

Title	Parentage / Surrogacy Experts' Group: Final Report "The feasibility of one or more private international law instruments on legal parentage"
Document	Prel. Doc. No 1 of November 2022
Author	Experts' Group on the Parentage / Surrogacy Project
Agenda item	Item II.1.
Mandate(s)	C&D Nos 5-6 of CGAP 2021
Objective	To present to CGAP the Final Report of the Experts' Group
Action to be Taken	For Decision <input checked="" type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
Annex	Final Report: The feasibility of one or more private international law instruments on legal parentage
Related Documents	See Annex II of the Final Report

Final Report: The feasibility of one or more private international law instruments on legal parentage

I. Introduction

- 1 From 17 to 21 October 2022, the Experts' Group on the Parentage / Surrogacy Project met in The Hague and via videoconference. This twelfth meeting of the Experts' Group was attended by 34 experts representing 23 Member States from various regions, one Member Regional Economic Integration Organisation and two Observers, as well as members of the Permanent Bureau of the HCCH.
- 2 During this twelfth meeting, the Group completed its Final Report, which is available as an **Annex** to this document. The Report includes two annexes, one with a compilation of the conclusions of the Experts' Group that appear in green boxes throughout the Final Report, and another one with a list of documents produced for the HCCH Parentage / Project.

II. Proposal for CGAP

- 3 CGAP is invited to make a decision on possible further work, taking into account the Final Report of the Experts' Group (see Annex).

ANNEX

Annex

EXPERTS' GROUP ON PARENTAGE / SURROGACY PROJECT
 NOVEMBER 2022
 FINAL REPORT



Final Report: The feasibility of one or more private international law instruments on legal parentage

1. INTRODUCTION	7
1.1. Background of the HCCH Parentage / Surrogacy Project	7
1.2. Mandate of the Experts' Group	8
1.3. Legal parentage.....	9
1.4. Working methods of the Experts' Group.....	10
2. CERTAIN ELEMENTS OF SCOPE COMMON TO BOTH A CONVENTION AND A PROTOCOL.....	11
2.1. Persons of any age.....	11
2.2. Rights and obligations / legal effects flowing from legal parentage	11
2.3. Recognition under domestic PIL rules.....	12
2.4. Legal parentage and methods of conception and circumstances of birth.....	12
3. A POSSIBLE CONVENTION ON LEGAL PARENTAGE	14
3.1. Scope of a Convention	14
3.1.1. Legal parentage established as a result of any international surrogacy arrangement or by intercountry adoption	14
3.1.2. Legal parentage established by domestic adoption	14
3.2. Rules for legal parentage established (or contested) by a judicial decision.....	16
3.2.1. Recognition of judicial decisions on legal parentage.....	16
a. Bases for recognition.....	16
b. Grounds for refusal of recognition.....	17
c. Partial or incidental recognition.....	17
3.2.2. Direct grounds of jurisdiction.....	18
3.2.3. Uniform applicable law rules.....	18
3.2.4. Recommended form accompanying the judicial decision	19
3.3. Rules for legal parentage established without a judicial decision.....	19
3.3.1. Uniform applicable law rules.....	19
3.3.2. Rules on the recognition of status.....	20
3.4. Rules for legal parentage recorded in a public document	21
3.4.1. Possible different effects to be given to public documents.....	21

3.4.2.	Possible international certificate on legal parentage.....	22
3.5.	Possible combination of rules for legal parentage established without a judicial decision and rules on public documents	22
3.6.	Other possible elements to be included in a Convention.....	24
3.6.1.	Preservation and access to information about origins	24
3.6.2.	Rules on cooperation.....	24
4.	A POSSIBLE PROTOCOL ON LEGAL PARENTAGE ESTABLISHED AS A RESULT OF AN ISA	25
4.1.	The reasons for a differentiated instrument	25
4.2.	Preliminary remarks	26
4.2.1.	Overarching aim of a Protocol.....	26
4.2.2.	Methods of establishing legal parentage as a result of an ISA to be included within the scope of a Protocol.....	27
4.2.3.	Possible approaches in a Protocol	28
a.	A priori approach.....	28
b.	A posteriori approach	29
c.	Combined approach (a priori + a posteriori).....	29
4.3.	Elements to be included in an <i>a posteriori</i> approach in a Protocol.....	30
4.3.1.	Rule of recognition.....	30
4.3.2.	Indirect grounds of jurisdiction	30
4.3.3.	Traditional PIL grounds for refusal of recognition	31
4.3.4.	Safeguards / standards	32
a.	Possible safeguards / standards identified.....	32
b.	Possible mechanisms to include safeguards / standards	34
Definition and scope.....		34
Conditions for recognition		34
Grounds for refusal.....		35
General obligations.....		36
Opt-in / opt-out mechanism.....		36
Declaration procedure.....		37
c.	General discussion on safeguards / standards	37
4.3.5.	Document accompanying the judicial decision	39
4.3.6.	<i>A posteriori</i> models discussed.....	40
a.	Model 1: Uniform safeguards / standards some of which feature as conditions for recognition	40
b.	Model 2: State-specific safeguards / standards with some grounds for refusal only	

5. OTHER SCOPE MATTERS AND RELATED FEASIBILITY ISSUES of legal parentage established as a result of a domestic surrogacy arrangement, by domestic adoptions following a surrogacy arrangement and as a result of ART44

 5.1. Legal parentage established as a result of a domestic surrogacy arrangement44

 5.2. Domestic adoptions following a surrogacy arrangement45

 5.3. Legal parentage established as a result of ART not involving a surrogacy arrangement47

6. GENERAL ASSESSMENT OF FEASIBILITY49

7. PROPOSAL FOR CGAP.....50

ANNEX I – COMPILATION OF CONCLUSIONS52

ANNEX II – RELATED DOCUMENTS: LIST OF DOCUMENTS PRODUCED FOR THE HCCH PARENTAGE / SURROGACY PROJECT57

1. INTRODUCTION

- 1 This Report has been drafted by the Experts' Group on the Parentage / Surrogacy Project 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 2023. Thus, it will be to CGAP to take any decision as to possible future work in this area.
- 2 This Report presents the HCCH Experts' Group on Parentage / Surrogacy analysis and main conclusions on the *feasibility* of the core aspects of possible options for two separate binding legal instruments on legal parentage: one on legal parentage in general, and another on legal parentage established as a result of an international surrogacy arrangement (ISA) specifically. The Experts' Group assessed *feasibility* by discussing whether it is possible to develop private international law (PIL) rules to facilitate the recognition of legal parentage that could form the basis of consensus-based instruments. The Experts' Group considered the legal and practical implications of such rules and the likelihood that they 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.
- 3 This Report furthermore identifies other feasibility aspects which would also need to be explored should CGAP approve further work on one or more of the possible options.
- 4 This Report presents (in chapters 6 and 7) the Experts' Group's overall feasibility assessment of the options considered, and its recommendation(s) on possible future work by the HCCH.
- 5 The Group worked with the understanding 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,¹ 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.²
- 6 Specific information regarding the content of the discussions of the Experts' Group appears in the Background Notes prepared by the Permanent Bureau (PB), which are available for Members of the HCCH on the HCCH Secure Portal.

1.1. Background of the HCCH Parentage / Surrogacy Project

- 7 In 2010, CGAP "invited the Permanent Bureau to provide a brief preliminary note on the PIL issues surrounding the status of children (excluding adoption) and, in particular, on the issue of recognition of parent-child relationships (filiation)". In addition, CGAP "acknowledged the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements", as well as the many concerns expressed by Members.³ Based on the results of the preliminary research carried out by the PB in 2011 and 2012, CGAP requested the PB to intensify the work in this area.
- 8 Based on the responses received to several questionnaires, the PB published a document on the desirability and feasibility of further work,⁴ which was accompanied by an extensive Study.⁵ The Study identified that surrogacy is increasingly used as a method of family formation. Cross-border

For a list of the abbreviations used in the footnotes, please refer to Annex II of this Report.

- 1 In this Report, the Group has used the terms "child" or "children" to refer to the immediate descendant of a person. When referring to the UNCRC or the best interests of the child, "child" refers to a person under the age of 18 years.
- 2 4th EG Report (Oct. 2018), para. 6; 5th EG Report (Feb. 2019), para. 4.
- 3 See responses to the 2013 Questionnaire, the 2014 Report on Desirability and Feasibility and 2010 CGAP, Conclusions and Recommendations (C&R) p. 3.
- 4 2014 Report on Desirability and Feasibility.
- 5 [2014 Study of Legal Parentage and the issues arising from ISAs.](#)

problems are arising because of the differences in domestic approaches to surrogacy (from banning to permitting and regulating), in domestic approaches to the question of legal parentage, as well as a result of the different PIL approaches of States. This results in children having either limping legal parentage or uncertainty as to their legal parentage, which impacts the human rights of all persons concerned, including, for children, those enshrined in the UNCRC. The Study noted that, in some States, there are rules regulating the practice of surrogacy and the establishment of legal parentage. The Study also identified reported situations of abuses involving ISAs. These documents concluded on the *desirability* (i.e., the need) of working in this area and recommended to CGAP to convene an Experts' Group to further explore the *feasibility* of working in this area.⁶

1.2. Mandate of the Experts' Group

- 9 In March 2015, CGAP decided to convene an Experts' Group to consider the feasibility of advancing work on the PIL issues surrounding the status of children, including issues arising from ISAs.⁷
- 10 In 2019, the Experts' Group expressed the view to CGAP that due to the various approaches to surrogacy globally, as well as the policy concerns of many States, the most feasible way forward would be to address legal parentage in the context of ISAs in a separate instrument. CGAP therefore mandated⁸ the Experts' Group to assess the feasibility of two possible instruments, as follows:⁹
- a binding PIL instrument on legal parentage in general (which the Group has referred to as a possible draft "Convention"; see chapter 3 of this Report); and
 - another binding PIL instrument on legal parentage established as a result of an ISA specifically (which the Group has referred to as a possible draft "Protocol"; see chapter 4 of this Report).
- 11 In line with this and other mandates from CGAP, the Experts' Group focused its feasibility assessment for a Convention mainly on the following core aspects:
- the scope of a Convention and whether:
 - ⇒ it should cover all methods by which legal parentage can be established,¹⁰
 - ⇒ it should include legal parentage established by domestic adoption and / or legal parentage established as a result of a domestic surrogacy arrangement;
 - possible harmonised PIL rules on the recognition of judicial decisions on legal parentage, as well as possible rules on direct jurisdiction and uniform applicable law;
 - possible harmonised PIL rules for legal parentage established by operation of law or following an act;
 - possible rules for public documents; and
 - possible cooperation mechanisms.
- 12 Regarding a possible Protocol, the Experts' Group focused its feasibility assessment mainly on the following core aspects:
- the scope of a Protocol, and whether:
 - ⇒ it should be limited to the recognition of legal parentage established by judicial decision, or whether it should cover all methods by which legal parentage can be

⁶ 2014 Report on Desirability and Feasibility, paras 68 and 69.

⁷ 2015 CGAP, C&R No 5.

⁸ 5th EG Report (Feb. 2019), para. 25.

⁹ 2019 CGAP, C&R No 7. See further section 4.1 below.

¹⁰ See section 1.3 (para. 16) below.

established and thus include also rules for the recognition of legal parentage established by operation of law or an act;

- ⇒ it should cover legal parentage established as a result of a domestic surrogacy arrangement and legal parentage established by domestic adoption following an international or domestic surrogacy arrangement;
- further elements that might be included in a possible Protocol; and
 - related considerations regarding two potential approaches: an *a priori* approach (with rules requiring State involvement in advance of a child’s conception) and two models of an *a posteriori* approach (with rules on the recognition of legal parentage that would apply after legal parentage is established in a State Party as a result of an ISA).

13 Regarding both instruments, the Experts’ Group considered the areas for which it seemed likely that binding multilateral consensus-based instruments might be achieved. This included an assessment of how the feasibility of one instrument might affect the feasibility of the other.

14 Over the years, the Experts’ Group and CGAP have emphasised that any work by the HCCH in relation to ISAs should not be understood as supporting or opposing surrogacy.¹¹

1.3. Legal parentage

15 Legal parentage can be defined as “the parent-child relationship established in law”. It is a personal status particularly relevant to a person’s identity, from which many important rights and obligations are derived. Legal parentage established in one State but not recognised in other States results in “limping legal parentage” and can create significant problems for children and their parents. Harmonising PIL rules on legal parentage amongst States would reduce the risk of such limping legal parentage whilst respecting the diverse substantive rules on legal parentage of States.¹²

16 The Experts’ Group identified the following as methods by which legal parentage can be established:

- by operation of law (e.g., as a result of giving birth; on a legal presumption for the establishment of paternity or maternity);
- following an act of a (putative) parent (e.g., an act of acknowledgment);
- by decision of an authority (usually judicial);¹³ and
- by adoption.¹⁴

17 In practice, legal parentage is established in the majority of cases by operation of law, and in some cases following an act. The establishment of legal parentage by judicial decision is less common, although the use of judicial decisions in disputed cases or in some more difficult cases may be more frequent.¹⁵ For each of the above-mentioned methods of establishment of legal parentage,

¹¹ 2022 CGAP, Conclusion and Decision (C&D) No 6; 2021 CGAP, C&D No 6; 2020 CGAP, C&D No 8 and 2019 CGAP, C&R No 10. 6th EG Report (Nov. 2019), para. 24 and 5th EG Report (Feb. 2019), para. 9.

¹² See also 1st EG Report (Feb. 2016), paras 4 and 5.

¹³ 4th EG Report (Oct. 2018), para. 7. The Group also acknowledged that legal parentage can be established by “possession d’état” (possession of status) but did not discuss this matter further. If CGAP approves further work on a Convention, further discussion on this aspect may be necessary.

¹⁴ The Group acknowledged that adoption is another method by which legal parentage can be established and that the recognition of domestic adoptions also raises issues and challenges. As legal parentage in the context of intercountry adoptions is already dealt with under the scope of the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993 Intercountry Adoption Convention), it was *not* considered by the Group. See further below at section 3.1.2.

¹⁵ 4th EG Report (Oct. 2018), para. 8.

the Experts' Group discussed the feasibility of certain PIL rules, which are presented in the sections below.

- 18 The Experts' Group also noted that an eventual PIL instrument on legal parentage would not attempt to harmonise States' substantive law on legal parentage.

1.4. Working methods of the Experts' Group

- 19 The Experts' Group has met 12 times since 2016.¹⁶ It was composed of experts from 24 HCCH Members and four observers.¹⁷
- 20 To assist its feasibility assessment, the Experts' Group considered draft provisions for a possible Convention and a possible Protocol. While these draft provisions did not reflect Group consensus, they may nevertheless be useful should CGAP approve further work.¹⁸

Conclusion No 1: Aim of any instrument

The Group worked with the understanding 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* and in particular their right that their best interests be a primary consideration in all actions taken concerning them.

¹⁶ It is to be noted that five of these meetings took place online due to the Covid-19 pandemic and were therefore shorter meetings.

¹⁷ Members: Argentina, Australia, Brazil, Canada, China (People's Republic of), European Union, France, Germany, India, Israel, Italy, Japan, Mexico, Netherlands, New Zealand, Philippines, Russian Federation, South Africa, Spain, Sweden, Switzerland, Ukraine, United Kingdom, United States of America.
Observers: Council of Europe (until the 2nd meeting), OHCHR (3rd meeting), UNICEF (since the 5th meeting), ISS, IAFL.

¹⁸ These provisions are presented in the Background Notes prepared by the PB, see para. 6.

2. CERTAIN ELEMENTS OF SCOPE COMMON TO BOTH A CONVENTION AND A PROTOCOL

21 The Experts' Group was of the view that the scope of one or more instruments on legal parentage would affect overall feasibility. It noted that if the scope of either instrument were too restrictive, it would risk not addressing the limping legal parentage of many children, which could limit States' interest in joining such instruments. On the other hand, if it were too broad, the feasibility of achieving consensus on PIL rules becomes more challenging.

2.1. Persons of any age

22 Legal parentage is a matter of personal status; it has legal significance throughout a person's life. The Experts' Group therefore worked with the understanding that a Convention and a Protocol would apply to the legal parentage of any person, regardless of age.¹⁹

2.2. Rights and obligations / legal effects flowing from legal parentage

23 The Group agreed that a Convention and a Protocol would be more feasible if only rules on legal parentage²⁰ were included in scope and if the rules on the rights or obligations that derive from legal parentage were excluded from scope. Such rights or obligations, also known as "legal effects", would include, for example, nationality, parental responsibility, maintenance and inheritance rights.

24 In particular, the Group agreed that the recognition of legal parentage under a Convention or a Protocol would be limited to the personal status, *i.e.*, of the parent-child relationship, and that the child would therefore have the same legal parents in the States Parties concerned. The recognition of the personal status under either instrument would not include the recognition of any legal effects that are attached to the parent-child relationship nor settle the question of what rights and obligations the child or parents had as a result of that relationship.

25 The Group agreed that the exclusion from scope of legal effects of legal parentage would mean that the requested State would determine the nature and extent of rights and obligations flowing from the recognised legal parentage in accordance with their own applicable law, including any PIL rules.

26 There were discussions as to whether the instruments could provide a rule requiring States to give certain minimum legal effects when recognising legal parentage (e.g., rights equivalent to those resulting from legal parentage established under domestic law rules; or only certain rights, such as nationality, parental responsibility or maintenance). In particular, a concern was raised about the attractiveness of a Convention or Protocol that contained no guarantees that children or parents would benefit from any rights or obligations in the requested State that typically flow from legal parentage since it could lead some requested States to treat children differently. However, most experts were of the view that such a provision would be difficult to agree on and / or would not be necessary, since once legal parentage is recognised, States would likely, by virtue of their applicable law, give the same effects to legal parentage as for all other children. These experts were also conscious of the need not to undermine other HCCH Conventions which deal specifically

¹⁹ See *supra* note 1.

²⁰ See para. 15 for a definition of legal parentage.

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

2.3. Recognition under domestic PIL rules

27 The Group agreed that any instrument on legal parentage should not preclude the possibility, for States, of recognising legal parentage under their domestic PIL rules, should recognition not be possible under the rules of a Convention or a Protocol. The Group agreed that, for the avoidance of doubt, such a provision should be included.²² Some experts believed, however, that routinely defaulting to domestic law for cases when recognition is not possible under an instrument could reduce the attractiveness of a Convention or Protocol.

2.4. Legal parentage and methods of conception and circumstances of birth

28 The Group agreed that a child's legal parentage should be recognised under the rules of a Convention or Protocol independently of the marital status of their parents (*i.e.*, whether they are married or not).

29 A further scope matter is what methods of conception, circumstances of birth and methods of establishment of legal parentage should be included in the scope of a Convention or a Protocol. Considerations can differ for States in determining both domestic and cross-border rules that establish and recognise legal parentage, depending, for example, on whether the methods of conception are traditional or via assisted reproductive technology (ART), whether the circumstances of birth include a domestic or international surrogacy arrangement, and whether legal parentage is to be established by a domestic adoption or an intercountry adoption.

30 Chapter 3 of this Report on a possible Convention discusses three such scope matters and the related feasibility considerations the Group has identified:

- the exclusion from the scope of legal parentage established as a result of an ISA in favour of inclusion within a Protocol;
- the exclusion from scope of legal parentage established by intercountry adoption as defined under the 1993 Intercountry Adoption Convention; and
- the potential inclusion within scope of legal parentage established by domestic adoption.

31 Chapter 5 discusses three further such scope matters and related feasibility considerations:

- whether legal parentage resulting from a domestic surrogacy arrangement should be included within scope of a PIL instrument and if so, whether it would be more feasible to do so within a Convention or a Protocol;
- whether legal parentage established by domestic adoption following a surrogacy arrangement (domestic or international) should be included within scope, and if so, the feasibility of doing so within either a Convention or a Protocol; and
- whether legal parentage resulting from conception by ART not involving a surrogacy arrangement would require special rules.

Addressing these scope matters in the final chapter of this Report, after a full consideration of the potential components and feasibility of a Convention and a Protocol, will make it easier to discuss these matters given the overlap with situations involving surrogacy and / or adoption.

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 The Group acknowledged that similar provisions have been included in the *Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2019 Judgments Convention) (Art. 15).

Conclusion No 2: Elements of scope common to both a Convention and a Protocol

To be feasible, both a Convention and a Protocol should:

- apply to the legal parentage of a person regardless of age, since legal parentage is a matter of personal status;
- exclude rules on any legal effects that derive from legal parentage, such as nationality, from scope;
- ensure recognition of legal parentage is still possible under domestic law, even if not possible under one or both instruments.

3. A POSSIBLE CONVENTION ON LEGAL PARENTAGE

3.1. Scope of a Convention

32 In addition to the elements of scope presented in chapter 2 of this Report, the following sections were considered by the Experts' Group.

3.1.1. Legal parentage established as a result of any international surrogacy arrangement or by intercountry adoption

33 As part of the Experts' Group's mandate, it was determined that legal parentage established in the following circumstances would be excluded from the scope of a Convention:

- **Legal parentage established as a result of any international surrogacy arrangement (ISA):** This is because such legal parentage would be dealt with in a separate Protocol, for the reasons explained, *infra*, in section 4.1.
- **Legal parentage established by an intercountry adoption:** This is because intercountry adoptions are already dealt with under the 1993 Intercountry Adoption Convention. In addition, CGAP agreed that *any* intercountry adoption, whether covered by the 1993 Intercountry Adoption Convention or not, should be excluded from the scope of any new instrument.²³

3.1.2. Legal parentage established by domestic adoption

34 The Group agreed on the importance of defining "domestic adoption" as the: "adoption of a child habitually resident in one State by (a) prospective adoptive parent(s) habitually resident in that *same State*".²⁴

35 The Experts' Group started preliminary discussions on the issue of domestic adoptions, taking into consideration the different Conclusions and Decisions from CGAP:²⁵

- Most experts agreed that because domestic adoption is a method of establishment of legal parentage, it should be included, in principle, within the scope of a Convention; otherwise, the legal parentage of many children would be outside the scope of a Convention. These experts also indicated that excluding domestic adoptions from the scope could limit States' interest in a Convention because doing so may be considered by many States as unlawfully

²³ 2019 CGAP, C&R No 11.

²⁴ This definition reads in opposition to the definition of "intercountry adoption" found in Art. 2(1) of the 1993 Intercountry Adoption Convention and would ensure that all intercountry adoptions are left out of the scope of a Convention, as required by CGAP (see *supra* note 23).

Further discussions may however be necessary to determine whether a temporal element should be added to this definition to specify at which point in time the habitual residence should be determined.

²⁵ 2010 CGAP, C&R p. 3: "[CGAP] invited the Permanent Bureau to provide a brief preliminary note to [CGAP] 2011 on the [PIL] issues surrounding the status of children (excluding adoption) and, in particular, on the issue of recognition of parent-child relationships (filiation)". Based on this recommendation, the PB did not include adoption as part of its work in this area (see 2011 Preliminary Note, paras 1, 2 and 43; 2014 Study, footnote 371).

Following the 2015 Meeting of the Special Commission on the 1993 Intercountry Adoption Convention, CGAP mandated the PB to undertake some preliminary work in the area of recognition of domestic adoptions (see 2016 CGAP, C&R No 30). In accordance with this mandate, the PB published in 2018 a [Report on the cross-border recognition of domestic adoptions](#), where it recommended that "[i]n view of the current recommendation of the Experts' Group on the Parentage / Surrogacy Project that it may be appropriate to recognise the legal parentage flowing from a domestic adoption under any possible future international instrument on legal parentage, and with a view to avoiding the duplication of work and ensuring the efficient use of HCCH resources, it is recommended that [CGAP] confirm that the Experts' Group on the Parentage / Surrogacy Project should continue with its study and consideration of this issue". Taking into account this recommendation, "[CGAP] acknowledged that recognition of domestic adoptions raises many important issues and challenges. While not a priority for the HCCH at this time, the topic could be addressed by the Experts' Group on the Parentage / Surrogacy Project at a later stage" (see 2019 CGAP, C&R No 13).

or unjustifiably treating children differently depending on whether their legal parentage was established at birth or by adoption. In addition, for these experts, excluding domestic adoption from the scope could in turn affect the overall feasibility of a Convention.

- Some experts were of the view, however, that the recognition of legal parentage established by domestic adoption might not be best addressed through a general Convention on legal parentage given the special nature of adoption.²⁶ They also highlighted the risk that domestic adoptions may be sought in order to circumvent the rules for recognition of legal parentage established as a result of an ISA under a Protocol and the risk of circumventing the rules on intercountry adoption and in particular those of the 1993 Intercountry Adoption Convention.

36 If CGAP approves further work on a Convention, the Group was of the view that discussions would be necessary, including on:

- whether the rules on the recognition of judicial decisions provided for in a Convention could be used for the recognition of domestic adoptions or whether different and / or additional rules or provisions would be necessary, for example, to address the special nature of domestic adoptions from the other methods of establishment of legal parentage, the specific characteristics of adoptions of adults, as well as concerns about illicit practices, abuses or illegal adoptions;
- whether the recognition of domestic adoptions should include only domestic adoptions finalised by a decision (whether judicial or administrative);
- whether specific rules would be needed to address how simple and full adoptions affect legal parentage differently;²⁷
- how to ensure that the 1993 Intercountry Adoption Convention is not undermined.²⁸

Conclusion No 3: Scope of a Convention

For some States, a Convention would be more attractive if the range of methods of conception and of establishment of legal parentage included is broad.

To be feasible, a Convention should exclude:

- rules on legal parentage established as a result of any ISA, which should be included in a separate Protocol; and
- rules on legal parentage established by intercountry adoption, so as not to undermine the 1993 Intercountry Adoption Convention.

Most experts were of the view that it is desirable that a Convention applies to legal parentage established as a result of domestic adoption. However, the feasibility for a Convention to also apply to legal parentage established by domestic adoption will depend in part on overcoming challenges as to what rules should apply particularly without undermining the 1993 Intercountry Adoption Convention. If a Convention did not apply to legal parentage established as a result of domestic adoption, its overall feasibility could be affected.

²⁶ One of the main differences being that adoption is a mechanism used to modify or create legal parentage and, in many States, it is also considered to be a child protection measure.

²⁷ Some domestic adoptions create a legal parent-child relationship between the child and the adoptive parent(s) and terminate the legal parent-child relationship between the child and the birth parent(s) (usually known as full adoptions), while other domestic adoptions only create an additional legal parent-child relationship between the child and the adoptive parent(s) without terminating the legal parent-child relationship between the child and the birth parent(s) (usually known as simple adoptions).

²⁸ For example, should there be additional requirements (e.g., the consent of the birth parents and the child, the adoptability of the child and the eligibility and suitability of the adoptive parent(s))?

3.2. Rules for legal parentage established (or contested) by a judicial decision

3.2.1. Recognition of judicial decisions on legal parentage

37 The Experts' Group concluded that developing a binding multilateral instrument dealing with the recognition of foreign judicial decisions on the establishment and contestation²⁹ of legal parentage is feasible, in principle, subject to scope considerations discussed, *supra*, in chapter 2 and section 3.1. and the elements discussed below.³⁰

a. Bases for recognition

38 The Group agreed on the feasibility of a rule of recognition "by operation of law", without reviewing the merits of the decision and without the need for any procedure in the requested State.

39 The Group also agreed rules should be subject to the following traditional conditions for recognition of foreign judicial decisions (*i.e.*, these requirements *must* be satisfied for recognition to take place): The judicial decision should be final and it should have legal effect in the State where it was rendered.³¹

40 The Group agreed that rules on recognition would be more feasible if they were subject to indirect grounds of jurisdiction.

41 The Group discussed possible connecting factors for indirect grounds of jurisdiction:

- The Group agreed that the most feasible connecting factors would be:
 - ⇒ the State of habitual residence of the child; and
 - ⇒ the State of habitual residence of the respondent(s);³² provided that they include a temporal requirement (e.g., at the time of the initiation of the proceedings that led to the judicial decision, or at any other relevant moment in time during those proceedings) since these connecting factors are mutable.
- The Group also identified other connecting factors that could be of interest to States but did not come to a conclusion as to their feasibility:
 - ⇒ the State where the child is present if the child is a refugee, internationally displaced, or if their habitual residence cannot be established;
 - ⇒ a State with which either the child or the subject-matter has a real and substantial connection: For some experts, such a connecting factor would provide for greater flexibility to take into account specific situations that may present a sufficient connection to the State where the decision was rendered, and could be combined with presumptions to increase predictability and certainty. For other experts, such a connecting factor would be too discretionary and could give rise to uncertainty;
 - ⇒ a State with which the child's (putative) parent(s) have a connection, such as habitual residence, domicile or nationality: For some experts, such connecting factors would be of particular interest to those States that already apply them or similar rules. However, many experts were of the view that such connecting factors would not be appropriate since they would be relying on what the judicial decision is seeking to determine (*i.e.*, the legal parentage).

²⁹ The Group noted that any specific rules dealing with the contestation of legal parentage in a cross-border context would require further consideration.

³⁰ 2nd EG Report (Feb. 2017), para. 6. See also 2017 CGAP, C&R No 8.

³¹ 2nd EG Report (Feb. 2017), para. 9.

³² Depending on the law applicable and / or the situation, the respondent could be the child or a (putative) parent.

- In light of the subject matter (*i.e.*, legal parentage), the Group agreed that grounds for indirect jurisdiction relating to party autonomy (*i.e.*, choice of court and submission to the jurisdiction of the court) would not be appropriate.

42 In addition to discussing indirect grounds of jurisdiction, the Group also discussed that some States might be interested in including direct jurisdiction rules in order to further facilitate recognition (see section 3.2.2 below).

b. Grounds for refusal of recognition

43 The Group concluded that the following grounds for refusal of recognition (*i.e.*, States *may* decide to refuse recognition if one or more of these grounds applies, but with no obligation to do so) would be feasible:

- a public policy exception, taking into account the best interests of the child;
- where a party did not have proper notice of the proceedings and an opportunity to be heard;
- fraud, in connection with a matter of procedure; and
- where there are inconsistent judicial decisions or parallel proceedings.

44 Another possible ground for refusal discussed by the Group was where the child was not heard in the proceedings that established the legal parentage (subject to a number of factors such as age and maturity).³³ However, there were different views as to whether such a ground was necessary. Some experts believed that such a ground is necessary considering the obligation placed on States Parties to the UNCRC in its Article 12 (also in conjunction with Art. 3) to ensure the right of the child to express their views in all matters affecting them, and also considering the obligation in some States to hear the child in legal parentage proceedings. Other experts believed that some States would not consider such a ground to be necessary because it would be possible to address this through a public policy exception. Some States might still be reluctant to such a ground given the risk of refusal based on different approaches to hearing a child in proceedings.

c. Partial or incidental recognition

45 The Group acknowledged that often, in judicial proceedings, legal parentage either arises as a condition to have access to other rights (*e.g.*, succession) or is a consequence of other matters (*e.g.*, the validity of the putative parent's marriage).

46 In both cases, when legal parentage is established in a foreign decision, the Group acknowledged the following:

- only the part in the judicial decision which explicitly pertains to a determination of legal parentage (*i.e.*, the personal status) should be recognised in accordance with the rules of a Convention (*i.e.*, this includes that such a determination has *erga omnes* effect) (partial recognition);
- in the case of a judicial or administrative proceeding on an excluded matter in the requested State, the competent authority (*e.g.*, court, administrative authority) might need to incidentally recognise a foreign judicial decision on legal parentage in order to issue its decision (*e.g.*, in the case of succession, the court may first recognise a foreign judicial decision that determines legal parentage by applying the rules of a Convention to identify whether a person is entitled to inheritance; in the case of a nationality decision, government

³³ The Group acknowledged that a child's opportunity to be heard would not seek to amend domestic procedural rules regarding hearing children nor place an obligation on States to hear the child directly and expressly in all cases. There are a range of ways to hear the child, for example, a child may be "heard" via their representative. The child may be heard by a court / judge directly, but may also be heard via an appropriate body.

officials might first recognise the foreign judicial decision before making a determination of nationality). The Group also noted that such incidental recognition would only be for the purpose of that proceeding (incidental recognition).

47 In any case, the Group noted that further discussions are necessary as to whether partial and / or incidental recognition of judicial decisions in relation to legal parentage ought to be granted under a Convention.

3.2.2. Direct grounds of jurisdiction

48 For some experts, the inclusion of direct grounds of jurisdiction would further increase legal certainty and reduce the risk of conflicting judicial decisions on legal parentage. Such rules could also mitigate concerns about forum shopping and parallel proceedings and would particularly assist judicial proceedings involving the contestation of legal parentage. In addition, these experts noted that if there were sufficient consensus on uniform applicable law rules for the establishment of legal parentage by a judicial decision in a Convention, direct grounds of jurisdiction could better assist with the challenges of uniform applicable law rules (since the *lex fori* could then be designated as (one of) the uniform applicable law rules, preventing the need in many cases to apply foreign law). These experts also believed that, overall, this could contribute to the recognition of legal parentage and increase the attractiveness of a Convention. If CGAP were to approve further work on a Convention, consideration could also be given as to whether the connecting factors for indirect grounds of jurisdiction could be used for direct grounds of jurisdiction and whether this would increase the attractiveness of a Convention.

49 Other experts questioned whether direct jurisdiction rules would in fact address the feasibility challenges of agreeing uniform applicable law rules, since it could not be presumed that *lex fori* would be designated as the uniform applicable law (as set out in para. 48). They also believed that States might prefer indirect grounds of jurisdiction or connecting factors framed as optional grounds for refusal since they ensure a sufficient link between the forum that established legal parentage and the case, and thus facilitate the recognition of the legal parentage.

3.2.3. Uniform applicable law rules

50 The Group was of the view that uniform applicable law rules for judicial decisions would broadly be feasible for States that already apply foreign law to establish legal parentage in some circumstances, but might be of less interest to States that apply their own law (*lex fori*) to the establishment of legal parentage. Experts also identified other factors that could affect the feasibility of including such rules, such as:

- whether methods of establishment of legal parentage other than judicial decisions are included within the scope of a Convention (see further discussions on this point at section 3.3.1 below); and
- whether direct grounds of jurisdiction could be agreed upon (e.g., this could allow to designate the *lex fori* as (one of) the uniform applicable law(s), although taking into account that the connecting factors might then become too limitative).

51 The Group was also of the view that further consideration would need to be given as to whether, if a uniform applicable law rule were to be included in a Convention, the same applicable law rule should also be applied in the context of a *contestation* of legal parentage.

3.2.4. Recommended form accompanying the judicial decision

- 52 If CGAP approves further work on a Convention, it might also be relevant to discuss whether a recommended form (similar to the form for the 2019 Judgments Convention) accompanying the judicial decision could facilitate its comprehension and thus its recognition by operation of law.

Conclusion No 4: Rules in a Convention for legal parentage established by a judicial decision

It is generally feasible to develop a binding multilateral instrument dealing with the recognition by operation of law of foreign judicial decisions on the establishment and contestation of legal parentage on the basis of uniform indirect grounds of jurisdiction, traditional PIL conditions for the recognition of foreign decisions and optional grounds for refusal of recognition.

For some experts, including direct grounds of jurisdiction and / or uniform applicable law rules would present some benefits; however, the feasibility of reaching consensus on such rules would need to be further explored.

The interest that States will have in such an instrument would need to be assessed in conjunction with other elements (e.g., scope of the instrument and whether a Protocol on legal parentage established as a result of an ISA could be negotiated alongside a Convention).

The feasibility of the use of a recommended form to facilitate the comprehension and cross-border recognition of foreign judicial decisions on legal parentage would need to be further explored.

3.3. Rules for legal parentage established without a judicial decision

- 53 Since legal parentage is most often established without a judicial decision, the Group agreed that a Convention that included rules for legal parentage established by operation of law or following an act (e.g., such as an “acknowledgement”) could be more attractive to States than a Convention which contained only rules on legal parentage established by a judicial decision. This approach would include the legal parentage of the majority of children, and not only the ones whose legal parentage is established by a judicial decision. The Group discussed two options for such cases: uniform applicable law rules (section 3.3.1) and rules on the recognition of status (section 3.3.2). The Group acknowledged that such rules could also be relevant for legal parentage established by a judicial decision.

3.3.1. Uniform applicable law rules

- 54 The Group noted that uniform applicable law rules would help ensure cross-border continuity of legal parentage established by operation of law or following an act.³⁴ The reason being that such a rule would provide for the *establishment* of legal parentage in all States Parties in accordance with the same applicable law(s) and thus arrive to the same result. However, the Group was divided as to the feasibility of including uniform applicable law rules.
- 55 The Group noted, for example, that uniform applicable law rules would require changes in current practices for certain States, especially for States applying their own law (*lex fori*) to the establishment of legal parentage (mainly common law States and some Latin American States).
- 56 It was also noted that uniform applicable law rules might be more feasible for States that are used to applying foreign law to establish legal parentage (mainly civil law States). However, it was noted that these States could also object to making changes to their rules as to which connecting factors and / or which law should apply.

³⁴ 6th EG Report (Nov. 2019), para. 16.

57 During its discussions, the Group considered the following uniform applicable law rules which, for some experts, could address the feasibility challenges associated with applying foreign law:

- **General rule:** law of the State of birth of the child, which would be a certain connecting factor as it is easy to ascertain. In addition, applying this law would be easier since States of birth have the obligation to register the birth of children, and, in the vast majority of cases, thus also to determine their legal parentage. By applying the law of the State of birth, the registration office can usually apply its own law, which could mitigate to a certain extent the challenges raised by some experts. However, experts also agreed that in order to limit forum shopping with the application of the law of the State of birth, it was relevant to include a fallback rule in the event that the (putative) parent(s) have no or an insufficient connection (e.g., if the child is born while the parents are on holiday abroad).
- **Fallback rule:** law of the State of habitual residence of the woman / person who gave birth,³⁵ at the time of birth, if at the time of birth of the child, none of the (putative) parents was habitually resident in the State of birth. Given the concerns raised above, some experts thought that the State of habitual residence of the woman / person who gave birth should be used for the general rule.
- **Exception rule:** law of the State of habitual residence of the child, if it would be in the best interests of the child. This rule could potentially apply where the question of legal parentage arises after the child has established their habitual residence in a State other than the State of birth.

58 For these experts, if uniform applicable law rules were included and if it were considered that such rules should apply for legal parentage established by a judicial decision (see, *supra*, section 3.2.3), it would be easier to apply the same applicable law rules to these different methods of establishment of legal parentage.

59 The Group also noted that further consideration would need to be given as to whether a different applicable law should apply for legal parentage established on the basis of a pre-birth judicial decision or act.

3.3.2. Rules on the recognition of status

60 Considering the feasibility challenges that uniform applicable law rules can entail, the Group also briefly discussed the possibility of including rules on the recognition of status (*i.e.*, rules on the recognition of the legal parentage itself) where such status is not established by judicial decision. Under this approach, legal parentage established abroad could be recognised provided that some conditions are met (e.g., provided that there is a proximity and / or that the domestic applicable law was correctly applied).

61 While no firm conclusion was reached, the Group generally agreed that such rules would pose feasibility challenges in part because they might require substantial changes in current practices for certain States, since there may not be a decision like a judicial one to form the basis of the recognition.³⁶ However, if CGAP were to approve further work, the Group also agreed that it would be relevant to consider this option more fully.

³⁵ The question of what the appropriate terminology is for who gives birth depends on the applicable law and different perspectives. For some, only a woman can give birth, such that the term “woman” should be used on its own. Others preferred to add or use only the term “person” on the basis that pregnancy / maternity can be experienced by those who identify as or have a gender under their domestic law that is different than that registered at birth. In this Report, the Group has used the term “woman / person who gave birth” to take into account these different legal frameworks and perspectives.

³⁶ 4th EG Report (Oct. 2018), paras 15-22.

Conclusion No 5: Rules in a Convention for legal parentage established without a judicial decision

Since legal parentage is most often established by operation of law or following an act (and not by judicial decision), the attractiveness of a Convention may depend on whether rules can be developed that allow for continuity of such legal parentage in those cases.

To achieve this, rules on uniform applicable law or the recognition of legal parentage as a status would be needed.

For some States, such rules would be attractive because they would be consistent with their current approach. For others, such rules would entail significant changes to their current approaches. This difference of view poses feasibility challenges for a Convention.

3.4. Rules for legal parentage recorded in a public document

62 The Group discussed possible rules for public documents recording legal parentage (such as birth certificates) which are more common than judicial decisions establishing legal parentage. The Group discussed possible rules on the basis that public documents would be defined as “a document issued by a public authority or body with competence to do so, which records the legal parentage of a person based on its laws and procedures”.

63 The Group noted that public documents recording legal parentage are not limited to birth certificates, but may include other documents, such as an act of acknowledgment, an excerpt from a public register or a notarial act. The Group also noted that public documents may have different effects, depending on their purpose and / or their State of issuance.³⁷

3.4.1. Possible different effects to be given to public documents

64 The Group discussed two possible effects to be given to foreign public documents:

- **Presumption of evidentiary effects:** The rules of a Convention could specify that foreign public documents should all be given the same presumptive evidentiary effects (*i.e.*, a presumption that the legal parentage recorded therein was established in accordance with the applicable law). This presumption could be rebutted by the presentation of contrary evidence. Under such a rule, all foreign public documents would therefore be given the same weight, independently of their effects or purpose in the State of issuance.
- **Same effects as in the issuing State:** The rules of a Convention could provide that public documents should be given the same effects that they have in the State in which they were issued. This would mean that if the rule in the issuing State was that the public document had only presumptive evidentiary effect (as described in the first bullet point), then all States would give it that effect, but if the rule in the issuing State was that legal parentage was “proven” by the public document (*i.e.*, legal parentage is as recorded, and cannot simply be rebutted by presenting contrary evidence), then all States would have to give it that effect.

65 The Group agreed that the presumption of evidentiary effects could provide some enhancement of certainty and predictability of legal parentage (even if only codifying the status quo, as it can still reflect existing good practices) by providing for a uniform approach and could therefore be of interest to States. On the other hand, for many experts it would not go further than codifying the current practice and might therefore not be of much interest.

66 For many experts, ensuring that a document can have the same effects as in the State of issuance in all States would be a way to achieve the aim of providing greater certainty and continuity of legal parentage, provided that the rule in the issuing State is that legal parentage is “proven” by the

³⁷ For example, in some States, birth certificates are only factual and do not record legal parentage.

public document.³⁸ This could be of particular interest to States that already “recognise” public documents in this way.³⁹ However, many experts agreed that this approach would pose feasibility challenges, for example, because it would require some States to give greater effects to foreign public documents (should the public documents have such greater effects in the State in which it was issued) than they give to their own public documents.

67 The Group also agreed that if rules for public documents were included in a Convention, consideration should also be given to 1) including direct jurisdiction rules governing which State Party is competent to issue a public document recording legal parentage within a given case, to ensure proximity between the State and the case; and / or 2) the possibility for States to indicate which authority in their State is competent to issue public documents.

3.4.2. Possible international certificate on legal parentage

68 The Group also discussed the possibility of including an international certificate on legal parentage to further enhance the rules on public documents. The objective of such a certificate would depend on the approach chosen as regards public documents (see, *supra*, section 3.4.1).

69 The Group agreed that such a certificate would not replace domestic public documents recording legal parentage or be mandatory in order for the rules of a Convention to apply. Rather, a certificate could be used / provided / requested to facilitate the application of such rules. The certificate could be issued only on request and might be subject to a fee.

70 The Group discussed two possible objectives that such a certificate could serve:

- **Translation aid:** All the information contained in the public document would be entered in the certificate under a specific number, which would avoid the need for translation. Such an objective could be met independently of the effects given to the public document (see, *supra*, para. 64 first and second bullet points).
- **Specifying the effects of the public document under the law of the issuing State:** Such an objective would only be necessary to be met if the public documents are given the effects they have in their State of issuance. This could amount to substantial recognition of legal parentage, depending on the effects the document produces under the law of the issuing State (see para. 64, second bullet point).

71 The Group agreed that a certificate used as a translation aid would be of interest to many States and would be feasible to develop.

72 Many experts agreed that while a certificate for additional purposes could be attractive to some States, it would pose feasibility challenges because other States might be reluctant to adopt an international certificate on legal parentage (e.g., due to the administrative burden) and because agreement amongst States on what effect such a certificate would have could be difficult for reasons similar to those set above (see, *supra*, paras 66 and 67).

3.5. Possible combination of rules for legal parentage established without a judicial decision and rules on public documents

73 The Group acknowledged that the rules for legal parentage established without a judicial decision (which could be extended to legal parentage established by a judicial decision) could be combined with the rules on public documents. This section presents the different options that were discussed by the Experts’ Group in that regard:

³⁸ See, *supra*, para. 64.

³⁹ This is the case in, for example, the Netherlands and some Latin American States.

- **Evidentiary effects of all public documents with uniform applicable law rules** (see, *supra*, para. 64, first bullet point and section 3.3.1): In the view of some experts, requested States would more readily agree to give evidentiary effects to a foreign public document if the legal parentage recorded in the document had been established by a uniform applicable law rule. For these experts, this might potentially reduce the cases where States would find a different result. A certificate could also be used as a translation aid of the public document (see, *supra*, para. 70, first bullet point). All experts agreed that if a Convention combined rules on public documents with uniform applicable law rules, it would provide even greater certainty and could thus enhance the rules for public documents.⁴⁰ The Group also agreed that this would require further consideration of the content and the practical operation of the applicable law rules, particularly given the feasibility challenges discussed above for the inclusion of applicable law rules in a Convention.⁴¹
- **Same effects of the public documents as in the issuing State with rules on the recognition of status** (see, *supra*, para. 64, second bullet point and section 3.3.2): The State accepting the foreign public document would give that public document the same effects it has in its State of issuance provided that some conditions are met (e.g., proximity, domestic applicable law – see, *supra*, para. 60). A certificate would be very useful in order for the issuing States to specify which effects it gave to its public document in order to ensure that the State accepting that document can give it the same effects (see, *supra*, para. 70, second bullet point). For some experts, giving the same effects to public documents as in the State of issuance would only be feasible if combined with uniform applicable law rules. The Group noted that if a Convention were to provide for uniform applicable law rules, the conditions of any other domestic law would therefore not need to be met.

Conclusion No 6: Rules in a Convention for legal parentage recorded in a public document

Rules on public documents recording legal parentage would increase the attractiveness of a Convention, in particular because legal parentage is most often established by operation of law or following an act, rather than established by judicial decision.

The feasibility of rules on public documents depends on the effects to be given to the public documents. The feasibility to give one or another effect to public documents will depend on the following:

- for evidentiary effects: whether these rules would be combined with uniform applicable law rules and whether they add to the current approach that States take to foreign public documents;
- for same effects as the issuing State: whether these rules would be combined with direct jurisdiction rules and / or uniform applicable law rules.

Including rules on an international certificate as a translation aid and / or to specify the effects of the public document in the issuing State could enhance the rules on public documents. The feasibility of including rules on an international certificate would require further consideration.

⁴⁰ 6th EG Report (Nov. 2019), para. 20.

⁴¹ *Ibid.*, para. 19.

3.6. Other possible elements to be included in a Convention

3.6.1. Preservation and access to information about origins

- 74 Taking into account the importance of knowing one's origins,⁴² in particular in the context of legal parentage, there were brief discussions within the Group as to whether a Convention should include a general obligation on States regarding the preservation of and access to information, similar to Article 30 of the 1993 Intercountry Adoption Convention. However, the Group did not reach any conclusion as to its possible inclusion, although some experts considered it should be included. If CGAP were to approve further work, this issue should be considered further.

3.6.2. Rules on cooperation

- 75 The Group had preliminary discussions on rules on cooperation. While experts noted that such provisions can be useful, and that they figure in most successful HCCH Conventions, some experts noted that some States might consider them unnecessary in a Convention. The feasibility of including such rules would therefore require further discussion. The Group was of the view, however, that, in any event, such rules would not be decisive as to the feasibility of a Convention. The Group finally agreed that, in principle, there would not be a need for States Parties to designate a Central Authority in order for a Convention on legal parentage to work properly.
- 76 If CGAP approves further work on a Convention, it might be relevant to discuss, *a minima*, a Country Profile and direct judicial communications.

Conclusion No 7: Other possible elements to be included in a Convention

The inclusion of a general obligation on States regarding the preservation of, and the access to, information should be further discussed.

Rules on cooperation can be useful and could enhance a Convention for some States, but for others might be considered unnecessary. The feasibility of including such rules would require further discussion. However, rules on cooperation are not decisive as to the feasibility of a Convention.

⁴² Arts 7 and 8 UNCRC.

4. A POSSIBLE PROTOCOL ON LEGAL PARENTAGE ESTABLISHED AS A RESULT OF AN ISA

77 The Group worked with the understanding that a surrogacy arrangement and an *international* surrogacy arrangement were defined as follows:

- **Surrogacy arrangement:** Agreement –
 - ⇒ between a prospective surrogate / surrogate mother⁴³ and (a) prospective intended parent(s)⁴⁴;
 - ⇒ made before a child is conceived;
 - ⇒ which provides that, following the child’s birth, the parties intend for the intended parent(s) to be the child’s legal parent(s) and for the child to be placed into the care of the intended parent(s).
- **International surrogacy arrangement:** Surrogacy arrangement where the surrogate / surrogate mother is habitually resident in one State and the intended parent(s) are (is) habitually resident in a different State and where it is intended that the child will move from their State of birth to the State of habitual residence of the intended parent(s).

4.1. The reasons for a differentiated instrument

78 The Experts’ Group discussed different possibilities for inclusion of rules on legal parentage established as a result of an ISA in a PIL instrument. The Group took into account the divergent domestic approaches to surrogacy, and the differing domestic approaches to the establishment or recognition of legal parentage in ISA cases:

- The divergent domestic approaches to surrogacy range from: banning the practice of surrogacy; to permitting and explicitly regulating it; to neither prohibiting nor regulating it. Amongst the States that regulate the practice of surrogacy, there is a wide variety of domestic regulations (e.g., permitting or prohibiting compensated surrogacy;⁴⁵ requiring a genetic connection to one intended parent; permitting or prohibiting unmarried, single or same-sex intended parents; requiring independent pre-conception counselling and independent legal advice). There may also be differences in how States enforce their regulations. The Group also took into account that ISAs can be prone to abuses, in particular where there is no appropriate regulatory framework in place. They note that, in some States, there are rules regulating the practice of surrogacy and the establishment of legal parentage, which are applied in a context that promotes trust in the rule of law, while in others, the absence of such rules and / or the other conditions raise concerns about potential abuses.
- Regarding the legal parentage of the intended parent(s), legislation may also vary from: establishing legal parentage at birth; to transferring legal parentage by judicial decision; to (re-)establishing legal parentage by adoption.

79 Given these considerations, the Group concluded that applying the same PIL rules for all legal parentage, irrespective of the circumstances of birth, would pose feasibility challenges. The Group therefore discussed the feasibility of including specific PIL rules for legal parentage resulting from

⁴³ The Group noted that the term “surrogate mother” has been used traditionally. Other terminology includes “surrogate” or “gestational carrier”. It was also noted that not all surrogates / surrogate mothers identify as female. In this Report, the Group has used the term “surrogate / surrogate mother” to take into account these different perspectives. See also, *supra*, note 35.

⁴⁴ Other terminology includes “intending parent” or “commissioning parent”. In this Report, the Group has used the term “intended parent” to refer to a person who intends to become a parent through surrogacy.

⁴⁵ In this Report, the Group has used the term “compensated surrogacy” to refer to situations where the surrogate / surrogate mother receives payment beyond the reimbursement of expenses.

an ISA in (1) a separate instrument; or (2) a Convention dealing with legal parentage generally, but in a specific chapter. This chapter could be complemented by an opt-in or opt-out mechanism which States could choose to exercise at the time of ratification or accession.

- 80 Most 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 ISA. At its 2019 meeting, after considering the recommendation of the Experts' Group, CGAP therefore mandated the Experts' Group to work on two possible instruments.⁴⁶
- 81 The Group was also of the view that while it would be feasible to have two instruments, the feasibility of either instrument would depend, amongst other things,⁴⁷ on whether a decision was made not to negotiate the other. That is, some States might not have sufficient interest in negotiating or joining one instrument (a Convention) if the other (a Protocol) was not negotiated or agreed to. Further, the feasibility of one instrument might depend on what was included or excluded from scope.

Conclusion No 8: The reasons for a differentiated instrument for legal parentage established as a result of an ISA

The Group concluded that in order to respect the policy concerns of many States, as well as the various approaches to surrogacy globally, the most feasible way forward would be to exclude legal parentage resulting from ISAs from the scope of an instrument on legal parentage generally (a Convention) and address such legal parentage in a separate instrument (a Protocol).

The feasibility of one instrument may be dependent on the feasibility of the other. Some States may not be interested in working only on one instrument without the other. For some experts, the overall feasibility of advancing work might therefore be affected.

4.2. Preliminary remarks

4.2.1. Overarching aim of a Protocol

- 82 As noted above, the Group worked with the understanding 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 UNCRC and in particular their right that their best interests be a primary consideration in all actions taken concerning them.⁴⁸
- 83 Experts expressed different views as to what a Protocol should entail to allow States to achieve these aims:⁴⁹

⁴⁶ 2019 CGAP, C&R No 7.

⁴⁷ As noted above, feasibility of either instrument will also depend on whether legal parentage resulting from certain other circumstances and methods of conception is in scope of one instrument or the other, in particular legal parentage resulting from a domestic surrogacy arrangement.

⁴⁸ 4th EG Report (Oct. 2018), para. 6; 5th EG Report (Feb. 2019), para. 4. In the case of surrogacy, in addition, CGAP acknowledged the complex issues of PIL and child protection arising from the growth in ISAs (see 2010 CGAP, C&R p. 3), and Members expressed many concerns on the reported abuses and breaches of human rights (see responses to the 2013 Questionnaire and the 2014 Report; 1st EG Report (Feb. 2016), para. 15; 2nd EG Report (Dec. 2016), para. 25; 3rd EG Report (Feb. 2018), para. 45; 5th EG Report (Feb. 2019), para. 9; 6th EG Report (Nov. 2019), para. 24;) as well as the effects of limping legal parentage and the pressing need for continuity of legal parentage 1st EG Report (Feb. 2016), para. 5; 2nd EG Report (Dec. 2016), para. 24; 3rd EG Report (Feb. 2018), para. 45; 5th EG Report (Feb. 2019), para. 4; 6th EG Report (Nov. 2019), para. 3).

⁴⁹ It should be noted, however, that some experts may support some but not all the elements of each of these views.

- For most experts, a PIL instrument would only be attractive to States if it affirmatively addressed human rights in order to achieve the aim of greater predictability, certainty and continuity of legal parentage. In their view, in order to be feasible, a Protocol should include some uniform safeguards / standards that would either be conditions for recognition, grounds for refusal of recognition,⁵⁰ and / or general obligations (see section 4.3.4.b below) to prevent breaches of human rights. In addition, in their opinion, many States will want to include some verification of such uniform safeguards / standards in all individual cases to help ensure that the human rights of the child and the persons concerned were protected and especially that the best interests of the child were taken into account. They also noted the importance that the public policy exception is used only sparingly, as a “safety valve” (on an individual, case-by-case basis). Many were also of the view that an HCCH instrument cannot legitimise the recognition of legal parentage when there has been a breach of human rights, as States have international obligations in this respect: In case of such a breach, recognition should not take place through the international instrument but could follow the application of domestic PIL rules where the court / authority will decide to grant recognition or not in that particular case.
- For some experts, it would not be legitimising a breach of rights for an HCCH instrument to provide continuity of validly established legal parentage particularly in the best interests of a child. Instead, for these experts, it would be protecting the right to or interest in continuity of personal status and avoiding the penalising a child for actions for which they bear no responsibility. States might also have different ways of meeting international obligations and providing protection against abuses rather than denial of recognition of legal parentage, which, in any event, would not provide an actual benefit or reparation for the surrogate / surrogate mother and / or intended parent(s) for any breach of their human rights. For these experts, if reliance is to be placed on domestic law to address difficult cases, this raises questions about how attracted States will be to an HCCH instrument. Further, for these experts, many States will wish to have flexibility to recognise legal parentage. Moreover, for these experts, attempting to agree internationally on uniform safeguards / standards and / or on the consequences of non-compliance with such safeguards / standards would raise significant feasibility challenges. First, States might have highly divergent views on which human rights should be taken into account in an instrument aimed at recognition of legal parentage, and on how potentially opposing rights should be dealt with. Secondly, States may also have highly divergent views on the choice of possible safeguards / standards to protect any such human rights. Thirdly, some States may see setting safeguards / standards for surrogacy as a matter of substantive law to be dealt with at the domestic level, rather than as requirements in a PIL instrument on which recognition of legal parentage depends. Thus, a Protocol should avoid setting uniform safeguards / standards and allow for the flexibility of grounds for refusal to recognise legal parentage, instead of conditions for recognition.

4.2.2. Methods of establishing legal parentage as a result of an ISA to be included within the scope of a Protocol

84 Legal parentage resulting from an ISA may be established by way of different methods. In many States, legal parentage is established by operation of law, but in most of these States it is also

⁵⁰ In this Report, the main differences between a condition for recognition and a ground for refusal of recognition are as follows:

- **Condition:** Recognition will take place *only if* the condition has been met. The fulfilment of a condition is thus *mandatory* for recognition to take place.
- **Ground:** If the ground has not been met, recognition will take place *except if* the authority decides not to permit this recognition. The fulfilment of a ground is thus *optional* for recognition to take place.

possible to request a judicial decision. In some States, the child's legal parentage with the intended parent(s) may only be established by judicial decision.

- 85 For some experts, a Protocol limited to the recognition of judicial decisions may be more feasible, since the intervention of a judge would provide greater assurances that legal parentage was validly established and that safeguards / standards have been observed.⁵¹ However, other experts believed that a Protocol might attract more State interest if it covered all methods of establishing legal parentage, and was not limited to judicial decisions only, as in some States, judicial decisions are not the main method of establishing legal parentage in ISA cases.⁵² In addition, this would mean that a Protocol would apply to all children regardless of the way their legal parentage was established in the State of origin.
- 86 In the end, the Experts' Group focused on the recognition of *judicial decisions* on legal parentage because this provides greater feasibility prospects. If CGAP approves further work on such a Protocol, it might wish to consider assessing extending the scope of a Protocol to legal parentage established by operation of law or by an act.⁵³

Conclusion No 9: Scope of a Protocol

The feasibility of a Protocol will be affected by the methods of establishment of legal parentage that are included. If a Protocol is limited to recognition of legal parentage established by judicial decision, it would be more feasible for some States because it is easier to deal with the recognition of a judicial decision and because these States would have more confidence that domestic rules with respect to the establishment of legal parentage were followed. However, for other States, it might be less feasible because legal parentage resulting from ISAs can be established by operation of law in many States that permit surrogacy, meaning that the legal parentage from these children and families would be excluded from scope.

The feasibility of extending the scope of a Protocol to legal parentage established by operation of law or an act will also be affected by the feasibility of doing so in a Convention.

4.2.3. Possible approaches in a Protocol

a. *A priori approach*

- 87 The Group discussed an *a priori* approach along the lines of the 1993 Intercountry Adoption Convention. This 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 an ISA until the recognition of legal parentage. It would include a cooperation mechanism to verify compliance with uniform safeguards / standards in order to recognise afterwards the legal parentage established in the State of origin as a result of an ISA. Thus, by the

⁵¹ For some experts, feasibility would be further increased if the decisions included their legal reasoning or if the decisions were accompanied by a checklist or a certificate that laid out the basis for the judicial decisions. See section 4.3.5 below.

⁵² Some experts noted that in some States when a judicial decision is issued, it may be "confirmatory" or "declaratory", *i.e.*, it is usually to confirm or declare the legal parentage that has arisen, or will arise, by operation of law. In the view of some experts, in such circumstances, the scope of the judicial investigation or analysis is more limited and often any safeguards / standards which do exist in the domestic law cannot be considered by the court. For them, it is a different nature of proceedings, with a necessarily different approach to the depth of review concerning the surrogacy arrangement and the legal parentage which results.

⁵³ The Experts' Group noted that the extension of a Protocol to legal parentage established by other methods might require different or additional rules. For example, the Group discussed two possible options to extend a Protocol to legal parentage established by other methods than a judicial decision: (1) an option with recognition of the legal status; and (2) a more traditional option with rules on uniform applicable law and public documents (which would follow the rules of a Convention, with, if needed, some adaptation).

time State authorities would allow an ISA to proceed, there would already be broad agreement between the States Parties concerned about the establishment and recognition of legal parentage.

88 Many experts believed that an *a priori* approach would likely best protect the human rights of all involved while securing the recognition of the child's legal parentage. They also believed that this approach would address one of the disadvantages of an *a posteriori* approach, namely, that the child has been born by the time compliance with the uniform safeguards / standards is being verified, thus presenting States with a *fait accompli*. If a State considers the ISA involved abusive practices, an *a priori* approach with its cooperation mechanism and verifications would reduce the risk of placing receiving States in the difficult situation of having either to (i) recognise the child's legal parentage and risk encouraging those abusive practices or (ii) not recognising the child's legal parentage and penalising *that child* for the adults' failure to adhere to the uniform safeguards / standards. Some experts noted, however, that State involvement in advance of the conclusion of an ISA would not always guarantee that the uniform safeguards / standards would be respected or followed.

89 However, most experts were of the view that an *a priori* approach would pose feasibility challenges for a multilateral consensus-based instrument for a number of different reasons, namely it would call for: major changes in (most States') domestic law; agreeing on uniform minimum safeguards / standards; and a more elaborate system of cross-border cooperation, which would require substantial government resources and involvement in individual cases, and which might therefore be of less interest both to States that permit and regulate surrogacy and those that prohibit it. In addition, for States that prohibit surrogacy, an *a priori* approach could pose feasibility challenges because it could imply that these States not only admit the practice of surrogacy but also that they formally approve their residents to use surrogacy abroad.

b. A posteriori approach

90 The Experts' Group discussed an *a posteriori* (or *ex post facto*) approach that would enable recognition by operation of law of legal parentage established as a result of an ISA, in accordance with a Protocol. This approach would not require State authorities to be involved prior to, and as part of, an ISA and there would be no need for an elaborate mechanism of cooperation or communication between States.

91 Most experts acknowledged that an *a posteriori* approach seemed more feasible than an *a priori* approach⁵⁴ and therefore discussions focussed on the possible elements to be included in a Protocol for an *a posteriori* approach (see section 4.3 below). Based on these discussions of the possible elements to be included in an *a posteriori* Protocol, the Group discussed two possible models for this approach. These are presented in section 4.3.6 below.

c. Combined approach (a priori + a posteriori)

92 The Experts' Group also briefly mentioned the possibility to have a Protocol combining both an *a posteriori* and an *a priori* approach: *E.g.*, a Protocol could follow an *a posteriori* approach and States so wishing could opt-in or opt-out of a separate chapter to implement an *a priori* approach. This means, however, that the *a priori* approach could only be followed if both States involved in the surrogacy arrangement would have opted-in for (or would not have opted-out of) the *a priori* chapter.

Conclusion No 10: Possible approaches of a Protocol

⁵⁴ For some experts, however, an *a posteriori* approach would pose more feasibility challenges than an *a priori* approach, since it would not address the issue that States are faced with a *fait accompli* (see, *supra*, para. 88).

Experts believed that a number of States might be attracted to an *a priori* model on the basis that it would better protect human rights. However, experts also concluded that because of the elaborate cross-border cooperation mechanisms, the higher degree of public authority involvement required in an *a priori* approach (both for States that regulate and those that prohibit surrogacy), and because it would imply acceptance of these practices before they have occurred, an *a posteriori* model would be more feasible.

4.3. Elements to be included in an *a posteriori* approach in a Protocol

93 The Experts' Group discussed different elements which could be included in a Protocol using an *a posteriori* approach. The experts agreed on the feasibility of certain basic elements that would need to be included in any Protocol (e.g., rule of recognition, traditional PIL grounds for refusal), but they had different views on the inclusion of other elements (e.g., some uniform safeguards / standards as conditions for recognition). If such elements were included, some experts were of the view that it would increase the feasibility of a Protocol, while for others it would reduce it.

4.3.1. Rule of recognition

94 The Experts' Group agreed that a rule on the recognition by operation of law of judicial decisions on legal parentage, subject to traditional grounds for refusal (see section 4.3.3 below) would be feasible to develop. However, experts disagreed as to whether recognition should be subject to certain conditions and / or grounds for refusal (see also section 4.3.4.c below):

- For many experts, a Protocol would only be attractive to certain States if it would improve the status quo by making recognition of legal parentage conditional upon compliance with some uniform safeguards / standards, in order to ensure in each individual case that there would be recognition of legal parentage only where the human rights of those involved have *not* been breached.
- For some experts, a Protocol would be more attractive if it gave States flexibility to recognise legal parentage in the best interests of a child and / or to protect the right to or interest in continuity of personal status despite allegations of non-compliance with uniform safeguards / standards in light of all the circumstances of the case. For these experts, rules on recognition of legal parentage that have been established by judicial decision in such States should only include grounds for refusal.

Conclusion No 11: Rule of recognition by operation of law in a Protocol

A rule of recognition by operation of law of legal parentage established as a result of an ISA by judicial decision would be feasible to develop, but the attractiveness of a Protocol for States will depend on whether recognition is subject to conditions and / or grounds for refusal.

4.3.2. Indirect grounds of jurisdiction

95 Experts were of the view that, in order to ensure some proximity between the case and the State of origin of the decision, as well as to avoid forum shopping / abuses, the rule of recognition of legal parentage established by judicial decision should include a jurisdictional filter. Experts also agreed that it would be more feasible if it were subject to an indirect ground of jurisdiction in a Protocol. Because of the specific characteristics of ISAs, experts also agreed that it would be more attractive to States to include an *exclusive* indirect ground of jurisdiction, rather than multiple ones.

96 The Group considered that the **State of habitual residence of the surrogate / surrogate mother** as the State of origin of the judicial decision, which would usually correspond to the **State of birth**, would be the most feasible connecting factor. For most experts, this connecting factor could help prevent the risks of the surrogate / surrogate mother being moved (or moving) unwillingly from their

State of habitual residence to another State for the purposes of an ISA. If a Protocol were to include a general certification mechanism for the judicial decision, many experts considered that it would also be feasible for the court issuing the judicial decision to certify compliance with this connecting factor.

97 Some experts proposed other options:

- a connecting factor based on **real and substantial connection** as a possible indirect ground of jurisdiction. The real and substantial connection could:
 - ⇒ be with a State linked to the surrogate / surrogate mother or to the subject-matter (*i.e.*, the establishment of legal parentage);
 - ⇒ be combined with presumptions⁵⁵ to increase the rule's predictability and certainty;
 - ⇒ have the advantage of allowing for the recognition of legal parentage established in a State other than the State of habitual residence of the surrogate / surrogate mother where there had been no apparent breach of their human rights (*e.g.*, where the surrogate / surrogate mother voluntarily travelled to another State for the purpose of an intrafamily ISA), or where, in light of the particular circumstances, there was a sufficient connection with that State;
 - ⇒ be combined with the surrogate / surrogate mother's State of habitual residence as a ground for refusal, to give States the flexibility not to recognise the judicial decision through a Protocol despite an otherwise real and substantial connection with the State of origin when they have concerns.
- to frame the State of habitual residence of the surrogate / surrogate mother and potentially other connecting factors, as **grounds for refusal only**, rather than framed as indirect grounds of jurisdiction. This would ensure that a Protocol had a jurisdictional filter to address the concerns outlined in this section and would also ensure that States had the flexibility to recognise the child's legal parentage in the best interests of the child and / or to protect the right to or interest in continuity of legal parentage, absent a connecting factor.

Conclusion No 12: Indirect grounds of jurisdiction in a Protocol

Experts agreed that a rule of recognition of legal parentage established by judicial decision would be more feasible if it were subject to an *exclusive* indirect ground of jurisdiction in a Protocol, although some experts were of the view that States might also be interested in other approaches to a jurisdictional filter, such as including one or more connecting factors as grounds for refusal.

4.3.3. Traditional PIL grounds for refusal of recognition⁵⁶

98 The Experts' Group found that it was feasible to include traditional PIL grounds for refusal⁵⁷ such as public policy taking into account the best interests of the child,⁵⁸ fraud and other procedural matters (*e.g.*, notice of proceedings and opportunity to be heard for the respondent, opportunity to be heard for the child). These grounds for refusal would be similar to those in a Convention.

Conclusion No 13: Traditional PIL grounds for refusal in a Protocol

Experts agreed that it would be feasible to subject a rule on the recognition by operation of law of legal parentage established by judicial decision to traditional PIL grounds for refusal.

⁵⁵ For example, the State of habitual residence of the surrogate / surrogate mother, the State of habitual residence of the intended parents and / or the State of birth could be presumed to be States having a real and substantial connection to the subject-matter.

⁵⁶ See, *supra*, para. 43.

⁵⁷ See, *supra*, note 50.

⁵⁸ See also, *supra*, explanations on the public policy exception at paras 43 and 44.

4.3.4. Safeguards / standards

- 99 There was general agreement during the meetings of the Experts' Group that safeguards / standards would make a Protocol more attractive to States.⁵⁹ However, with respect to overall feasibility, experts had different views on:
- how to strike a balance between continuity of legal parentage and other human rights of those involved;
 - how to ensure continuity of legal parentage without breach of human rights of all those involved;
 - which safeguards / standards to include;
 - how these should feature, either (i) as uniform safeguards / standards directly included in a Protocol or (ii) as State-specific safeguards / standards included indirectly in a Protocol (*i.e.*, safeguards / standards in the domestic law of the State of establishment of legal parentage); and
 - how safeguards / standards should be included (*i.e.*, as part of a definition, as conditions for recognition, as grounds for refusal and / or as general obligations).
- 100 In order to inform CGAP's consideration of these issues, this section presents first (a) a list of possible safeguards / standards identified by the Group and then (b) a list of possible mechanisms to include safeguards / standards. In addition, in (c), a discussion on safeguards / standards (including on whether they should feature as uniform safeguards / standards or as State-specific safeguards / standards) is proposed.
- a. Possible safeguards / standards identified⁶⁰**
- 101 The Experts' Group identified aspects of the practice of surrogacy or the establishment of legal parentage resulting from an ISA that States might wish to see in a Protocol as possible safeguards / standards, noting that States might have different views on the relevance of these to recognition of legal parentage, and on their precise content. Some of these aspects were only briefly discussed by the Group. However, a range of views were expressed by different experts on the aspects that were discussed.
- 102 **Consent of the surrogate / surrogate mother (and their partner):** The Group considered consent to be a fundamental safeguard / standard:
- consent to the surrogacy arrangement: to be given before the child's conception;
 - consent to surrender the child's legal parentage: to be given before or after birth;⁶¹
 - consent being given freely, in writing, informed and not having been withdrawn;
 - consent of the surrogate / surrogate mother's partner if the partner is considered a legal parent at birth under the applicable law.
- 103 **Consent of the intended parent(s):**
- consent to the surrogacy arrangement to be given before the child's conception;
 - consent to assuming legal parentage upon the child's birth;
 - consent being given freely, in writing, informed and not having been withdrawn.

⁵⁹ 5th EG Report (Feb. 2019), para. 17; 6th EG Report (Nov. 2019), para. 25.

⁶⁰ Further information on the reasons for discussing the different safeguards / standards presented in this section appears in the Background Notes (see, *supra*, para. 6).

⁶¹ Many experts indicated that for some States, it would be necessary that this consent be given (or confirmed) after the birth of the child. However, some experts indicated that pre-birth consent should be acceptable since it does not take effect until after the birth of the child and because it ensures certainty on legal parentage from the moment of birth.

- 104 **Eligibility and suitability of the surrogate / surrogate mother:**
- being eligible and suitable according to the law of the State of origin⁶² which includes, at a minimum, being an adult with full capacity and being mentally and physically fit to enter into a surrogacy arrangement.
- 105 **Eligibility and suitability of the intended parent(s):**
- being eligible and suitable according to the law of the State of origin, which includes, at a minimum, the intended parent(s) to be (an) adult(s) with full capacity and that they have no previous criminal convictions for offences against children.
- 106 **Genetic connection:**
- the child being genetically connected to at least one of the intended parent(s); and / or
 - the gamete of the surrogate / surrogate mother not having been used to conceive the child.
- 107 **Conception of the child:**
- the conception of the child taking place by way of ART;
 - any medical procedure pursuant to the ISA taking place in the State of origin.
- 108 **Surrogacy arrangement:**
- the ISA being subject to, and governed by, the law of the State of origin;
 - the surrogacy being expressly permitted in the State where the ISA takes place at the time the ISA was entered into and executed;
 - the surrogacy arrangement:
 - ⇒ being in writing;
 - ⇒ not restricting the surrogate / surrogate mother's right to full and free determination;
 - ⇒ not penalising the surrogate / surrogate mother if they revoke their consent;
 - ⇒ not being enforceable, or enforced, for the parts concerning the establishment or transfer of legal parentage;
 - ⇒ indicating that the intended parent(s) would take financial responsibility for the child upon birth;
 - ⇒ identifying any intermediaries; and
 - ⇒ outlining all fees and costs involved.
- 109 **Establishment of legal parentage:**
- being validly established pursuant to the applicable law of the State of origin.
- 110 **Financial aspects:** The Group agreed that surrogacy should not constitute or lead to the sale, trafficking, and / or any other forms of exploitation of children:⁶³
- the surrogate / surrogate mother receiving payment or not, in addition to the reimbursement of any expenses;
 - the timing of all payments to the surrogate / surrogate mother;⁶⁴

⁶² See, *supra*, possible connecting factors in section 4.3.2, regarding which State could be considered as the State of origin of the judicial decision.

⁶³ UNICEF and Child Identity Protection Briefing Note, Key Considerations: Children's Rights and Surrogacy, February 2022 available at <https://www.unicef.org/media/115331/file>.

⁶⁴ Some experts noted the recommendations of the UN Special Rapporteur on the sale of children in that regard. See UN Special Rapporteur, General Assembly, Report, 2018, available at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F37%2F60&Language=E&DeviceType=Desktop&LangRequested=False>; and UN Special Rapporteur, General Assembly, Report, 2019, available at

- no improper financial gain deriving from activities related to an ISA; and
- payments to intermediaries and / or the surrogate / surrogate mother, being reasonable and proportionate.

111 **Intermediaries:** regulation and supervision of the activities of intermediaries by competent authorities in the State of origin.

112 **Child's origins:** the collection, preservation, access and availability to the child of information related to their origins (*i.e.*, on the surrogate / surrogate mother, any gamete donor(s), the intended parent(s); gestational history of the child and medical history of the child's genetic parents).

b. Possible mechanisms to include safeguards / standards

113 The Experts' Group discussed different mechanisms to include safeguards / standards. These are presented in the sections below. The Group noted that safeguards / standards could be included using one or more mechanisms.

Definition and scope

114 The Experts' Group discussed the possibility that some safeguards / standards could be addressed in the definition of a surrogacy arrangement, which would affect the scope of a Protocol. For example, if a surrogacy arrangement were defined (in addition to the elements already included in the definition proposed, *supra*, in para. 77) as a "written agreement", legal parentage resulting from an unwritten surrogacy arrangement would not meet the threshold and would therefore be excluded from the scope of such a Protocol (*i.e.*, it would thus not be recognised under this Protocol).

115 Experts agreed that States could differ on whether such an approach might be appropriate for certain safeguards / standards. Some experts also expressed the view that the safeguards / standards may not be sufficiently clear and visible if only dealt with in this manner.

Conditions for recognition

116 The Experts' Group discussed the possibility of including some of the safeguards / standards as conditions for recognition. This would mean that for each individual case, the child's legal parentage would be recognised by operation of law but only if those safeguards / standards were met. Two main views were expressed by experts about this proposal:

- For many experts, some safeguards / standards are viewed as crucial and therefore they need to be in the form of conditions. According to these experts, this approach would have the benefit of taking into account the human rights of all those involved in individual cases. In addition, when safeguards / standards have been respected, a Protocol would provide for a quicker avenue ("safe track") for the recognition of legal parentage. This would also provide certainty and predictability as people would know from the beginning of the ISA process that, in principle, the intended legal parentage would be recognised if the safeguards / standards are met. It would also reduce the need for recourse to the public policy exception because there would be more detailed rules for determining when recognition has to be granted or refused, taking into account the human rights of the child and the persons concerned. These experts were also of the view that, if safeguards / standards were not respected in an individual case, States could still apply their domestic PIL rules to recognise the legal parentage in that particular case.

- However, some experts thought that this approach would pose feasibility challenges because some States will prefer to have flexibility to recognise legal parentage in the best interests of the child (to protect the right to or interest in continuity of personal status) balancing this, for example, against the particular circumstances of each case, as could be done if the safeguards / standards were dealt with as optional grounds for refusal. This would be the case, for example, if non-compliance with safeguards / standards has been *de minimis* or debatable or did not affect the conditions for the establishment of legal parentage. For these experts, including safeguards / standards as conditions for recognition could leave many more children rather than less with limping legal parentage, thus affecting the attractiveness of a Protocol for some States.

117 The Experts' Group discussed how this approach could apply, for example, to the consent of the surrogate / surrogate mother to the transfer of legal parentage:

- Some experts underlined that it is very common to review the existence of consent before recognising legal status (e.g., for marriage, adoption), and that it would not be unfamiliar to States to do so also in the context of legal parentage established as a result of an ISA. Most experts considered that it was therefore feasible for safeguards / standards such as the consent of the surrogate / surrogate mother to be directly included in a Protocol as a condition for recognition, and for States then to be able to refuse to recognise legal parentage if that consent had not been provided.
- Some experts were of the view that, given the feasibility challenges explained in paragraph 116, the fact that the consent of the surrogate / surrogate mother is a key element for the transfer of legal parentage would not necessarily mean that States would wish to deal with consent as a condition for recognition. For example, there might be exceptional circumstances in which the judge of the State of origin allowed for the transfer of legal parentage because consent was being unreasonably withheld. Rather, States might prefer the flexibility provided by dealing with consent as an optional ground for refusal (as discussed below), particularly States in which the transfer of legal parentage may legally occur, in exceptional circumstances and after weighing the best interests of the child, without the consent of the surrogate / surrogate mother, for example, where the consent cannot be obtained or is being withheld unjustifiably. In addition, some requested States may see it as the role of the judge in the State of origin to verify, in accordance with applicable law, that the conditions for establishing legal parentage are met, including any conditions relating to the consent of the surrogate / surrogate mother.

Grounds for refusal⁶⁵

118 The Experts' Group discussed the possibility of including some of the safeguards / standards as grounds for refusal of recognition of legal parentage. This would mean that for each individual case, the child's validly established legal parentage would be recognised by operation of law but that the requested State could refuse this recognition if these safeguards / standards were not met. It is also to be noted that these grounds for refusal are in addition to the traditional PIL grounds for refusal presented, *supra*, in section 4.3.3.

119 Experts had the following views:

- For some experts, this mechanism could be attractive to States because it would provide for more flexibility than conditions for recognition, thus allowing the requested State to decide on the recognition of legal parentage taking into account the circumstance of non-compliance

⁶⁵ See, *supra*, note 50.

with the safeguards / standards in the individual case, and in light of the aim of a Protocol, including the child's right to have their best interests be a primary consideration.

- However, many experts were of the view that this mechanism would not be appropriate for some safeguards / standards and it therefore posed feasibility challenges because it would allow for recognition of legal parentage even if safeguards / standards had not been complied with, thus possibly leading to a situation in which there had been a breach of certain human rights.

General obligations

120 The Experts' Group discussed the possibility that some of the safeguards / standards be dealt with as general obligations. This would mean that they would not need to be verified in each individual case for recognition of the legal parentage to take place, but that States would commit to respect these safeguards / standards in general, and requested States would trust that there had been compliance in the State of origin. For example, if a safeguard / standard stating that payments to a surrogate / surrogate mother must be reasonable were to be included as a general obligation, verification in the requested State of the reasonableness of payments would not be necessary for the child's legal parentage to be recognised. States would commit, however, to ensure that any payments in relation to an ISA were, *a minima*, reasonable. The Group briefly discussed the possibility of using this mechanism regarding safeguards / standards dealing, for example, with a child being provided access to information on their origins.

121 For some experts, it could be attractive to some States that general obligations could send a strong common message as to which human rights of all those involved should be protected, without affecting the recognition of the legal parentage. As to the feasibility of including such general obligations in a Protocol, experts referred to Article 30 of the 1993 Intercountry Adoption Convention, as an example. Other experts questioned how feasible it would be for States to agree on a hierarchy of safeguards / standards in which some featured as conditions for recognition and / or grounds for refusal, and some featured as general obligations, with no bearing on continuity of legal parentage. These experts questioned how interested States would be in negotiating such provisions: States that prohibit surrogacy could be concerned not to appear to approve of surrogacy by creating rules applicable to it; and States that already permit surrogacy might consider general obligations as a form of further regulation of it. In addition, these experts cautioned against comparisons with Article 30 of the 1993 Convention, given the fundamental differences between the *a priori* approach of the 1993 Convention and a possible Protocol using an *a posteriori* approach, with respect to the nature and the level of State involvement.

Opt-in / opt-out mechanism

122 The Experts' Group discussed the possibility that some safeguards / standards could be dealt with through an opt-in or opt-out mechanism. This mechanism could allow States to specify at the time of accession or ratification whether they would want any such safeguards / standards (whether they appear in a Protocol as a condition for recognition, a ground for refusal or a general obligation) to apply (opt-in) or not (opt-out) in their relations with other States.

123 Most experts agreed that such an approach might be appropriate if a Protocol included minimum uniform safeguards / standards in order to take into account the different views that States may have regarding such safeguards / standards. However, some experts were concerned that such an approach would undermine the purpose of agreeing uniform safeguards / standards. Some other experts were concerned about the consequences, if such an approach were used, of too many safeguards / standards: it would be more difficult to know what the requirements of a Protocol were to apply in each State. Other experts also questioned whether States would encounter difficulty

reaching agreement on for which safeguards / standards there should be an opt-in / opt-out possibility, and justifying a difference of approach.

Declaration procedure

- 124 The Experts' Group discussed the following options regarding the establishment of relations between States also as a means of addressing some of the feasibility challenges posed by a Protocol, including with respect to safeguards / standards:
- **Declaration to establish:** States joining a Protocol could declare with which other States they wish to establish relations.⁶⁶ This option could be enhanced by the use of a mandatory country form containing detailed information about the legal framework regulating surrogacy and establishing legal parentage, to inform States' decisions (see also below Model 2 under section 4.3.6.b). These relations could be reciprocal or the declaration mechanism could allow for asymmetric relations (e.g., there would not need to be mutual declarations to recognise legal parentage established as a result of an ISA; State A could decide that it would apply the provisions of the Protocol with State B, even though State B would not have made any declaration to apply the provisions of the Protocol with State A). On the one hand, such declarations could provide some assurances to States as they would be able to choose with which State they will establish treaty relations and on what basis. On the other hand, if declarations were not reciprocal, there could be difficulty identifying which States have a Protocol relationship.
 - **Notification to object to establishment of treaty relations:** Relations would be automatically established with all States party to a Protocol, except where one particular State decides not to establish relations with another State. This could follow the example of Article 29 of the 2019 Judgments Convention. This could be reciprocal or not. Such an approach would present the same assurances to States as the declaration approach but could lead to a similar difficulty of not knowing which States had a Protocol relationship. This option could also be enhanced by the use of a mandatory country form, as described in the preceding bullet point.

125 Experts acknowledged that either of these options would be feasible in principle.

c. General discussion on safeguards / standards

- 126 For many experts, to attract State interest, a Protocol should include some "core" uniform safeguards / standards which would have to be verified in each individual case. In their view, doing so would potentially minimise the use of the public policy exception to refuse recognition of legal parentage. For these experts, the discussion should focus on which safeguards / standards should be included as uniform safeguards / standards, how they should be included in a Protocol (e.g., as a part of a definition or as conditions for recognition), and when and how they should be verified. For these experts, it should be feasible for States to agree on which safeguards / standards are the "core" uniform safeguards / standards. This approach is reflected in Model 1 discussed below in section 4.3.6.a.
- 127 For some experts, reaching consensus internationally even on "core" uniform safeguards / standards would pose significant feasibility challenges.⁶⁷ This is because States may have very different views on which safeguards / standards might be relevant to an instrument on legal parentage and, of those, which ones should be considered "core" uniform safeguards / standards,

⁶⁶ Please note that this declaration would go further than the acceptance mechanism of the HCCH 1980 Child Abduction Convention, as it could be asymmetric, and could be in relation to any State (and not only to newly acceding States).

⁶⁷ See, *supra*, para. 83, second bullet point.

depending in part on whether they are a State of birth, a requested State or both, and depending on whether each individual safeguard / standard were to be included as a definition, as a condition for recognition, as a ground for refusal or as a general obligation. For some of these experts, the feasibility challenges would be even greater if the possible uniform safeguards / standards related to the practice of surrogacy rather than to the conditions for the establishment of legal parentage, since many States might be reluctant to effectively set harmonised standards for the practice of surrogacy in a PIL instrument. These experts believe that a Protocol would provide greater feasibility prospects if it did not contain uniform safeguards / standards and if it allowed States joining a Protocol to choose with which other States they will accept to apply the Protocol based, *inter alia*, on the surrogacy practices and legal parentage law of that other State (“State-specific” safeguards / standards) and on their view of which safeguards / standards they deem the most fundamental / important. Under this approach, the need to agree on uniform safeguards / standards would be avoided. This approach is reflected in Model 2 discussed below in section 4.3.6.b.

128 Other experts were of the view that such a State-specific approach to safeguards / standards would present some feasibility challenges because this approach would make it more difficult to determine amongst which States the Protocol applied, and they were concerned that States might not keep their information up to date. Finally, some experts believed that States would only be interested in a Protocol that would establish uniform safeguards / standards in States where surrogacy is practiced.

129 The Experts’ Group acknowledged that, regardless of how safeguards / standards are featured in a Protocol, some States that prohibit surrogacy might nevertheless be reluctant to join any instrument on legal parentage resulting from ISAs if their doing so could be interpreted as accepting the practice of surrogacy, albeit occurring in another State. The Group agreed that this might affect the overall feasibility of a Protocol.

Conclusion No 14: Safeguards / Standards in a Protocol

There was general agreement that to be feasible, a Protocol would need to include safeguards / standards.⁶⁸ However, with respect to overall feasibility, experts had different views on:

- which safeguards / standards to include;
- how safeguards / standards should be included (*i.e.*, as part of a definition, as conditions for recognition, as grounds for refusal, as general obligations, with an opt-in or opt-out mechanism, through a declaration procedure); and
- how these should feature, either (i) as uniform safeguards / standards directly included in a Protocol or (ii) as State-specific safeguards / standards included indirectly in a Protocol (*i.e.*, safeguards / standards applicable in the domestic law of the State of establishment of legal parentage).

Experts acknowledged that safeguards / standards represent a challenge. Notwithstanding this, most of them considered that having uniform safeguards / standards is the best way to guarantee the protection of the human rights of the child and the persons concerned. Others considered that State-specific safeguards / standards would be preferable as they would give States flexibility to decide whether another State Party’s legal framework was sufficient to apply a Protocol with that State.

⁶⁸ 6th EG Report (Nov. 2019), para. 25.

4.3.5. Document accompanying the judicial decision

132 Experts also discussed whether the judicial decision (and / or public documents if included within the scope of an instrument) could be accompanied by a document to facilitate its recognition. In particular, such a document could, for each individual case, improve the judicial decision's readability. Two options were discussed:⁶⁹

- **Multilingual form:** To improve the readability and comprehension of the judicial decision, the possibility was discussed that the judicial decision / public document be accompanied by an optional multilingual form that would have the same objective as a translation aid, as identified in the Convention (see, *supra*, para. 70, first bullet point), and would identify all the relevant information that appears in the judicial decision in a classification order.

The Group agreed that an optional multilingual form would facilitate the recognition of legal parentage in the requested State and that including such a form in a Protocol would be feasible, in principle.

- **Certificate:** If a Protocol included uniform safeguards / standards as conditions for recognition and / or as grounds for refusal of legal parentage established by judicial decision, then compliance with these conditions would need to be verified in the State of origin. A certificate could be issued by the State of origin authorities (e.g., by the judge rendering the decision, by another designated competent authority) to certify such compliance. The certificate could be provided on request or could be mandatory. If the certificate were mandatory, recognition by operation of law of the judicial decision could depend on the issuance of such a certificate by the State of origin. Because the certificate would "certify" / confirm that the safeguards / standards have been respected, it would make it clear when recognition could be granted or not, thus limiting the need for recourse to the public policy exception. The certificate could also be multilingual to facilitate its comprehension.

The Group had divergent views on the need for and feasibility of a certification mechanism, depending largely on their views on the inclusion of safeguards / standards as conditions for recognition in a Protocol. The experts supporting such inclusion thought a certificate would make a Protocol more attractive to States because it would allow for verification in the requested State that safeguards / standards had been complied with in individual cases before recognition of legal parentage was granted. Some experts also noted that while such a mechanism might entail additional costs, it might on the other hand save costs as some issues may have been prevented through that certification mechanism.

For other experts, however, a certificate would be less feasible than a multilingual form for several reasons. First, it was believed that some States might view that, in an *a posteriori* approach, verification by the requested State should not be necessary in circumstances in which the requested State has chosen to establish treaty relations with the State of origin based on the surrogacy and legal parentage legal framework applicable there, and where a judge in that State has established legal parentage within that framework. Second, some States might question the utility of certification balanced against the administrative burden of it.

⁶⁹ Another possibility was briefly proposed in this context. In order to verify compliance with agreed safeguards / standards, authorities of receiving States should have the ability to access any public document recording the legal parentage established in the State of origin. This could be done by creating a secure site in which such a public document would be uploaded by the relevant authority in the State of origin. Authorities should upload such a public document at the request of intended parents, and highlight the relevant information, in particular information on safeguards / standards if included in the public document. This could replace, at least in part, the need for a more robust cooperation regime.

- 133 Many experts emphasised the importance that such a certification or multilingual form could have from the perspective of preservation of, and access to, information on a person's origins.

Conclusion No 15: Document accompanying the judicial decision in a Protocol

An optional multilingual form accompanying judicial decisions to help facilitate their readability would be feasible, in principle.

A judicial decision that is accompanied by a certificate that verifies compliance in the State of origin with uniform safeguards / standards or with the applicable legal framework including for the establishment of legal parentage would be feasible to develop and could increase the attractiveness of a Protocol for some States.

A certificate could decrease the interest of other States due to administrative burdens and / or the view that a judicial decision provides sufficient verification on its own of compliance with applicable safeguards / standards. For some experts, this may be the case especially if a Protocol allows States to choose with which States they will establish treaty relations.

4.3.6. A posteriori models discussed

- 134 The Experts' Group discussed how the elements presented in section 4.3 could be combined in a Protocol. The following two *a posteriori* models were discussed: a model with uniform safeguards / standards directly included in a Protocol as conditions for recognition, grounds for refusal and / or general obligations (Model 1); and a model with State-specific safeguards / standards included indirectly in a Protocol with grounds for refusal (Model 2). The Group acknowledged it is possible to create other models combining these elements in a different way.

- 135 The Group also discussed that both models would feature traditional PIL grounds for refusal, as presented, *supra*, in section 4.3.3 of this Report. Any further reference to grounds for refusal in the following two sections refer to grounds for refusal that would be in addition to the traditional PIL ones, as presented, *supra*, in section 4.3.4.b.

a. Model 1: Uniform safeguards / standards some of which feature as conditions for recognition

- 136 Model 1 would enable recognition by operation of law of legal parentage established by judicial decision as a result of an ISA, provided that some agreed uniform safeguards / standards included directly in a Protocol would have been respected. The key features of such a Protocol would be the inclusion in a Protocol of these uniform safeguards / standards to protect the human rights of all persons concerned including, for children, those rights enshrined in the UNCRC. Model 1 implies the verification of such uniform safeguards / standards in each individual case. These uniform safeguards / standards would be included as definitions, conditions for recognition, grounds for refusal and / or general obligations. The list and precise content of these safeguards / standards would be the subject of eventual negotiations, as would the question of which ones feature as conditions for recognition or as grounds for refusal. Some of these safeguards / standards could be dealt with through an opt-in / opt-out mechanism.⁷⁰

- 137 To facilitate recognition, a certification process (see, *supra*, section 4.3.5) could be included whereby an authority in the State of origin would verify compliance with the uniform safeguards / standards. States Parties would designate the authority in charge of the certification process. This could be a separate competent authority or the same judge who issued the decision, which would avoid creating new administrative burdens.

⁷⁰ See, *supra*, para. 122.

- 138 For many experts, Model 1 presents better feasibility prospects, for the reasons set out in the first bullet point of paragraph 83 (*supra*). In particular, it could provide, in their view, a “safe track” for recognition, when the requirements, including the uniform minimum safeguards / standards of a Protocol have been met. In their opinion, the uniform safeguards / standards would also limit the application of the public policy exception. This Model 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. For these experts, Model 1 would incentivise parties to the ISA to follow the uniform safeguards / standards of a Protocol, because this route would provide greater certainty on the cross-border recognition and continuity of legal parentage. Where recognition through a Protocol would not be possible, these experts noted that 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.⁷¹
- 139 For some experts, Model 1 would pose feasibility challenges for several reasons. In their view, first, States might have difficulty agreeing on uniform safeguards / standards on surrogacy and legal parentage, given the fundamental differences amongst States regarding the practice of surrogacy and legal parentage resulting from it. Secondly, many States might prefer to have the flexibility of recognising legal parentage as part of a Protocol (after weighing the specific circumstances and the best interests of the child), rather than being required to refuse recognition under a Protocol (because the uniform safeguards / standards were not met), and then having to consider possible recognition or the re-establishment of legal parentage under their own domestic PIL rules, as is currently the case. In addition, for these experts many States might take the view that taking into account the human rights of the child and the persons concerned would not require agreeing internationally on uniform safeguards / standards as conditions for recognition since States may fulfil their international obligations in different ways.

b. Model 2: State-specific safeguards / standards with some grounds for refusal only

- 140 Model 2 would also enable recognition by operation of law of legal parentage established by judicial decision, but it would not involve mandatory refusal of recognition, nor uniform safeguards / standards. Under this Model, the human rights of the child and the persons concerned would be taken into account by including indirectly in a Protocol State-specific safeguards / standards and by including grounds for refusal rather than conditions for recognition. This would provide States with the flexibility to recognise legal parentage to protect the right to or interest in continuity of personal status based on being satisfied with the safeguards / standards applicable in the State of establishment of legal parentage, including how that State has implemented its obligations under international treaties such as the UNCRC in its domestic law and practices.
- 141 Specifically, under this Model, at the time of joining a Protocol, States permitting surrogacy would complete and deposit an enhanced information form describing the legal framework for such practice and the establishment of legal parentage resulting from surrogacy in their jurisdiction (which would include State-specific safeguards / standards). The requirements for the enhanced information form would be negotiated as part of the Protocol obligations that would apply, for example: detailed information on how the State implements its obligations under applicable international law such as the UNCRC; the State’s law on consent of the surrogate / surrogate

⁷¹ See, *supra*, para. 116, first bullet point.

mother and intended parents; and its law on establishment of legal parentage as a result of a surrogacy arrangement.⁷²

- 142 Based on this enhanced information provided, other States (whether they allow for surrogacy or not) would declare with which State(s) permitting surrogacy they would agree to establish treaty relations and recognise legal parentage established there.⁷³ Each State's decision to establish treaty relations would be based on the legal framework(s) provided for in the chosen State(s) of origin, considering the safeguards / standards they deem important for the recognition of legal parentage and their own public policy.
- 143 In this way, treaty relations within a Protocol's multilateral framework would operate between a State of origin and a State that has declared that it is satisfied with the safeguards / standards on surrogacy and establishment of legal parentage applicable in that State of origin. This treaty relationship would not need to be reciprocal. It could be asymmetrical (*i.e.*, there would be no need for mutual or reciprocal declarations amongst States Parties to apply the Protocol) in particular, for example, because a State Party might be in the position only of being a requested State and not a State of origin allowing for the establishment of legal parentage resulting from surrogacy arrangements, if surrogacy is prohibited there. Further, there would be requirements for a State to keep its enhanced information form up to date, and formally to notify States Parties directly or through the depositary of any changes, with an opportunity for other States Parties to withdraw any declarations if they were no longer satisfied with the framework of the safeguards / standards applicable in the State of origin.
- 144 Recognition by a declaring State of legal parentage established in a State of origin with which it had agreed to operate the Protocol, would then be by operation of law, subject to limited grounds for refusal. That list would be the subject of eventual negotiations, but could include, for example, the consent of the surrogate / surrogate mother. While recognition of legal parentage would be by operation of law, consideration could be given to including, in a Protocol, a multilingual form or certificate that could require the State of origin to verify that there had been compliance with the applicable legal framework including for the establishment of legal parentage, and in particular with respect to the consent of the surrogate / surrogate mother. This would assist the requested State's consideration of grounds for refusal, but would not require refusal of recognition.
- 145 For some experts, Model 2 would provide better feasibility prospects for the reasons set out in the second bullet point of paragraph 83, *supra*. In particular, this Model would include indirectly State-specific safeguards / standards without having to reach international consensus on uniform safeguards / standards to be included directly in a Protocol, which would pose feasibility challenges in their view. In addition, including grounds for refusal, rather than conditions for recognition, would give requested States the flexibility to recognise legal parentage or not, taking into account the particular circumstances of each case and human rights, including the best interests of the child.

⁷² There are three key differences between this enhanced form and a traditional / typical country profile: the detail and nature of the information; the way the prescribed content is agreed; and the purpose they serve. In contrast to a traditional country profile, the enhanced form would provide detailed substantive information on the law regulating surrogacy and the establishment of legal parentage, including the way the State implements its obligations under international treaties. The information that the enhanced information form would require would be negotiated amongst States as part of the Protocol negotiations, such that States Parties that might become requested States could ensure that they would have the information they each wish about the safeguards / standards that apply to surrogacy and the establishment of legal parentage in the prospective State of origin. This enhanced information form would ensure that a State Party that is a prospective requested State can make an informed decision about whether to establish treaty relations with the prospective State of origin.

⁷³ Such declaration could be made at the time of joining a Protocol, or later, for example, when a new State permitting the practice of surrogacy joins a Protocol.

- 146 For many experts, Model 2 would pose feasibility challenges for several reasons. First, because in their view this Model is based on a bilateral relationship that can be suspended whenever a State changes its legal rules or practices with the ensuing uncertainty. Secondly, setting uniform safeguards / standards directly in a Protocol would, for these experts, provide greater assurances that human rights are taken into account, which seems preferable to accepting State-specific safeguards / standards on the basis of abstract information contained in an enhanced information form. Thirdly, verification through a certification process in individual cases is essential in order to uphold the best interests of the child and their rights as recognised in international law. Fourthly, keeping the information form up to date would pose important operational challenges. For these experts, this approach would merely reflect the status quo and would not be enough to address concerns about abusive practices and human rights.

Conclusion No 16: A *posteriori* models discussed in a Protocol

Experts had different views on which *a posteriori* model they thought would be more feasible.

For many experts, a model including agreed uniform safeguards / standards directly in a Protocol, some of which feature as conditions for recognition, would be more feasible.

For some experts, a model including State-specific safeguards / standards indirectly in a Protocol (*i.e.*, safeguards / standards in the domestic law of the State of establishment of legal parentage) with some grounds for refusal only, would be more feasible.

The Group also discussed the possibility that a future Protocol could also combine elements of each of these models.

5. OTHER SCOPE MATTERS AND RELATED FEASIBILITY ISSUES of legal parentage established as a result of a domestic surrogacy arrangement, by domestic adoptions following a surrogacy arrangement and as a result of ART

147 At the outset, the Group noted that for these cases it may likely not be apparent whether a child's legal parentage was established at birth or by adoption and / or whether their conception was the result of ART, or the result of a domestic or international surrogacy arrangement. This could pose practical challenges for any instrument.

5.1. Legal parentage established as a result of a domestic surrogacy arrangement

148 A scope question which arises is whether legal parentage established as a result of a domestic surrogacy arrangement should be included in scope, and if so, whether it would be more feasible to include it in a Convention or a Protocol. The Group took into account the divergent approaches to domestic surrogacy.⁷⁴ The Group worked with the understanding that *domestic* surrogacy arrangements were defined as follows: a surrogacy arrangement where the surrogate / surrogate mother and the intended parent(s) are habitually resident in the same State.

149 The Group agreed that it would be desirable to include legal parentage established as a result of a domestic surrogacy arrangement in the scope of a Convention or a Protocol. However, experts expressed different opinions as to the feasibility of including such legal parentage in the scope of a Convention or a Protocol. These different opinions are presented below.

150 **Inclusion in the scope of a Convention:** For some experts, it would be more feasible to include legal parentage established as a result of a domestic surrogacy arrangement in the scope of a Convention since a Convention would be intended to cover legal parentage generally unless there was a strong reason to exclude legal parentage deriving from certain circumstances from its scope. In addition, some experts questioned the feasibility of excluding legal parentage resulting from a domestic surrogacy arrangement from the scope of a Convention, or of creating separate rules for the recognition of such legal parentage within a Convention, because doing so may be seen by some States as unlawfully or unjustifiably treating children born to persons habitually resident in the same State differently based on the circumstances of their conception.

151 As noted above, due to the fact that it could be very difficult to identify situations where legal parentage resulted from a domestic surrogacy arrangement, experts raised further questions regarding the feasibility and practicality of dealing with such legal parentage outside the scope of a Convention. In addition, some experts pointed out that there could be less risk of improper forum shopping and of breaches of human rights in situations involving domestic surrogacy arrangement than ISAs, which, in their view, would justify including such legal parentage in the scope of a Convention.

152 Furthermore, some experts believed that some States might take the view that a request for recognition of legal parentage established as a result of domestic surrogacy arrangements poses less need for additional safeguards / standards, since there will usually be fewer connections to the requested State than an ISA typically has, and less risk of circumvention of domestic rules. States might take this view particularly where time has elapsed between the establishment of legal parentage and the request for recognition. Finally, some experts suggested that consideration might be given to allowing States joining a Convention to specify whether they would accept that

⁷⁴ The divergent approaches to domestic surrogacy range from (explicit) prohibition, to (explicit) permission with or without regulation. See also, *supra*, para. 78.

the Convention applies also to legal parentage established as a result of a domestic surrogacy arrangement, by way of declaration or reservation.

153 **Inclusion in the scope of a Protocol:** For some experts, it would be more feasible to include legal parentage established as a result of a domestic surrogacy arrangement in the scope of a Protocol for the same reasons that it was decided to address legal parentage established as a result of an ISA under a Protocol and not a Convention.

154 First, since (most) States which prohibit surrogacy could object to (or not participate in) the negotiation of an instrument on legal parentage that would include legal parentage established as a result of any type of surrogacy arrangement. Secondly, the fact that domestic surrogacy arrangements also present risks of breaches of human rights might justify treating such legal parentage differently (*i.e.*, in a Protocol rather than a Convention). Thirdly, the considerations as to what elements a Protocol should contain (*e.g.*, as to safeguards / standards, conditions or grounds for refusal, opt-ins or declarations) would, for many States, be similar for ISAs and domestic surrogacy arrangements, such that it would be more feasible to include these rules in the same instrument.

155 Further, these experts noted that if legal parentage established as a result of a domestic surrogacy arrangement and an ISA were addressed in two different instruments, there could be risks of circumvention of the rules of a Protocol. For these experts, this concern could be alleviated if the rules for recognition were exactly the same, independent of whether the legal parentage was established as a result of a domestic surrogacy arrangement or an ISA. Some experts, however, identified feasibility challenges that could arise if a Protocol included legal parentage resulting from ISAs and domestic surrogacy arrangements in scope, and a Convention included legal parentage resulting from ART in scope, given that the former often involves ART and many States might consider that certain elements should be similar. This is discussed further at paragraph 163 below.

156 If CGAP approves further work, the Group acknowledged that more in-depth discussions would be necessary to assess the feasibility of:

- including legal parentage established as a result of a domestic surrogacy arrangement within the scope of a Convention or a Protocol;
- under either instrument, dealing with such legal parentage in a separate chapter and / or creating separate rules; and
- the impact that favouring one option over the other may have on the overall feasibility of both instruments.

5.2. Domestic adoptions following a surrogacy arrangement

157 Since domestic adoption may currently be used as a method of establishing legal parentage following a surrogacy arrangement, a further scope question arises as to whether legal parentage established as a result of domestic adoptions should be included in the scope of an instrument on legal parentage, and if so, what the feasibility would be of including it within the scope of either a Convention or a Protocol. Domestic adoptions that establish legal parentage with one or both intended parent(s) following a surrogacy arrangement occur in the following situations:⁷⁵

- **Situation 1:** Where a *domestic* surrogacy arrangement takes place and, in accordance with domestic law, in order to establish the child's legal parentage with the intended parent(s),

⁷⁵ It may happen in other situations, where, after an ISA, the child needs to be adopted in the State of origin before the intended parent(s), together with the child, can return to their State of habitual residence. However, the Group did not discuss this subject since this would entail intercountry adoptions which fall under the scope of the 1993 Intercountry Adoption Convention (even though recognition under this instrument would not be possible).

the intended parent(s) must adopt the child. Such legal parentage may need to be recognised abroad (e.g., because the family moves to another State or because (one of) the intended parent(s) is a national of another State).

- **Situation 2:** Where an *international* surrogacy arrangement takes place and the child's legal parentage with the intended parent(s) is established in the State of origin, the intended parent(s) may nevertheless need or wish to adopt the child after returning to their State of habitual residence if the legal parentage with one or both intended parent(s) is not, or cannot be, recognised in that State. In most States where such adoptions take place, they are considered and treated as domestic adoptions. The legal parentage resulting from such adoptions may need to be recognised in a third State where the legal parentage of the intended parent(s) established in the State of origin might also not be recognised (e.g., if the family moves to such State or if (one of) the intended parent(s) is a national of such State).

158 The Experts' Group assessed the feasibility of dealing with the legal parentage established in situations 1 and 2 either as (a) legal parentage established by a domestic adoption, or (b) legal parentage established as a result of a surrogacy arrangement (*i.e.*, a domestic surrogacy arrangement, in situation 1 and an ISA, in situation 2). The Group noted that if such legal parentage were treated as domestic adoptions (*i.e.*, option (a)), they would fall within the scope of a Convention, except if domestic adoption generally were to be excluded from such a scope. It further noted that if the legal parentage were treated as resulting from a surrogacy arrangement (*i.e.*, option (b)), the legal parentage established in situation 1 would fall within the scope of either a Convention or Protocol (see above discussion in section 5.1) and legal parentage established in situation 2 would fall within the scope of a Protocol.

159 Most experts agreed that legal parentage established in situation 1 should be treated as a domestic adoption, and should thus come within the scope of a Convention (except if domestic adoptions were to be excluded – see, *supra*, section 3.1.2).

160 Experts had divergent views, however, on the feasibility of including the recognition of legal parentage established through domestic adoption in situation 2 within the scope of a Convention or a Protocol:

- For some experts, addressing recognition in a Protocol may be seen by some States as unlawfully or unjustifiably treating children adopted domestically differently based on the circumstances of their conception. They noted that these States may also have concerns that, once a person is adopted, the recognition of that person's legal parentage would be treated differently from that of a person whose legal parentage was established at birth as it is the case now. It would likely not be apparent whether a child's legal parentage was established at birth or by adoption and / or whether the child was born as a result of a domestic surrogacy arrangement or an ISA.
- For other experts, addressing the recognition of legal parentage established in situation 2 in a Convention may pose feasibility concerns for States that may see this as potentially creating avenues to circumvent safeguards / standards contained in a Protocol. For them, these situations should thus be addressed in a Protocol, and they noted that if children are in different situations, it may require the application of different rules. They also noted that to increase State interest in a Protocol, such a Protocol should contain rules that would be more attractive to families than the rules on the recognition of domestic adoptions done following an ISA.
- In any case, the Group noted that if States become party to a Protocol, States would be able to recognise the legal parentage through that Protocol without the need to (re-)establish the legal parentage via domestic adoptions in ISA cases.

161 The Group also agreed that if CGAP approves further work, in-depth discussions as to the compatibility and the connection between a Convention and a Protocol, and the scope of both instruments, would need to take place.

5.3. Legal parentage established as a result of ART not involving a surrogacy arrangement

162 While the Group agreed, in principle, that the legal parentage of children born from ART not involving a surrogacy arrangement should fall within the scope of a Convention, it did not discuss it in detail. If CGAP approves further work on a Convention, future discussions might include such issues. First, since surrogacy generally involves ART, questions would arise as to the extent to which the rules on the recognition of legal parentage established as a result of ART not involving a surrogacy arrangement would need to be similar to the rules on the recognition of legal parentage established as a result of either a domestic surrogacy arrangement or an ISA. This is especially the case if ART would involve a third-party individual (donor). A particular question is whether the safeguards / standards that experts identified for potential inclusion in a Protocol which relate to the conception by ART or to the establishment of legal parentage should apply to all cases where ART is used, whether involving a surrogacy arrangement or not (or if they could be left to the public policy exception). Such safeguards / standards might include: genetic connection; financial aspects, consent of the partner; and preservation of and access to information on origins.⁷⁶ For those States for which rules on establishment of legal parentage treat surrogacy as a subset of ART, or that have the same or similar rules for both ART and surrogacy arrangements, it could be particularly challenging to justify treating these situations differently.

163 Further, if a Protocol were to include safeguards / standards (see, *supra*, section 4.3.4), then questions would arise as to whether the same safeguards / standards should apply to recognition of legal parentage established as a result of ART not involving a surrogacy arrangement. If a Protocol also made recognition conditional on compliance with certain safeguards / standards, questions would also arise about whether this approach should be taken for legal parentage established as a result of ART not involving a surrogacy arrangement. These questions would be particularly challenging if a Convention otherwise did not include safeguards / standards as conditions for recognition.⁷⁷ In addition, feasibility challenges could also arise because some States might see any difference in approach as unlawfully or unjustifiably treating children differently, on the basis of whether ART was used in a surrogacy context or not.

Conclusion No 17: Other scope matters for both a Convention and a Protocol

The Group agreed that it would be desirable to include legal parentage established as a result of a domestic surrogacy arrangement in the scope of a Convention or Protocol. If CGAP approves further work, in-depth discussions would be necessary to assess:

- the feasibility of including legal parentage established as a result of a domestic surrogacy arrangement either within the scope of a Convention or a Protocol;
- under either instrument, the feasibility of dealing with such legal parentage in a separate chapter and / or creating separate rules; and
- the impact that favouring one option over the other might have on the overall feasibility of both instruments.

⁷⁶ See section 4.3.4.a.

⁷⁷ This would be diminished if a Protocol took a grounds for refusal approach.

The Group agreed that it would be desirable to include legal parentage established by domestic adoption following a domestic or ISA in the scope of a Convention or Protocol. If CGAP approves further work, in-depth discussions would be necessary on:

- whether such adoptions should be treated as domestic adoptions or as legal parentage established as a result of a surrogacy arrangement, and whether there should be a distinction between domestic adoptions following a domestic surrogacy arrangement and domestic adoptions following an ISA;
- whether rules on such adoptions should therefore feature in a Convention or Protocol; and
- the impact that favouring one option over the other might have on the overall feasibility of both instruments.

The Group agreed that it would be desirable that a Convention apply to legal parentage established as a result of ART. In case of legal parentage established as a result of ART involving a third-party individual (donor), feasibility will depend in part on determining whether rules should be more similar to Convention rules (not involving ART) or Protocol rules in relation to ISAs (which involve ART). Differing rules would need to be justified.

6. GENERAL ASSESSMENT OF FEASIBILITY

- 164 The Group agreed on the desirability of, and urgent need for, further work by the HCCH in the form of a binding PIL instrument on legal parentage in general (a Convention) and a binding PIL instrument on legal parentage established as a result of an ISA specifically (a Protocol).
- 165 The conclusions of the Group with respect to the feasibility of some of the key elements of a Convention and a Protocol are set out in boxes throughout (and annexed to) this Report.
- 166 The Group concluded on the general feasibility of developing a Convention dealing with the recognition by operation of law of foreign judicial decisions on the establishment and contestation of legal parentage.
- 167 The Group also concluded on the general feasibility of rules on recognition by operation of law of legal parentage as a result of an ISA established by judicial decision in a Protocol. Feasibility will depend in particular on how safeguards / standards are addressed.
- 168 Owing to the particularly complex and sensitive nature of the topic, the Group noted some key feasibility challenges going forward, which include:
- For a Convention, whether or not to include:
 - ⇒ domestic adoption;
 - ⇒ rules on uniform applicable law for the establishment of legal parentage; and
 - ⇒ rules on public documents.
 - For a Protocol, the way to address safeguards / standards.
 - For both instruments, scope issues related to legal parentage established as a result of a domestic surrogacy arrangements and / or ART involving a third-party individual (donor) and legal parentage established by domestic adoptions following a surrogacy arrangement.
 - Some experts agreed on the feasibility of advancing work on only one instrument, while others did not think that advancing work on one instrument without the other would be feasible.
- 169 While different elements to be included in a Convention and / or a Protocol, when taken individually, seemed to be feasible, this assessment might change depending on decisions taken on other elements. For example:
- For some experts, any instrument would only be attractive to States if it also addressed legal parentage established without a judicial decision, given that, in the majority of cases, legal parentage is established by operation of law or following an act. For other experts, this did not seem a key issue and / or those experts questioned the feasibility of agreeing rules on legal parentage without a judicial decision in an instrument.
 - Although the Group agreed on the need for safeguards / standards in a possible Protocol, experts had different views as to which safeguards / standards should be included and how they should feature. For many experts, a Protocol would only be feasible if it included uniform safeguards / standards included directly in a Protocol, some of which featuring as conditions for recognition, others as grounds for refusal. For some experts, a Protocol would rather be feasible if it included State-specific safeguards / standards indirectly in a Protocol with a declaration mechanism and grounds for refusal.

7. PROPOSAL FOR CGAP

- 170 The Group identified a number of promising elements for one or more PIL instruments on legal parentage. It also identified a number of feasibility challenges.
- 171 If CGAP were to consider that work in this area should continue, the Group recommends that CGAP consider establishing a Working Group to explore possible provisions for a Convention on legal parentage generally and a Protocol on legal parentage resulting from ISAs, in order to further inform policy considerations and decisions in relation to the scope, content and approach of any new instrument(s).
- 172 If such a Working Group were to be formed, it should –
- 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 UNCRC and in particular their right that their best interests be a primary consideration in all actions taken concerning them; and
 - draw on the ideas and assessments in this Report, recognising that a number of elements and approaches identified could feature either on their own or in a combined way.
- 173 In view of the proposal by the Experts Group, the PB indicates that if CGAP decides to give the mandate to work on one instrument at the time, the necessary resources within the International Family and Child Protection Division will need to be allocated for the PB to carry this work. If it is decided to work on a Convention and a Protocol in parallel at the same time, it is clear that at least, the PB will have to re-organise its resource allocation, at the detriment of other work, or an increase in human resources will be needed at the PB.

ANNEXES TO THE FINAL REPORT

ANNEX I – COMPILATION OF CONCLUSIONS

This Annex compiles the conclusions of the Experts' Group that appear in **green boxes** throughout the Final Report.

Conclusion No 1: Aim of any instrument

The Group worked with the understanding 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* and in particular their right that their best interests be a primary consideration in all actions taken concerning them.

Conclusion No 2: Elements of scope common to both a Convention and a Protocol

To be feasible, both a Convention and a Protocol should:

- apply to the legal parentage of a person regardless of age, since legal parentage is a matter of personal status;
- exclude rules on any legal effects that derive from legal parentage, such as nationality, from scope;
- ensure recognition of legal parentage is still possible under domestic law, even if not possible under one or both instruments.

Conclusion No 3: Scope of a Convention

For some States, a Convention would be more attractive if the range of methods of conception and of establishment of legal parentage included is broad.

To be feasible, a Convention should exclude:

- rules on legal parentage established as a result of any ISA, which should be included in a separate Protocol; and
- rules on legal parentage established by intercountry adoption, so as not to undermine the 1993 Intercountry Adoption Convention.

Most experts were of the view that it is desirable that a Convention applies to legal parentage established as a result of domestic adoption. However, the feasibility for a Convention to also apply to legal parentage established by domestic adoption will depend in part on overcoming challenges as to what rules should apply particularly without undermining the 1993 Intercountry Adoption Convention. If a Convention did not apply to legal parentage established as a result of domestic adoption, its overall feasibility could be affected.

Conclusion No 4: Rules in a Convention for legal parentage established by a judicial decision

It is generally feasible to develop a binding multilateral instrument dealing with the recognition by operation of law of foreign judicial decisions on the establishment and contestation of legal parentage on the basis of uniform indirect grounds of jurisdiction, traditional PIL conditions for the recognition of foreign decisions and optional grounds for refusal of recognition.

For some experts, including direct grounds of jurisdiction and / or uniform applicable law rules would present some benefits; however, the feasibility of reaching consensus on such rules would need to be further explored.

The interest that States will have in such an instrument would need to be assessed in conjunction with other elements (e.g., scope of the instrument and whether a Protocol on legal parentage established as a result of an ISA could be negotiated alongside a Convention).

The feasibility of the use of a recommended form to facilitate the comprehension and cross-border recognition of foreign judicial decisions on legal parentage would need to be further explored.

Conclusion No 5: Rules in a Convention for legal parentage established without a judicial decision

Since legal parentage is most often established by operation of law or following an act (and not by judicial decision), the attractiveness of a Convention may depend on whether rules can be developed that allow for continuity of such legal parentage in those cases.

To achieve this, rules on uniform applicable law or the recognition of legal parentage as a status would be needed.

For some States, such rules would be attractive because they would be consistent with their current approach. For others, such rules would entail significant changes to their current approaches. This difference of view poses feasibility challenges for a Convention.

Conclusion No 6: Rules in a Convention for legal parentage recorded in a public document

Rules on public documents recording legal parentage would increase the attractiveness of a Convention, in particular because legal parentage is most often established by operation of law or following an act, rather than established by judicial decision.

The feasibility of rules on public documents depends on the effects to be given to the public documents. The feasibility to give one or another effect to public documents will depend on the following:

- for evidentiary effects: whether these rules would be combined with uniform applicable law rules and whether they add to the current approach that States take to foreign public documents;
- for same effects as the issuing State: whether these rules would be combined with direct jurisdiction rules and / or uniform applicable law rules.

Including rules on an international certificate as a translation aid and / or to specify the effects of the public document in the issuing State could enhance the rules on public documents. The feasibility of including rules on an international certificate would require further consideration.

Conclusion No 7: Other possible elements to be included in a Convention

The inclusion of a general obligation on States regarding the preservation of, and the access to, information should be further discussed.

Rules on cooperation can be useful and could enhance a Convention for some States, but for others might be considered unnecessary. The feasibility of including such rules would require further discussion. However, rules on cooperation are not decisive as to the feasibility of a Convention.

Conclusion No 8: The reasons for a differentiated instrument for legal parentage established as a result of an ISA

The Group concluded that in order to respect the policy concerns of many States, as well as the various approaches to surrogacy globally, the most feasible way forward would be to exclude legal

parentage resulting from ISAs from the scope of an instrument on legal parentage generally (a Convention) and address such legal parentage in a separate instrument (a Protocol).

The feasibility of one instrument may be dependent on the feasibility of the other. Some States may not be interested in working only on one instrument without the other. For some experts, the overall feasibility of advancing work might therefore be affected.

Conclusion No 9: Scope of a Protocol

The feasibility of a Protocol will be affected by the methods of establishment of legal parentage that are included. If a Protocol is limited to recognition of legal parentage established by judicial decision, it would be more feasible for some States because it is easier to deal with the recognition of a judicial decision and because these States would have more confidence that domestic rules with respect to the establishment of legal parentage were followed. However, for other States, it might be less feasible because legal parentage resulting from ISAs can be established by operation of law in many States that permit surrogacy, meaning that the legal parentage from these children and families would be excluded from scope.

The feasibility of extending the scope of a Protocol to legal parentage established by operation of law or an act will also be affected by the feasibility of doing so in a Convention.

Conclusion No 10: Possible approaches of a Protocol

Experts believed that a number of States might be attracted to an *a priori* model on the basis that it would better protect human rights. However, experts also concluded that because of the elaborate cross-border cooperation mechanisms, the higher degree of public authority involvement required in an *a priori* approach (both for States that regulate and those that prohibit surrogacy), and because it would imply acceptance of these practices before they have occurred, an *a posteriori* model would be more feasible.

Conclusion No 11: Rule of recognition by operation of law in a Protocol

A rule of recognition by operation of law of legal parentage established as a result of an ISA by judicial decision would be feasible to develop, but the attractiveness of a Protocol for States will depend on whether recognition is subject to conditions and / or grounds for refusal.

Conclusion No 12: Indirect grounds of jurisdiction in a Protocol

Experts agreed that a rule of recognition of legal parentage established by judicial decision would be more feasible if it were subject to an *exclusive* indirect ground of jurisdiction in a Protocol, although some experts were of the view that States might also be interested in other approaches to a jurisdictional filter, such as including one or more connecting factors as grounds for refusal.

Conclusion No 13: Traditional PIL grounds for refusal in a Protocol

Experts agreed that it would be feasible to subject a rule on the recognition by operation of law of legal parentage established by judicial decision to traditional PIL grounds for refusal.

Conclusion No 14: Safeguards / Standards in a Protocol

There was general agreement that to be feasible, a Protocol would need to include safeguards / standards.¹ However, with respect to overall feasibility, experts had different views on:

¹ 6th EG Report (Nov. 2019), para. 25.

- which safeguards / standards to include;
- how safeguards / standards should be included (*i.e.*, as part of a definition, as conditions for recognition, as grounds for refusal, as general obligations, with an opt-in or opt-out mechanism, through a declaration procedure); and
- how these should feature, either (i) as uniform safeguards / standards directly included in a Protocol or (ii) as State-specific safeguards / standards included indirectly in a Protocol (*i.e.*, safeguards / standards applicable in the domestic law of the State of establishment of legal parentage).

Experts acknowledged that safeguards / standards represent a challenge. Notwithstanding this, most of them considered that having uniform safeguards / standards is the best way to guarantee the protection of the human rights of the child and the persons concerned. Others considered that State-specific safeguards / standards would be preferable as they would give States flexibility to decide whether another State Party's legal framework was sufficient to apply a Protocol with that State.

Conclusion No 15: Document accompanying the judicial decision in a Protocol

An optional multilingual form accompanying judicial decisions to help facilitate their readability would be feasible, in principle.

A judicial decision that is accompanied by a certificate that verifies compliance in the State of origin with uniform safeguards / standards or with the applicable legal framework including for the establishment of legal parentage would be feasible to develop and could increase the attractiveness of a Protocol for some States.

A certificate could decrease the interest of other States due to administrative burdens and / or the view that a judicial decision provides sufficient verification on its own of compliance with applicable safeguards / standards. For some experts, this may be the case especially if a Protocol allows States to choose with which States they will establish treaty relations.

Conclusion No 16: A *posteriori* models discussed for a Protocol

Experts had different views on which a *posteriori* model they thought would be more feasible.

For many experts, a model including agreed uniform safeguards / standards directly in a Protocol, some of which feature as conditions for recognition, would be more feasible.

For some experts, a model including State-specific safeguards / standards indirectly in a Protocol (*i.e.*, safeguards / standards in the domestic law of the State of establishment of legal parentage) with some grounds for refusal only, would be more feasible.

The Group also discussed the possibility that a future Protocol could also combine elements of each of these models.

Conclusion No 17: Other scope matters for both a Convention and a Protocol

The Group agreed that it would be desirable to include legal parentage established as a result of a domestic surrogacy arrangement in the scope of a Convention or Protocol. If CGAP approves further work, in-depth discussions would be necessary to assess:

- the feasibility of including legal parentage established as a result of a domestic surrogacy arrangement either within the scope of a Convention or a Protocol;
- under either instrument, the feasibility of dealing with such legal parentage in a separate chapter and / or creating separate rules; and

- the impact that favouring one option over the other might have on the overall feasibility of both instruments.

The Group agreed that it would be desirable to include legal parentage established by domestic adoption following a domestic or ISA in the scope of a Convention or Protocol. If CGAP approves further work, in-depth discussions would be necessary on:

- whether such adoptions should be treated as domestic adoptions or as legal parentage established as a result of a surrogacy arrangement, and whether there should be a distinction between domestic adoptions following a domestic surrogacy arrangement and domestic adoptions following an ISA;
- whether rules on such adoptions should therefore feature in a Convention or Protocol; and
- the impact that favouring one option over the other might have on the overall feasibility of both instruments.

The Group agreed that it would be desirable that a Convention apply to legal parentage established as a result of ART. In case of legal parentage established as a result of ART involving a third-party individual (donor), feasibility will depend in part on determining whether rules should be more similar to Convention rules (not involving ART) or Protocol rules in relation to ISAs (which involve ART). Differing rules would need to be justified.

ANNEX II – RELATED DOCUMENTS: LIST OF DOCUMENTS PRODUCED FOR THE HCCH PARENTAGE / SURROGACY PROJECT

	CONCLUSIONS AND DECISIONS FROM CGAP
	2015 CGAP, C&R No 5
	2016 CGAP, C&R No 15
	2017 CGAP, C&R Nos 8-10
	2018 CGAP, C&R Nos 6-7
	2019 CGAP, C&R Nos 7-12
	2020 CGAP, C&D Nos 5-9
	2021 CGAP, C&D Nos 5-6
	2022 CGAP, C&D Nos 5-6
Short title used in footnotes	REPORTS OF THE EXPERTS' GROUP
1 st EG Report (Feb. 2016)	First Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 15-18 February 2016)
2 nd EG Report (Feb. 2017)	Second Report of the EG on the Parentage / Surrogacy Project (meeting of 31 January – 3 February 2017)
3 rd EG Report (Feb. 2018)	Third Report of the EG on the Parentage / Surrogacy Project (meeting of 6-9 February 2018)
4 th EG Report (Oct. 2018)	Fourth Report of the EG on the Parentage / Surrogacy Project (meeting of 25-28 September 2018)
5 th EG Report (Feb. 2019)	Fifth Report of the EG on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019)
6 th EG Report (Nov. 2019)	Sixth Report of the EG on the Parentage / Surrogacy Project (meeting of 29 October – 1 November 2019)
7 th EG Report (Oct. 2020)	Seventh Report of the EG on the Parentage / Surrogacy Project (meeting of 12 – 16 October 2020)
8 th EG Report (Feb. 2021)	Eighth Report of the EG on the Parentage / Surrogacy Project (meeting of 15 – 17 February 2021)
9 th EG Report (July 2021)	Nineth Report of the EG on the Parentage / Surrogacy Project (meeting of 5 – 9 July 2021)
10 th EG Report (Nov. 2021)	Tenth Report of the EG on the Parentage / Surrogacy Project (meeting of 15 – 19 November 2021)
11 th EG Report (March 2022)	Eleventh Report of the EG on the Parentage / Surrogacy Project (meeting of 28 March – 1 April 2022)

	(PRELIMINARY) REPORTS AND STUDY
2011 Preliminary Note	2011 Preliminary Note on the PIL issues surrounding the status of children
2012 Preliminary Report	2012 Preliminary Report on the issues arising from ISAs
2014 Report on Desirability and Feasibility	2014 Report on the Desirability and Feasibility of further work on the Parentage / Surrogacy Project
2014 Study	2014 Study of Legal Parentage and the issues arising from ISAs
2015 Updating Note	2015 The Parentage / Surrogacy Project: An Updating Note
	BACKGROUND NOTES
1 st Background Note (Jan. 2016)	Background Note for the First meeting of the Experts' Group (EG) on the Parentage / Surrogacy Project (meeting of 15-18 February 2016)
2 nd Background Note (Dec. 2016)	Background Note for the Second meeting of the EG on the Parentage / Surrogacy Project (meeting of 31 January – 3 February 2017) – Only available for Members of the HCCH on the HCCH Secure Portal
3 rd Background Note (Dec. 2017)	Background Note for the Third meeting of the EG on the Parentage / Surrogacy Project (meeting of 6 – 9 February 2018) – Only available for Members of the HCCH on the HCCH Secure Portal
4 th Background Note (Aug. 2018)	Background Note for the Fourth meeting of the EG on the Parentage / Surrogacy Project (meeting of 25 – 28 September 2018) – Only available for Members of the HCCH on the HCCH Secure Portal
5 th Background Note (Jan. 2019)	Background Note for the Fifth meeting of the EG on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019) – Only available for Members of the HCCH on the HCCH Secure Portal
6 th Background Note (Sept. 2019)	Background Note for the Sixth meeting of the EG on the Parentage / Surrogacy Project (meeting of 29 October – 1 November 2019) – Only available for Members of the HCCH on the HCCH Secure Portal
7 th Background Note (Sept. 2020)	Background Note for the Seventh meeting of the EG on the Parentage / Surrogacy Project (meeting of 12 – 16 October 2020) – Only available for Members of the HCCH on the HCCH Secure Portal