evidenced these serious difficulties. The overwhelming majority of French intending parents confirmed that they have not been able to transcribe the children’s foreign birth certificate into the French registry.⁶⁹² In addition, several German intending parents had seemingly not mentioned the fact of surrogacy in order to acquire German nationality for their child, a phenomenon which several lawyers confirmed is taking place and which some States reported as a real concern. As several lawyers pointed out, this practice leaves the child in a precarious legal position since, if the surrogacy arrangement is subsequently discovered, the legal parentage or nationality may be revoked.⁶⁹³ The lawyer and intending parent responses revealed that fear is often the driving force behind intending parents taking such steps. The dangers associated with not regularising the child’s legal status in the receiving State were also evidenced by the submissions from intending parents. One German couple stated that they had not sought German nationality for their children (relying on the passports of the State of birth) but the children were now facing deportation from Germany. Some of the German intending parents who provided information whilst still in the process of undertaking an ISA expressed their concerns about the future, with one couple stating that the fact that decisions were often spread across several different departments (*e.g.*, civil registry, youth welfare, foreign ministry) and taken individually (with no system of binding precedent) made it more troubling as it added to the uncertainty of outcome.

180. In relation to the Spanish intending parents, prior to the 2010 DGRN Instruction, couples reported children travelling back to Spain as US tourists and living illegally (in one case for up to two years) in Spain until the Instruction was promulgated. Following the Instruction, transcription into the Spanish registry became possible if the criteria of the Instruction were fulfilled, including for same-sex intending fathers. The impact of the recent Spanish Supreme Court decision⁶⁹⁴ on the Instruction, however, remains to be seen.

Consequences of “limping” legal status

181. The consequences for children of a “limping” legal status are already beginning to be seen and it is anticipated that these consequences will only become more apparent as the children with “limping” legal parentage grow up and life inevitably causes issues such as divorce, custody disputes, child support disputes, abduction, leave to remove applications and inheritance questions to arise. In terms of the cases which have already arisen:

1) One lawyer reported the difficulties which have arisen in a child abduction case because the child was born as a result of an ISA. In this case, a UK couple entered into an ISA in the USA and had a child using the intending father’s sperm, a donor egg and a gestational surrogate mother. They brought the child to the UK on the child’s US passport and did not take any further steps to regularise the child’s position in the UK. The couple subsequently experienced relationship difficulties and the father took the child to a State in South America without the intending mother’s consent. The 1980 Hague Convention is

⁶⁹¹ *E.g.*, single intending parents, intending parents who cannot satisfy the domicile requirements or those who have missed the limitation period.

⁶⁹² In one case, the intending father had acknowledged his paternity according to French law (but the status of this is now uncertain in light of the recent *Cour de Cassation* decisions – see notes 670 and 671 above).

⁶⁹³ This was mentioned by Norway (response to Question 66 e)) and New Zealand (response to Question 66: one couple did not mention surrogacy when applying for nationality by descent and the child acquired nationality on the basis that he / she was born normally overseas. When the surrogacy was discovered, the couple had to adopt the child).

⁶⁹⁴ See para. 164.4) above.

in force between the two States but the father is arguing that the intending mother has no legal rights of custody under English law in respect of the child because she is not a legal parent according to English law and has no parental responsibility for the child.

2) The Permanent Bureau is also aware of a case in France in which the intending father of a child born as a result of an ISA has died. He was unable to have his legal paternity established under French law and, as a result, it is not clear if the child will be able to inherit from him in France.

3) In another case reported by ISS,⁶⁹⁵ a bi-national couple who had a child through an ISA subsequently divorced in the UK and the intending mother wished to obtain the necessary permission from the court to take the child to live in her State of origin. However, she had never regularised her position under English law (*i.e.*, she had not obtained a “parental order”) and hence she had neither legal parentage nor parental responsibility for the child. The intending father therefore contested her application on the basis that she was not a legal parent of the child and therefore could not make such an application. Ultimately the court granted the intending mother a “parental responsibility order” in order that she could make the “leave to remove” application. However, this order did not (and the English Court could not, at this stage⁶⁹⁶) accord her legal parentage for the child.

182. In addition, even if the child’s legal status can eventually be resolved in the receiving State, the precarious legal position children are placed in for the interim period whilst proceedings are underway can have serious consequences. For example, Norway reported a case in which a Norwegian intending father died *prior to* the child’s birth to a surrogate mother resident in Thailand.⁶⁹⁷ In the UK, there has also been a case in which an intending father died following an ISA in India, after his application for a parental order in the UK but prior to the determination of the application.⁶⁹⁸ This is an issue regarding which several lawyers expressed serious concern because, depending upon the receiving State involved and the particular intending parent which dies, the child may consequently not be able to regularise his / her position in relation to that parent and therefore may not be able to inherit from that “parent”. Further, the remaining intending parent may not be able to establish their legal parentage for the child.

183. Moreover, as several lawyers pointed out, “limping” legal parentage is not just a problem for the child in terms of the legal status of the intending parents. It often has the additional consequence that the legal parentage of others (*e.g.*, the surrogate mother and sometimes her husband or partner) endures according to the law of the State in which the family is living. This can mean that the consent of these persons is required for certain actions to be taken concerning child during his / her minority.⁶⁹⁹ It may be possible to initiate further court proceedings to terminate the guardianship / parental responsibility of others but, in the interim period or where this is not possible, it may make the situation difficult for the intending parents and child.

184. Intending parents who provided information to the Permanent Bureau also reported other problems following ISAs, including: the refusal by certain States to give social security benefits to intending parents for children, the refusal of maternity / paternity leave by employers⁷⁰⁰ and the refusal to grant medical / health insurance to the children. In some cases, these decisions were challenged successfully (*e.g.*, by some intending parents in Spain).

⁶⁹⁵ In the “ISS Network Contribution” (on file with the Permanent Bureau).

⁶⁹⁶ The UK legislation establishes a limitation period within which an application for a parental order must be brought.

⁶⁹⁷ See Norway’s response to Question 66 i). Several lawyers reported the potential for this to happen and the uncertain consequences for the child’s legal status (*e.g.*, concerning inheritance) if legal status issues have not been resolved by the time of death.

⁶⁹⁸ See *A and A v. P, P and B* [2011] EWHC 1738.

⁶⁹⁹ *E.g.*, medical treatment and education, *etc.*

⁷⁰⁰ In this regard, see the recent Court of Justice of the European Union case law on maternity leave following surrogacy arrangements, at note 271 above.

(b) Child Welfare

185. Whilst all of the problems reported in this section directly or indirectly impinge on child welfare, the following specific areas were raised by those providing responses to the Questionnaires.

Physical and psychological health of children born following ISAs⁷⁰¹

186. In terms of the physical health of children born following ISAs, as with all children born following ART procedures, there is an increased risk of multiple and pre-term births for these children and hence consequent ongoing health issues as a result. It is generally accepted that medical best practices can reduce some of these risks (*e.g.*, reducing the number of embryos transferred to a surrogate mother can reduce multiple births and associated risks). However, whilst some States have legislation in place concerning such matters, some do not and the degree to which any professional guidance is followed in the absence of binding rules may vary significantly according to the State of birth.⁷⁰² There are documented cases, for example, of premature, multiple birth babies dying in India.⁷⁰³

187. The psychological health or adjustment of children born following ISAs is a topic which, to date, has received little specific study or attention.⁷⁰⁴ However, a domestic, longitudinal study of parenting, parent-child relationships and child outcomes in families created using surrogacy undertaken in the UK (with data collected over 5 time points: when the children were aged 1, 2, 3, 7 and 10 years) recently reported that, “[t]he findings of this study add to the growing body of research suggesting that biological relatedness between parents and children is not essential for positive child adjustment”.⁷⁰⁵ It also found that, “[i]n terms of children’s psychological adjustment, ... children born using surrogacy do not experience psychological problems. Longitudinal analyses of the data suggests that children born using surrogacy may experience more difficulties at around the age of seven years compared to children born using other forms of assisted reproduction ... however this difference disappeared by age 10 years and may be a result of more surrogacy children being aware of their birth in comparison to children born using gamete donation”.⁷⁰⁶ However, as one of the authors of the study has commented, “[f]urther studies need to focus on the longer term impact of surrogacy for these children” and *international* surrogacy arrangements raise “additional questions and concerns [and] [t]he impact of surrogacy on these children is unknown.”⁷⁰⁷ This is an area which therefore warrants further study (see also para. 205 below).

⁷⁰¹ This issue should also be considered in light of Art. 24 of the UNCRC: “States Parties recognise 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 ICESCR should also be considered. The General Comment No. 14 (2000) on Art. 12 ICESCR makes clear that this provision requires measures to improve “child and maternal health”.

⁷⁰² See the “Assisted Reproductive Technology Surveillance — United States, 2010”, 6 December 2013, 62(ss09);1-24, by the Division of Reproductive Health, National Center for Chronic Disease Prevention and Health Promotion (“CDC”), available at < <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6209a1.htm> >, which states that, “ART is associated with potential risks to the mother and fetus” and that “reducing the number of embryos transferred per ART procedure among all age groups and promotion of eSET procedures, when clinically appropriate, is needed to reduce multiple births, including twin births, and related adverse consequences of ART”.

⁷⁰³ See, *e.g.*, the media story at note 739 below.

⁷⁰⁴ This was a concern identified by Switzerland (see response to Question 67) and likely results from the fact that the phenomenon is so recent.

⁷⁰⁵ “Children born through reproductive donation: a longitudinal study of psychological adjustment”, by Susan Golombok, Lucy Blake, Polly Casey, Gabriela Roman, Vasanti Jadva, in the *Journal of Child Psychology and Psychiatry*, Volume 54, Issue 6, pp 653–660, June 2013.

⁷⁰⁶ See “Children born through surrogacy: Are they being told and what are their feelings?” by Dr Vasanti Jadva, in the ISS Monthly Review Special Issue on “International Surrogacy and children’s rights” (2013, see note 585 above).

⁷⁰⁷ *Ibid.*

The child's right to know his / her origins

188. An area which may be closely linked with the child's psychological adjustment is the issue of children's right to know their birth and / or genetic origins. This was an area which several States and lawyers reported as one of concern in the ISA context because of the considerable variations in State laws and practices to issues of donor and surrogate anonymity and the preservation of, and access to, information in future.⁷⁰⁸ One State commented that, whilst adoption and surrogacy are clearly different, "lessons from the closed adoption era should be heeded" and that some children born through ISAs will want to be able to find out about their birth mother and genetic parents, where relevant, in future.⁷⁰⁹ This State identified the complex issues involved and the potential for them to adversely affect children's wellbeing, including their mental health, sense of identity and belonging. Another State identified that in intercountry adoption, racial, ethnic and cultural awareness are described as essential ingredients for successful identity formation. Again recognising the different contexts (particularly where intending parents use their own gametes), it was highlighted that such issues still need to be considered and discussed for children born through ISAs.⁷¹⁰ Any discussion of this issue will, of course, need to take into account the requirements of Articles 7 and 8 of the UNCRC and other international / regional human rights obligations.⁷¹¹

Clinic errors and practices

189. Several States and lawyers also reported a very troubling phenomenon which appears to be occurring with some degree of regularity⁷¹² in certain States of birth⁷¹³ which is that intending parents enter into an ISA with the intention of using one or both of their gametes and, when the child is born and DNA tests are undertaken, it is discovered that the child is not, in fact, genetically related to the intending parent(s)⁷¹⁴ as expected due to the fact that the clinic has used the wrong gametes or embryo. This situation raises multiple issues for the children and families concerned, including: whether the intending parents will still wish to raise the child in these circumstances and, if not, what will happen to the child; the child's legal status (particularly bearing in mind the number of States which require a genetic connection to an intending parent for the child to acquire nationality and / or legal parentage⁷¹⁵); and the child's ability to discover his / her genetic origins in future, as well as his / her general long-term psychological well-being if he / she discovers the truth surrounding his / her conception. In one particularly distressing case, reported by a lawyer, twins were born to an Indian surrogate mother following an agreement with Australian intending parents. Upon birth it was apparent that one child was Caucasian and the other Indian. The clinic blamed the surrogate mother for this situation, stating that she did not abstain from intercourse during pregnancy, but a mix-up of gametes was suspected. In the end, the intending parents took the Caucasian child and not the Indian child and it is not known what happened to the latter child.⁷¹⁶

⁷⁰⁸ *E.g.*, Canada, Finland, Germany, Ireland, Mexico, Netherlands, New Zealand, Norway, Philippines, Sweden and Switzerland identified this issue as one of concern. See para. 16.4) above concerning the considerable diversity which still exists in internal law concerning these issues.

⁷⁰⁹ Response of New Zealand to Question 67 c).

⁷¹⁰ See "The search for origins applied to the practice of surrogacy", by Geraldine Mathieu, in the ISS Monthly Review Special Issue on "International Surrogacy and children's rights" (2013, see note 585 above) which notes the different practices in States concerning children's ability to access information concerning their origins following surrogacy (*e.g.*, contrasting the approach of States in which a transfer of legal parentage takes place following surrogacy, with those States where the intending parents are recognised as the legal parents from birth).

⁷¹¹ See note 89 above. The UN Committee on the Rights of the Child's General Comment No 14 on Art. 3 UNCRC (note 9 above) also makes clear that "due consideration of the child's best interests implies that children have ... the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country" (para. 56).

⁷¹² Bearing in mind that it was reported by several receiving States (*e.g.*, Australia, New Zealand, Canada and Israel) and multiple lawyers from different jurisdictions.

⁷¹³ Cases have been reported in India and Thailand.

⁷¹⁴ Cases falling into this category were reported by: Australia, New Zealand, Canada, and Israel.

⁷¹⁵ See above.

⁷¹⁶ This was reported by a lawyer but may also be the case referred to by Australia in their response to Question 66 h).

190. It must also be mentioned that, in India it appears that intending parents are sometimes advised to have embryos transferred to more than one surrogate mother at the same time, "to increase the chances of a successful birth".⁷¹⁷ This has resulted in situations where children have the same genetic mother and father (often an egg donor and the intending father), the same social mother (the intending mother), but different birth mothers and are born on different days (but often closely together).⁷¹⁸

Breakdown of ISAs and other concerns

191. There are also cases reported in Questionnaire responses which raise serious child welfare concerns which do not fall into the above categories. Sometimes they may relate to the breakdown of the ISA. For example, two cases were reported in which a child was born with a disability and the intending parents subsequently reneged on the ISA. In one case the child was fostered in the State of birth and in the other case the child was adopted.⁷¹⁹ A further case was reported in which the intending parents did not arrive in Canada to pick up the child born as a result of an ISA. The child was subsequently privately adopted. In another case, a surrogate mother did not adhere to the terms of the agreement and had sexual relations with her partner. Following the child being handed over to the intending parents, she wanted the child to be returned to her and therefore wanted DNA tests to prove it was her and her partner's biological child.

(c) Position of the Surrogate Mother

192. Several States and lawyers expressed that they have encountered legal problems or have concerns regarding the position of surrogate mothers in some ISA cases. These concerns vary significantly in their intensity depending upon the State of birth involved, with concerns often significantly more marked where surrogate mothers live in conditions of poverty (and, on the whole, with concerns significantly less marked where surrogate mothers live in the USA). Concerns relate to a number of different areas, including: the assessments which have (or have not) been undertaken of a surrogate mother prior to conception, the information and support provided to surrogate mothers in order for an informed decision to be made, the support provided to surrogate mothers throughout the surrogacy process and their general physical and psychological health, including the medical care provided.

Eligibility and suitability to become a surrogate mother

193. In most States and most agencies or clinics,⁷²⁰ some assessment process is undertaken before a woman is accepted into the agency or clinic's programme to become a surrogate mother. However, the nature of the checks and the quality of this process varies considerably, an issue which was highlighted as an area of concern for several States and lawyers. This is the result of the fact that, in some States of birth, there is no legislation concerning this matter or only legislation which specifies very sparse minimum eligibility requirements⁷²¹ and beyond any minimum requirements, the assessment process is established and monitored by the individual agency / clinic.⁷²² However, it was

⁷¹⁷ See para. 10 of *Re X and Y (Children)* [2011] EWHC 3147 (Fam) in which Sir Nicholas Wall describes the advice provided to British intending parents by an Indian fertility clinic. In this case, the intending parents, having created embryos using an anonymous egg donor and the intending father's sperm, used two different gestational surrogate mothers from India at the same time and had two children closely together.

⁷¹⁸ It should be noted that the *Assisted Reproductive Technologies (Regulation) Bill*, still under consideration in India, contains a clause (No. 34(20)) which would put an end to this practice, by stating: "A couple or an individual shall not have the service of more than one surrogate at any given time."

⁷¹⁹ One case involved an ISA in Canada and another in the USA.

⁷²⁰ In some States, it will be the agency, and in some the clinic (see para. 143 above).

⁷²¹ In Ukraine, according to the Ukrainian Instruction on Procedures for ART, a surrogate mother must be a legally capable woman over 18 years old and have had at least one child of her own. She should also have given her voluntary written consent for participation in the programme and have no contraindications for pregnancy.

⁷²² Although, in some States, there are professional guidelines or good practice standards which may be followed: e.g., in the USA, those of the American Society for Reproductive Medicine ("ASRM").

mentioned by several lawyers that some experienced agencies in the USA have developed sophisticated assessment processes for possible surrogate mothers, including psycho-social screening, as well as medical, financial and criminal records checks, amongst others (e.g., whether the woman has a family support system, employment and whether she has already had a live birth).⁷²³ Nonetheless, social work professionals commented that, even in these cases, counselling may not be provided to potential surrogate mothers, something which would have a different emphasis from psycho-social screening.⁷²⁴

Informed consent

194. Several State and lawyer responses indicated that whether surrogate mothers have given full and informed consent to ISAs is an issue of real concern, particularly in cases involving certain States of birth.⁷²⁵ Concerns include: whether women have been properly informed of the physical and psychological risks associated with surrogacy, how it is ensured that the decision is free from financial, social and emotional pressure (duress), and how informed decision-making and the consent of illiterate women is ensured. In relation to the pressures which may be placed upon women to become surrogate mothers in certain States of birth, a report by the Centre for Social Research in India highlights the stark economic pressures for women (and their economic vulnerability) in less developed States.⁷²⁶ The same report also indicated the pressure which may be placed on women by their husbands due to the significant sums of money involved.⁷²⁷ In relation to the concerns surrounding the illiteracy of some surrogate mothers in certain States of birth,⁷²⁸ one State reported that, *"we were particularly concerned in one case where we received a copy of a surrogate mother's consent, where the surrogate mother had signed consent by simply making a thumb print. This raised for us serious concerns about whether all information is translated...and whether the surrogate mother understands the implications of what she is signing"*.⁷²⁹ These are concerns echoed in other States, as well as in the case law concerning ISAs. For example, in a recent Australian decision, the judge stated, it is *"troubling that this 29 page document is written in English. It is signed by the applicant and, because she is illiterate in English and Hindi, the mother's attestation is her thumb print. There is nothing in the document which suggests that before the birth mother signed it that it was read and translated to her."*⁷³⁰ Indeed, the fact that many surrogate mothers in India are not fully aware of the terms of their contracts (often only orally explained to them by the clinics, with no ability for independent verification or legal advice – see below) was made clear in the Centre for Social Research's report.⁷³¹

⁷²³ Often using independent psychologists and medical experts.

⁷²⁴ Social work professionals have stated that psycho-social screening may be more focused on ensuring that the woman is suitable in terms of the intending parents and agency's perspective: *i.e.*, ensuring that she will not renege on the agreement. Counselling would help to prepare the woman for the long-term effects of her decision.

⁷²⁵ *E.g.*, Canada, Finland, Israel, New Zealand, Norway and Switzerland indicated that they had encountered problems concerning these (and other) matters relating to surrogate mothers and Australia, Finland, Ireland, Israel, Mexico, New Zealand, Norway, Philippines, Sweden and Switzerland indicated that this was an area of concern (see responses to Question 66 g) and 67 d)).

⁷²⁶ See the report by the Centre for Social Research (India) (note 574 above), at p. 4. The report states that: *"[w]omen who undertake these assignments in India, ... are often in need of money. Their need for money is so acute that more than often, childless couples can negotiate a better price as a result of competition."* It also reports (at p.38) that over 85% of surrogate mothers interviewed reported that poverty had driven them to take the decision to become surrogate mothers.

⁷²⁷ *E.g.*, the Centre for Social Research (India) report (note 574 above) noted that *"we found that it was the husband who emotionally pressurised the wife to undergo surrogacy in order to buy a house...or to start a business..."*

⁷²⁸ The Centre for Social Research (India) report (note 574 above) identified that almost half of the 100 surrogate mothers interviewed were educated to primary level, whilst in Anand, around 51.7% of the surrogate mothers were completely illiterate.

⁷²⁹ New Zealand's response to Question 67 d).

⁷³⁰ *Mason v. Mason* [2013] Fam CA 424 (para. 4), per Ryan J. Although it should be noted that one Indian doctor, in response to Questionnaire No 3, stated that surrogate mothers he deals with are provided with independent legal representation and an independent psychologist.

⁷³¹ See note 574 above. It was also reported by the Centre for Social Research (India) that *"the payments to the surrogate mothers are arbitrarily decided by the infertility physician of the clinic / hospital..."* (p.47). Further, surrogacy contracts are often only be signed in India once a pregnancy is confirmed and even into the

195. Part of the concern expressed by some States and lawyers in their responses to the Questionnaires on this point relates to the absence of independent legal advice provided to surrogate mothers in some States of birth. Yet again, however, whether legal advice is provided to surrogate mothers and, if so, by whom, varies significantly from State to State and even agency to agency. In the USA and Canada, lawyer responses evidence that some agencies ensure that legal advice is provided to surrogate mothers prior to entering into an ISA and at all relevant stages.⁷³² Some insist that *independent* legal advice should be provided to the surrogate,⁷³³ whilst others routinely have the same lawyer advise both intending parents and surrogate mothers.⁷³⁴ In either case, the intending parents pay for this legal advice as part of the overall cost of the ISA. The responses from individuals who have undertaken ISAs in the USA confirmed this and reported that each party (the surrogate, intending parents and egg donor, where relevant) had their own independent legal representation, usually at the recommendation of the US agency. In only one case did the intending parents state that they had the same lawyer as the surrogate mother. In other States, however, such as India, Georgia and Mexico, this is reportedly not the case and it appears that it is not common practice for legal advice to be provided to a surrogate mother. Moreover, if any advice is provided, it is not provided by an independent lawyer but a lawyer working for the agency or clinic.

196. The clauses in some surrogacy contracts which provide that the surrogate must comply with all legal procedures in any other State and will face damages for breach of contract if she does not do so were also reported as a concern by some lawyers from receiving States. They commented that this clause is unhelpful since it could effectively undermine the surrogate mother's free consent, an issue often considered carefully by the competent authorities in the receiving State.

197. Some social work professionals have commented that as surrogate mothers undergo health risks for the benefit of others, a "high level of informed consent" should be required.⁷³⁵

Physical and psychological health⁷³⁶

198. Several States also expressed concern regarding the care provided to some surrogate mothers prior to, during and after their pregnancy.⁷³⁷ Again, however, these concerns vary greatly in intensity depending upon the particular State of birth involved. In relation to the surrogate mother's physical health, troubling practices were reported by several States and lawyers in relation to the high number of embryos being transferred to surrogate mothers.⁷³⁸ In some States of birth, this practice may also lead

second trimester: "the delay in signing the contract puts the surrogate mother at the mercy of the clinic, doctor and commissioning parents."

⁷³² Although this is not the case across the USA and some agencies consider that the surrogate mother should be able to choose whether she receives legal advice and if she does not wish to have such advice, beyond psychological screening and reference checks, her autonomy and ability to make decisions for herself should be respected.

⁷³³ Although in some cases the agency will engage the independent lawyer on behalf of the surrogate mother.

⁷³⁴ This was the case in Ukraine where a lawyer reported often advising both the intending parents and the surrogate mother concerning the surrogacy arrangement. Cf. the AAARTA Code of Ethics in this respect (note 280 above), in particular, Arts 2 and 3.

⁷³⁵ "Cross-border reproductive services – suggestions for ethically based minimum standards of care in Europe", by P. Thorn, T. Wischmann & E. Blyth, *Journal of Psychosomatic Obstetrics & Gynaecology*, 2012, 1 to 6 at p.3.

⁷³⁶ This issue should also be considered in light of the right to maternal, child and reproductive health contained within Art. 12 of the ICESCR (see note 701 above and para. 21 of the General Comment mentioned therein).

⁷³⁷ See note 725. The medical care provided to the surrogate mother was, in particular, highlighted as a concern by Canada, Finland, Ireland, Israel, Mexico, New Zealand, Norway, Philippines, Sweden and Switzerland.

⁷³⁸ See also para. 186 above concerning the risk to the child's health as a result of this practice. Another concern reported in the Centre for Social Research (India) report (note 574 above) is the number of IVF cycles undertaken by some surrogate mothers in India, with 10-20 cycles being reported and / or the number of times women are allowed to be surrogate mothers.

to questions concerning foetal reduction.⁷³⁹ Concerns were also expressed about the standard of medical care provided to surrogate mothers in some States of birth, with medical follow-up post-pregnancy being a particular concern. For example, Norway mentioned a case in which a surrogate mother in India died after giving birth to child and the media has also reported a case in which another Indian surrogate mother died 8 months into a pregnancy for a US couple.⁷⁴⁰ Another concern, reported in relation to India, was the routine use of caesarean sections instead of vaginal delivery which also increases the health risk to the surrogate mother. Indeed, there are references in case law to the troubling nature of some surrogacy contracts in this regard. In the Australian case of *Mason*, the judge stated: “it should not pass without comment that the provisions which limit the birth mother’s ability to manage her health during the pregnancy and make decisions about delivery of her babies, are troubling.”⁷⁴¹ The media has also reported these issues in India, with one article following an interview with a surrogate mother stating, “she had no idea...that she would have no say if the parents chose to have her abort the child.”⁷⁴²

199. In addition, the psychological impact of surrogacy arrangements on surrogate mothers was an area highlighted as one of concern and in need of quality research.⁷⁴³ As social work professionals mentioned, whilst there is often psychological screening to determine a surrogate mother’s suitability from the perspective of the success of the ISA, there may be less or no psychosocial support for surrogate mothers in order to assist them with coping with any longer-term effects.⁷⁴⁴ One State also emphasised the risk of social exclusion for surrogate mothers in some States as a result of having undertaken a surrogacy arrangement.⁷⁴⁵ Further, several lawyers reported concerns that, in some States of birth, intending parents often do not meet the surrogate mother at all and the entire transaction is conducted at “arms length”.⁷⁴⁶ In such circumstances, there is little knowledge as to how the surrogate mother was treated.⁷⁴⁷ In some cases, there may also be concerns about the treatment of the surrogate mother by intermediaries and the absence of psychological support. For example, one UK lawyer reported that she had had a case where a surrogacy agency treated the surrogate mother very poorly with bullying behaviour during a pregnancy, and this raised concerns for the lawyers, as well as for the English court.

(d) Gamete Donors

200. The physical and psychological risks to any egg and sperm donors involved in an ISA also have to be taken into consideration.⁷⁴⁸ Again, legislation and professional guidance concerning gamete donation varies significantly according to the particular

⁷³⁹ See this media story which highlights a number of concerns, particularly in India, including high number embryo transfers, foetal reductions and multiple women being impregnated at the same time: < <http://www.theage.com.au/national/surrogacys-painful-path-to-parenthood-20130322-2glhn.html> >.

⁷⁴⁰ < <http://www.cbsnews.com/news/are-indian-surrogacy-programs-exploiting-impoverished-women/> >: this media report also stated that (1) the surrogate mother’s family was not entitled to compensation following her death according to the contract (although the intending parents gifted the surrogate’s children \$20,000 in the end); and (2) the surrogate mother was illiterate and couldn’t read the contract she signed. Her family did not understand what would happen if she died.

⁷⁴¹ *Mason v. Mason* (note 607), per Ryan J at para. 4.

⁷⁴² See: < www.sfchronicle.com/local/bayarea/item/India-surrogacy-23858.php >. Such concerns are also highlighted in the Centre for Social Research’s Report (note 574 above): e.g., “the surrogate may be forced to terminate the pregnancy if desired by the contracting couple...” (at p.5).

⁷⁴³ E.g., Canada, Finland, Ireland, Mexico, New Zealand, Norway, Philippines, Sweden and Switzerland indicated this as an area of concern. New Zealand mentioned the need for further research.

⁷⁴⁴ In the Centre for Social Research’s (India) report (note 574 above), it was noted that surrogate mothers recalled that “they cried a lot at the separation point” (at p.55). Ongoing psychological support is unlikely to be provided to such women.

⁷⁴⁵ E.g., due to the stigma involved (this is a concern in India and possibly Thailand). See Switzerland’s response to Question 67 e). The Centre for Social Research (India) report (note 574 above) noted that surrogacy in India is still looked upon as a “stigma and a taboo”.

⁷⁴⁶ This was reported to be the case frequently in India and also was reported to have occurred in Mexico (Tabasco).

⁷⁴⁷ In contrast, in the USA, there is often contact between the intending parents and the surrogate mother and sometimes enduring relationships are forged (see para. 141 above).

⁷⁴⁸ E.g., one known risk for egg donors is that of “hyperstimulation” which may occur if the ovaries are over-stimulated (in order that a large number of eggs can be harvested).

State in which the donor resides, and hence the medical practices and care will also vary, as may issues such as whether psychological support or counselling is provided.

(e) Intending Parents

Misinformation, particularly concerning the potential legal problems in the receiving State

201. A primary concern of a large number of States and lawyers remains the (mis)information provided to intending parents, particularly concerning the legal problems they may encounter in the receiving State in relation to their and the child's legal status.⁷⁴⁹ Whilst most agencies or clinics appear to undertake checks to ensure that any legal requirements of the State of birth are fulfilled,⁷⁵⁰ the situation is very different concerning the legal requirements of the receiving State. Although some experienced agencies in some States of birth do insist on intending parents receiving independent legal advice from the receiving State prior to engaging in an ISA,⁷⁵¹ these agencies unfortunately are the exception rather than the norm.⁷⁵² Many lawyers commented that legal advice from the receiving State is not routinely sought by foreign agencies or clinics and intending parents are not being informed to obtain such advice.⁷⁵³ One lawyer stated that the information provided by some surrogacy agencies and clinics in this regard is still "routinely misleading" and lacks transparency concerning the problem which might arise.⁷⁵⁴ This causes significant problems when the intending parents need to travel home and have their legal parentage established in the receiving State. As one lawyer put it, "*I have not seen evidence in any of the contracts, or surrogacy agreements that confirms that the intended parents are entitled to be treated as parents in the receiving State... The concern is on the legality of the arrangement in the country in which the arrangement is undertaken and on ensuring that parenthood passes in that country. Little, if any, regard is had to the position of the child vis-a-vis the intended parents' country. This is very unfortunate in my view and has often caused serious practical difficulties. This is the same in all of the countries I have had involvement with.*" Some lawyers stated that it is particularly remiss of agencies / clinics not to insist on intending parents obtaining legal advice from the receiving State since the legal requirements of the receiving State may well affect the profile of the surrogate mother with which the intending parents should be matched in order that the family encounters the minimum

⁷⁴⁹ *E.g.*, Australia, Canada, Finland, Ireland, Israel, Mexico, Netherlands, New Zealand, Norway, Philippines, Sweden and Switzerland indicated this as an area of concern.

⁷⁵⁰ They are usually (but not always) based in these States. For example, following the new visa rules in India, it appears that checks are being undertaken by many clinics to ensure couples comply with these requirements. In Ukraine, the two main eligibility criteria that intending parents should be a married heterosexual couple and should have medical indications for surrogacy according to Ukrainian law, appear to be generally checked by clinics.

⁷⁵¹ And / or the State of their nationality, if different.

⁷⁵² Some of these agencies, in fact, often work "in tandem" with lawyers in the intending parents' State of residence (and / or nationality if different). One US lawyer, working in a surrogacy agency, stated that "we work to understand the general legal position of surrogacy in all of the States where our intending parents reside. This is important as it guides our matching process – we match intending parents with gestational carriers first and foremost based on the legal compatibility between the two States involved. This means that we work to ensure that we can produce the documentation needed for the safe return of the child(ren) and the intending parents". A Ukrainian lawyer stated that the diplomatic missions of the receiving State in the State of birth may sometimes be consulted to clarify the current situation there and procedures for obtaining passports. A Canadian lawyer also noted that professional organisations with international membership, such as AAARTA, have lists of lawyers in other States who can provide legal advice to the intending parents.

⁷⁵³ The report by the Centre for Social Research in India (note 574 above), states that fertility clinic websites in India often contain "facts and fiction...and it is not uncommon for them to encourage couple to ignore the implemented laws regarding surrogacy in their home country" (at p.23).

⁷⁵⁴ One lawyer stated, "intended parents are often given to believe that they will be the legal parents of the child for all purposes and in all jurisdictions". One example is the case of *Re X and Y (children)* [2011] EWHC 3147 (Fam) in which it was noted by the judge that the intending parents, engaging a surrogate mother in India through an Indian clinic, "did not consult solicitors in the UK about the legal implications of an international surrogacy arrangement before flying to India though they were aware of some of the legal difficulties they might encounter" (para. 10).

legal difficulties in the receiving State (*e.g.*, an unmarried surrogate may be preferable if the intending parents live in certain receiving States⁷⁵⁵).

202. In some receiving States, intending parents are becoming more aware themselves of the need to obtain legal advice in their State of residence before commencing with an ISA, often as a result of government advice on public websites. However, frequently the burden is on intending parents to understand the need for, and seek, legal advice in their State of residence and / or nationality.⁷⁵⁶ Several responses from individuals who have personally undertaken ISAs corroborated this, describing how hard it had been to find reliable information and stating that it had taken a long time to find the right information and contacts.

Suitability of intending parents to enter into an ISA

203. Several receiving States and some social worker submissions reported the fact that intending parents are not subject to any routine suitability checks in many States of birth as a matter of concern. This was also a concern expressed by some lawyers who reported that they had seen cases involving significantly older intending parents or those who have previously been turned down for adoption pursuing an ISA.⁷⁵⁷ Whilst some lawyers and agencies involved with ISAs have principled objections to detailed suitability assessments (akin to “home studies” in adoption) being undertaken of intending parents in an ISA context, particularly if the intending parents’ own genetic material is being used to conceive a child, the need for some basic professional standards in relation to this issue still appears to be acknowledged by many involved in the field. Indeed, in line with this approach, the Questionnaire responses revealed that, in practice, many experienced agencies / clinics in some States of birth do, in fact, have requirements which must be fulfilled by intending parents in order for them to be accepted into the surrogacy programme and there are also non-binding professional guidelines on these matters in some States which require basic medical and psychological screening.⁷⁵⁸ Some agencies and lawyers also reported policies in this regard requiring, for example, intending parents to comply with certain upper age limits, to have received a medical diagnosis of infertility,⁷⁵⁹ to have undergone criminal records checks and even, in some cases, requiring certain standards concerning the motivations of the intending parents.⁷⁶⁰

204. However, whether there are any such requirements and, if so, their nature and the degree to which they are enforced will currently often depend upon the particular agency / clinic.⁷⁶¹ In contrast, in one (lesser used) State of birth, fertility clinics are mandated by primary legislation to conduct a “welfare of the child” assessment before proceeding with any fertility treatment.⁷⁶² This is not akin to a “home study” in adoption cases but involves basic, minimum checks concerning the intending parents, including checks which pertain to past or current circumstances which may lead to a child experiencing serious physical or psychological harm or neglect, and those concerning past or current circumstances which are likely to lead to an inability to care throughout childhood for any

⁷⁵⁵ See the discussion of the case law above: *e.g.*, if the intending parents are German, engaging an unmarried surrogate mother will make establishing legal parentage and acquiring German nationality far easier.

⁷⁵⁶ This issue also relates to the (mis)-information or poor information sometimes provided to intending parents (again – this is highly dependent upon the State of birth and particular agency).

⁷⁵⁷ Although more rarely, shocking and extreme cases do also exist – see para. 206 below.

⁷⁵⁸ However, this is not universal as one experienced US agency which responded to Questionnaire No 4 does not undertake psychological checks on intending parents as a matter of principle as it sees this as discriminatory against those who are infertile.

⁷⁵⁹ Where relevant: obviously this is not the case, *e.g.*, for same-sex male couples.

⁷⁶⁰ This was reported to be the case in the USA and Ukraine. A Ukrainian lawyer stated that the intending parents will undergo full medical screening and also have to complete a detailed questionnaire on their personal details, including living conditions, any criminal record and their motivation for surrogacy.

⁷⁶¹ Some social workers have commented that if the agencies / clinics themselves are undertaking these assessments, there may well be a “conflict of interest”.

⁷⁶² The UK: see s.13(5) of the Human Fertilisation and Embryology Act 1990 (as amended in 2008) which states that, “[a] woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth.”

child who may be born, or that are already seriously impairing the care of any existing child of the family.⁷⁶³

205. In addition to any checks which may (or may not) be undertaken in the State of birth, it is interesting to note that the processes currently required in some *receiving* States for the child to obtain nationality and / or for the intending parents to acquire legal parentage may involve some assessment of the intending parents. For example, in the UK, for a parental order application to be successful, a “welfare assessment” of the child will be required from a court appointed social worker and this will include an assessment of the intending parents’ ability to care for the child appropriately. In other States, similar assessments will be required by social work professionals in order for the necessary adoption(s) to be completed. However, at this stage, the child is born and has usually already been living with the intending parents for some time. It may be possible to “catch” cases where there are grave concerns at this stage but many States reported that this is the wrong stage of the process for such checks to be undertaken.⁷⁶⁴ As one State put it, “we are concerned that at some point a surrogacy arrangement will be made and a child born and the authorities find the intending parents to be unfit for parenting...”⁷⁶⁵ Such cases do unfortunately already exist.

206. Moreover, whilst there is no doubt that the vast majority of intending parents undertake ISAs with good intentions after years of struggling to have a family, there are a minority of extremely troubling cases which have resulted from a system which has no enforced minimum checks concerning intending parents. For example, the ISS Network reported a case in which a married, heterosexual couple conceived twins through an ISA in South East Asia.⁷⁶⁶ The intending parents subsequently divorced and shared the care of the children until the children were removed from the intending father’s care, aged 5, when he was charged with child sex offences. Unfortunately this case is not unique.⁷⁶⁷ The Centre for Social Research also reported a case concerning a foreign couple who undertook a surrogacy arrangement in India in order to obtain an organ for their sick child.⁷⁶⁸

207. It is therefore clear that a balance has to be struck and, whilst the different context from adoption may require a different approach, some basic, minimum standards are required in order to protect children from harm and to comply with basic human rights standards.⁷⁶⁹

⁷⁶³ HFEA Guidance is provided to clinics in the form of a “Code of Practice” which states at para. 8.3 that, “[t]he centre should assess each patient and their partner (if they have one) before providing any treatment, and should use this assessment to decide whether there is a risk of significant harm or neglect to any child...” Factors to take into account during the assessment process are listed at para. 8.10 and include: (1) past or current circumstances that may lead to any child mentioned above experiencing serious physical or psychological harm or neglect, *e.g.*, previous convictions relating to harming children, child protection measures taken regarding existing children, or violence or serious discord in the family environment; as well as, (2) past or current circumstances that are likely to lead to an inability to care throughout childhood for any child who may be born, or that are already seriously impairing the care of any existing child of the family, *e.g.*, mental or physical conditions, drug or alcohol abuse, medical history, where the medical history indicates that any child who may be born is likely to suffer from a serious medical condition, or any circumstances that the centre considers likely to cause serious harm to any child. The Code of Practice is available online: < http://www.hfea.gov.uk/docs/8th_Code_of_Practice.pdf >.

⁷⁶⁴ *E.g.*, this was identified as an area of concern by Australia, Canada, Finland, Ireland, Israel, Netherlands, New Zealand, Norway, Philippines, Sweden and Switzerland.

⁷⁶⁵ New Zealand’s response to Question 67 j).

⁷⁶⁶ Reported in the “ISS Network Contribution” (on file with the Permanent Bureau). The couple entered into the ISA due to the intending mother’s advanced age and the fact she could not conceive naturally.

⁷⁶⁷ *E.g.*, Prel. Doc. No 10 of March 2012 at note 7, and Prel. Doc. No 11 of March 2011, at para. 31. More recently, the media has reported the following case in which the “purchase” of a child for the purposes of a paedophile ring was disguised as a “surrogacy arrangement”: < <http://www.stuff.co.nz/world/americas/9497260/Paedophile-who-bought-baby-jailed-30-years> >.

⁷⁶⁸ Note 572 above at p.5.

⁷⁶⁹ *E.g.*, Arts 3(2) (“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being”), 6 and 34 to 37 of the UNCRC, amongst others.

Gender issues

208. A significant gender issue concerning intending parents which must be borne in mind is that, in the current situation and as has been illustrated above, if heterosexual couples undertake ISAs (or single women), it is often the intending mother who is left in the most precarious legal position *vis-a-vis* the child. In most cases, this is irrespective of whether she is genetically related to the child or not.

(f) The competency and conduct of some intermediaries

209. Several States and lawyers reported the competency and / or conduct of intermediaries as an area of concern.⁷⁷⁰ A general concern of some States was the extent to which the best interests of children are the primary consideration of such intermediaries (“in many cases, the services provided in this industry are driven by profit, rather than the best interests of the child”⁷⁷¹). This appears to be yet another issue which varies considerably depending upon the States involved and the particular intermediary concerned. There are undoubtedly reports of very good practices in ISA cases with professionals trying to bring about the best solutions for the family and ultimately the child in difficult circumstances. Indeed, in this respect, individuals who had undertaken ISAs noted that where intermediaries are experienced and follow ethical and professional good practice standards, they can act as an important safeguard to the process and are a vital source of support on what is a complex and emotional journey for intending parents. This is also borne out by the problems which can occur in situations where intending parents make arrangements themselves (*e.g.*, via the internet).⁷⁷² Nevertheless, significant concerns were expressed by intending parents and lawyers because of the variable quality and standard (including ethical standards) of intermediaries both within and across States. As two experienced lawyers (from Ukraine and Argentina) put it, the area requires specialist knowledge and too many intermediaries, keen to benefit from the “booming business”, eagerly offer their services despite the fact that they do not have the necessary expertise.⁷⁷³

210. Many of the more specific concerns relating to intermediaries have been discussed in the categories above: for example, the misinformation (or absence of any information) provided by some agencies and / or lawyers to intending parents concerning international legal issues, the conduct towards surrogate mothers by certain agencies or clinics, the medical practices in some clinics and the conflict of interest issues which may not be adequately addressed by some lawyers. Beyond this, States and lawyers also reported that where problems have occurred in cases, some intermediaries have been unwilling to assist with resolving the matter. For example, one State reported that in a case in which the wrong gametes had been used by the clinic, the clinic failed to help by identifying the child’s genetic parents or finding out what happened to the missing gametes.⁷⁷⁴ Further, a lawyer who needed to obtain an Indian surrogate mother’s consent for the purposes of English parental order proceedings also reported that the clinic refused to provide assistance in contacting her.⁷⁷⁵

211. Moreover, four States reported having encountered problems following the behaviour of intermediaries which was criminal according to international or domestic legal standards.⁷⁷⁶ In two cases, this related to trafficking allegations (involving Thailand

⁷⁷⁰ *E.g.*, Australia, Canada, Finland, Ireland, Israel, New Zealand, Norway and the Philippines.

⁷⁷¹ Comment by New Zealand.

⁷⁷² *E.g.*, in particular, traditional surrogacy arrangements made directly between parties over the internet which subsequently go wrong.

⁷⁷³ This is reflected in the fact that one lawyer from a receiving State reported that some contracts, for example in Ukraine, have been drafted by those without the requisite experience and do not even comply with Ukrainian legal requirements.

⁷⁷⁴ See New Zealand’s response to Question 67 h).

⁷⁷⁵ See also *Re D and L (Surrogacy)* [2012] EWHC 2361 in which a surrogate mother in India could not be traced, even after using an enquiry agent.

⁷⁷⁶ Denmark, New Zealand, Norway and Switzerland.

and Ukraine).⁷⁷⁷ There have also been particularly acute examples of criminal behaviour by intermediaries reported in the media, such as the case of Theresa Erickson, sentenced to imprisonment for her involvement in what was, in effect, “baby-selling”, disguised as a surrogacy,⁷⁷⁸ as well as another US intermediary who was recently sentenced to 5 years in jail for “wire fraud” having cheated prospective intending parents out of more than \$2 million.⁷⁷⁹

212. Although the question was not asked directly, in the submissions from individuals who have undertaken ISAs, two sets of intending parents reported dissatisfaction with the service provided by their surrogacy agency.

(g) The financial aspects of ISAs

213. The costs which may be incurred by intending parents undertaking an ISA have been described above.⁷⁸⁰ It is plain from the amounts disclosed therein that international surrogacy is not an option available to those without access to substantial funds.⁷⁸¹

214. The financial side of ISAs was an area of concern identified by several States.⁷⁸² Concerns related to the commodification of women and children in light of the amounts involved and also the risk that women could be exploited for financial gain. These risks were identified to be greater in some States of birth. Several lawyers also reported excessively high agency fees as an area of concern and one set of intending parents stated that they would have appreciated greater transparency from their agency at the outset concerning the fees which would be incurred.

(h) Criminal Activity

215. Lastly, it should be noted that several States expressed concerns regarding criminal activity which had taken place in the State in connection with ISAs.⁷⁸³ For example, in Australia (NSW), it was reported that, despite the 2010 legislation which prohibits New South Wales residents from going abroad to enter into a for-profit surrogacy arrangement, persons are still regularly travelling to Thailand, India and the USA for such arrangements. The Czech Republic and Portugal reported that their authorities have been faced with situations which are presented to the authorities as applications for step-parent adoptions but which they suspect are “covering” surrogacy arrangements (both domestic and international).⁷⁸⁴ In Canada, the first federal charges were brought under

⁷⁷⁷ In relation to trafficking issues, see also Prel. Doc. No 10 of March 2012 at note 11 which mentions the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (entry into force 25 December 2003, Protocol to the *United Nations Convention Against Transnational Organised Crime* of 29 September 2003), as well as the “Model Law against Trafficking in Persons”, developed by the United Nations Office on Drugs and Crime (“UNODC”), which specifically mentions “forced pregnancy” and the “use of women as surrogate mothers” as, in certain circumstances, possible examples of “exploitation” which States may wish to consider when legislating to criminalise “trafficking”.

⁷⁷⁸ See the media report at: < <http://abcnews.go.com/US/san-diego-women-sentenced-baby-selling-case/story?id=15785854> >.

⁷⁷⁹ See the media report at: < <http://www.modbee.com/2013/05/13/2714124/surrogacy-swindle-nets-5-year.html> >.

⁷⁸⁰ See paras 136 et seq: though the costs identified therein do not include incidental costs such as travel and accommodation etc.

⁷⁸¹ In fact, the need for significant amounts of money has led to initiatives such as the establishment of websites to seek funding from the general public for surrogacy: see < www.krowdkidz.com/en >.

⁷⁸² E.g., Canada, Finland, Ireland, Israel, New Zealand, Norway, Philippines, Sweden and Switzerland.

⁷⁸³ The Philippines stated that, under the guise of “international surrogacy”, it has been reported that foreign resident couples are attempting to circumvent intercountry adoption laws and undertake illegal domestic adoptions. These are not, however, surrogacy arrangements since there is no arrangement in existence pre-conception and they are in breach of Art. 35 UNCRC and its *Optional Protocol on the sale of children, child prostitution and child pornography*. In its 2011 States Party Report to the UN Committee on the Rights of the Child (CRC/C/OPSC/PHL/1), the Philippines stated that legislation had been adopted to punish the “offering [of] money to a pregnant mother in exchange for permission to adopt the child” (para. 96).

⁷⁸⁴ E.g., a surrogate mother is found by intending parents through the internet (either in their State or in another State, depending upon whether a traditional or gestational arrangement is required). Following the child’s birth (either in the State or in another State), the intending, genetic father acknowledges his legal paternity in accordance with the general rules and the intending mother will then apply for a step-parent adoption (at which point the case comes to the attention of the authorities).

the Assisted Human Reproduction Act in February 2013 in Ontario. A company and its owner face 19 charges including charges relating to accepting payment for arranging the services of a surrogate mother, the purchase of ova from a donor and payment to a woman to become a surrogate mother.⁷⁸⁵

3. Developments in States' approaches to ISAs, including bilateral, regional and international efforts at co-operation

216. Several internal developments concerning ISAs were reported by States. In some States, developments were in the form of the drawing up of non-binding guidance, whether for the competent authorities dealing with ISA cases or for intending parents considering ISAs.⁷⁸⁶ In other States, it was reported that new legislation or rules specifically concerning ISAs are currently being considered.⁷⁸⁷ For example, in Sweden, in June 2013, the government established an inquiry "to consider ways to expand the possibilities for involuntary childless people to become parents".⁷⁸⁸ This work will include consideration of whether there is a need for special rules concerning ISA cases in Sweden, in particular in view of the need to eliminate legal uncertainty for children. In Switzerland, it was reported that parliament has mandated the government to provide a report on ISA cases and the recognition in Switzerland of the legal parentage arising as a result.⁷⁸⁹ In Norway, temporary legislation and rules have already been passed in order to permit transfers of legal parentage to intending parents following ISAs, as well as to permit the recognition of legal paternity established abroad in some cases.⁷⁹⁰ These measures apply to children currently residing in Norway with intending parents who have not been able to establish their legal parentage under Norwegian law. The aim of the temporary measures is to provide a remedy for the children currently living with "limping" legal parentage. However, at the same time, the drawing up of clear governmental guidance aims to prevent such situations occurring in future insofar as is possible (it also seeks to ensure consistent practices by competent State authorities).

217. Interestingly, only a small number of States reported that they had engaged in cross-border co-operation with other States in ISA cases at the current time.⁷⁹¹

218. At the regional and international levels, there has been interesting research and investigative work undertaken concerning ISAs, such as the comparative studies undertaken for the EU Parliament and ICCS.⁷⁹² Moreover, regional and international human rights bodies have been, or are currently, engaged with the issues arising from ISAs. For example, as mentioned above, there are currently four ISA cases pending before the ECtHR.⁷⁹³ In addition, concerns about ISAs have been reported to the UN Committee on the Rights of the Child in several State reporting procedures, including one concerning which the Committee has yet to issue its observations.⁷⁹⁴

⁷⁸⁵ It should be noted that it was not specified whether these charges relate to domestic or international surrogacy arrangements, or both.

⁷⁸⁶ *E.g.*, Australia, Canada (immigration/nationality guidance only and concerning ART cases generally), Ireland, New Zealand, Norway, UK and Switzerland reported developing guidance in the area.

⁷⁸⁷ *E.g.*, Finland, Israel, Mexico, Philippines, Sweden and Switzerland. Draft legislation concerning surrogacy arrangements also remains pending in India and Thailand (from the Permanent Bureau's own research). Australia also reported that it is currently awaiting the outcome of the Australian Family Law Council's report into issues in relation to who is considered to be a parent of a child under the Family Law Act 1975 (Cth). It is understood that this report will include consideration of ISAs. Furthermore, the UK has recently established a cross-departmental group to consider the issues arising in the ISA context.

⁷⁸⁸ See Sweden's response to Question 69.

⁷⁸⁹ See Switzerland's response to Question 40.

⁷⁹⁰ See Norway's response to Questions 39 and 69.

⁷⁹¹ *E.g.*, New Zealand stated that it had co-operated with Australia, Thailand and the USA (also reported by the USA), and the Netherlands reported cross-border co-operation with India and Ukraine.

⁷⁹² The Permanent Bureau has actively co-operated, during this project, with the team which undertook the comparative study for the EU Parliament, as well as ICCS.

⁷⁹³ See note 673 above.

⁷⁹⁴ *E.g.*, see the "List of issues in relation to the combined 3rd and 4th periodic reports of India", dated 25 November 2013 (CRC/C/IND/Q/3-4) issued by the Committee for its upcoming 66th session (26 May – 13 June 2014) which asks, at Question 6, "[p]lease provide detailed information on any measures taken to ensure that legislation and procedures relating to surrogate birth are compliant with the Convention, particularly articles 3, 6, 7, 8, 9, 19, 21 and 35". The issue was also raised by the Committee in its questions to Germany concerning

219. It should also be mentioned that, more generally in relation to “cross-border reproductive care” (“CBRC”),⁷⁹⁵ international and regional initiatives have been undertaken calling for, or establishing, best practices and guidelines for CBRC.⁷⁹⁶ For example, the International Federation of Social Workers (“IFSW”) has issued a policy statement which notes “[t]he particular challenges of cross border reproductive service provision” and promotes “engagement with international organisations ... to develop international guidelines for cross border reproductive care”.⁷⁹⁷ Further, at the regional level, the European Society of Human Reproduction and Embryology (“ESHRE”) has developed a Good Practice Guide to assist centers and physicians providing fertility treatment to foreign patients.⁷⁹⁸ In addition,⁷⁹⁹ case law of the ECtHR has dealt with issues concerning access to certain forms of ART and, in this context, has also touched upon the ability of persons to travel to other States to undertake forms of ART prohibited at home.⁸⁰⁰

220. The conclusions which are drawn from this Study and the consequential analysis of the desirability and feasibility of future work at the Hague Conference on the “Parentage / Surrogacy Project” are discussed in Prel. Doc. No 3 B of March 2014.⁸⁰¹

the 3rd and 4th reports of Germany for the 65th Session (13-31 January 2014, see List of Issues: CRC/C/DEU/Q/3-4). The Committee asked what measures Germany had taken in ISA cases to address the rights of children living in Germany born following ISAs and, in particular, to prevent their statelessness (see para. 7). International surrogacy was also discussed in the context of Israel's second to fourth periodic reports at the Committee's 63rd session (27 May – 14 June 2013) (although the Concluding Observation on surrogacy (see paras 33-34 of CRC/C/ISR/CO/2-4) seemingly focuses on the internal regulation of surrogacy.)

⁷⁹⁵ See the **Glossary** at Annex A to Prel. Doc. No 3 B of March 2014.

⁷⁹⁶ It should also be noted that, within the EU, free movement of persons principles are relevant to this phenomenon, as well as *Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare*.

⁷⁹⁷ See the Policy Statement of the IFSW on Cross Border Reproductive Services, adopted by the IFSW General Meeting in Salvador de Bahia, Brazil, August 14, 2008 (available at <http://ifsw.org/policies/cross-border-reproductive-services/>). The International Federation of Social Workers (IFSW) is a global organisation striving for social justice, human rights and social development through the promotion of social work, best practice models and the facilitation of international cooperation.

⁷⁹⁸ It aims to “ensure high-quality and safe assisted reproduction treatment, taking into account the patients, their future child and the interests of third-party collaborators such as gametes donors and surrogates. This is achieved by including considerations of equity, safety, efficiency, effectiveness (including evidence-based care), timeliness and patient centeredness”: see further, “ESHRE's good practice guide for cross-border reproductive care for centers and practitioners”, by Shenfield et al *Human Reproduction* Volume 26, Issue 7, at pp. 1625 to 1627 (quote from p. 1625).

⁷⁹⁹ As mentioned in **Part A, Section 2** above.

⁸⁰⁰ *E.g.*, see *S.H. and Others v. Austria* (App. No. 57813/00, 3 November 2011): in holding that neither in respect of the prohibition of egg donation for the purposes of ART, nor in respect of the prohibition of sperm donation for IVF, had the Austrian legislature exceeded the margin of appreciation afforded to it, the ECtHR specifically mentioned that “there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria” (para. 114, though note the dissenting opinion on this point). Also, see the Inter-American Court of Human Rights case of *Artavia Murillo v. Costa Rica* (see note 275 above and the quote at para. 56).

⁸⁰¹ See note 2 above.