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Committee on Social Affairs, Health and Sustainable Development

Human rights and ethical issues related to surrogacy

Rapporteur: Ms Petra DE SUTTER, Belgium, SOC

Outline for a report

A. Introduction

1. On 1 July 2014, the Committee's Chairperson, Mr Valeriu Ghiletschi, and others tabled a motion for a resolution entitled "Human Rights and ethical issues related to surrogacy" (Doc. 13562). This motion raised concerns about the practice of surrogacy, in particular "commercial surrogacy", whose unregulated nature, according to the motion, poses concerns regarding "the exploitation of women in disadvantaged positions and fertility tourism resulting in a black market of 'baby selling'". The authors of the motion thus asked the Assembly to further examine the issues arising from the practice of surrogacy and to discuss tools for addressing the problem.

2. On 3 October 2014, the motion was referred to our Committee for report and to the Committee on Equality and Non-Discrimination for opinion. I was appointed Rapporteur on 28 January 2015 by the lead Committee. At our upcoming Committee meeting during the April part-session 2015 in Strasbourg, I intend to present this outline report to the Committee. Please refer to the suggested timetable for future work in Chapter C of this outline report for more details: I would like to present this report to the Assembly during the January 2016 part-session.

B. Suggested outline for the report

3. Since the first time a (traditional, for-profit¹) surrogacy arrangement was contested in court in the late 1980s in New Jersey (USA)², the "Baby M"-case, countries (and, in the USA, states) have grappled with regulating what has by now become a billion-dollar-a-year business³ which does not respect borders. It is estimated that, in the USA alone, thousands of babies are born to surrogate mothers a year.⁴

¹ For definitions, please see the glossary in Appendix I, prepared by the Hague Conference on Private International Law (HCCH).

² In the United Kingdom, it was an American agency-brokered (traditional, for-profit) surrogacy arrangement with a British surrogate mother, the "Baby Cotton"-case, which prompted regulation.

³ Mary 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, page 18, citing ATDT.

⁴ Clyde Haberman, "Baby M and the Question of Surrogate Motherhood", Retro report, New York Times, 23 March 2014.

4. Different countries (and different US states) have taken different approaches to surrogacy. The approaches were categorised as follows in a recent study:⁵

4.1. “Surrogacy-friendly jurisdictions”: for-profit surrogacy is legal, performed on a large scale, there are legal measures allowing intended parent(s) to obtain legal parentage, and there is no nationality, domicile or habitual residence prerequisite for the intended parents. Examples include: India, Uganda, 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, Russia, and the Mexican State of Tabasco. The following sub-categories can be identified: jurisdictions where for-profit surrogacy is practiced on an unregulated basis, where it is allowed by judicial precedent, and where it is allowed by statute:

4.2. “Anti-surrogacy jurisdictions”: these jurisdictions outlaw surrogacy in all its forms – China, France, Germany, the Australian state of Tasmania, and certain US states (for example, Michigan, New York and the District of Columbia).

4.3. “Surrogacy-neutral jurisdictions”: these include jurisdictions where surrogacy is regulated but only an altruistic form is permitted (examples include: Australia, Greece, Israel, New Zealand, South Africa, the United Kingdom, and several US states), which prohibit for-profit surrogacy arrangements and limit surrogacy to a relatively small number of altruistic arrangements. A second sub-type are countries where all forms of surrogacy remain unregulated, neither expressly banned nor expressly permitted, which include Argentina, Belgium, Brazil, the Czech Republic, Guatemala, Hungary, Ireland, Japan, the Netherlands, Spain, Venezuela, and the Mexican states of Coahuila and Mexico City, the Northern Territory of Australia, and some US states. Any surrogacy arrangement in this second sub-category (whether for-profit or altruistic) would be considered void and unenforceable.

5. The policy approach behind the ban on all forms of surrogacy sees surrogacy as a reification of human beings, and thus as a violation of the child’s and the surrogate mother’s human dignity. Consequently, several countries have, in the past, refused to accept the legal parentage of intended parents, leaving children with “limping” legal status with all its consequences on nationality, residence, and children’s civil rights. While the European Court of Human Rights delivered a landmark judgment in June 2014 (*Mennesson & Labassee v. France*), in which 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, many questions remain.⁶

6. Since there is obviously no consensus on how to regulate surrogacy nationally, how best to ensure that at least the human rights of children and surrogate mothers are *de facto* protected when it comes to the increasingly common international surrogacy arrangements? Policy-makers and lawyers have grappled with the question of whether regulation and prohibition are mutually exclusive alternatives, but, at a recent conference,⁷ there was wide agreement that it is important to:

⁵ 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.

⁶ 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.

⁷ International Forum on Intercountry Adoption and Global Surrogacy, Thematic Area 5, Global Surrogacy Practices, held in August 2014, the proceedings of which were summarised in the Working Paper No. 601 of the International Institute of Social Studies at the Erasmus University Rotterdam (the Netherlands).

- Eliminate practices that pose unnecessary medical risks to surrogates and children;
- Eliminate restrictions on the personal autonomy of surrogates;
- Establish and maintain records to give participants in surrogacy arrangements the option of acquiring information on their origins and/or future contact should the mutual desire or need for it arise;
- Carry out a basic screening of commissioning parents to reduce risks of abandonment or abuse of children born via surrogacy;
- Provide evidence-based information about known and potential risks, living conditions and outcomes for surrogate mothers, gamete providers and commissioning parents;
- Heighten regulation and oversight of intermediaries.⁸

7. The question remains open whether these recommendations should take the form of “soft” or “hard” law. 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.⁹ It is currently forming an Expert Group, which is to meet for the first time in the first half of 2016, and is exploring the option of drafting a binding International Convention on the subject on the model of the Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption. A second question is whether there should be complementary action of the “soft” or “hard”-law kind at the Council of Europe level.

8. My suggested report outline is thus as follows:

- I. Introduction
- II. The legal situation:
 - a. at national level
 - b. at international level
- III. Possible ways of protecting the human rights of children and surrogate mothers in international surrogacy agreements
- IV. Conclusions and recommendations

C. Suggested timetable for future work

Date	Action
<i>April 2015 part-session Committee meeting</i>	Consideration of this outline report
<i>19 May 2015 Committee meeting</i>	Committee hearing
<i>11 September 2015 Committee meeting</i>	Consideration of an introductory memorandum
<i>October 2015 part-session Committee meeting</i>	Consideration of a draft report

⁸ List taken from working paper no. 601, page 37.

⁹ The HCCH has undertaken a number of highly informative studies, available at: http://www.hcch.net/index_en.php?act=text.display&tid=178.

23 November 2015 <i>Committee meeting</i>	Consideration of a revised draft report Adoption of a draft resolution
January 2016 <i>part-session</i>	Debate in the Plenary Assembly

Appendix I: [Revised] Glossary prepared by the Hague Conference on Private International Law¹⁰

International surrogacy arrangement	A surrogacy arrangement entered into by intending parent(s) resident ¹¹ 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 ¹² 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

¹⁰ 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.

¹¹ 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.

¹² 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”.

	<p>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).</p>
Receiving State	The State in which the intending parents are resident and to which they wish to return with the child, following the birth.
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. ¹³
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.

¹³ Or may have been "trafficked" there for this purpose.