

THE PARENTAGE / SURROGACY PROJECT: AN UPDATING NOTE

drawn up by the Permanent Bureau

* * *

LE PROJET FILIATION / MATERNITÉ DE SUBSTITUTION : NOTE DE MISE À JOUR

établie par le Bureau Permanent

*Preliminary Document No 3A of February 2015 for the attention
of the Council of March 2015 on General Affairs and Policy of the Conference*

*Document préliminaire No 3A de février 2015 à l'attention
du Conseil de mars 2015 sur les affaires générales et la politique de la Conférence*

I. INTRODUCTION¹

1. This updating note seeks to provide Members with an overview of some key developments² relevant to the "Parentage / Surrogacy Project" of the Hague Conference which have taken place since the 2014 meeting of the Council on General Affairs and Policy ("Council"). At the conclusion of that meeting, Council welcomed the work carried out by the Permanent Bureau on this Project and agreed that work should continue to explore further the feasibility of drawing up a multilateral instrument. To this end, Council invited the Permanent Bureau to continue information-gathering. In addition, whilst "the support expressed by a considerable number of Members for the establishment of an Experts' Group" was noted, Council deferred the final determination of the matter to its meeting in 2015.³

2. Three points should be noted at the outset of this document:

- (i) The Permanent Bureau's recommendation to Members concerning the "next steps" for this Project remains as stated at the 2014 Council meeting: that is, it recommends that Council mandate the convening of an Experts' Group to explore further the feasibility of drawing up a multilateral instrument in this field. This recommendation is set out in more detail at Section V of the [2014 Report](#)⁴ and this detail will not be re-stated in this note. However, one year on, issues relating to the proposed timing of the first meeting of the Group and the resource implications of the proposed work are addressed in Section V below.
- (ii) The analytical reasoning behind this recommendation, as well as the evidential basis for it, can be found in the 2014 Report and [Study](#).⁵ Members are respectfully requested to bear these documents in mind for the 2015 Council meeting.⁶ This note is merely a supplement to bring matters up-to-date and to confirm that developments in 2014 have continued to demonstrate the importance of the "Parentage / Surrogacy Project" remaining actively on the Agenda of the Hague Conference.
- (iii) Whilst most of the recent developments described in this note relate to international surrogacy arrangements ("ISAs"),⁷ since this is a growing and dynamic phenomenon, the recommendation of the Permanent Bureau at paragraphs 68 to 70 of the 2014 Report, made in light of the detailed consultation process undertaken and the analysis in the 2014 Report and Study, remains in terms of the broader scope of the recommended future work.

¹ The Permanent Bureau would like to thank Hannah Baker (Senior Legal Officer), the author of this Updating Note, Laura Martinez-Mora (Principal Legal Officer) and William Duncan (former Deputy Secretary General of the Hague Conference) for their advice and assistance, as well as Marta Tarragona (Intern) for her research assistance. The Permanent Bureau would also like to thank Nadine Lederer and Eleonora Lamm, scholars in Germany and Argentina respectively, who have kindly given of their time to keep the Permanent Bureau apprised of developments in their regions.

² Please note: this document does not attempt to provide Members with an exhaustive account of global developments relating to parentage / surrogacy matters in the course of the past year. Instead, the Permanent Bureau has selected some key developments of which it is aware and which it considers are particularly relevant for Members in view of the decision they are requested to make at the 2015 Council meeting.

³ Para. 3 of the "Conclusions and Recommendations of the 2014 meeting of the Council on General Affairs and Policy of the Conference" (8 to 10 April 2014), available on the Hague Conference website < www.hcch.net >.

⁴ "The desirability and feasibility of further work on the Parentage / Surrogacy Project", Prel. Doc. No 3 B of March 2014 (hereinafter, "the 2014 Report").

⁵ "A Study of Legal Parentage and the issues arising from International Surrogacy Arrangements", Prel. Doc. No 3 C of March 2014 (hereinafter, "the 2014 Study").

⁶ These two Preliminary Documents were originally circulated to Members in English in March 2014. In December 2014, the Report was circulated to Members in French and Spanish, and in February 2015 the Study was circulated to Members in French.

⁷ Please see the "Terminology" chart, available on the specialised "Parentage / Surrogacy Project" section of the Hague Conference website < www.hcch.net > (also Annex I to the 2014 Report).

II. SOME KEY INTERNATIONAL AND REGIONAL DEVELOPMENTS IN 2014

*The UN Committee on the Rights of the Child*⁸

3. A first point of note, which demonstrates both the important human rights concerns which the current situation regarding ISAs raises, as well as the increasing prevalence of such arrangements, is that issues relating to ISAs have been discussed at the UN Committee on the Rights of the Child in two different State reporting procedures in relation to which sessions took place in 2014.⁹ Interestingly, these issues have been debated in relation to one *receiving State*¹⁰ and one State of *birth*.¹¹ In relation to the receiving State (Germany), the UN Committee focused its queries on the legal status of the children born as a result of ISAs and requested information on, in particular, the measures taken to prevent such children from becoming stateless.¹² In relation to the State of birth (India), in response to civil society submissions¹³ highlighting concerns regarding the protection of children born in India as a result of ISAs,¹⁴ as well as the rights of surrogate mothers,¹⁵ the UN Committee requested that India provide information on the measures taken to ensure that legislation and procedures relating to surrogacy are compliant with the *UN Convention on the Rights of the Child* ("UNCRC").¹⁶ In this case, the UN Committee issued a Concluding Observation stating that: "[c]ommercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children's rights".¹⁷

4. These discussions follow debates regarding surrogacy, including ISAs, which took place at the UN Committee in 2013.¹⁸ It is notable that, before 2013, mentions of surrogacy at the UN Committee were rare.¹⁹ These developments might therefore be considered to add weight to the conclusion of the 2014 Report²⁰ that there is now a human, including children's, rights imperative to the work of the Hague Conference in this area and also that the need for this international work is only growing every year. Moreover, they might also be considered to add

⁸ The Permanent Bureau is in contact with the UN Committee and the Committee is therefore aware of the Hague Conference's "Parentage / Surrogacy Project" and its ongoing work in the field. Indeed, during its reporting procedure India was asked by the Committee whether it was aware of the work of the Hague Conference in this area and Israel also mentioned the Hague Conference's work and its involvement in it during its reporting procedure in 2013.

⁹ In relation to Germany, it should be noted that the documents mentioning ISAs (*i.e.*, the "List of issues" (see note 12 below) and the "Reply to the List of Issues" ((CRC/C/DEU/Q/3-4/Add.1), 23 December 2013) were drawn up in 2013 (see also the 2014 Study at note 794). However, the 65th session of the UN Committee at which Germany's reports were discussed took place in January 2014, hence its inclusion in this document.

¹⁰ As in earlier Permanent Bureau documents, "receiving State" is used here to denote the State in which the intending parents reside and the State to which they wish to return to live following the birth of a child abroad as a result of an ISA.

¹¹ "State of birth" is used to denote the State in which a child is born following an ISA.

¹² Para. 7 of the "List of issues in relation to the combined third and fourth periodic reports of Germany" (CRC/C/DEU/3-4), 10 July 2013. See also the 2014 Study at note 794.

¹³ See the submissions of "India Alliance for Child Rights" and the "Centre for Child Rights and Terre Des Hommes", available at < <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> >.

¹⁴ Concerns in this regard related to, *e.g.*, the legal status of children born following ISAs, the absence of suitability checks on intending parents and the situation for a child if he / she is abandoned by intending parents (following reported examples of cases involving such issues in India).

¹⁵ Concerns in this regard centred on issues of exploitation of women and girls as a result of the promotion of reproductive tourism.

¹⁶ "List of issues in relation to the combined third and fourth periodic reports of India", (CRC/C/IND/Q/3-4), 25 November 2013 at p.2.

¹⁷ Para. 57(d) of the "Concluding observations on the consolidated third and fourth periodic reports of India" (CRC/C/IND/CO/3-4), 13 June 2014. The Committee also recommended that India, "[e]nsure that ... legislation to be developed contain provisions which define, regulate and monitor the extent of surrogacy arrangements and criminalises the sale of children for the purpose of illegal adoption, including the misuse of surrogacy" (at para. 58(d)).

¹⁸ In relation to Israel (see the "Concluding Observations on the second to fourth periodic reports of Israel, adopted by the Committee at its 63rd session" (CRC/C/ISR/CO/2-4) 4 July 2013 at paras 33 to 34 – though see the comment made at note 794 of the 2014 Study regarding these Concluding Observations) and the USA (see the "Concluding Observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention of the sale of children, child prostitution and child pornography" (CRC/C/OPSC/USA/CO/2), 2 July 2013 at paras 29(a) and (b) and 30(b)).

¹⁹ *E.g.*, from the Permanent Bureau's research, the main prior mentions were in 2009, during its 50th session, when there was a limited discussion of surrogacy in the context of the State reporting procedure of the Netherlands (see "Concluding observations: Netherlands" (CRC/C/NLD/CO/3), 27 March 2009, at paras 45 to 46).

²⁰ See paras 18 and 19 of the 2014 Report.

weight to the conclusion that, despite there being no specific provision of the UNCRC on the establishment of parentage and / or surrogacy, there is nonetheless a foundation for international work in the UNCRC when one considers the treaty holistically and, in particular, the provisions the UN Committee cited in its queries of India.²¹

Decisions of the European Court of Human Rights ("ECtHR")

5. Another important development²² this year has been the decisions of the ECtHR in *Mennesson v. France* and *Labassee v. France*.²³ In these much-anticipated judgments the ECtHR held that France's refusal to recognise, or permit the establishment of, the legal relationship between children, born in the USA following ISAs, and their genetically-related intending fathers, violated Article 8 of the *European Convention on Human Rights* ("ECHR") concerning the children's right to respect for their private life. In reaching this conclusion, the ECtHR appeared to place emphasis on: (1) the fact that the position under French law *completely precluded* the establishment of a legal relationship between the children and their intending father - *i.e.*, not only was transcription of the foreign birth certificate into the French register denied, but there was also no possibility for the intending father to establish his legal parentage in France by any other means;²⁴ and, (2) the intending father was, in both cases, the children's *genetic* father.²⁵

6. These decisions have clarified several important questions regarding the requirements of Article 8 ECHR insofar as legal parentage is concerned,²⁶ including that the right to respect for private life, "requires that everyone should be able to establish details of their identity as individual human beings, *which includes the legal parent-child relationship*".²⁷ The wide margin of appreciation afforded to States regarding the decision not only whether or not to permit surrogacy, but also whether or not to recognise a legal parent-child relationship between children conceived abroad and intending parents, therefore has to be *reduced* in light of the fact that, "an essential aspect of the identity of an individual is at stake where the legal parent-child relationship is concerned".²⁸ Moreover, even within the limits of the margin of appreciation, the approaches taken by States to the establishment and recognition of legal parentage, including any application of the public policy principle, will be scrutinised by the ECtHR, "to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution".²⁹ Moreover, in determining whether a "fair balance" has been struck, the ECtHR will "have regard to the essential principle according to which whenever the situation of a child is in issue, the best interests of that child are paramount".³⁰ It is also worthy of note that the ECtHR stated that whilst deterring nationals from going abroad to take advantage of methods of assisted reproduction prohibited on a State's own territory might be an understandable aim, "the effects of non-recognition [...] of the legal parent-child relationship are not limited to the parents alone [...] they also affect the children" and it is respect for the *children's* best interests which "must guide any decision in their regard".³¹

²¹ *I.e.*, Arts 3, 6, 7, 8, 9, 19, 21 and 35.

²² Although a "regional" development in the sense that the decisions come from a *European Court*, these decisions, of course, affect States beyond the region due to the fact that the State of birth may well be outside Europe (*e.g.*, in *Mennesson* and *Labassee*, the USA was the State of birth).

²³ Dated 26 June 2014. Application numbers 65192/11 and 65941/11 respectively.

²⁴ *E.g.*, by acknowledging his paternity under French law or acquiring legal paternity in France on the basis of *de facto* enjoyment of status or adoption.

²⁵ The reliance on genetics by the ECtHR is interesting in light of the fact that the French government made the point that, "having regard to the various different ways in which the legal parent-child relationship could be established under French law, giving priority to a purely biological criterion 'appear[ed] highly questionable'" (para. 72). Also, this reliance ignores the fact that, in many ISA cases, the intending mother will also be the genetic mother of the child to be born if she has provided her egg. Does the ECtHR's reasoning for genetically-related intending *fathers* apply to these intending *mothers*? (See further para. 8 below.)

²⁶ In this regard, it should be noted that the *Mennesson / Labassee* judgments have implications for Council of Europe Member States beyond ISA situations since they provide important clarifications regarding the requirements of Art. 8 ECHR in terms of the establishment and recognition of legal parentage *generally*. These decisions therefore have relevance for all aspects of the work of the Hague Conference in this field.

²⁷ Para. 96 of *Mennesson* (note 23 above).

²⁸ *Ibid.* at para. 80.

²⁹ *Ibid.* at paras 84 and 81.

³⁰ *Id.*

³¹ Para. 99. See also the article by H. Fulchiron, "*Du tourisme procréatif*" in "*La famille en mutation*", Arch. phil. droit. 57 (2014) [p.331-347] in which the author makes the point that, whilst there may be fraud in French

The questions which remain following the ECtHR decisions

7. Whilst these ECtHR decisions have answered an important question regarding the obligations of Article 8 ECHR when it comes to recognising or permitting the establishment of a child and genetically-related father's legal relationship, several related questions remain. These questions concern both: (1) the requirements of Article 8 ECHR as regards the legal parentage of children in cases with different key facts to *Mennesson / Labassee*; and, importantly, (2) what to do about the broader concerns which arise, in particular, in the ISA context.

8. In relation to the first point, it remains unclear whether Article 8 ECHR will be held to have been violated if the specific facts which led to a violation in the *Mennesson / Labassee* cases are not present in other cases. Two examples can be given:

a) First, is it a violation of a child's Article 8 ECHR rights to deny him / her the ability to have his / her legal parentage, established abroad, recognised or established (again) with a *non-genetically related* intending parent? Paragraph 99 of the ECtHR's judgment may suggest that to refuse a child any method of establishing his / her legal parentage with a person in these circumstances *is* a violation of Article 8 ECHR, whilst paragraph 100 makes the situation far less clear. It might have been thought that the more recent ECtHR case of *Paradiso and Campanelli v. Italy*,³² involving an ISA undertaken in Russia and two intending parents *neither* of whom are genetically related to the child,³³ would address this question. However, in its decision of 27 January 2015 the ECtHR held that, in relation to the question as to whether Article 8 ECHR had been violated by Italy's refusal to transcribe the child's Russian birth certificate into the Italian civil registry, the intending parents had not exhausted all possible domestic remedies.³⁴ As a result, this part of the claim was dismissed and the ECtHR did not directly determine the issue.³⁵ An additional question that remains following these cases is whether it is a violation of a child's Article 8 ECHR rights to deny him / her the ability to have his / her legal parentage, established abroad, recognised or established with a *genetically-related* intending mother (*i.e.*, an intending mother who uses her own egg).

b) Secondly, the ECtHR decisions also seem to leave open the question as to whether providing *any* method for the establishment of legal parentage will satisfy Article 8 ECHR. For example, what if a State will not *recognise*³⁶ a child's legal parentage established abroad but permits intending parents, including those genetically related to the child, to instead apply to *adopt* the child once back in the receiving State (a procedure which may be lengthy and have an uncertain outcome)?³⁷ Is this Article 8 ECHR compliant? The courts in several States³⁸ have expressed views in 2014 to the effect that adoption may not be the most

private international law terms in an ISA situation (due to the fact that a situation is created abroad which is illegal in France), the *child* born through surrogacy has nothing to do with the *adult's* behavior. It may be considered that this fact has been implicitly accepted, post *Mennesson / Labassee*, by the French *Cour de cassation* in its Advisory Opinions of 22 September 2014 (*Avis de la Cour de cassation No 15010 et 15011 du 22 September 2014*).

³² Application No 25358/12 (not yet final: see Art. 44(2) ECHR).

³³ According to the intending parents, this situation resulted from a clinic error since they had arranged that the intending father's gametes would be used.

³⁴ As required by Art. 35 ECHR (since they had not appealed the refusal to the *Corte Suprema di Cassazione*).

³⁵ However, the ECtHR did make an interesting *obiter* comment in relation to the Italian authorities' approach to the child's legal status (at para. 77) stating that, in applying national law strictly to determine legal parentage and ignoring the legal status created abroad, they had not, in the circumstances of this case, acted "unreasonably" (contrary to the ECtHR's decision in *Wagner and J.M.W.L. v. Luxembourg*, Application No 76240/01, 28 June 2007). A violation of Art. 8 ECHR was, moreover, found in relation to the child's removal from the intending parents' care (as to which, see para. 10 below).

³⁶ *I.e.*, by private international law methods.

³⁷ Due to the (illegal) method of assisted reproduction used. In relation to the application of the 1993 Hague Intercountry Adoption Convention in these cases, see the 2011 Preliminary Note written by the Permanent Bureau (Prel. Doc. No 11 of March 2011) at para. 43 and the Conclusion and Recommendation from the 2010 meeting of the Special Commission on the practical operation of the 1993 Convention, at para. 25 which "viewed as inappropriate the use of the Convention in cases of international surrogacy".

³⁸ The German Federal Court (see **Annex I**, at point 1), the Brazilian court (see note 60 below) and the English High Court (*e.g.*, in *CC v. DD* [2014] EWHC 1307 where a step-parent adoption order was made in the USA to provide an intending mother with legal parentage. In considering the effect of that adoption order in the receiving State (England), Theis J remarked that, whilst the adoption order could be recognised in England, a parental order under English law would "better reflect [...] [the child's] identity as a child of reproduction rather than an adopted child" and "[a] parental order is the most suited to surrogacy situations" (para. 40). See also *Re G and*

suitable procedure following a surrogacy arrangement. However, the ECtHR jurisprudence is less clear.

9. Looking at the broader rights issues arising in ISA cases, the result of the *Mennesson / Labassee* decisions appears to be that whilst Council of Europe Member States are required by Article 8 ECHR to permit the legal relationship between a child and his / her genetically-related intending father to be recognised or established following an ISA, this is required in circumstances in which, due to the absence of any international framework, receiving States have no, or a very limited,³⁹ ability to *a priori* control the circumstances which have led to the conception and birth of such children. In the subsequent ECtHR decision of *D. and Others v. Belgium*,⁴⁰ an ISA case concerning the Belgian authorities' refusal to authorise the child's entry into Belgium and the consequent separation of the child and intending parents, the ECtHR did confirm that the ECHR could not oblige States to authorise entry into their territory of children born to surrogate mothers without the authorities having a prior opportunity to conduct certain legal checks.⁴¹ However, this does not avoid the problem that any such checks have to be undertaken by the receiving State *ex post facto* and, importantly, *once a child already exists*. As many judges have lamented, this is already too late to be able to exercise any meaningful control and often decisions at this stage have to be guided by the child's best interests.⁴²

10. This difficulty was illustrated yet again in the recent ECtHR case of *Paradiso and Campanelli v. Italy* referred to above⁴³ in which the Italian authorities removed the child from the care of the intending parents and placed him / her in a children's home and, subsequently, foster care. In finding a violation of Article 8 ECHR in relation to this removal,⁴⁴ the ECtHR stated that the public policy considerations underlying the Italian authorities' decisions (including the fact that the intending parents had attempted to circumvent the Italian rules on surrogacy and international adoption) could not take precedence over the best interests of the child, irrespective of the lack of any genetic relationship with the intending parents and the short time the child had been in their care. The removal of a child from the family setting was an extreme measure which could only be justified in the event of immediate danger to the child. Moreover, the Court emphasised that it was necessary to ensure that a child was not disadvantaged simply because he / she was born to a surrogate mother, starting with his / her identity (and, in this regard, the ECtHR cited Art. 7 UNCRC).⁴⁵

11. As is apparent from these recent decisions, the situation currently faced in the ISA context therefore has the potential to leave States in an extremely challenging position. What if receiving States have serious concerns – either in a particular case or systemically across all cases originating from particular States – about the circumstances which have led to the birth of some children following ISAs? What if there are concerns regarding the treatment of surrogate mothers (e.g., in relation to their consent, treatment or healthcare)?⁴⁶ What about children's other rights beyond legal status issues (e.g., their right to know their genetic and birth origins, their right to health, their right to be protected from harm etc.)?⁴⁷ What if some receiving States have particular concerns and difficulties in relation to certain ISAs (e.g., those in which there will be no genetic relationship between the intending parents and the child)? What of the concerns regarding some intermediaries (e.g., clinics in which genetic "mix-ups"

M [2014] EWHC 1561 and the comments of Munby J in *Re X (A child) (Surrogacy: Time limit)* [2014] EWHC 3135 at para. 7.

³⁹ E.g., through bilateral discussions and agreements.

⁴⁰ Application no. 29176/13 (judgment available in French only).

⁴¹ *Id.* at para. 59. The ECtHR also emphasised (para. 48) that the complaint in this case was not the non-recognition of legal parentage (since this issue was still pending before the national court) but was instead about the child's entry into the territory and the separation which had taken place as a result of the initial refusal.

⁴² Contrast this situation with the internationally agreed approach in relation to intercountry adoption: that the recognition of an intercountry adopted child's legal status is *founded upon* a certification that the adoption procedure has been undertaken in accordance with the Convention and therefore, most importantly, in accordance with its internationally agreed safeguards and guarantees (see Art. 23 of the 1993 Convention).

⁴³ At para. 8.a).

⁴⁴ It should be noted that Judges Raimondi and Spano expressed a joint and partly dissenting opinion in this case.

⁴⁵ In relation to the refusal of the Italian authorities to transcribe the Russian birth certificate, see para. 8.a) above.

⁴⁶ Which there frequently are: see the 2014 Study at paras 192 to 199.

⁴⁷ See the 2014 Study at paras 185 to 191.

are regularly occurring)? Of course, this is not to say that an approach which leaves children with “limping” legal parentage (or stateless) is a solution: this does no more to resolve these questions. However, as a detailed review of the area has demonstrated,⁴⁸ the legal status of children is but one of the many, varied and complex questions posed by ISAs and to mandate recognition of legal parentage in a situation in which other *a priori* controls, including internationally-agreed minimum standards and co-operative frameworks, are not in place could have problematic, unintended consequences.⁴⁹

12. As a result of the situation outlined above - *i.e.*, the remaining uncertainties concerning children’s legal parentage, as well as the challenging position in which States are now placed - the current situation may be considered highly unsatisfactory for families and States alike. Indeed, in the Permanent Bureau’s view, the current situation highlights ever more starkly the need for the international community to come together to consider whether a multilateral framework might be agreed upon which could create legal certainty for everyone in these cross-border situations *and* enable States to work together to uphold the human rights of all concerned.⁵⁰ Only a holistic analysis by the global community can begin to determine whether international legislation can achieve these aims.

III. SOME KEY DEVELOPMENTS AT THE NATIONAL LEVEL IN 2014⁵¹

Trends in relation to the establishment / recognition of legal parentage following ISAs⁵²

13. The continuing, steady stream of reported decisions concerning legal parentage following ISAs at the national level in 2014 has only added weight to the conclusion⁵³ that the number of ISAs has grown significantly and that the problems arising as a result are continuing to grow. In terms of the approaches of States to these questions in 2014, the impact of the *Mennesson / Labassee* decisions has already been significant in some Council of Europe Member States, particularly in States in which a more restrictive approach was formerly taken. This is not to say that such States have changed, or are contemplating changing, their *internal* positions (including prohibitions) on surrogacy: to the contrary, some have explicitly stated that this is not under consideration. It is instead the approach to the *recognition of a legal status lawfully acquired abroad* which is evolving. Indeed, it might be (cautiously) stated that the early signs of a trend in these States towards the recognition of legal parentage in ISA cases *in certain circumstances* can be seen, with notable recent case law to this effect,⁵⁴ as well as recommendations or proposals for legislative developments in others.⁵⁵ These important developments are detailed further in **Annex I**.

⁴⁸ See the 2014 Study at Section C and the 2014 Report.

⁴⁹ *E.g.*, if recognition of legal parentage encourages more intending parents to undertake ISAs in circumstances where other safeguards are not in place for all parties. For example, see the list of areas identified as possibly in need of some internationally agreed minimum standards in the 2014 Report at paras 63 and 64.

⁵⁰ See the policy objectives of further work set out at p. 68 of the 2014 Report.

⁵¹ Several States have considered or passed *domestic* legislative reform concerning surrogacy over the course of the past year: *e.g.*, Israel (an updated law is before parliament to permit same-sex couples and single men and women to obtain surrogacy services), Viet Nam (legislation has been passed allowing surrogacy under strict conditions), Serbia (legislative reform is under consideration), and the USA (New York state). Moreover, in the USA, policy guidance has been issued (28 October 2014) which states that a woman who gives birth to a non-genetically related child abroad (*i.e.*, usually conceived following ART with a donor egg), can now pass her US citizenship to the child despite the absence of a genetic connection (see < www.uscis.gov >, PA-2014-009).

⁵² Whilst trends in ISA cases are described here since they represent the majority of case law in this field in 2014, there have also been notable developments concerning the cross-border recognition of legal parentage in non-surrogacy cases: *e.g.*, see < <http://www.thelocal.it/20150109/turin-will-transcribe-birth-certificate-of-gay-couples-son> > where the media reports that, in a first for Italy, a child’s Spanish birth certificate, naming two women, was fully transcribed in Italy following an appeals court ruling.

⁵³ See the 2014 Study at paras 125 to 129.

⁵⁴ *E.g.*, in Germany, Switzerland and the UK.

⁵⁵ *E.g.*, France (suggestion of possible *international* initiative), Spain and Ireland.

14. Beyond Europe, the approach of States to these questions in 2014 has also seemingly tended towards facilitating the recognition or establishment of children's legal parentage with intending parents on the basis of the child's best interests.⁵⁶ For example, in Australia, a judge of the Family Court recently held that he was able to make a declaration as to the legal parentage of a genetically-related intending father (despite previous Australian jurisprudence to the contrary),⁵⁷ in view of the fact that "the interests of the child must outweigh [...] public policy considerations."⁵⁸ In Brazil, albeit in a *domestic* altruistic surrogacy case,⁵⁹ a recent decision held that a same-sex male couple should be registered as the legal parents of the child on the birth certificate on the basis that this was the result in accordance with the child's best interests.⁶⁰ In Canada, the Quebec Court of Appeal recently decided that, despite the fact that a surrogacy agreement is "absolutely null" in Quebec, a step-parent adoption in favour of an intending mother (the genetically-related intending father already being the legal father in Quebec in this case) should be granted on the basis that the interests of the child prevailed over the circumstances of his / her birth.⁶¹

Problems remaining: limits and broader rights issues

15. Whilst recognition of the child's legal status might have been possible in more of the reported ISA cases in 2014 (although by no means all⁶²), developments at the national level also continue to demonstrate starkly the significant issues which remain in the absence of international regulation, that is: (1) what limits, if any, should receiving States place on the circumstances in which they will recognise / establish a child's legal parentage (and / or nationality) following an ISA? And, (2) what of the broader human rights issues arising in these cases? Are receiving States to simply "close their eyes" to these issues and focus solely on the legal status of the resulting child?

16. In relation to the first issue, it is interesting to note that a limit appears to be discernable across some European receiving States in terms of how far the reasoning of the ECtHR will be applied to cases which have different fact patterns to *Mennesson / Labassee*.⁶³ For example, in Italy, in a decision of 26 September 2014, the Supreme Court relied upon *Mennesson / Labassee* to *distinguish* the facts of those cases from a case before it.⁶⁴ It held that a Ukrainian birth certificate, which stated that an Italian couple were the legal parents of a child born in Ukraine as a result of an ISA, could not be recognised in Italy in circumstances where *neither the*

⁵⁶ Albeit in certain, defined circumstances, and with legal parentage is established / recognised by varying methods.

⁵⁷ See the 2014 Study at para. 156.

⁵⁸ Per Johns J at para. 44 in *Green-Wilson & Bishop* [2014] FamCA 1031. It should be noted that the judge was able to distinguish earlier Australian judgments on the basis of differences in Australian state laws concerning surrogacy (*i.e.*, this case was in Victoria, as opposed to New South Wales).

⁵⁹ The case involved an altruistic, traditional surrogacy arrangement and the surrogate was the sister of one of the intending fathers. The sperm of the intending father unrelated to the surrogate mother was used.

⁶⁰ Case No 0800779-46.2013.8.24.0090. *Averiguacao de Paternidade/PROC*. Florianopolis (SC), Judge: Luiz Claudio Broering. Dated 30 July 2014.

⁶¹ *Adoption – 1445* [2014] QCCA 1162, 10 June 2014. This was also a case involving a *domestic* surrogacy arrangement and the judge in this case found that, contrary to the finding of the lower court, it could not be concluded that the surrogate mother had been remunerated (*i.e.*, it may have been an *altruistic* arrangement). Moreover, whether remunerated or not, any payments were not designed to obtain her consent to the adoption (as prohibited, and made a criminal offence by, the Law on the Protection of Youth (*Loi sur la protection de la jeunesse*), Arts 135.1 and 135.1.3).

⁶² See para. 16 below. In addition, another case reported in the media which it is understood is still pending before the Swiss courts concerns a Swiss couple who undertook a second ISA in the USA (having had no problems establishing the legal status of the first child in Switzerland, possibly due to the fact the authorities were not aware of the ISA). However, as regards the second child, the Swiss authorities reportedly refused to recognise the Swiss intending mother as the legal mother of the child and named a guardian for the child. The couple left Switzerland as a result and went to live in the USA. As already demonstrated by the case law analysed in the 2014 Study (at paras 147 *et seq.* and, in particular, see paras 176 to 179), this case is another example of the inconsistency in decision-making which can arise in ISA cases in the absence of an international framework (see also in this regard, the comments of the German intending parents reported at para. 179 of the 2014 Study).

⁶³ See the question outlined at para. 8 above about how far the reasoning of the ECtHR will be applied.

⁶⁴ *Corte Suprema di Cassazione, 1a sezione civile*, 24001 / 14, dated 26 September 2014.

*intending mother or father were the genetic parents of the child.*⁶⁵ As a result, the lower court's decision that the child be declared adoptable and a guardian be appointed was upheld.⁶⁶ In a similar vein, the German Federal Court recently,⁶⁷ despite mandating recognition of the legal parentage in the case before it, specifically reserved for later determination cases in which (1) neither of the intending parents were genetically related to the child, and / or (2) the surrogate mother was also the genetic mother of the child.⁶⁸ However, a focus on genetic connection is not universally accepted (*e.g.*, see the comments of the judge in the Brazilian case mentioned above,⁶⁹ as well as the position of France before the ECtHR⁷⁰).

17. In relation to the second issue, many of the 2014 cases have, whilst recognising the child's legal status (by whatever method might be available in that receiving State and following sometimes lengthy, uncertain and financially and emotionally draining legal processes⁷¹), continued to lament that these cases raise systemic human, including children's, rights issues which it is not possible for courts, after the fact and in individual cases, to resolve.⁷² Indeed, the situation has led to further calls for regulation, with one English judge beginning his judgment in a 2014 ISA case thus: "There is, in my view, a compelling need for a uniform system of regulation to be created by an international instrument in order to make available an appropriate structure in respect of what can only be described as the surrogacy market."⁷³ In a similar vein, an Australian judge commented on "the need for regulation and scrutiny of these practices in other jurisdictions to ensure that the rights of all parties (and any children born as a result of such arrangements) are protected".⁷⁴

18. Some extremely serious rights issues which have *continued* to arise in 2014⁷⁵ are detailed in **Annex II** below and include: cases of child abandonment (causing a media furor), cases in which the suitability of intending parents has been called into question and in which child trafficking concerns have arisen, cases in which courts have lamented the child's likely future inability to trace his / her genetic and birth origins, cases in which concerns have yet again arisen in relation to the free and informed consent of surrogate mothers and the contract terms surrogate mothers have signed, and cases demonstrating clear concerns in relation to unscrupulous intermediaries. However, it should be noted that, as stated in the 2014 Study and Report, these concerns arise with varying frequency and severity across different States of birth.⁷⁶

⁶⁵ The absence of any genetic relationship between the child and intending parents is actually also contrary to Ukrainian law on surrogacy which mandates that one intending parent should be genetically related to the child. Whilst the facts are very similar, this is a different case to *Paradiso and Campanelli v. Italy* (see para. 8.a) above).

⁶⁶ Please note: in relation to the removal of the child from the intending parents in this case, it will be interesting to see if the intending parents take further steps to challenge this decision in light of the recent ECtHR judgment in *Paradiso and Campanelli v. Italy* (see paras 8.a) and 10 above). *Paradiso* will also have to be taken into account in future ISA cases with similar fact patterns.

⁶⁷ In the case cited in **Annex I**.

⁶⁸ Again, in a similar vein (although focused on the acquisition of nationality, rather than legal parentage), a 2014 Canadian Federal Court of Appeal decision (*Kandola v. Canada (Citizenship and Immigration)* [2014] FCA 85, 31 March 2014) has confirmed that for a child born abroad as a result of ART to acquire Canadian citizenship by descent from her Canadian intending parent, "the only type of connection which can confer derivative citizenship is a genetic / gestational one" (*cf.* the earlier Federal Court decision in this case, mentioned at para. 157 and note 613 of the 2014 Study). In this case, as the child was not genetically-related to the Canadian intending father (or indeed the foreign intending mother), she could not automatically acquire Canadian citizenship by descent.

⁶⁹ In which he stated that the idea that legal parentage should be based solely on a genetic connection was "archaic" (see note 60 above).

⁷⁰ See note 25 above. In addition, in South Africa, a woman who wishes to have a child through surrogacy but who cannot (for medical reasons) use her own eggs and is single (and thus would be using donated sperm) has brought a claim before the Pretoria High Court challenging the legislative requirement of a genetic link between a baby born as a result of a surrogacy arrangement and at least one of the intending parents. She is challenging this provision on the basis that it violates a number of her constitutional rights (see further < <http://www.timeslive.co.za/thetimes/2014/10/15/sa-surrogacy-law-challenged> >).

⁷¹ See the 2014 Study at paras 176 to 180.

⁷² As one Australian judge commented recently, "the starting point [...] is to make clear from the Court's perspective that this is an area where the Court has some disquiet". Per Cronin J at para. 5 of *Fisher-Oakely & Kittur* [2014] FamCA 123.

⁷³ Per Moylan J at para. 1 of *Re D (A Child)* [2014] EWHC 2121.

⁷⁴ Per Johns J in *Green-Wilson & Bishop* [2014] FamCA 1031 at para. 10.

⁷⁵ Unfortunately these issues are not new - see the 2014 Study at paras 185 to 215.

⁷⁶ *E.g.*, many of the serious cases in 2014 have involved India and Thailand.

19. In India and Thailand, it is interesting to note that the current situation is already necessitating international co-operation with key receiving States, as certain cases hit the media “spotlight”, the States of birth respond with policy changes and intending parents struggle to navigate the resulting rapidly evolving contexts.⁷⁷ Looking to the longer-term future, legislative efforts are underway in both States to attempt to resolve some of the challenges (although, as the bills currently stand, they adopt very different approaches in relation to whether *for-profit* surrogacy arrangements will be allowed, with India permitting such arrangements under certain conditions and Thailand outlawing them).⁷⁸ Interestingly, both approaches demonstrate the limits of how far *domestic* legislation can solve the problems of such a truly *international* phenomenon. For example, it appears that the expected “closure” of Thailand to ISAs has caused some clinics and agencies to establish themselves in Nepal (already), underlining the strength of demand for ISAs and the nature of the adaptable “market forces” at play.⁷⁹ Meanwhile, the Indian legislation will, if passed in its current form,⁸⁰ in relation to the questions of the legal status (including nationality) of the children born to ISAs, ultimately rely on international co-operation⁸¹ to function effectively (which, as domestic legislation, it cannot compel). The need for a truly *multilateral* approach⁸² has also been reconfirmed by the number of reported cases in 2014 which have involved *more than two* States (e.g., as a result of the fact that the intending parents resided in a different State from the State of their nationality, or due to the fact that the gamete provider(s) and surrogate mother resided in different States).⁸³

IV. FURTHER SUPPORT EXPRESSED FOR HCCH WORK ON PARENTAGE / SURROGACY

20. In the 2014 Report, reference was made to the fact that other bodies have recognised the need for international legislative work in this field and have supported work going forward under the auspices of the Hague Conference.⁸⁴ Since publication of the 2014 Report, and as the work of the Hague Conference in this field has become more widely known,⁸⁵ further support for this work has been expressed including by State actors such as policy makers, judges and those commissioned to undertake studies in this field. For example, in 2014, both the UK and Swiss governments were asked questions by Members of Parliament concerning the difficulties arising in relation to ISAs.⁸⁶ In their responses, both governments made reference to their support, at

⁷⁷ For example, the pending Thai legislation and the current “clamp down” on commercial surrogacy has caused a situation in which many intending parents and indeed surrogate mothers who had already entered into ISAs, have been left in positions of uncertainty as to what will happen in relation to these “transition cases”. Meanwhile, in India, following the media “storm” surrounding the case of the child abandoned by Australian intending parents, there were reports that a “temporary ban” had been placed on the issuance of the necessary visas to Australians and reports that all visa applications were being scrutinised far more closely.

⁷⁸ See the Indian *Assisted Reproductive Technology (Regulation) Bill* (2013) and the Thai *Protection of Children born from Assisted Reproductive Technologies Bill* (which passed its first reading on 28 November 2014 and is now being reviewed and amended by a committee before being submitted for a second reading).

⁷⁹ E.g., see < <http://www.ekantipur.com/2014/12/04/headlines/Door-opens-to-foreigners-for-surrogacy/398524/> >.

⁸⁰ Media reports suggest that different Ministries in India have provided very different comments on the draft legislation, with the Directorate General of Health Services stating that surrogacy in India should be allowed only for Indian citizens and people of Indian origin (which would represent a significant policy departure from the previous drafts) and the Union Women and Child Development Ministry taking a different view. See: < <http://blog.indiansurrogacylaw.com/women-and-child-development-ministry-assisted-reproductive-technology-bill/> >.

⁸¹ Of the receiving States and indeed any other implicated States.

⁸² See, in this respect, Art. 23 of the 1993 Hague Intercountry Adoption Convention: where the criteria of the Convention are fulfilled, the adopted child’s legal status will not only be recognised in the State from which his intending parents come but in *all* States Parties to the Convention, thus ensuring the maximum security of legal status possible for the child and family.

⁸³ Noted previously in the 2014 Study at para. 134. In terms of the former situation, see, e.g., from 2014, the English cases of *CC v. DD* [2014] EWHC 1307; *Re G and M* [2014] EWHC 1561 and the Australian case of *Fisher-Oakley & Kittur* [2014] FamCA 123. As to the latter situation, see the Australian case of *Green-Wilson & Bishop* [2014] FamCA 1031 in which the egg provider was from Ukraine and the surrogate mother was from India.

⁸⁴ E.g., the International Social Service, a report commissioned by the Legal and Parliamentary Affairs Committee on the EU Parliament, academic conferences and literature. See further, the 2014 Report at para. 20, note 68.

⁸⁵ In part, due to the co-operation work undertaken by the Permanent Bureau with others working in the field.

⁸⁶ In relation to Switzerland, see “Interpellation 14.3742” (18 September 2014) and the Federal Council’s response (5 November 2014) at

the international level, of the work of the Hague Conference towards possible future international legislation.⁸⁷ Moreover, whilst not in the context of a parliamentary debate, the French Prime Minister has also remarked that it might be possible to envisage an “international initiative” in this area.⁸⁸ In Australia, the Family Law Council, following their “Report on Parentage and the Family Law Act” concluded, in relation to ISAs, that it “believes that this issue requires a coordinated international regulatory response [...] and supports the Hague Conference on Private International Law’s current work in this regard.”⁸⁹ Lastly, in the judicial arena, as noted above, in 2014 judges have (again) referred to the difficult position in which courts are placed in ISA cases and the need for international regulation.⁹⁰

V. NEXT STEPS

21. Members are referred to Section V of the 2014 Report in which it was recommended that the Council mandate the formation of an Experts’ Group to facilitate further exploration of the feasibility of drawing up a multilateral instrument in this field. The Permanent Bureau’s recommendations regarding (1) the composition of the Group and (2) the structure of its work were set out in paragraphs 69 to 72 respectively of that document and will not be repeated here. However, one year on, the question of timing and resources is addressed below.

22. In relation to the timing of the first meeting of the Group, the Permanent Bureau considers it realistic to suggest that it meet in the first half of 2016. This would allow time in the second half of 2015⁹¹ for the Permanent Bureau to work with Members on the formation of the Group and to undertake the necessary preparations for the meeting.

23. In terms of resources, following publication of the Council documents in March 2014 and in accordance with the Council-mandated prioritisation of the work on the 2015 meeting of the Special Commission on the 1993 Hague Intercountry Adoption Convention, this Project has been allocated approximately 20% of the time of one Senior Legal Officer, and 5% of the time of one Principal Legal Officer. If an Experts’ Group is formed, further resources will need to be allocated to this Project.

24. The Permanent Bureau would also be grateful if Council would consider recommending that Members keep the Permanent Bureau closely updated regarding significant developments in their States in relation to legal parentage and surrogacy (e.g., new case law, legislation and policy approaches) wherever possible. This would save the Permanent Bureau resources that it would otherwise need to invest in tracking these developments.

< http://www.parlament.ch/e/suche/Pages/geschaefte.aspx?gesch_id=20143742 >. In relation to the UK, see the Westminster Hall Debate which took place on 14 October 2014, available in Hansard at < <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm141014/halltext/141014h0001.htm#14101451000001> >.

⁸⁷ In Switzerland, this response followed the “Report on Surrogacy” by the Swiss Federal Council which emphasised the need for inter-State co-operation to resolve the problems arising in relation to ISAs (« *Rapport sur la maternité de substitution* », *Rapport du Conseil fédéral du 29 novembre 2013 en exécution du postulat 12.3917 du 28 septembre 2012*, at pp. 2 and 34). In a similar vein, the UK government, emphasising its obligation to protect children, stated that “the Hague Conference is probably the international body best placed to consider this” (see Hansard (note 86 above) at Column 14WH).

⁸⁸ See, e.g., < <http://www.gouvernement.fr/manuel-valls-la-gpa-est-et-sera-interdite-en-france> > and < <http://www.la-croix.com/Actualite/France/Manuel-Valls-La-France-entend-promouvoir-une-initiative-internationale-sur-la-GPA-2014-10-02-1215549> >. Valls gave an example of an initiative, along the lines of the current Indian visa rules, which would seek to ensure that countries which permit surrogacy do not extend the benefit of this to nationals of countries which prohibit it.

⁸⁹ See the Family Law Council’s “Report on Parentage and the Family Law Act” (December 2013), available at < <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/family-law-council-report-on-parentage-and-the-family-law-act-december2013.pdf> >. Subsequently, Western Australia’s Department of Health, having conducted a review of the state’s 2008 Surrogacy Act, tabled a report in state parliament making recommendations, including that further research on ISAs be encouraged and facilitated. In this regard, it highlighted that a global regulatory response could be borne out of work by the Hague Conference.

⁹⁰ See para. 17 above.

⁹¹ Following the 2015 meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention, upon which this team is also working.

ANNEX I

Important developments in relation to the recognition / establishment of legal parentage following ISAs in some Council of Europe Member States post *Mennesson / Labassee*¹

1. In Germany, a recent Federal Court of Justice decision,² overturning the decision of the lower court³ and contrary to much of the previous German jurisprudence,⁴ held that a Californian judgment naming two intending fathers as the legal parents of a child⁵ should be recognised in Germany. In reaching this decision, the Court placed reliance on Article 8 ECHR and the *Mennesson / Labassee* decisions, stating that the best interests of the child required recognition of his / her legal parentage established in the USA and that the child could not be made responsible for the actions of the adults. Of particular interest is the fact that the Federal Court disagreed with the lower court's comments to the effect that an adoption, and not the recognition of a foreign judgment, would be a process better suited to establishing a legal relationship between the child and the *non*-genetically related intending father. The Federal Court stated that, to the contrary, an adoption would entail the risk that the intending parents might change their mind following the birth of the child. It could therefore enable intending parents to shirk their responsibility for the child. The Federal Court emphasised the differences between adoption and surrogacy and stated that, in surrogacy cases, legal parentage should be established *at the time of the child's birth*. Moreover, the Federal Court also disagreed with the lower court's opinion that full transcription of the foreign judgment would infringe the child's right to know his identity due to the fact it would not contain any information concerning the surrogate mother. The Federal Court stated that it is not the role of the civil birth register to protect a child's right to know his / her *genetic* origins since this register is concerned with *legal* relationships only. The Court gave examples of other situations in which the civil register does not correspond with genetic reality (e.g., in the case of sperm donation, the donor is not registered). Therefore, this reasoning could not prevent the recognition of the foreign judgment.

2. In Switzerland,⁶ the Higher Cantonal Administrative Court of St. Gallen recently held⁷ (decision currently under appeal to the Swiss Federal Court)⁸ that two intending fathers should be registered as the legal fathers of a child born following an ISA, in accordance with the US birth certificate, on the basis that this was the outcome in the best interests of the child.⁹ The court stated that to hold otherwise would leave the child in a situation in which he / she had "limping" legal parentage. Furthermore, it would mean that the second intending father would be unable to establish his legal paternity for the child.¹⁰ This would have negative consequences *for the child* as he / she would not have any maintenance or inheritance claims against this intending father. Therefore, recognition was required in order to protect the child's legal and financial interests. However, the Swiss Court partially upheld the appeal of the Federal Office of Justice stating that, in addition to the *legal* status of the child, the *genetic* origins of the child, as well as details of the surrogate mother,¹¹ must also be recorded in the civil register wherever

¹ Whilst some of the cases referred to in this Annex do not explicitly cite *Mennesson / Labassee*, they post-date these ECtHR cases and it appears that the reasoning of the courts may be based on the decisions or, at the least, on Art. 8 ECHR.

² *Bundesgerichtshof*, decision of 10 December 2014 (No XII ZB 463/13).

³ Of the *Kammergericht* Berlin, dated 1 August 2013, detailed at para. 164.3) of the 2014 Study.

⁴ See the 2014 Study at paras 164 to 165.

⁵ In circumstances where the child was conceived following an ISA using one of the intending father's sperm and an egg provider.

⁶ This decision was taken despite the fact that surrogacy is constitutionally prohibited in Switzerland.

⁷ On 19 August 2014. The cantonal Department of Internal Affairs had ruled in favour of registering the two men but the Federal Office of Justice appealed this decision to the Administrative Court.

⁸ The Federal Office of Justice has appealed this decision.

⁹ Although the ECtHR decisions were not directly cited by the court, the reasoning of the court suggests that they may have been taken into account.

¹⁰ This decision has challenged the previously prevailing Swiss practice which often required the genetic intending father to acknowledge his legal paternity under Swiss law and provided no method for the non-genetically related second intending father to establish his legal parentage (same-sex step-parent adoption is not available in Switzerland).

¹¹ Her date and place of birth and her current address have to be registered.

possible.¹² This is particularly interesting in light of the different view expressed recently by the German Federal Court on this issue (set out at para. 1 above).

3. In Spain, in response to the ECtHR decisions, the Directorate General of Registries and Notaries ("DGRN")¹³ has issued a Circular¹⁴ stating that the 2010 DGRN Instruction, which adopted a more "liberal" approach to recognition,¹⁵ must now be applied again by registries despite the contrary February 2014 Spanish Supreme Court ruling.¹⁶ Moreover, on 11 December 2014, the Spanish Minister of Justice stated that an amendment to the draft Spanish Law on Civil Registries, currently before parliament, would be proposed in order to ensure that the specific provision on registration of a child following an ISA complies with the recent ECtHR decisions. The new draft provision has not yet been made available.

4. In France, following the ECtHR decisions, Prime Minister Valls made it clear that France would not appeal these decisions.¹⁷ He remarked that the government would take time to reflect on the issue but that it might be possible to envisage an "international initiative" in this area.¹⁸ Following this, more recently, the *Conseil d'Etat*, in a decision of 12 December 2014, confirmed the validity of a Circular of 25 January 2013, issued by the Minister of Justice, regarding the granting of certificates of nationality to children born abroad following ISAs. Whilst the public rapporteur made clear that the *Conseil d'Etat's* jurisdiction was limited to the administrative law question before it (*i.e.*, whether the Circular was *ultra vires*) and the *Conseil* did not intend to comment on the legal parentage and nationality consequences of the ECtHR decisions, the *Conseil's* obiter remarks in this respect are interesting. The *Conseil* stated that the fact that a child has been born abroad as a result of an agreement which, as a matter of French law (public order), is void, cannot, of itself, deprive that child of French nationality *if* the child is entitled to such nationality on the basis of the relevant provisions of the French Civil Code.¹⁹ Apparently referencing the ECtHR decisions, it stated that a contrary approach would represent a "disproportionate interference" with the child's right to respect for his / her private life in accordance with Article 8 ECHR.²⁰

5. In Ireland, the Supreme Court recently held,²¹ albeit in the context of a *domestic* surrogacy arrangement, that a genetically-related intending mother could not be registered as the legal mother on a child's birth certificate instead of the gestational surrogate mother. In overturning the lower court's decision, the Supreme Court stated that neither common nor statutory law in Ireland addresses this issue to date and hence the *Oireachtas* (Irish Parliament)

¹² The court noted that the egg provider was anonymous in this case and thus her details could not be included. However, the fact that an anonymous egg donation was used should be recorded.

¹³ *Dirección General de los Registros y del Notariado*.

¹⁴ Dated 11 July 2014.

¹⁵ The content of this Instruction is described in more detail at note 126 of the 2012 Preliminary Report, available on the specialised "Parentage / Surrogacy Project" section of the Hague Conference's website < www.hcch.net >.

¹⁶ See the Spanish Supreme Court decision of 6 February 2014 (decided by a majority of 5 votes to 4) which held that a US birth certificate of a child born following an ISA could not be transcribed into the Spanish civil registry on the basis that the registry had to examine not only the authenticity of the document but also whether the certificate was contrary to Spanish public order. This certificate named two intending fathers as the legal parents of the child. It should be noted that despite the refusal to transcribe the US birth certificate, the Supreme Court 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. See further the 2014 Study at p.76.

¹⁷ He also confirmed that France will not change its domestic prohibition on surrogacy. Acknowledging the complexity of the resulting situation, Valls noted that, on the one hand, the government does not wish to authorise the automatic transcription of foreign civil status acts resulting from ISAs "because this would be the equivalent of accepting and normalising surrogacy" in France, but, on the other hand, it is not possible to consider the children born abroad to ISAs as without *filiation* and without identity.

¹⁸ See, *e.g.*, < <http://www.gouvernement.fr/manuel-valls-la-gpa-est-et-sera-interdite-en-france> > and <http://www.la-croix.com/Actualite/France/Manuel-Valls-La-France-entend-promouvoir-une-initiative-internationale-sur-la-GPA-2014-10-02-1215549> >.

¹⁹ *E.g.*, Arts 18 and 47 of the French Civil Code. Note that an application of Art. 47 still appears to leave open the possibility that, in certain circumstances, the foreign civil status act might not be transcribed into the French registry on the basis that it contains facts which do not "correspond to reality" (*e.g.*, perhaps if the father on the birth certificate is not the *genetic* father of the child).

²⁰ See para. 11 of the decision of 12 December 2014.

²¹ *M.R. and D.R. (suing by their father and next friend O.R.) & ors -v- An t-Ard-Chláraitheoir & ors*, [2014] IESC 60 (7 November 2014).

should legislate to fill the “lacuna in the law as to certain rights, especially those of the children born in such circumstances”.²² It was noted in the judgment of MacMenamin J that the ECtHR decisions in *Mennesson / Labassee* had emphasised the need for States to distinguish between the interests of the intending parents and the rights of the children.²³

6. In England, the High Court recently determined that an order conferring legal parentage on the intending parents following an ISA could be made despite the fact that the application had not been brought within the statutory six month time-limit (from the time of the child’s birth).²⁴ The court held that an order conferring legal parentage, “goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being” and hence parliament could not have intended *any* delay, however trivial, to be fatal to an application. The court also relied on Article 8 ECHR and stated that, if its reading of the statute was wrong, the ECHR would, in any event, require that the statute be read to ensure that the essence of the Article 8 right was not impaired.

²² See the judgment of Denham CJ at paras 116 to 118. She also stated that legislation should include retrospective provision for situations of surrogacy.

²³ In response to this decision, the Irish government has announced its plans to legislate on issues relating to legal parentage, surrogacy, egg and sperm donation as soon as possible.

²⁴ *Re X (A child) (Surrogacy : Time limit)* [2014] EWHC 3135.

ANNEX II

Some of the serious human, including child, rights issues which have arisen (again) in ISA cases in 2014

1. **Child abandonment**:¹ in Thailand and India, cases of child abandonment following ISAs were reported in 2014, causing media “storms” and illustrating the risks inherent in ISA cases for children, particularly in an unregulated environment.² Both the “Baby Gammy” case (involving the alleged abandonment by Australian intending parents of one twin with Down’s Syndrome, conceived as a result of an ISA) and the Indian case in which, again, a twin was abandoned by Australian intending parents³ highlight, yet again, the need for international discussion on many issues, including what should happen when arrangements break down, as well as what checks should be made of intending parents before they are permitted to enter into ISAs. The point could not have been made more starkly when, in the Baby Gammy case, it was subsequently revealed that the intending father had been previously convicted in Australia for offences against children.⁴
2. **Suitability of some intending parents and possible child trafficking**: the media also reported other cases in 2014 which suggest the imperative for international work to protect children. For example, it was reported that a wealthy Japanese businessman has fathered at least 16 children⁵ as a result of ISAs undertaken in Thailand. The media has reported concerns that this case could be connected with child trafficking (but this is, as yet, unclear). Trafficking and sale of children concerns⁶ also featured in reports that an Indian intermediary had been arrested and charged for, in effect, “selling” an unrelated child to intending parents when they believed him to be brokering a surrogacy arrangement and using their gametes to impregnate a surrogate woman.⁷
3. **The child’s right to know his / her origins**: courts in several States continued to voice their concerns in 2014 regarding the likely future inability of children born as a result of ISAs to trace their genetic and birth origins, with some courts unable to trace surrogate mothers even at the time of subsequent court proceedings,⁸ and others lamenting the fact that they are not sure, “what this child will face in 15 years’ time if cultural issues arise or his issues about identity become a crisis”.⁹

¹ See also the case of child abandonment which was reported in the 2014 Study at para. 189.

² Albeit that the case in India actually took place in 2012. The intense media coverage of these cases has led to the issues being considered at the highest level and media reports that the establishment of a Commonwealth agency to oversee ISAs and / or a national inquiry into ISAs is being discussed: < <http://www.sunshinecoastdaily.com.au/news/experts-agency-to-monitor-verseas-surrogacy-not-en/2415837/> >.

³ And possibly subsequently sold to a woman in India (this is not clear and it is not known whether, if this did happen, the woman wished to care for the child or not).

⁴ He was subsequently being investigated and monitored by social services in the relevant Australian state in relation to his ability to care for the child still in his care. In view of the fact that ISA cases are seemingly not being routinely tracked in States, it is impossible to ascertain how frequently child abandonment is occurring following ISAs. However, given the extremely serious nature of these cases, whether rare or more common than might be hoped, they must be taken into account when considering future international approaches to ISAs.

⁵ E.g., see < <http://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children> > and < <http://www.abc.net.au/news/2014-09-10/japanese-surrogacy-man-has-another-baby/5732856> >. He reportedly wished to have a large number of children.

⁶ In this context, it is perhaps unsurprising that, at the Parliamentary Assembly of the Council of Europe on 1 July 2014, a motion for a resolution was put forward seeking a declaration against the practice of surrogacy and requesting that the Assembly further examine the issues arising from the practice, particularly the links with the reproductive health of women, human trafficking and the rights of children and discuss tools for addressing the problem. The motion for a resolution had not been discussed in the Assembly and committed only those who signed (23 parliamentarians). See “Human rights and ethical issues related to surrogacy”, Motion for a resolution tabled by Mr Valeriu Ghiletschi and other members of the Assembly (Doc 13562), available at < www.assembly.coe.int >.

⁷ See further: < <http://www.thehindu.com/news/cities/bangalore/fertility-specialist-held-on-charge-of-selling-newborn-running-surrogacy-racket/article6492156.ece> >.

⁸ E.g., *Re D (A child)* [2014] EWHC 2121.

⁹ *Fisher-Oakley & Kittur* [2014] FamCA 123 (at para. 9). See also the discussion of these issues in the German and Swiss cases reported in **Annex I** above.

4. **Concerns regarding the consent of surrogate mothers**: in several cases in 2014, issues arose, yet again, concerning whether the consent of some surrogate mothers had been given “freely, unconditionally and with full understanding of what is involved”.¹⁰ These concerns arose primarily in States in which the surrogate mothers are not native English speakers. This is because the documentation signed is often in English, with no information provided as to whether the surrogate mother speaks English, is literate or has had the documents read and interpreted for her. In some cases, the intending parents have also never met the surrogate mother and thus are unable to provide any information about her literacy or language skills.¹¹ Concerns have also been expressed, yet again, regarding certain contract terms and, in some cases, the limitations placed on the decision-making of surrogate mothers, particularly as regards their health.¹²

5. **Difficulties with intermediaries**: as in previous years, 2014 has proved a cautionary tale as regards intermediaries in the ISA context, particularly in certain States of birth,¹³ with several English court decisions highlighting the difficulties which have been encountered. There have been reports of unhelpful and unresponsive clinics and poor clinic and agency advice,¹⁴ as well as further reports of gamete “mix-ups” by clinics in some States of birth.¹⁵ Media reports have also alleged that one company in Mexico (US owned), now reportedly bankrupt and under US federal investigation, was not screening surrogate mothers properly, failing to provide appropriate healthcare and treatment, as well as taking money from intending parents fraudulently.¹⁶ Several reported decisions this year have also reiterated the need for intending parents to obtain specialist legal advice in all implicated jurisdictions since ISA cases are a “legal minefield”.¹⁷

¹⁰ Per Theis J at para. 28.

¹¹ *E.g.*, *Re WT* [2014] EWHC 1303. In this case, these concerns prompted the court to request that the UK Visas and Immigration service amend the standard letter provided to support medical visa applications by those seeking surrogacy services in India to “stress the importance of the requirement [...] for the birth mother’s post-birth full and informed notarised written consent [...] to hand over the child [...] and agree to the making of the parental order” (para. 45). Also, see the Australian case of *Green-Wilson & Bishop* [2014] FamCA 1031 where it was stated that there was no evidence that the surrogacy agreement had been translated into Hindi. As a result, the judge felt it necessary to make the orders on the condition that they be personally served on the surrogate mother and her husband and they have the ability to contest them within a defined period.

¹² *E.g.*, see *Green-Wilson & Bishop* [2014] FamCA 1031.

¹³ Many reports in 2014 have centred on India, Thailand and Mexico.

¹⁴ *E.g.*, *Re WT* [2014] EWHC 1303 (where clinic was unresponsive and unhelpful to court’s requests and provided contradictory legal advice); *Re D (A Child)* [2014] EWHC 2121 – where the director of a clinic refused to provide statement and co-operate with court and seemingly lied regarding a surrogate’s marital status.

¹⁵ *E.g.*, see < <http://www.dailymail.co.uk/news/article-2794150/australian-couples-shocked-discover-no-genetic-link-children-born-india-surrogate.html> >. This issue was also highlighted in the 2014 Study at para. 189.

¹⁶ A California-based medial tourism company: see, *e.g.*, the reports at < <http://www.abc.net.au/news/2014-07-08/would-be-parents-fleeced-by-mexican-surrogacy-operation/5572262> > and < <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/14/desperate-for-a-babyscammingglobalsurrogacysnewestfrontier.html> >. As with other intermediaries operating in Mexico, this company was based in Cancun, in a state in which surrogacy is illegal, and was flying surrogate mothers to Tabasco, where *altruistic* surrogacy is legal, for the births of the children (thus also contravening the requirements of altruism in Tabasco).

¹⁷ *Re G and M* [2014] EWHC 1561 and *CC v. DD* [2014] EWHC 1307.