

Child Identity Protection Briefing Note

Surrogacy in 2023: Priority Issues Relating to Children's Rights Protection

Introduction

Surrogacy continues to be used as a method of family formation around the world. Children born through surrogacy have the same rights as all children under [the United Nations Convention on the Rights of the Child \(UN CRC\)](#) and the [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography \(OPSC\)](#). However, because of the way that the practice of surrogacy has evolved, the fundamental rights of these children are at risk, especially in international arrangements.

Specific children's rights which are most often at risk in surrogacy are the right not to be sold, the right to an identity, including birth registration, name, nationality, family relations and access to origins; and the right to the enjoyment of the highest attainable standard of health.

This Briefing Note focuses on three priority issues relating to children's rights protection in the context of surrogacy in 2023, given their practical significance, especially in international surrogacy arrangements. It builds on guidance provided by the UN CRC Committee's recommendations, UN SR on sale and sexual exploitation reports,¹ *Principles for the Protection of the Rights of the Child Born Through Surrogacy* (Verona Principles, 2021),² and the Child Identity Protection (CHIP) and UNICEF briefing note: *Key Considerations – Children's Rights and Surrogacy* (2022).³

These three priority issues, outlined below, need urgent attention and action, in particular by States that allow surrogacy to occur in their jurisdictions and those having to respond to surrogacy issues due to the activities of their nationals and residents.

Priority issue 1: Adoption and surrogacy

Although adoption and surrogacy are both used in practice for family formation, they are very different in nature. Distinguishing between them is vital from a children's rights and child protection perspective.

Current international standards approach adoption from a child-centred standpoint. It is seen as a child protection measure enabling a child deprived of their family to be cared for by adoptive parents. These standards enumerate various safeguards – such as evaluations, matching and follow-up – that must be in place to ensure the rights of the children concerned are respected.

In contrast, the act of surrogacy involves bringing new children into the world as a result of deliberate decisions and actions on the part of intending parents, surrogate mothers, gamete donors, and often with the participation of intermediaries. Because children's rights are at stake in surrogacy, child protection measures tailored to this specific situation are required.

This fundamental distinction means that, save in exceptional cases, adoption is not an appropriate mechanism to regularise the parent-child relationship between an intending parent and a child born through commercial surrogacy. In addition, since adoption standards preclude "payment or compensation of any kind" to the birth mother,⁴ it is of particular concern when adoption is used

¹ <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>

² https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February2021.pdf

³ <https://www.unicef.org/media/115331/file>

⁴ HCCH 1993 Adoption Convention Art 4.c(3)

following forms of commercial surrogacy involving the purchase of consents that may qualify as sale of children under the OPSC,⁵ which forbids “any act or transaction whereby the child is transferred ... for remuneration.”

Therefore, recourse to an adoption procedure cannot be justified simply by the absence of alternative legal pathways to establish the parent-child legal relationship, as is the case in many jurisdictions. In that respect, it is notable that, in 2010, the Hague Conference on Private International Law stated that it is inappropriate to use the HCCH 1993 Adoption Convention in cases of international surrogacy.⁶

Priority issue 2: Consent in surrogacy

In the context of surrogacy today, obtaining the free and informed consent of the surrogate mother is not always guaranteed in practice. This is highly concerning, given that confidence in the integrity of the circumstances surrounding the surrogacy arrangement that led to a child’s birth through surrogacy is of great importance for this child.⁷

The surrogate should be able to make independent and informed decisions relating to the surrogacy, and be free from exploitation and coercion in all her decision-making and actions. Given the nature of the relationship between the surrogate mother and a child that she gives birth to, the protection of the child’s human rights is, to a great degree, dependent on the protection of the rights of the surrogate mother herself. Free and informed decision-making and consent should be upheld for the surrogate mother in all legal, psychological, social, financial and medical matters, and she must be able to exercise self-determination. Consent to the transfer of a child to the child’s intending parents must not be paid for – consent must not be bought. To do so violates the central tenet of the purpose of consent in surrogacy, and raises significant issues regarding the right of children not to be sold.

Priority issue 3: The role of intermediaries in surrogacy

Intermediaries, such as surrogacy brokers and clinics, are often involved in surrogacy arrangements, especially international surrogacies. Concerningly, in the majority of States where surrogacy is practised and/or where intermediaries are operating, they tend to operate without adequate regulation and in unsupervised networks. This means that intermediaries are often working in ways that risk violating the rights of children born through surrogacy, in particular the right of the child not to be sold. It is especially problematic that intermediaries often play a lead role in working with surrogate mothers, obtaining their irrevocable consent, and setting up contractual agreements in surrogacy, without the requirement to operate within the boundaries of adequate regulatory and human rights protective frameworks.

All States that allow surrogacy to be practiced within their jurisdictions should, in order to uphold children’s rights, ensure effective regulatory frameworks to govern the practice of intermediaries in surrogacy. Such regulation should be grounded in international human rights law standards, including the UN CRC. Particular attention should be given to the role of intermediaries to uphold the child’s right to establish and preserve their identity as required by the UN CRC Article 8.⁸

To guard against enticing intending parents from States that do not allow surrogacy or certain kinds of surrogacy (such as commercial surrogacy) to engage in international surrogacy, advertising and promotion by intermediaries in such States should be banned and sanctioned.

⁵ See Verona Principles, Principle 7(3): Consent of surrogate mother.

⁶ <https://assets.hcch.net/docs/2ed33240-387f-4270-a418-d7de4ca0e464.pdf>

⁷ See Verona Principles, Principle 7: Consent of surrogate mother.

⁸ See Verona Principles, Principle 11: Protection of identity and access to origins.