 

**Submission to the Special Rapporteur on the sale and sexual exploitation of children**

***Inputs on safeguards for the protection of the rights of children born from surrogacy arrangements***

**May 2019**

International Women’s Health Coalition and Human Rights Watch welcome the opportunity to provide input to the Special Rapporteur on the sale and sexual exploitation of children on the topic of safeguards for the protection of the rights of children born from surrogacy arrangements.

We appreciate the Special Rapporteur’s attention to new issues arising from innovations around assisted reproduction. We share the view that these developments raise important human rights issues.

International Women’s Health Coalition and Human Rights Watch have decades of experience examining issues relevant to this topic in countries around the world. IWHC has a long history advocating to advance sexual and reproductive rights at the global and regional levels. The organization currently supports grantee partners’ advocacy on these issues in Argentina, Brazil, Cameroon, Egypt, Fiji, India, Kenya, Lebanon, Nigeria, Pakistan, Peru, Poland, South Africa, Turkey and Uruguay. We are also currently doing documentation work on the impact of the global gag rule in Nepal, Nigeria, Kenya and South Africa, as well as documentation on the impact of refusals to provide care on the ground of conscience in Chile.

Human Rights Watch has extensive experience documenting human rights abuses including trafficking of children and women, sexual exploitation of children and women, violations of the sexual and reproductive rights of women and girls, and criminalization of sexual and reproductive actions and decisions. We have conducted research on these topics in Afghanistan, Bangladesh, Brazil, Burkina Faso, Chile, China, Colombia, Dominican Republic, Ecuador, El Salvador, Honduras, Indonesia, Ireland, Mauritania, Mexico, Myanmar, Nepal, Nicaragua, Ireland, Papua New Guinea, Poland, South Africa, Sierra Leone, the United States of America and Zimbabwe.

The issue of surrogacy arrangements, particularly compensated surrogacy arrangements, requires careful consideration of several sets of intersecting rights, and the interests of multiple rights holders. This is particularly important given that human rights analysis around surrogacy is relatively nascent and given the key principles of universality and interdependence of human rights. We have reviewed the Special Rapporteur’s previous work on this issue and appreciate the strong focus that work has brought to the rights and interests of children born of surrogacy arrangements. Our goal, in this submission, is to highlight the other rights and rights holders also essential to this discussion.

We are concerned by any over-broad view of the applicability of the prohibition on the sale of children to surrogacy that would unnecessarily, disproportionately or in a discriminatory fashion limit the options of surrogacy as a means of founding a family and exercising reproductive rights. The optional protocol prohibits “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” People acting as surrogates may do so for no remuneration (money paid for work or a service) or no consideration (money in exchange for benefits, goods, or services), and in other cases may receive compensation that constitutes fair recompense for lost wages and other opportunity costs, health care and nutrition expenses, and restitution for the significant burdens and risks associated with pregnancy. We submit that such arrangements do not and should not in and of themselves constitute sale of children under the optional protocol.

In this submission we outline our recommendations regarding: 1) relevant human rights that should inform discussions around surrogacy; 2) relevant rights holders who should be part of discussions regarding surrogacy; and 3) longstanding human rights principles that should guide and inform legal and policy framework development on this issue.

1. **Relevant human rights that should inform any discussions around surrogacy**

The call for inputs listed the following as “The core standards guiding the Special Rapporteur in the context of surrogacy”:

* Best interests of the child as a primary consideration ((CRC art. 3, para. 1) and General Comment No. 14 (2013));
* Identity rights, access to origins and family environment (CRC arts. 7, 8, 9, 10, 20);
* Prohibition of sale of children (CRC art. 35 and OPSC) and child trafficking (CRC art. 35;
* Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)).

We agree that these standards are relevant and important. However, these standards essentially address the rights of children and, in reality, surrogacy arrangements involve various stakeholders and at least two other rights holders (those seeking to provide surrogacy services and intending parents). While the substantive focus of the Special Rapporteur’s report is the rights of children born of surrogacy, they should not be viewed in isolation but subject to principles of universality and indivisibility of rights, equality and non-discrimination, and proportionality when examining the rights of other stakeholders. Moreover, providing in-depth analysis of the rights, principles and considerations at issue in surrogacy arrangements will only serve to enrich the Special Rapporteur’s guidance and analysis. Along these lines, set forth below are non-exhaustive examples of applicable human rights and relevant, persuasive and informative human rights standards that should be considered in the Special Rapporteur’s report.

**Human rights implicated by surrogacy arrangements:**

* Right to equality and non-discrimination (e.g. UDHR art. 2; ICCPR art. 26; ICESCR art. 2; CEDAW art. 2, CRPD arts. 5 and 6);
* Right to health (e.g. UDHR art. 25, ICESCR art. 12, CEDAW art. 12);
* Right to privacy (e.g. UDHR art. 12; ICCPR art. 17);
* Bodily autonomy (e.g. ICCPR arts. 7 and 17, CEDAW art. 12 and GR 24)
* Reproductive autonomy (e.g. CESCR GC 22, CEDAW art. 12 and GR 24);
* Right to decide number and spacing of children (CEDAW art. 16);
* Right to found a family (e.g. UDHR art. 16; CRPD art. 23);
* Right to information (e.g. UDHR art. 19; ICCPR art. 19);
* Right to benefit from scientific progress (e.g. UDHR, art. 27, ICESCR, art. 15 (b));
* Rights of persons with disabilities (e.g. CRPD arts. 5, 6, 7, 12, 17, 23).

1. **Relevant rights holders who should be part of discussions around surrogacy**

Children born of surrogacy are obviously crucial rights holders whose human rights must be considered in any discussion of surrogacy, and whose best interests are a primary consideration in all matters affecting them. Nevertheless, they are not the sole rights holders implicated in surrogacy arrangements. Additionally, it may not be in children’s best interests to exclude consideration of the human rights of surrogates and intending parents and doing so is unlikely to lay the groundwork for effective policy. Along these lines, the development of guidance and policy on surrogacy should not move forward without full participation by representatives of the following groups, without discrimination including on the basis of race, ethnicity, age, disability, sexual orientation or identity, etc., and expert groups who represent the interests of these groups:

1. Children born of surrogacy;
2. Individuals who have acted or wish to act as surrogates, including through both commercial and non-commercial surrogacy;
3. Individuals struggling with infertility;
4. Individuals who have utilized (or seek to utilize) assisted reproduction, including surrogacy, to become parents; and
5. Individuals who have participated or may wish to participate in assisted reproduction, including surrogacy, through contribution of genetic material including eggs and sperm.

**3) Key considerations and principles derived from human rights law and research that should frame the formulation of guidance, law and/or policy on issues of surrogacy**

As mentioned above, we fully agree with the importance of the primacy of protecting the rights of children born of surrogacy arrangements, and with the relevance of the core standards the Special Rapporteur has set forth in that regard. The following principles pertain more to other rights holders whose rights are implicated by surrogacy arrangements, as we are concerned that these rights have not yet been fully considered in this discussion:

1. Everyone participating in a surrogacy arrangement in any capacity should have a full opportunity for informed consent, expert advice, accessible communication, and, as appropriate, supported decision making and legal counsel and representation.[[1]](#footnote-2)
2. Every person has the right to make their own decisions about their reproductive life,[[2]](#footnote-3) including surrogates and potential surrogates, people who seek to become parents through surrogacy and other forms of assisted reproduction, and donors of genetic material.
3. People who are pregnant should not be deprived of the right to make decisions about abortion and other healthcare decisions by reason of a surrogacy agreement,[[3]](#footnote-4) and legal or policy frameworks for surrogacy should not facilitate such deprivation.
4. To the extent that new legal frameworks are developed for surrogacy, they should not rely on criminal sanctions. Criminalizing conduct related to consensual sexuality and reproduction (for example: sex work, sex outside of marriage, adolescent sexual behavior, same-sex intimacy, adolescent pregnancy and pregnancy outside of marriage, abortion, etc.) is generally harmful and leads to violations of human rights.[[4]](#footnote-5) In addition, it is unlikely that criminalizing surrogacy would end the practice. Rather, it is more likely that criminalization would drive surrogacy underground where unsafe conditions, discrimination and exploitation for all rights holders involved can flourish.
5. Fetal personhood has no basis in human rights law.[[5]](#footnote-6)
6. The right to found a family, to make decisions on the number and spacing of children and to benefit from scientific progress including through surrogacy and other forms of assisted reproduction, should not be denied on the basis of discriminatory criteria such as sexual orientation, gender identity, disability, marital or partnership status, etc.
7. The best interests of the child is a dynamic concept that should be applied appropriately in this specific context,[[6]](#footnote-7) including an examination of the likely consequences for children of surrogacy, it is prohibited and pushed underground.

There are risks of abuse in surrogacy. The solution to this problem is not to ban surrogacy, but for surrogacy to be practiced under a framework based in international human rights law, incorporating the rights of the child, surrogates and potential surrogates, and people seeking to become parents through use of surrogacy and other forms of assisted reproduction.

1. See, for example, UN General Assembly, Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, U.N. Doc. A/64/272 (August 10, 2009) (on “the fundamental role that informed consent plays in respecting, protecting and fulfilling the right to health”);

   Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995), para. 7.3; Beijing Declaration and Platform for Action, para. 95. [↑](#footnote-ref-2)
2. CEDAW Committee, Statement on sexual and reproductive health and rights: Beyond 2014 ICPD review, 2014; Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995), para. 7.3; Beijing Declaration and Platform for Action, para. 95 [↑](#footnote-ref-3)
3. CEDAW, art. 16(e). [↑](#footnote-ref-4)
4. See, for example, CEDAW Committee, Statement on sexual and reproductive health and rights: Beyond 2014 ICPD review, 2014; Human Rights Committee, General Comment 28 (Article 3: The equality of rights between women and men), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 2000; CESCR, General Comment 22 (The right to sexual and reproductive health (Article 12)), UN Doc. E/C.12/GC/22, 2016; Report of the UN Working Group on Discrimination against Women in Law and Practice, UN Doc. A/HRC/32/44, 2016; Committee on the Rights of the Child, General Comment 20 (Implementation of the rights of the child during adolescence), UN Doc. CRC/C/GC/20, 2016, para. 60; Report of the UN Secretary-General on the fast track to ending the AIDS epidemic, UN Doc. A/70/811, 2016, paras. 53, 75(f). [↑](#footnote-ref-5)
5. See Article 1 of the Universal Declaration of Human Rights: “All human beings are *born* free and equal in dignity and rights” G.A. Res.217, UN Doc. A/810, 1948. The word “born” was used intentionally to exclude any antenatal application of human rights. An amendment was proposed and rejected that would have deleted the word “born”, in part, it was argued, to protect the right to life from the moment of conception (UN GAOR 3rd Comm., 99th mtg. at 110-124, UN Doc. A/PV/99, 1948). See also for example, K.L. v. Peru, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (Human Rights Committee 2011); L.C. v. Peru, Communication No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009, para. 8.15 (CEDAW Committee 2011) (state violated a pregnant girl’s rights by prioritising the fetus over her health by postponing essential surgery until she was no longer pregnant); Baby Boy v. United States, Resolution 23/81, Case 2141, OEA Ser.L/V/II, doc. 9 rev. 1, para. 18(b) (Inter-American Commission on Human Rights March 6, 1981) (finding that a law permitting unrestricted access to abortion was compatible with the right to life provision of the American Declaration). [↑](#footnote-ref-6)
6. See generally Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, U.N. Doc. CRC/C/GC/14 (May 29, 2013). [↑](#footnote-ref-7)