



General Assembly

Distr.: General
15 July 2019

Original: English

Seventy-fourth session

Item 68 (a) of the preliminary list*

**Promotion and protection of the rights of children:
promotion and protection of the rights of children**

Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and any other child sexual abuse material, submitted in accordance with Assembly resolution [73/155](#).

* [A/74/50](#).



Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material

Summary

In the present report, submitted pursuant to General Assembly resolution [73/155](#), the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, describes the activities undertaken in relation to the discharge of her mandate since her previous report to the Assembly ([A/73/174](#) and [A/73/174/Corr.1](#)).

She also presents a thematic study on safeguards for the protection of the rights of children born from surrogacy arrangements. The report is supplementary to her previous report to the Human Rights Council on surrogacy and sale of children ([A/HRC/37/60](#)).

The thematic study contains an analysis of the international legal framework and specific violations to the rights to identity, access to origins and to a family environment. It then provides a review of existing safeguards and subsequently proposes a set of safeguards for the protection of the rights of children born from surrogacy arrangements.

Contents

	<i>Page</i>
I. Introduction	3
II. Activities carried out by the Special Rapporteur	3
A. Conferences and engagement with the stakeholders	3
B. Country visits	3
III. Study on safeguards for the protection of the rights of children born from surrogacy arrangements	4
A. Objectives, scope and methodology	4
B. Ongoing international initiatives	5
C. International legal framework	5
D. Safeguards on the protection of the rights of children born from surrogacy arrangements	11
E. General considerations	15
IV. Conclusions and recommendations	18
A. Conclusions	18
B. Recommendations	19

I. Introduction

1. The present report, submitted pursuant to General Assembly resolution [73/155](#), contains information on the activities undertaken by the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, during the period from August 2018 to June 2019.

2. The report also includes a thematic study on safeguards for the protection of the rights of children born from surrogacy arrangements. It aims to follow up on last year's thematic report on surrogacy and sale of children ([A/HRC/37/60](#)), presented at the thirty-seventh session of the Human Rights Council.

II. Activities carried out by the Special Rapporteur

A. Conferences and engagement with stakeholders

3. On 18 and 19 September 2018, the Special Rapporteur attended the second meeting of the Group of Experts on responses to violence against children, organized by the Council of Europe, at which she presented the conclusions and recommendations on combating and preventing the sale and sexual exploitation of children through the implementation of the Sustainable Development Goals from a children's rights-based perspective contained in her report to the seventy-third session of the General Assembly ([A/73/174](#) and [A/73/174/Corr.1](#)). On 19 and 20 November, the Special Rapporteur attended the inaugural meeting of the Interfaith Alliance for Safer Communities: Child Dignity Online. She continued her engagement with the WePROTECT Global Alliance, a multi-stakeholder platform dedicated to national and global action to end the sexual exploitation of children online. From 27 to 29 November, the Special Rapporteur attended the first regional dialogue in the Latin America and Caribbean region, entitled "On the road to equality", dedicated to the thirtieth anniversary of the adoption of the Convention on the Rights of the Child.

4. On 5 March 2019, the Special Rapporteur presented her thematic report on the sale and sexual exploitation of children in the context of sports to the Human Rights Council and engaged in the subsequent interactive dialogue with representatives of Member States and civil society. A panel discussion was held on the subject on 7 March, attended by representatives of Member States, United Nations agencies, sport federations and civil society.

5. On 27 May 2019, the Special Rapporteur addressed the high-level round table on Sustainable Development Goal 16 on peace, justice and strong institutions, addressing the pledge of the 2030 Agenda for Sustainable Development to leave no one behind. The round table was organized by the Department of Economic and Social Affairs of the Secretariat and the International Development Law Organization, and hosted by the Government of Italy, in Rome.

B. Country visits

6. The Special Rapporteur visited Malaysia from 24 September to 1 October 2018, at the invitation of the Government. She also conducted a country visit to Bulgaria from 1 to 8 April 2019. The Special Rapporteur thanks both Governments for their cooperation before, during and after the visits.

7. The Government of the Gambia has agreed to a visit by the Special Rapporteur from 21 to 29 October 2019, and the Government of Paraguay has also invited her for

a visit during the first half of 2020. The Special Rapporteur is grateful for the acceptance of her requests and looks forward to a constructive dialogue in the preparation for the missions.

III. Study on safeguards for the protection of the rights of children born from surrogacy arrangements

A. Objectives, scope and methodology

8. In her 2018 thematic report on surrogacy and sale of children submitted to the Human Rights Council (A/HRC/37/60), the Special Rapporteur explored the practice of surrogacy from the perspective of her mandate, focusing on the prohibition of the sale of children. In the context of potentially exploitative practices, she provided an analysis and recommendations on how to uphold the prohibition and prevention of the sale of children.

9. Given the lack of international consensus from the legal, normative, policy or ethical perspective on surrogacy, the Special Rapporteur decided to develop minimum safeguards for the protection of surrogate-born children to guide States in efforts to ensure that the best interests of the child are duly taken into consideration.

10. While the best interests of the child will be the key consideration for the purpose of the present report, the Special Rapporteur is aware that the international and national regulatory vacuum, as well as the existing disparity in surrogacy laws and practices, have potential implications on multiple stakeholders involved in surrogacy arrangements. She therefore recognizes that further efforts should be made to develop holistic empirical research that ensures the interlinkages between the practice of surrogacy and the fundamental human rights of equality and non-discrimination of all parties involved, in particular children, women who act as surrogates, gamete donors and intending parents.

11. With a view to ensuring an inclusive and comprehensive consultation for the report, a questionnaire focusing on the development of safeguards for the protection of the human rights of children born from surrogacy was sent out by the Special Rapporteur to Member States and relevant stakeholders.¹ The Special Rapporteur wishes to thank all of the stakeholders who provided a response to her questionnaire and welcomes the engagement demonstrated through this exercise.

12. A review of the literature on the topic of surrogacy was also undertaken and a consultation was held in Geneva with interested stakeholders on 24 June 2019. In preparation of her report, an additional consultation was also organized on the margins of the International Surrogacy Forum organized by the Cambridge Family Law Centre, the International Academy of Family Lawyers and the American Bar Association at the University of Cambridge on 27 and 28 June 2019.²

13. The analysis of the responses received from States presented herein by the Special Rapporteur follows the classification of surrogacy-related jurisdictions developed by a number of academics.³ They can be described as prohibitive; tolerant (where the jurisdiction does not regulate surrogacy itself, but deals with its consequences, in the form of regulating the transfer of parenthood from the surrogate to the intending parents); regulatory; and free market (where there are no specific

¹ See <https://www.ohchr.org/EN/Issues/Children/Pages/ChildrenBornSurrogacyArrangements.aspx>.

² See <https://www.family.law.cam.ac.uk/international-surrogacy-forum-2019>.

³ See for example Jens M. Scherpe, Claire Fenton-Glynn, Terry Kaan, *Eastern and Western Perspectives on Surrogacy*, Intersentia Studies in Comparative Family Law, 2019.

regulations on who can enter into surrogacy arrangements but private contract law determines the enforceability of arrangements between the parties). The Special Rapporteur also received input from States where surrogacy arrangements, whether altruistic or commercial, are prohibited and where no specific safeguards are known to be in place. The Special Rapporteur has not received any information from jurisdictions regulated solely by medical, administrative or judicial authorities.

B. Ongoing international initiatives

14. The report is intended to complement the focus on private international law of the project on parentage/surrogacy being carried out by the Hague Conference on Private International Law. Since 2011, the Permanent Bureau of the Hague Conference has been studying private international law issues in relation to the legal parentage of children, including questions emanating from international surrogacy arrangements.⁴

15. The focus of the report on safeguards will also complement the ongoing work of the International Social Service organization in developing international principles to ensure the protection of the rights of the child in the context of surrogacy arrangements.

16. In addition, in 2018, an inter-agency meeting on surrogacy and human rights was organized by several United Nations agencies, namely the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Population Fund (UNFPA) and the World Health Organization, in Bangkok. Participants emphasized the need for regulation at the international level and for legislative and policy approaches to surrogacy that are based on a human rights framework to protect the rights of all parties involved and prevent exploitative practices.

C. International legal framework

17. A preliminary analysis of the international human rights framework as it relates to surrogacy and the sale of children can be found in the above-mentioned report of the Special Rapporteur to the Human Rights Council ([A/HRC/37/60](#), paras. 34–37).

18. The primary consideration of the best interests of the child born from a surrogacy arrangement should be the starting point of any analysis of the international legal framework. No matter whether the State in question adopts a prohibitive, tolerant, regulatory or free-market approach to surrogacy arrangements, the child's best interests must always form the basis of decision-making. In this respect, general comment No. 14 (2013) of the Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration ([CRC/C/GC/14](#)) explains that best-interests assessments must balance protection factors, which may limit or restrict rights, and empowerment measures, which enable the full exercise of rights. It also explains that the child's best interests is a threefold concept, including a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.

19. In relation to surrogacy, in addition to giving full effect to the main parameters outlined in general comment No. 14 (2013), the best interests of the child must be ensured, at a minimum, by providing certainty of identity; of status; and of parenthood. Major issues arise in the context of jurisdictions where surrogacy

⁴ See <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

contracts are null and void, unenforceable or even subject to criminal sanctions, with grave repercussions for the child born from an international surrogacy arrangement.

20. It is therefore imperative that States put in place clear frameworks for the protection of children and for ensuring the primacy of their best interests, in the context of surrogacy arrangements. In light of the global demand for surrogacy, even the most domestically prohibitive States must deal with the consequences of surrogacy arrangements, and it is therefore in the best interests of children to ensure that there is a clear decision-making framework in place to provide clarity and certainty.

1. Non-discrimination and the right to health of surrogate-born children

21. Consistent with the general principles of the Convention on the Rights of the Child, it is crucial to ensure that laws, policies and practices in relation to surrogacy comply with the principles of non-discrimination, the best interests of the child, the right to life, survival and development, as well as the right of children to express their own views. In the case of international surrogacy arrangements, it is of particular importance that different national legal frameworks do not lead to discriminatory situations. In line with article 2 of the Convention on the Rights of the Child, States must guarantee the rights enshrined in the Convention without discrimination of any kind, irrespective, *inter alia*, of the child's birth. This is complemented by the second paragraph of article 2, which provides that States parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

22. In its general comment No. 7 (2005) on implementing child rights in early childhood ([CRC/C.GC/7/Rev.1](#)), the Committee on the Rights of the Child highlights that young children "may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values", and recalls the responsibility of States parties "to monitor and combat discrimination in whatever forms it takes and wherever it occurs – within families, communities, schools or other institutions".

23. This overarching principle of non-discrimination signifies that none of the rights of the child should be impacted by the method of his or her birth, including through a surrogacy arrangement. Specifically, the rights of the child to identity, access to origins and to a family environment should not be adversely affected by surrogacy. An example of good practice can be seen in the 2009 decision of the Colombian Constitutional Court which established that, even though surrogacy is not addressed in the legal order, children born through assisted reproductive technology, including surrogacy, have the same rights as other children.⁵

24. Furthermore, the right to health of the surrogate-born child must be guaranteed regardless of the method of birth or family environment. Article 24 of the Convention on the Rights of the Child provides that "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health", through, *inter alia*, the provision of appropriate prenatal and post-natal health care for mothers. The availability of information on genetic and gestational origins, detailed below, is of vital importance in the context of children's right to health.

⁵ See submission from Colombia, available from: <https://www.ohchr.org/EN/Issues/Children/Pages/SurrogacySubmissions.aspx> (all submissions received and referenced in the present report are available at this website).

2. Nationality and identity

25. Article 7 of the Convention on the Rights of the Child, based on article 24 of the International Covenant on Civil and Political Rights, protects the right of the child to identity, which includes the right to birth registration, the right to a name, the right to acquire a nationality, and the right, as far as possible, to know and be cared for by his or her parents.

26. The Human Rights Committee, through its general comment No. 17 on the rights of the child, states that the rights provided under article 24 of the International Covenant on Civil and Political Rights “should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child’s legal personality”.

27. At the regional level, the American Convention on Human Rights also provides for the right to a name and to a nationality (articles 18 and 20). The African Charter on the Rights and Welfare of the Child also includes the right to a name, to birth registration and to a nationality (article 6). Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) calls for the respect of private and family life, which the European Court of Human Rights has interpreted to include the right to establish details of their identity as individual human beings.⁶

Nationality and statelessness

28. The obligations contained in article 7 are of fundamental importance for the rights of the child born of surrogacy. The obligation to register births is essential to prevent abduction, sale of or traffic in children, while the right to acquire a nationality requires States to prevent statelessness of children as part of the right to identity. A legitimate concern arises in particular regarding risks of statelessness for surrogate-born children. In the context of international surrogacy arrangements across countries with different legislation or regulation, there is a real risk that a child will be unable to receive the nationality either of his parents or of the State where he or she was born.

29. For example, in the case of *Baby Manji Yamada v. Union of India* in 2008, there was a situation of potential statelessness. Following the divorce of the intending Japanese parents, the surrogate-born child was left in India without documentation as neither the Japanese authorities (who only recognize the surrogate as the mother) nor the Indian authorities (who do not allow adoption by single parents) were willing to recognize legal parentage between the child and the intending father. The Supreme Court of India finally decided to issue a certificate of identity to enable the surrogate-born child to travel to Japan with the father.⁷

30. In this respect, States must bear in mind, that they “are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he [or she] is born”, as expressed by the Human Rights Committee in its general comment No. 17.

Identity

31. In addition to the obligation to ensure the child’s birth registration and nationality under article 7, the Convention on the Rights of the Child establishes the obligation, through article 8, to “respect the right of the child to preserve his or her

⁶ *Mennesson v. France*, No. 65192/11, June 2014; *Labassee v. France*, No. 65941/11, 2014; *Foulon and Bouvet v. France*, No. 9063/14 and No. 10410/14, 2016.

⁷ *Baby Manji Yamanda v. Union of India and Anr*, Supreme Court of India, 2008.

identity, including nationality, name and family relations as recognized by law without unlawful interference”. States parties also have the obligation to provide a remedy in case of illegal deprivation “of some or all of the elements of his or her identity”.

32. Although surrogacy changes the constitutive elements of identity, by breaking the link between genetic, gestational and social parenthood, the fundamental rights of the child remain the same. From the child’s perspective, genetics, gestation and the exercise of parental responsibility are all a part of the constitutive elements of identity. The right of the child to birth registration, to a name, to a nationality and to know and be cared for by his or her parents, as far as possible, should not be affected by the method of the child’s birth. In particular, the Special Rapporteur notes that a refusal to grant legal recognition to children born through surrogacy arrangements by prohibitionist States can be detrimental to children’s best interest and lead to violations of the rights of the child.

33. In the cases of *Mennesson v. France* and *Labassee v. France* (refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States of America between children born as a result of surrogacy arrangements and their intending parents, with only the father having a genetic link with the child), the European Court of Human Rights noted that France had violated the child’s right to respect for privacy under article 8 of the European Convention on Human Rights. Specifically, the Court concluded that the non-recognition by authorities of parentage between the intended parents and the child, born through a gestational surrogacy arrangement in California, violated an essential aspect of the identity of individuals, namely the legal parent-child relationship. Most importantly, it underlined that the paramount best interests of the child outweighed the authorities’ aim to deter its nationals from violating national law on surrogacy.

3. Access to origins

34. The right of access to origins significantly overlaps with the right to identity, as a constitutive element of the latter right, as stipulated in the Convention on the Rights of the Child under article 7 on the right of the child to know and be cared for by his or her parents, as far as possible, and article 8, on the preservation of family relations.

35. Through its concluding observations, the Committee on the Rights of the Child has consistently called for respect of the right of children to access to information about their origins in the context of assisted reproductive technologies, with often a specific reference to surrogacy.⁸ The right of access to origins can also be particularly important for the right to health of the child born through surrogacy, as protected under article 24 of the Convention on the Rights of the Child.

36. While surrogacy is a relatively new phenomenon, there are also many lessons to be learned from the practice of adoption, where access to information on origins is also of particular importance. In its general comment No. 14, the Committee on the Rights of the Child underlined that, as part of the obligation to guarantee the identity of the child in the context of adoption and family separation, it is in the child’s best interests to have “access to the culture [...] of their country and family of origin, and the opportunity to access information about their biological family”. Similarly, in the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, the “need of a foster or an adopted child to know about his or her

⁸ See, inter alia, [CRC/C/CHE/CO/2-4](#), [CRC/C/ISR/CO/2-4](#), [CRC/C/IRL/CO/3-4](#) and [CRC/C/GEO/CO/4](#).

background should be recognized by persons responsible for the child's care, unless this is contrary to the child's best interests".

37. Moreover, the European Court of Human Rights, through its jurisprudence, has determined that "everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality" under the respect for private life provided by article 8 of the European Convention on Human Rights.⁹

38. In light of this, the Special Rapporteur wishes to emphasize that a blanket enforcement of anonymity for gamete donors, and/or the surrogate, including by only recording the intending parents on the birth certificate, will prevent the child born from a surrogacy arrangement from having access to his or her origins. This is a particularly common violation of the rights of the child and is amplified in the case of international surrogacy arrangements. For example in India, the Surrogacy (Regulation) Bill 2016 proposes that the appropriate authority must preserve details of surrogacy arrangements, but there is no provision for children to access this information. Conversely, under a new law in Thailand, information does not have to be preserved on either the surrogate, or the gamete donors. Under such an arrangement, children would not have any mechanism for finding out information on their genetic and biological origins.¹⁰

4. Family environment

39. In the preamble to the Convention on the Rights of the Child, the family is recognized "as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children" and as such it should receive the necessary protection and assistance.

40. It is important to note that the family is not defined under international human rights law and that the Human Rights Committee in its general comment No. 19 on the family stipulates that it is "not possible to give the concept a standard definition". Several other treaty bodies have also underlined that the concept of the family must be understood "in a wide sense" and "in accordance with appropriate local usage".¹¹ There is thus no definition of the family in the context of surrogacy under international human rights law.

41. The Convention on the Rights of the Child establishes, under article 7, the right of the child to be cared for by his or her parents, as far as possible. The importance of the family for the child is reinforced under article 5, on the States' respect of family's duties, article 9, on separation from parents, article 10, on family reunification, article 16, on family life, and article 18, on the role of the family for the upbringing of the child. Strong protections for the role of the family, and the family environment, also exist at the regional level, under the European Convention on Human Rights (article 8), the Charter of Fundamental Rights of the European Union (articles 7 and 24), the American Convention on Human Rights (article 17) and the African Charter on the Rights and Welfare of the Child (article 18).

42. The Convention on the Rights of the Child places strong emphasis on maintaining family life and preventing separation unless it is in the best interests of the child. In its general comment No. 14, the Committee on the Rights of the Child emphasizes that "separation should only occur as a last resort measure, as when the

⁹ *Mikulić v. Croatia*, No. 53176/99, 2002, para. 54.

¹⁰ See Jens M. Scherpe, Claire Fenton-Glynn, Terry Kaan, *Eastern and Western Perspectives on Surrogacy*, Intersentia Studies in Comparative Family Law, 2019, pp. 487–537.

¹¹ [A/HRC/31/37](#), para. 24.

child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child”. This is particularly the case for young children, who the Committee cautioned in its general comments No. 7, “are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary caregivers”.

43. Surrogacy arrangements may end in family separation, either temporary or permanent, following the non-recognition of parentage. There is a particular risk where international surrogacy arrangements are concluded by intended parents from countries where surrogacy is prohibited. In light of this very real risk of family separation, it is vital to maintain a very high threshold for the justification of a separation in accordance with international norms and standards.

44. The case of *Paradiso and Campanelli v. Italy*¹² illustrates the very real risk of separation of a surrogate-born child from his intending parents following a domestic judicial decision. In this case, the Italian authorities refused to recognize the parent-child relationship, following the discovery that there was no genetic link between the surrogate-born child and the intending parents, and placed the child in alternative care. On appeal, the Grand Chamber of the European Court of Human Rights decided that there were no de facto family ties, refusing to acknowledge the legal parent-child relationship established abroad, and consequently dismissed the case of the applicants. Nonetheless, the initial decision by the Chamber, which recognized de facto family ties, and the dissenting opinion of six judges annexed to the judgment of the Grand Chamber, who also recognized the existence of de facto family ties, shows that this decision was complex and fraught.

45. This case illustrates the fear of prohibitionist States having to rubber-stamp surrogacy arrangements undertaken abroad, whether safeguards were respected or not. To overcome this, it is of utmost importance that a trustworthy procedure be set in place so that only international surrogacy arrangements that respect specific safeguards are permitted, and that only those international surrogacy arrangements would be worthy of recognition.¹³

46. Other domestic courts, however, have felt themselves bound to recognize the legal parent-child relationship established abroad, despite a breach of domestic law, on the grounds that this is necessary to guarantee the best interests of the child.¹⁴ Indeed, it will generally be decided that it is in the best interests of the child to remain with his or her intending parents in order to preserve the family environment. However, this is not a foregone conclusion, and judicial or administrative reviews of international surrogacy arrangements remain vital. As with any best interests assessment, it is an individual case-by-case process, which may eventually determine that removing the child from his or her intending parents is either appropriate or inappropriate, for example, where child protection concerns are raised in relation to the intending parents.

47. Moreover, it must be kept in mind that the Committee on the Rights of the Child has indicated in general comment No. 14 that in “cases where the parents or other primary caregivers commit an offence, alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children”.

¹² *Paradiso and Campanelli v. Italy*, No. 25358/12, 2017.

¹³ See report of the Hague Convention on Private International Law, para. 44 (<https://assets.hcch.net/docs/6403eddb-3b47-4680-ba4a-3fe3e11c0557.pdf>).

¹⁴ See, for example, *Re X and Y (Foreign Surrogacy)* (2008) EWHC 3030 (Fam); and German Federal Court of Justice, No. XII ZB 463/13.

D. Safeguards on the protection of the rights of children born from surrogacy arrangements

48. In the absence of international regulatory frameworks, several States have already started contemplating a variety of national safeguards. The question is, to what extent do these regulations contain safeguards to protect the best interests of the child born from surrogacy arrangements?

1. Data

49. In order to effectively develop safeguards, it is vital to collect comprehensive disaggregated data on surrogacy. The Special Rapporteur received very few statistics on the number of surrogate births domestically or on the number of surrogacy arrangements undertaken by citizens in another jurisdiction. Indeed, it appears that there is no centrally collected and verified independent data on the extent and scope of the practice. Statistics on surrogate births are available in only a handful of jurisdictions gathered by independent researchers rather than by Governments. In other jurisdictions there is no information to track and monitor the scale of the practice beyond anecdotal reporting in the media.

50. The United Kingdom of Great Britain and Northern Ireland has been one of the two countries to provide some data on the number of surrogacy arrangements. However, not all surrogacy arrangements are recorded, as there is no obligation to go through the official procedure of obtaining a “parental order” (which would transfer parenthood from the surrogate to the intending parents under domestic law). As of 10 June 2019, the number of parental orders obtained in England and Wales following surrogacy were: 407 in 2016; 332 in 2017; and 176 in the first six months of 2018. In only two cases over the last five years the surrogacy arrangement broke down and the Family Court had to intervene to decide on custody and parental responsibility.¹⁵ Australia has also provided data on the number of surrogacy arrangements undertaken abroad and some data on national arrangements at the State level: in the 2016–2017 period, there were 139 cases; and in 2017–2018, there were 175 cases.¹⁶

51. With regard to the tracking of abuses, in 2019 Portugal installed court-management software to collect data related to crimes committed in the context of surrogacy arrangements.¹⁷

2. Best interests assessments

52. Jurisdictions differ as to when, and if, a best interests assessment should be carried out in relation to a child born through a surrogacy arrangement. In Greece, Israel and South Africa, administrative and judicial bodies are involved during preconception assessments of the eligibility of intending parents, and authorization must be given for the fertilization to take place. This is intended to indirectly protect the best interests of the child by ensuring that the parents are suitable. In Ireland, under the draft Assisted Human Reproduction Bill, there will be a requirement of pre-authorization for all surrogacy arrangements.¹⁸ In jurisdictions where an agreement is (partly) enforceable, certain procedural and substantive requirements should be met and approved by the relevant administrative or judicial authority. It is up to such authorities to ensure that the best interests of the child and other procedural requirements are the foremost consideration of the approving authority. In South

¹⁵ See submission from the United Kingdom of Great Britain and Northern Ireland.

¹⁶ See submission from Australia.

¹⁷ See submission from Portugal.

¹⁸ See submission from Ireland.

Africa, for example, the High Court must consider the child's best interests before an agreement is confirmed.¹⁹

53. Alternatively, in some jurisdictions, the authorities are involved only after the birth of the child and are responsible only for deciding whether to transfer parenthood from the surrogate to the intending parents.

54. Post-birth best interests assessments are an essential measure to guarantee the rights of the child in the context of surrogacy arrangements. In Spain, where surrogacy is prohibited, the registration of a child born abroad from a surrogacy arrangement is only possible following a judicial review, which includes the necessity of ensuring that the best interests of the child and the rights of the surrogate have not been violated.²⁰ A similar procedure exists in Switzerland, which prohibits surrogacy, where, in the case of international surrogacy arrangements, authorization to enter the country for the family is denied until documents proving parentage and the legality of the arrangement in the country where it occurred can be provided.

55. The practice of examining the arrangement before entry authorization is given has been explicitly approved by the European Court of Human Rights in the case of *D. and Others v. Belgium*,²¹ in which the Court rejected the complaint regarding a temporary separation due to the refusal to provide the intending parents with a travel document for their surrogate-born child based on the argument that it was within the State's purview to undertake checks before allowing the child to enter Belgium, with several legitimate aims, in particular the protection of the rights of the surrogate and the child.

56. The United Kingdom of Great Britain and Northern Ireland has established "parental orders" to transfer parentage in the context of surrogacy arrangements. The Court can only issue such an order where it is determined that to do so would be in the best interests of the child. To help evaluate this, a parental order reporter is appointed as a guardian to review, inter alia, the welfare of the child.²² Likewise, in Israel, a social worker is named as the child's guardian until, within seven days of birth, a parental order is granted to the commissioning parents. The court must issue this order unless it is satisfied, after receiving a report from a social worker, that it would not be considered incompatible with the welfare of the child.²³

57. Post-birth evaluations of the child's best interests may be made difficult, however, by the fact that the child has already been born and is living with the intending parents. In such circumstances, courts may find it difficult to undertake a thorough and effective evaluation, as it will rarely be in the child's best interests to refuse to recognize or grant parenthood that reflects the child's lived reality. Although justified, the fear of being forced to recognize the situation of the child as a fait accompli should not dilute the importance of judicial or administrative reviews of international surrogacy arrangements. As with any best-interests assessment, reviews should be carried out on an individual case-by-case process, through which it may be determined that removing a child from the intending parents is preferable.

¹⁹ *Ex Parte CJD and others (Centre for Child Law intervening as amicus curiae)* (case No. 53131/2017, Noh Gautend High Court), *Surrogacy in a Globalised World, Claire Fenton-Glynn and Jens M. Scherpe*, p. 525.

²⁰ See submission from Spain.

²¹ *D. and Others v. Belgium*, No. 29176/13, 2014.

²² See submission from Dr. Michael Wells-Greco.

²³ See submission from Victoria Gelfand, Esq.

3. Identity rights and access to origins

58. In the context of surrogacy, guaranteeing the rights to identity and access to origins, is particularly complex. Some jurisdictions have removed donor anonymity while others are facing obstacles to the disclosure of such information to persons who would be entitled to know an individual's (genetic) origin. In all surrogacy cases, there will be the need not only to ensure access to information on genetic origins but also information on the surrogate.

59. In some countries, safeguards protecting access to origins are considered in the context of birth registration and the parental order process. There are several approaches by States that have an impact on the type of necessary safeguards guaranteeing the right of the child to identity and access to origins. In most jurisdictions that either prohibit or tolerate surrogacy arrangements, legal parenthood at birth is assigned according to traditional rules of parenthood (*mater semper certa est*), which ensures that there will be a record of the surrogate. For example, in the United Kingdom, the surrogate, as the legal mother at birth, will be listed on the original birth certificate and the child will be issued a new, amended version when the parental order is made transferring parenthood to the intending parents.

60. On the other hand, in regulated and free-market jurisdictions, legal parenthood is attributed to the intending parents directly, either before or after the birth, and the name of the surrogate is not necessarily recorded in any official document. In this context, essential safeguards are necessary to protect identity rights and access to origins. For example, in certain jurisdictions within the United States, intending parents are recognized before birth as the sole parents of the surrogate-born child. The Surrogacy (Regulation) Bill of 2018 in India also establishes a system of determining parentage before the child is born.

61. It is of fundamental importance that States ensure that a record is kept with details of the surrogate and of the gamete donors, where possible. Many States are already starting to recognize this, including: Ireland, where, under the draft Assisted Human Reproduction Bill, a National Surrogacy Register would be established, containing information regarding the surrogate, intending parents and donors, and would be accessible for surrogate-born children from the age of 18 onwards;²⁴ and similar suggestions have been made by the Law Commission of England and Wales and the Scottish Law Commission in their recent proposals for a new law on surrogacy.

62. In the context of gamete donation, many States already have established protections ensuring children's access to information regarding their genetic parents. In Argentina, the Civil and Commercial Code gives individuals born from an assisted reproductive technology the right to access medical records of the donor(s), when relevant, and, under judicial review, to obtain the identity of the donor(s).²⁵ Sweden does not allow anonymous donations and preserves information about the donor's identity for the child to access when they have reached sufficient maturity.²⁶ In April 2019, the Parliamentary Assembly of the Council of Europe came to a similar conclusion, recommending that "anonymity should be waived for all future gamete donations in Council of Europe member States, and the use of anonymously donated sperm and oocytes should be prohibited".²⁷ Furthermore, in Portugal, the anonymity of all third-party donors of genetic material was decided to be unconstitutional as it

²⁴ See submission from Ireland.

²⁵ See submission from Defensor del Pueblo de la Nación.

²⁶ See submission from the Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights.

²⁷ See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=27680&lang=en>.

violated the personal identity and the development of personality of persons born from surrogacy arrangements.²⁸ On the other hand, in South Africa, children have the right to access information on their genetic origins when they reach 18; however, the identity of the surrogate, who is usually not the genetic parent, is not disclosed.

63. When considering access to information on origins, there are many close links to legislation and jurisprudence surrounding adoption. In Spain, the legal order protects the right to access origins and to privacy of surrogate-born children, and information relating to adoption and any change in parentage are confidential and do not appear on the birth register. Nonetheless, the child may access this information.²⁹ On the other hand, in Colombia, jurisprudence has developed the concept of “biological truth”, also known as the right to know one’s origins, which entails the right to know one’s progenitor. In this regard, and in the context of adoption, the Colombian Institute of Family Welfare has established an administrative process to assist individuals in search of their biological family.³⁰ Similarly, El Salvador guarantees the right of the adopted person to know who are his biological parents, qualifying this right as irrevocable and imprescriptible, and also establishes the responsibility of competent authorities to safeguard this information.³¹ Cambodia also has provisions in the context of adoption which allow a child of appropriate maturity to access his or her records, including the identity of his or her parents.³²

4. Genetic ties and the establishment of legal parentage

64. Currently there are no international standards clearly delineating how parentage and parental responsibility should be determined in the context of surrogacy in general, and in international surrogacy arrangements, in particular. As indicated by various jurisdictions, the approaches adopted by States vary, and parentage is established before or after birth depending on the country in question. In addition, States often have different parentage and parental responsibility rules for traditional and gestational surrogacy, which also depend on whether one parent or both intending parents have a genetic connection to the child.

65. The complex challenge of determining parentage is partly alleviated when the original intention under the surrogacy arrangement remains the intention of all parties after birth of the child. Regardless of the legal system, in the majority of cases, the surrogates voluntarily carry through with their intention to transfer parentage and parental responsibility as part of the contractual post-birth voluntary waiver.

66. Similarly, a well-regulated system overseeing the legality of proceedings through a designated oversight body, including pre-approval of surrogacy arrangements, a genuinely independent counselling process, the screening of both intending parents and surrogates and the voluntary consent of the surrogate, will effectively diminish the likelihood of proceedings into the determination of legal parenthood that place the child in a situation of uncertainty.

67. Fundamentally, a desire for certainty cannot justify legal regimes built upon ignoring the rights of the child, surrogate or intending parent(s). Practically, neither a surrogate nor intending parent(s) should be forced to maintain parental responsibility involuntarily, for it is generally contrary to the best interests of a child to be raised under such circumstances.

²⁸ See submission from Portugal.

²⁹ See submission from Spain.

³⁰ See submission from Colombia.

³¹ See submission from El Salvador.

³² See submission from Professor Kasumi Nakagawa and students of Pannasastra University of Cambodia.

68. The existence of a genetic link has been of fundamental importance when determining parenthood, particularly following an international surrogacy arrangement. For example, in South Africa, provided that she is genetically related to the child, a surrogate can challenge a pre-established parentage agreement within 60 days and parental rights will revert to her. The opportunity for the surrogate to challenge parentage appears to be particularly important when there is a significant change in circumstances that is detrimental to the rights of the child.

69. In a number of European jurisdictions, the decision as to whether or not to recognize parenthood established abroad has been strongly influenced by the rulings of the European Court of Human Rights, which has ruled, in specific cases, that where a child has a genetic connection with one of the intending parents, the child's right to respect for private life should lead to the recognition of legal parenthood. This line of reasoning can also be seen in a decision by the German Federal Court of Justice, which has ruled that a foreign decision on parenthood must be recognized if at least one of the intending parents is genetically related. Reversing a previous decision, the Court held that recognition was not against public policy, even though surrogacy is illegal within Germany, and was based on the best interests of the child, since the foreign law allowing the transfer of parenthood to the intending parents does not contravene fundamental principles of German law.³³

70. The importance of genetics is also revealed in the decision of the Swiss Federal Court of Justice of 21 May 2015, which, while accepting the parenthood of the intending parent who was genetically related to the child, refused to recognize a judgment by the State of California in relation to the non-genetically-related intending parent. The decision of the Court is based on the wish to deter Swiss citizens from going abroad to circumvent the national prohibition on surrogacy. Thus, when considering the best interests of the child, the Court focused on promoting children's welfare generally by preventing child trafficking and protecting children from being treated as commodities rather than on the individual welfare of the child in question. The Court pointed out, however, that the non-genetically-related intending parent could, nonetheless, adopt the surrogate-born child.

71. On the other hand, the Supreme Court of Mexico, in a 2018 case on surrogacy, reiterated that one of the fundamental elements in the determination of parentage was the "procreational will" of the parents, which is defined as the will to have a child even with no biological link and to assume all the derived responsibilities.³⁴ A similar concept of "procreational will" has been applied by courts in Argentina in order to recognize parentage in the context of surrogacy.³⁵

72. The development of such a concept and related procedures would provide a safeguard in respect to parentage for certain specific cases where there is no genetic link between the surrogate-born child and the intending parents.

E. General considerations

1. Sale of children

73. Following the presentation of her report on surrogacy and the sale of children in 2018, the Special Rapporteur received substantial feedback both during her

³³ See, for example, Jens M. Scherpe, Claire Fenton-Glynn, Terry Kaan, *Eastern and Western Perspectives on Surrogacy*, Intersentia Studies in Comparative Family Law, 2019, p. 35–58.

³⁴ See submission from Grupo de Información en Reproducción Elegida and https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-10/AR-553-2018-181023.pdf.

³⁵ See submission from Defensor del Pueblo de la Nación.

interactive dialogue with the Human Rights Council and in its aftermath. She identified three main responses to her conclusions: (a) several States and civil society organizations rejected the premise of sale outright in the context of surrogacy, arguing that at no point is there a transaction for the child; (b) a substantial number of stakeholders expressed concern about the conflation of sale with surrogacy, which could lead to the criminalization of surrogates and intending parents as well as to possible violations of the right to sexual and reproductive health; and (c) a number of other States and civil society organizations argued for an outright ban of surrogacy, with no exception.

74. Taking into consideration the above observations, the Special Rapporteur reiterates the urgent need for holistic regulation of surrogacy, in particular when it comes to international surrogacy arrangements. The existence of oversight mechanisms is of vital importance in order to prevent any sale and exploitation of children in the context of surrogacy.

75. Moreover, the rights of access to origins and identity are a safeguard and response to illicit activities, as they help to create greater accountability, ensure proper record-keeping and appropriate transparency.

76. Furthermore, with regard to the specific notion of the sale of children, although the analysis of the matter as it relates to surrogacy still stands ([A/HRC/37/60](#), paras. 41–51), it is necessary to qualify it in additional detail in view of the varying realities across the world. The first priority must be the prevention of the commodification of children, and specifically the rejection of a “right to a child” (*ibid.*, paras. 64 and 65), while guaranteeing the rights of all the other involved stakeholders.

77. Nonetheless, a strict interpretation of the notion of the sale or trafficking of children as a criminal offence can have dire consequences. For example, in Cambodia 43 surrogates were arrested and detained under the provisions of article 16 of the Law on Suppression of Human Trafficking and Sexual Exploitation. The surrogates were only released under the condition of keeping and raising the surrogate-born children. The case indicates the risks of a rigid application of criminal law that does not take into account the best interests of the child or the rights of the surrogates and intending parents.³⁶

78. In such contexts, the real threat of exploitation and commodification of children, and potentially of surrogates, is often related to the role of intermediaries. In general, this is due to the for-profit motives of private intermediaries, who have, as a guiding motive, the successful completion of the surrogacy agreement with little to no regard for the rights of those involved.

79. Consequently, it is fundamental that appropriate safeguards are in place regarding sale of children in the context of surrogacy. Such safeguards should focus on free and informed consent by surrogates and the role of intermediaries and should not lead to the criminalization of surrogates. In respect to intending parents involved in cases of foul play, it must be kept in mind that criminalization will not normally be in the best interests of the child and, as indicated previously in the case of such offences, “alternatives to detention should be made available and applied on a case-by-case basis” (general comment No. 14, (2013)).

³⁶ See submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR), Cambodia.

2. Right to privacy

80. Although the right to privacy does not fall under the scope of the mandate of the Special Rapporteur, she nonetheless wishes to draw attention to this crucial question and encourages an in-depth analysis of the issue by other human rights mechanisms with a view to finding the right balance between the rights to identity and access to origin of children, as set out above, and the right to privacy of surrogates and gamete providers.

81. Within the Convention on the Rights of the Child, two exceptions are already present to the rights to identity and access to origin, namely feasibility and the primary consideration of the best interests of the child. Moreover, countering claims to privacy that would limit access to origins is increasingly irrelevant, given the increased availability of DNA-based data through which children born of assisted reproductive technologies can identify genetic relatives.

82. At the domestic level, attempts have been made to reconcile these rights. For example in Victoria, Australia, where all donor-conceived children have equal access to information regardless of their mode of conception, there is a contact veto/preference system that allows them to access identifying information on the donor, while the donors can decide if they wish to have no contact or a certain type of contact with their descendants.³⁷ When donor-conceived children born from 2010 apply for their birth certificate as adults they will be informed that more information is available about their birth. If they are not already aware that they are donor-conceived, they are likely to find out when they ask about this additional information.³⁸

83. The right to privacy of surrogate-born children, or children born of donated gametes, is also important. In many jurisdictions, a birth certificate must be presented to register for official services such as schooling, health care or State benefits. States must be careful to preserve the right of such children not to have their origins known by anyone who sees their birth certificate. One solution would be to preserve this information in a separate record, rather than on the birth certificate, while allowing children to have access to this record once they are sufficiently mature.

3. Sexual and reproductive health

84. As stated in the previous report of the Special Rapporteur to the Human Rights Council ([A/HRC/37/60](#), para. 11), and reiterated herein, no information set out in either report should be interpreted as a restriction of women's autonomy in decision-making or of their rights to sexual and reproductive health.

85. Although considerations in this context do not fall strictly within the scope of the mandate of the Special Rapporteur, it is fundamental to reiterate concisely the core international human rights norms and standards as they relate to sexual and reproductive health.

86. In line with article 12 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights produced general comment No. 22 on the right to sexual and reproductive health, a core tenet of which is "the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health".

87. Moreover, in paragraph 7.3 of the Programme of Action, adopted at the International Conference on Population and Development in 1994, reproductive

³⁷ See submission from Australia.

³⁸ See submission from the Victorian Assisted Reproductive Treatment Authority.

rights are explicitly defined to include “the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health”.

88. It should be noted that the Inter-American Court of Human Rights has recognized that the choice to procreate through assisted reproductive technologies is part of the rights to humane treatment and personal liberty and the rights of the family.³⁹

89. Lastly, as part of the considerations under sexual and reproductive health rights, it is crucial to ensure that access to a whole range of health facilities, goods, services and information is not discriminatory. In the context of surrogacy arrangements, any restriction based on the sexual orientation or gender identity of the intending parents constitutes a violation of their rights.

IV. Conclusions and recommendations

A. Conclusions

90. **There is no doubt that surrogacy offers new opportunities for family formation for those who are otherwise unable to have a child, but it also presents new legal and ethical challenges. There is an undeniable need to develop standards, empirical studies and further research on its long-term impact on all stakeholders concerned, especially children.**

91. **The Special Rapporteur has observed that the prohibition of surrogacy arrangements carried out abroad is problematic as domestic laws prohibiting surrogacy will often be sidestepped. States will inevitably be confronted with surrogacy arrangements carried out abroad, leading to issues surrounding, inter alia, rights to identity, access to origins and the family environment for the child. Such surrogacies should neither be automatically rejected nor accepted, the only valid consideration being the best interests of the child.**

92. **A pragmatic response on the part of prohibitionist jurisdictions is necessary and should be in line with human rights standards, including sufficient safeguards to deal with commonly observed violations of the rights of the child. National legislative and policy approaches to surrogacy should be based on a human rights framework to ensure the human rights of all parties involved and to prevent exploitative practices.**

93. **Conversely, in the context of international surrogacy arrangements, jurisdictions allowing surrogacy should verify that intending parents coming from abroad will be able to return to their countries of origin with their surrogate-born child, and that legal parentage will be recognized by the authorities of their country of origin, as part of the pre-birth assessment and authorization.**

94. **The analysis of the various submissions received shows that, even though the best interests of the child are extensively mentioned in most legislation reviewed, there is often a lack of detail as to the constitutive elements of such determinations, although, in the specific context of surrogacy, assessments and determinations regarding the best interests of the child are fundamental. The question as to whether the determination of the best interest of surrogate-born children should be carried out through judicial or administrative proceedings is**

³⁹ See http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf.

the discretionary decision of the State and depends on the circumstances of the case.

95. As can be observed from several examples presented herein, the judiciary is often faced with the complex and difficult choice between acknowledging a fait accompli as far as parentage is concerned, even when no safeguards were in place, and taking an autonomous decision in order to guarantee the rights of the child.

96. Governments should be encouraged to develop international norms through, for example, the Hague Conference on Private International Law project on parentage/surrogacy. The development of an international convention through the Hague Conference will build bridges between different legal systems around parentage issues and ensure legal certainty for children and parents in international surrogacy arrangements. The project will not, however, resolve all issues as it is not about substantive law and is not intended to unify practices around surrogacy.

97. An interim solution in the form of a model law to be adapted and contextualized in various jurisdictions, and/or a set of commonly agreed minimum principles governing the practice from a multidimensional and holistic human rights perspective is needed to regulate surrogacy arrangements.

98. With such diverging approaches to surrogacy across the world, the tabling of an international instrument regulating surrogacy risks facing severe hurdles. Nonetheless, in view of the very real risks to the rights of the child and the rights of the other involved stakeholders, it is essential to develop a set of minimum safeguards that can be applied regardless of the stance of States on surrogacy. The following recommendations will attempt to develop a set of minimum standards to safeguard the rights of children born from surrogacy arrangements.

B. Recommendations

1. At the national level

99. The Special Rapporteur calls upon States to:

(a) Ratify the Convention on the Rights of the Child and its three Optional Protocols;

(b) Incorporate in national legislation the prohibition of sale of children, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

100. With regard to the child's best interests assessment and safeguards for the protection of the rights of children born from surrogacy arrangements, the Special Rapporteur calls upon States to:

(a) Ensure that the core principle of the best interests of the child as stipulated in article 3, paragraph 1, of the Convention on the Rights of the Child and further expanded in general comment No. 14 of the Committee on the Rights of the Child, is the paramount consideration in all judicial and administrative decisions, relevant legislation and public and decision-making policies and practices concerning surrogate-born children, with due consideration for the requirement of a rights-based approach, engaging all stakeholders;

(b) Review and, where necessary, amend domestic legislation to implement the best interests of the child through the application of a threefold dimension of the concept of the child's best interests, namely: (i) the substantive

right of children to have their best interests assessed and taken as the primary consideration; (ii) a fundamental, interpretative legal principle, according to which the most effective serving interpretation is chosen as a legal interpretation; and (iii) a rule of procedure requiring that a determination of the best interest of the child be incorporated as part of the decision-making process affecting the child;

(c) Determine, on a case-by-case basis, the substantive content with regard to the concept of the child's best interests through the interpretation and implementation of article 3, paragraph 1, of the Convention on the Rights of the Child, allowing legislators, judges, administrative, social and/or educational authorities to clarify the concept and to make concrete use thereof, according to the specific situation of the child concerned, taking into account the personal context, situation and needs of the child;⁴⁰

(d) In consultation with stakeholders concerned, including, where possible, with surrogacy-born children, initiate legal reforms to bring up to date the existing laws, regulations or practices for the establishment, recognition and contestation of legal parentage, indicating specifically how the child's best interests are factored into the context of surrogacy arrangements and indicating cases where further judicial oversight of a parental order would be required and retained;

(e) Ensure that the judiciary, legislative bodies, consulate services overseas and immigration officers, policymakers and decision makers involved in directly or indirectly in decisions impacting surrogate-born children are aware of and trained in the best-interests determination and in the minimum safeguards applied by the receiving country in the context of international surrogacy arrangements.

Non-discrimination and the right to health of surrogate-born children

101. The Special Rapporteur further calls on States to take the following steps with regard to non-discrimination and the right to health of surrogate-born children:

(a) Guarantee the principle of non-discrimination of surrogate-born children on prohibited grounds, such as gender, race, sexual orientation, religion or beliefs, cultural identity, marital status (of intended parents), nationality, class/caste, disability or other status;

(b) Make available health insurance coverage for the surrogate and the child born from a surrogate arrangement and determine who should be responsible for the coverage in the national health-care system.

Identity rights, access to origins and family environment

(c) Ensure that judicial decisions, laws, policies and practices in relation to surrogate-born children respect their right to identity and are duly taken into consideration in assessing the child's best interests;

(d) Preserve, in all cases, all pertinent information, and establish and maintain registers and national records containing information about the genetic and gestational origins of surrogate-born children, through which children can seek to access, in line with their evolving capacity and maturity and subject to the cultural context of the country, in particular with regard to the use of donor gametes: regardless of the determination of parentage, there should be

⁴⁰ CRC/C/GC/14, para. 32.

comprehensive safeguards to ensure that records of the surrogate arrangement are kept in order to enable the surrogate-born children to have access to information about their origins;

(e) Ensure the right of surrogate-born children to access information about their identity and origin, including their cultural, ethnic, religious and linguistic background, in line with their evolving capacity and in accordance with the legal regulations of the given country;

(f) Put in place a mechanism to enable the application process for registration of all children born through surrogacy arrangements, irrespective of the intention of the intending parents to apply for a parental order in the receiving country;

(g) Initiate a post-birth review (judicial or administrative) to assess the compliance of surrogacy arrangements with procedural and other minimum safeguards requirements, with a view to assessing the legal parenthood established domestically or abroad while ensuring that the child is not left in a situation of legal uncertainty;

(h) Develop policies and international agreements to minimize the separation of surrogate-born children from the intending parents during the review of the transfer of legal parenthood, and avoid putting the burden of responsibility on surrogates against their will;

(i) In cases of abandonment or of refusal to transfer legal parenthood, there should be a clear framework ensuring that the parental responsibility of the intending parents and/or surrogates towards the surrogate-born child cannot be relinquished until a suitable alternative-care solution has been found.

Data

102. The Special Rapporteur further calls on States to take the following steps with regard to data:

(a) Put in place measures to monitor, record and collect in a centralized manner comprehensive and disaggregated data on the extent and the scope of surrogacy arrangements, both domestic and overseas, parental orders issued and the follow-up arrangements carried out in line with the best interests determination of the surrogate-born children;

(b) Ensure the collection of data on intermediaries and fertility clinics and others facilitating surrogacy arrangements.

Protecting children from sale, abuse and exploitation

103. The Special Rapporteur reiterates, in this regard, her recommendations from her previous report on surrogacy ([A/HRC/37/60](#)) and calls on States to:

(a) Ensure that laws and policies prohibiting the sale, trafficking, abuse and exploitation of children, as well as general safeguards against the sale and trafficking of children, apply in the context of surrogacy;

(b) Where intermediaries are operating, register and closely regulate their operation in order to ensure that the commodification of children and ultimately the sale of children do not occur.

2. At the international level

104. The Special Rapporteur welcomes other ongoing international initiatives on surrogacy and encourages other human rights mechanisms, in particular the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, as well as other special procedures' mandates and other United Nations agencies, to look into the issue of surrogacy with a view to developing a holistic human rights-based framework on surrogacy.

105. The Special Rapporteur calls on the international community to support comprehensive research and data collection on existing surrogacy practices, in particular on the experience of all involved stakeholders, namely the surrogates, intending parents and surrogate-born children, and to consider developing a model law based on the available scientific evidence and good practices on how States have been applying the principle of the best interests of the child in the context of domestic law and a public international law governing international and transnational surrogacy arrangements.

106. The Special Rapporteur reiterates her call on the international community to support the work of the Hague Conference on Private International Law, in particular in relation to the project on parentage/surrogacy; and calls on the Hague Conference to include safeguards, to be complied with prior to conception, during pregnancy and post-birth, to enable the recognition of legal parentage.

107. The Special Rapporteur encourages the International Social Service organization to continue developing international principles for the protection of the rights of the child in the context of surrogacy, in close consultation with relevant stakeholders.

108. The Special Rapporteur reiterates her earlier recommendation that nothing in these recommendations should imply that women, including women who act as surrogates, cannot make independent decisions about the autonomy of their own bodies during pregnancy.
