



INTERNATIONAL SOCIAL SERVICE

SURROGACY

Technical assistance and advocacy

What are Surrogacy Arrangements?

Surrogacy involves the carrying of a child by a surrogate mother, with the intention that another person or persons will be the parent(s) of that child. Over the past three decades surrogacy has become an increasingly popular method of alternative reproductive technology. It is, however a practice that raises a number of human rights, ethical and legal questions – at the forefront being: can a surrogacy arrangement constitute the sale of children; and how can the human dignity of those involved be protected. Surrogacy involves multiple parties and can occur across borders – raising, *inter alia*, issues of: the legality of the arrangements in either the State in which the Surrogacy occurs, or in the intending parents home State; how parentage/parental responsibility will be determined; and the immigration status of the child. Domestic legal responses to surrogacy differ widely. In some States the practice is regulated, in some it is expressly prohibited, whilst in others it is not legislated for at all. Jurisdictions which provide for surrogacy, differ on appropriate practices, such as payments to surrogate mothers beyond reasonable pregnancy-related expenses (so called ‘commercial surrogacy’).

Why might surrogacy endanger the best interests of the child, and breach broader human rights standards?

Varied domestic legal approaches, coupled with a complete lack of an international legal framework as well as disregard to fundamental human rights, has led to unsound practices. Intending parents often leave their home State for surrogacy procedures, purposely choosing ‘surrogacy friendly’ jurisdictions. In this environment, an extensive international commercial surrogacy market has developed, with it an inherent risk of human rights abuses. The Committee on the Rights of the Child has referred to unregulated surrogacy as constituting the sale of children. The UN Special Rapporteur on Sale, Trafficking and Exploitation of Children, is dedicating her 2018 report to this issue. Exploitative surrogacy practices jeopardise the human dignity of all parties. Surrogate born children risk being sold, may face statelessness, may be abandoned by either the intending parent (for whom there are no standards of suitability assessment practices) or the surrogate mother, and uncertainty around formal parentage. Women in developing countries are particularly at risk of exploitation.

What is ISS’ Role in Surrogacy?

ISS is coordinating an Experts’ Group working to address the risks associated with surrogacy. ISS’s work is supported by the HCCH, and is complimentary to the HCCH’s own work on parentage/surrogacy (a project constrained by the limits of private law). The expert group includes key children’s rights and human rights bodies, including UNICEF and the UN Special Rapporteur on Sale, Trafficking and Exploitation of Children. Experts represent various geographical regions and intellectual standpoints, coming from government, academic institutions, civil society, and national, regional and international organisations. The group has identified an urgent need for comprehensive universal principles, considering surrogacy from an international and child-centered approach, and grounded in International Human/Children Rights Law and standards.

Guiding international standards and ISS internal documents:

- [Convention on the Rights of the Child](#)
- [OP to the CRC on the sale of children, child prostitution and child pornography](#)
- [Convention on the Elimination of All Forms of Discrimination against Women](#)
- [ISS thematic factsheets on alternative care and adoption](#)
- [HCCH discussion documents on parentage and surrogacy](#)
- Drafted ‘Principles for a better protection of children’s rights in surrogacy arrangements’ (see below)

Casework Services may include:

- Counselling and awareness raising about the feasibility and implications at the socio-legal level

Technical assistance and advocacy may include:

- Dissemination of information to professionals (e.g.: Monthly Review, over 100 country situation analysis, comparative studies and thematic publications);
- Evaluation missions and technical assistance in national law and policy reforms at the request of countries;
- Active participation in expert consultation groups;
- Work with UN and regional treaty bodies.

ISS Expert Group: Key agreed messages

As of June 2017, there are eight key agreed messages, that provide the framework for the Expert Group's work in drafting 'Principles for a better protection of children's rights in surrogacy arrangements':

1. There is an urgent need for national and international regulation on surrogacy arrangements compliant with international human/children's rights standards. The foundational international human and children's rights documents do not specifically address surrogacy. Hence, the task of this project is to apply the general norms of children's rights and human rights to surrogacy arrangements. The Principles apply to all surrogacy arrangements, with a particular emphasis on international surrogacy arrangements (ISAs). Helpful guidance is provided by examining the treatment of analogous relevant practices, such as adoption, noting both the differences and similarities.
2. The Principles simultaneously define the standards for surrogacy to be compatible with international human/children's rights, as well as what to do after the fact if surrogacy is conducted in ways that violate those norms.
3. Under current interpretations of international and children's rights, as well as national policy determinations, there is a legitimate diversity of approaches to surrogacy. It is legitimate to prohibit all surrogacy arrangements, prohibit only commercial surrogacy arrangements, or to permit certain arrangements under regulations compatible with human/children's rights norms. States must prohibit surrogacy arrangements constituting the sale of children, and should create safeguards to ensure that the sale of children does not occur in the context of surrogacy.
4. States may refuse to become centres for ISAs by limiting the participation of foreign intending parents. States should strive to respect the national policies of other States regarding surrogacy arrangements, by limiting the participation of foreign intending parents evading their own State's laws. States are not required to acquiesce in ISAs or foreign parentage orders contrary to their own national policies on surrogacy.
5. Children must never be punished based on the circumstances of their birth, and surrogacy prohibitions must therefore not be enforced through the denial of rights to surrogate-born children. Hence, even when surrogacy arrangements violate the Principles and/or national policies on surrogacy, the Principles permit States to grant intending parents parentage and/or parental responsibility, so long as such is done in the context of individualised post-birth consideration of the best interests and rights of the child, and of the rights of surrogate mothers.
6. Pre-birth processes, so long as they are not binding on the surrogate mother or the courts, may be helpful. For example, preliminary suitability screening could prevent the initiation of inappropriate surrogacy arrangements.
7. Parentage must not be established, lost or transferred by private agreement or contract. Written agreements may provide evidence of intention and be part of a process of recording consent, but such agreements cannot be determinative: a court or competent body must make final determinations through appropriate processes. The surrogate mother should be recognised as a parent on the birth of the child. Jurisdictions that do not recognise the surrogate mother as a legal parent at birth due to pre-birth agreements, contracts or arrangements (or the intentions therein) deprive both surrogate mother and child of their rights. In a commercial context, such agreements, contracts and arrangements are likely to encompass conditions that constitute or give rise to the sale of children.
8. Irrespective of the circumstances of their birth, all children have a right to a nationality, and States have an obligation to prevent statelessness. States must ensure that there is an adequate legal framework on nationality and immigration for all children conceived through surrogacy, such that no surrogate-born child is stateless. States should apply provisions on acquisition of nationality to surrogate-born children under the same conditions as they do to all children.

