

## Comments on the Report on the different manifestations of violence against women and girls in the context of surrogacy presented by Reem Alsalem, UN Special Rapporteur on violence against women and girls, its causes and consequences (A/80/158)

### Executive summary

CHIP does not advocate for or against prohibition; our focus is on ensuring any surrogacy that occurs complies with international human rights standards.

#### Areas of agreement

- States should prevent commodification and protect both women and surrogate-born children from exploitation.
- There is no unconditional 'right to have a child'; reproductive arrangements should be bound by human rights standards and safeguards.
- Both prohibitionist and permissive States should work to prevent ISAs between their jurisdictions due to the grave risks those arrangements pose, which cannot be effectively regulated at a national level. The activities of intermediaries in such ISAs should be targeted as criminal matters, particularly when services are promoted in prohibitionist States.
- Clear, lawful pathways to legal parentage are needed to avoid limbo for surrogate-born children.

#### Key concerns

- 'Unaccompanied minors' interim measure risks unnecessary separation; continuity of care should be preferred where safe and appropriate.
- Adoption is generally not the appropriate mechanism for establishing parentage in surrogacy.
- Text conflates legal definitions of trafficking and sale of children.
- Tendency to attribute the worst abuses of some surrogacy systems to all surrogacy arrangements

#### Recommendations

1. Withdraw the 'unaccompanied minors' framing for surrogate-born children; prioritise continuity with a safe, genetically related intending parent where possible pending post-birth best interests determination.
2. Legislate specialised parentage orders that include adoption-grade safeguards: screening, counselling, independent legal advice, and post-birth confirmation.
3. Keep trafficking and sale-of-children analyses distinct; acknowledge the 'purpose of exploitation' element central to trafficking definitions but absent from sale of children definition.
4. Publish a minimum set of private international law safeguards for cross-border surrogacy (identity, origins, suitability screening, best-interests determination, prohibition of sale of children, non-discrimination, nationality etc.).

### Comments

We welcome the Special Rapporteur's initiative to foreground women's rights in surrogacy, alongside children's rights, following the recommendations already made by the UN Special Rapporteur on the sale and sexual exploitation of children in her 2018<sup>1</sup> and 2019 reports. Our organisation – Child Identity Protection (CHIP) - recognises that women's rights and children's rights together constitute the key component of the human rights at issue in surrogacy. CHIP's 2023 briefing note stated that "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

<sup>1</sup> Para. 78 Encourage other human rights mechanisms, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations entities to contribute, with further research, to discussions on surrogacy and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations.

mother herself.”<sup>2</sup> Deprivations of the rights of the child in surrogacy may thus be viewed, in part, as consequences of violating women’s rights.

**The purpose of this note is to invite the Special Rapporteur to consider the issues set out below that may merit further reflection and/or clarification.<sup>3</sup>**

### **1. The report recommends the prohibition of all forms of surrogacy**

One of the most notable recommendations of the report is to “take steps toward eradicating surrogacy in all of its forms” at the international level,<sup>4</sup> through “adopting an international legally binding instrument prohibiting all forms of surrogacy.”<sup>5</sup>

CHIP takes no position on whether surrogacy should be prohibited. Our priority is safeguarding rights wherever surrogacy occurs, especially in cross-border commercial contexts where risks are acute. CHIP takes the position that if surrogacy occurs, it should respect human rights. CHIP notes the violation of multiple rights of the child typical in most commercial surrogacy arrangements.

CHIP maintains that permissive States should not allow international surrogacy arrangements with intending parent(s) who plan to bring the child to be raised in a prohibitionist State, given the practical impossibility of implementing adequate safeguards for such cross-border arrangements. CHIP likewise notes that if States adopt a prohibitionist stance, they should put measures in place to prevent and sanction intermediaries promoting the practice occurring within their territory.<sup>6</sup> Given the present realities, CHIP focuses on how to protect the rights of surrogate-born children, which can be better accomplished if the linkages between women’s rights and the rights of the child are kept in view.

### **2. The report, in discussing violations of both women’s and children’s rights, sheds light on the linkages between the rights of surrogate mothers and of surrogate-born children**

The report identifies various forms of violence against women in the context of surrogacy, including economic, psychological, physical, and reproductive violence. It also includes the marginalization and vulnerability, and risks of being trafficked, experienced by women in the context of surrogacy. The report notes the ways in which some frameworks for surrogacy fail to recognize surrogate mothers as mothers *ab initio*, stripping them of legal protections and treating them as mere carriers, which undermines human dignity as “her body and its reproductive functions are used as a commodity.”<sup>7</sup>

The report further notes many of risks to children’s rights including the rights to family relations, identity and origins in surrogacy arrangements.<sup>8</sup> The report provides for important protections for children, such as “parental suitability screening.”<sup>9</sup> The report recognises the child’s rights to nationality<sup>10</sup> and to non-discrimination.<sup>11</sup> The report correctly rejects “an unconditional right to have a child.”<sup>12</sup> The report concludes that the best interests of the child “must be incorporated into the decision-making on whether

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<sup>2</sup> See <https://www.child-identity.org/childrens-rights-in-surrogacy/>

<sup>3</sup> Prepared by David Smolin with input from Laurence Bordier, Maud Buquicchio, Nigel Cantwell, Mia Dambach, Olga Khazova, Katarina Trimmings and Michael Wells-Greco. The views reflected are those of CHIP and not necessarily of any other organisation and/or institution.

<sup>4</sup> Para. 70a

<sup>5</sup> Para. 70b

<sup>6</sup> See <https://www.child-identity.org/thematic-report-of-the-special-rapporteur-on-violence-against-women-and-girls-on-surrogacy/>

<sup>7</sup> Para. 53, 54

<sup>8</sup> Para. 46, 59, 70(n)

<sup>9</sup> Para. 70(k)

<sup>10</sup> Para. 48, 68, 70m

<sup>11</sup> Para 68, 70l

<sup>12</sup> Para. 60

to ban or regulate surrogacy.”<sup>13</sup> Finally, the report states that commercial surrogacy “constitutes the sale of children, which is a crime.”<sup>14</sup>

Explicitly and implicitly, the report illuminates linkages between those two groups of rights violations, particularly as they occur in commercial surrogacy arrangements. For example, systems that commodify surrogate mothers’ bodies and reproductive functions,<sup>15</sup> tend to also commodify surrogate-born children through violation of the prohibition of sale of children under the OPSC.<sup>16</sup> The common roots of these violations of both the rights of the child and of women’s rights are the construction of international commercial surrogacy systems organised around the reproductive goals of intending parents and the profit-seeking of intermediaries, including moving surrogate mothers across national boundaries. Surrogacy may be simplified to an expensive solution to medical or intrinsic infertility or may be a preferred parenting choice. Surrogacy is however not a mere medical technology but also requires the body and/or human reproductive material of another person. These same systems tend to wrongly presuppose a right to a child. Some systems that reduce surrogate mothers to carriers without rights to their own children, who often are denied bodily autonomy and the right to make informed health care decisions, tend also to deny surrogate-born children the protections of suitability reviews and best interests of the child determinations. Practices that violate the inherent dignity and rights of surrogate mothers tend also to violate those of surrogate-born children. Cross-border surrogacy generally fails to protect the rights of surrogate-born children to identity in family relations and origins.

### 3. Points of further concern

- a. The SR report, as already noted, while declaring the best interests of the child are “the primary consideration”<sup>17</sup> in all decisions relating to parentage and care<sup>18</sup> and to “be incorporated into the decision-making on whether to ban or regulate surrogacy”, recommends an interim period in which surrogate-born children should be treated “as unaccompanied minors to be placed in alternative care...”<sup>19</sup> This recommendation is in not in the best interests of the child as it creates a situation that is tantamount to forced abandonment. It is silent on the possibility of placing the child with a genetically-related intending parent pending the establishment of parentage, which could avoid unnecessary separation, and temporary alternative care placements. Additionally, the analogy with unaccompanied minors seems misplaced, as surrogate-born children are in principle accompanied.
- b. Recommendation 70(g) states “When deemed in the best interests of the child born through surrogacy, the partner of the biological father could be allowed to adopt the child, thereby avoiding the normalization of surrogacy and maintaining the original parentage.” CHIP maintains that, save in exceptional circumstances, adoption should not be employed as a mechanism in the context of surrogacy. Instead, we propose specialised parentage orders that import adoption-grade safeguards without undermining core adoption principles regarding payments and consent to regularize 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, it is of particular concern when adoption is used following forms of commercial

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<sup>13</sup> Para. 68

<sup>14</sup> Para. 42

<sup>15</sup> Para. 53, 54

<sup>16</sup> Para. 56

<sup>17</sup> Para. 70(g). See best interests of the child as the primary consideration in Verona Principles and Para 77(e) UN SR on sale and sexual exploitation report 2018, Cf. Art. 21 CRC

<sup>18</sup> Para. 70(j)

<sup>19</sup> Para. 70(g)

surrogacy involving the purchase of consents...”<sup>20</sup> CHIP agrees that many of the adoption protections, such as suitability reviews and best interests of the child determinations, should be applied to parentage decisions for surrogacy arrangements.<sup>21</sup> However, such should be done in the context of specialised parenting orders that avoid undermining fundamental principles of adoption.<sup>22</sup>

- c. Surrogate-born children, regardless of the legality of the arrangement, should not be deprived of any of their rights.<sup>23</sup> Private international law approaches should include minimum safeguards (identity, origins, suitability screening, best-interests determination, prohibition of sale of children, non-discrimination, nationality etc.). Continuity of legal parentage should not be prioritised over other rights such as having a complete identity and the right not to be sold.
- d. Para. 56 claims that “there is no requirement of ‘exploitation’ as a separate element” in the definition of human trafficking in Art. 3 of the Trafficking in Persons Protocol (Palermo Protocol). Yet, art 3(a), in defining “trafficking in persons,” specifically requires that the defined actions be done “for the purpose of exploitation” and then includes a definition of exploitation. In support of the statement that exploitation is not a required element of trafficking, Para. 56 then quotes the 2018 Report of the UN SR on sale and sexual exploitation of children. However, the quotation, while accurate, concerns the absence of an exploitation element in the definition of sale of children in the OPSC, **not** the definition of trafficking in the Palermo Protocol.
- e. CHIP takes no position on the claim that all forms of surrogacy are inherently a violation of the human dignity of the surrogate mother, no matter how well intentioned. However, for many purposes CHIP finds it important to carefully differentiate between different kinds of surrogacy systems, including commercial surrogacy, altruistic systems that border on commercial because of the involvement of intermediaries and high payments in the guise of reimbursements, and truly altruistic arrangements among persons who knew each other prior to the arrangement. Systems also vary based on the parental status of the surrogate mother at birth and the specific safeguards that are provided. Although these distinctions are sometimes made in the report, the report suffers from a tendency to attribute the worst abuses of some surrogacy systems to all surrogacy arrangements.

**CHIP remains available to support the Special Rapporteur as she considers the intersection of violence against women with children’s rights in surrogacy. We agree on the need to prevent commodification and to reject an unconditional ‘right to a child’. We recommend three refinements: (1) withdraw the ‘unaccompanied minors’ interim care concept in favour of continuity of care with a safe, genetically related intending parent where appropriate; (2) prefer specialised parentage orders that import adoption-grade safeguards instead of defaulting to adoption; and (3) avoid conflating ‘sale of children’ with ‘trafficking’, retaining the exploitation element central to trafficking definitions. Our focus is practical safeguards wherever surrogacy occurs, especially in cross-border commercial contexts.**

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<sup>20</sup> See <https://www.child-identity.org/childrens-rights-in-surrogacy/>

<sup>21</sup> Cf. Para. 46

<sup>22</sup> Cf. Legal Memorandum Denmark v KK decision <https://www.child-identity.org/wp-content/uploads/2023/04/CHIP-2023-Surrogacy-LegalMemorandum.pdf>

<sup>23</sup> Para 68.