

Council on General Affairs and Policy – March 2020

Document	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	Prel. Doc. 2 of November 2019
Title	Report of the Experts' Group on the Parentage / Surrogacy Project (meeting from 29 October to 1 November 2019)	
Author	Experts' Group on the Parentage / Surrogacy Project	
Agenda item	III.2	
Mandate(s)	C&R Nos 7-12 of the March 2019 Council on General Affairs and Policy (CGAP) of the HCCH	
Objective	To report on the sixth meeting of the Experts' Group	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
Annexes	List of participants of the sixth meeting of the Experts' Group on the Parentage / Surrogacy Project	
Related documents	<ul style="list-style-type: none"> - Prel. Docs Nos 3A of February 2015, 3B and 3C of March 2014 and C&R No 5 of the March 2015 CGAP - Prel. Doc. No 3 of February 2016 and C&R No 15 of the March 2016 CGAP - Prel. Doc. No 2 of February 2017 and C&R Nos 8-10 of the March 2017 CGAP - Prel. Doc. No 2 of February 2018 and C&R Nos 6-7 of the March 2018 CGAP - Prel. Docs Nos 2A of October 2018, 2B of February 2019 and C&R Nos 7-12 of the March 2019 CGAP 	

I. INTRODUCTION

1. From 29 October to 1 November 2019, the Experts' Group on Parentage / Surrogacy (the Group) met in The Hague. This sixth meeting of the Group was attended by 22 Experts, 3 Observers and members of the Permanent Bureau (PB) of the HCCH. The Experts represented 22 Member States from various regions. The list of participants is included as an Annex.

2. The meeting took place in accordance with the Conclusions and Recommendations reached by the Council on General Affairs and Policy (CGAP) at its last meeting in March 2019, at which CGAP:

- endorsed the continuation of the work of the Group, with a focus on proposing provisions for inclusion in (1) a general private international law (PIL) instrument on the recognition of foreign judicial decisions on legal parentage (Convention), and (2) a separate protocol on the recognition of foreign judicial decisions on legal parentage rendered as a result of an international surrogacy arrangement (ISA)(Protocol);
- acknowledged that the feasibility of making provisions in relation to applicable law rules and cooperation requires further study and discussion;
- underlined that any work by the HCCH in relation to ISAs should not be understood as supporting or opposing surrogacy;
- decided that intercountry adoptions, including those within the scope of the 1993 HCCH Intercountry Adoption Convention, should be excluded from the scope of any future instrument; and
- 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 Group at a later stage.

II. COMMON SOLUTIONS TO AVOID LIMPING LEGAL PARENTAGE

3. The Group recalled the desirability of this project on legal parentage for all families and States. It was noted that the work of the Group has been acknowledged by a number of regional and international stakeholders. Experts reaffirmed the pressing need for common internationally-agreed solutions to avoid limping legal parentage. The aim of any future instrument would be to provide predictability, certainty and continuity of legal parentage in international situations for all individuals concerned, taking into account their rights, the *United Nations Convention on the Rights of the Child* and in particular the best interests of the child.

III. DRAFT CONVENTION

4. The Group made significant progress in developing draft provisions for a possible future HCCH Convention dealing with the recognition of foreign judicial decisions on legal parentage.

A. Recognition of judgments on legal parentage

1. Objects

5. The Group agreed that the Convention should provide for recognition of judgments on legal parentage rendered in Contracting States only. Experts also discussed the advantages and disadvantages of a possible optional extension mechanism to enable Contracting States that so choose to recognise judgments on legal parentage from non-Contracting States under the rules of the Convention.

2. Scope and definitions

6. Experts confirmed that the Convention should apply to all judgments on legal parentage whatever the decision may be called, whether constitutive or declaratory in nature and whether rendered following a proceeding to establish or contest legal parentage.

7. The Group reaffirmed that the Convention should apply to the legal parentage of any person regardless of age.

8. The Group agreed that the Convention should only apply to the recognition of judgments on legal parentage and not to the rights and obligations which derive therefrom, such as maintenance, succession or nationality. The Group also agreed that the provision on exclusions from scope be formulated as simply as possible.

9. While discussing the scope of the Convention, the Group acknowledged that domestic adoptions (where both the child and the (prospective) adoptive parents are habitually resident in the same State),¹ are a means by which legal parentage can be established. Given the overarching aims of the Convention, most Experts agreed that it would be appropriate to include domestic adoptions within its scope. The Group agreed, however, that provisions relating to the recognition of legal parentage flowing from domestic adoptions would require further discussion because of the challenges that can arise in distinguishing between domestic adoptions and intercountry adoptions, and the need to ensure that the proposed Convention does not undermine in any way the 1993 HCCH Intercountry Adoption Convention.²

3. Recognition of foreign judgments on legal parentage by operation of law

10. The Group agreed that the recognition regime should occur by operation of law and be subject to the satisfaction of certain indirect grounds of jurisdiction in the State where the judgment was issued.

a. Indirect grounds of jurisdiction

11. The Group agreed on the need to limit the grounds for indirect jurisdiction to ensure that there is sufficient proximity between the subject matter and the State of judgment. The Group agreed on the following alternative indirect grounds of jurisdiction that would have to be fulfilled at the time when proceedings were initiated:

- (a) the child's habitual residence, noting the need for another ground in exceptional circumstances based on presence such as for refugee children;
- (b) the respondent's habitual residence, noting that the State might be the respondent in certain jurisdictions.

12. The Group recognised that in certain cases a real and substantial connection could be a very useful ground, provided that further clarification be given as to the application of such a connecting factor.

¹ Domestic adoption in this Report is to be understood in comparison with intercountry adoption as defined in Art. 2 of the 1993 HCCH Intercountry Adoption Convention ("a child habitually resident in one State has been, is being, or is to be adopted by spouses or a person habitually resident in another State"). For more information on this, please see the "HCCH Report on cross-border recognition of domestic adoptions", Prel. Doc. No 12 of December 2018, available on the HCCH website at < www.hcch.net >, under "Governance" then "Council on General Affairs and Policy".

² See "Conclusions and Recommendations of the Council on General Affairs and Policy (5-8 March 2019)", C&R No 13, available on the HCCH website at < www.hcch.net >, under "Governance" then "Council on General Affairs and Policy".

13. 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) should not be included in light of the subject matter of the proceedings (legal parentage).

b. Grounds for refusal of recognition

14. The Group discussed possible grounds for refusal of recognition. The Group agreed that the Convention should include the following alternative grounds: (i) a public policy exception, taking into account the best interests of the child; (ii) where the respondent did not have proper notice of the proceedings and an opportunity to be heard; and (iii) where there are inconsistent judgments or parallel proceedings. Experts also agreed that a ground of fraud should be included, but there was discussion as to whether such a ground should go beyond fraud in connection with a matter of procedure. Furthermore, the Group discussed whether providing the child with an opportunity to be heard should be a separate ground.

B. Other PIL techniques

15. As in the majority of cases legal parentage is not established by a judgment, the Group agreed that additional PIL techniques would be required if the Convention were to facilitate more fully the continuity of legal parentage.

1. Applicable law

16. The Group noted that uniform applicable law rules would help ensure the continuity of legal parentage cross-border in the absence of a foreign judgment on legal parentage (*i.e.*, where legal parentage is established by operation of law or following the act(s) of (an) individual(s)). Most Experts concluded that it would be beneficial to include such rules in the Convention.

17. Many Experts suggested that the same applicable law rules should apply at the time of the child's birth and also to a later establishment of legal parentage. Some Experts were of the view that different applicable law rules should apply depending on the timing of establishment of legal parentage, particularly following the act of a parent or putative parent.

18. The Group saw benefit in formulating the applicable law rules by reference to the methods by which legal parentage is established (that is, by (i) operation of law, and (ii) following the act(s) of (an) individual(s)). Some Experts underlined the importance of the same connecting factor applying to the establishment of legal parentage by operation of law or by an act so to ensure consistency in the outcome regardless of method.

19. The Group discussed how such rules could operate together with public documents. The Group concluded that further consideration on the content and the practical operation of such rules would be required.

2. Foreign public documents and legal parentage

20. In further considering provisions regarding the acceptance of foreign public documents, the Group concluded that it would be beneficial to include in the Convention a rule on the presumption of validity of legal parentage recorded in a public document issued by a designated competent authority. The Group noted that such a PIL technique would not of itself ensure the continuity of legal parentage in cross-border cases, but could provide greater certainty if combined with an applicable law rule.

21. The Group agreed that further consideration needs to be given to additional rules on the material validity of public documents relating to legal parentage. Such rules might operate in conjunction with uniform applicable law rules. Some Experts noted that in cases where the public document was constitutive of legal parentage in the State of origin, a recognition approach might be appropriate. The feasibility of providing for such matters should be the subject of further discussion.

22. Experts discussed the possible advantages of having, upon request, a multilingual model form to facilitate the translation and circulation of foreign public documents. Such a form could also specify the effects of the public document under national law, and the authority issuing the document. Some Experts suggested that consideration be given to an international certificate on legal parentage.

C. Comprehensive PIL instrument

23. Some Experts noted that direct grounds of jurisdiction would further increase legal certainty and reduce the risk of conflicting judgments on legal parentage, and believed it would be helpful to give further consideration to such grounds in conjunction with the PIL techniques discussed above. If direct grounds of jurisdiction could be agreed upon, Experts noted that it would be helpful to have an applicable law rule stating which law authorities should apply in exercising their jurisdiction under the Convention.

IV. DRAFT PROTOCOL

24. The Group reaffirmed that any future protocol on legal parentage established as a result of an ISA should not be understood as supporting or opposing surrogacy. Experts agreed that a protocol would help ensure the predictability, continuity and certainty of legal parentage resulting from ISAs. Most Experts were of the view that a protocol would also protect the best interests of the child and the fundamental rights of all individuals involved.

25. There was general agreement that a protocol should contain certain safeguards. Many Experts stated that any protocol could, as a consequence, also help to prevent bad practice in ISAs.

A. Recognition of judgments on legal parentage in ISA cases

1. Scope and definitions

26. Many Experts recommended that the Protocol should cover the recognition of legal parentage established in ISA cases only. Some Experts wished to explore how legal parentage resulting from domestic surrogacy arrangements,³ and how legal parentage resulting from surrogacy arrangements established by domestic adoption, could be covered in the Protocol or the Convention. How this would work in practice would require further careful consideration and study.

27. In considering draft definitions, the Group focussed on the terms “surrogacy arrangement”, “ISA” and “judgment on legal parentage rendered as a result of an ISA”. There was general agreement that surrogacy arrangements should be in writing, as this would promote transparency and protection of the parties involved. Experts also agreed that these arrangements need to be made pre-conception. Some Experts proposed that references to “surrogate mother” should be in a more neutral manner, and suggested “surrogate” or “surrogate woman” as alternatives for consideration.

28. The Group acknowledged that judgments concerning legal parentage in ISA cases generally would be rendered shortly after the child’s birth. Some Experts believed that the draft Protocol should also cover judgments rendered at points later in the child’s life. Some Experts recommended limiting the timeframe during which the judgment should be issued.

29. For the purposes of the meeting and to facilitate discussions, the Group considered draft provisions prepared prior to the meeting.

³ Domestic surrogacy arrangement in this Report is to be understood as a surrogacy arrangement where the surrogate mother and the intending parent(s) have the same habitual residence.

2. Recognition of foreign judgments on legal parentage in ISA cases by operation of law

30. The Group considered possible criteria for the recognition of judgments on legal parentage in ISA cases. Most Experts agreed that judgments rendered post-birth in the State of origin of the ISA⁴ should be recognised by operation of law in all other Contracting States provided that certain conditions (still to be agreed) under the Protocol had been met. In this regard, many Experts re-emphasised, in line with their Conclusions from the previous fifth meeting,⁵ the central importance of including minimum standards or safeguards to protect the rights and welfare of the parties involved and, in particular, the best interests of the child. These Experts recalled that safeguards in a recognition framework were the most important feature of an instrument dealing with ISAs.⁶

3. Conditions and certification

31. To facilitate recognition, the Group discussed the possibility of certification (for example, by way of a model form) to verify that conditions under the Protocol have been met. Certification should include confirmation that ISAs were permitted under the law of the State of origin at the time the ISA was entered into and executed. Experts had differing views on who should be competent to provide such certification in the State of origin of the ISA.

32. The Group reaffirmed the central importance of the free and informed consent of the surrogate mother throughout the ISA as a condition for recognition of the judgment on legal parentage. There were different views on the level of detail needed to express this requirement in the Protocol.

33. The Group agreed on the importance of the preservation of information concerning the child's origins. Some Experts were of the view that such a provision should be a condition for recognition, whereas most Experts favoured having it in the general obligations of the Protocol.

34. Many Experts also underlined the need to provide access to such information under appropriate guidance for children, as a general obligation. A few Experts noted that the access to information should rather be a condition for recognition.

35. The Group also discussed to what extent the Protocol should address or limit the involvement of intermediaries in ISAs. It was noted that further consideration would need to be given to defining "intermediary" for the purposes of the Protocol. Some Experts suggested that a provision on the identification and authorisation of intermediaries be included in the general obligations of the Protocol. A few Experts suggested that it should be among the conditions for recognition. Other aspects regarding the authorisation and supervision of intermediaries were discussed.

36. The Group also discussed possible minimum standards concerning the eligibility and suitability of the surrogate mother, and the eligibility and suitability of the intending parents.

37. The Group underlined the desire to prevent the abduction, sale of, or traffic in women and children in the context of ISAs, taking into account the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 20 May 2000*. Experts discussed how a recognition framework could operate in a way that does not unintentionally facilitate the sale of children. They also considered whether the inclusion of additional specific

⁴ The State of origin of the ISA is to be understood as the State of habitual residence of the surrogate mother, the State pursuant to whose law the surrogacy arrangement is entered into and the State in which all parties intend the child(ren) to be born.

⁵ See "Report of the Expert's Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019)", Prel. Doc. No 2 B of February 2019, available on the HCCH website at < www.hcch.net >, under "Governance" then "Council on General Affairs and Policy", para. 17.

⁶ *Ibid.*

safeguards would be needed to respond to this concern, or if the public policy exception, in combination with mentioning the aim of prevention in the Preamble and objects, would be sufficient.

38. A few Experts were of the view that multiple conditions for recognition may undermine the overarching aims of the Protocol, in particular because failure to satisfy a condition would result in non-recognition of the child's legal parentage pursuant to the Protocol, leaving the child in a state of limping legal parentage. It was suggested that it may be more feasible to structure some of the proposed safeguards as grounds for non-recognition and /or general obligations, rather than conditions for recognition.

39. Many Experts suggested that in addition to the *a posteriori* approach reflected in the current draft provisions for a Protocol, it would be useful to develop draft provisions for an *a priori* approach.⁷ The feasibility of such an approach should be the subject of further discussion.

40. There was general support for intersessional work as described below (see para. 43) to assist the Group in developing provisions along these lines.

B. Legal parentage established in ISA cases by means other than a judgment

41. Noting that in many States of origin in ISA cases judicial determinations of legal parentage are usually not necessary, the Group discussed how the Protocol could also be applied to legal parentage when it is not established by a judgment. There was general support in the Group for exploring how a certification mechanism might operate in the absence of a judgment.

V. RELATIONSHIP BETWEEN THE DRAFT INSTRUMENTS

42. In principle, the Group favoured an approach whereby States could choose to become a party to both instruments or only one of them. Some Experts proposed that consideration be given to possible mechanisms to serve as a bridge between the two instruments. Experts agreed that, at this time, the Group should continue its work by considering the draft instruments in parallel.

VI. CONCLUSIONS AND RECOMMENDATIONS AS TO FUTURE WORK

43. Given the progress made, the Group recommends that CGAP approve that the Experts' Group continue its work on a Convention and a Protocol, in order to complete the drafting of provisions for the two instruments along the lines discussed in the present Report. To this end, the Group recommends meeting on at least two more occasions, and reporting to CGAP in March 2022 in order for CGAP to make a final decision on whether to proceed with the project. An oral report on progress would be presented at CGAP in 2021. The Group also recommends that intersessional work be carried out with the assistance of a smaller group of experts to refine the drafting of provisions for the Convention and the Protocol and to develop possible other approaches to those instruments. The intersessional work would start as soon as possible, using information and communication technology wherever possible and appropriate.

44. In this regard, the Group recommends that CGAP direct the PB to undertake the necessary work with a view to preparing the meetings of the Group prior to the 2022 meeting of CGAP. The Group encourages the PB to continue to allocate the relevant resources to this project. The Group supports the continuing use of consultants and encourages Member States to put secondees at the disposal of the PB for this project.

⁷ See "Report of the Expert's Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019)", *supra* note 5, para. 21.

ANNEX



October / octobre 2019

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

From 29 October to 1 November 2019

List of participants

MEMBERS

Argentina

Professor Nieve RUBAJA, Legal Adviser, Ministry of Foreign Affairs; Professor in Private International Family Law and Researcher, University of Buenos Aires, Buenos Aires

Australia

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

Brazil

Ms Lalisa FROEDER DITTRICH, Specialist in Public Policies and Government Management, Department of Asset Recovery and International Legal Cooperation, Ministry of Justice, Brasília

Canada

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

China

Mr HUO Zhengxin, Professor of Law and Vice Dean of the Faculty of International Law, China University of Political Science and Law

France

Ms Sabine CARRE, Judge, *Bureau du droit des personnes et de la famille (C1)*, *Direction des Affaires civiles et du Sceau*, Ministry of Justice, Paris

Germany

(Unable to attend)

India

Mr Himanshu GOENKA, Legal Officer, Legal & Treaties Division, Ministry of External Affairs, New Delhi

Israel

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

Italy

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

Japan

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

Mexico

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

The Netherlands

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

New Zealand

Ms Margaret CASEY, QC, Barrister, Auckland

Philippines

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

Russian Federation

Ms Olga KHAZOVA, Associate Professor, The Moscow School of Social Economic Sciences, Moscow

South Africa

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

Spain

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

Sweden

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

Switzerland

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

United Kingdom

(Unable to attend)

Ukraine

Ms Lyudmyla RUDA, Deputy Head of the Department for International Legal Assistance, Head of the Unit on Conclusion of International Treaties on Legal Assistance, Directorate for International Law, Ministry of Justice, Kyiv

United States of America

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

OBSERVERS***Representatives for intergovernmental organisations*****United Nations Children's Fund (UNICEF)**

Ms Kirsten DI MARTINO, Senior Child Protection Adviser, Programme Division, New York

Representatives for non-governmental organisations**International Academy of Family Lawyers (IAFL)**

Ms Rachael KELSEY, Director, SKO Family Law Specialists; Secretary to the IAFL, Edinburgh

International Social Service (ISS)

Ms Mia DAMBACH, Director ISS/IRC, Coordinator Advocacy and Policy Development, International Social Service, Geneva

PERMANENT BUREAU OF THE HCCH

Hague Conference on Private
International Law
Churchillplein 6 B
2517 JW THE HAGUE
The Netherlands
Tel: +31 (70) 363 3303
Fax: +31 (70) 360 4867

e-mail: secretariat@hcch.net

Ms Laura MARTÍNEZ-MORA, Secretary

Ms Capucine PAGE, Legal Officer

Ms Hannah BAKER, Consultant to the Permanent Bureau (*remotely*)

Mr Keith LOKEN, on Secondment at the Permanent Bureau

Mr Michael WELLS-GRECO, Consultant to the Permanent Bureau

Ms Yoon Jung CHOI, on Secondment at the Permanent Bureau

Ms Janaína ALBUQUERQUE, Intern

Ms Mathilde PRÉNAS, Senior Administrative Assistant

Mr Willem VAN DER ENDT, General Services Officer