18 June 2019

**Attention: Ms. Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children.**

Re: Call for Inputs on Safeguards for the protection of the rights of children born from Surrogacy Arrangements

[International Social Service (ISS)](http://www.iss-ssi.org/) is pleased to respond to the Call for Inputs regarding Safeguards for the protection of the rights of children born from Surrogacy Arrangements launched earlier this year. Please consider the following information and recommendations as to the topics enumerated in the Call for Inputs.

Given the time and length limitations for responses, the information below will not in principle discuss specific States. Rather, in each section we present general observations about current law and practice in both domestic and international surrogacy systems common in many (**but not all**) States, which create concerns as to each of the three sets of child rights norms. Supplementary documentation is available upon request.

The recommendations below reflect safeguards necessary to protect the specific children’s rights outline in the Call for Inputs, in the context of both domestic and international surrogacy as well as altruistic and commercial arrangements.

**Background to submission**

ISS makes this submission to focus attention of the necessary respect for the human rights of children in the context of surrogacy arrangements. ISS’ views are inspired by and grounded in the provisions of the [Convention on the Rights of the Child](https://www.ohchr.org/en/professionalinterest/pages/crc.aspx), its [Optional Protocol on the Sale of children, child prostitution and child pornography (OPSC)](https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx) and other relevant international human rights instruments. ISS neither condones nor encourages surrogacy. ISS seeks to inform the development, assessment and implementation of legislation, policy, decision-making and practice to ensure the protection of the rights of every child born through surrogacy. ISS notes the necessity to consider the rights of others parties including the surrogate mother in such discussions.

International human rights law requires that no child be disadvantaged, suffer harm or be punished because of the circumstances of birth, whether through discrimination, exploitation or any other action that might deprive the child of a right established in international law. It is therefore necessary to ensure that there are procedures and safeguards requiring that regulation of surrogacy in any form exclude any violations of the human rights of children such as discrimination, statelessness, abuse and lack of access to origins. Forms that constitute or lead to the sale of children should be prohibited by law.

**I. Best interests of the child as a primary consideration**

**Information**

Many surrogacy systems are adult focused, seeking to fulfil the desire of intending parents for children. Based on this approach, many surrogacy systems fail to implement the procedural aspect of best interests, as described in [General Comment 14](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en) (cited in the Call for Inputs):

 *“(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child …, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child … concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.”*

Many surrogacy systems in law or practice simply assume that the best interests of the child may be found with exclusive parentage in the intending parent(s). In practice, this means that by the time the child is born, the law, courts, or competent authorities consider parentage already settled, a fait accompli, with no true opportunity for a court or other competent authority to perform a best interests of the child review unless there are child protection concerns.

In practice, surrogacy arrangements – both altruistic and commercial - are initiated by adults entering into arrangements including contracts whereby the State accepts that parentage belongs to those who initiated the process and intended to parent. Such an approach lacks any individualized best interests of the child determination and is arguably contrary to the CRC and General Comment 14. It should be noted that it appears that a best interest review does occur in a few States for example, Israel and South Africa.

In many surrogacy systems, domestic and international, the factual predicates necessary for a best interests of the child determination are lacking. Often, basic information as to the intending parents, to the surrogate mother and gamete donors is lacking, as there is no systematic availability or requirement of a criminal background check, child abuse registry search, social work evaluation of suitability, or home-study. In international surrogacies it is difficult for a court or competent authority in the State of the surrogate mother to have access to such evaluative information about intending parents residing in a different State. Barriers of different legal cultures, different languages, and distance, mitigate against the full availability of such information. Ideologically, in both domestic and international surrogacies, the posture of a “right to a child” means that there is not really even an interest in seeking evaluative information about intending parents, because such is viewed as inherently discriminatory and contrary to a right to procreate or a right to respect for private and family life. Yet, without such information, judges or other competent authorities are less able to comply with the CRC’s requirements including the best interests of the child is a “primary” consideration. It should be likewise noted that evaluation practices do occur in a few States such as for instance in South Africa and United Kingdom.

Procedural safeguards occurring prior to birth or even prior to embryo transfer or artificial insemination (AI) which are designed to screen out and prevent clearly unsuitable surrogacy arrangements, are in the best interests of children generally, and are also important elements enabling prospective surrogate mothers and intending parents to make informed decisions with respect to the proposed arrangements. While such pre-birth procedures are helpful, they cannot replace an individualized best interests of the child determination conducted after birth. It is impossible to conduct an individualized best interests of the child determination until after birth, particularly in an international surrogacy arrangement. In our experience the goal of some pre-birth procedures is simply to effectuate the purported “right to a child” in the guise of a right to procreate, and to guarantee that the intending parents always have parentage, rather than to screen out unsuitable surrogacies.

**Recommendations**

States that permit surrogacy arrangements should conduct screenings and suitability reviews of all parties to the arrangements to prevent unsuitable surrogacy arrangements prior to the medical procedures designed to initiate pregnancy (AI or embryo transfer). These screenings should include criminal background checks, child abuse registration reviews, and suitability reviews based on sound social work practice. Approval of a surrogacy arrangement at this stage should not foreclose an appropriate best interests of the child review after birth, and should not permanently and irrevocably sever the surrogate mother’s legal relationship or any other parent’s legal relationship to the child prior to birth.

Regardless of whether or not pre-birth screenings are done, after birth a thorough best interests of the child determination should be made promptly by a court or other competent authority, as to parentage and parental responsibility. Such best interests of the child determinations should be based on an adequate factual foundation and investigation, including, *inter alia*, criminal background checks, child abuse registration reviews, and suitability reviews based on sound professional practice.

**II. Identity rights, access to origins and family environment**

**Information**

Surrogacy arrangements often arise in the context of a consumer-driven sphere of ART focusing on fulfilling the wishes of the paying customers in commercial arrangements, the intending parents, usually with little attention to the rights and long-term needs of surrogate-born persons. This lack of attention to the rights of surrogate-born persons is particularly evident in regard to identity rights, including access to origins. Admittedly the lack of access to origins is less problematic in altruistic surrogacy arrangements where there is frequently a pre-existing relationship between the surrogate mother and intending parent(s) or in surrogacy arrangements where there is an intention to have an ongoing relationship between the different parties.

In States where the surrogacy systems primarily reflects the wishes of many intending parents for what might be called an “as if’ relationship, in which the child is treated “as if” he or she had been born exclusively to the intending parents and had no other parental ties. This “as if” approach is reflected in some legal regimes in which the only “birth certificate” or “birth registration” for the surrogate-born person lists only the intending parents, and excludes any mention of the surrogate mother and gamete donors. Often, there are no laws requiring records of gamete donors or surrogate mothers to be collected and stored, and no organized or delineated way for the surrogate-born person to access such information. Some systems also use anonymous gamete donors, which often arise in the context of a commercial market. Hence, in many surrogacy systems there are, practically speaking, serious obstacles to surrogate-born persons seeking to access information central to identity rights and access to origins.

**Recommendations**

States should ensure that surrogate-born persons are able to preserve their identity, particularly including their genetic, gestational and social origins. Therefore, States should establish collection and storage frameworks to preserve in perpetuity identity information relating to all persons born through surrogacy and should facilitate access to this identity information by surrogate-born persons. Human reproductive materials used for surrogacy arrangements should only come from persons who provide accurate identifying information about themselves and who agree that their identifying information may be transmitted to persons with whom they have a genetic connection.

**III. Prohibition of sale of children and child trafficking**

**Information**

ISS endorses the legal analysis pertaining to this area stated in the Special Rapporteur’s thematic report on surrogacy and the sale of children in March 2018 (A/HRC/37/60). In addition, ISS agrees with the Report’s observation that “[c]ommercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law.” See para. 41. In particular ISS notes the wording of article 2a of the OPSC.

This conclusion should not be read as a blanket repudiation of surrogacy. Even as to commercial surrogacy, the Special Rapporteur’s report described how the practice could be appropriately regulated to avoid the sale of children. ISS views the Special Rapporteur’s 2018 Report as correctly avoiding the continuing controversy over whether surrogacy in itself is compatible with human rights or ethical norms. Instead, the 2018 Report focuses correctly on an analysis of the sale of children in a non-ideological way, applying the clearly stated elements of sale of children to both regulated and unregulated commercial and altruistic surrogacy systems.

The Special Rapporteur’s observation should be understood as a correct observation about the current practice of surrogacy. In general, most surrogacy arrangements are commercial surrogacy arrangements especially those of an international nature noting that altruistic arrangements do occur. Further, the commercial surrogacy systems currently producing the largest number of surrogacy arrangements occur either in regulated regimes structured around parentage by contractual intention or in unregulated commercial systems involving an uncontrolled exchange of money. Both kinds of systems either implicate or potentially violate the prohibition of sale of children.

ISS notes with concern some of the responses to the Report, which have come to our attention. These include the viewpoint that surrogacy can never constitute the sale of children because it is not specifically mentioned in the OPSC; that the definition of sale of children requires additional harm beyond that of the transfer of a child for remuneration or other consideration; that because surrogacy is a reproduction technique and therefore different from adoption that surrogacy should not be evaluated under the sale of children norm; that because the child always “belongs” to the intending parent under domestic law or by contract that there is no transfer of the child and, as such, the sale of child norm is irrelevant.

Such responses advocating for a surrogacy exception to OPSC are detrimental to the development and protection of established child rights norms for all children irrespective of the circumstances of their birth. Such arguments undermine central norms of the rights of the child, in areas far beyond surrogacy.

ISS likewise notes with concern the risks of child trafficking that arise in surrogacy systems built upon the premise of a right to procreate or even to a child as well as in unregulated surrogacy systems, which go so far as to preclude safeguards such as suitability reviews, criminal background checks and use of child abuse registries. Such systems are a product of an ideological viewpoint whereby procedures that screen out some surrogacies are seen as inherently discriminatory and contrary to such claimed rights of intending parents. Such surrogacy systems have already been proven vulnerable to those who would pose a serious risk of exploitation of the child. The fact that most intending parents plan to use surrogacy for family formation and pose no special risk of exploitation, does not justify creating systems without safeguards against those who pose serious risks of exploitation to the child. Hence, the information and recommendations pertaining to the procedural aspects of the best interests of the child, are also central to efforts to avoid the trafficking of children.

The information and recommendations pertaining to the best interests of the child, above, are also helpful in avoiding the sale of children. When parentage and parental responsibility are determined promptly post-birth by a court or competent authority conducting an individualized best interests of the child determination may sever the link between the payment of funds and the transfer of the child, avoiding the sale of a child. However, when parentage and parental responsibility are primarily determined by contracts and the best interests of the child is presumed to be with the intending parents, then contracts for surrogacy services may become contracts and payment for the transfer of the child: a form of sale of the child.

**Recommendations**

ISS recommendations in regard to the prohibitions of sale and trafficking of children generally are in accord with the Conclusions and Recommendations in the Special Rapporteur’s 2018 Report and believes it is worth emphasising the important role of pre-birth processes in seeking to combat potential exploitative practices.