

Council on General Affairs and Policy of the Conference – March 2019

Document	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 2 B of February 2019
Title	Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019)	
Author	Permanent Bureau	
Agenda item	III.2	
Mandate(s)	C&R Nos 6-7 of the <u>March 2018 Council on General Affairs and Policy of the HCCH</u>	
Objective	To report on the fifth meeting of the Experts' Group, in particular on progress made in relation to the Parentage / Surrogacy Project in the area of international surrogacy arrangements specifically	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
Annexes	List of participants of the fifth meeting of the Experts' Group on the Parentage / Surrogacy Project	
Related documents	<ul style="list-style-type: none"> - Prel. Doc. No 3A of February 2015, 3B and 3C of March 2014 and C&R No 5 of the March 2015 Council on General Affairs and Policy - Prel. Doc. No 3 of February 2016 and C&R No 15 of the March 2016 Council on General Affairs and Policy - Prel. Doc. No 2 of February 2017 and C&Rs No 8-10 of the March 2017 Council on General Affairs and Policy - Prel. Doc. No 2 of February 2018 and C&Rs No 6-7 of the March 2018 Council on General Affairs and Policy - Prel. Doc. No 2 A of October 2018 	

I. INTRODUCTION

1. From 29 January to 1 February 2019, the Experts' Group on Parentage / Surrogacy ("the Group") met in The Hague.¹ This fifth meeting of the Group was attended by 21 Experts, three Observers and members of the Permanent Bureau of the Hague Conference on Private International Law ("HCCH"). The Experts represented 20 States from various regions. The list of participants is included as an Annex.
2. The meeting took place in accordance with the Conclusions and Recommendations reached by the Council on General Affairs and Policy of the HCCH ("CGAP") at its last meeting in March 2018. At this meeting, CGAP welcomed the Report of the Group and its recommendations made at the conclusion of its third meeting in February 2018. Moreover, CGAP agreed on the need to convene:
 - a fourth meeting focusing on the private international law (PIL) issues surrounding legal parentage in general. This meeting was held from 25 to 28 September 2018 and the report of that meeting is set out in Preliminary Document No 2 A of October 2018; and
 - a fifth meeting focusing specifically on legal parentage arising in cases of international surrogacy arrangements (ISAs).² This meeting responds to this part of CGAP's mandate.
3. The Group's recommendations also take into account the report of the fourth meeting.

II. NEED FOR COMMON SOLUTIONS TO AVOID LIMPING LEGAL PARENTAGE

4. The Group recalled the desirability of this project on legal parentage for all families and States. The absence of uniform private international law ("PIL") rules on legal parentage increasingly leads to limping parentage across borders and can create significant problems for children and families in a number of cases. The Group noted, for example, cases involving the contestation of paternity and assisted reproductive technologies (ART) in the context of establishing legal parentage. New medical developments will likely create other challenges in the area of parentage in the future, particularly in the context of the increased mobility of families.
5. The Group further recalled that uniform PIL rules can assist States in resolving limping parentage, while ensuring that the diverse substantive rules of States on legal parentage are respected. The aim of any new instrument would be to provide predictability, certainty and continuity of legal parentage in international situations for all parties concerned, taking into account their rights, the *United Nations Convention on the Rights of the Child* and in particular the best interests of the child.
6. Experts recalled that PIL rules and co-operation systems in many successful HCCH Conventions are tools or techniques which enable States to protect the human rights of all those involved in cross-border contexts.
7. Legal parentage is a status from which children derive many important rights and adults acquire obligations such as parental responsibility and maintenance. The Group agreed that any international instrument on legal parentage would need to be developed with a view to complementing the existing HCCH Family Conventions and to attracting as many States as possible.

¹ All HCCH documents on the Parentage / Surrogacy Project mentioned in this Report are available on the HCCH website at < www.hcch.net > under "Parentage / Surrogacy".

² See "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (13-15 March 2018)", C&R Nos 6 to 7, available on the HCCH website at < www.hcch.net >, under "Governance" then "Council on General Affairs and Policy".

8. Most Experts highlighted the need to also address ISAs in any future instrument since many of the international challenges relating to legal parentage currently arise in the context of ISAs, and these challenges for States are only likely to increase.

III. OVERARCHING AIMS OF AN INTERNATIONAL INSTRUMENT ADDRESSING LIMPING PARENTAGE IN RELATION TO ISAs

9. Many Experts emphasised that the overarching aim of the work on limping parentage, and in particular of any instrument which may include ISAs, must be to protect the rights and best interests of the child, as well as the human rights of all those involved. A possible PIL instrument on legal parentage which includes coverage of ISAs should not be understood as an endorsement of the practice of surrogacy, but rather as a mechanism for addressing in a practical way limping parentage resulting from ISAs, as well as enabling States to better protect the human rights of all those involved in the cross-border arrangement. The adoption of any instrument would not be intended to encourage States to introduce surrogacy as a permitted practice.

10. The Experts were of the view that the aims discussed at the fourth meeting³ are relevant to all children, including therefore ISA cases. In the context of ISAs, Experts underlined the need to prevent the sale and trafficking of women and children.

IV. SCOPE OF APPLICATION OF AN INSTRUMENT CONCERNING ISAs

11. For some Experts, placing some limitations on the scope of an instrument that includes ISAs was very important to ensure the protection of children and parties to ISAs. For other Experts, the scope of any instrument including ISAs should be as broad as possible, to cover the maximum number of cases and so as not to differentiate between children.

V. THE POSSIBILITY OF USING THE GENERAL PIL PROVISIONS ON LEGAL PARENTAGE IN ISA CASES

12. The Experts confirmed their understanding that, as in non-ISA cases, legal parentage in ISA cases may be established: (1) by judicial decision; (2) by operation of law; or (3) by the act of an individual or by an agreement. It was acknowledged that some ISA cases may involve a combination of methods.

A. Recognition of legal parentage established by judicial decision

13. The Group noted that judicial determinations of legal parentage in ISA cases are prevalent in many States of origin. The Group further noted that in many receiving States legal parentage currently needs to be established *de novo*. Many Experts were of the view that a judicial decision provides guarantees that facilitate the recognition of legal parentage.

1. Indirect grounds of jurisdiction

14. The Group discussed the use of indirect grounds of jurisdiction in the context of a recognition regime and whether the connecting factors under consideration for general legal parentage would be appropriate in ISA cases.

³ See Report of the Experts' Group on the Parentage / Surrogacy Project (meeting from 25 to 28 September 2018) (hereinafter "4th EG Report (Sept. 2018)"), para. 6.

15. Most Experts concluded that the indirect grounds previously identified in the context of general legal parentage would not work in ISA cases, and instead supported the State of birth of the child as the primary connecting factor in an ISA case as this would provide certainty and predictability. A qualifier to that connecting factor (such as the habitual residence of the person giving birth to the child) might be necessary to guarantee sufficient proximity, as well as to prevent and combat trafficking of persons and law evasion.

2. Other methods

16. Some Experts noted that further consideration should be given to applicable law rules and how such rules might operate in the context of judicial determinations of legal parentage.

3. Safeguards and other considerations

17. Acknowledging the public policy concerns at the international level concerning surrogacy, most Experts affirmed the importance of having minimum standards or safeguards specifically for ISA cases to protect the rights and welfare of the parties involved. Such safeguards would provide greater assurance to States that legal parentage established in an ISA case could be recognised in other States. Many Experts noted that safeguards in a recognition framework were the most important feature of an instrument dealing with ISAs.

18. Such safeguards could be presented as conditions that must be satisfied for recognition (*i.e.*, mandatory) or as grounds for non-recognition at the discretion of the recognising State (*i.e.*, non-mandatory).

19. Most Experts agreed that the free and informed consent of the surrogate mother was a primary safeguard to be included. In addition, the Group discussed the relevance of a general public policy clause, as well as other grounds for refusal of recognition relating to procedural matters discussed in the context of general legal parentage.⁴

20. Given the parameters of the general public policy exception, most Experts acknowledged the importance of continuing discussion on the following matters:

- a) the requirement of a genetic link between the child and an intending parent;
- b) the preservation of, and access under appropriate guidance to, information concerning the child's origins;
- c) the prevention of sale and trafficking of children;
- d) the prevention of exploitation and trafficking of women;
- e) the eligibility and suitability of the surrogate and intending parents; and
- f) the financial aspects.

4. Co-operation

21. It was acknowledged that, in the ISA context, channels of communication and a co-operation framework would be particularly valuable in verifying that the agreed safeguards have been respected. A key consideration is when and how such verification would occur. Many Experts thought that a co-operation approach throughout the arrangement would be the most desirable option, particularly to better protect the human rights of the child and all parties involved, and help avoid current situations where States are faced with a *fait accompli*. Such an approach would help ensure compliance with relevant safeguards as part of a trustworthy procedure, to the extent possible, prior to the child's conception, during pregnancy, and after the child's birth, thereby helping to facilitate the recognition of legal parentage. A number of Experts questioned the feasibility of such an

⁴ See 4th EG Report (Sept. 2018), para. 43.

approach due to various concerns. However, most Experts agreed that a co-operation mechanism would be feasible at the recognition stage to check compliance with the established safeguards. It was also noted that such an approach would not necessarily require a system of Central Authorities.⁵

5. Conclusion regarding feasibility

22. Most Experts concluded, on the basis of the foregoing, that it would be feasible to develop a framework for the recognition of legal parentage established by judicial decision in ISA cases which respects the diversity of national approaches. They also concluded that a co-operation mechanism at the recognition stage would be feasible.

B. Legal parentage arising by operation of law or pursuant to an act of an individual (in the absence of a judicial decision)

23. The Experts next considered legal parentage in ISA cases that arise in the absence of a judicial decision, *i.e.*, by operation of law or pursuant to an act of an individual. Safeguards and co-operation, as discussed above, could also be relevant in this context. Recalling the discussion from the fourth meeting, the Group noted the challenges with an applicable law approach in the ISA context. The general view was that this might be considered further at a later stage depending on how the issue is resolved with respect to other legal parentage cases.

24. For many Experts, these challenges reinforced the advantages of focusing on recognition of judicial decisions, which are common in ISA cases.

VI. FORM OF A POSSIBLE INSTRUMENT ON LEGAL PARENTAGE IN THE CONTEXT OF ISAs

25. Most Experts recognised that ISAs require specific treatment to facilitate the application of, and adherence to, the safeguards identified by the Experts as necessary in such cases. Most Experts also felt that this would be a better solution to respect the various approaches to surrogacy globally, as well as the policy concerns of many States. Accordingly, those Experts expressed the view that the most feasible way forward would be to address legal parentage in the ISA context in a separate instrument. This could be in the form of a protocol.

VII. OTHER CASES OF LEGAL PARENTAGE

A. Adoption⁶

26. The Group concluded that it would not be necessary to have special rules on adoptions following an ISA in a new instrument on legal parentage. Some Experts said it would be adequate to treat all domestic adoptions under the scope of the general instrument, as adoptions should be disassociated from the underlying reason for establishing legal parentage. However, other Experts thought that because domestic adoptions raise complex issues, including the interaction with the 1993 HCCH Intercountry Adoption Convention, they should be left out of the scope of any future instrument on legal parentage.

⁵ Other possible co-operation mechanisms are explained in the 4th EG Report (Sept. 2018), at para. 46.

⁶ See also 4th EG Report (Sept. 2018), paras 41 and 42. See also "Report on the cross-border recognition of domestic adoptions", Prel. Doc. No 12 of December 2018, to be discussed at the 2019 meeting of CGAP.

B. Assisted reproductive technologies (ART)

27. The Group discussed the challenges that might arise in ART cases in the context of legal parentage. It decided that it was premature to determine whether such cases would require a differentiated approach but agreed to monitor developments in this area.

VIII. CONCLUSIONS AND RECOMMENDATIONS AS TO FUTURE WORK

A. Focus of future work

28. At the end of its fourth meeting (25-28 September 2018) on general legal parentage, the Group reserved its final conclusions and recommendations from that meeting pending the results of its fifth meeting. Accordingly, the conclusions and recommendations that follow reflect the discussions during both of those meetings.

29. During those meetings, the Experts reaffirmed the desirability and importance of providing predictability, certainty and continuity of legal parentage in international situations, taking into account the human rights of all parties concerned and the best interests of the child.

30. Most Experts confirmed that much benefit could be gained from adding value to the existing HCCH Family Conventions by developing a binding multilateral instrument on the recognition of foreign judicial decisions on legal parentage. Most Experts agreed, in principle, on the feasibility of a separate protocol on the recognition of foreign judicial decisions in ISA cases.

31. The possibility remains open at this stage of making further provisions in relation to legal parentage when there is no judicial decision. The feasibility of providing for such matters should be the subject of further discussion.

32. Most Experts recommend that future work focus on the following matters:

- developing both:
 - a general PIL instrument on the recognition of foreign judicial decisions on legal parentage; and
 - a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from ISAs
- further consideration of other methods that could enhance the attractiveness and effectiveness of such instruments, for example, uniform applicable law rules to determine legal parentage or cross-border recognition of the status of legal parentage established by operation of law or following the act of an individual.

B. Recommendations in relation to working method

33. The initial task of the Group would be to prepare proposals for consideration in relation to provisions for inclusion in future instruments relating to recognition of judicial decisions along the lines discussed above and in the report of the fourth meeting. The Group may wish to establish a smaller drafting committee to assist with the preparation of specific proposals for discussion by the Group. In working towards the drafting of future instruments, it will be important to avoid duplication in efforts and resources.

34. Most Experts therefore recommend to CGAP continuation of the work on these matters, noting the urgency previously identified. In this regard, the Group recommends that CGAP direct the Permanent Bureau to undertake the necessary work with a view to preparing a next meeting of the Group prior to the 2020 meeting of CGAP, and to allocate the necessary resources accordingly.

ANNEX



January / janvier 2019

**FIFTH MEETING OF THE EXPERTS' GROUP
ON THE PARENTAGE / SURROGACY PROJECT**

From 29 January to 1 February 2019

Final list of participants

MEMBERS

Argentina

Professor Nieve RUBAJA, Professor in Private International Family Law and Researcher, University of Buenos, Buenos Aires

Australia

The Honourable John PASCOE, AC CVO, Former Chief Justice, Family Court of Australia, Chief Justice's Chambers, Sydney

Canada

Ms Marie RIENDEAU, Counsel, Constitutional, Administrative and International Law Section, Department of Justice Canada, Ottawa

China

Ms WU Yingying, China University of Political Science and Law, Beijing (*via videoconference*)

France

Ms Sophie MAITRE, Judge, *Bureau du droit des personnes et de la famille (C1)*, *Direction des affaires civiles et du Sceau*, Ministry of Justice, Paris

Germany

Mr Rolf WAGNER, *Ministerialrat*, Head of Division for Private International Law, *Bundesministerium der Justiz und für Verbraucherschutz*, Berlin

India

Ms K.C. SOWMYA, Senior Legal Officer, Legal & Treaties Division, Ministry of External Affairs, New Delhi

Israel

Mr Jacob FRIEDBERG, Legal Counsel and Legislative Department, Ministry of Justice, Jerusalem

Italy

Ms Laura CARPANETO, Associate Professor of European Union Law, Member, International Association of Child Law Researchers (IACLaR), University of Genoa, Genoa

Japan

Ms Yuko NISHITANI, Professor of private International Law, Kyoto University, Kyoto

Mexico

Ms María Mercedes ALBORNOZ, External Adviser to the Office of the Legal Adviser, Ministry of Foreign Affairs; Professor, Department of Legal Studies, *Centro de Investigación y Docencia Económicas (CIDE)*, Mexico City

The Netherlands

Ms Susan RUTTEN, Professor on Islamic Family Law in European context and Associate Professor of Private International Law, Faculty of Law, Maastricht University, Maastricht

New Zealand

Ms Margaret CASEY, QC, Barrister, Auckland

Philippines

Ms Elizabeth AGUILING-PANGALANGAN, Professor of Private International Law; Director, Institute of Human Rights, University of the Philippines, College of Law, Quezon City

Russian Federation

Excusé / unable to attend

South Africa

Mrs Ronaldah Lerato Karabo OZAH, Attorney, Deputy Director, Centre for Child Law, Faculty of Law, University of Pretoria, Pretoria

Spain

Ms Cristina GONZÁLEZ BEILFUSS, Professor in Private International Law, University of Barcelona, Barcelona

Sweden

Mr Michael HELLNER, Professor of Private International Law, Stockholm University, Stockholm

Switzerland

Ms Joëlle SCHICKEL-KÜNG, Co-Head of the Private International Law Unit, Federal Office of Justice (OFJ), Berne (*Chair of the Fifth meeting of the Experts' Group*)

United Kingdom

Mr Nic TURNER, European Union Civil Law and Private International Law Team, Europe Division, Ministry of Justice, London

Ms Nikita BHARKHADA, Attaché, Embassy of the United Kingdom of Great, The Hague

Ukraine

Excusé / unable to attend

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Ms Lisa VOGEL, Attorney Adviser, US Department of State, Overseas Citizens Services, Office of Legal Affairs, Washington, D.C.

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