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Children's rights related to surrogacy

Report[1]
Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly
Rapporteur: Ms Petra DE SUTTER, Belgium, Socialist Group

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[1] Reference to committee: Doc. 13562, Reference 4071 of 3 October 2014.

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A. Draft recommendation[2]

1. The Parliamentary Assembly recommends that the Committee of Ministers:

1.1. consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to surrogacy arrangements;

1.2. collaborate with the Hague Conference on Private International Law (HCCH) on private international law issues surrounding the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements, with a view to ensuring that the views of the Council of Europe (including those of the Parliamentary Assembly and the European Court of Human Rights) are heard and taken into account in any multilateral instrument that may result from the work of the HCCH.

[2] Draft recommendation adopted by the Committee at its meeting on 21 September 2016 in Paris, with 17 votes in favour, 14 votes against and 2 abstentions

C. Explanatory memorandum by the Rapporteur, Ms De Sutter

1. Introduction

1. The Committee on Social Affairs, Health and Sustainable Development appointed me the Rapporteur on "human rights and ethical issues related to surrogacy" on 28 January 2015.[3] In the past 16 months, I presented several versions of a draft report on the subject to the Committee after having organised a hearing[4] and undertaken two fact-finding visits.[5] However, the Committee (narrowly) rejected the amended preliminary draft resolution and amended preliminary draft recommendation at its meeting in Paris on 15 March 2016.

2. In view of this experience, I believe that members of the Committee – and probably also of the Assembly as a whole – are too divided on the human rights and ethical issues related to surrogacy to find anything but circumstantial majorities in relation to some of the issues at stake. While I believe that there is a large majority in favour of prohibiting for-profit surrogacy arrangements,[6] I no longer believe that such a majority exists on whether or not altruistic surrogacy arrangements should be allowed, nor on whether we should encourage states which do allow for-profit surrogacy arrangements to set minimum standards with a view to protecting surrogate mothers and surrogate-born children from abuse.

3. I would thus like to focus my report on what we can agree on, as discussed during our Committee meeting in Strasbourg on 20 April 2016: the importance of putting the best interests of the child first. As I made clear in all versions of my draft report, I am of the opinion that for-profit surrogacy arrangements should be prohibited. Most children born of international surrogacy arrangements are, in fact, born of for-profit surrogate arrangements (estimations reach 98-99%). Thus, the need to put the best interests of the child first dovetails neatly with the proposal to ban for-profit surrogacy arrangements.

4. This is why I would like to propose to change the title to "children's rights related to for-profit surrogacy."[7] I want to make clear that, with this change in title, this is no longer a report on surrogacy as such, and I will thus take no position in this report on the ethical issues related to surrogacy in general, notably in relation to the rights of intending parents or women's rights and vulnerabilities, which certainly are of major concern in relation to surrogacy. I will focus this report on for-profit surrogacy as it impacts on the rights of surrogate-born children, with the aim of ensuring that their rights are effectively protected.

5. On 10 March 2016, Ms Caroline Roux (Vice-Chairwoman of UIAGA, Director of VITA International) addressed a petition entitled "No maternity traffic" to the President of the Assembly on behalf of more than 100,000 signatories. The petition[8] was transmitted to our Committee by the Assembly Bureau on 26 May 2016 to be taken into account in the context of the preparation of this report. The petition asks the Parliamentary Assembly "to condemn in clear terms all forms of surrogacy as constituting a violation of rights and human dignity".

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[3] As the Head of the Department of Reproductive Medicine at the University Hospital of Gent, I have had to deal with isolated cases of domestic altruistic surrogacy arrangements in the past. However, I have not done so for several years, and have no financial or other interests in surrogacy. Allegations that I have treated foreign surrogacy patients or have collaborated with foreign clinics in surrogacy arrangements are false.

[4] At our Committee meeting in Paris on 11 September 2015, a hearing was held with the following experts, the minutes of which were approved and declassified at our meeting on 1 October 2015, see AS/Soc (2015) PV 6 add: Ms Laura Martínez-Mora, Principal Legal Officer, Permanent Bureau of the Hague Conference on Private International Law; Professor Susan Golombok, Director, Centre for Family Research, Faculty of Social and Political Sciences, University of Cambridge, United Kingdom; Professor René Frydman, Foch Hospital, Department of Obstetrics, Gynaecology and Reproductive Medicine, Suresnes, France.

[5] The Committee authorised two fact-finding visits, to the UK (which took place on 26-27 October 2015), and to Ukraine (which took place on 9-10 November 2015). I would like to take this opportunity to express my heartfelt thanks to everyone involved in the preparation of these visits – in particular, to Mr Nicholas Wright, Secretary to the UK delegation and his team, and to Mr Andriy Korniychuk, Secretary to the Ukrainian delegation and his team - , as well as to everyone who took the time to meet me.

[6] All definitions used in this report are those of the Hague Conference on Private International Law (HCCH), which has prepared a glossary of terms (see Appendix).

[7] The Committee, at its meeting in Paris on 21 September 2016, decided to change the title to Children's rights related to surrogacy.

[8] Published as AS/Soc/Inf (2016) 06.

6. In light of the explanations given above (paragraphs 1-4), the preliminary draft resolution I am proposing in this report will condemn in clear terms all for-profit surrogacy arrangements, but take no position on other forms of surrogacy. My personal opinion on altruistic forms of surrogacy, which concern only an extremely limited number of children in Europe, is well-known: I do not believe that altruistic surrogacy should be prohibited (for many reasons[9]), but it should be limited to gestational surrogacy, be tightly regulated and be legally available only to resident nationals of the jurisdiction in question[10]. Again, since our Committee could not reach a clear majority in accepting nor rejecting this opinion, the present report will not deal with altruistic surrogacy arrangements.

7. I continue to believe, however, that the lack of a multilateral legal instrument on parentage related to surrogacy increases the risk of children's rights abuses. Before the Hague Conference on Private International Law (HCCH), and subsequently the Council of Europe, adopted their conventions on adoption, the situation regarding international adoptions was as unregulated as international surrogacy and the resulting legal parentage issues are now. I thus believe that the Assembly should encourage both Council of Europe member States and the Committee of Ministers to collaborate with the HCCH.

2. The case against for-profit surrogacy

8. For-profit surrogacy arrangements are defined by the HCCH in the following way (see appended glossary):

> "A surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her "reasonable expenses". This may be termed "compensation" for "pain and suffering" or may be simply the fee which the surrogate mother charges for carrying the child. This may be a gestational or a traditional surrogacy arrangement."

9. As the HCCH points out, the defining characteristic of a for-profit surrogacy arrangement is that the surrogate receives financial remuneration from the intending parents which goes beyond "reasonable expenses". The following countries were identified in a recent report[11] as countries in which such for-profit surrogacy is legal, performed on a large scale, where there are legal measures allowing intending parent(s) to obtain legal parentage, and there is no nationality, domicile or habitual residence prerequisite for the intended parents. These include: Russia, Ukraine, the US states of Alabama, Arkansas, California, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, West Virginia and Wisconsin, as well as India (NB: since 2013, not for homosexual couples anymore[12]; a bill is currently pending before parliament to restrict surrogacy arrangements to resident national heterosexual couples married for at least 5 years with health problems and with a close relative as the surrogate) and Uganda.

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[9] If, as is often the case for instance, a sister or a good friend of a woman who cannot carry a child to term for health reasons, having been screened herself and having been provided with evidence-based information about known and potential risks, living conditions and outcomes for surrogate mothers, enters into an an altruistic gestational surrogacy agreement with the intending parents based on free and informed consent in a jurisdiction where such an agreement is legal, tightly regulated and available only to resident nationals of said jurisdiction, the risk of an adverse outcome for both the surrogate mother and the surrogate-born child is extremely small. See, for example, the research undertaken by Professor Susan Golombok on surrogate-born children born in the UK in such conditions.

[10] The United Kingdom combines elements of good practice in this regard: for-profit surrogacy is strictly prohibited, while altruistic surrogacy is only legally available to UK residents through three non-profit agencies. While I do not believe that the situation is perfect, as it is only possible for intending parents to apply for a parental order in a short window of time (six weeks to six months following the birth of the child), there do not seem to have been many problematic cases in the last 30 years.

[11] Katarina Trimmings and Paul Beaumont, "General Report on Surrogacy", Chapter 28, in: Katarina Trimmings and Paul Beaumont (eds) "International Surrogacy Arrangements", May 2013, Kindle-edition downloaded on 23 March 2015. Regarding the situation in the European Union, please also see: Directorate-General for Internal Policies, Policy Department C, Legal and Parliamentary Affairs: A comparative study on the regime of surrogacy in EU member States, 2013.

[12] It is unclear whether surrogacy is still available to foreign heterosexual couples at the time of writing of this report, pending passage of the "Assisted Reproductive Technology Bill". However, at the end of 2015, the Indian Council of Medical Research, a government body, sent a notice to clinics ordering them to stop receiving new cases of foreigners for for-profit surrogacy with immediate effect.

10. How many children are born of international for-profit surrogacy arrangements? Though most agree that the number has been rising for a while, reliable estimates are hard to come by. The NGO International Social Service (ISS) estimates that over 20,000 children are born through surrogacy annually[13]; the BBC, citing official Indian estimates, reported 5,000 surrogate babies born each year in India alone[14]. In the Ukraine, 396 cycles of IVF with surrogate mothers in private clinics (state clinics do not offer surrogacy) were reported to the Ministry of Health on a voluntary basis in 2014. In any case, for-profit surrogacy has an important financial dimension: in India alone, it is estimated to be worth $2.3bn[15] - of which only about one third usually goes to the surrogate mother[16], with the biggest payments seeming to be made to agencies, middlemen, and doctors/clinics.

11. Most surrogate mothers in for-profit arrangements, especially in developing countries, are relatively poor and not well-educated. They run all the risks of a medically-induced pregnancy and childbirth.[17] Moreover, they are particularly vulnerable because they are bound to give up the child shortly after birth – usually, their (full) payment will depend on it. This brings with it psychological risks, compounded if the surrogate is also the genetic mother, receives no proper counselling and/or cannot stay in contact with the child. There is also the risk that the intending parents will interfere with the pregnancy (placing limitations on the decision-making of surrogate mothers regarding their health or even the continuation of the pregnancy), or refuse to accept and thus abandon a child which is not healthy or otherwise not wanted anymore.

12. There have been a number of scandals in recent years involving abuses of surrogate mothers in international, for-profit surrogacy arrangements – where women in countries such as India or Nepal (which has since banned such arrangements) have reportedly been isolated on "baby-farms", their personal freedoms severely curtailed, far from their families[18], subjected to practices posing unnecessary medical risks, paid a pittance (or nothing at all in case of miscarriage or stillbirth)[19]. But even in countries such as the USA, some surrogate mothers have reported being abused by intending parents or intermediaries.[20]

13. One of the most famous scandals, the "Baby Gammy"-case, illustrates well the reasons for which I believe that for-profit surrogacy arrangements should be forbidden – even though the case is not as clear-cut as was initially claimed in the media. Australian couple Wendy Li and David Farnell made international headlines in 2014 when they engaged a Thai surrogate (reportedly for less than the equivalent of 10,000 Euros) but only took home one of the twins born, Pipah, leaving behind Gammy, who has Down's syndrome. The surrogate, Pattaramon Chanbua, applied for legal custody of Pipah after learning that Farnell had been jailed for child sex offences nearly two decades ago. The responsible family court in West Australia ruled in April 2016 that reports the parents had "abandoned" Gammy in Thailand (and tried to access the infant's trust

[13] http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf.
[14] "Despair over ban in India's surrogacy hub" (BBC 22 November 2015), http://www.bbc.com/news/world-asia-india-34876458.
[15] Ibid.
[16] In the Ukraine, agencies advertise packages for 37,000 USD (of which 10-20,000 USD would go to the surrogate mother, and 4,000 USD to the clinic); in India, the fee (just part of the total cost) starts in the region of 17,000 GBP – of which only about one third goes to the mother; in the US, 100,000 USD is not uncommon, of which the surrogate mother also receives about one third in a fee and expenses (costs can rise significantly in case of multiple births because health insurance for twins alone can cost 100,000-120,000 USD). See, for example, http://surrogacyukraine.com/programs/about-surrogacy, "The fraught world of UK surrogacy" (BBC 21 August 2014), www.bbc.com/news/magazine-28864973, "Surrogate babies: Where can you have them, and is it legal?" (BBC 6 August 2014), www.bbc.com/news/world-28679020. These figures were also confirmed by several interlocutors during my fact-finding visits.
[17] Which can include serious diseases (such as eclampsia during pregnancy and hemorrhage in childbirth), some of which can result in infertility or death. The overall maternal mortality rate in 2010 was 34/100,000 live births in Russia, 21 in the USA, and 7 in Israel, to give some examples. See the World Factbook, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html.
[18] Since surrogacy is culturally frowned upon in India, it appears that some Indian surrogate mothers prefer to leave their homes during the more advanced stages of pregnancy to avoid stigmatisation, in which case their isolation may be voluntary. See: Jeffrey Kirby: Transnational Gestational Surrogacy: Does It Have to Be Exploitative?, The American Journal of Bioethics, 14:5, p. 24-32, downloaded on 16 October 2015.
[19] See the examples given in Marcy Darnovsky and Diane Besson, "Global Surrogacy Practices", Working Paper No. 601 of the International Institute of Social Studies at the Erasmus University, Rotterdam (the Netherlands), December 2014.
[20] See, for example, the film "Breeders – A Subclass of Women?" (2014), produced by the Center for Bioethics and Culture Network, www.cbc-network.org.

fund) were untrue and the result of a "media frenzy".[21] The judge ruled that the conflicting accounts between the Farnells and Ms Chanbua came about because of cultural and language differences, and that it was little wonder such misunderstandings arose "when a woman's body is rented for the benefit of others".

14. As this case illustrates, for-profit surrogacy arrangements, in particular international ones, should be prohibited as a violation of human dignity because of the high, inherent risks of:

14.1. reducing children to commodities to be bought and sold, and putting them at risk of abandonment or abuse;

14.2. exploiting surrogate mothers, who cannot give their consent "freely, unconditionally, and with full understanding of what is involved".[22] This concern is the most obvious when the surrogate mothers are not native English speakers[23] and/or illiterate, but even the pure fact that a "life-changing" amount of money changes hands can put into question the validity of the consent given.[24]

3. Protecting children's rights

15. The United Nations Convention on the Rights of the Child (UNCRC) has guaranteed the following rights to children for over 25 years now:

a. the right to be registered immediately after birth and the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents (Article 7);
b. the right not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (Article 9);
c. the right for the best interests of the child to be a primary consideration (Article 3).

16. It is clear that the child cannot be blamed for being born out of a surrogacy arrangement; thus, the rights of the child cannot be curtailed simply because the intending parents flouted national law when it forbids surrogacy. This is the essence of the European Court of Human Rights judgment in *Mennesson & Labassee v. France*: the best interests of the child prevail. In this landmark judgment of June 2014, the Court, availing itself of the "best interests of the child"-principle, clarified that France had violated Article 8 of the European Convention on Human Rights in refusing to recognise the legal parent-child relationship of a genetic father with his surrogate-born children. However, some questions remain. While France can now no longer presume that all foreign birth certificates established following an international surrogacy arrangement are invalid[25], with all the effects on the child(ren) concerned regarding legal parentage and citizenship,[26] it is unclear whether it is a violation of a child's Article 8 rights to deny him/her the ability to have his/her legal parentage, established abroad, recognised (or established again) with a non-genetically related intending parent.[27] The European Court of Human Rights judgments also seem to leave open the question of whether the receiving country can

[21] See "Baby Gammy's twin can stay with Australian couple despite father's child sex offences", by Michael Safi in the Guardian, 14 April 2016, http://www.theguardian.com/lifeandstyle/2016/apr/14/baby-gammys-twin-sister-stays-with-western-australian-couple-court-orders. According to the judgment there was "only a very low risk of [Pipah] being abused if she stays", as an extensive safety plan had been developed and put in place in partnership with the state's child protection service, prohibiting Farnell from being alone with the child.

[22] See the Permanent Bureau of the HCCH, "The parentage/surrogacy project: an updating note", Prel. Doc. No. 3A, February 2015, Annex II, page ii.

[23] Most surrogacy contracts are drawn up in English.

[24] In Ukraine, our interlocutors did not hide the fact that most surrogates received "life-changing" amounts of money (with which they would buy a house for their family or finance the higher education of their own children), and that the compensation fee was a primary motivation for them.

[25] It should be noted that the execution of the *Mennesson & Labassee v. France judgments* is still pending before the Committee of Ministers, though the subsequent case-law of the French courts in other cases has been respectful of the judgments.

[26] See: Claire Lengrand et Anaïs Planchard: *Vers un renforcement en France du statut juridique de l'enfant issu d'une GPA effectuée à l'étranger?, La Revue des droits de l'homme*, 27 February 2015, available here: http://revdh.revues.org/1054.

[27] See, for example, the analysis of the judgment in the updating note on the parentage/surrogacy project drawn up by the Permanent Bureau of the HCCH, Preliminary Document No. 3A of February 2015, p. 4-7.

also resort to its adoption procedure instead of recognising the legal parentage established abroad.[28]

17. Following these decisions, the French Court of Cassation held that foreign birth certificates of children, born under surrogacy arrangements in Russia in two separate cases of intending (genetic) fathers, could be transcribed in the civil register. The principle that the best interest of the child prevails was confirmed in another case - where there was no genetic link between the intending parents and the child - , *Paradiso & Campanelli v. Italy* (judgment of 27 January 2015), where the ECtHR also spelled out that it is necessary that a child should not be disadvantaged by the fact that he was born by a surrogate mother.[29] However, this judgment was appealed by the Italian government, and is being judged by the Grand Chamber.[30]

18. On 21 July 2016, the European Court of Human Rights delivered a judgment in the cases of *Foulon v. France* and *Bouvet v. France,* which concerned the non-recognition in France of the acknowledgment of paternity of intending (biological) fathers of children born to surrogates in India. Despite the change in French case-law since the *Mennesson & Labassee v. France* judgments, legal parentage had not been established (with Mr Foulon having exhausted all legal options and remedies). The Court thus came to the same conclusion as in *Mennesson & Labassee v. France*: the right to respect of the children's privacy had been violated by France, and awarded each child 5 000 Euros in respect of non-pecuniary damage. It is important to note that all these judgments against France find no violation of Article 8 of the Convention (right to respect for their family life) of the applicant parents, only of the surrogate-born children. One further case against France is currently still pending before the European Court of Human Rights: *Laborie v. France* concerns the non-recognition of Ukrainian birth certificates in France with respect to two children born to a surrogate.

19. It is actually not that easy to apply both the UNCRC and the ECtHR judgments in practice, because, for example, the definition of who is a child's parent depends on the legal definition in national law, and this can differ between the different national jurisdictions involved. Theoretically, Article 7 could be interpreted in a way that it applies to maximum three "mothers" and three "fathers": the mother who has born the child (the surrogate mother), the mother who is the genetic mother (the egg donor), the intending mother, the genetic father (the sperm donor), the intending father, and the husband of the surrogate mother. The child born of such a surrogacy arrangement could be interpreted to have the right to know and to be cared for by all these six people – which, of course, rarely happens in practice, in particular in international surrogacy arrangements (ISAs) of the for-profit kind.

20. As the HCCH has pointed out,[31] "States' approaches to the establishment and contestation of legal parentage, particularly in the context of children born by means of assisted reproductive technology ("ART") and ISAs, vary significantly. Where children are connected with more than one State or move cross-border, the application of different rules on jurisdiction, applicable law and the international circulation of foreign public documents (i.e., birth certificates, civil status documents) and judicial decisions (i.e., rules on recognition) has led to situations of uncertain and "limping" legal parentage."[32]

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[28] Adoption procedures are usually more lengthy, and can have an uncertain outcome. Ibid, p. 5.

[29] *"il est necessaire qu'un enfant ne soit pas désavantagé du fait qu'il a été mis au monde par une mère porteuse"*

[30] A hearing was held on 9 December 2015 (see http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2535812_09122015&language=lang&c=&py=2015 to listen to a recording of the webcast). It is uncertain when the final judgment will be available.

[31] The Hague Conference on Private International Law (HCCH) has been working on the feasibility of drawing up a multilateral instrument in the field of parentage/ surrogacy for several years now. It has formed an Expert Group, which met for the first time mid-February 2016, to explore the feasibility of advancing work in the area of "private international law issues surrounding the status of children" – i.e., cross-border problems arising in relation to legal parentage, including those resulting from ISAs. The Group determined that, "owing to the complexity of the subject and the diversity of approaches by States to these matters, definitive conclusions could not be reached at the meeting as to the feasibility of a possible work product in this area and its type or scope. The Group was of the view that work should continue and at this stage consideration of the feasibility should focus primarily on recognition. The Group therefore recommends to Council that the Group's mandate be continued". Following consideration of this at their March 2016 meeting, the Council: "welcomed the Report of the Experts' Group on Parentage / Surrogacy. Noting the progress made at the Group's first meeting, the Council invited the Group to continue its work in accordance with its mandate of 2015, and requested the Permanent Bureau to convene a second meeting of the Group before the next meeting of the Council. The consideration of the feasibility should focus primarily on recognition. The Group will report to the Council in 2017."

[32] Paragraph 9 of the Background note for the meeting of the experts' group on the parentage/surrogacy project, drawn up by the Permanent Bureau of the HCCH, January 2016, https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf.

21. In practice, when the legal parentage of a child needs to be decided in a cross-border surrogacy case, the HCCH has noted that "national and regional developments appear to be directed towards securing continuity in the civil status of children".[33] This is because there is an important human rights dimension to the status of children: "The unity, stability, and continuity of an individual's personal status is of a social interest. A certain civil status is a constituent element of a child's personal identity."[34] In addition, cross-border surrogacy can also be a source of statelessness for children, in violation of Article 7 of the UNCRC.

22. However, even if, in practice, most countries (including jurisdictions which prohibit for-profit surrogacy arrangements) manage to find solutions for children born abroad of such arrangements eventually, the solutions are not always ideal, and not necessarily in the best interest of the child. What exactly is in the child's best interest is also open to dispute: is it in a child's best interest, for example, to be sent back to a foreign surrogate mother who does not wish to care for the child in a surrogacy-friendly jurisdiction, or to stay with the intending parents who do wish to care for the child in a jurisdiction where surrogacy is prohibited, or to be taken into care by the State in either of the jurisdictions? In any case, being abandoned by the intending parents (in particular, if the surrogate mother refuses to care for the child, as well) because the child is not healthy or otherwise not wanted anymore (for example, because the intending parents have separated), is definitely not in the child's best interest.[35]

23. The child's vulnerability in all this is very clear. Whether children born of surrogate mothers also run psychological risks due to the lack of maternal attachment of the surrogate mother during pregnancy, and the "abandonment" straight after birth, is disputed, as scientific studies are few and far between, and often plagued by inherent bias.[36] However, in some international surrogacy cases, courts are already unable to trace surrogate mothers a few months after the birth of the child(ren) concerned – it is thus highly unlikely that all children born as a result of ISAs will be able to trace their genetic and birth origins later in life, which is not only a violation of the child's right to know his/her origins, but can also have negative psychological (and even physical[37]) repercussions on the child.

4. Conclusions and recommendations

24. The vast majority of for-profit surrogacy arrangements are across state borders (e.g. in the USA) or across national borders, usually involving intending parent(s) from jurisdictions in which for-profit surrogacy is prohibited and surrogates in jurisdictions where for-profit surrogacy is legal and where there are legal measures allowing intending parent(s) to obtain legal parentage. The reasons why intending parent(s) "vote with their feet" in this way are multiple: infertility tends to be the most prevalent one.[38] The alternative of adoption is not always available to these intending parents, for example because of national laws and regulations which set conditions they cannot fulfil (such as nationality requirements, age-limits, the need to be married, in a heterosexual stable relationship, etc.). However, some intending parents also choose surrogacy over adoption because they want their "own" child, which is going to be genetically related to at least one of them; because they have no realistic prospect of being able to adopt a child in a relatively short timeframe; or because they fear not to pass or would indeed not pass adoption screenings.

25. But what does this mean for the child(ren) born of such cross-border surrogacy arrangements in practice? Such children face various risks from multiple actors (intending parents, surrogate mothers, third

[33] Ibid, paragraph 31.
[34] Ibid, paragraph 31.
[35] In 2014 alone, two cases in which a twin was abandoned made the headlines, see for 2014 examples: the Permanent Bureau of the HCCH, "The parentage/surrogacy project: an updating note", Annex II, page i.
[36] See the discussion on the study undertaken by Professor Susan Golombok in AS/Soc (2015) PV 6 add.
[37] Physical repercussions are possible if the genetic mother (surrogate mother or egg donor) transmits a gene implicated in a certain disease (for example, breast cancer), and the child cannot test early for that gene in order to manage risk.
[38] The otherwise rather liberal Ukrainian legislation, which allows for-profit surrogacy (including for foreigners), but outlaws traditional surrogacy, restricts surrogacy to heterosexual married couples with a medical need. (Thus, for example, a ballerina wishing to preserve her figure would not be able to access surrogacy in Ukraine, whether she was married or not).

parties, states in which the children are born, states to which the children are connected via their intending parents), as noted above:

25.1. falling victim to child trafficking;

25.2. falling victim to abandonment and/or abuse;

25.3. becoming stateless or being left with "limping" parentage;

25.4. having their right to know their origins violated, with the attendant possible negative psychological (and even physical) repercussions.

26. The application of the "best interest of the child"-principle by states confronted with individual children born abroad of international for-profit surrogacy arrangements generally leads to acceptable – though not expeditious - outcomes even in states which prohibit some or all forms of surrogacy domestically, via adoptions, parental orders, humanitarian leave to remain, etc. However, there is no legal certainty as these states do not want these case-by-case solutions to be seen as an endorsement of international surrogacy arrangements which may lead to their further proliferation.

27. As I have already underlined in previous versions of this draft report, I believe that there is no right "to a child", but that children have rights that need to be respected[39]. And these rights need to be respected by all actors, including states. I do understand why it is so difficult to harmonize national laws in a way which respects children's rights to legal parentage without *de facto* legitimizing cross-border for-profit surrogacy arrangements, which would *in fine* not be in these children's best interest, either.[40]

28. The ideal way to solve this problem would, of course, be for all countries to prohibit for-profit surrogacy, which comprise an estimated 98-99% of all surrogacy arrangements. Indeed, I have proposed this solution all along. The European Parliament included a paragraph in a resolution of December 2015[41] calling for the prohibition of gestational, for-profit surrogacy. Surprisingly, however, the European Parliament only called for the prohibition of gestational for-profit surrogacy, not traditional for-profit surrogacy (which I personally consider the worst form of surrogacy). It is for this reason that I propose in the preliminary draft resolution that member States prohibit all forms of for-profit surrogacy in the best interest of the child.

29. However, it is a fact that, due to the absence of a binding legal instrument on the matter, each country is free to decide for itself which stance it wants to take domestically. In other words, it is unlikely that all countries which currently allow for-profit surrogacy and practice it on a large scale (including two Council of Europe member States, Ukraine and Russia), or the ones where it is practiced illegally but tolerated (as in Greece[42])

[39] It was interesting that several of my interlocutors in Ukraine claimed that having a child was a human right. The USA also ranks the "right to procreate" a constitutional right which is read to encompass access to surrogacy arrangements in many US states.

[40] I have trouble to understand how some parliamentarians and NGOs – such as the NGO which submitted the "No maternity traffic" petition together with a background note dated March 2016 entitled "Surrogacy is incompatible with international law" – argue (for example, in said background note, or in the French parliament on 8 June 2016) that ISAs should produce no legal effect, even in cases when there is a genetic link between at least one parent and the child. Following the clear rulings of the European Court of Human Rights that such a position (which was held by France prior to the Court's judgments) is a violation of the child's human rights, this seems contradictory to me – the violation of a child's rights cannot be in his/her best interest.

[41] In its resolution of 17 December 2015 on the European Union's (EU) Annual Report on Human Rights and Democracy in the World 2014 and the EU's policy on the matter, the European Parliament, in paragraph 115: "condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments". See www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0470. It should be noted that there is no reference to surrogacy or surrogacy arrangements in the European Union's Annual Report on Human Rights and Democracy in the World 2014 (see www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-human-rights-report/.

[42] See "The cost of a child", a documentary by Wild Angle Productions (April 2016) that describes the illegal for-profit surrogacy arrangements which are practiced in Greece since this country allowed surrogacy for non-Greek residents in 2014. https://youtu.be/0kUhUtlg4sM.

will decide to prohibit for-profit surrogacy just because the Parliamentary Assembly of the Council of Europe has so recommended. It seems even more unlikely that such countries would agree to be bound by a legal instrument prohibiting for-profit surrogacy, whether such a legal instrument were developed at a European or international level. Since there is little, if any cross-border movement of surrogate-born children between countries which prohibit for-profit surrogacy, a legal instrument prohibiting for-profit surrogacy would have no effect on children's rights.

30. In these circumstances, I believe that, as a minimum requirement, those countries which continue to allow for-profit surrogacy should be required to only accept resident nationals of their own state and country for surrogacy arrangements. Indeed, there is already an interesting trend in this direction which has been noted by the HCCH[43]. If this requirement were included in an international legal instrument to which both countries prohibiting and countries allowing for-profit surrogacy were bound, it would have the effect of reducing surrogacy arrangements to less than 1-2% of their current number, and avoid cross-border movement of children born of for-profit surrogacy arrangements altogether, thus effectively protecting these children from violations of their rights linked to parentage and nationality.

31. In conclusion, I thus propose that the Assembly recommend that:

31.1. member States prohibit all forms of for-profit surrogacy in the best interest of the child;

31.2. member States and the Committee of Ministers collaborate with the HCCH with a view to including, as a minimum requirement, a restriction of access to surrogacy arrangements to resident nationals of their own state and country in any multilateral instrument that may result from the HCCH's parentage/surrogacy project;

31.3. member States take care not to violate children's rights when taking measures to uphold public order and discourage recourse to surrogacy arrangements;

31.4. and the Committee of Ministers explore the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to for-profit surrogacy arrangements.

32. Finally, there are many ways in which most of our member States could make adoption a more viable alternative to surrogacy, thus providing a child in need with loving parents and fulfilling infertile couples' desire of having a child – the best outcome for all.

[43] See paragraph 22 of the Background note for the meeting of the experts' group on the parentage/surrogacy project, drawn up by the Permanent Bureau of the HCCH, January 2016, https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf: Thailand has prohibited surrogacy arrangements for profit as well as the use of surrogacy by foreign and same-sex couples; and the Mexican State of Tabasco has restricted surrogate arrangements to Mexican nationals and to cases where the intending mother (aged 25 to 40) is medically unable to bear a child. It appears India is also in the process of barring foreign couples from accessing surrogacy.

Appendix: [Revised] Glossary prepared by the Hague Conference on Private International Law[44]

International surrogacy arrangement	A surrogacy arrangement entered into by intending parent(s) resident[45] in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State. Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or for-profit[46] in nature (see below).
Traditional surrogacy arrangement	A surrogacy arrangement where the surrogate provides her own genetic material (egg) and thus the child born is genetically related to the surrogate. Such an arrangement may involve natural conception or artificial insemination procedures. This may be an altruistic or for-profit arrangement (see below).
Gestational surrogacy arrangement	A surrogacy arrangement in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate. Such an arrangement will usually occur following IVF treatment. The gametes may come from both intending parents, one, or neither. This may be an altruistic or for-profit arrangement (see below).
For-profit surrogacy arrangement	A surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her "reasonable expenses". This may be termed "compensation" for "pain and suffering" or may be simply the fee which the surrogate mother charges for carrying the child. This may be a gestational or a traditional surrogacy arrangement. N.B. It is often difficult to draw the line between what is an altruistic surrogacy arrangement and what is a for-profit arrangement. For example, if a surrogate is unemployed prior to conception but can claim "reasonable expenses", including loss of earnings, for the arrangement, is this arrangement still "altruistic"?
Altruistic surrogacy arrangement	A surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her "reasonable expenses" associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate. This may be a gestational or a traditional surrogacy arrangement. Such arrangements often (but not always) take place between intending parent(s) and someone they may already know (*e.g.*, a relative or a friend).
Receiving State	The State in which the intending parents are resident and to which they wish to return with the child, following the birth.

[44] Annex A of Preliminary Document No. 3 B of March 2014 on "The desirability and feasibility of further work on the parentage / surrogacy project", downloadable here: http://www.hcch.net/upload/wop/gap2015pd03b_en.pdf.

[45] The term habitually resident is purposely not used here. It may usually be the case that both the intending parent(s) and the surrogate are "habitually resident" in these States. However, the definition has been drawn broadly (even including those cases where a surrogate is merely "present" in the other State) to include all possible cases where problems are occurring: e.g., this would include situations where women have been "trafficked" to a permissive State for the purposes of being surrogates.

[46] Following feedback from intending parents that the word "commercial" (as used in the Glossary attached to Prel. Doc. No 10 of March 2012) was offensive for some intending parents that have undertaken these arrangements and that, whilst such arrangements may involve compensation beyond expenses for a surrogate mother, they are not usually "commercial" in nature, this term has been replaced with the term "for-profit".

State of the child's birth	The State in which the surrogate gives birth to the child and in which the question of the child's legal parentage usually first arises. This will usually be the State in which the surrogate is resident. However, in some cases the surrogate may move to a State specifically for the birth.[47]
Surrogate (mother)	The woman who agrees to carry a child (or children) for the intending parent(s) and relinquishes her parental rights following the birth. In this paper, this term is used to include a woman who has not provided her genetic material for the child. In some States, in these circumstances, surrogates are called "gestational carriers" or "gestational hosts".
Intending parent(s)	The person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement.
Gamete (egg) donor	The woman who provides her eggs to be used by other person(s) to conceive a child. In some States, such "donors" may receive compensation beyond their expenses. The question of the anonymity of "donors" also varies among States.
Gamete (sperm) donor	The man who provides his sperm to be used by other person(s) to conceive a child. In some States, such "donors" may receive compensation beyond their expenses. The question of anonymity of "donors" also varies among States.
"Legal parentage" or the legal parent(s)	The person(s) considered to have acquired the legal status of being the "parents" of the child under the relevant law, and who will acquire all the rights and obligations which flow from this status under that law. In surrogacy situations, this may not (indeed, often will not) coincide with the genetic parentage of the child (i.e., those who have provided their genetic material).
"Genetic parentage" or the genetic parents	The person(s) who have provided their genetic material for the conception of the child. In some languages, this is referred to as "biological parentage". In surrogacy situations, such person(s) may not be (and often will not be), the legal parent(s) of the child.

[47] Or may have been "trafficked" there for this purpose.