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COMMITTEE OF EXPERTS ON FAMILY LAW (CJ-FA)

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REPORT ON PRINCIPLES CONCERNING THE ESTABLISHMENT AND LEGAL CONSEQUENCES OF PARENTAGE – "THE WHITE PAPER"

as adopted by the CDCJ at its 79th plenary meeting on 11-14 May 2004

Working document prepared by CJ-FA Secretariat

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FOREWORD

As a result of the XXVII Colloquy on European Law on "Legal problems relating to parentage" held in 1997 in Valletta, Malta, the Council of Europe Committee of experts on family law (CJ-FA) discussed the future work to be carried out on questions concerning the legal status of children in the light of the proposals made at this Colloquy.

Following the examination of these proposals, it was decided to prepare principles to be included in an international instrument (Convention or Recommendation) on the legal status of children.

At the initial stage of preparation in 1997 the CJ-FA assigned its Working Party No. 2 on the legal status of children (CJ-FA-GT2) the task of drawing up a report containing principles relating to the establishment and legal consequences of parentage in order to provide guidelines to States, which was finalised and submitted to the CJ-FA during its 31st meeting from 5 to 7 October 1998 as a Report on principles concerning the establishment and legal consequences of parentage.

In 1999 the CJ-FA discussed, as a preliminary question, the nature of the international legal instrument to be prepared by its Working Group. As a large number of member States were revising their national laws on these issues at the time, it was not advisable to prepare a new Convention which could become rapidly out of date or which could be in contradiction with new internal laws. Therefore, the CJ-FA entrusted the CJ-FA-GT2 with the task of preparing at that stage a Recommendation containing a set of principles or standards relating to the establishment and legal consequences of parentage. Some or all of these principles could be considered as possible models which could be used by national legislatures when elaborating or revising their internal laws concerning these issues at present or in the future.

In 2000, the CJ-FA during its 33rd meeting from 23 to 25 May 2000, asked the CJ-FA-GT2 to revise and finalise the Report on principles concerning the establishment and legal consequences of parentage and to indicate whether it might be possible to prepare a draft Recommendation on this subject.

In the light of the comments received from delegations, the CJ-FA felt that – in a field as important as that concerning the legal status of children, which was affected by the development of society and by progress in areas such as technology, genetics and medically assisted procreation – governments and other persons concerned should be given more time to comment on the principles set out in this text. Therefore it proposed that the Report be disseminated in the form of a "White Paper" for the purposes of comments, particularly by CJ-FA participants, and public consultation.

Consequently the CJ-FA proposed to examine any comments on this "White Paper" submitted to the Secretariat by 31 January 2003 at the latest with a view to report

subsequently to the CDCJ. Only ten comments were received by the deadline of 31 January 2003.

Due to the low number of comments, the period for public consultation of the White Paper was extended to 31 December 2003 after which and any further prolongation of the consultation period seemed unnecessary.

It was decided by the Plenary of the CDCJ on 11-14 May 2004 to adopt this document as a Report and request its publication. It has to be noted that this Report could be a useful basis for introducing national legislation on this question and possible drafting of a new Council of Europe Convention on adoption, as it also deals with the adoption law. Although the time is not yet ripe to draft a recommendation or even guiding principles on this issue, national legislation in this area is constantly developing, leaving open the possibility of reviewing the Report after a certain period of time.

INTRODUCTION

1. This "White Paper"[1] contains 29 principles which are contained in the following 3 parts:

- Part A: principles relating to the establishment of legal parentage;
- Part B: principles relating to legal consequences of parentage; and
- Part C: possible legal consequences where parentage has not been established.

Part A of the White Paper - principles relating to the establishment of legal parentage - contains seventeen principles concerning the following issues: the establishment of maternal affiliation; the establishment of paternal affiliation; the cases of medically assisted procreation in the establishment of paternal affiliation; contestation of parentage and the change of parentage.

Part B of the White Paper - principles relating to legal consequences of parentage – contains eleven principles concerning the following matters: parental responsibilities; maintenance; the family name of the child; the nationality of the child; succession and the right of the child to know his or her origins.

Part C of the White Paper - possible legal consequences where parentage has not been established – contains one principle relating to possible consequences, in particular concerning parental responsibilities and maintenance in cases where parentage has not been established.

[1] This document was originally produced under the reference 'CJ-FA (2001) 16 e rev – "White Paper" on principles concerning the establishment and legal consequences of parentage' dated 15 January 2002.

A. PRINCIPLES RELATING TO THE ESTABLISHMENT OF LEGAL PARENTAGE

a) General matters relating to legal parentage

5. The participants at the XXVIIth Colloquy on European Law on legal problems relating to parentage (September 1997, Valletta, Malta) recognised that, since the opening for signature of the *European Convention on the adoption of children* [ETS 58] and the *European Convention on the legal status of children born out of wedlock* [ETS 85] in 1967 and 1975 respectively, there had been considerable social and legal changes in each State and account would have to be taken of the provisions of the 1989 United Nations *Convention on the rights of the child* and 1996 *European Convention on the exercise of children's rights* [ETS 160]. These social and legal changes, together with the newly available medical techniques, have increased the need for European States to up-date their laws so that these laws contain appropriate standards and provide greater legal certainty concerning the legal status of all children.

6. Matters relating to parentage are one of the main issues which arise when dealing with the legal status of children. Therefore, it is advisable to prepare the main principles governing the establishment and legal consequences of parentage in order to provide guidelines to States when introducing or considering legislative reforms in this field.

7. The main principles established by the case law of the former European Commission of Human Rights and the European Court of Human Rights on this matter have been taken into account when drafting the principles included in this "White Paper". In this respect, it has to be recalled that, according to the Court's interpretation of Article 8 of the *European Convention on Human Rights* with regard to affiliation, "respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family" (cf. Marckx v. Belgium (1979)[2]; Johnston v. Ireland (1986)[3]). Taking furthermore into account the principle of non-discrimination laid down in Article 14 of the Convention, this interpretation only allows exceptions which are duly justified in accordance with the principles of lawfulness, necessity in a democratic society for the protection of the values enumerated in paragraph 2 of Article 8, and proportionality of means.

8. The Principles of this "White Paper" only deal with questions concerning legal parentage since the establishment of biological parentage is a medical matter. Therefore, any reference to parentage shall be understood as legal parentage. In this respect, it was underlined that references made in this "White Paper" to "parent" shall be understood to refer only to "legal parent"; and "legal parent" is defined as a person whose parentage has been established in a manner prescribed by law.

9. For the interpretation and application of the following principles, the best interests of the child should be the paramount consideration. In this respect, it should be underlined that it is

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[2] *Eur. Court HR, Marckx v. Belgium judgment* of 13 June 1979, Series A, n° 31.

[3] *Eur. Court HR, Johnston and others v. Ireland judgment* of 24 January 1986, Series A, n° 112.

in the best interests of the child, first of all, to establish parentage as from the moment of the birth and, secondly, to give stability over time to the established parentage.

10. Other interests, such as the interest of the family as well as the public interest may also be taken into account in addition to the best interests of the child. Therefore the law may opt not to allow the parentage to be established on the basis of biological affiliation, for instance in cases of medically assisted procreation with an anonymous donor of sperm. Where the child is born as a result of an incestuous relationship the establishment of biological affiliation may also be precluded.

11. The following principles on legal parentage are intended to reflect a balance between "the biological truth", reflecting primarily biological and genetic parentage, and "the social parenthood", reflecting the fact with whom the child is living and who is taking care of him or her. In this respect, it is useful to recall that in a case where the applicant claimed to be the biological father of a child born to his former partner who, at the time of the birth, was married to another person, the European Court of Human Rights stated "In the instant case, the applicant […] did not form any emotional bond with the baby […] The applicant's link with the child was therefore insufficient to fall within the scope of family life. […] It was justifiable for domestic courts to give greater weight to the interests of the child and the family in which it lives rather than the interests of the applicant in obtaining the determination of a biological fact" (European Court of Human Rights (Section IV), decision of 29 June 1999 in the application N° 27110/95 in the case Nylynd against Finland).

b) The establishment of maternal affiliation

Principle 1:

The woman who gives birth to the child shall be considered as the mother.

12. Principle 1 stresses that it is the fact of the birth which determines the legal maternal affiliation. Principle 1 follows the wording of paragraph 1 of Principle 14 of the general conditions for the use of artificial procreation techniques as contained in the "White Paper" on "Human artificial procreation" prepared by the Council of Europe's ad hoc Committee of experts on progress in the biomedical sciences (CAHBI). Furthermore, it is in the line with the interpretation given by the European Court of Human Rights in the Marckx judgment according to which it is a fundamental right for a mother and her child to have their link of affiliation fully established as from the moment of the birth[4].

13. However, the effects of new developments in biology and medicine, in particular the existence of surrogate mothers (with or without their own ova) and the different possibilities offered by medically assisted procreation, have to be taken into account. In this respect, those States which allow surrogacy in cases defined by their national law should provide

[4] *Eur. Court HR, Marckx v. Belgium judgment* of 13 June 1979, Series A, n° 31.

procedures, under the control of the competent authorities, in order to take into account the best interests of the child at the time of the transfer of legal parentage from the surrogate mother to the new legal mother. Furthermore, the principles reflected in the report on "Human artificial procreation" prepared by the Council of Europe's ad hoc Committee of experts on progress in the biomedical sciences (CAHBI) during the period of 1985 to 1987 should be applied, in particular those mentioned in paragraphs 2 and 4 of Principle 15 of that report, which state:

> "2. Any contract or agreement between the surrogate mother and the person or couple for whom she carried the child shall be unenforceable.
>
> 4. However, States may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that:
>
> a. the surrogate mother obtains no material benefit from the operation;
> b. the surrogate mother has the choice at birth of keeping the child."

14. Nevertheless, after examining the different situations derived from the medically assisted procreation, it was agreed that Principle 1 concerns the legal situation at the time of birth. Therefore, any prior agreement relating to the birth of a child and the obligation to give subsequently this child to another person will not affect the legal maternal affiliation at the moment of the birth. In other words, all previous circumstances concerning the conception and pregnancy (e.g. cases of surrogacy) and any subsequent modification of the legal parentage (e.g. adoption by another person) will not affect the legal maternal affiliation at the moment of birth.

c) The establishment of paternal affiliation

Principle 2:

1. ***The law shall always provide for the possibility to establish paternal affiliation by presumption, recognition, or judicial decision.***

2. ***The establishment of paternal affiliation may only be prohibited in exceptional circumstances determined by law when the best interests of the child so require.***

15. Paragraph 1 of this Principle underlines that it is always necessary to give the possibility to establish paternal affiliation.[5].

[5] In this respect, it was noted that there is a pending case before the European Court of Human Rights where a man claiming to be the father was unable to have his paternity established after the mother's death (*Eur. Court HR, Yousef v. The Netherlands,* decision of 5 September 2000, App. n°33711/96).

16. Principle 2 is a general principle which applies irrespective if the child was born as a result of a medically assisted procreation or not.

17. There are three clearly different forms to establish paternal affiliation as indicated in the Principle: by presumption (which is the most frequent way), by recognition and by judicial decision. This is the normal sequence of the application of these different forms of establishing paternal affiliation. Nevertheless, this sequence does not prevent States from replacing one form by another in some situations or even combining them.

18. The term presumption, as used in this "White Paper", describes situations where legal effects are achieved by simple operation of law. The term recognition, as used in this "White Paper", describes the situations where paternal affiliation is established on the basis of voluntary acts of the parents. Such recognition may have different forms, e.g. expression of will before an administrative authority (civil register), in a protocol before a court or administrative authority, by written agreement between parents or by joint signature of birth registration.

19. Paragraph 2 of Principle 2 concerns cases where, in the best interests of the child, the establishment of paternal affiliation is not allowed at all e.g. in cases of children born as a result of an incestuous relationship. Such prohibition may apply to any of the forms for the establishment of paternal affiliation. This Principle does not concern the possibility of a particular man to have his paternal affiliation established.

The establishment of paternal affiliation by means of a presumption in case of married couples

20. The presumptions resulting in paternal affiliation are based on the probability that the biological paternity coincides with a situation recognised by law (e.g. the husband of the woman who has given birth is presumed to be the father). This takes account of the case-law of the European Court of Human Rights: In the case of Berrehab v. the Netherlands (1988)[6], the Court held that the relationship which exists between the spouses in the case of a lawful and genuine marriage must be regarded as a family life within the meaning of Article 8 of the Convention: the cohabitation of the partners is not a required condition. Moreover, the Court even considered that the child born of such a union is *ipso iure* part of that relationship and that hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to family life protected by Article 8, even if the parents are not then living together.

21. Given the variety of factual situations, it is necessary to consider in which cases there should be a presumption. In order to determine the presumptions which could be applied to the establishment of paternal affiliation in case of married couples, the following situations were considered:

[6] *Eur. Court HR, Berrehab v. Netherlands judgment* of 21 June 1988, Series A, n° 138.

- a child conceived before the marriage and born during the marriage
- a child conceived during the marriage and born during the marriage
- a child conceived during the marriage and born after the end of the marriage
- a child conceived during a first marriage of the mother and born during a second marriage of the mother
- a child conceived before the marriage and born after the end of this marriage.

22. Taking into account the above cases, the following two principles are proposed:

Principle 3:

1. ***A child born during the marriage of his or her mother shall be presumed to be the child of the mother's husband.***

2. ***States are free not to apply this presumption if a child was born after the factual or legal separation of the spouses.***

23. Paragraph 1 of Principle 3 deals with the usual presumption according to which the husband of the woman who has given birth is automatically presumed to be the father.

24. The second paragraph of this Principle is inspired by certain national laws which prohibit the presumption of paternity after "*de facto*" or the legal separation of the spouses. For instance in some national laws, even though the presumption of paternity is, in principle, applied, it is not applied in cases where the child was born after the legal separation of his or her parents.

Principle 4:

1. ***A child born within a time limit, determined according to the law by reference to the normal period of gestation, after the end of the marriage of his or her mother shall be presumed to be the child of the mother's husband.***

2. ***States are free not to apply this presumption if a child was born after the dissolution of the marriage by annulment or divorce.***

25. Paragraph 1 of Principle 4 refers to cases where the marriage ends by the death of the husband, by divorce or annulment of the marriage.

26. The second paragraph of this Principle is inspired by certain national laws which prohibit the presumption of paternity after annulment or divorce. This Paragraph allows those States which so wish not to apply paragraph 1 in such cases. The underlying idea for this provision is that the fact that the husband is not the biological father may be the factor which leads to divorce or annulment of marriage. Therefore in such cases, it is more practicable for all concerned, if there is no automatic establishment of the paternal affiliation of the mother's

husband after the divorce or annulment of the marriage as it helps to avoid legal proceedings to contest paternity. The non-application of the presumption in such cases will enable the biological father to recognise the child without the need of first contesting the paternal affiliation in judicial proceedings.

The establishment of paternal affiliation by means of a presumption in case of unmarried couples

Principle 5:

States are free to apply the presumptions mentioned in Principles 3 and 4 to those cases where the mother of the child is living or has been living with a man without being married.

27. Concerning those cases where the establishment of paternal affiliation operates by means of a presumption, a provision relating to the application of the presumptions contained in Principles 3 and 4 to unmarried couples is established in Principle 5. It takes into account that according to the case law of the European Court of Human Rights, a child born out of a relationship where the father and the mother were living together outside of marriage was *ipso iure* part of that family unit from the moment of his birth and by the very fact of it (Keegan v. Ireland judgment (1994)[7]). The main difficulty to apply presumptions in these cases of unmarried couples is to prove the beginning and the end of cohabitation. This difficulty could be solved, for instance, by applying only the presumptions to couples that are living or have been living in a relationship and circumstances comparable to a marriage or have their cohabitation registered by a competent authority. Nevertheless, it should be taken into account that the Court concluded that "even if between persons who are not united by marriage, cohabitation is as a rule a condition for their relationship being regarded as amounting to family life, exceptionally other factors may also serve to demonstrate that their relationship has sufficient constancy to create "*de facto* family ties" (Kroon v. the Netherlands judgment (1994)[8]).

Principle 6:

States shall provide rules in their law to solve situations resulting from the conflict of presumptions.

28. The aim of this principle is to oblige States to provide solutions in their law for cases where the application of presumptions may lead to contradicting results (e.g. if a woman re-marries shortly after the death of her husband and gives birth to a child in a short period of time thereafter). The Principle does not seek to prejudge the manner in which States should solve the conflict.

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[7] *Eur. Court HR, Keegan v. Ireland judgment* of 26 May 1994, Series A, n° 291.

[8] *Eur. Court HR, Kroon and others v. the Netherlands judgment* of 27 October 1994, Series A, n° 297-C.

29. If States chose to apply presumptions also to unmarried couples (Principle 5) the possibility of conflicting presumptions may also rise. In such cases Principle 6 applies and States are required to provide solutions for the conflicts of presumptions concerning unmarried couples.

The establishment of paternal affiliation by means of voluntary recognition

Principle 7:

1. ***If paternal affiliation is not established by presumptions, the law shall provide for the possibility to establish paternal affiliation by voluntary recognition.***

2. ***States may decide to make such establishment conditional on one or both of the following:***

    a) ***the consent of the child, but if the child is not considered by the internal law as having sufficient understanding, the consent of the child's representative;***
    b) ***the consent of his or her mother.***

3. ***States can also make the establishment of paternal affiliation by voluntary recognition conditional on the consent or confirmation of a competent authority, when the purpose of this is to ensure that the person having recognised the child meets the requirements prescribed by law.***

30. As the voluntary recognition of a child has direct impact on the status of the child as well as the situation of the mother, States may wish to give the mother or the child, or both, the possibility to oppose to the establishment of paternity by voluntary recognition made by the person claiming to be the father. This, however, does not imply that paternity cannot be established if any of these persons opposes the voluntary recognition. In such a case although the paternity could not be established by means of voluntary recognition, it could be established by means of judicial proceedings.

31. In respect of the consent of the child, it should be pointed out that in the majority of cases when paternal affiliation is established, the child is too young to express his or her consent. In these cases of very young children, if the States have decided to make the establishment of paternal affiliation conditional on the consent of the child, this required consent can be given by the representative of the child. Where the child is considered by the internal law as having sufficient understanding his or her consent should be required, according to the spirit of the *United Nations' Convention on the rights of the child* and the *European Convention on the exercise of children's rights.*

32. This Principle seeks to balance two opposing views: On the one hand the view which considers that the establishment of paternal affiliation by means of voluntary recognition should always be conditional on the consent of the child and possibly on the consent of the

mother. This view considered that any other approach would be in contradiction with the rights of children enounced in the above Conventions, although the oldest European international legal instruments (*European Convention on the legal status of children born out wedlock* of 1975 and in the *European Convention on the adoption of children* of 1967) do not require the consent of the child to be obtained. This view also considers that the establishment of paternal affiliation by voluntary recognition should not be conditional on the consent of any competent authority. The opposing view considers that to make the voluntary recognition of paternal affiliation conditional on the consent of the child or the mother would not facilitate the establishment of paternal affiliation and would be counterproductive. It therefore considers that it should be left to States to decide whether to make or not such establishment conditional on different consents.

33. The reference in this Principle, as well as the following principles, to a "child considered by the internal law as having sufficient understanding" is to be understood in the same manner as used in the *European Convention on the exercise of children's rights*. In this respect, the explanatory report of this Convention states that "it is left to States to define the criteria enabling them to evaluate whether or not children are capable of forming and expressing their own views, and States are naturally free to make the age of children one of those criteria. Where internal law has not fixed a specific age in order to indicate the age at which children are considered to have sufficient understanding, the judicial or administrative authority will, according to the nature of the case, determine the level of understanding necessary for children to be considered as being capable of forming and expressing their own views" (see paragraph 36 of the explanatory report of the *European Convention on the exercise of children's rights*).

34. States may, in order to minimize contestable recognitions, wish to make the effects of voluntary recognition conditional upon the consent or confirmation of a competent authority. Such practices, already existing in some States, might increase the stability of the family situation of the child. In such cases, however, the primary reasons why the authority may withhold its consent or confirmation will be the existence of evidence making it uncertain that the person seeking to recognise or having recognised the child is the biological father or, in cases of medically assisted procreation, consented to the treatment. In this respect Article 4 of the *European Convention on the legal status of children born out of wedlock* was taken into account. According to it, the voluntary recognition of paternity may not be apposed or contested in so far as the internal law provides for these procedures unless the person seeking to recognise or having recognised the child is not the biological father. In cases of utilisation of the sperm of a third donor paternity is based on the consent of the mother’s companion to the treatment instead of biological affiliation. It is, therefore, appropriate to amend the principle accordingly. This procedure should, however, not be confused either with the procedure for the establishment of paternity by the judicial proceedings referred to in Principle 8 below or the procedure for overturning the possible refusal to agree to voluntary recognition by the child and/or the mother.

<u>The establishment of paternal affiliation by means of a judicial decision</u>

Principle 8:

1. ***If paternal affiliation is not established either by a presumption or by voluntary recognition, the law shall provide for the possibility to institute proceedings with the view to establish paternal affiliation by means of a judicial decision.***

2. ***The child, or his or her representative, shall have the right to institute proceedings to establish paternal affiliation.***

   Such a right may also be given to one or more of the following:

   - ***the mother***
   - ***the person claiming to be the father***
   - ***other persons justifying a specific interest***
   - ***public authorities.***

3. ***States may specify time limits to institute legal proceedings aiming to establish paternal affiliation.***

35. Principle 8 deals with the establishment of paternal affiliation by means of a judicial decision. The first paragraph of this Principle underlines the subsidiary character of the judicial decision in the establishment of paternal affiliation in the majority of cases.

36. Paragraph 2 of Principle 8 establishes the right of the child, considered by the internal law as having sufficient understanding, to institute proceedings in order to allow the establishment of paternal affiliation by a judicial decision.

37. Furthermore other persons than the child may also be entitled to institute proceedings to establish paternal affiliation: the mother, the man claiming to be the biological father, other persons justifying a specific interest and the public authorities. Such "other persons justifying a specific interest" could be, for instance, the descendants or ancestors of the person claiming to be the father or of the mother. In some countries the public authorities (e.g. social services for the protection of the childhood) may have the right to institute proceedings aiming to establish paternal affiliation, either as a specific representative for the child or on their own behalf, in particular in connection with proceedings relating to the child support (maintenance). In all these proceedings instituted by persons other than the child, the child considered by internal law as having sufficient understanding should have the right to be informed and to express his or her views (see Article 3 of the *European Convention on the exercise of children's rights).*

38. Paragraph 3 of Article 8 states the possibility to establish certain time limits for the institution of proceedings in order to give stability to the family situation of the persons involved over the time. Therefore even the right of the child to institute legal proceedings aiming to establish paternal affiliation may be limited (in particular this right may be limited by a certain period of time after reaching the age of majority).

d) Medically assisted procreation in the establishment of paternal affiliation

Principle 9:

Presumptions applied by States by virtue of principles 3, 4 and 5 shall also apply in cases of medically assisted procreation.

Principle 10:

1. ***If presumptions do not apply, principles 7 and 8 are applicable.***

2. ***The mother's husband or companion who gave his consent to the treatment cannot oppose the establishment of his paternity, unless the court finds that the child was not born as a result of the treatment he consented to.***

39. Principles 9 and 10 are based on the idea that the establishment of paternal affiliation in cases of medically assisted procreation should be based on the same rules as natural procreation, and therefore the presumptions should be applied in the first place. If the presumptions are not applied by the States or are not applicable, the law should provide the possibility to establish paternity by voluntary recognition under Principle 7. If paternity is not established in such a way, there shall be an opportunity to institute proceedings under Principle 8. In such cases the consent to the treatment might be the fundamental element where the husband or the companion of the mother later refuses to recognise the paternal affiliation. In the context of judicial proceedings, the mother's husband or companion shall not be able to oppose the establishment unless the court finds that the child was not born as a result of the treatment he consented to. According to Principle 10 the consent to the treatment is not the only fact on which the establishment of paternity can be based. In cases where medically assisted procreation is carried out using the sperm of the mother's husband or companion, States may also choose to base the paternity on biological affiliation. The Principle only precludes the mother's husband or companion who has consented to the treatment from the possibility of opposing the establishment of paternity.

40. In this respect it is necessary to take into account that according to the case law of the European Commission of Human Rights and following the interpretation of the notion of "family life" given by the Court in the above-mentioned Marckx judgment, the Commission considered that the situation of a man who had agreed to donate his sperm solely in order to allow a woman not married to him to conceive by artificial insemination did not in itself confer on the donor of the sperm a right to respect for family life with the child (*Eur. Comm. HR, M. v. the Netherlands decision* of 8 February 1993, App. n°. 16944/90).

41. The fact that the "White Paper" provides for rules for the establishment of paternal affiliation in cases of medically assisted procreation of couples who are not married does not imply that such treatment must not be made subject to restrictions by the internal law and does not say anything about the question whether such treatment is legal or illegal.

e) Contestation of parentage

42. Principles 11 to 13 deal with the contestation of maternal and paternal affiliation, in particular the grounds of contestation and the persons entitled to contest. Principle 14 deals with evidence in proceedings concerning the establishment and contestation of parentage. The following principles concerning contestation of parentage do not aim to regulate questions relating to changes in the birth records.

Principle 11:

1. ***The paternal affiliation established by a presumption or by recognition may be contested in proceedings under the control of the competent authority.***

2. ***Paternal affiliation may be contested on the following grounds:***
   a) ***the child has not been procreated by the father, or***
   b) ***in cases of medically assisted procreation:***
   - ***the father consented to medically assisted procreation but the child was not born as a result of such treatment;***
   - ***the father consented to medically assisted procreation with the use of his sperm but the sperm of a third person was used;***
   - ***the father did not consent to medically assisted procreation.***

3. ***The right to contest paternal affiliation shall be given to:***

   - ***the father, and***
   - ***the child or his or her representative***

   Such a right may also be given to one or more of the following:

   - ***the mother, and***
   - ***other persons justifying a specific interest, in particular the person claiming to be the father.***

4. ***The law may, in the best interests of the child, prohibit a person from contesting paternal affiliation in certain cases.***

43. Principle 11 is only dealing with the grounds of contestation of the established paternal affiliation and with the persons entitled to contest such an affiliation. This Principle is neither dealing with issues relating to the validity of the establishment of paternal affiliation (e.g. questions relating to the validity of the recognition), nor with grounds for the review of the court decision by which paternity was established.

44. Paragraph 1 of Principle 11 establishes the fundamental rule according to which paternal affiliation established by a presumption or by recognition can only be contested in

proceedings under the control of the competent authority. The term "competent authority" is used here instead of "judicial authority" in order to take into account those systems where administrative authorities have equivalent powers to a court in these matters.

45. Paragraph 2 of Principle 11 deals with cases where paternal affiliation may be contested. In this respect, it is necessary to distinguish cases where the child has been conceived by natural means from those where the child has been conceived by medically assisted procreation. When the child has been conceived by natural means the only ground of contestation is the fact that the legal father is not the biological father. In connection with the first ground of contestation, in cases where paternal affiliation was established by recognition, it is useful to recall that Article 4 of the *European Convention on the legal status of children born out of wedlock* provides that the "voluntary recognition of paternity may not be opposed or contested insofar as the internal law provides for these procedures unless the person seeking to recognise or having recognised the child is not the biological father". The second ground of contestation concerns cases of medically assisted procreation. In this respect the man who is in law the father can no longer use his right to contest paternal affiliation if he has consented to medically assisted procreation, unless the birth results from an adulterous relationship or if the birth results from medically assisted procreation but with the sperm of a third donor in cases where the father consented to a treatment using his own sperm. It should also be possible to contest the established paternal affiliation in those cases where the man who is in law the father has not consented to medically assisted procreation at all (see also Principle 10 above). In cases of medically assisted procreation, States may decide which of these grounds of contestation will be allowed under their national law.

46. Paragraph 3 of Principle 11 enumerates persons who are entitled to contest the established paternal affiliation. These persons are the father and the child or his or her representative. The inclusion of the child or his or her representative in this list responds to the idea that children are holders of rights and can exercise them by themselves or through their representatives, and therefore they should be allowed to participate in proceedings affecting them before a judicial authority.

47. Furthermore the right to contest paternal affiliation may be given to the mother, and to other persons justifying a specific interest, in particular the person claiming to be the father. But also other persons may have a specific interest to contest paternity (e.g. the parents of the father if he is dead, etc.).

48. Paragraph 4 of Principle 11 enables those states which so wish to prevent contestation of paternal affiliation in those cases where contestation is considered to be against the best interests of the child. States may decide to introduce such prohibition, for instance, in certain cases of medically assisted procreation and in cases where the father recognised and cared for the child being conscious that he was not the biological father. Furthermore, the law may prohibit the contestation or the competent authority may by refusing to order a genetic or blood test for reasons of securing the family relationships and legal certainty, allow the presumption to apply according to which the married man is regarded as the father of his

wife's child[9]. In this respect, it is recalled that the European Commission of Human Rights considered that the English courts' refusal to order a DNA test to ascertain whether a child was really the child of the man who had been always considered to be the father, did not constitute a lack of respect for the man's private life. The refusal was based on the consideration that the child's interest was inextricably linked with the family unit in which he had been brought up and that the risk of disrupting the stability of that family by a blood test would be harmful to the child. The Commission considered that there were sound reasons of legal certainty and security of family relationships for the Contracting States to apply the "*legal presumption*" according to which a married man is regarded as the father of his wife's children and to require good cause before allowing that "presumption" to be disturbed (*Eur. Comm. HR, M.B. v. the United Kingdom decision* of 6 April 1994, App. n°No. 22920/93).

Principle 12:

1. ***The rules contained in paragraphs 1, 3 and 4 of Principle 11 shall be applied, mutatis mutandis, to the contestation of maternal affiliation.***

2. ***Established maternal affiliation may be contested only on the ground that the woman considered to be the mother was not the one who gave birth to the child.***

49. Principle 12 deals with the contestation of maternal affiliation. In this respect, all the paragraphs of Principle 11, except paragraph 2 dealing with the grounds of contestation, apply mutatis mutandis. The application of the provision of Principle 11, paragraph 3, mutatis mutandis, implies that the mother will be the person entitled, with an absolute right, to contest maternal affiliation ("shall") and the father could have, as other persons, a right to contest maternal affiliation ("may"). The fact that the woman considered to be the mother has not given birth to the child is the only ground of contestation of maternal affiliation permitted. This Principle is the corollary of Principle 1 according to which the mother is always the woman who gives birth to the child. Therefore, the contestation must be based solely on the fact that the legal mother did not give birth to a specific child: a woman falsely claims to have given birth, or the child has been substituted for another child at birth (the child is not the same child as the child born to the mother). In the latter case, the woman has given birth to a child but has not given birth to the child whose maternal affiliation she is contesting. States should establish a procedure for contestation of maternal affiliation in order to deal with such cases.

Principle 13:

The law may specify time limits for the exercise of the right to contest affiliation by certain persons.

[9] *Eur. Court HR, X., Y. and Z. v. the United Kingdom judgment* of 22 April 1997, Series A.

50. Principle 13 deals with the establishment of time limits for the exercise of the right to contest affiliation. The reference to “certain persons” implies that States may decide not to apply time limits on the exercise of this right by some persons (e.g. the child) but may chose to apply it on the exercise by others (e.g. the person claiming to be the father). States may also specify different moments when these time limits begin to run for different persons e.g. the moment of the birth or the age of the majority of the child. The underlying intention of this provision is to provide the child with a stable legal situation (therefore, such time limits should not be too long) by defining his or her father and mother in a definitive manner within a certain period after his or her birth and not making his or her situation depend on changes of mind on the part of certain persons entitled to contest.

***Principle 14*:**

States shall take steps in order to promote the availability, in proceedings concerning the establishment and contestation of parentage, of new medical and genetic techniques and allow the use of information resulting from such techniques as evidence.

51. Principle 14 relates to the issue of biological parentage, in particular to the availability of new medical and genetic techniques as well as the use of the information resulting from the use of such techniques as evidence in proceedings concerning the establishment and contestation of parentage. If biological truth is sought, in the context of proceedings concerning the establishment or the contestation of parentage, it is important that the best available methods are used. Modern DNA techniques together with other medical information now make it possible to ascertain almost certainly who is or who is not the biological parent of the child. The States should, therefore, take steps to promote the availability of new medical and genetic techniques and allow the use of information resulting from the use of such techniques in proceedings, where the parentage of a child is at stake. Examples of such steps are:

- making blood or DNA tests compulsory for the parties;
- burden of proof - introducing rules according to which a refusal to undergo a relevant test is evidence against the refusing party;
- in cases of need, provide financial support for blood tests or provide to meet them through the system of legal aid.

52. In this respect, it is necessary to take into account the case law of the European Court of Human Rights according to which the fact that a child already has a legal father on the basis of the rule *pater is est quem nuptiae demonstrant*, which only the legal father may challenge, with the consequence that the real father is prevented from recognising his child, is not in itself considered sufficient justification for preventing the formation of complete legal family ties between that man and his child. In the Court's view, respect for family life requires that biological and social reality prevail over "legal presumptions" in those cases where the existence of a family life between a man not married to the mother and the child is established. The European Court of Human Rights underlined the necessity that internal law

provides a wide range of possibilities to contest the parentage established by legal presumptions [10].

53. Compulsory testing encountered some hesitations deriving from the constitutional provisions in some countries. However, it has to be pointed out that several decisions of the former European Commission of Human Rights have declared that the obligation to undergo these tests in order to establish paternity is not contrary to the *Convention on Human Rights,* as such tests are in the best interests of the child. However, while, according to the case-law of the European Commission of Human Rights, the obligation to undergo a paternity test does not violate a father's rights resulting from Article 8 of the European Convention on Human Rights, this provision on the other hand does not require States to make compulsory testing available (*Eur. Comm. HR, M.B. v. the United Kingdom decision* of 6 April 1994, App. n°No. 22920/93). Furthermore, even if the *Convention on the protection of human rights and dignity of the human being with regard to the application of biology and medicine: Convention on human rights and biomedicine* of 1997 deals only with the possibility to carry out tests which are predictive of genetic diseases and performed exclusively for health purposes, the preliminary work on this Convention indicated clearly that the relevant article did not intend to ban tests ordered by a court in the course of criminal proceedings or paternity tests (see doc. CDBI (97) 15).

54. The words "allow the use" do not imply that a judicial authority is required to order the use of medical and genetic information in all cases, nor does it imply that judicial authorities must accept a test that they did not order to carry out. The judicial authority may refuse to allow such information for reasons of "security of family relationships and legal certainty"[11] as stated by the European Court of Human Rights.

f) Change of parentage

Principle 15:

1. ***An adoption shall not be granted unless at least the following consents to the adoption has been given and not withdrawn:***
   - ***the consent of the mother***
   - ***the consent of the father***

   States may also require the consent of the child considered by the internal law as having sufficient understanding.

2. ***The law may dispense with the consent of the father or of the mother or of both if they are not holders of parental responsibilities or if this consent cannot be obtained, in particular if the whereabouts of the mother or of the father or of both is unknown and they cannot be found or are dead.***

[10] *Eur.Court HR, Kroon and others v.the Netherlands judgment* 27 October 1994, Series A, n°297-C.

[11] *Eur. Court HR, X., Y. and Z. v. the United Kingdom judgment* of 22 April 1997, Series A.

3. The competent authority may overrule the refusal to consent of any person mentioned in paragraph 1 only on exceptional grounds determined by law.

55. Adoption is the most frequent form of change of parentage. In this respect, the underlying ideas are that an adoption shall not be granted unless the competent authority is "satisfied that the adoption will be in the interest of the child" and that special attention shall be paid "to the importance of the adoption providing the child with a stable and harmonious home" (paragraphs 1 and 2 of Article 8 of the *European Convention on the adoption of children*). Assuming that these are the obvious aims of adoption, no specific Principle dealing with this matter has been included.

56. After the examination of some of the provisions of the *European Convention on the adoption of children*, in particular Article 5 which deals with the consents required for an adoption, the above Principle which requires the consent of, at least, the mother[12] and the father, was adopted. In this respect, it is necessary to underline that in the common law systems the reference to the "father" in the provisions relating to adoption shall be understood as a reference to the man who is a holder of parental responsibilities. States may decide to require also the consent of the child considered by the internal law as having sufficient understanding to the adoption. Since it was held that the requirement of such a consent might in certain cases be counterproductive (e.g. if the child grew up in the belief that the mother's husband was his father) and thus against the best interest of the child, no absolute requirement for such consent (as opposed to the requirement for the consents by the mother and the father) was adopted. The fact that States do not require the consent of the child in certain cases, does not imply that children should not be provided with all relevant information and that they are not allowed to express their views.

57. The consents may be dispensed with in certain cases, or the refusal of consent may be overruled by the competent authority, on exceptional grounds determined by law. Concerning the question of which consents may be dispensed by the law, the consent of the mother and/or the father can be dispensed with when it cannot be obtained and if they are not holders of parental responsibilities. The fact that the law may dispense with the consent of the father or of the mother if they are not holders of parental responsibilities, does not imply that these persons are not consulted.

58. The refusal of the consent by the mother and/or the father may be overruled by the competent authority in particular in cases when the father or the mother have not parental rights or have been deprived of their parental rights (in this respect see Article 5 paragraph 3 of the *European Convention on the adoption of children*). In this respect, it was recalled that, in a case where the Swedish courts granted the stepfather –mother's husband- permission to adopt the child despite the refusal to consent of the natural father of the child who was not sharing the custody, the European Court of Human Rights concluded that the fact that the

[12] The European Court of Human Rights declared a violation of Article 8 and Article 6, paragraph 1 of the Convention in a case where a daughter was declared available for adoption and all contact between the child and the mother was broken off due to a mental disease of the mother (*Eur. Court HR, E.P. v. Italy judgment* of 16 November 1999).

judicial authority overruled the consent of the father was not in breach of Article 8 of the Convention[13].

59. Concerning the required consents, the *European Convention on the adoption of children* of 1967 requires the consent of the father of the child to an adoption only if the child is born in wedlock. However, under the case-law of the European Court of Human Rights, in particular the case Keegan v. Ireland[14], the placing for adoption by a mother, where the law did not give the father of a child born out of wedlock the right to be consulted, is in breach of Article 8 of the *European Convention of Human Rights*. In this respect, it was wondered whether in this case "to require the consent" is different from "the right to be consulted". In any case, it was considered that States should safeguard, as far as possible, the right of parents to be heard in procedures concerning the adoption of their child. In respect of the persons whose consent is required, it should be pointed out that paragraph 1 of Principle 15 states that “at least” the consent of the father and the mother should be required. Therefore States can provide that the consent of other persons should also be required.

60. The question of persons who may adopt a child was also discussed. In this respect, it was underlined that the *European Convention on the adoption of children* stated that only one person or married couples can adopt a child. It is to be noticed that remarkable changes in family patterns have taken place since the 1967 Convention was adopted.

These changes may make it appropriate to reconsider the issue of who should be entitled to apply for adoption. However, taken into account that the object of this “White Paper” is to examine issues concerning the establishment and legal consequences of parentage, this “White Paper” is not dealing with questions concerning the determination of persons[15] who may adopt a child or other conditions of adoption which are not related to the topic of this “White Paper”.

Principle 16

Before an adopted person attains his or her full legal capacity, the adoption may be revoked only by a decision of a competent authority on serious grounds established by law, taking into account the best interests of the child.

61. The question relating to the possibility of the revocation of an adoption was examined. Paragraph 1 of Article 13 of the *European Convention on the adoption of children* states "Before an adopted person comes of age, the adoption may be revoked only by a decision of a judicial or administrative authority on serious grounds, and only if revocation on that ground is permitted by law". Concerning this Article, it was considered that the terms "on

[13] *Eur. Court HR, Söderbäck v. Sweden judgment of* 28 October 1998.

[14] *Eur. Court HR, Keegan v. Ireland judgment* of 26 May 1994, Series A, n° 290.

[15] There is a pending case before the European Court of Human Rights, lodged by an unmarried homosexual man, concerning the rejection on the grounds of his “life-style” of his request to adopt the child. The applicant complained, *inter alia*, of an interference with his right to respect for his private and family life, of discrimination (on the grounds of his sexual orientation) in relation to that life (*Eur. Court HR, Frette v. France,* decision March 1999, App. n° 36515/97).

serious grounds" were too broad and it was necessary to qualify them. In this respect, it was agreed that the best interests of the child should be the paramount consideration and taken into account in the legal text fixing the grounds of revocation and by the competent authority when deciding on the revocation. The principle, similarly to that of Article 13 of the above-mentioned Convention, deals only with the rule relating to the possibility to revoke adoption while the child is a minor. It does not deal with the possibility of revocation after the adopted child has come of age and such possibility can always be foreseen by the States. The provision also does not represent an obligation for States to allow revocation while the child is a minor, but, if they do allow it, then this principle should apply.

Principle 17:

Any new form of change of parentage shall take place under the control of the competent authority in procedures which have due regard to the best interests of the child. Any such form should be subjected to the same safeguards as adoption.

62. It was noted that nowadays the only legal form of change of parentage is adoption. Nevertheless, it was agreed that, taking into account possible social, medical and legal developments in the near future, and the inventiveness of the legal profession, attempts to develop new forms of change of parentage may appear, for instance in the area of surrogate motherhood. Therefore it decided to formulate the above Principle.

B. PRINCIPLES RELATING TO LEGAL CONSEQUENCES OF PARENTAGE

63. The following are the legal consequences to be considered when dealing with parentage:

a) Parental responsibilities
b) Maintenance
c) Name
d) Nationality
e) Succession
f) The right of a child to know his or her origins.

a) Parental responsibilities

Principle 18:

Parental responsibilities are a collection of duties and powers, which aim at ensuring the moral and material welfare of children, in particular:

- ***care and protection***
- ***maintenance of personal relationships***
- ***provision of education***
- ***legal representation***
- ***determination of residence and***

- ***administration of property.***

64. It was considered that the main contents of parental responsibilities were already contained in the definition of "parental responsibilities" given in Principle 1 of *Recommendation N° R (84) 4 of the Committee of Ministers to member States on parental responsibilities*. However, it was considered that it would be advisable to use the expression "care and protection" because this was wider than the notion "care of the person of the child" used in the Recommendation N° R (84) 4. The terms "care and protection" also include the health, nourishment and welfare of the child. It was also considered that taking into account the *United Nations' Convention on the right of the child* as well as the [draft] Convention on contact concerning children of the Council of Europe the question of the "determination of the residence of the child" was an issue that should be included, as a separate one, among the rights and duties of parental responsibilities.

65. The question whether or not the issue of "maintenance" should be included as one of the duties contained in parental responsibilities was one of the major points of discussion. Recommendation N° R (84) 4 included maintenance as a part of parental responsibilities. However, taking into account that maintenance should always be an obligation of parents, even if they are no longer holders of parental responsibilities and the fact that in some legal systems maintenance was not linked to parental responsibilities, it was decided not to include "maintenance" among the duties and powers included in the concept of parental responsibilities. Therefore, it was agreed that the issue of "maintenance" will be treated as an independent legal consequence of parentage and directly linked with possible duties of the child concerning his or her parents (in this respect, see principle 26 below).

Principle 19:

1. ***Parental responsibilities should in principle belong jointly to both parents.***

2. ***In cases where only one parent has parental responsibilities by the operation of law, the other parent should have an opportunity to acquire parental responsibilities, unless it is against the best interests of the child. Lack of consent or opposition by the parent having parental responsibilities should not as such be an obstacle for such acquisition.***

Principle 20:

1. ***Parents having parental responsibilities should have an equal right to exercise such responsibilities and whenever possible they should exercise them together unless the best interests of the child otherwise requires.***

2. ***Subject to the best interests of the child, parental responsibilities may be exercised by one parent alone or the exercise may be divided between the two parents according to the decision of the competent authority or on the basis of an agreement concluded between them.***

3. In cases determined by law a person other than a parent may, upon a decision by a competent authority, exercise some or all parental responsibilities in addition to or instead of parents.

Principle 21:

When exercising parental rights and responsibilities the child should have a right to express his or her views and due weight should be given to the views expressed by the child according to his or her age and maturity.

Principle 22:

Dissolution or annulment of marriage, separation of parents or termination of the cohabitation should not as such affect the right of a parent to exercise parental responsibilities. The competent authority may, however, rule on the exercise of parental responsibilities taking into account the best interests of the child.

Principle 23:

1. Where parental responsibilities are exercised jointly by both parents and one of them dies, these responsibilities should belong to the surviving parent.

2. Where the parent who is entitled to exercise alone some or all parental responsibilities dies, his or her responsibilities should be exercised by the surviving parent or a third person, either by operation of law or upon a decision taken in the best interest of the child by the competent authority to that effect.

3. Where there is no longer any parent living, the competent authority should take a decision concerning the attribution of parental responsibilities. National legislation **may** *provide that these responsibilities may be given to a member of the family or to* **a** *stepparent or to a person designated by the last parent to die unless the interests of the child require any other measures.*

4. States may provide that a parent entitled to exercise parental responsibilities may make a will appointing another person to exercise such responsibilities after his or her death. The competent authority shall have a power to declare that the person appointed should not exercise such responsibilities if this would be against the best interest of the child.

66. The underlying idea of these principles is that the joint exercise of parental responsibilities is in the best interests of the child irrespective of whether the child was born in or out of wedlock. Therefore, no distinction is made between married and unmarried couples because if the legal parentage has been established it is the same whether the parents are married or not, and the joint attribution and exercise of parental

responsibilities would be the ideal situation for the child. Even in the case of a dissolution of the marriage or a separation of the parents married or not, the joint parental responsibilities should continue automatically, unless this has been clearly shown to be contrary to the best interests of the child (in exceptional circumstances). The agreement of the parents should not be a condition for the joint exercise of parental responsibilities.

67. However, in some cases it could be in the best interests of the child to divide between both parents the exercise of parental responsibilities or for the parental responsibilities to be exercised by one parent alone (for instance when one parent has not shown any interest in the child after his or her birth or in cases of unmarried couples when the paternal affiliation had been established by judicial decision against the will of the father). In this respect, see in particular paragraph 2 of principle 7 of Recommendation N° R (84) 4.

68. When one of the parents dies, if they exercised jointly parental responsibilities, these responsibilities should be exercised by the surviving parent. If the deceased parent was entitled to exercise alone some or all parental responsibilities, in principle the parental responsibilities of the deceased parent should be exercised by the surviving parent or third persons. The second paragraph of Principle 23 is intended to cover a range of situations: the situation where both parents are holders of parental responsibilities and only one exercises them; situation where only one parent is the holder of parental responsibilities and he or she exercises them alone; the situation where both parents are holders of parental responsibilities, but the exercise is divided (see Principle 20.2) and one of the parents exercises certain rights or responsibilities alone. The determination of the person who will exercise parental responsibilities –the surviving parent or a third person - could be done either directly by operation of law or through a decision by the competent authority. The reference to the third person includes not only physical persons –e.g. the spouse of the deceased father- but also legal persons (e.g. public authorities). Where there is no longer any living parent, the competent authority should take a decision in this respect.

69. The possibility that a parent designates a person in the context of paragraph 3 of Principle 23 does not prevent the competent authority to attribute parental responsibilities to another person if the exercise of these responsibilities by the designated person would be against the best interests of the child.

Principle 24:

1. ***In exceptional circumstances determined by the law, the parents may, partly or totally, be deprived of parental responsibilities or of the exercise of them, upon a decision by a competent authority made in the best interests of the child.***

2. ***The States should consider the need to establish procedures for the periodical review of such decisions even in the absence of an application to that effect by the person concerned.***

Principle 25:

1. ***In any decision of the competent authority concerning the attribution, the deprivation or the exercise of parental responsibilities, the best interests of the child should be the primary consideration. No discrimination should be made between children born in and out of wedlock. However, the equality between parents should also be respected and no discrimination should be made, in particular on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.***

2. ***When the competent authority takes a decision relating to parental responsibilities due weight should be given to the views expressed by the child according to the age and maturity of the child.***

70. Parents may be deprived of parental responsibilities only in exceptional circumstances determined by law, because parental responsibilities are inherent to the notion of parenthood. Therefore, the stress on exceptional circumstances was felt necessary, as it should not be a commonplace situation to deprive parents of their responsibilities. Normally, the best interests of children requires them to be cared for their parents, even if the parents are not perfect. Such exceptional circumstances may include criminal offences committed by the parent against the child, for instance sexual or physical abuses, but could also include other circumstances, e.g. mental illness of the parent[16], where the physical and moral welfare of the child is in danger. The deprivation of parental responsibilities will always have to decide by the competent authority. Such decisions of the competent authority will always have to be made in the best interests of the child: this could mean, for instance, that in certain situations it might be preferable to leave children in the care of their parents, despite the existence of some of the above circumstances, rather than removing children from the family and placing them in a public institution.

71. Taking into account that parental responsibilities aim at ensuring the moral and material welfare of the child, and that they must be attributed and exercised in the best interests of the child, any difference between children born in and out of wedlock should be eliminated. In this respect, nowadays any legal solution which distinguishes between children born in and out wedlock would be contrary to numerous international instruments as well as the case law of the European Court of Human Rights.

72. Discrimination against either parent concerning the attribution and the exercise of parental responsibilities is dealt in the second sentence of the first paragraph of Principle 25 which provides for the equality of the parents. The text of this Principle dealing with discrimination is based on Article 14 of the *Convention for the Protection of Human Rights and Fundamental Freedoms.* Therefore, the case law of the European Court of Human Rights in relation to discriminations concerning the right to respect for private and family life

[16] *Eur. Court HR, Kutzner v. Germany*, decision of 23 March 2000, app. n°46544/99.

(Article 14 in conjunction with Article 8 of the above mentioned Convention) will also be applicable.

b) Maintenance

Principle 26:

1. ***In all cases both parents should be under a duty to maintain the child.***

2. ***National law may provide for the obligation of children to maintain their parents in need.***

73. Concerning the question of "maintenance" of children the following should be taken into account:

- "maintenance" should be a direct legal consequence of parentage;
- "maintenance" should always be an obligation of parents, even if they are no longer holders of parental responsibilities;
- no difference between children born in and out of wedlock should be made concerning their maintenance. Although this Principle does not specifically refer to this issue, the same treatment should also apply to children born out of wedlock where the law provided for the subsidiary maintenance of children born in wedlock by certain members of the family of the mother or father or both (thus the wording "in all cases" in par. 1 of the Principle).

74. As indicated above, it was decided not to include "maintenance" among the duties and powers included in the concept of parental responsibilities. Therefore, the issue of "maintenance" was examined as an independent legal consequence of parentage and directly linked with possible duties of the child concerning his or her parents.

75. Paragraph 1 of Principle 26 is a general one and therefore it is up to national laws to fix the conditions or the duration of the duty to maintain the child.

76. It was agreed that children are not only holders of rights but they have also duties or obligations. These obligations are of two types: moral obligations and legal obligations (in particular to pay maintenance to parents in need). The first type of obligations cannot be legally enforced. Concerning the second type, in many States children are not obliged to pay maintenance to parents in need.

77. Taking into account that the principles established in this "White Paper" are legal principles addressed to all member States, it was decided that, it would, under paragraph 2 of Principle 26, be up to national laws to determine whether, as a legal consequence of parentage, a child should pay maintenance to parents. Where such a duty exists it would be for the State concerned to fix the conditions (e.g. whether such a duty can be enforced against a minor child, when the parents shall be considered "in need", etc.).

c) The family name of the child

78. Concerning the question of the family name of the child, it was agreed to adopt the following principle:

Principle 27:

1. ***The child should have the right to acquire a family name from birth.***

2. ***States are free to make use of different systems for the choice of the family name provided that this does not result in an unjustified discrimination of one of the parents.***

79. Concerning the question of the choice of the family name to be used by the child, it is necessary to take into account the provisions of the *Resolution (78) 37 of the Committee of Ministers to member States on equality of spouses in civil law,* of the *Recommendation N° R (85) 2 of the Committee of Ministers to member States on legal protection against sex discrimination*, as well as Parliamentary Assembly's Recommendations 1271 (1995) and 1362 (1998) *on discrimination between women and men in the choice of a surname and the passing on of parents' surnames to children*. States should also consider the application of these provisions to unmarried couples.

80. In particular paragraph 17 of Resolution (78) 37 states: "[…] taking the necessary steps with a view to allowing both spouses equal rights as to the family name to be given to the children of their marriage, or the children adopted by them, by making use, for instance, of one of the following systems:

i. when the parents do not have a common family name:
   a. to allow the child to take the family name of the parent whose name he was not granted by law,
   b. to allow the family name of the children to be chosen by the common agreement of the parents;

ii. when the parents have, by the addition of their family names, a common family name which has been either chosen by them or formed by the operation of law, the omission of part of this family name should not lead to discrimination concerning the choice of the family name or names to be omitted. […]"

81. Principle 27 does not concern the possibility of a later change of the family name of the child following an administrative procedure or the marriage of the child.

d) The nationality of the child

82. The recent *European Convention on nationality* of 1997 in its paragraph 1.a of Article 6 states:

"Each State Party shall provide in its internal law for its nationality to be acquired *ex lege* by the following persons:

a. 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 which may be provided for by its internal law as regards children born abroad. With respect to children whose parenthood is 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".

83. Article 6 paragraph 4 letter d. of *European Convention on nationality* states:

"Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons:

d. children adopted by one of its nationals".

Paragraph 1 of Article 11 of the *European Convention on the adoption of children* states:

"Where the adopted child does not have, in the case of an adoption by one person, the same nationality as the adopter, or in the case of an adoption by a married couple, their common nationality, the Contracting Party of which the adopter or adopters are nationals shall facilitate acquisition of its nationality by the child".

84. Taking into account the above provisions, it was decided not to formulate any principle concerning the nationality of the child. The reasons for this decision are that any principle which shall not be in contradiction with these provisions would have to be discriminatory for children born out wedlock and adopted children. Furthermore, it was considered that upon recognition of an adoption of a foreign child by one of its nationals, the State concerned should grant *ex lege* its nationality to the adopted child. However, it was recognised that nationality is a very sensitive and political matter which has important implications in practice. Therefore, while recognising that the above provisions are discriminatory for children born out of wedlock and adopted children, it was decided not to formulate any principles in order to take into account the current national laws of member States as well as the recent *European Convention on nationality.*

e) Succession

85. The opinion was that the principle contained in Article 9 ("This Article gives children born out of wedlock the same rights of succession as children born within wedlock") of the *European Convention of children born out of wedlock* is satisfactory. In two recent cases[17] concerning respectively the discrimination against children of adulterous relationships and a

[17] *Eur. Court HR, Mazurek v. France judgment of* 1February 2000 and *Eur.Court HR, Camp and Bourimi v. The Netherlands judgment* of 3 October 2000.

child born out of wedlock with regard to inheritance rights, the European Court of Human Rights declared a violation of Article 14 of the Convention in relation to Article 1 of the First Protocol to the Convention in one case and a violation of Article 14 in conjunction with Article 8 in the other case. It also noted that there are States which have made reservations to Article 9 of the *European Convention of children born out of wedlock* which show the controversial nature of this issue. Therefore it was agreed not to formulate any principle on this matter.

86. This issue of succession might be examined in a more detailed manner by the Committee of experts on family law (CJ-FA) in the year 2002. In this respect, it should be underlined that the terms of reference of the CJ-FA for 2001 and 2002 are as follows: "The Committee is instructed to prepare, for the attention of the CDCJ, a report in the field of succession on the legal protection of the surviving child, spouse or other member of the family. This work will be carried by the CJ-FA and a Working Party in 2002 in the light of the results of the 6th European Conference on family law. A report on this topic will be submitted to the CDCJ in 2002 or 2003".

f) The right of the child to know his or her origins

Principle 28:

The interest of a child as regards information on his or her biological origin should be duly taken into account in law.

87. The Working Party discussed the issue of the right of children to know their parents (their origins). The discussion in the Working Party confirmed the controversial nature of this subject, particularly due to the inexistence of an uniform interpretation of Article 7 of the United Nations *Convention on the rights of the child* which states that "[…] the child shall have […], as far as possible, the right to know […] his or her parents". In this respect, Principle 28 goes one step further and refers specifically to the "biological origins" of the child. The Working Party noted that currently substantive discussions concerning this matter are taking place in some member States.

88. The Working Party did not draft a principle which would establish the absolute right of the child to know his/her origins. However, it recognised that all children have a legitimate interest with respect to their origins. At the same time it recognised that in certain situations, the best interests of the child or of other persons involved may justify withholding from the child such information or certain parts of it.

89. In connection with this right of the child, it was pointed out that in a case concerning complaints regarding the applicant's continuing lack of access to his case-file held by a local authority relating to his period in care in a public institution following the death of his mother, the European Court of Human Rights stated " persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other

hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. […] The Court considers that the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent […]"[18]. There is currently a pending case under the European Court of Human Rights concerning the impossibility, according to the French law, for an adopted child to discover his origins due to the application of the principle of secrecy of birth[19]; the applicant alleged a violation of Article 8 and 14 of the Convention.

C. POSSIBLE LEGAL CONSEQUENCES WHERE PARENTAGE HAS NOT BEEN ESTABLISHED

Principle 29:

1. ***In those cases where the law does not allow parentage to be established between a certain person and a child, States may permit the exercise of some parental responsibilities by that person upon decision of a competent authority.***

2. ***In those cases where the law does not allow parentage to be established between a certain person and a child, States may permit the possibility to establish the maintenance obligation by such a person towards the child upon a decision of a competent authority.***

90. There are certain cases when it is known that a person is the parent of the child but the law does not allow the parentage to be established (e.g. in some countries the father of a child born as a result of an incestuous relationship). In some cases there may still be certain legal consequences (e.g. the father of a child in the case of incest may have to pay maintenance, a child may be entitled to contact the parent).

91. The non-establishment of parentage does not necessarily preclude the child from obtaining information relating to his or her biological parents. In this respect, account should be taken of Article 7 of the United Nations *Convention on the rights of the child* mentioned above (see comments on Principle 28). The provision of genetic information about the biological parent(s) for medical purposes should be made possible in all instances.

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[18] *Eur. Court HR, Gaskin v. United Kingdom judgment* of 7 July 1989, paragraph 49.

[19] *Eur. Court HR, Odievre v. France, decision pending May 2000, App. n° 42326/98.*