

Call for Action 2016

Urgent need for regulation of International surrogacy and artificial reproductive technologies

In 2016 International Social Service (ISS) calls for urgent regulation of international surrogacy and other artificial reproductive technology practices in cross border contexts. This builds on ISS' call for action for "Preserving the best interests of children" in these arrangements in 2013 and work undertaken during this interval. Estimates are now of at least 20,000 children being born each year with numbers growing. Lack of regulation has resulted in vast lucrative business opportunities as well as potentially dangerous activities of intermediary agencies, specialised clinics as well as candidates for parenthood creating a pressing need for immediate action. Indeed, there have already been several individual cases around the world that have highlighted serious problems and likely abuses of unregulated reproduction through surrogacy, affecting particularly children¹.

ISS understands all arguments that call for regulation of international surrogacy and other artificial reproductive technology practices in cross border contexts (see note to editor). Notwithstanding these arguments as well as others not mentioned, ISS as a network most naturally aligns itself with reasoning linked to children's rights and places this as the overarching right governing our work. In particular, the Convention on the Rights of the Child and its Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography² - as recently developed by Smolin.³

"Commercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children's rights."
CRC Committee, 2014

In the context of this protocol – where article 2a defines "sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration" - the CRC Committee has made a number of helpful observations as to possible applications to international surrogacy. There are clear recommendations to prevent the sale of children in situations where surrogacy is not properly regulated.

For instance in its concluding observation to India in 2014⁴ where under the adoption section, at paragraph 57 the Committee states "Commercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children's rights." This was followed with a recommendation at paragraph 58 that the State "(d) Ensure that the Assisted Reproductive Technology (Regulation) Bill, 2013, or other subsequent legislation contain provisions which define, regulate and monitor surrogacy arrangements and criminalizes the sale of children for the purpose of illegal adoption, including the misuse of surrogacy. The State party should ensure that action is taken against all those who

¹ Such as the situation that arose in Thailand when an Australian couple rejected their surrogate child, reports that Indian surrogate mothers suffer exploitation, the refusal to issue a passport to a child born through surrogacy in Mexico or the high costs requested by some surrogacy agencies (all reported in press articles).

² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>

³ http://works.bepress.com/david_smolin/19/

⁴ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIND%2fCO%2f3-4&Lang=en and under India Concluding Observation
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=843&Lang=en

have engaged in illegal adoptions.” Likewise in its concluding observation to the USA in 2013⁵, in the adoption section, at paragraph 29b, the Committee states “the absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children.” Therefore for ISS the need for regulation of international surrogacy and other artificial reproductive technology practices in cross border contexts is most convincingly embedded in the rights of children to be protected from being sold.

To this end, ISS with a group of experts is in the process of developing “**Principles for a better protection of children’s rights in cross-border reproductive arrangements, in particular international surrogacy**” given the lack of regulation in this field and consequent breaches of human rights (see concept note). Whilst ISS believes that this initiative would certainly support the development of a potential international instrument on cross-border surrogacy (at the Hague Conference on Private International Law), as well as the development of recommendations or opinions in this regard (such as a General Comment by the CRC Committee or the work undertaken at the European Parliament), its priority action is to set the basic principles now that could support any of these initiatives.

ISS network, 5 January 2016



Note to editor:

One argument among many includes that by Rotabi and Goswami about commercial global surrogacy being a “form of work”. This approach acknowledges the right of women to make informed choices about their work, acknowledging that labour laws require regulation to ensure for example health and safety measures are in place (e.g.: care during pregnancy and post birth as well as emotional follow up support). One can understand that for some women, being a surrogate may be less harmful “work” compared to the few possibilities they may have to earn money.⁶

However another prevailing argument is that regulation is necessary as international surrogacy would be covered by the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.⁷ According to article 3 “use of terms” - (a) “Trafficking in persons” shall mean the (...) abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. This argument is persuasive in that the conditions under which international surrogacy is carried out today debatably do not respect the human integrity of surrogate mothers, as there is no balance of power between the intending parents, the medical clinics and surrogate mothers. It is contended that surrogacy can only take place when all parties are in a position to express their will freely, without any external form of constraints. Yet historically using the trafficking terminology has met with opposition and is at times politically divisive.

⁵http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fUSA%2fC0%2f2&Lang=en and under USA Concluding Observation http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=369&Lang=en

⁶ See full argument in Surrogacy Chapter in ISS publication on «Professional Resources to address illegal adoption » to be published in 2016 and available upon request

⁷ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>