



Commercial Surrogacy and the Risk of Child Trafficking and Child Sexual Abuse/Exploitation

A Position Paper

Introduction

As the global market for international adoption becomes ever more regulated, international surrogacy arrangements (ISAs) are booming, particularly in developing countries where lower costs entice the demand of industrial nations (Smerdon, 2008). Surrogacy is not a new concept (for example, the practice dates back to Biblical and mythological times) and over the last few decades, new reproductive technologies have greatly evolved. However, the surge of ISAs in recent years, in the absence of any international oversight, has left surrogate mothers and children exposed to ethical and protection risks, which have included allegations of exploitation and sexual abuse (Engel, 2014).

There are two types of surrogacy arrangements: ‘altruistic surrogacy’, in which the mother receives no payment or compensation for carrying and delivering the child; and ‘commercial surrogacy’, in which the mother, and often the facilitating organisation, are paid.

There are also different forms of surrogacy: traditional (or ‘straight’) surrogacy, in which the eggs of the surrogate mother are used; gestational or ‘host’ surrogacy, in which *in vitro* fertilization (IVF) technology is used to transfer an embryo into the uterus of the surrogate mother.

In many developed countries, commercial surrogacy is either prohibited or heavily regulated. What has resulted is a growth in surrogacy agencies and brokers in the developed West, heavily marketing ISAs through the guise of ‘medical tourism’ and ‘procreative treatment’. The ensuing result has been a significant growth in market supply in Latin and Central America, Asia and Eastern Europe where legislation and regulatory oversight of ISAs is minimal, if present at all. (Cranshaw, et al., 2014).¹

The conceptual debate surrounding surrogacy and child rights is highly polarised. Advocates for surrogacy contend that couples struggling with infertility or those who are biologically unable to conceive (such as same sex couples or those who are single) should be given the chance for the ‘gift of life’ (Lahl, 2014). However, critics argue that surrogacy is essentially the

¹ For example, India, certain states in the US, and Ukraine have liberalised their family laws to accommodate surrogacy whereas in many European countries, surrogacy is forbidden by law. This leads to intended parents travelling to more favourable jurisdictions and ‘forum shopping’ in search of markets that promise better service at lower cost (Engel, 2014).



‘commodification’ or ‘buying and selling’ of children, which may undermine the rights of the child, and constitute a form of human trafficking (White, 2014). Some of the more prevalent dangers related to international surrogacy include uncertainty in the child’s birth registration, parentage, nationality and identity; increased exposure and risk of child trafficking and sexual exploitation; and increased risk of economic exploitation of surrogate mothers, specifically in marginalised or low-income communities (Pascoe, 2012).

This brief position paper does not seek to argue the ethical considerations around different approaches to surrogacy but examines the potential harm to children conceived through surrogacy, such as exploitation, trafficking and sexual abuse. The paper offers recommendations, which if followed would offer greater international regulation of surrogacy agreements and enhanced oversight of surrogacy arrangements, which in turn would offer a greater degree of protection for children against abuse and exploitation.

Commercial surrogacy and the vulnerability to child Sexual abuse and exploitation

Whilst the vast majority of commercial surrogacy arrangements are genuine and end in children going to loving homes, ECPAT’s long experience and commitment to eliminating all forms of commercial sexual exploitation of children is important when considering the potential for surrogacy agreements to be used as an avenue to exploit children. The lack of clear international standards to inform or regulate commercial international surrogacy agreements has enabled a transnational market for surrogacy to develop with limited oversight or regulation (Engel, 2014). Recent historical examples highlight the potential for serious adverse outcomes from unregulated surrogacy agreements. Thailand is currently being shaken by two high-profile cases. In the case of Gammy (a baby born with Down’s syndrome to a Thai surrogate and then abandoned by the Australian intended parents), further investigation revealed that the father was convicted for 22 child sex offenses in the late 1990s (Rajendran, 2014). This scandal also exposed the case of a 24-year-old Japanese businessman who had allegedly fathered 15 babies with Thai surrogate mothers. Three of the babies had already been taken out of Thailand and their fate remains unknown. Thai authorities are investigating the case as potential child trafficking (Derbali, 2014).

In 2013, reports emerged that an Israeli man, who was also a convicted child sex offender, was allowed to engage in an international surrogacy agreement in India and for the child to be brought to Israel. The child welfare agency in Israel has since reportedly been in touch with the family and is keeping the child under ‘observation’ (Rajendran, 2014).

Another particularly distressing case involved a male same-sex couple living in Australia who arranged for a surrogate child to be born in Russia in 2005. Whilst the media heralded the men as ‘happy, loving fathers’, allegations later came to light that the child had been subjected to sexual abuse by the two men. Further evidence emerged that the couple had allowed eight



men (from four different countries) to allegedly subject the child to sexually abuse over four years, when he was two to six years of age (Baklinski, 2013).

Whilst these cases may appear to be isolated instances, they do elucidate the possible risks that surrogate mothers and children born out of surrogacy potentially face in the absence of international oversight or due consideration to human rights. The truth is that without greater regulation and oversight, the risks to surrogate children are simply not known and such cases could be happening more frequently than is currently identified.

What can be done to better protect children born of surrogacy arrangements?

The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption² has been in place since 1993; however, no such equivalent convention exists on surrogacy. The Hague Conference on Private International Law is attempting to initiate the process to draft a convention on international surrogacy arrangements to be shared in 2015; unfortunately, this is likely to be fraught with challenges due to divergent legal regimes regulating family law in the different jurisdiction (Hague Convention on Private International Law, 2012). A set of minimum international standards specific to surrogacy would be able to speak to the unique issues, which children born out of surrogacy arrangements face, ensuring their best interests are safeguarded. Irrespective of what form such an international instrument takes, it is imperative that it complies with already existing international human rights standards.

The existing core international human rights conventions³ offer a wide range of human rights and protections, which if applied to surrogacy could serve as a basis for developing global minimum standards on ISAs.⁴ For instance, children born out of surrogacy agreements are often denied their right to parentage (i.e. having the prospective father and mother identified on their birth certification as opposed to the birth mother); their right to acquire a nationality (i.e. where the surrogate mother is a different nationality than the intended parents); their

² The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, concluded on 29 May 1993, available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=69

³ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 993 U.N.T.S. 3, entered into force 3 January 1976; *International Covenant on Civil and Political Rights* (ICCPR), 999 U.N.T.S. 171, entered into force 23 March 1976; *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 1249 U.N.T.S. 13, entered into force 3 September 1981; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, entered into force 26 June 1987; *Convention on the Rights of the Child* (CRC), 1577 U.N.T.S. 3, entered into force 2 September 1990.

⁴ Other related international instruments, such as the *ILO Convention no 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*⁴ may also be useful.



right to birth registration; their right to an identity (i.e. the right to know their father and mother), as a result of the unique circumstances of their birth. Article 2 of the *Convention on the Rights of the Child* (CRC), if applied to surrogacy agreements, would prohibit any form of discrimination against a child on the basis of his or her birth,⁵ requiring the State to actively identify children vulnerable to discrimination and take special protective, legislative, administrative and other measures to ensure they are offered equal access to rights and protection under the Convention. The right to birth registration, parentage, nationality and identity are important entitlements, which if denied, could give rise to conditions which facilitate abuse or exploitation and trafficking.

The prohibition against violence against children under article 19 of the CRC, if applied to surrogacy arrangements, would offer protection to both the surrogate mother and the child. Article 19 of the CRC imposes an obligation on States to take all measures to ensure children are protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁶ The Committee on the Rights of the Child stresses that there is 'no leeway for the discretion of State parties,' in implementing this obligation.⁷ '[States] are under a strict obligation to undertake 'all appropriate measures' to fully implement this right for all children.'⁸ What is meant by 'appropriate' has been defined as integrated, cohesive, interdisciplinary and coordinated, incorporating a full range of measures which are sustainable and effective.⁹ Read with article 36 of the CRC, this imposes a wide duty on States to protect the child against all forms of exploitation prejudicial to any aspects of the child's welfare.¹⁰

Article 7 of the ICCPR prohibits any form of ill-treatment against any individual (child or adult),¹¹ calling on the State to protect both the dignity and the physical and mental integrity of the

⁵ Article 2, CRC: 'State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the children's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, **birth or other status.**'

⁶ Article 19, CRC.

⁷ United Nations Committee on the Rights of the Child, 'General Comment No. 13 (2011): The right of the child to freedom from all forms of violence,' 18 April 2011, UN Doc. CRC/C/GC/13, para 37 (UNCRC GC 13).

⁸ *Ibid.*

⁹ UNCRC GC 13, para 39.

¹⁰ Article 36, CRC.

¹¹ Article 7, ICCPR, 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'



individual.¹² Article 7 of the ICCPR applies to children as well as adults, and includes conduct perpetrated by State actors as well as private actors. Article 7 of the ICCPR imposes a clear and strict obligation on States to take all appropriate measures to protect surrogate mothers and children from exploitation, abuse or ill-treatment. Applying these provisions to surrogacy laws would offer a mechanism to ensure surrogate mothers and children are protected from exploitation, abuse or violence.

Finally, adopting and applying the principle of the best interests of the child to domestic legislation on surrogacy would be an effective check against ISAs undertaken for the purposes of exploitation, abuse or trafficking. Article 3 of the CRC obligates States to take measures to assess the best interests of the child and ensure it is given primary consideration in all actions concerning children. This requires each State to take necessary, deliberate and concrete measures to fully assess and consider the rights of the child at each stage in matters which directly or indirectly concern the child. At a practical level, applying article 3 requires States, at a very minimum, to put in place a vetting procedure of prospective parents to ensure the welfare and best interests of the unborn child.

Any international mechanism on surrogacy must give due consideration to the human rights of the surrogate mother and the unborn child. With the objective of ensuring compliance with such standards and better protection of surrogate mothers and children born out of surrogacy agreements, ECPAT makes the following recommendations to the international community:

Develop a set of international guidelines on surrogacy agreements, which includes the following minimum requirements:

- *The best interests of the child is given paramount consideration in assessing whether an international surrogacy arrangements should be allowed;*
- *Any surrogacy agreement forged for the purposes of trafficking, sexual exploitation or any other form of abuse or exploitation of surrogate mothers and/or children born out of surrogacy is prohibited;*
- *Any surrogacy agreement must comply with and apply human rights enumerated in the Convention on the Rights of the Child as well as other relevant international conventions and instruments on human rights;*
- *There must be a vetting procedure for prospective parties to a surrogacy arrangement, which includes:*
 - *Ensuring all relevant information (i.e. identity, financial status, employment status, current state of health, criminal background check) is provided by each*

¹² United Nations Human Rights Committee, 'General Comment 20, Article 7' 1994, UN Doc. HRI/GEN/1/Rev.1 at 30, para 2 (UNHRC GC 20).



prospective parent with the aim of determining the eligibility and suitability of prospective parents to enter into a surrogacy agreement.

- *Establishing a clear procedure for assessing the best interests of the child before the surrogacy agreement is entered into as well as after the child is born. The best interests of the child will be given paramount consideration.*
- *Ensuring that in transnational surrogacy arrangements, each of the countries involved has its own vetting procedure for all of the parties, and such a procedure complies with international human rights law.*
- *Ensuring that any prospective party who has a criminal conviction for an offence involving conduct related to physical or mental violence against a child; abuse, sexual abuse, neglect or negligent treatment, maltreatment, exploitation or sexual exploitation of a child; trafficking, sale of children or child pornography is prohibited from entering into any surrogacy arrangement.*

To the States:

- *Review all domestic surrogacy laws with a view of repealing, amending and enacting legislation which complies with the above requirements. Rescind any pending surrogacy arrangements and prohibit any further surrogacy agreements until domestic laws on surrogacy are brought into compliance with international human rights standards;*
- *Engage in further research to understand the phenomena of commercial surrogacy from the standpoint of the best interests of the child; to assess risks; and to inform appropriate interventions/actions that should be made to better protect children.*

Conclusion

With the growing technical possibilities for assisted reproduction, international and national legal frameworks have not been able to keep up with what has become a thriving commercial business.

In light of the diversity of legal, regulatory and factual complexities in both the national and international realm with commercial surrogacy, there is a pressing need for States to review and amend their surrogacy laws. The establishment of an international instrument, similar to the Hague Adoption Convention, would be an important step towards ensuring global standards.

With the potential for great harm to children and their vulnerability to exploitation within the context of commercial surrogacy, it is necessary to place the welfare of the child above the interest of the intended parents.



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