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WG on Parentage / Surrogacy: Final Report on the Feasibility of a possible Convention on the Recognition of Judgments on Legal Parentage

I. Introduction

1 This Report has been drafted by the Working Group (WG) on Parentage / Surrogacy of the Hague Conference on Private International Law (HCCH) pursuant to mandates given by the HCCH Council on General Affairs and Policy (CGAP). It is submitted to CGAP for consideration at its meeting in March 2026 and for decision as to possible future work in this area.

2 This Report presents draft provisions for a possible future Convention on the recognition of judgments on legal parentage. It also presents explanations and feasibility considerations of these draft provisions, as well as a general assessment of the feasibility of such a Convention, followed by the WG's proposal for CGAP on possible future work. The WG assessed the feasibility of a possible Convention in several ways. It assessed whether it is possible for States to agree on such a Convention, and whether the draft rules fulfilled the mandate designed by CGAP for any new instrument in this area. The WG also considered whether States would be likely to join such a draft Convention, *i.e.*, whether the draft rules would be of interest or attractive to States in light of the divergent views, laws and practices amongst States in the area of legal parentage, and in light of the possible value the rules could add, or not, to the current private international law (PIL) rules applied by States to legal parentage.

3 Throughout this Report, the use of square brackets around words in the draft provisions for a Convention indicates that there are differing opinions within the WG as to the inclusion of that particular text.[1]

A. Background of the HCCH Parentage / Surrogacy Project[2]

4 The HCCH Parentage / Surrogacy Project started in 2010 with preliminary research being conducted. In 2014, the Permanent Bureau (PB) of the HCCH published a document on the desirability and feasibility of future work.[3] This document was accompanied by an extensive study based on responses to questionnaires addressed to States and other actors. The 2014 document concluded that carrying out work in this area was desirable (in this case, needed).[4] In March 2015, CGAP therefore decided to convene an Experts' Group (EG) to consider the feasibility of advancing work on the PIL issues surrounding the status of children, including issues arising from international surrogacy arrangements.

5 The EG met 12 times between 2016 and 2022 and presented a Final Report to CGAP 2023.[5] The EG recommended the establishment of a WG to explore possible provisions for two instruments: (1) a Convention on legal parentage in general – *i.e.*, excluding legal parentage established as a result of an international surrogacy arrangement; and (2) a Protocol on legal parentage established specifically as a result of an international surrogacy arrangement.

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1 When a draft provision contains multiple sets of square brackets, or when an entire article is in square brackets, colours have been added to the square brackets to help identify which words belong to which segment in square brackets.

2 For further detailed information on the background of the project, see the Experts' Group Final Report (EG Final Report), Prel. Doc. No 1 of November 2022 for CGAP 2023, available on the HCCH website (www.hcch.net) under "Projects" then "Legislative Work", paras 7-8 and 170-173.

3 The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project (2014 Report on Desirability and Feasibility), Prel. Doc. No 3 B of March 2014 for CGAP 2014 (see path indicated in note 2).

4 *Ibid.*, paras 40 and 68.

5 See EG Final Report, *op. cit.* note 2.

B. Mandate of the WG

6 In March 2023, CGAP mandated the establishment of a WG on PIL matters related to legal parentage generally, including legal parentage resulting from an international surrogacy arrangement. In addition, CGAP mandated:

> "5. a. the Working Group first to explore provisions for, if possible, one new instrument on these matters, to further inform CGAP on policy considerations in relation to the scope and content of such instrument, including on the feasibility of reaching consensus. The Working Group could later explore the possibility of two instruments, if necessary;
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> b. the Working Group to proceed on the basis that the aim of any new instrument would be to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children, those enshrined in the *United Nations Convention on the Rights of the Child* (UNCRC) and in particular their right that their best interests be a primary consideration in all actions taken concerning them;
>
> c. the Working Group to draw on the ideas and assessments in the Final Report of the Experts' Group, recognising that a number of elements and approaches identified could feature either on their own or in a combined way […]."[6]

7 While, as noted above, the EG had recommended work on two instruments,[7] CGAP mandated the WG to explore the possibility of developing only one instrument due to concerns over the different treatment of children depending on the circumstances of their birth. Based on the mandate from CGAP, the WG thus worked on draft provisions for *one instrument* only that would apply irrespective of the method of conception (*e.g.*, traditional or via assisted reproductive technologies (ART)), circumstances of birth (*e.g.*, following a surrogacy arrangement) or method for establishing legal parentage (*e.g.,* by an adoption).

8 The WG met five times between 2023 and 2025. The WG was composed of delegates from 25 HCCH Members and three Observers.[8] The WG produced a draft Convention using as a basis the text drawn up by the PB during the EG stage of the Project. The text was subsequently regularly amended by subgroups of the WG in order to reflect discussions during the WG meetings, and comments sent in writing by delegates. The subgroups were composed of the Chair of the WG, WG delegates, and members of the PB.[9]

C. Key elements of the draft Convention

9 "Limping legal parentage" might arise when legal parentage is established in one State but not recognised in other States, or when legal parentage differs between States with which parties have

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6 C&D No 5(a)-(c) of CGAP 2023, available on the HCCH website (www.hcch.net) under "Governance" then "Council on General Affairs and Policy" and "Archive (2000-2025)".

7 The EG had made this recommendation on the basis that "[m]ost experts were of the view that a differentiated approach (*i.e.*, with different rules included in differentiated instruments) would be more feasible, since (some) States which prohibit surrogacy could object to (or not participate in) the negotiations of an instrument on legal parentage that would include legal parentage established as a result of an [international surrogacy arrangement]", see EG Final Report, *op. cit.* note 2, para. 80.

8 Members: Argentina, Belgium, Brazil, Canada, China, Czech Republic, European Union, France, Germany, Greece, India, Ireland, Israel, Italy, Japan, Mexico, Netherlands, Russian Federation, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom and United States of America.
Observers: International Academy of Family Lawyers, International Social Service and United Nations Children's Fund.

9 At the last meeting of the WG in November 2025, the idea of working on a possible soft law instrument was mentioned by some members, as consensus could not be reached as to whether the project should advance to a Special Commission. However, as there was no mandate from CGAP regarding this matter, the WG did not discuss this option.

connections. This can create significant problems for children and their parents,[10] and can have significant adverse consequences throughout a person's lifetime, including on their human rights.[11]

10 The reasons for the current difficulties with cross-border continuity of legal parentage are that States have not only different substantive rules on the establishment of legal parentage in domestic situations but also different rules on international jurisdiction, applicable law and recognition of legal parentage. In particular, States have divergent views and laws on the establishment and recognition of legal parentage following a surrogacy arrangement.

11 The draft Convention therefore aims to build bridges between the different systems to facilitate the recognition of legal parentage established abroad by judgment, while taking into account States' concerns and reflecting diverse domestic approaches to the establishment and recognition of judgments on legal parentage depending on the circumstances of birth and methods of conception. The following is a summary of the draft Convention.

1. Scope of application

12 The draft Convention applies to the legal parentage of any person, regardless of age and irrespective of the method of conception, circumstances of birth or method of establishing legal parentage. This means that the draft Convention applies to domestic adoptions as well as the legal parentage of children born following a surrogacy arrangement and following ART. However, intercountry adoptions, and rights and obligations derived from legal parentage are excluded from its application (Art. 3).

13 There is a further potential exclusion from scope (Art. 2(3)): legal parentage established by judgment following a surrogacy arrangement is excluded from scope where the "surrogacy arrangement" does not fulfil the definition of that term in Article 4(f)).

2. Rules of recognition

14 The draft Convention provides for the recognition of judgments on legal parentage (Art. 1(a)). It does not apply to legal parentage established by operation of law (*e.g.*, based on birth or legal presumptions) or following an act (*e.g.*, an acknowledgment of paternity or maternity). Therefore, it does not include direct jurisdiction rules, applicable law rules, or rules on the recognition of legal parentage recorded in public documents, such as birth certificates.

15 The draft Convention establishes that recognition takes place by operation of law (Art. 5) but it also provides for the possibility to request a decision on recognition or non-recognition (Art. 12). The draft Convention provides that judgments on legal parentage are recognised provided that some conditions are met, including: scope (Art. 2), *erga omnes* effect as well as a final and conclusive judgment (Art. 6), indirect grounds of jurisdiction (Art. 9), declarations (Art. 22(1)), reservations (Art. 23), and the fact that the judgment comes from a Contracting State with which the requested State is applying the Convention (Art. 25). It also provides for discretionary grounds for non-recognition (Arts 10 and 22(2)).

16 To address different interests and needs of protection, the draft Convention contains some specific rules for judgments on domestic adoptions (Arts 9(3), 9(4) and 10(1)(b)), legal parentage following a surrogacy arrangement (Arts 9(5) and 10(1)(c)), and ART (Art. 10(1)(d)).

10 EG Final Report, *op. cit.* note 2, para. 15.
11 See C&D No 5b of CGAP 2023 (see path indicated in note 6).

3. Safeguards / standards[12]

17 The draft Convention includes safeguards / standards aimed at protecting the fundamental rights of the child and all those involved. The inclusion of safeguards / standards in the draft Convention requires or allows the non-recognition of judgments on legal parentage when the safeguards / standards are not met.

18 These safeguards / standards have been included in the draft Convention in different ways:

- In the scope and / or definition provisions (Arts 2(3) and 4(f)), to exclude from the application of the Convention legal parentage following surrogacy arrangements that do not satisfy the safeguards / standards (free and informed consent of the surrogate / surrogate mother[13] and intended parents prior to conception).
- In indirect grounds of jurisdiction (Art. 9), so that only judgments on legal parentage made in States that have certain jurisdictional links are eligible for recognition under the Convention. Specific connecting factors are framed to mitigate concerns of sale, trafficking and exploitation of children and / or surrogates / surrogate mothers.
- As grounds for refusal (Art. 10), so that the recognition of judgments on legal parentage can be refused if certain safeguards / standards are not met (*e.g.,* age; consent in the context of surrogacy, domestic adoption and ART; absence of trafficking or movement / habitual residence of the surrogate / surrogate mother in the context of the surrogacy arrangement; and absence of unacceptable / disadvantageous conditions or sanctions imposed on the surrogate / surrogate mother in the surrogacy arrangement).
- In declarations (Art. 22), so that Contracting States can declare that judgments shall be recognised only if specific safeguards / standards are met (*e.g.,* no improper financial gain derived from adoptions or from surrogacy; presence of a genetic link between the child and at least one intended parent; absence of a genetic link between the child and the surrogate / surrogate mother; adoption / surrogacy / ART regulated in the State of judgment; post-birth consent of surrogate / surrogate mother for legal parentage to be established solely with the intended parent(s)).
- In a reservation (Art. 23), allowing a State to refuse recognition of judgments on legal parentage and / or adoption following a surrogacy arrangement.
- In a treaty relations establishment provision (Art. 25), so that States can choose with which States they wish to apply the Convention based on the assessment of legal standards and practices of those States. Decisions to establish treaty relations could be based in part on information provided in a Form or Country Profile (Art. 24) on the safeguards / standards in the national law of the State of judgment relating to the practice of surrogacy, ART or adoptions.

4. General obligations

19 The draft Convention also contains general obligations on States (Arts 20 and 21) not directly linked to or potentially not limited to, the recognition of judgments on legal parentage rendered abroad. These relate to the prevention of the sale, trafficking or exploitation of children, women and other persons, and to the preservation of and access to information about the child's origins.[14]

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12 This dual term is used because there was no consensus in the WG on whether inclusion of provisions aimed at protecting fundamental rights in adoption, surrogacy or ART, amounts to including "safeguards" (such that not including certain specific safeguards would amount to not protecting fundamental rights) or including uniform regulatory "standards" for the practice of adoption, surrogacy or ART.

13 The alternative words "surrogate" and "surrogate mother" reflect the different views in the WG for the appropriate term to use in the draft Convention.

14 General obligations have the same overall aim of protecting the fundamental rights of the child and all those involved, and can thus also be considered safeguards / standards.

5. National law

20 The draft Convention does not affect the competence of States to adopt substantive and procedural rules of family law (such as rules on the establishment or contestation of legal parentage). The draft Convention also does not affect the competence of States to permit or prohibit surrogacy, adoptions or the use of ART. These decisions are left to the national laws and policies of States.[15]

21 The draft Convention also does not affect national rules on recognition of judgments on legal parentage. In other words, if a judgment is not within the scope of the draft Convention or a judgment is within the scope of the draft Convention but cannot be recognised under the draft Convention, a requested State can still choose to recognise it under its national rules (Art. 17).

6. Public documents

22 While the WG could not agree on including rules in the draft Convention for the recognition of legal parentage recorded in public documents, it included two provisions in square brackets to facilitate the understanding of foreign public documents (Arts 18 and 19). This could be achieved by issuing an international certificate and / or a multilingual standard form, which would accompany the public document issued by a Contracting State and provide information on the content and the effects of that document under the law of the State of origin.

23 The WG also noted that in some cases, requested States may be faced with situations where both a judgment and a public document (such as a birth certificate) are circulating or presented to their authorities, and the legal parentage recorded in those two documents are inconsistent with one another. Under the draft of the Convention presented in this Report, while rules on the recognition of the judgment would fall under the draft Convention, the rules on public documents would fall under the national law of the State. Thus, States may have to consider how those different rules could interact and work together.

15 In this report, the term “national law” has been used rather than the term “domestic law”. It is intended that “national law” should include the applicable law within a State (substantive law and PIL), including law enacted by any level of government within a State with non-unified legal systems (*e.g.*, provincial or State governments), as well as applicable regional and international law. Where the intention is to refer only to national law excluding regional and international law, references are made to domestic legislation, rules and practices.

II. General assessment of the feasibility of a Convention

24 During the discussions within the WG, it was noted that the problems which originally gave rise to the project[16] continue to occur in practice. Moreover, it was underlined that a multilateral solution is needed to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children, those enshrined in the United Nations *Convention on the Rights of the Child* (UNCRC) and in particular their right that their best interests be a primary consideration in all actions taken concerning them. Despite the feasibility challenges discussed below, there was broad consensus regarding the desirability of unified PIL rules on recognition of legal parentage.

25 The conclusions of the WG with respect to the feasibility of each draft provision are set out throughout this Report under the sections "Feasibility considerations" of each article. This current section contains a general assessment of the feasibility of a Convention on the recognition of judgments on legal parentage.

26 The WG has made significant progress in setting out what a draft Convention on the recognition of judgments on legal parentage could look like. However, there are policy areas in which it has not been possible to achieve consensus, which, for some members of the WG, are fundamental, and which may lead to opposing assessments of feasibility, depending on the solution retained. This is essentially due to:

- divergent policies and approaches amongst States to surrogacy, ART and adoption; the establishment of legal parentage in these circumstances; and the recognition of such legal parentage;
- divergent views as to the safeguards / standards to be included in a Convention on the recognition of judgments on legal parentage, their formulation, and the appropriate balance in such an instrument between continuity of legal parentage and safeguards / standards that require, or may permit, refusal of recognition; and
- divergent views as to the extent of verification and power to refuse recognition that requested States should have in a Convention on the recognition of judgments on legal parentage based on the principle of mutual trust in legal systems.

27 The following paragraphs explain these overall challenges and other feasibility considerations in more detail.

1. Recognition of judgments on legal parentage

28 The draft Convention is limited to the recognition of judgments on legal parentage between States. It does not include rules on direct jurisdiction and applicable law. The WG considered that consensus on direct jurisdiction and applicable law rules appeared difficult to achieve, given, in particular, the differences in legal traditions regarding direct jurisdiction rules, applicable law rules, treatment of public documents and fundamental differences in policy and substantive rules on the establishment of legal parentage, particularly in adoption, surrogacy and ART contexts. Some States may therefore be reluctant to sign up to a Convention that would require them to make changes to their national law and practices on direct jurisdiction, applicable law and public documents. Further, the European Commission proposal for European Union rules in this area was noted, and a concern was expressed about the interaction of those possible rules with a draft Convention.

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16 2014 Study of Legal Parentage and the issues arising from International Surrogacy Arrangements, Prel. Doc. No 3 C of March 2014 for CGAP 2014 (see path indicated in note 2) (*i.e.*, the non-recognition of legal parentage and abuses in human rights) and EG Final Report, *op. cit.* note 2, para. 8.

29 A Convention on the recognition of judgments on legal parentage, on the other hand, should not, in principle, require as many changes to domestic PIL rules related to legal parentage, as such conventions are based on the principle of mutual trust between legal systems. This trust is founded on the assumption that the judgments in question have been subject to judicial scrutiny, rendered following an established procedural framework, include the possibility of appeal, and demonstrate a sufficient degree of homogeneity in terms of legal standards and protections. This trust is typically particularly assured where a convention provides for the possibility for States to choose with which States they wish to establish treaty relations. For all these reasons, reaching a consensus on a Convention on the recognition of judgments on legal parentage appeared more feasible.

30 As the draft Convention focuses only on the recognition of judgments on legal parentage, it would not address the cross-border effect of legal parentage established by operation of law (*e.g.*, based on birth or legal presumptions) or following an act (*e.g.*, an acknowledgment), which is how legal parentage is most often established. However, the WG noted that, in complex cases, legal parentage is often established by judgment and that these cases would benefit from a Convention on the recognition of judgments on legal parentage.

31 While the WG thought that a Convention limited to the recognition of judgments on legal parentage should not be understood as promoting or incentivising an application to the courts to obtain a judgment (judicialisation), some members were of the view that it could send the message that legal parentage established by operation of law or by legal act should be confirmed by a judgment to ensure its recognition across borders. While the WG could not agree on rules on recognition of legal parentage recorded in public documents, the draft Convention contains a provision in square brackets that aims to facilitate the understanding of such public documents through the use of an international certificate and / or a multilingual standard form, though there was no WG consensus as to whether these matters should form part of the draft Convention either. Public documents are currently accepted as evidence of legal parentage in most cases.

2. Recognition by operation of law

32 The draft Convention provides that recognition of judgments on legal parentage takes place by operation of law (Art. 5). This facilitates cross-border recognition of judgments on legal parentage, since it would not be necessary to resort to separate proceedings for recognition. Therefore, it would reduce costs and bureaucracy for those seeking recognition and further the aim of the instrument. However, in some States, a procedure may be required in practice for verification where a non-judicial authority is asked to recognise a judgment. A decision may also be sought by one of the parties in any event for certainty as to recognition or non-recognition (Art. 12).

3. One instrument applicable to all legal parentage, but with distinct rules for legal parentage established following a surrogacy arrangement, ART or adoption

33 The WG agreed that it would be more appropriate to have only one instrument on the recognition of judgments on legal parentage that would apply to all legal parentage, including adoption (except intercountry adoptions, which are already covered, or potentially covered, by the 1993 Adoption Convention),[17] rather than have separate instruments based on the circumstances of the child's birth, such as international surrogacy arrangements. The reasons given are as follows:

- First, having only one instrument would help avoid differentiation of children based on the circumstances of their birth, while allowing for States to take a differentiated approach, where desirable or necessary in order for States to be able to join a Convention.

[17] *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.*

- Second, the WG noted that it is difficult in practice to formulate rules that clearly distinguish between a domestic surrogacy arrangement and an international surrogacy arrangement. It may also be difficult to treat legal parentage differently depending on whether the child is born through surrogacy or via ART not involving surrogacy.

34 Notwithstanding the appropriateness of having only one instrument, the WG noted that consensus still had to be reached as to whether specific rules for the recognition of judgments on legal parentage following a surrogacy arrangement, including those established by a domestic adoption, should be included in a Convention or not. One of the main reasons is that States that oppose or prohibit surrogacy might not wish to join an instrument that provides for recognition of judgments on legal parentage established following a surrogacy arrangement. Thus, a reservation mechanism has been included in the draft Convention to allow States that oppose or prohibit surrogacy to join a convention without having to recognise legal parentage established following a surrogacy arrangement. However, it was also noted that, even if a reservation mechanism allowed an opt-out from such provisions, such States still might not join a Convention. Further, some members were of the view that since a key rationale of the draft Convention is to address limping legal parentage that can arise as a result of surrogacy arrangements, the inclusion of such a reservation mechanism or a Convention which would not be joined by States that oppose or prohibit surrogacy could be of limited added value.

35 Consensus on the content of any rules for recognition of judgments on legal parentage established by adoption or following a surrogacy arrangement or ART could also be difficult, given the significant differences in States' approaches to establishing legal parentage or recognising judgments on legal parentage in these contexts, and given the differences of views on how to take the fundamental rights of children and other persons involved into account in a Convention on the recognition of judgments on legal parentage. It was also not clear whether provisions that prevent recognition of judgments on legal parentage established by adoption or judgments on legal parentage following a surrogacy arrangement would suffice to address the concerns of certain States. On the other hand, the overall effect of the rules as currently drafted (*e.g.*, with declaration / reservation mechanisms) is, for some members of the WG: (1) more restrictive to continuity of legal parentage than domestic PIL rules, particularly in relation to recognition of adoptions; and otherwise (2) likely to add little value to the *status quo* given the number of ways that continuity of legal parentage established by judgment can be refused under the draft Convention text.

4. Safeguards / standards

36 The greatest feasibility challenge is perhaps the lack of consensus on how best to include safeguards / standards surrounding surrogacy, domestic adoptions and ART not involving surrogacy into a Convention on the recognition of judgments on legal parentage. While the WG agreed on the aims of such a Convention, members of the WG had different perspectives as to how these aims should be achieved. The Introduction above describes the various ways in which safeguards / standards are incorporated in the draft Convention: scope and definition provisions; indirect grounds of jurisdiction; discretionary grounds for refusal; general obligations; declarations or reservations; and treaty relations establishment provisions.

37 There were different views within the WG as to which elements should be included in the draft Convention, to what extent and in what ways, to best achieve the aims that CGAP had set for any new instrument (*i.e.*, to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children, those enshrined in the UNCRC and in particular their right that their best interests be a primary consideration in all actions taken concerning them). Examples are provided in the paragraphs below.

38 For some members of the WG, the draft Convention would meet these aims and be more feasible if it included safeguards / standards by way of: (1) comprehensive conditions for recognition, (2) grounds for refusal, (3) declarations, and (4) reservations. For those members:

- There are fundamental, important policy aspects that need to be abided by in requested States in considering the possibility of recognising judgments on legal parentage, particularly in the surrogacy context. For example, pre-conception and post-birth free and informed consent of the surrogate / surrogate mother, minimum age of the surrogate / surrogate mother, and the absence of trafficking or other abusive practices are essential factors that need to be safeguarded under the draft Convention. Thus, a judgment on legal parentage following a surrogacy arrangement, where these elements are not fulfilled, would not circulate under the draft Convention.
- The inclusion of these explicit rules could limit the application of the public policy exception (which, in some States, is often raised in the area of legal parentage) and serves to ensure legal certainty and protects human rights.
- By knowing in advance which rules should be respected, citizens would know what they need to do to limit the application of the public policy exception. This would increase predictability, certainty and continuity of legal parentage and provide better protection of the human rights of all those involved.
- Having these safeguards / standards in the draft Convention does not amount to regulating practices of surrogacy in different States, because they are only applied at the stage of recognising judgments on legal parentage.
- The draft Convention would be more attractive if it could lead to better practices of surrogacy worldwide. This would ensure that the fundamental rights of the child and all those involved are respected and thus legal parentage recognised under the draft Convention has been established following minimum safeguards / standards in line with international treaties, such as the UNCRC. It would also ensure that States recognising judgments on legal parentage under the draft Convention do not contradict international treaties.
- Setting forth safeguards / standards in the draft Convention may have the consequence for some States that the draft Convention is more restrictive to continuity of legal parentage than their domestic PIL rules. However, the draft Convention serves as a useful new pathway for recognition of judgments on legal parentage, in addition to national law (Art. 17), providing for the recognition of judgments on legal parentage from these States reciprocally.

39 For some other members of the WG, the draft Convention would meet the aims set out at paragraph 37 and be more feasible if it: (1) left regulatory safeguards / standards principally to national law; (2) coupled this with a treaty relations establishment mechanism that would allow each State to choose with which other States it would apply the draft Convention, and therefore what level and nature of safeguards / standards it would consider sufficient in States of judgment; and (3) facilitated continuity of legal parentage based on conventional indirect grounds of jurisdiction and limited discretionary grounds for refusal (in the draft Convention itself or as possible declarations). More particularly for these members:

- Denial of a right to or interest in continuity of status of children by penalising them for actions that were carried out by other persons before their birth is potentially putting their welfare in jeopardy, or at least may not be in their best interests. It would be more appropriate and effective for regulatory safeguards / standards on the practice of surrogacy, ART and domestic adoption to be improved through other means, and regulating such practices is not appropriate given the mandate of the HCCH.
- A Convention in which safeguards / standards feature significantly in conditions and declarations / reservation could too often result in denial of continuity of legal parentage

validly established by judgment from treaty partner States (which will have been expressly chosen by requested States to apply the draft Convention with, presumably based on knowledge of and trust in those legal systems including their safeguards / standards for surrogacy, ART and adoption).

- They questioned the appropriateness and practicability as well as effects for continuity of legal parentage, of authorities in requested States, which will often be administrative authorities, verifying compliance with safeguards / standards that will have been assessed by courts in States of judgment, particularly when verification of compliance could occur years after the original judgment.
- Too many possibilities of refusing recognition could also lead to significant asymmetry of application. This would be confusing, but also unlikely to add discernible value to current domestic rules. Although recourse to the public policy exception might be reduced by such an approach, it would not appear to provide greater continuity of legal parentage.
- It would also not seem feasible for States to agree to uniform standards for the practice of surrogacy, ART or domestic adoption, since States' policies vary so widely.
- Finally, the effect of many of the safeguards / standards in the draft Convention is that, for some members of the WG, the rules in the draft Convention are more restrictive on continuity of legal parentage than the current domestic rules of some States, leading to questions about how much value a Convention would add.

40 For one member of the WG, the inclusion of safeguards / standards may still be understood as legitimising surrogacy. This would be intolerable for that member. Above all, recognition of judgments on legal parentage following any kind of surrogacy arrangement (particularly where the child has no biological link to the intended parent) is viewed as not in the best interests of the child, and therefore contrary to public policy. Instead, protection of the child in this jurisdiction is ensured through a concrete, case-by-case assessment of whether the *de facto* relationship between the child and the intended parents serves the child's best interests, such as in the context of adoption. For that member, legal parentage established following any kind of surrogacy arrangements should not be mentioned in the text of the draft Convention.

41 Since States have divergent laws and policies on legal parentage, the Group believed that one way to avoid the difficulties in achieving consensus to harmonise rules in a Convention on the recognition of judgments on legal parentage was to include a declaration or reservation mechanism. The inclusion of declarations and reservations could leave the possibility to States to be Party to the instrument according to their substantive law and principles. However, the inclusion of declarations could, in addition to the restrictive effects for continuity of legal parentage discussed above, lead to a Convention of "variable geometry", where the Convention is applied differently by different States.

5. General obligations

42 Further, there were differing opinions on including general obligations relating to the prevention of the sale, trafficking or exploitation of children, and to the preservation of and access to information about a child's origins. These general obligations may replicate obligations in other international instruments or create new international law obligations. These obligations could make a Convention more attractive for some States, but less attractive for others. All members of the WG recognised the importance of the general principles underlying the general obligations, but there was no consensus on whether it is appropriate to include such general obligations in a PIL instrument on the recognition of judgments on legal parentage:

- For some members, the inclusion of such obligations is crucial and aligns with international standards. For these members, this ensures that a Convention addresses certain concerns

regarding practices of adoption, surrogacy and ART, and considers the children's right to know their origins as fundamental. For these members, an instrument of the HCCH should take this approach.

- For other members, such general obligations are not directly linked to recognition of judgments on legal parentage but rather relate to national substantive law (which includes regional and international law) and may lead to harmonisation of that law. They may also be outside the HCCH and WG mandates.

III. Proposal for CGAP

43 The WG acknowledged the importance of the HCCH Parentage / Surrogacy Project to develop an international instrument on legal parentage in cross-border situations. The WG agreed that such an instrument is desirable, as it could enhance legal certainty, predictability and continuity while protecting the rights of children and families, and all persons involved.

44 The draft text produced by the WG shows some promising progress since the EG Final Report, particularly on one instrument applicable to all legal parentage established by judgment. However, policy differences remain, which for some WG members are fundamental, in particular on the way in which safeguards / standards should feature in an instrument on the recognition of judgments on legal parentage, including legal parentage established following surrogacy arrangements.

45 While recognising the progress made, the WG acknowledged that these differences present feasibility challenges and that consensus could not be reached on whether the Project should advance to a Special Commission.

46 Should CGAP decide not to advance to a Special Commission at this stage, it might consider tasking the PB, subject to available resources, and drawing on information from the Members where possible, to monitor legal and practical developments, and to report to CGAP. This update on developments, together with this Final Report, may serve as reference documents, should a decision on further work on this Project be revisited at a later stage.

IV. Text of the draft Convention

PREAMBLE

The States signatory to the present Convention,

Desiring to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including for children, those enshrined in the United Nations *Convention on the Rights of the Child* and in particular their right that their best interests be a primary consideration in all actions taken concerning them,

Reaffirming the obligations under existing human rights instruments ratified by States Parties especially the United Nations *Convention on the Rights of the Child* and its *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*[,] [and] [the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*][, and] [the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the* United Nations *Convention against Transnational Organized Crime*],

Reaffirming the commitments made by States Parties to the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*,

Recognising that the application of this instrument should not facilitate or lead to the sale, trafficking or any other forms of exploitation of children, women or any other [vulnerable] persons,

[...]

Have agreed upon the following provisions –

Explanations

47 The current draft Preamble includes different aspects that the WG has discussed throughout its meetings, and which have been shaping its discussions and the draft of a Convention. These include:

- The aims of a Convention: these have been guiding the WG in drafting the provisions of the draft Convention according to the mandate given by CGAP.[18]
- The international context in which a Convention will operate: the WG thought it was important to recall other international instruments that are relevant to the area of legal parentage.
- The importance that the instrument's application should not facilitate or lead to the sale, trafficking and / or any other forms of exploitation of children, women and other persons: this aspect has been considered by the WG as part of its discussions on safeguards / standards. In addition, some members of the WG would want to include a specific provision on this aspect in a Convention (see Art. 20 below).

Feasibility considerations

48 There was general agreement on the main elements that should appear in the Preamble, but more discussions would be needed on the list of international instruments of paragraph 2 and the scope and wording of the different statements.

18 See *supra* para. 6.

CHAPTER I – OBJECTS, SCOPE AND DEFINITIONS

Article 1 – Object[s]

Object[s]

The object[s] of this Convention [is] OR [are] –

a. to provide for the recognition of judgments on legal parentage given in a Contracting State in all Contracting States[;]

b. [to facilitate the understanding of public documents on legal parentage issued in a Contracting State;] [and]

c. [to provide for certain obligations regarding the prevention of the sale, trafficking and exploitation of children, women and other persons, and regarding the preservation of and access to information about a child's origins].

Explanations

49 The main objective of the draft Convention, set out in Article 1(a), is to provide for the recognition of judgments on legal parentage given in a Contracting State in all other States Party to the Convention. A discussion of the reasons for this is found in paragraphs 28 to 31.

50 Article 1(b) refers to the objective of facilitating the understanding of public documents on legal parentage issued in a Contracting State (see Arts 18 and 19 and the discussion in paras 195-201).

51 Article 1(c) refers to the objectives of preventing the sale, trafficking or exploitation of children, women and other persons, and the preservation of and access to information about a child's origins (see Arts 20 and 21 and the discussion in paras 202-209). Certain members of the WG queried whether such general obligations were appropriate to specify as an object of this draft Convention.

Feasibility considerations

52 Discussions of the feasibility considerations of these objectives are found respectively in paragraphs 28 to 31, 195 to 201, and 202 to 211 .

Article 2 – Scope

Scope

1. Subject to paragraphs 2 and 3, this Convention applies to the legal parentage of any person.
2. This Convention applies to any adoption which is not an intercountry adoption according to Article 3(a).
3. This Convention applies to the legal parentage following a surrogacy arrangement only where the definition of Article 4(f) is fulfilled.

Explanations

Article 2 – Introduction

53 Article 2 addresses the scope of the draft Convention. It should be read in conjunction with Articles 1, 3 and 4. Any judgment which is not under the scope of the draft Convention cannot be recognised under this instrument.

Article 2(1) – General scope

54 Article 2(1) addresses the general scope of the draft Convention, *i.e.*, legal parentage. It further specifies that it applies to the legal parentage of any person.

Article 2(2) – Scope in relation to adoptions

55 Article 2(2) should be read in conjunction with Article 3(a). It specifies that intercountry adoptions, as defined by Article 3(a), do not fall under the scope of the draft Convention.

Article 2(3) – Scope in relation to legal parentage established following a surrogacy arrangement

56 Article 2(3) specifies to which cases of legal parentage following a surrogacy arrangement the draft Convention applies. If a surrogacy arrangement does not fulfil the definition set out in Article 4(f), then the legal parentage established following that surrogacy arrangement will fall outside the scope of the draft Convention. This definition therefore effectively includes a number of scope requirements, such as "free and informed consent prior to conception", by virtue of being incorporated by reference in Article 2(3). Members of the WG had different views on these scope requirements:

- For some members of the WG, "free and informed *consent prior to conception*" should be included as a scope matter as it constitutes a necessary element of a surrogacy arrangement, without which the arrangement in question cannot be considered a surrogacy arrangement.
- For some members of the WG, the specific mention of "free and informed" should not be included as a scope matter because it is unnecessary since consent has to be given freely and be informed in order to be valid and therefore is implicit.
- Others were of the view that "*consent* prior to conception" is inherent to surrogacy and clearly fundamental to avoid trafficking and sale risks, and circumvention of rules on adoption. However, these members stressed that the draft Convention should apply to judgments validly rendered in a treaty partner State. Judges in the State of judgment are better placed than authorities in the requested State, which will often be administrative authorities, to evaluate the validity of the surrogacy arrangement including the consent requirement under the applicable legal framework (which presumably will have been satisfactory to the requested State or it would not have entered into treaty relations with that State). They therefore did not support a framework that required such authorities to revisit the court's

findings. Of course, these members recognised that situations of fraud or trafficking may arise, *e.g.*, where a private adoption is disguised as surrogacy, or where the surrogate / surrogate mother was forced into surrogacy. They are of the view that such situations must firstly be addressed through national law, which is more effective to directly address problems including through denial of establishment of legal parentage where appropriate and in the child's best interests. Combatting fraud and trafficking that took place before the birth by denial of recognition of judgments on legal parentage – sometimes years later – is much less effective and can be detrimental to the child's welfare. These members were of the view that cases of fraud or trafficking would be better addressed under grounds for refusal (Art. 10) to allow more flexibility and not exclude any judgment from the scope of an instrument. Such members preferred to have the flexibility to recognise legal parentage, established by a court in a treaty partner State, in the best interests of the child, and balancing this against the particular circumstances of each case.[19]

- For certain members who were of the view that the requirement of consent in Article 2(3) is a safeguard / standard, its inclusion may be understood as implicitly legitimising surrogacy, which is against the public policy of their States and would not be tolerable for them.

57 In any case, there will need to be careful coordination between the content of several articles, including Articles 2(3), 4, 10 and 22, to avoid duplications and contradictions.

Feasibility considerations

58 There are policy differences with regard to the inclusion of Article 2(3), as set out in paragraph 56 above.

19 See EG Final Report, *op. cit.* note 2, paras 116-117.

Article 3 – Exclusions from scope

Exclusions from scope

This Convention does not apply to –

a. intercountry adoption, where a child habitually resident in one State (the State of origin) has been, is being, or is to be moved to another State (the receiving State) either after their adoption in the State of origin by a couple or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin, including intercountry adoptions which fall within the scope of the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*;

b. any rights or obligations that are derived from legal parentage.

Explanations

Article 3(a) – Exclusions of intercountry adoptions

59 Article 3(a) excludes all intercountry adoptions, including those which could fall within the scope of the 1993 Adoption Convention so as not to undermine it. This was included following a decision from CGAP.[20] It prevents overlap between both instruments, and it prevents the new instrument disincentivising States not yet Party to the 1993 Adoption Convention from becoming Party to it. This provision also aims to prevent adoptive parents from circumventing the guarantees and procedures set forth in the 1993 Adoption Convention.

Article 3(b) – Exclusions of rights and obligations

60 Article 3(b) excludes any rights or obligations that are derived from legal parentage. This refers to, for example, nationality, name, maintenance, parental responsibility and inheritance. This exclusion would mean that the requested State would determine the nature and extent of rights and obligations flowing from the recognised judgments on legal parentage in accordance with their own applicable law, including any PIL rules. It clarifies that the recognition of judgments on legal parentage under the draft Convention would be limited to personal status, *i.e.,* of the parent-child relationship. This avoids undermining other HCCH Conventions which deal specifically with the PIL aspects of some of these rights and obligations (*i.e.*, the 1996 Child Protection Convention which deals with parental responsibility and the 2007 Child Support Convention).[21] Further, this draft Convention does not include any rights with regard to legal parentage from adoptions, in the manner that the 1993 Adoption Convention does for intercountry adoptions (*i.e.*, the recognition of parental responsibility, a favourable treatment of the child under the national law of the requested State, and the conversion of simple adoption into full adoption).[22]

Feasibility considerations

61 The WG concluded that a Convention will be more feasible for States to agree to if it contains rules only on legal parentage, but leaves it to the national law of the requested State to determine the

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20 C&R No 11 of CGAP 2019: "Council decided that intercountry adoptions, including those within the scope of the 1993 HCCH Intercountry Adoption Convention, should be excluded from the scope of the Parentage / Surrogacy Project. Council emphasised the importance of not undermining the 1993 Intercountry Adoption Convention" (see path indicated in note 6).

21 *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* and *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

22 See also *infra* para. 190.

nature and extent of the rights or obligations that typically derive from legal parentage, such as nationality, parental responsibility, maintenance or inheritance rights.

62 However, a concern was expressed about the attractiveness of a Convention that contains no guarantees for children or parents that they will benefit from any of the rights or obligations that typically flow from legal parentage, or that could lead to differential treatment of children and parents.

Article 4 – Definitions

Definitions

For the purposes of this Convention –

a. "legal parentage" means the parent-child relationship established in law, regardless of the age of the child;

b. "court" means any judicial or administrative authority of a Contracting State fulfilling a judicial function regardless of its name;

c. "judgment" means any decision on a person's legal parentage given by a court, whatever the decision may be called[;]

d. ["surrogate / surrogate mother" means a person who agrees to give birth to a child with the intention that legal parentage is established between the child and the intended parent(s) and who for that purpose, enters into a surrogacy arrangement with the intended parent(s);]

e. ["intended parent(s)" means the person(s) who agree(s) to be the parent(s) of a child carried by a surrogate / surrogate mother and who, for that purpose, enter(s) into a surrogacy arrangement with the surrogate / surrogate mother;]

f. ["surrogacy arrangement" means an agreement –

   i. between the intended parent(s) and a surrogate / surrogate mother;

   ii. where both parties have given their [free and informed] consent prior to conception;[23]

   iii. where the surrogate / surrogate mother agrees to give birth to a child, with the intention that legal parentage is established between the child and the intended parent(s)].

Explanations

Article 4 – Introduction

63 Article 4 includes some definitions for the purposes of a Convention.

Article 4(a) – "legal parentage"

64 The definition of "legal parentage" in the draft Convention has purposefully been left very broad and focuses on the personal status itself without making reference to terms in national law. This seeks to take into consideration the different legal realities of each State.

65 The draft Convention does not include a definition of "child" so that it can be interpreted appropriately depending on the context (*i.e.*, the "descendant" / "offspring" of another person who may be below or above 18 years of age).[24] The expression "regardless of the age of the child" has therefore been included to clarify that the word "child" in the draft Convention refers to a person of any age. Meanwhile, when a reference is made in the draft Convention to the "best interests of the child", it applies to any person below 18 years of age only.

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23 WG members agreed that the word "conception", when understood in the context of ART, refers to the transfer of the embryo and not to the creation of the embryo. Consideration could be given to using the word "pregnancy" in this definition instead of "conception" to avoid any confusion.

24 The draft Convention also does not include a definition of "parent".

66 Although it is not specified explicitly, the draft Convention does not apply to persons before they are born. However, pre-birth judgments are included within the scope of the draft Convention (see para. 102 below).

Article 4(b) – "court"

67 For the definition of "court", the term "fulfilling a judicial function" should be understood as including all authorities which apply the law to the facts and take decisions, irrespective of their name. This may include, for example, administrative authorities which make decisions on legal parentage (*e.g.*, adoption). However, it does not include authorities which only record information (*e.g.*, a civil registrar would not be understood as an authority "fulfilling a judicial function", although it may produce public documents).

Article 4(c) – "judgment"

68 A short, simple definition of "judgment" has been included on the basis that any additional clarifications could be left to the Explanatory Report of a Convention.

69 Any judgment which is not expressly excluded is therefore included within the meaning of the definition, and thus, included within the scope of the draft Convention. This would include, for example:

- constitutive and declaratory judgments;
- contentious and non-contentious judgments;
- judgments rendered pre- and post-birth, as well as later in the child's life; and
- judgments modifying a child's legal parentage or confirming the existence or non-existence of a child's legal parentage (*i.e.*, confirmatory or negative decisions).

Article 4(d) – "surrogate / surrogate mother"

70 The WG had different views regarding the definition of "surrogate / surrogate mother"[25] and its need:

- Some members of the WG suggested that, rather than including a definition, it is sufficient to set out in Article 2 what falls in the scope of a Convention with regard to judgments on legal parentage following a surrogacy arrangement. For such members, depending on the eventual content of the scope provisions, this could avoid confusion if certain States' definition of "surrogate / surrogate mother", "intended parents" or "surrogacy arrangement" do not align with the definitions in this Article.
- Other members of the WG were of the view that the definition should be retained to have an autonomous concept regarding surrogacy in the instrument.
- Some members of the WG questioned the need for such a definition depending on whether a definition of surrogacy arrangement were included, and depending on the content.

Article 4(e) – "intended parents"

71 The WG also had different views regarding the definition of "intended parent(s)",[26] similar to those for the definition of "surrogate / surrogate mother".

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25 See *supra* note 13 for the explanation of why this dual term of "surrogate / surrogate mother" is used in the draft Convention and in this Report.

26 Although the draft Convention refers to "intended parents", the WG noted that different terms are used in different States (*e.g.*, intending parents, commissioning parents).

Article 4(f) – "surrogacy arrangement"

72 The WG also had different views regarding the definition of "surrogacy arrangement", some similar to those voiced regarding the definitions of "surrogate / surrogate mother" and "intended parent(s)". In particular, the requirement that both parties have consented to the surrogacy arrangement prior to conception is important for members of the WG in favour of having an autonomous concept of surrogacy in the instrument. A discussion with respect to the words "free and informed consent prior to conception" is found at paragraph 56.

Feasibility considerations

73 There were differing views among WG members on the inclusion of definitions related to surrogacy in this provision under Article 4(d), (e) and (f):

- For some members, including such provisions is important as a Convention should have clear autonomous definitions.
- For other members, a definition is not necessary as it is more appropriate and sufficient to set out in Article 2 what is within the scope of a Convention with regard to legal parentage following a surrogacy arrangement.
- Others questioned the necessity to define the three terms separately and were of the view that a definition of surrogacy arrangement would be sufficient.

CHAPTER II – RECOGNITION OF JUDGMENTS ON LEGAL PARENTAGE

Article 5 – Recognition by operation of law

Recognition by operation of law

A judgment on legal parentage given in a Contracting State (State of judgment) shall be recognised in the other Contracting States (requested States), in accordance with this Convention, by operation of law, without specific proceedings for recognition being required.

Explanations

74 Under this Article, a judgment given by a court of a Contracting State (the State of judgment) shall be recognised in the other Contracting States (the requested States). This obligation of recognition presupposes that a number of conditions have been met:

- the judgment falls within the scope of application of the Convention (Art. 2);
- the judgment is from a Contracting State (Art. 5) and one with which the requested State has agreed to apply the Convention (Art. 25);
- if the State of judgment has made one or more declarations under Article 22(1), these condition(s) are met;
- the judgment is not subject to a reservation under Article 23;
- the judgment has *erga omnes* effect in the State in which it was rendered and can no longer be the subject of ordinary review in that State (Art. 6); and
- the judgment meets (one of) the indirect grounds of jurisdiction (Art. 9).

75 Recognition under the draft Convention would take place by operation of law. This means that there would be no need to go through a specific procedure to recognise the judgment before presenting the judgment to the relevant authority (*e.g.*, registry, civil status office, immigration office). However, the above-mentioned conditions and discretionary grounds for non-recognition (Art. 10) set forth in the draft Convention would still be verified by the relevant authority (*e.g.*, registry). The methods for such verification would vary from State to State as set out in national law. In some States, verification takes place *ex officio* whereas in other States recognition is presumed but may be rebutted.

76 In some cases, it is still helpful to go through a procedure to have a declaratory judgment on recognition or non-recognition of the judgment. This can ensure predictability and legal certainty for interested parties. Such a procedure is provided for in Article 12.

Feasibility considerations

77 While there was general agreement that recognition should take place by operation of law, some members questioned how recognition by operation of law would work in practice, given the number of conditions, grounds for refusal and potential declarations in the draft Convention. They noted that administrative authorities presented with a foreign judgment on parentage in the course of their activities may not be equipped to apply the rules of the draft Convention.

Article 6 – *Erga omnes* effect and final and conclusive judgment

Erga omnes *effect and final and conclusive judgment*

A judgment shall be recognised only if it has *erga omnes* effect in the State in which it was rendered and can no longer be the subject of ordinary review in that State.

Explanations

78 Article 6 provides the obligation to recognise a judgment if:

- It has *erga omnes* effect (*i.e.*, binding on all persons, for all purposes) in the State in which it was rendered. Some members of the WG questioned the need to include the words "*erga omnes*": while the vast majority of judgments on legal parentage would have *erga omnes* effect, some may not (*e.g.*, in some States, a judgment on legal parentage established posthumously). As legal parentage is a status matter, the WG was of the view that the draft Convention should only cover judgments which have *erga omnes* effect.
- It can no longer be the subject of ordinary review in that State: this is the case when all ordinary avenues for appeal have been exhausted and the judgment has become final and conclusive in the State of judgment. This prevents subsequent proceedings concerning subject-matter claims on the same legal parentage (*i.e.*, *res judicata* or claim preclusion) or concerning issues related to the same legal parentage (*i.e.*, collateral estoppel or issue preclusion) in the State of judgment. In both cases, once recognised, foreign judgments have the same effects as in the States of judgment.

Feasibility considerations

79 There are no specific policy differences remaining under this Article.

Article 7 – Scope of recognition

Scope of recognition

If a judgment does not relate solely to legal parentage, the application of the rules of this Chapter is limited to the parts of the judgment which concern legal parentage and fulfils the conditions of Article 6.

Explanations

80 This provision is similar to Article 19(2) of the 2007 Child Support Convention. In the absence of such a provision, there could be issues as to whether the part of the judgment which does not relate to legal parentage must be recognised. Moreover, there is a risk that the entire judgment would not be considered eligible for recognition if one part of it, unrelated to legal parentage, was not so eligible.

81 Such a provision would apply, for example, in the following situations:

- The child's legal mother starts proceedings to request child support from the child's putative father. Before the court can decide whether the child is entitled to child support, the court must respond to the following preliminary question on legal parentage: is the putative father the child's legal father?
- The child's legal mother starts proceedings to establish the child's legal parentage with the child's putative father. Before the court can determine the child's legal parentage, the court must respond to the following preliminary question: does the mother need to be married to the father at the time that the child was conceived, in order for a paternity presumption to apply?

82 The judgment in the first example would thus have one part on legal parentage and one part on child maintenance and the judgment in the second example would thus have one part on marriage and one part on legal parentage. In both situations, Article 7 would clarify that the draft Convention applies only to the part of the judgment that is on legal parentage, in so far as that part on legal parentage has *erga omnes* effect and can no longer be the subject of ordinary review in the State of judgment (Art. 6).

Feasibility considerations

83 There are no specific policy differences remaining under this Article.

Article 8 – Partial recognition

Partial recognition

If the requested State is unable to recognise the whole of the judgment, it shall recognise any severable part of the judgment which can be so recognised.

Explanations

84 This provision is similar to Article 21(1) of the 2007 Child Support Convention on severability. Such a provision is useful to require recognition of part of a judgment even if authorities in a requested State wish to refuse recognition to another part. For example:

- For judgments on the establishment of legal parentage with more than two legal parents, a State might limit recognition to two legal parents based on its public policy.
- In the case of judgments on the establishment of legal parentage of two mothers in a same-sex relationship, a State might limit recognition to one mother based on its public policy.

85 In other words, even if one or several grounds for refusal would inhibit the recognition of a part of the judgment, the State is still under an obligation to recognise the parts of the judgment for which this or these grounds do not apply.

86 Article 8 differs from Article 7 in that Article 7 refers to judgments on both legal parentage and another matter falling outside the scope of the draft Convention (and the possibility to recognise only the parts on legal parentage). In contrast, Article 8 refers to (parts of) judgments which are only on legal parentage and therefore within the scope of the draft Convention, but where the recognising State is unable to recognise some parts of that judgment on legal parentage.

87 Article 8 differs from Article 16 in that Article 16 refers to cases in which a judgment establishing legal parentage simultaneously ends another legal parentage. These two parts of the legal parentage judgment would not be considered severable, and thus, the requested State would not have the possibility to recognise only one part. For example, a judgment on full adoption establishes legal parentage with the adoptive parents and, at the same time, extinguishes legal parentage with the birth parents. In such a case, the requested State would not be able to recognise the establishment of the legal parentage in the adoptive parents without also recognising the extinction of the legal parentage of the birth parents.

Feasibility considerations

88 There are no specific policy differences remaining under this Article.

Article 9 – Indirect grounds of jurisdiction

Indirect grounds of jurisdiction

1. Except for judgments falling under paragraphs 3, 4 and 5, a judgment on [the **establishment** of] **legal parentage** is eligible for recognition, if at the date that the proceedings were instituted –
   a. the child or a parent or a putative parent had their habitual residence[, domicile,] or nationality in the State of judgment[;]
   b. [the child [or a parent or a putative parent] was present in the State of judgment and either (1) was a refugee or (2) due to disturbances occurring in their country, was internationally displaced;] [or]
   c. [there was a real and substantial connection between the State of judgment and the child].
2. [Except for judgments falling under paragraphs 3, 4 and 5, a judgment [solely relating to the **termination** of] OR [relating to termination without establishment or re-establishment of] **legal parentage** is eligible for recognition, if at the date that the proceedings were instituted, paragraph (1)(a)[,] [or] (b) [or (c)] is satisfied in relation to the child.]
3. A judgment on the **establishment** of legal parentage by an **adoption** is eligible for recognition, if, at the date that the proceedings were instituted [and until the judgment was given], [both the child and the adoptive parent or at least one of the adoptive parent(s)] OR [the adoptive parent or at least one of the adoptive parent(s)] had their habitual residence[[,] [or] domicile [or nationality]] in the State of judgment.
4. A judgment on the **termination** of legal parentage initially established by an **adoption** is eligible for recognition, if the judgment was rendered in the State whose courts made the initial adoption or, if, at the date that the proceedings were instituted, the child was habitually resident in the State of judgment.
5. A judgment on the **establishment** of legal parentage following a **surrogacy** arrangement is eligible for recognition, if at the date that the proceedings were instituted [[the child][, or] [the intended parent or at least one of the intended parents] had their habitual residence[, domicile or nationality] in the State of judgment or] the surrogate / surrogate mother had their habitual residence in the State of judgment.

Explanations

Article 9 – Introduction

89 Article 9 provides the indirect grounds of jurisdiction that must be met for a judgment to be recognised. Article 9 principally ensures that States of judgment are closely connected with the parties or the case which serves to deter forum shopping, though there are certain possible restrictions on the grounds that would have additional aims as discussed further below. The draft Convention does not include rules on direct jurisdiction.

90 Article 9 should be read in conjunction with Article 4 on definitions, to know whether a judgment is considered to be a judgment on adoption (and thus whether Art. 9(3) or 9(4) applies), a judgment on the establishment of legal parentage following a surrogacy arrangement (and thus whether Art. 9(5) applies), or another judgment which would then fall under Article 9(1) or 9(2). The scope provisions are also relevant. If, for example, an adoption or a judgment on legal parentage following a surrogacy arrangement does not meet the criteria set forth in Articles 2, 3 and 4, then it is not in scope and the authorities of the requested State would not look at the Article 9 requirements, meaning that the judgment could not be recognised under the draft Convention. This is without prejudice to Article 17 of the draft Convention (recognition under national law).

91 Finally, it is intended that nothing in Article 9 would affect Article 16 on substantive effects of judgments on legal parentage. Thus, regardless of the indirect grounds of jurisdiction that applied by virtue of Article 9, the recognition of a foreign judgment on the establishment of legal parentage may still extend to the termination of another legal parent-child relationship if included in such a judgment. Further, the recognition of a foreign judgment on the termination of legal parentage may include the re-establishment of a legal parent-child relationship that had previously been terminated.

Article 9(1) to (2) – Legal parentage in general

92 The WG was of the view that Article 9(1) and 9(2) would apply to all judgments on legal parentage, except to those judgments that would fall under Article 9(3), 9(4) or 9(5). As a consequence, the following judgments would, for example, fall under Article 9(1) or 9(2): judgments on general legal parentage (*e.g.*, establishment of paternity); judgments on legal parentage established following the use of ART, whether or not a third party was involved but provided there was no surrogacy arrangement involved; judgments on multiple legal parentage (*e.g.*, three or more legal parents); and judgments on termination of legal parentage (contentious and non-contentious), with the exception of termination of legal parentage initially established by adoptions.

93 Article 9(1)(a), (b) and (c) specify the indirect grounds of jurisdiction, one of which must be met, for the judgment to be recognised under the draft Convention.

- Article 9(1)(a): This provision includes habitual residence, domicile and nationality. It is thus very broad and allows most foreign judgments to be recognised.
- Article 9(1)(b): This provision has been included to reflect the situations of refugee children and children internationally displaced, which may prevent their State of habitual residence, domicile or nationality to take decisions for them. For these children, sole presence in the State of the judgment should be sufficient to allow recognition of that judgment. In the case of a parent or putative parent, some members of the WG were of the view that the sole connection to them should not be included, as the connection to the child is most appropriate in the cases of refugees and international displacement due to disturbances occurring in their country.
- Article 9(1)(c): this provision has been included to allow for the recognition of judgments which would otherwise not be recognised under sub-paragraph (a) or (b). For example, depending on the circumstances or the specific facts of the case, the following States could be considered as having a real and substantial connection with the State of judgment, without being States referred to in sub-paragraph (a) or (b): the State of birth, the State where the child's (putative) parents have all their assets, and / or the State of habitual residence of the child's sibling(s). However, the WG had different views as to the need for this indirect ground of jurisdiction.
  - ⇒ For some, recognition of as many foreign judgments as possible would be an advantage.
  - ⇒ However, for others, such a ground might be difficult to implement as it would be subjective and not sufficiently predictable.
  - ⇒ Some members of the WG also noted that this ground would not seem necessary since there are already several other alternative indirect grounds of jurisdiction under Article 9(1)(a) and (b).
  - ⇒ In relation to judgments on termination, some members of the WG were of the view that this ground should not be included as it may allow the termination of existing legal parentage without sufficient proximity.

94 Regarding Article 9(1)(a), (b) and (c):

- Some members of the WG were of the view that the above grounds under Article 9(1)(a), (b) and (c) should only be applicable to judgments on the *establishment* of legal parentage, as opposed to *termination* of legal parentage which should be covered under a separate provision (*i.e.*, Art. 9(2)). Such members of the WG were of the view that indirect grounds of jurisdiction for judgments which solely relate to the termination of legal parentage should be limited to those in Article 9(1) "in relation to the child". This is set out in Article 9(2). Such members of the WG were of the view that termination of an existing legal parentage is a significant matter that should not be allowed if the sole connection was to the parent or putative parent, and that this would ensure some proximity between the child and the State of judgment and avoid forum shopping.
- Other members of the WG had concerns about such a restriction on recognition of judgments from treaty partner States, and were also concerned that it could lead to complications in applying Article 9 in determining the applicable ground depending on whether a judgment only established legal parentage, established and terminated it, only terminated it, or terminated and re-established it. As currently drafted, together with Article 9(5), there is also no ground for judgments that terminate legal parentage following a surrogacy arrangement, even though such termination typically occurs simultaneously in judgments that establish it.

Article 9(3) – Adoption – Establishment

95 As Article 3(a) excludes all intercountry adoptions from the scope of the draft Convention,[27] Article 9(3) applies to judgments on the *establishment* of legal parentage by an adoption that do not meet the definition of intercountry adoptions. In the case of full adoptions, these judgments also fully extinguish at the same time, the legal parentage of the birth parent(s). It differs from Article 9(4) which applies exclusively to judgments on the *termination* of legal parentage previously established by an adoption.

96 The intention is that the rules on recognition of judgments on the establishment of legal parentage by an adoption would also apply to adoptions following a surrogacy arrangement by (one of) the intended parents (*e.g.*, second parent adoptions), since it is assumed that States would apply the same rules to adoptions following a surrogacy arrangement as they would to any other adoptions.

97 Regarding the timing of the judgment, the WG had different views:

- For some members of the WG, it was sufficient to refer to the "date [at which] the proceedings were instituted", as, in their opinion, this would be more in line with traditional PIL rules on recognition of judgments. Further, these members viewed that any risk of circumvention of the 1993 Adoption Convention (see next bullet point) should be addressed through other means, such as the scope provision, rather than indirect grounds of jurisdiction.
- However, for other members of the WG, there should be a double-timing requirement which refers to both "the date [at which] the proceedings were instituted" and "until the judgment was given", on the basis that this could lessen risks of circumvention of the 1993 Adoption Convention[28] by avoiding forum shopping, as the connecting factor would need to be met throughout the duration of the proceedings.

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27 See *supra* para. 59.

28 Since the 1993 Adoption Convention provides for an *a priori* system, the requirements are applied differently in that Convention than in the present *a posteriori* draft Convention on the recognition of judgments on legal parentage. Under the 1993 Adoption Convention, an adoption is recognised if it is certified as having been made in accordance with the Convention (Art. 23). Requirements connected with the timing include that the receiving State and the State of origin must be involved from the start of the procedure (*i.e.*, from the moment the child is declared adoptable – Arts 4 and 16; and from the moment the prospective adoptive parents apply and are declared eligible and suitable to adopt – Arts 14 and 15) until the child is transferred to the receiving State (Art. 19; with an exception at Art. 21 where the transfer takes

98 The WG had different views on what the connecting factors should be, both for the persons and the States, under Article 9(3):

- Regarding the connection with persons: for some members of the WG, there should be a double requirement of "both the child and the adoptive parent or at least one of the adoptive parent(s)". In their view, this double requirement would better mirror the requirements under the 1993 Adoption Convention and thus could lessen risks of circumvention of the 1993 Adoption Convention. For other members of the WG, the connecting factor should be broader and connection with "the adoptive parent or at least one of the adoptive parent(s)" would be sufficient and better reflect their current domestic legislation.
- Regarding the connection with States: for some members of the WG, the sole requirement of habitual residence would better mirror the requirements under the 1993 Adoption Convention and thus could lessen the risk of circumvention of the 1993 Adoption Convention. For other members of the WG, it would be better to be broader and include both habitual residence and domicile as alternative connections, in order to better reflect the differences in national law of States. However, some members noted that if domicile were included, nationality should also be included to balance the possible alternative connecting factors. Thus, "domicile" and "nationality" have been included in square brackets.
- Some members of the WG also noted that the connecting factors should be left broad (*i.e.*, "the adoptive parent or at least one of the adoptive parents" and "habitual residence, domicile or nationality"). They also noted that if the connecting factors were left broad and if the time requirement were limited to the date at which the proceedings were instituted, there may not be a need to have a specific Article 9(3) provision, and Article 9(1) could then be applied to such situations. It was also raised that inclusion of certain or any connecting factors could be more restrictive than the national law in some States for recognising adoptions.

Article 9(4) – Adoption – Termination

99 Article 9(4) applies exclusively to judgments on the termination of legal parentage previously established by an adoption. This includes, for example, judgments on annulment and / or revocation of an adoption. See also paragraph 96 above which would equally apply here.

100 This specific provision was included to target connecting factors which are specifically relevant to these situations, namely the State that made the initial adoption and the child's habitual residence at the date the proceedings were instituted.

Article 9(5) –Legal parentage following a surrogacy arrangement – Establishment

101 The intention is that Article 9(5) would apply exclusively to judgments on the establishment of legal parentage which are not adoptions and which follow a surrogacy arrangement. In certain States, these judgments are known as "parental orders", which are part of a regulatory framework for surrogacy and the establishment of legal parentage (although given the current lack of consensus around which connecting factors should be included in this provision, it is not certain which of these parental orders could fall within Article 9(5). This is explained further below).

102 The WG also noted that, as currently drafted, it would be possible to recognise pre-birth judgments with this provision, since in any case they only take effect from the moment of birth in most States.

103 Regarding the termination of legal parentage following a surrogacy arrangement:

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place before the adoption is issued). See also the HCCH Note on Habitual Residence and the Scope of the 1993 Adoption Convention, available on the HCCH website (www.hcch.net) under the "Adoption Section" and "HCCH Publications".

- Some members of the WG were of the view that this would not warrant any need for specific rules.
- For other members of the WG, termination of legal parentage following a surrogacy arrangement warrants specific rules which require a closer connecting factor to the child, rather than only to the intended parent(s) or the surrogate / surrogate mother.

104 While the WG acknowledged that for some States it would be necessary to include a specific provision for these judgments, the WG also had different views as to which connecting factors were more relevant, both for the persons and the States.

105 Regarding the connection with persons, there was no consensus in the WG as to what connections should be required. Although there was agreement that the provision should include a connection with the surrogate / surrogate mother, there was no consensus as to whether that should only be in conjunction with a further possibility of a connection with the child and / or intended parents. For this reason, Article 9(5) includes three possibilities as currently drafted, but there is no agreement whether they would each be alternatives or whether only one, two or all three of these would feature, and, if so, in what way. The following paragraphs explain further:

- "[T]he surrogate / surrogate mother": as mentioned above, the WG agreed to include the connection with the surrogate / surrogate mother, but to limit the connection to habitual residence to mitigate concerns of trafficking, sale and / or exploitation.
- "[T]he intended parent or at least one of the intended parents":
  - ⇒ There was some opposition in the WG to the inclusion of an indirect ground of jurisdiction based solely on a connection of the intended parent, or at least one of the intended parents, to the State of judgment, because in their view recognition of judgments on legal parentage in such circumstances should not be possible under a Convention as there could be risks that such judgments involved trafficking of women.
  - ⇒ For other members of the WG, safeguards / standards against trafficking of women are extremely important, but are and should be dealt with in other places – in other provisions of the draft Convention specific to trafficking or consents (*e.g.*, Arts 10(1)(c)(iv), (v) and (vi) and 23(1)(b)), and in national law (including regional and international law). In their view, indirect grounds of jurisdiction should be based on connections with the forum, and inclusion of a connection to the intended parent(s) would make a Convention more attractive for several reasons.
    - > First, a number of States have frameworks for judgments to establish legal parentage following a surrogacy arrangement, where the birth may have taken place abroad, that contain safeguards / standards to protect against trafficking and ensure free and informed consents. The ground of jurisdiction for these judgments may be based on the connection of the intended parent(s) to the forum (habitual residence / domicile / nationality). If such a connecting factor were omitted, these judgments could not circulate under the draft Convention.
    - > Second, such an indirect ground of jurisdiction would include those cases where the legal parentage following a surrogacy arrangement established in the State of birth of the child cannot be recognised and that legal parentage has been established in the State where the intended parent(s) are habitually resident (or domiciled / nationals).
    - > Finally, some States might wish to have the possibility to recognise legal parentage established by judgment in the best interests of the child where the judgment comes from a State with which the intended parent(s) have a connection and the requested State has established treaty relations (Art. 25), to protect the right or interest in continuity of status and on the basis of trust in the

judgment of the State of judgment. Adding this indirect ground of jurisdiction would enable the recognition of judgments in these situations and make the draft Convention more attractive.

- "[T]he child":
  - ⇒ Some members of the WG noted that the child's habitual residence (or domicile / nationality) can be a useful connecting factor when judgments on legal parentage following a surrogacy arrangement are issued, *e.g.,* several years after the childbirth, and the connection with the surrogate / surrogate mother no longer exists.
  - ⇒ For other members of the WG, this indirect ground of jurisdiction may cause difficulties when such judgments are rendered before or right after childbirth, because the habitual residence of a newborn is difficult to determine. It could also, if included without the alternative of a connection to the intended parent(s), prevent continuity of legal parentage established by the particular type of judgments as mentioned in the bullet point "the intended parent or at least one of the intended parents" above.

106 Regarding the connection with States in relation to the intended parent(s) and the child:

- For some members of the WG, the inclusion of domicile / nationality as an alternative connecting factor would be desirable to reflect their current domestic legislation and ensure that judgments on legal parentage following a surrogacy arrangement would not be prevented from circulating under the draft Convention, which could be the case if only "habitual residence" were included. In their view, domicile / nationality is a ground for "home State" jurisdiction that can serve to protect parties in proceedings to establish legal parentage in the best interests of the child as part of a regulatory framework containing anti-trafficking and other safeguards / standards via other provisions, especially where those parties have a different habitual residence and that State fails to provide a proper forum. Further, eliminating this connecting factor would lead to a highly restrictive Convention that could exclude many cases of legal parentage established by judgment in those States which use domicile / nationality as a direct ground of jurisdiction when establishing legal parentage.
- For other members of the WG, connection should be limited to habitual residence. Certain members consider the inclusion of domicile as an indirect ground of jurisdiction undesirable because the notion of domicile varies from State to State and cannot be uniformly defined.

Feasibility considerations

107 The WG agreed that rules on recognition would be more feasible if they were subject to indirect grounds of jurisdiction. Such grounds ensure that there is proximity between the parties and the State of judgment and therefore generally facilitate recognition. Further, in contrast to direct grounds of jurisdiction, indirect grounds of jurisdiction would be less likely to require States to make changes to their national laws. This increases the attractiveness of the draft Convention.

108 Regarding the inclusion of specific provisions:

- The WG agreed that it would be more attractive for some States to have specific provisions for some case scenarios of legal parentage, given specific concerns and circumstances about certain methods of conception, circumstances of birth and methods of establishing legal parentage, and in order to ensure predictability and certainty.
- However, other members were of the view that the more specific the rules become to particular categories, such as for adoption and surrogacy, the more complex and restrictive the rules become to continuity of legal parentage established by judgment.
- For some, broader and more general indirect jurisdiction rules would be more appealing and pose less of a risk of being restrictive compared to national law, while safeguards / standards

could be dealt with in other provisions and in national law (including international and regional law).

109 In addition, the following policy differences remain:

- First, it needs to be decided whether to include the connecting factors of domicile and nationality in the indirect grounds of jurisdiction:
  - ⇒ Some members of the WG hesitated to include domicile or nationality as connecting factors, particularly due to the divergent notion of domicile among different States.
  - ⇒ Other members of the WG considered that domicile and nationality are important connecting factors in the national law of establishment of legal parentage in the best interests of the child and can protect parties. The exclusion of domicile and nationality would lead to a highly restrictive Convention that could exclude many cases of legal parentage established by judgment in States with which requested States have otherwise agreed to apply the draft Convention (under the treaty relations establishment provisions in Art. 25).
- Second, indirect grounds of jurisdiction that are based not only on proximity to the forum but that also contain safeguards / standards will make a Convention more attractive to some States, but less attractive for others:
  - ⇒ For some members of the WG, a judgment on legal parentage following a surrogacy arrangement should not be recognised under a Convention in circumstances where the State of judgment's only connection is to the intended parents, because such judgments could have followed trafficking of the surrogate / surrogate mother.
  - ⇒ But for other members of the WG, protections against trafficking are dealt with in other parts of the draft Convention and often in national regulatory frameworks for surrogacy and for establishment of legal parentage in States of judgment, with which requested States will have chosen to apply the treaty or not. Although recognition might still be possible under national law in such requested States, the exclusion of such legal parentage established by judgment in such treaty partner States diminishes the added value of a Convention.
- Third, the timing requirement at Article 9(3) may still warrant further discussion to ensure feasibility.
- Lastly, the inclusion of Article 9(5) also warrants further discussion:
  - ⇒ Some members of the WG supported its inclusion to facilitate recognition of judgments for children born following a surrogacy arrangement.
  - ⇒ However, other members opposed its inclusion as they considered it as unduly enabling recognition of judgments on legal parentage established abroad following a surrogacy arrangement, which is against the child's best interests and contrary to public policy.

Article 10 – Refusal of recognition

Refusal of recognition

1. Recognition **may be refused** if –

a. such recognition is manifestly contrary to the **public policy** of the requested State;

b. [for judgments on **adoption**, the birth parents or the child, taking into account the child's age and maturity did not give their free[,] [and] informed [and written post-birth] **consent** to the adoption [if such consent was needed], [in violation of fundamental principles of the requested State];]

c. for judgments on legal parentage following a **surrogacy** arrangement –

i. [the surrogate / surrogate mother was under 18 years of **age** when entering into the surrogacy arrangement;]

ii. [the surrogate / surrogate mother did not give free, informed [and written]:

A. [**consent** to the surrogacy arrangement prior to conception;]

B. [[[post-birth] OR [continued]] **consent** [for legal parentage to be established solely with the intended parent(s)] OR [not to be a legal parent[, or withdrew it [within a reasonable time period]]] [in violation of fundamental principles of the requested State];]]

iii. [the intended parent(s) did not give their free[,] [and] informed [and written] **consent** to the surrogacy arrangement prior to conception;]

iv. the surrogate / surrogate mother is a victim of **trafficking** [for the purposes of the surrogacy arrangement][;]

v. [[the primary reason for the surrogate / surrogate mother to be in the State of the child's birth was [to enter into] the surrogacy arrangement] OR [the surrogate / surrogate mother did not have habitual residence in the State of the child's birth];]

vi. [the surrogacy arrangement included conditions which unreasonably limit the surrogate / surrogate mother's liberty, or include disproportionate sanctions for violations].

d. [where applicable, any person, whose consent was required in an **assisted reproductive technique** case did not give their free[,] [and] informed and written consent to establishing their legal parentage;]

e. the judgment was obtained by **fraud**;

f. on the request of a party to the proceedings, such judgment was given without such person having received **proper notice** of the proceedings which prevented them from being heard in the proceedings;

g. on the request of a person who has a legitimate interest in the judgment on legal parentage (child, putative parent), such judgment was given without such person having been provided an **opportunity to [be heard]** OR **[participate]**;

h. [on the request of a person who has a legitimate interest in the judgment on legal parentage (child, putative parent),] the judgment was given without the child, according to their age and maturity, having been provided the **opportunity to be heard**, [in violation of fundamental principles of procedure of the requested State];

i. the judgment is **irreconcilable** with a judgment given by a court of the requested State which determines the legal parentage of the same child; or

j. the judgment is **irreconcilable** with an **earlier** judgment given by a court of another State which determines the legal parentage of the same child, provided that the earlier

judgment fulfils the conditions necessary for its recognition in the requested State or has already been recognised by the requested State.

2. [[When applying paragraph 1] OR [When applying paragraph (1)(a)[, (b), (c) or (d)]], the competent authority shall take into account, for children under 18 years of age, their rights, [including their right to have their **best interests** assessed and taken into account as a primary consideration].]

3. Recognition may be postponed or refused if proceedings which involve the determination of the legal parentage of the same child are **pending** before a court of the requested State, where the court of the requested State was seised before the court in the State of judgment. A refusal under this provision does not prevent a subsequent application for recognition of the judgment.

Explanations

Article 10 – Introduction

110 Article 10 provides for specific grounds that allow, but do not require, refusal of recognition of a judgment. Thus, these grounds are discretionary (recognition "may be" refused). If one or more of these grounds apply, the competent authority in the requested State may decide whether to, and to what extent, refuse or still grant recognition.

Article 10(1) – Introductory phrase

111 The list of grounds in this provision is exhaustive, which limits the grounds that can be invoked to prevent recognition in the requested State.

112 Article 10(1)(a) to (d) refer to public policy of the requested States; age of the surrogate / surrogate mother; consent in adoption, surrogacy and ART; and some grounds related to the protection of the surrogate / surrogate mother (trafficking, habitual residence, as well as conditions and sanctions in the surrogacy arrangement).

113 Article 10(1)(e) refers to substantive and procedural fraud.

114 Article 10(1)(f) to (j) refer to *procedural* principles. Namely, proper notice, opportunity to be heard and irreconcilable judgments.

Article 10(1)(a) – Public policy

115 Article 10(1)(a) refers to the general public policy exception and is complemented by the Article 10(1)(b) to (d) provisions which spell out specific aspects of the public policy exception that are particularly relevant in the context of legal parentage (*e.g.*, consent). If, however, Article 10(1)(b) to (d) do not apply, States may decide to revert to Article 10(1)(a) to refuse recognition of a judgment.

Article 10(1)(b) to (d)

Article 10(1)(b) to (d) – Introduction

116 Article 10(1)(b) to (d) refer to the possibility to refuse the recognition of the judgment in specific circumstances, in particular when there is a lack of consent. These provisions clarify what the public policy exceptions of a number of States might entail (see para. 115 above).

117 An open and key question remains as to what law the competent authority will apply to determine whether each of the elements of the relevant ground was met.

118 With respect to consent, the WG discussed three different options: (1) the law of the State of judgment; (2) the law of the requested State; and (3) through an autonomous interpretation of "consent". Options 1 and 2 require an assessment of the substantive law of the relevant State, whereas Option 3 allows an interpretation specific to the draft Convention.

119 Members in favour of Option 1 were of the view that this would allow for specificities of the law of the State of judgment such as the dispensing of consent. By contrast, those in favour of Option 2 were of the view that the assessment should be in accordance with the law of the requested State, since this falls under the ambit of the requested State's public policy. Meanwhile, members in favour of Option 3 preferred an autonomous interpretation as they were of the view that the draft Convention should not have applicable law rules. Further, in relation to surrogacy arrangements, some members considered that it would not be possible to apply the law of the State of judgment or requested State to verify consent if surrogacy is prohibited in such a State. Notwithstanding the option chosen, it may be relevant to consider how evidence that each element of the necessary consent has been satisfied, as determined by the court, may be presented in the State of judgment (*e.g.*, in a certificate, in the judgment itself, or by the parties).

120 The inclusion of these provisions (Art. 10(1)(b) to (d)) is also part of a broader discussion of the WG on the inclusion of safeguards / standards within the draft Convention. The WG reached a consensus to include some safeguards / standards as grounds for refusal, rather than as conditions for recognition, on the basis that where conditions have not been satisfied, the State is required to refuse recognition under the draft Convention. By contrast, some States might prefer the discretion to recognise legal parentage established by judgment, taking into account, for example, the best interests of the child and / or rights or interests in continuity of status, despite a ground for refusal being made out under Article 10. The WG consensus also acknowledged that the non-application of these safeguards / standards gives rise to the application of the public policy exception in some States, but not in other States.

121 Members of the WG had different views as to the relevance of the grounds at Article 10(1)(b) to (d):

- For some members of the WG, the grounds at Articles 10(1)(b) to (d) are not necessary, as reference to the general public policy exception contained in Article 10(1)(a) can serve as a "catch-all" ground for refusal. For these members, consent in adoption, surrogacy and ART circumstances is fundamental enough that the public policy ground for refusal would be sufficient. Further, public policy is assessed according to the standards of the requested State, whereas it is not yet decided whether specific consent requirements would be considered under the law of the requested State (see above para. 118).
- For other members of the WG, it is important to include such grounds for the following reasons:
  - ⇒ Since recognition of judgments on legal parentage is an area where States might use the public policy exception extensively and *in abstracto*, rather than *in concreto*,[29] it is important to provide some details as to which aspects of the public policy exception the drafters of a Convention had in mind.
  - ⇒ Expressly spelling out the possibility to refuse recognition in case of a lack of consent emphasises the importance of this requirement in the context of adoption and ART.
  - ⇒ If such grounds for refusal are included for some methods of establishing legal parentage, but not others, it may imply that consent is only relevant for those methods of establishment where indicated (*e.g.*, including a specific ground on consent for legal

29 *In concreto* refers to the examination of real and specific situations, where the concrete circumstances of each case are taken into account. In contrast, *in abstracto* denotes a more theoretical and general approach, where a legal rule is considered without linking it to a particular context.

parentage established following a surrogacy arrangement, but not for adoption, might suggest that consent is only relevant in the surrogacy context but not for adoption).

Article 10(1)(b) – Consent in adoption

122 Article 10(1)(b) refers to the possibility to refuse recognition of the judgment where there is a lack of consent in the context of an adoption. There was no consensus in the WG as to a uniform consent safeguard / standard which competent authorities would have to assess. In certain circumstances, a judge may dispense with this consent, particularly where domestic legislation has been enacted to allow for these specified situations. This could be the case, for example, if the birth parent(s) cannot be found or are incapable of giving consent.

123 The WG noted that for some States, the Article 10(1)(b) requirement is restrictive compared to national law regarding the recognition of adoptions from courts in a significant number of States. In those circumstances, adoptions are often recognised by operation of law if they come from specified other States, with no verifications occurring as to consent – leaving consent matters to the State of judgment. These members also highlighted that authorities could be asked to recognise an adoption many years after the adoption happened in the State of judgment.

Article 10(1)(c) – Surrogacy arrangements

124 Article 10(1)(c) refers to the possibility to refuse recognition of the judgment in the context of a surrogacy arrangement in the case of the surrogate / surrogate mother being under the age of 18 (Art. 10(1)(c)(i)), lack of consent (Art. 10(1)(c)(ii) and (iii)), or in the case that the surrogate / surrogate mother may have been trafficked, moved or did not have their habitual residence in the State of the child's birth, or in the case that the surrogacy arrangement included certain conditions or sanctions (Art. 10(1)(c)(iv)to (vi)).

Article 10(1)(c)(i) – Age of the surrogate / surrogate mother when entering into the surrogacy arrangement

125 Article 10(1)(c)(i) relates to the age of the surrogate / surrogate mother when entering into the surrogacy arrangement. While some members of the WG suggested that this should be included as a safeguard / standard, other members were of the view that this ground is unnecessary. For these members, the requested States should not be examining the age of the surrogate / surrogate mother as this is a matter of substantive law, with the exception of egregious cases (i) which would be covered by the public policy ground under Article 10(1)(a) or (ii) in which other factors might be present for which other grounds would be available (*e.g.*, lack of consent).

Article 10(1)(c)(ii)(A) and (iii) – Consent to the surrogacy arrangement

126 Article 10(1)(c)(ii)(A) and 10(1)(c)(iii) relate to consent to the surrogacy arrangement by the surrogate / surrogate mother and the intended parents. The WG was of the view that the criteria for "free and informed consent to the surrogacy arrangement prior to conception" should be included in the draft Convention, under Article 2 about scope and / or under Article 4 about the definition of a "surrogacy arrangement" and / or here in Article 10 as grounds for refusal, and / or in declarations under Article 22, but <u>not</u> in all places (though it currently features in all of these places, including in square brackets in some). There are differing views as to where it should be included:

- For some members of the WG, the criteria for "free and informed consent to the surrogacy arrangement prior to conception" should be included in Article 2 on scope and not as grounds for refusal. For certain members, this is because it is a key safeguard / standard. Under this proposal of including it in Article 2 on scope, failing to satisfy the consent criteria will mean that the arrangement is not considered a surrogacy arrangement, and therefore the intention is that

it will fall outside the scope of the draft Convention. For some of these members, only the qualifier that such consent be "written" should be left to the grounds for refusal.

- For other members of the WG, "free and informed consent to the surrogacy arrangement prior to conception" is of course a fundamental safeguard / standard and one which is found in the national law (including regional and international law) of these States, but the question is where it should be placed in a Convention on the recognition of judgments on legal parentage between treaty partner States aimed at continuity of legal parentage where courts in States of judgment will have applied their national law to determine whether consent requirements were met. Against that background, these members were of the view that consent should be a ground for refusal. Under this proposal, there is more flexibility, with no child's legal parentage established by judgment automatically excluded from the scope of the draft Convention, and with States given the discretion to decide whether to recognise legal parentage in the best interests of the child (i) even if the court in the State of judgment reached a different conclusion about consent than authorities in the requested State, or (ii) where the circumstances of the case meant that not all consent criteria had been satisfied in the view of the requested State's authorities. While some of these members suggested requiring such consent in the grounds for refusal to be "written", some members considered this too restrictive for those States where the judge has allowed for other forms of proof.

Article 10(1)(c)(ii)(B) – Consent for legal parentage to be established solely with the intended parent(s) / to not be a legal parent

127 In the context of surrogacy, there are two aspects to which the surrogate / surrogate mother needs to consent:

- Consent to the surrogacy arrangement: without such consent, the surrogacy arrangement would be either void or non-existent. This consent is reflected in Article 2(3) and 4(f), as well as in Article 10(1)(c)(ii)(A).
- Consent for legal parentage to be established solely with the intended parents / not to be a legal parent: this consent is reflected in Article 10(1)(c)(ii)(B). In certain circumstances, this consent may be dispensed with by a judge, particularly where domestic legislation has been enacted to allow for these specified situations. This could be the case, for example, if the surrogate / surrogate mother cannot be found or is incapable of giving consent.

128 Article 10(1)(c)(ii)(B) provides that a State can refuse to recognise a judgment where there is a lack of consent from the surrogate / surrogate mother that legal parentage be established solely with the intended parents / not to be a legal parent.

129 The WG also had different views as to certain policy considerations and the level of detail that this provision should include, in particular:

- Post-birth or continued consent: the WG had different views as to whether this consent should only be valid if given post-birth, if given continuously (*i.e.*, when the surrogacy arrangement is entered into and verified again post-birth), or if it would be sufficient to refer to the consent without specifying a timeframe. Another option suggested was to include the possibility for States that so wish to be able to make a declaration requesting that consent be given post-birth (see Art. 22(2)).
- Legal parentage to be established solely with the intended parents / not to be a legal parent: the WG had different views on the wording to be used to refer to the nature of the consent. Some members of the WG noted, for example, that since in some States the surrogate / surrogate mother never becomes a legal parent, it would not be possible for the surrogate / surrogate mother to relinquish legal parentage.

- Withdrawal of consent within a reasonable time period: The WG acknowledged it is common that any provision on consent also refers to that consent not having been withdrawn. However, some members noted it would not be necessary in the context of this instrument, since in their view a consent that had been withdrawn could not have led to a judgment being issued in the State of judgment. Other members of the WG wished to clarify that the withdrawal of consent should take place within a reasonable period of time.
- Under the law of the State of judgment / in violation of fundamental principles of the requested State: members of the WG had different opinions as to whether consent should be given in accordance with the law of the State of judgment or the requested State, or autonomously (see also para. 119 above on explanations on how consent could be verified under the draft Convention).

Article 10(1)(c)(iv) to (vi) –Protection of the surrogate / surrogate mother (trafficking, habitual residence, and as well as conditions and sanctions in the surrogacy arrangement)

130 Article 10(1)(c)(iv) refers to the possibility to refuse recognition of the judgment in cases where the surrogate / surrogate mother was trafficked. Members had different views on the following:

- For some members of the WG, it would be clearer if such a ground were explicit about its intention (*i.e.*, protecting the surrogate / surrogate mother from trafficking) and would take into account the fact that the surrogate / surrogate mother may be trafficked without being moved to another State.
- Some members suggested that the provision should be limited to trafficking "for the purposes of the surrogacy arrangement", while other members were of the view that the ground for refusal should be wider to protect against surrogate / surrogate mothers who are trafficked not specifically for the purposes of the surrogacy arrangement.

131 Article 10(1)(c)(v) refers to the possibility to refuse recognition if the primary reason for the surrogate / surrogate mother being in the State of the child's birth was to enter into the surrogacy arrangement, or the surrogate / surrogate mother did not have habitual residence in the State of the child's birth. This may be the case, for example, where the surrogate / surrogate mother is moved (or asked to move) from the State of habitual residence to another State because that State allows surrogacy (while the State of habitual residence may not) or because the legislation on surrogacy in that State is more favourable to the intended parents. The following views were expressed:

- For members in favour of including this ground, the movement of the surrogate / surrogate mother to another State can often be an indication of, or reason to suspect, trafficking and the inclusion of this ground increases protection against trafficking.
- However, other members of the WG noted that such wording could lead to a restriction of the surrogate's / surrogate mother's freedom of movement and recognition of the judgment on legal parentage for the child.

132 Article 10(1)(c)(vi) refers to the possibility to refuse recognition of a judgment where the surrogacy arrangement had conditions which unreasonably limit the surrogate / surrogate mother's liberty, or include disproportionate sanctions for violations. The following thoughts were expressed:

- Some members were of the view that the inclusion of this provision is an important feasibility matter, as some States would wish to include it as an extra safeguard / standard against exploitation and abuses of surrogates / surrogate mothers, and that this ground does not fall under public policy.
- Other members were of the view that although safeguards / standards against exploitation and abuse of surrogates / surrogate mothers are indisputably important, and exist in their

national law, the question is whether and to what extent surrogacy arrangements should be assessed by authorities in requested States when (i) they are asked to recognise a judgment on legal parentage from a treaty partner State which presumably has safeguards / standards about those surrogacy arrangements that the requested State has agreed are satisfactory (or it would not have entered into treaty relations with that State under Art. 25); and (ii) continuity of legal parentage established by judgment is in the balance, meaning that children could be penalised because the requested State's authorities reach different conclusions than the State of judgment or its courts about such surrogacy arrangements. These members were also of the view that such a ground could also be covered by public policy.

Article 10(1)(d) – Consent in ART

133 Article 10(1)(d) refers to the possibility to refuse recognition of the judgment in the case of lack of consent in the context of ART.

134 This ground may apply, for example, when a couple undertakes ART treatment to create frozen embryos, but then divorces. The ex-wife subsequently decides to implant one embryo without informing her ex-husband. This may lead to a judgment to establish and / or contest legal parentage with the ex-husband. This ground may also apply in surrogacy cases: taking the previous example, this would be the case if the ex-wife decided to enter into a surrogacy arrangement and to have the embryo implanted in the surrogate / surrogate mother without informing her ex-husband.

135 This provision is in square brackets as there was no consensus as to the inclusion of this as a specific ground for refusal. Despite the clear importance of consent issues in scenarios such as those described above and other ART circumstances, there were different views similar to those expressed in previous sections about the need for such a ground, particularly if there is also a public policy ground, and in a Convention on the recognition of judgments on legal parentage, and about the impact of such a ground on continuity of legal parentage.

Article 10(1)(e) – Fraud

136 Article 10(1)(e) refers to the possibility to refuse recognition of the judgment in the case that the judgment was obtained by fraud, whether this fraud was procedural or substantive.

Article 10(1)(f), (g) and (h) – Proper notice, opportunity of a person who has a legitimate interest in the judgment to be heard, and opportunity of the child below 18 years of age to be heard

137 Article 10(1)(f), (g) and (h) refer to the possibility to refuse recognition of the judgment in the case that there was no proper notice or opportunity to be heard.

138 According to Article 10(1)(f), recognition may be refused if a party to the proceedings did not receive proper notice of the proceedings (a rule on the service of documents). One proposal suggested by the WG was that this ground would only apply if two conditions were fulfilled: (1) that the party who did not receive proper notice was also not heard in the proceedings; and (2) that the party raised this point when requesting the non-recognition of the judgment. Article 10(1)(f) is drafted broadly by referring to "a party to the proceedings" and not only to "a respondent". This is because legal parentage proceedings may not always be contentious.

139 In Article 10(1)(g), recognition may be refused if a person who has a legitimate interest in the judgment was not given an opportunity to be heard in the proceedings (procedural rule). For this ground to be applied, the person must raise this point to request non-recognition of the judgment.

140 Members of the WG agreed that the above principles in Article 10(1)(f) and (g) should relate to the procedural law of the requested State.

141 In Article 10(1)(h), recognition may be refused if the child, who is below 18 years of age, was not given an opportunity to be heard in the proceedings in accordance with their age and maturity. This is part of States Parties' obligations under the UNCRC. Some members of the WG also noted that this provision would be particularly crucial in legal parentage proceedings where the child is older, such as in adoption proceedings. An Explanatory Report could specify whether the persons referred to in the text in parenthesis should be exhaustive or whether they should only reflect examples of who an interested person may be. The WG had different views on the following:

- For some members of the WG, this provision should be applied only at the request of a party. For other members, this provision enshrines respect for the child's right to be heard, and therefore the recognising authority should have the possibility of applying this ground *ex officio* (even if no interested person requested it).
- Some members of the WG noted that children may not be able to express their views in legal parentage proceedings, owing to their age (often being infants) and / or level of maturity, and that States Party to the UNCRC have diverse ways of complying with their obligations regarding the child's right to be heard under Article 12 of that Convention.
- Other members of the WG were reluctant to include this text because they considered that in certain cases it might be in the child's interest to recognise legal parentage established by judgment – even if the child had not been given the opportunity to be heard, particularly if the request for recognition came many years after the judgment.
- For some members this ground should be assessed taking into consideration the law of the requested State, but others thought it should be the law of the State of the judgment.
- Finally, the WG also discussed the need to include the phrase "in violation of fundamental principles of procedure of the requested State" in this Article because in their view:
  - ⇒ If this were not included, it would leave doubt about whether the child's right to be heard were to be interpreted autonomously, according to the law of the State of judgment or the law of the requested State. It could also mean that each time a child was not heard, States would have the possibility to refuse recognition. For some members of the WG, this could be in the interests of some children.
  - ⇒ If it were included, States would only have the possibility to refuse recognition if the child was not heard and if this violated the requested State's fundamental principles of procedure. Examples of such principles may include that children (i) above a certain age or degree of maturity must be heard (*i.e.*, if the child not heard was below a certain age, then the State's fundamental principles of procedure would not have been violated) and / or (ii) must be heard in particular ways. For some members, such a review of decisions on hearing the child in accordance with the law of the requested State could lead to too much uncertainty and non-recognition of judgments on legal parentage, and might not be in a child's best interests.

Article 10(1)(i) – Irreconcilable judgments (requested State)

142 Article 10(1)(i) addresses situations of conflicting judgments on the legal parentage of the same child. It refers to the possibility to refuse recognition of the judgment where the judgment is inconsistent with another judgment rendered in the requested State.

Article 10(1)(j) - Irreconcilable judgments (other States)

143 Article 10(1)(j) addresses situations of conflicting judgments on the legal parentage of the same child. It refers to the possibility to refuse recognition of the judgment where the judgment is irreconcilable with an earlier judgment rendered in another State. This Article operates in so far as the latter judgment can be recognised in the requested State under the draft Convention or national law.

144 The provision refers to "another State" and not "another Contracting State". This means that the application of this ground for non-recognition is independent of the decision to limit the recognition of a judgment on legal parentage under this instrument only to Contracting States (see Art. 1). This ground is therefore applicable to any judgment, whether given by a court of a Contracting State or not.

145 This provision means, for example, that when a first judgment establishes legal parentage with the child's father and a second judgment (to be recognised under the draft Convention) determines that this same person is not the child's father, the child's legal parentage as established in the first (earlier) judgment will continue to be recognised and the recognition of the second judgment will therefore be refused.

Article 10(2) – Rights of the child

146 Article 10(2) clarifies that for children below 18 years of age, the application of grounds for refusal set forth in either Article 10(1) or Article 10(1)(a) to (d) should also take into account the rights of the child, including their best interests.

147 The WG acknowledged it is common in HCCH Children's Conventions[30] to include a reference to a consideration of the best interests of the child. However, when contemplating the use of the public policy exception, members of the WG had different views as to whether such a reference needed to be included in the context of legal parentage:

- For some members of the WG, it is relevant to include a reference to the best interests of the child in the context of child protection, but not in the context of legal parentage. This is because they consider that a person either has legal parentage or does not, based on domestic legislation.
- Some members, however, noted that while it might not be relevant as a general consideration, it might still be relevant in the adoption and surrogacy context, where States might have concerns or opposition to surrogacy, but where recognition of the legal parentage might in the circumstances of the case clearly be in the best interests of the child. This could be discussed in an Explanatory Report.
- For other members of the WG, the best interests of the child principle is at least relevant in the legal parentage context, if not fundamental, including to ensure coherence with the UNCRC and given a child's right to, or interest in, continuity of status.
- For certain members, it is important to include a consideration of the best interests of the child when recognising judgments on legal parentage, as it creates a lens through which to analyse and assess the grounds for refusal. This helps to balance the child's rights, including to have their best interests taken into account, as well as their right to or interest in continuity of status, with the grounds for refusal that may arise.
- For some members, this provision is also important as best interests come into play for legal parentage through socio-affectivity and not only through a genetic link. To give clarity to the principle of the best interests of the child as a right, some noted that it would be appropriate to rely on the wording used by the United Nations Committee on the Rights of the Child, where the child has "the right to have [their] best interests assessed and taken into account as a primary consideration"[31] in all actions or decision that concern them. These members had different views, however, as to which grounds this reference to the rights of the child / best interests of the child should be applicable:

30 Permanent Bureau, *The HCCH Children's Conventions, An Introduction to the Conventions*, 2022, available on the HCCH website (www.hcch.net) under "Publications & Studies" then "Brochures".

31 United Nations Committee on the Rights of the Child, General comment No 14 (2013) on the right of the child to have their best interests taken as a primary consideration (Art. 3(1)), para. 1.

⇒ For some members of the WG, such a reference should be applicable to all grounds for refusal in Article 10(1). This would ensure that in all cases where a refusal of recognition is considered, the rights of the child and their best interests are also taken into account.

⇒ For other members of the WG, it would be more appropriate if such a reference were applicable to certain grounds only, since the consideration of the rights of the child and their best interests may not, in their view, be relevant for all grounds. In some cases, "best interests" is more relevant for making the decision, but not for recognising it. Secondly, the status does not depend on a discretionary best interests test. Some members of the WG noted that such a reference should not be applicable to all grounds for refusal due to the administrative burden placed on competent authorities, who may not be well-versed in assessing the child's best interests. Some members of the WG were also of the view that while such a reference is relevant for the general public policy exception (*i.e.*, Art. 10(1)(a)), it is less relevant for the grounds at Article 10(1)(b) to (d).

Article 10(3) – Lis pendens

148 Article 10(3) addresses situations of parallel proceedings and provides for the *lis pendens* rule.

149 While Article 10(1)(i) and (j) deal with cases where several judgments have already been rendered and they conflict with each other, Article 10(3) deals with cases where proceedings are still pending in the requested State when recognition of a judgment given in another Contracting State is sought.

150 For Article 10(3) to apply, the proceedings must involve the determination of the legal parentage of the same child and the court of the requested State must have been seised before the court in the State of judgment. The rationale for this second condition is that the court in the State of judgment should have yielded to the priority of the court first seised and suspended or refused the commencement of the proceedings since the same case was already pending in another Contracting State. *Lis pendens* in another State cannot be invoked to refuse recognition.

151 The last sentence of Article 10(3) clarifies that a refusal under this provision does not prevent a subsequent application for recognition. In such a situation, Article 10(1)(i) may then, however, be applicable.

Feasibility considerations

152 With regard to classic PIL grounds for refusal (*i.e.*, Art. 10(1)(a) and 10(1)(e) to (j)),[32] the WG agreed that their inclusion would be feasible.

153 With regard to safeguards / standards being included as grounds for refusal specific to adoption, surrogacy and ART (*i.e.*, Art. 10(1)(b) to (d)),[33] members of the WG had different views on their possible inclusion.

154 For some members of the WG, the inclusion of safeguards / standards as grounds for refusal, especially for the child and surrogate / surrogate mother, would have the following effects:

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32 These are: public policy; fraud; proper notice; opportunity of a person who has a legitimate interest in the judgment to be heard; opportunity of the child below 18 years of age to be heard; irreconcilable judgments (requested States); and irreconcilable judgments (other States).

33 These are: consent in adoption; age, consent to the surrogacy arrangement, and consent to relinquish legal parentage in surrogacy of the surrogate / surrogate mother; consent to the surrogacy arrangement of the intended parents; protection of the surrogate / surrogate mother (trafficking, habitual residence, as well as conditions and sanctions in the surrogacy arrangement); and consent in ART.

- It would ensure that the fundamental rights of the child and all those involved are respected. As such, legal parentage recognised under the draft Convention would have been established following minimum safeguards in line with international treaties, such as the UNCRC. This would have a positive effect on the persons whose judgment on legal parentage is recognised in the short but also long term, such as if they look for information about the recognition. They also noted that the safeguards / standards proposed in the draft Convention are in many cases minimum and consistent with existing principles found in instruments such as the UNCRC.
- It would clarify the possible content of some States' public policy exceptions, thereby providing certainty for persons seeking to comply with States' national principles to have their judgments on legal parentage recognised under the draft Convention. In turn, recourse to the public policy exception would be reduced.
- It would help ensure that States recognise judgments on legal parentage under the draft Convention only in circumstances that are not contradictory with international treaties and therefore avoiding that States bear an international responsibility for recognising judgments on legal parentage rendered in another State without taking into account international treaties (see Art. 31(3)(c) of the Vienna Convention on the Law of Treaties).
- It would provide a "safe and fast track" for recognition, when the requirements, including the uniform minimum safeguards / standards of a Convention, have been met.
- It would allow verification of compliance with the agreed uniform safeguards / standards in each individual case before determining when recognition has to be granted, and when it should be refused, taking into account the human rights of all persons concerned and the best interests of the child.
- It would incentivise parties to follow the uniform safeguards / standards of a Convention, because this route would provide greater certainty on the cross-border recognition and continuity of legal parentage. Where recognition through a Convention would not be possible, the persons concerned should be able to seek recognition or the re-establishment of legal parentage under the domestic PIL rules of the requested States, if possible.
- It would ensure that a Convention remains relevant to any State independently of their legal systems and traditions, as it provides a common basic framework that respects differing domestic practices while upholding uniform safeguards / standards.

155 For other members of the WG, the question is not whether safeguards / standards are important. They indisputably are, and are found in the national law (including the regional and international law) of these members. The question is also not whether safeguards / standards should feature as grounds for refusal, since their inclusion in this way is, in principle, likely to make a Convention more attractive to a wider group of States, particularly if they are included instead of *conditions* to recognition, which would give no flexibility to States to recognise legal parentage in the best interests of the child. However, these members noted that inclusion of too many and too detailed uniform safeguards / standards as grounds for refusal could cause a Convention to be less attractive to some States for the following reasons:

- They could be restrictive compared to domestic rules of recognition of judgments on legal parentage established by judgment.
- They could create difficulties in obtaining consensus on a Convention given the need to agree on uniform formulations of minimum safeguards / standards in the provisions, and the need to agree on whether compliance with the safeguards / standards should be assessed according to the law of the requested State, the State of judgment or according to autonomous interpretations. An alternative would be for many of these issues to be addressed through public policy.

- They could lead to reluctance for States to join a Convention where the minimum safeguards / standards differ in their detail from their national law and where administrative authorities in requested States would be re-assessing conclusions reached by courts in the States of judgment, despite the requested States having agreed to apply the draft Convention with the States of judgment through the treaty establishment provision (Art. 25).
- They could raise questions as to the added value of a Convention that contains so many possibilities for refusing continuity of status.
- They could raise criticism because of the differences in treatment of children depending on the method by which they were conceived.

156 The inclusion of safeguards / standards could also be less attractive for States for which surrogacy is against their public policy and consider that the inclusion of safeguards / standards would legitimise that practice. These States would likely make a reservation to limit the scope of the Convention (see Art. 23).

157 Policy differences, and therefore feasibility considerations, remain as to if and how the Article 10 provisions would be included and formulated, and according to which law (or autonomous interpretation) these would be assessed.

Article 11 – Documents to be produced

Documents to be produced

1. The person seeking recognition shall produce –
   a. a complete and certified copy of the judgment;
   b. if necessary, any information to establish that the judgment has *erga omnes* effect and can no longer be the subject of ordinary review in the State of judgment.
2. An application for recognition may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of judgment, in the form recommended and published by the Hague Conference on Private International Law.
3. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language of that State, unless the requested authority of that State dispenses with translation or the law of the requested State provides otherwise.
4. [All documents [to be produced] OR [delivered under this Convention] shall be exempt from legalisation or any analogous formality.]

Explanations

Article 11 – Introduction

158 Article 11 lists the documents and information to be produced by the person seeking recognition of a judgment under the draft Convention. It applies whether the person seeks recognition by operation of law under Article 5 or requests a decision under Article 12. Article 11 is similar to Article 12 of the 2019 Judgments Convention.[34]

Article 11(1) – Documents and information to be produced

159 Article 11(1)(a) requires the production of a complete and certified copy of the judgment. A "judgment" includes, where applicable, the court's reasoning and not only the final order (*dispositif*).

160 Article 11(1)(b) requires the production of any information necessary to prove that the judgment has *erga omnes* effect in the State of judgment (see Art. 6). The words "if necessary" have been included since this information may be stated in the recommended form (see Art. 11(2)) and this information may therefore not be necessary.

Article 11(2) – Recommended form

161 Article 11(2) provides that the documents to be produced may be accompanied by a form recommended and published by the HCCH. This form would be issued by a court (including by an officer of that court) of the State of judgment. The court issuing the form would not be required to be the court that rendered the judgment. Although States would not be required to adopt the form, its use may facilitate the process of recognition (*e.g.*, the form could *inter alia* contain information as to whether the judgment has *erga omnes* effect in the State of judgment or not).

34 *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.*

Article 11(3) – Language

162 Article 11(3) deals with the language of the documents listed in Article 11(1). If the documents are not in an official language of the requested State, they must be accompanied by a certified translation into an official language of that State, unless the competent authority of that State dispenses with translation or the law of the requested State provides otherwise. This State may, therefore, provide that a translation is not necessary at all or that a non-certified translation is sufficient.

Article 11(4) – Exemption from legalisation

163 Article 11(4) provides for the exemption from legalisation. However, not all members of the WG were in favour of dispensing with this requirement.

Feasibility considerations

164 The WG noted that the use of a recommended form would be feasible and could facilitate recognition of the judgment, although utility would depend on the content of the form.

165 The exemption from legalisation would warrant a policy decision. While many HCCH Conventions provide for such an exemption (*e.g.*, the 2007 Child Support Convention), others, such as the 1993 Adoption Convention and the most recent HCCH Convention, the 2019 Judgments Convention, do not include such an exemption.

Article 12 – Request for decision on recognition or non-recognition of a judgment on legal parentage

Request for decision on recognition or non-recognition of a judgment on legal parentage

1. Without prejudice to Article 5, any interested person or authority may request from the competent authority of a Contracting State that they decide on the recognition or non-recognition of a judgment given in another Contracting State. Except as otherwise provided in this Chapter, the procedure is governed by the law of the requested State. The competent authority in the requested State shall act expeditiously.

2. Each Contracting State shall designate the authorities competent for this procedure.

Explanations

Article 12 – Introduction

166 Although recognition under the draft Convention is intended to be by operation of law (see Art. 5), interested persons may also have an interest in requesting a decision on recognition (*e.g.*, to clarify that the judgment would be recognised). Article 12 thus provides for such a possibility. Since recognition is produced by operation of law, it is only at the time when the judgment is invoked in a State that a possible dispute over the existence of a ground for non-recognition would be the subject of a ruling. This date may be too late, and any interested person may have a legitimate interest in dispelling, as soon as possible, any doubt which may exist about the existence of such a ground for non-recognition. A decision on recognition or non-recognition could also accelerate or assist with uniform treatment of the judgment in the requested State by different administrative authorities. A person may thus have an interest in having an advanced decision on recognition in a given State. Article 12 is similar to Article 24 of the 1996 Child Protection Convention.

Article 12(1) – Procedure

167 Article 12(1) clarifies that the procedure to be followed in the case where a decision on recognition or non-recognition is sought should be governed by the law of the requested State. It also specifies that the authority competent to issue such a decision should act expeditiously.

168 Due to the fact that recognition takes place by operation of law, interested persons or authorities may also want, in some circumstances, to request a decision to clarify that the judgment will not or cannot be recognised. This would then be a decision on non-recognition of the judgment.

Article 12(2) – Designation

169 Article 12(2) specifies that the authorities competent to issue a decision on recognition or non-recognition should be designated for that purpose under the draft Convention.

Feasibility considerations

170 This Article does not warrant any specific policy decisions. This Article would add to the attractiveness of a Convention since it would make it possible to obtain certainty concerning the recognition of judgments on legal parentage in another Contracting State, including before moving to that State.

Article 13 – [Findings of fact [and law]]

[Findings of fact [and law]

The authority of the requested State is bound by the findings of fact [and law] on which the court of the State of judgment based its jurisdiction.]

Explanations

171 Article 13 provides that the authority competent in the requested State has to accept, and is bound by, the findings of fact concerning the ground(s) of jurisdiction made by the court in the State of judgment. In that context, the term "jurisdiction" refers to the direct jurisdiction under the law of the State of judgment.

172 Article 13 is similar to Article 27 of the 2007 Child Support Convention,[35] Article 8(2) of the 2005 Choice of Court Convention and Article 6 of the 1970 Divorce Convention,[36] all of which also contain indirect grounds of jurisdiction.

173 Members of the WG had different views as to the need for this provision:

- For some members, this provision would be useful to prevent the competent authority in the requested State from going behind the findings of fact made by the court in the State of judgment concerning the ground of jurisdiction on which its judgment is based. For these members, the fact that a similar provision is found in other HCCH Conventions (mainly on family law) containing indirect grounds of jurisdiction, but not in the 2019 Judgments Convention which relates to civil and commercial matters, may reflect concerns about parties in family law matters having to re-litigate, and competent authorities re-assessing conclusions by courts in States of judgment. For these members, such concerns are particularly important in an instrument aimed at continuity of legal parentage established by judgment in the State of judgment. Further, while courts may not always explicitly explain the basis on which they have assumed jurisdiction, this is a matter that courts or States party to a Convention could seek to improve if they wished, via changes to domestic law or practice. In any event, it was noted in the context of the 2007 Child Support Convention that "[e]ven if this observation may limit the practical reach of the rule, it is not sufficient to condemn its principle".[37]
- For other members of the WG, this provision would only make sense if the draft Convention provided for direct jurisdiction rules, and they noted that the 2019 Judgments Convention did not include such a provision for those reasons. With the inclusion of such a provision, the authority competent in the requested State would not have the possibility to properly ensure that the requirements of Articles 9 and 14 were met. They also noted that it would be difficult to be bound by the findings of fact concerning the ground of jurisdiction as, in practice, few courts clearly explain in their judgment the basis upon which they have assumed jurisdiction.

174 Regarding the inclusion of the findings of law:

- Some members of the WG who favoured including this provision also noted that it is often very difficult to distinguish between fact and law, particularly in matters such as findings of domicile and habitual residence. Thus, it would be useful if this provision could also refer to

35 As well as Art. 9 of the *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*.

36 *Convention of 30 June 2005 on Choice of Court Agreements* and *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.*

37 Explanatory Report to the 2007 Child Support Convention, para. 547.

findings of law. This is particularly so for domicile. Domicile is an important ground of jurisdiction for some States in matters of legal parentage, which can serve to protect parties in proceedings to establish legal parentage in the best interests of the child. These members also noted that it will often be administrative authorities in the requested State, rather than courts, who have to verify compliance with Article 9, given that the draft text provides for recognition by operation of law. This inclusion in Article 13 would also mean that Article 14 would then no longer be necessary.

- However, for other members of the WG, the difficulty in distinguishing between fact and law is another reason why Article 13 should not be included, since it would completely prevent the competent authority in the requested State from verifying that the requirements of Article 14 had been met.

Feasibility considerations

175 The policy differences with respect to this provision are set out above, namely whether there should be a possibility for the competent authority in the requested State to examine the findings of fact and law concerning the ground of jurisdiction:

- Some members of the WG expressed that these differences are part of wider policy differences in the WG regarding the extent to which competent authorities in requested States should re-assess the findings of courts in States of judgment in a PIL convention aimed at continuity of legal parentage in which States will decide whether to apply the draft Convention with each other (under Art. 25).
- For other members, the (non-)inclusion of this provision is only a technical matter on the question of jurisdiction and thus would not rise to the level of feasibility. The WG also disagreed about the practical and legal implications of such an article.

Article 14 – [Determination of domicile [and nationality]]

[Determination of domicile [and nationality]

Where applicable, the authority of the requested State is bound by the determination of the court of the State of judgment as to whether the person was domiciled in[, or a national of] the State of judgment.]

Explanations

176 Article 14 provides that the competent authority in the requested State has to accept the determination of the court in the State of judgment as to whether the person was domiciled in, or a national of, the State of judgment. If nationality is included, it would mean that in cases of multiple nationalities, Article 14 could potentially guard against States giving automatic priority to their own nationality.

177 If Article 13 is included and refers to both fact and law, Article 14 may not be necessary. If, however, Article 13 does not refer to the findings of law or is not included, Article 14 may be relevant (although various members of the WG still had different views on its relevance). Furthermore, if domicile or nationality were no longer used as a connecting factor in indirect grounds of jurisdiction in Article 9, there would no longer be a need for Article 14.

178 Members of the WG shared differing views on Article 14, similar to those expressed in Article 13, particularly concerning the discussion in relation to findings of law in paragraph 174 above. Under Article 14, the differing views pertain to how a Convention should address differing understanding or definitions of domicile between the State of judgment and the requested State. While some members prefer the inclusion of Article 14 to ensure that it is the determination of the State of judgment that should prevail, other members did not support its inclusion as there are no direct jurisdiction rules.

Feasibility considerations

179 Members of the WG expressed similar policy differences to those discussed under Article 13, as set out in paragraph 175 above.

Article 15 – No review of merits of the judgment

No review of merits of the judgment

[There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.]

OR

[There shall be no review of the merits of the judgment in the requested State, except to the extent necessary for the application of this Convention.]

Explanations

181 Article 15 clarifies that a competent authority in the requested State that has to decide on the recognition of a foreign judgment is not entitled to review the merits of the judgment given by the court in the State of judgment. That is, if a judgment meets the criteria set out by the draft Convention for recognition, the judgment will be granted effect without being revisited in the requested State.

182 The prohibition of a review of the merits of a decision is a standard provision in Conventions on recognition of judgments.[38] Without it, foreign judgments might, in some States, be reviewed by the competent authority in the requested State as if it were an appellate court hearing an appeal from the court of the State of judgment. The prohibition of the review of the merits *does not mean*, however, that an authority cannot verify that the indirect grounds of jurisdiction of Article 9 were met, or cannot verify if a ground for refusal under Article 10 applies. This principle applies whether it is stated expressly in the provision or not.

183 The two options in the text reflect a difference of views in the WG as to the nature of verification or assessment that will be done by a competent authority in the requested State in relation to certain provisions in the draft Convention, such as Article 10(1) grounds relating to consent, or certain scope or definition provisions:

- For some members, the consent requirements or grounds for refusal in the draft Convention will mean re-determinations by competent authorities of the merits of certain parts of the judgment. For example, States that regulate surrogacy have consent requirements in their law for legal parentage to be established, such that adjudication of consent is a (fundamental) part of the merits of the court's judgment.
- For other WG members, however, the competent authorities in the requested State would only be verifying these matters and not reviewing the merits of the judgment. For such members, "review of the merits" would mean reviewing whether the fact-finding of the foreign court (*i.e.*, the facts relied on by the court) was correct, and whether the result based on the fact-finding exercise was correct.

184 The WG worked on the basis of two different possible wordings:

- Option 1 is similar to Article 4(2) of the 2019 Judgments Convention and considers that the review of the merits means re-examining the facts and the legal reasoning of the foreign judgment whereas verifications are solely towards the recognition.
- Option 2 is a variant of Article 4(2) of the 2019 Judgments Convention which intends to clarify the meaning of the second sentence in that provision. It considers that the

38 See Art. 27 of the 1996 Child Protection Convention, Art. 26 of the 2000 Protection of Adults Convention, Art. 8(2) of the 2005 Choice of Court Convention, Art. 28 of the 2007 Child Support Convention, and Art. 4(2) of the 2019 Judgments Convention. In all these provisions, the content and objectives are always the same.

verifications / assessments by competent authorities that are required by certain provisions such as Article 10(1)(b) to (d) are a review of the merits but that they are an exception to the principle.

Feasibility considerations

185 While the inclusion of such a provision does not warrant specific policy decisions, States will need to decide whether and how the provision should (1) clarify that requested States may verify the criteria set out in Articles 9 and 10 as well as other provisions, such as scope and definitions, depending on their final content, and (2) explain what is meant by "review of the merits".

Article 16 – Substantive effects of judgments on legal parentage

Substantive effects of judgments on legal parentage

The recognition of any judgment on legal parentage under this Convention includes the establishment, termination or re-establishment of legal parentage, to the extent that the judgment has this effect in the State of judgment.

Explanations

186 Article 16 has been included to clarify that in many judgments on legal parentage, the legal parentage of several persons may be impacted. For example:

- The establishment of a parent-child relationship also means the *termination* of another parent-child relationship at the same time (*e.g.*, full adoption, establishment of paternity after a contestation).
- A parent-child relationship which had been terminated may be *re-established* (*e.g.*, revocation of a full adoption).

187 As indicated by the word "includes", this Article sets out different possible substantive effects of judgments on legal parentage but does not constitute an exhaustive list.

188 With regard to the nomenclature of legal parentage, some members of the WG thought that there should be clarity on whether States can adapt their own legislation and practices when recognising a judgment. This question arises, for example, when the language of legal parentage used in a foreign judgment is different to the relevant nomenclature in the requested State. Following the recognition of such a judgment, the requested State will have to decide, when registering the child's legal parents, whether they can refer to them as "Mother" and "Father", "Parent 1" and "Parent 2", "Mother" and "Second Parent", etc., even though the judgment may refer to them differently.

189 Article 16 should be distinguished from Article 3(b), which deals with *other* substantive effects (*i.e.*, any rights or obligations that are derived from legal parentage, such as nationality or inheritance) which are outside the scope of the draft Convention.

190 Unlike the 1993 Adoption Convention (Art. 27), this draft Convention does not include a specific provision about the conversion from a simple adoption to a full adoption.[39] Nevertheless, where a judgment converting a simple adoption into a full adoption is made under national law, it can circulate under the draft Convention as an adoption.

Feasibility considerations

191 There was some discussion about whether this Article was needed or whether it could cause confusion about legal effects of legal parentage, but there were otherwise no specific policy differences.

39 Some States do not refer to simple and full adoptions, but instead to weak and strong adoptions.

Article 17 – Recognition under national law

Recognition under national law

This Convention does not prevent the recognition of judgments on legal parentage under national law.

Explanations

192 Article 17 deals with how the draft Convention relates to national law and provides that the draft Convention does not prevent the recognition of judgments on legal parentage under national law. If a judgment cannot be recognised under the draft Convention, for example because it is not eligible according to Article 2 or Article 9, a party may still seek recognition under national law, if recognition is possible under that law. In other words, the draft Convention sets standards for mutual recognition of judgments, but States may decide to recognise judgments on legal parentage under national law, even though they cannot recognise them under the draft Convention.

193 Some members of the WG also noted the relevance of such a provision when a State's national law on recognition is more generous than what the draft Convention provides. If the draft Convention sets forth strict conditions and detailed grounds for refusal, in particular for safeguards / standards in surrogacy cases, it would be crucial for many States to have a pathway under national law to recognise judgments on legal parentage.

Feasibility considerations

194 The WG believes that the inclusion of this Article will increase the feasibility of a Convention and the interest of States to join a Convention:

- At the same time, some members noted that the more a Convention restricts recognition of judgments on legal parentage, the more that recourse to national law on recognition becomes necessary, and the less value a Convention tends to add.
- For some other members, the fact of having safeguards / standards met for a judgment to be recognised under the draft Convention would improve the *status quo*, but if that judgment is not recognised under the draft Convention, it could still be recognised under national law.

CHAPTER III – [PUBLIC DOCUMENTS]

Article 18 – [International certificate]

[International certificate

1. A public document on legal parentage presented in the requested State may be accompanied by an international certificate, as set out in Annex I.
2. A Contracting State may designate an authority competent to issue this certificate.
3. This certificate shall –
   a. transcribe the content of the public document;
   b. specify the method by which legal parentage was established; and
   c. describe the effects of the public document in the State of origin.
4. [A public document on legal parentage presented in the requested State together with this certificate shall be exempt from legalisation or any analogous formality.]]

Article 19 – [Multilingual standard form]

[Multilingual standard form

1. A public document on legal parentage presented in the requested State may be accompanied by a multilingual standard form, as set out in Annex I.
2. A Contracting State may designate an authority competent to issue this form.
3. This form shall transcribe the contents of the public document.
4. [A public document on legal parentage presented in the requested State together with this form shall be exempt from legalisation or any analogous formality.]]

Explanations

195 While the WG discussed possible rules for including public documents on legal parentage in the draft Convention, it agreed that, at this stage, the inclusion of such rules would be too challenging. In particular, for some members, including rules for public documents would, as a precondition, require including uniform applicable law rules.

196 However, the WG agreed that the use of an international certificate and / or a multilingual standard form could still add value to the draft Convention. Therefore, to facilitate the reading and understanding of public documents that may need to be used abroad, Article 18 provides for the possibility to issue an international certificate and Article 19 provides for the possibility to issue a multilingual standard form.

197 Articles 18 and 19 differ from Article 11(2) in that the former Articles refer to a certificate / form facilitating the understanding of a foreign *public document*, while Article 11(2) refers to a form facilitating the understanding of a foreign *judgment*.

198 Public documents falling under the scope of Articles 18 and 19 should be those that specifically record legal parentage (*e.g.*, a birth certificate, an extract from the civil registry, an acknowledgment of paternity). However, public documents which only incidentally include information on legal parentage should not be considered as falling under the scope of this provision (*e.g.*, a student diploma which includes the student's parents' names).

199 Regarding Article 18:

- Some members of the WG thought it would be helpful to have an international certificate which reflects the meaning of what is contained in a public document. For such members, the international certificate would facilitate the recognition of the legal status contained within the public document as it would enable the authority in the requested State to better understand the legal effects of the public document in the State of origin. This would be beneficial to families where their legal parentage is not established through judgments. For some members of the WG, having an international certificate is a matter of access to justice which is important for families. Some members have emphasised that this international certificate should be made available in the language of the requested State.
- Other members of the WG considered that public documents generally circulate without any problems nowadays. Thus, they would not want to create an expectation that all public documents should be accompanied by such a certificate (or form). These members considered that creating and issuing such a certificate (or form) would create an administrative burden on States, with limited added value, and would not address concerns over the limitation of the draft Convention to only recognition of judgments on legal parentage.
- Some members of the WG believed that without applicable law rules, an international certificate has limited utility, and therefore a multilingual standard form could be useful instead.

200 Regarding Article 19, for certain members, a multilingual standard form that transcribes the contents of public documents, and translates it in several languages, could be helpful.

Feasibility considerations

201 Regarding the inclusion of this provision:

- Since both the international certificate and multilingual standard form would be optional (“may be accompanied”), some members of the WG thought that these mechanisms would be useful and attractive to States. These mechanisms have the great advantage of avoiding the burden of translation.
- Other members of the WG were concerned about the administrative burden and setting an expectation that public documents would need to be accompanied by such forms or certificates in order to be used in the requested State.

CHAPTER IV – GENERAL PROVISIONS

Article 20 – [Prevention of sale, trafficking or exploitation of children, women and other persons]

[Prevention of sale, trafficking or exploitation of children, women and other persons

Contracting States shall ensure that the application of this instrument does not facilitate or lead to the sale, trafficking or any other forms of exploitation of children, women or any other [vulnerable] persons.]

Explanations

202 Members of the WG had different opinions as to both the need for, and the extent of, this provision:

- For some members of the WG, this provision would be important to address the concerns of certain States and some intergovernmental and non-governmental organisations about the practice of surrogacy, adoption and ART. For these members, it is key to go further than simply sending a message as to the risks of sale, trafficking or exploitation, and to instead include an obligation on States. They thus consider that it is indispensable that this draft Convention include a human rights based approach, which can be achieved *inter alia* by way of general obligations.
- For other members of the WG, there are ways other than through general obligations to take into account human rights in a PIL instrument on the recognition of judgments on legal parentage. They further felt that this provision is not necessary because: (1) its content is already included in the Preamble of the draft Convention; and (2) States are already bound by this, or a similar obligation (depending on the text agreed), under other international instruments (including, for example, the United Nations *Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography*).
- Some members also questioned whether such an obligation is within the mandate of the HCCH and / or the WG.

Feasibility considerations

203 The feasibility of this particular provision will depend mainly on whether States agree to include, in the context of a PIL instrument on legal parentage, a general obligation to prevent the sale, trafficking and exploitation of children, women and other persons, in addition to a reference to such matters in the Preamble. If so, States will also have to agree on the appropriate scope of its application. The inclusion of this provision, in addition to the Preamble, is an important feasibility matter for most members of the WG. For some, the inclusion of such a provision will make a Convention more attractive. However, some States may not wish to join a Convention if such a provision is included.

Article 21 – [Child's [origins] OR [identity]]

[Child's [origins] OR [identity]

1. [If applicable,] Contracting States should –
   a. make every effort to collect [any] information about the child's [gestational, genetic, biological, social and medical] [origins] OR [identity]; and
   b. [as far as possible,] [according to the law of their State,] ensure that this information [held by them] is preserved and that the child and / or their representative has access to such information[, under appropriate guidance].
2. Contracting States shall cooperate to facilitate [the collection, preservation and] access to the information referred to in paragraph 1.
3. [Any Contracting State may, however, declare to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention, that they will not be bound by paragraph 1 [on the obligation to [collect and] preserve information and / or on the obligation to provide access to information] and / or paragraph 2.]]

Explanations

Article 21 – Introduction

204 Article 21 includes a general obligation on Contracting States regarding the collection and preservation of, and access to, information about the child's origins. This general obligation has been included in line with Articles 8 and 24 of the UNCRC as well as Article 30 of the 1993 Adoption Convention.

205 Members of the WG had different views as to the need for this provision:

- For some members of the WG, this provision would be crucial, considering that knowledge of one's origins is a fundamental right of the child, with particular importance in the areas of adoption, surrogacy and ART, as well as for some groups such as children of migrants. This provision would also align with the draft Convention's Preamble. For these members, the issue of legal parentage is inextricable from the question of the child's origins, and it is crucial that the child's right to access this information is enshrined in a Convention. Some of these members also noted that without such a provision, it would create different standards between intercountry adoptions (which are covered by Art. 30 of the 1993 Adoption Convention) and domestic adoptions (which would be covered by the draft Convention). Some members of the WG considered that it was important to incorporate lessons from the operation of the 1993 Adoption Convention, with respect to the importance for an adoptee's sense of identity to know about their origins. Finally, some of these members noted that the absence of an obligation with regard to a child's right to know their origins would likely deter some States from joining such a Convention.
- For other members of the WG, the obligation set forth in this provision is not linked to PIL and the recognition of judgments on legal parentage, and therefore should not be included in a Convention containing such rules. This should instead be left to national law (including regional and international law). These members noted that this obligation would amount to the creation of a new regulation in the area of public and / or medical law. Some also considered that rules on how to ensure the protection of collected data would need to be specified, which would go further beyond the ordinary scope of a Convention on the recognition of judgments. They also noted a distinction between the 1993 Adoption Convention which has an *a priori* system, where the authorities are handling the information

to which access is given, and this draft Convention which contains an *a posteriori* system of recognition of judgments.[40] For these members, the inclusion of such a provision would likely deter some States from joining a Convention. For these members, a reference to matters related to a child's origin or identity could be included in the Preamble, but an obligation of substantive law should be avoided, including due to implementation concerns.

Article 21(1) – Child's origins OR identity

206 Article 21(1) provides for three different obligations regarding the child's origins / identity:

- Obligation to make every effort to collect the information: the competent authority should make every effort to gather all information (both identifying and non-identifying) relevant to the child's origins / identity.
- Obligation to preserve the information: the competent authority should ensure that all information that was collected is securely stored for a definite or indefinite period of time.
- Obligation to provide access to the information: the competent authority should ensure that children (of any age) whose information has been collected and preserved can have access to it. While this is the most relevant obligation to these children, this obligation would be meaningless if the information would not first have been collected and / or preserved.

Article 21(2) – Cooperation

207 Article 21(2) provides for an obligation for States to cooperate in the context of the child's right to know their origins / identity. This obligation could either be applicable to the collection, preservation and provision of access to the information or could be limited to the obligation to provide access to the information. Nevertheless, this Article would also provide a legal basis for States to transmit information about the child's origins / identity. This obligation was included since, in practice, the child may be habitually resident in one State and information concerning them may be held in another State. Cooperation between both States would thus appear as particularly relevant to ensure that the child can have actual access to their information. If the draft Convention is to include this provision on cooperation, it should explain how the cooperation between States would operate in practice.

Article 21(3) – Declaration

208 Article 21(3) allows States to declare that they would not be bound by some or all of the obligations set forth in Article 21(1) and 21(2). This declaration was included given that the inclusion or non-inclusion of this provision could pose feasibility issues for different States (see para. 205 above). Some members of the WG noted that such a declaration could be helpful for some States that may wish to balance the right of the child to have access to their information with the right of confidentiality of others. For other members of the WG, the inclusion of this declaration would deter certain States from joining a Convention.

Feasibility considerations

209 As set out in paragraph 205 above, there is a significant difference of views as to whether a provision on the preservation of and access to information about a child's origins should be included, or not, in a Convention on the recognition of judgments on legal parentage. For some, its

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40 An *a priori* approach would require the involvement of authorities in the State of habitual residence of the surrogate / surrogate mother and that of the intended parent(s) from before the conclusion of a surrogacy arrangement until the recognition of legal parentage, while an *a posteriori* approach would not require State authorities to be involved prior to, and as part of, a surrogacy arrangement and there would be no need for an elaborate mechanism of cooperation or communication between States.

inclusion is crucial to the feasibility of a Convention. For others, its inclusion could affect whether some States wish to join a Convention.

210 If agreement were reached on inclusion of such a general obligation on the child's origins, feasibility would then further depend on the extent of this obligation – namely, whether the obligation should simply be limited to the preservation of and access to information, or whether it should also include an obligation to collect information.

211 A question also arose as to whether the inclusion of such a provision, without the possibility to opt-out of this obligation, could be feasible if it were limited to a core obligation (still to be determined).

Article 22 – Declarations concerning the recognition of judgments on legal parentage

Declarations concerning the recognition of judgments on legal parentage

1. A Contracting State may declare [at any time] to the depositary of the Convention that –

   c. [a judgment on the establishment of legal parentage by an **adoption** shall be recognised only if no party involved derived **improper financial or other gain** from an activity related to the adoption;]

   d. [a judgment on the establishment of legal parentage following a **surrogacy** arrangement shall be recognised only if the surrogate / surrogate mother gave free[,] [and] informed [and written] [[post-birth] OR [continued]] **consent** [for legal parentage to be established solely with the intended parent(s)] OR [not to be a legal parent] [and did not withdraw it];]

   e. a judgment on the establishment of legal parentage following a **surrogacy** arrangement shall be recognised only if [no persons involved derived **improper financial or other gain** from an activity related to the surrogacy arrangement];

   f. a judgment on the establishment of legal parentage following a **surrogacy** arrangement shall be recognised only if the child is **genetically** connected to at least one of the intended parents;

   g. a judgment on the establishment of legal parentage following a **surrogacy** arrangement shall be recognised only if the child is **not genetically** connected to the surrogate / surrogate mother;

   h. [[a judgment [[on the establishment] OR [solely relating to the termination]] of legal parentage which follows an **assisted reproductive technique** procedure, a judgment on the establishment of legal parentage by an **adoption**, or] a judgment on the establishment of legal parentage following a **surrogacy** arrangement shall be recognised only if [–

      i. the assisted reproductive technique procedure was conducted;

      ii. the adoption was completed; or]

      iii. the surrogacy arrangement was carried out [–]

      in a **State where that practice is regulated**[, in accordance with the law of that State][, unless the judgment corresponds to a re-establishment of the legal parentage].]

2. [Any Contracting State may declare [at any time] to the depositary of the Convention that a judgment on the establishment of legal parentage following a **surrogacy** arrangement be refused recognition if the **surrogate** / surrogate mother did not give free[,] [and] informed [and written] [[post-birth] OR [continued]] **consent** [for legal parentage to be established solely with the intended parent(s)] OR [not to be a legal parent];]

3. A Contracting State may further declare that the declarations under paragraph 1 or 2 shall apply only if the party requesting the recognition of the judgment is **habitually resident** in the requested State.

4. A Contracting State may withdraw any declarations made under paragraph 1 or 2 at any time.

Explanations

Article 22 – Introduction

212 Article 22 provides the possibility for Contracting States to make declarations to limit the scope of recognition under the draft Convention, in accordance with their national fundamental policies.

213 Members of the WG noted that different States may have different understandings as to which safeguards / standards should be considered essential. The inclusion of an article with different declarations gives the possibility to limit the number of safeguards / standards to be included in

other ways in the draft Convention for all Contracting States. At the same time, it provides flexibility to those States that want to include safeguards / standards and which are not ready to recognise judgments on legal parentage without those safeguards / standards. In addition, declarations have as a further aim to limit the use of the public policy exception and enhance legal certainty with regard to the recognition of judgments on legal parentage.

Article 22(1) – Possible declarations – additional conditions for recognition

214 Article 22(1) lists the declarations that States may make. The declarations in Article 22(1) would operate as conditions additional to requirements otherwise provided for in the draft Convention (*e.g.*, Arts 2 and 9): if a judgment does not meet the specified requirement, the judgment must be refused recognition.

215 Article 22(1)(a) sets out an additional condition for recognition of judgments on the establishment of legal parentage by adoption. If States make such a declaration, they will only recognise judgments on adoption if no parties involved in the adoption derived improper financial or other gain from an activity related to the adoption.[41] Some members of the WG noted, however, the difficulty in determining what an "improper financial or other gain" is, and suggested that it might be easier to leave this matter to the general public policy exception.

216 Article 22(1)(b) to 22(1)(e) include additional conditions for recognition of judgments on legal parentage established following a surrogacy arrangement. These are as follows:

- Article 22(1)(b): If States make such a declaration, the ground for refusal provided for at Article 10(1)(c)(ii)(B) would be converted into a condition for recognition. Thus, States would only recognise judgments on legal parentage established following a surrogacy arrangement, if the surrogate / surrogate mother gave free and informed consent for legal parentage to be established solely with the intended parent(s) / not to be a legal parent.
- Article 22(1)(c): If States make such a declaration, they will only recognise judgments on legal parentage established following a surrogacy arrangement if no persons involved derived improper financial or other gain. The WG agreed that "persons" in this provision are not limited to individuals, and include, for example, intermediaries, clinics and doctors. The WG also noted the need to clarify that the reimbursement of costs to the surrogate / surrogate mother should not be considered a gain. Some members of the WG thought that the wording of this provision was too vague and the group agreed that if the provision were to be included, the wording would need to be clarified. Some members were also of the view that there could be difficulty achieving consensus on a formulation of this condition in a Convention.
- Article 22(1)(d): If States make such a declaration, they will only recognise judgments on legal parentage established following a surrogacy arrangement if the child is genetically connected to at least one of their intended parents.
- Article 22(1)(e): If States make such a declaration, they will only recognise judgments on legal parentage established following a surrogacy arrangement if the child is not genetically connected to their surrogate / surrogate mother.

217 Article 22(1)(f) includes an additional condition for recognition of judgments on the establishment of legal parentage which follows an ART procedure, an adoption or a surrogacy arrangement. If States make such a declaration, they will only recognise those judgments if the ART procedure was conducted, or the adoption was completed, or the surrogacy arrangement was carried out, in a

41 See HCCH, *Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption*, 2023 (see path indicated in note 28).

State where that practice is regulated.[42] Some members thought that it should only apply in cases of surrogacy arrangements (and not in cases of ART or adoption). States would also need to agree on the inclusion of possible additional wording to widen or limit the scope of this declaration ("[in accordance with the law of the State]" and "[unless the judgment corresponds to a re-establishment of the legal parentage]"). Some members were of the view that there could be uncertainty or difference of interpretation as to whether a practice is regulated, or sufficiently regulated, even if an Explanatory Report contained additional interpretative information.

218 Members of the WG also had different views as to whether States should have the possibility of making these declarations only at the time of accession / ratification of a Convention or at any time, considering that rules and practices around ART, surrogacy and adoption may evolve. Some members of the WG also noted that if declarations may be made at any time, it will be necessary to include transitional provisions in the draft Convention.

219 Some members of the WG also cautioned against these declarations since, in practice, they would likely be applicable only to families with same-sex or single parents (because it may not be apparent that children were born following an ART or a surrogacy arrangement in families with different-sex parents).

Article 22(2) – Possible declaration – additional ground for refusal of recognition

220 Article 22(2) includes an additional ground for refusal of recognition of judgments on legal parentage established following a surrogacy arrangement, if the surrogate / surrogate mother did not give or confirm consent *post-birth* for legal parentage to be established solely with the intended parent(s) / not to be a legal parent (the exact wording would have to be adjusted once the wording of Art. 10(1)(c)(ii)(B) is settled). This declaration would only be necessary if Article 10(1)(c)(ii)(B) would not require for the consent to be given post-birth (see para. 129, first bullet point).

Article 22(3) – Application of a declaration dependent on the party's habitual residence

221 Article 22(3) provides the possibility for States to clarify the scope of application of a declaration made under Article 22(1) or 22(2). Specifically, it clarifies whether the declaration only implicates foreign judgments where the petitioner is habitually resident in the requested State, or whether the relevant grounds / conditions within the declarations may apply to any and all foreign judgments they are required to recognise.

222 While some States may not recognise a foreign judgment if one of the parties (in particular, the intended parents in a surrogacy arrangement) is habitually resident in their State (pursuant to the notion of public policy of proximity),[43] they may also adopt a more permissive approach if one of the parties requires their judgment to be recognised in their State but is not habitually resident there.

Article 22(4) – Withdrawal of declarations

223 Article 22(4) provides the possibility for States that have made a declaration(s) to withdraw it / them at any time.

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42 It was also noted that it may be relevant to specify in an Explanatory Report that:
- the term "regulated" refers to regulation through both legislation and case law; and
- regulation should, in principle, encompass regulation of the intermediaries (this is because it was noted that many bad practices are due to intermediaries' practices).

43 The public policy of proximity creates an inverse relationship between connection to the forum and tolerance of a result produced by a foreign judgment. In certain States, with respect to surrogacy where the parents are habitual residents before and after the birth of the child, courts are much less likely to recognise legal parentage established abroad as there is a direct conflict with the prohibition of surrogacy in the State of habitual residence of the intended parents.

Feasibility considerations

224 The feasibility of a Convention may depend on whether consensus can be reached on the inclusion and formulation of the set of declarations that should feature in this Article, and the number of States that would intend to make use of such declarations:

- Some members of the WG noted that if many States make use of these declarations, it might be difficult to know which conditions apply in which States and it might lead to significant non-recognition of judgments on legal parentage, which would not change the *status quo*.
- Other members, however, were of the view that including a declaration procedure would improve the protection of children and other persons involved, and therefore would change the *status quo*.
- For some members, the inclusion of a mechanism allowing for declarations could make the draft Convention more attractive for them, given their particular interests. They also considered it a positive feature that such declarations could be made or withdrawn at a later stage.

Article 23 – Reservation concerning the recognition of judgments following a surrogacy arrangement

Reservation concerning the recognition of judgments following a surrogacy arrangement

A Contracting State may enter a reservation with the effect that judgments on legal parentage and / or adoption, insofar as they follow a surrogacy arrangement, shall not be recognised.

Explanations

226 Article 23 provides Contracting States with the possibility to limit the scope of recognition under a Convention. While Article 22 enables Contracting States to make declarations on very specific aspects of the recognition of a judgment on legal parentage, Article 23 provides the possibility for individual Contracting States that have made the reservation to refuse the recognition of judgments on legal parentage, and / or adoption, following a surrogacy arrangement.

227 This provision was included following comments from some members of the WG that the inclusion of safeguards / standards could be interpreted as inadvertently legitimising some surrogacy arrangements as acceptable, while for them surrogacy arrangements can never be considered acceptable.

228 For some members of the WG, it would be sufficient to have a reservation for judgments on legal parentage following a surrogacy arrangement, so long as adoptions following surrogacy arrangements fell within the draft Convention's rules for adoptions, or vice versa. For others, it would be necessary to have the possibility to exclude recognition for both kinds of judgments. These possibilities are reflected by the wording "and / or" in Article 23.

Feasibility considerations

229 If many States intend to make such reservation, it may affect the feasibility and added value of a Convention, through limiting the application of a Convention and failing to resolve some of the critical issues that led to the negotiations around the draft Convention (*i.e.*, addressing issues of limping legal parentage – especially in the context of surrogacy arrangements). However, without such an article, States opposed to the practice of surrogacy, and possibly other States, may decide not to join a Convention altogether, which would also have an impact on the feasibility of a Convention.

CHAPTER V – FINAL CLAUSES

230 This Chapter only includes those final clauses considered relevant for a feasibility assessment. Other final clauses, such as an REIO clause, were not discussed for this purpose and are thus not included in this draft Convention.

Article 24 – [[Form] OR [Country Profile]]

[[Form] OR [Country Profile]

1. Upon the deposit of their instrument of ratification, acceptance, approval or accession, States shall [deposit [with the depositary] a completed Form] OR [provide the Permanent Bureau of the Hague Conference on Private International Law with a completed Country Profile] as set out in Annex II.
2. Contracting States shall promptly [deposit an updated Form] OR [provide an updated Country Profile] in the event of any changes.
3. The [Form] OR [Country Profile] or updated [Form] OR [Country Profile] shall be completed in English, French or Spanish.
4. [The depositary shall inform the Permanent Bureau of the Hague Conference on Private International Law of any Form or updated Form, which the Permanent Bureau shall then communicate to all Contracting States.] OR [The Permanent Bureau of the Hague Conference on Private International Law shall make available Country Profiles or updated Country Profiles it receives to all Contracting States.]]

Explanations

231 Article 24 provides an obligation for Contracting States to complete a Form or Country Profile at the time of accession or ratification. This Form or Country Profile can then be updated when needed. The WG noted that it could be useful to include such a Form or a Country Profile but this will depend on the final content of a Convention.

232 Members of the WG noted that this could be a Form deposited with the depositary, or a Country Profile provided to the PB. Both could include information about Contracting States' laws and practices on legal parentage, but also on surrogacy, adoption and ART. Some members of the WG noted that substantive details as to the purpose and contents of the Form or Country Profile will need to be included, potentially in an Annex to a Convention.

233 Regarding Article 24:

- Some members considered that the more information Contracting States were required to provide on their legal frameworks, including safeguards / standards, regarding establishment of legal parentage, regulation of surrogacy and ART, and on adoption, the more informed Contracting States would be in making decisions under Article 25 to establish treaty relations. For some members, the decision under Article 25, together with the information that Contracting States would have under Article 24, would contribute to mutual trust in legal systems between those States, which is a principle that typically underpins instruments on recognition of judgments. For these members, this Form or Country Profile would therefore be an integral part of how a Convention on the recognition of judgments on legal parentage could address safeguards / standards without uniform formulations for which consensus could be challenging. Instead, Contracting States could use the information in the Form or Country Profile about other Contracting States' national law on safeguards / standards to decide whether they wished to apply the Convention with those States.

- For other members, however, it was more important that a Convention on the recognition of judgments on legal parentage resulting from surrogacy, ART or adoption include uniform minimum safeguards / standards, with a Form or Country Profile likely providing insufficient information or assurance to Contracting States. These members also raised questions about whether such a Form or Country Profile would be too cumbersome to complete and update, which could deter some States from joining a Convention.

Feasibility considerations

234 There were no policy differences in principle about creating an obligation to deposit Forms or Country Profiles. However, as set out above, there were differences about the role these could play, and the link that these could have to how safeguards / standards should be addressed in a Convention on the recognition of judgments on legal parentage.

Article 25 – Establishment of relations pursuant to the Convention

Establishment of relations pursuant to the Convention

Option 1

1. [This Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3. In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.

2. A Contracting State may notify the depositary[, within 12 months after the date of the notification by the depositary referred to in Article X,] OR [at any time] that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention.

3. A State may notify the depositary[, upon the deposit of its instrument pursuant to Article X,] OR [at any time] that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this Convention.

4. A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date upon which the notification is received by the depositary.]

OR

Option 2

1. [The ratification, acceptance, approval or accession will have effect only as regards the relations between the ratifying, accepting, approving or acceding State and such Contracting States as will have declared their acceptance of the ratification, acceptance, approval or accession. Such a declaration will also have to be made by any Contracting State ratifying, accepting, approving or acceding to the Convention after a ratification, acceptance, approval or accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention; the depositary shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

2. The Convention will enter into force as between the ratifying, accepting, approving or acceding State and the State that has declared its acceptance of the ratification, acceptance, approval or accession on the first day of the third calendar month after the deposit of the declaration of acceptance.]

OR

Option 3

1. [For legal parentage, except for legal parentage established following a surrogacy arrangement –

   a. this Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph (1)(b) or (1)(c). In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made;

   b. a Contracting State may notify the depositary[, within 12 months after the date of the notification by the depositary referred to in Article X,] OR [at any time] that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention;

c. a State may notify the depositary[, upon the deposit of its instrument pursuant to Article X,] OR [at any time] that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this Convention;

d. a Contracting State may at any time withdraw a notification that it has made under paragraph (1)(b) or (1)(c). Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date upon which the notification is received by the depositary.

2. For legal parentage established following a surrogacy arrangement –

a. this Convention shall have effect in a Contracting State, in its relations with another Contracting State, only if that former State has notified the depositary regarding the other in accordance with paragraph (2)(b) or (2)(c). In the absence of such a notification, the Convention shall not have effect in that Contracting State, in its relations with that other Contracting State;

b. upon its ratification, acceptance, approval or accession, a State shall notify the depositary with which other Contracting States the Convention shall have effect in its State;

c. a Contracting State shall notify the depositary at any time whether the Convention shall have effect with that State;

d. a Contracting State may at any time withdraw a notification that it has made under paragraph (2)(b) or (2)(c). Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date upon which the notification is received by the depositary.]

Explanations

235 Article 25 provides a mechanism to establish treaty relations between Contracting States. The WG explored different mechanisms, taking into account the following aspects:

- **Opt-in or opt-out mechanism**: Members of the WG agreed that States would wish to choose their treaty partners via a mechanism to opt-in or opt-out of treaty relations. Including such a mechanism would notably allow States to restrict and choose their treaty partners based on the safeguards / standards which are important to them. But a key question was how such a mechanism should work. Should a State proactively notify the depositary about the States with which they *want* to establish treaty relations or should a State only proactively notify the depositary about States with which they *do not want* to establish treaty relations?
- **Reciprocity of the establishment of treaty relations**: If a State does not want to establish treaty relations with another State, should that other State still have the possibility to establish treaty relations with that first State or not? For example, State A may not recognise judgments from State B but should State B still be able to recognise judgments, under a Convention, from State A (establishing, in other words, an asymmetric treaty relation)? Some members of the WG were of the view that, if a cooperation mechanism is included in a Convention, there should be reciprocity in the establishment of treaty relations, meaning that both States must take corresponding steps to establish such relations. Others were of the view that asymmetric establishment of treaty relations should be possible.
- **Different mechanism for judgments on legal parentage established following a surrogacy arrangement**: Should there be a different mechanism for establishing treaty relations in respect of the recognition of judgments on legal parentage established following a surrogacy arrangement?

236 The WG also noted that if it is agreed that (withdrawal of) objections or acceptance could take place at any time, it would be necessary to include transition provisions in a Convention.

237 In light of the above, the WG discussed three possible options as summarised below:

- **Option 1 (opt-out)**: This opt-out mechanism is based on Article 29 of the 2019 Judgments Convention. It is also similar to Article 44 of the 1993 Adoption Convention and Article 54 of the 2000 Protection of Adults Convention.[44] By default, a Convention would apply between two Contracting States unless either of them object. In terms of timing, the WG did not reach an agreement on whether this objection can be made at any time from the moment the depositary notifies the Contracting States of a State's ratification, acceptance, approval or accession or only up to 12 months thereafter. The objection made by a Contracting State may be withdrawn at any time.
- **Option 2 (opt-in)**: The opt-in mechanism is similar to Article 38 of the 1980 Child Abduction Convention.[45] By default, the draft Convention does not apply between States. For a Convention to apply between States, the ratification, acceptance, approval or accession by a State must be accepted by Contracting States through a declaration. The acceptance of the ratification, acceptance, approval or accession can be made at any time but cannot be withdrawn.
- **Option 3 (opt-out and opt-in)**: This option follows Option 1 but applies a differentiated approach of Option 2 for legal parentage established following a surrogacy arrangement.

Feasibility considerations

238 While the WG agreed on the relevance of such a provision, it noted that it was premature to decide which option would be most feasible and that it would be useful to set all three options out at this stage.

239 The choice of a treaty relations establishment mechanism is related to other policy considerations discussed in the WG. For example:

- Some States may find that an opt-out system may not serve its purpose since objections are conventionally limited to diplomatic and / or political reasons, which might therefore not sufficiently permit those States to consider the legal framework in the other Contracting States regarding establishment of legal parentage, surrogacy, ART and adoption.
- Other States might find an opt-in system too cumbersome or that it could lead to delays in establishing treaty relations.
- Another group of States may not wish to join a Convention if different relations between States are established for judgments on legal parentage established following a surrogacy arrangement, while for others, this would be an essential element.

44 *Convention of 13 January 2000 on the International Protection of Adults.*
45 *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.