



Contribution to the List of Issues Prior to Reporting

Thematic Report presented by the Comité Protestant évangélique pour la Dignité Humaine to the Committee on the Rights of the Child on the occasion of the 6th periodic review of France for the International Convention on the Rights of the Child (CRC – OPSC)

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Contribution à la liste de questions prioritaires adressées à la France. »

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Introduction

1. The Evangelical Protestant Committee for Human Dignity (*Comité Protestant Évangélique pour la Dignité Humaine - CPDH*)¹ was founded in November 1999 with the aim of promoting respect for human dignity and defending and protecting the rights of children, women and men in general. The CPDH has been a member for ten years of the Coalition against human trafficking (*Collectif Ensemble contre la traite des êtres humains*)², which fights against trafficking in all its forms within French, European and international institutions.
2. The CPDH is concerned about the trivialization and toleration of surrogacy practices in France. Surrogacy is a serious violation of the rights of the child that is similar to human trafficking on a global scale with implications on French territory. This is what this contribution to the periodic review of the International Convention on the Rights of the Child (CRC) intends to demonstrate.
3. The practices of surrogacy are often accompanied by Assisted reproductive technologies (ARTs). They include both cases of surrogate motherhood with embryo implantation where the woman rents her womb to carry a fetus of which she is not the biological mother, and the fewer cases where the woman is also the mother of the child who has also donated her oocytes (with artificial insemination or in vitro fertilization). In all cases, ARTs are required in order to create an embryo with the sperm of one of the intended parents or of a donor. Surrogacy is said to be "altruistic" when it is not directly financially compensated (even if the costs of the pregnancy are covered), or "commercial" when it is openly remunerated. In all cases, however, the child is the subject of a contract.
4. By organizing ART for female couples and single women³, the draft revision of the bioethics law⁴ paves the way for demands for the "right to a child" for male couples⁵. The latter can only satisfy their desire for children through surrogacy.

Background

5. The CRC prohibits the sale, trafficking and abduction of children in its article 35, as does the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (hereinafter the Optional Protocol).
6. Surrogacy is prohibited in France by article 16-7 of the *Code Civil*, which states "any convention relating to procreation or gestation for the benefit of others is null and void". This prohibition is consistent with the principle of unavailability and non-patrimonialization of the human body and its products under French law⁶.

¹ <https://cpdh.org/>

² <http://contrelatraite.org>

³ Bill n° 2011-814 of July 7, 2011, presented to the Cabinet meeting on July 24, 2019, under discussion at the National Assembly for the second reading: see http://www.assemblee-nationale.fr/dyn/15/dossiers/bioethique_2 and <http://www.senat.fr/dossier-legislatif/pjl19-063.html>

⁴ Article 1 of the revision draft bill of the bioethics law

⁵ Brunetti-Pons Clotilde, *Le « droit à l'enfant » et la filiation en France et dans le Monde*, pp. 310-311

⁶ Article 16 of the *Code Civil*

However, this practice exists on French territory⁷ and it is estimated that a child born of surrogacy would arrive in France every three days (2014 figure)⁸.

7. Moreover, we notice a certain laxity of the French justice system in dealing with those who violate this prohibition. Indeed, French law does not criminalize the sale of children, and the courts very rarely condemn its perpetrators (parents of intent, who are nevertheless delinquent, and intermediaries) to the penalties that are prescribed by law.
8. The media regularly advocate for surrogacy without facing the justice system and the consequences of promoting illicit practices.

I) State of international law

9. UN bodies generally concur that surrogacy practices constitute a violation of the rights of women and children, and may be analogous to the sale of children and trafficking in human beings⁹. There is no internationally endorsed "right to a child" that would justify these practices of exploitation of women's bodies and social misery on the one hand, and the unacceptable violence of abandonment and separation imposed on children¹⁰ on the other.
10. Article 35 of the CRC calls upon signatory States to make every effort at the national, bilateral and multilateral levels to ensure the prohibition of the sale, trafficking and abduction of children. However, France is not fulfilling its commitment and is not undertaking any diplomatic efforts to promote the international abolition of surrogacy, as called for by many associations, including the *Collectif Marchons Enfants* ("Marching for children" coalition)¹¹.
11. Moreover, article 2 of the Optional Protocol clearly proclaims the prohibition of the sale and trafficking of children. In this sense, any surrogacy convention contravenes international law and must be considered null and void: "Article 2, For the purposes of the present Protocol: Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration"¹².

II) General principles (arts. 2, 3 and 12)

Non-discrimination and best interests of the child

12. Articles 2 and 3 of the CRC respectively enshrine the fundamental principles of non-discrimination and the best interests of the child. The Committee on the Rights of the Child has already questioned France on respect for the best

⁷ As shown by the coalition against human trafficking in its report published in May 2015: examples of clandestine surrogacy, in particular by undocumented migrant women
Collectif Ensemble contre la traite, *Les nouveaux visages de l'esclavage, « né pour être vendus »*, p. 69, les éditions de l'atelier, Paris, 2015

⁸ Motto of the *Manif pour tous* in October 2014, on the occasion of the first scientific symposium on surrogacy in Paris

⁹ Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, January 15, 2018, A/HRC/37/60
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22763&LangID=E>
<https://www.ohchr.org/EN/Issues/Children/Pages/ChildrenBornSurrogacyArrangements.aspx>
<https://adfinternational.org/news/experts-at-un-event-on-surrogacy-modern-exploitation-of-women-and-children/>

¹⁰ Brunetti-Pons Clotilde, *Op. cit.*, pp. 325-326

¹¹ See <https://marchonsenfants.fr/>, demandes au gouvernement (requests to the government)

¹² <https://www.ohchr.org/FR/ProfessionalInterest/Pages/OPSCCRC.aspx>

interests of the child¹³. With regard to children born by surrogacy in France or abroad for French nationals, these principles are not respected. Indeed, the best interests of the child are being exploited in favor of the fulfillment of adults' wishes, which create entangled legal situations for children. In this sense, the best interests of the child should be considered in abstraction and in a general way: the child has no interest in being ordered¹⁴. And this situation does not favor the protection of the rights of the child, but gives rise to a "right to a child"¹⁵.

13. Moreover, in the case of surrogacy for men or women couples or single persons, the deliberate deprivation of mother or father is a discrimination that is imposed on the child who is deprived of part of his or her identity and filiation. There is thus a de facto inequality between children who have the opportunity to know their parents and those born of surrogacy who do not have this right and who are voluntarily born by contract¹⁶.
14. This situation may also give rise to psychological, emotional and developmental fragility, which cannot be in the best interests of the child. When same-sex couples commission surrogacy, the reassignment by the child of the scene of childbirth to the biological reality of parentage is "impossible and unthinkable"¹⁷.

Respect for the views of the child

15. The transcription of civil status records for children born abroad from surrogacy violates Article 12 of the CRC. Indeed, their opinion is not taken into account regarding the transcription of a "fictional parentage" that does not reflect the biological reality, and there is no possibility of recourse at the child's majority, for example. In recent cases, the appellate court has allowed the full transcription of foreign birth certificates whereas the age of the children did not allow them to express their opinion¹⁸.

III) Civil rights and freedoms (arts. 7, 8 and 17)

Registration of birth, name and nationality

16. Article 7 of the CRC affirms the right of every child to be registered at birth, to know his or her father and mother and to be brought up by them. In surrogacy practices, this right is not respected. In French law, the mother of the child is the one who gives birth, "mater semper certa est", and the mother's husband is presumed to be the father of the child, although the presumption of paternity tends to be questioned. Children born by surrogacy are sometimes not registered abroad, so they have no nationality, no civil status and no rights¹⁹. Similarly, in cases of clandestine surrogacy in France, children are illegally recognized, since the male sponsor who recognizes the child is not the mother's spouse and not

¹³ UNCRF, *Concluding observations on the fifth periodic report of France*, February 23, 2016, CRC/C/FRA/CO/5, p.5, section 26

¹⁴ Observations of the International Coalition for the Abolition of Surrogate Motherhood (ICASM) in the Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material to the Guarantees for the protection of the rights of children born of surrogate motherhood conventions, May 2019, p. 2

¹⁵ Brunetti-Pons Clotilde, *Op. cit.*, p. 52-53

¹⁶ Observations of the ICASM, p. 2

¹⁷ Brunetti-Pons Clotilde, *Op. cit.*, p. 311

¹⁸ Lea Jennifer and Price Lorcan, ADF International, *Advisory Opinion No. P16-2018-001 to the European Court of Human Rights Grand Chamber*, p. 23 sections 6 and 7

¹⁹ <https://www.nouvelobs.com/rue89/rue89-temoignage/20130218.RUE3191/gpa-j-ai-vendu-un-appartement-pour-faire-mon-fils.html>

necessarily the biological father²⁰. Moreover, children born by surrogacy are contractually deprived of living and being brought up by their biological parents, and in some cases are definitively deprived of a father or mother.

Preservation of identity

17. Every child has the right to respect for his or her identity and nationality. In situations of surrogacy, children are deprived of maternal or paternal parentage without the possibility of appeal, which deprives them of an important part of the components of their identity²¹. The breakdown of parentage leads to instability the legal bond that links the child to his/her parents, since six different persons can claim parental rights over him/her: the sperm donor, the oocyte donor, the surrogate mother, the husband of the surrogate mother, the mothers and/or fathers of intent²². Moreover, in the case of procedures in France for the transcript of foreign civil acts of these children, they may change their nationality without their opinion being taken into account.

Role of the media in the promotion and protection of the rights of the child

18. We notice in France that, despite the illegality and the opposition to the rights of the child, the media and public information channels regularly promote and praise surrogacy without being condemned, nor indicted despite complaints submitted to the *Conseil Supérieur de l'Audiovisuel* (High Audiovisual Council). As an example, we can mention the case of a television celebrity, Marc-Olivier Fogiel, who had two children by surrogacy abroad and who openly promotes it through his book and all communication channels without ever being worried²³. Also, the news channels that publicized the situation of the intended parents who were unable to recover their baby born through surrogacy in Ukraine because of the Covid-19 epidemic²⁴, and a documentary on a public channel using children's voices to promote illegal practices in France (ART for female couples or single women and surrogacy among others)²⁵. The French State is therefore complicit in this promotion and as such does not abide by its international commitments.

²⁰ https://www.lepoint.fr/medias/envoye-special-enquete-sur-le-marche-clandestin-des-meres-porteuses-31-01-2019-2290502_260.php#

²¹ Contribution of the European Centre for Law and Justice (ECLJ) to the Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material to the Guarantees for the protection of the rights of children born of surrogate motherhood conventions, May 2019, p. 4

²² Lea Jennifer and Price Lorcan, ADF International, *Op. cit.*, p. 1 section 3

²³ <https://www.marianne.net/debattons/billets/le-derangeant-gpa-tour-de-marc-olivier-fogiel>
https://www.lepoint.fr/societe/fogiel-defend-la-gpa-je-n-ai-pas-choisi-un-enfant-sur-catalogue-04-10-2018-2260441_23.php

²⁴ <https://www.leparisien.fr/societe/malgre-le-confinement-sophie-a-pu-voir-son-bebe-ne-d-une-gpa-en-ukraine-11-06-2020-8333610.php> https://www.francetvinfo.fr/replay-radio/un-monde-d-avance/plus-de-100-bebes-nes-par-gpa-bloques-en-ukraine-en-raison-de-l-epidemie-de-coronavirus_3948723.html

²⁵ <https://www.valeursactuelles.com/societe/pma-gpa-la-serie-le-monde-en-face-sur-france-5-ou-l-instrumentalisation-de-la-parole-de-lenfant-120020>

IV) Violence against children (art. 19)

Abuse, neglect and abandonment

19. Article 19 of the CRC protects children against violence and abandonment. Surrogacy involves the abandonment of a child by its biological mother, known as "surrogate mother". This is intolerable violence against children²⁶ and "reproductive slavery" for women and children. Indeed, it has been shown in many studies that intrauterine and emotional exchanges between mother and baby are important for the development of the child. Through pre-birth perception, or "early memory", the child recognizes his/her mother and is thus able to overcome the separation resulting from childbirth. In the case of surrogacy practices, the child experiences the violence of abandonment from the mother who bore him, which represents a trauma in the psychic sense, and a vital anxiety that will have consequences for his whole life²⁷.

V) Family environment and alternative care (arts. 11 and 21)

Domestic and international adoption, illegal non-returns

20. For children born abroad by surrogacy, French case-law holds that the parent-child relationship is normally established with regard to the biological parent, the parent of intent being the subject of a simple adoption. However, in cases of surrogacy abroad, particularly in the United States, the conditions for the international adoption of a child set out in Article 21.b of the CRC are not met, since the conditions for proper upbringing exist in the child's country of origin. Such an adoption cannot therefore be considered legal or in the best interests of the child. The Special Rapporteur on the sale and sexual exploitation of children also describes such adoptions as illegal and recalls that the terms of adoption are violated "when the purpose of an adoption is to find a child for adoptive parents rather than a family for a child."²⁸
21. Furthermore, Article 1 of the Hague Convention requires "*to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child (...) and thereby prevent the abduction, the sale of, or traffic in children*". It has been observed that full adoptions have also been granted in France for children born abroad by surrogacy²⁹. In this context, full adoptions definitively erase all ties

²⁶ Myriam Szejer, child psychiatrist and psychoanalyst, in *Le Figaro*: "The drama of infertility is not a sufficient reason to fabricate children who will have to endure all the problems associated with abandonment at birth. What right do we have as doctors to cause this? What a child recognizes at birth is not its gametes, it is its mother. It's the mother who will give him a sense of security, confidence. From the moment he is no longer with its mother, it is sure that he will cope with what is offered to him... But there is no denying that it leaves scars, an amputation on the mother's side as well as on the child's side. What I've seen is that, on the surface, they don't seem to be worse off than the others. But, deep down, they are not doing well at all! This is a similar problem to the one faced by adopted children. »
<https://www.lefigaro.fr/actualite-france/2014/07/23/01016-20140723ARTFIG00258-ces-enfants-auront-a-subir-tous-les-problemes-lies-a-l-abandon-a-la-naissance.php>

²⁷ Schaub-Thomas Anne, *Un cri secret d'enfant : Attachement mère-enfant, mémoires précoces, séparation-abandon*, Les acteurs du savoir, 2017

²⁸ Report A/HCR/34/55, see also
<https://www.ohchr.org/EN/issues/children/pages/illegaladoptions.aspx>

²⁹ Contribution of the European Centre for Law and Justice (ECLJ) to the Report of the Special Rapporteur, p.6. See also <https://www.valeursactuelles.com/societe/gpa-letranger-pourquoi-la-cour-dappel-de-paris-denie-linteret-superieur-de-lenfant-99152>

with the child's biological parents and all possibilities of appeal. This is not in the best interests of the child. In the same way, these practices are similar to illicit transfer and non-return of children by a third party according to Article 11 of the CRC, since the child is abducted from his or her parents without return and in violation of national legislation³⁰.

VI) Disability, health and basic well-being (arts. 23 and 24)

Disabled children

22. Although there are no proven cases involving French nationals, children with disabilities in the context of surrogacy are often aborted or abandoned by their parents of intent³¹. This trend is worrying and is consistent with eugenic practices. Indeed, the sponsors of surrogacy choose surrogate mothers and gamete donors from a catalogue according to their physical, intellectual or other characteristics³². Screening tests for genetic abnormalities such as Down syndrome are used for embryo selection as well as during pregnancy with a view to medical or voluntary abortion³³. If at the end of this process, the child is born with any abnormality that does not meet the expectations of the parents of intent, the child is rejected and abandoned as a mere non-compliant commodity. France must firmly oppose these practices.

Health and health services, in particular primary health care

23. With regard to health and access to health care as defined in Article 24 for children born by surrogacy, particularly in developing countries, the antecedents of surrogate mothers and gamete donors are not always known and are not followed up over time. This is therefore a risk to the child's health in the long term, the fight against genetic, transmissible and non-communicable diseases and access to care. Moreover, the psychological health of these children is not guaranteed. A child born by surrogacy may have up to six parents. This discrepancy between procreation and parenthood can lead to psychological instability for the child³⁴.

VII) French case-law

24. Despite the ban, the French judiciary has been complacent, to say the least, with surrogate practices in recent years. In particular, in 2018, the *Court de Cassation* (court of last resort) requested an Advisory Opinion from the ECHR on the recognition in domestic law of a parentage link between a child born abroad by surrogacy and the mother of intent³⁵, instead of strictly applying French law and

³⁰ ADF International, *Response to the Questionnaire of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, May 2019, p. 5, section 24

³¹ <https://www.lefigaro.fr/actualite-france/2014/08/01/01016-20140801ARTFIG00369-ils-font-appel-a-une-mere-porteuse-puis-abandonnent-le-bebe-handicape.php>
<https://fr.aleteia.org/2014/08/28/gpa-personne-ne-voudrait-adopter-un-enfant-handicape/>

³² Streb Blanche, *Bébés sur Mesures: Le monde des meilleurs*, Artège, Paris, 2018

³³ <https://www.fondationlejeune.org/bioethique-transhumanisme-humanisme-politique-france-bilan-2012-2017recommandations-2017-2022dpm/>

³⁴ Brunetti-Pons Clotilde, *Op. cit.*, pp. 310-311

³⁵ <http://hudoc.echr.coe.int/fre?i=003-6380431-8364345>

the resulting sanctions. France also took part in the Council's expert group on General Affairs and Policy of the Hague Conference and in its decisions taken in March 2019 to provide a framework for surrogacy practices that are in contradiction with national and international law³⁶.

25. France does not criminalize the sale of children; it recognizes in criminal law (article 227-12 of the Criminal Code)³⁷ the incitement to abandon children and the mediation for the abandonment or adoption of children. However, there is no specific criminal penalty for the sale of children³⁸. For example, a woman who sold two of her children on the Internet was sentenced for defrauding the buyers to a one-year suspended prison sentence (after receiving money from the first buyers, she claimed that the children had died before selling them to others)³⁹. However, surrogacy could possibly be criminalized under the crimes of enslavement (Penal Code, art. 224-1-A) and child trafficking (Penal Code, art. 225-4-1)⁴⁰.
26. Since 2013⁴¹, France has authorized the issuance of certificates of French nationality to children born abroad by surrogacy and ordered by French "parents of intent". In 2015, the Court of Cassation handed down several rulings organizing the recognition of children born abroad by surrogacy in two stages: firstly, the partial transcription of the birth certificate for biological parentage, and then the adoption of the child by the mother of intent or the father's spouse⁴². The ban on surrogacy thus loses its legal effects and the French justice system turns a blind eye to practices involving the sale of children and trafficking in human beings by allowing the "laundering of the procreative market". Yet the absence of a transcript did not deprive the children of their foreign civil status. Moreover, the European Court of Human Rights recognized this position in 2019 as being valid with regard to respect for the best interests of the child⁴³. However, in several cases in 2019, the Rennes Court of Appeal decided to authorize the full transcription of the birth certificates of children born abroad by surrogacy, even though they designated the "mother of intent" as the mother of the child⁴⁴. This reversal of case-law undermines the protection of children's rights against sale and exploitation⁴⁵, and encourages human trafficking⁴⁶ in opposition to Article 35 of the CRC.

³⁶ <http://genetique.org/fr/la-haye-un-groupe-dexperts-veut-encadrer-la-gpa-lechelle-internationale-71426.html#.Xrs8sRP7R0t>

³⁷ "The act of provoking, either for profit or by gift, promise, threat or abuse of authority, the parents or one of them to abandon a born or unborn child is punishable by six months' imprisonment and a fine of 7,500 euros.

Any person who, for financial gain, mediates between a person wishing to adopt a child and a parent wishing to abandon a born or unborn child shall be punished by one year's imprisonment and a fine of EUR 15,000.

The penalties provided for in the second paragraph shall apply to the act of mediation between a person or couple wishing to adopt a child and a woman agreeing to carry the child within her with a view to handing it over to them. Where such acts are committed on a regular basis or for profit, the penalties shall be doubled."

³⁸ Deficiency that were already raised by the Committee on the Rights of the Child, see the response of France CRC/C/FRA/5, section 588

³⁹ Tribunal correctionnel de Blois, 03.22.2016

⁴⁰ de La Hougue Claire, « La qualification juridique de la gestation pour le compte d'autrui au regard du droit international et du droit pénal français », *Droit de la famille* n° 11, November 2015, study 15

⁴¹ *Circulaire Taubira* of January 25, 2013: http://www.textes.justice.gouv.fr/art_pix/JUSC1301528C.pdf

⁴² *Cass. ass. plén., July 3rd, 2015, n° 14-21.323* and *Cass. ass. plén., July 3rd, 2015, n° 15-50.002*

⁴³ <http://hudoc.echr.coe.int/fre?i=003-6380431-8364345>

⁴⁴ Cour d'Appel de Rennes, *arrêt n°628, November 25, 2019*, <https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2019/11/doc271119-27112019155318.pdf>

⁴⁵ Lea Jennifer and Price Lorcan, ADF International, *Op. cit.*, pp. 2-3

27. Furthermore, action research in Europe and the Middle East conducted by Caritas on child trafficking⁴⁷ reveals that some clinics, including BioTexCom in Ukraine, were providing false birth certificates to children born by surrogacy who had no biological link to the parents of intent. We believe that these cases of child trafficking that were discovered in 2018 are not isolated, and that, faced with this situation, the French justice system should not transcribe foreign civil status records without prior DNA verification of the biological links between the parents of intent and the child, in order to respect France's international obligations.

VIII) Recommendations

28. We recommend to the French State the elaboration of an international convention for the prohibition of surrogacy⁴⁸ and the consequent efforts of French diplomacy in international and multilateral negotiations on this subject. Surrogacy must be considered as trafficking in human beings and commodification of the human body and its products. The definition of slavery may also apply⁴⁹.
29. We call on the French judiciary to systematically prosecute and sentence to the penalties provided for "parents of intent", perpetrators of offences, as well as all actors and intermediaries promoting surrogacy, such as foreign companies, lawyers, reproductive tourism agencies, the media and public figures.
30. We recommend the verification by DNA tests of the biological links between the child born by surrogacy and his or her parents of intent before any transcription of his or her civil status in France. In case of suspicion of child trafficking, the parents of intent must be prosecuted for trafficking in human beings.

IX) Questions to the French government

- How does the French State intend to enforce the ban on surrogacy practices by its nationals?

To this end, will France punish its nationals with the penalties prescribed by law? Will it sign bilateral agreements with countries that allow surrogacy, in order to expressly prohibit it for French citizens?

- With regard to children born of these practices and brought back to French territory, do French legislators intend to purely and simply prohibit the complete transcription of foreign civil-status records in the absence of biological plausibility?

- Does France intend to undertake diplomatic efforts to make the international abolition of surrogacy effective, under the terms of Article 35 of the CRC?

⁴⁶ Comité Protestant Evangélique pour la Dignité Humaine ("Evangelical Protestant Committee for Human Dignity"), *Etats Généraux de la Bioéthique, Audition par le Conseil Consultatif National d'Ethique (CCNE)*, April 6, 2018

⁴⁷ Caritas, *Invisible children, an unpunished crime, Act against exploitation and child trafficking*, Action Research in Europe and Middle East, December 2019, p. 67

⁴⁸ Opinion No. 126 of the *Comité Consultatif National d'Ethique* (National Consultative Ethics Committee) on societal demands for recourse to medically assisted procreation, June 15, 2017

⁴⁹Contribution of the European Centre for Law and Justice (ECLJ) in the Report of the Special Rapporteur on the sale and sexual exploitation of children, p. 7