Principles for the protection of the rights of the child born through surrogacy

(Verona principles)

Published by:

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ISBN: 978-2-940629-17-6

Disclaimer: In early 2021, a group of experts in international law and human rights adopted the Verona Principles for the protection of the rights of the child born through surrogacy. In addition to the drafting, experts have contributed to the Verona Principles in various ways, through background research, reviews, or comments. The experts come from universities and organisations located in all regions of the world and include current and former members of international human rights treaty bodies, including regional human rights bodies, members of the judiciary, and the UN Special Rapporteur on the sale and sexual exploitation of children. These experts act in their individual capacity. The institutions listed with the names of the signatories and core group are for the purpose of identification rather than endorsement of the commentary given by these institutions.

Statement of Support by UN Committee on the Rights of the Child

Advances in biomedical science bring new challenges, including to children's rights. Thus, surrogacy, while providing those who have fertility problems with an opportunity to have a child, at the same time raises difficult ethical, legal and human rights questions, which have never been faced before, at least until a relatively recent time. Considering the lack of regulation or poor regulation, surrogacy often leads to serious violations of the rights of those involved, first of all, children. The spread of surrogacy across the state borders and the development of international surrogacy arrangements have significantly aggravated the situation.

The "Principles for the protection of the rights of the child born through surrogacy (Verona principles)", drafted by independent experts, aim to identify the most problematic areas and to formulate procedural and safeguard requirements to ensure the protection of the rights of children born through surrogacy. Considering the lack of any comprehensive guidance on how to approach problems that children born through surrogacy face, the "Verona principles" may serve as an important tool that will help identify appropriate legislative responses to the new challenge related to the protection of children's rights.

We, members of the UN Committee on the Rights of the Child, support the "Verona Principles" as an important contribution to developing normative guidance for the protection of the rights of children born through surrogacy.

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Prefatory note

Surrogacy is increasingly used as means for family formation, including in cross-border contexts. International standards lag behind these developments. The perspective of the rights of children born from surrogacy is often overshadowed by other interests, be it commercial or simply the claim to a right to a child, to the detriment of the child's human rights and their best interests, a key principle enshrined in the Convention on the Rights of the Child.

Legislators and policy makers have to respond to the reality that in today's world children are born through multiple assisted reproductive technologies, of which surrogacy at least for the time being, is the most challenging one. They need to respect the rights of these children and offer them a future free from discrimination. Regardless of their stance on surrogacy, be it prohibitive or permissive, States must urgently create safeguards to ensure the fundamental rights of children born through surrogacy arrangements. Leaving the matter unregulated clearly entails serious risks for all parties involved and, in particular, children themselves.

The Verona Principles are drafted to assist States and other stakeholders in their discussions about possible responses to surrogacy. A wide ranging consultation process had informed these Principles. As the Principles are primarily designed for the protection of the rights of the child born through surrogacy, they are created in the expectation of complementary and evolving efforts in the wider human rights framework.

It our sincere hope that the Principles will assist lawmakers and society as a whole to hold informed discussions on such complex issues, going beyond emotions and pre-conceived views. This is the purpose which these Principles are meant to serve.

Maud de Boer-Buquicchio, UN Special Rapporteur on the sale and sexual exploitation of children (2012-2020)

Wanchai Roujanavong, Thailand representative to ASEAN Commission on the promotion and protection of the rights of women and children (2017 – 2022)

Rosa Maria Ortiz, CRC Committee member (2003-2010) and Inter-American commission on human rights (2012-2015)

25 February 2021

Background

From 2013, International Social Service (ISS) called for urgent international regulation of international surrogacy arrangements as they affect the children concerned. In that context, ISS launched an initiative in 2016 to draw up a set of Principles that could be agreed on globally to guide policy and legislation. Continued work on these Principles was supported by the United Nations Special Rapporteur on the Sale and Sexual Exploitation of Children in 2018 (UN Doc. A/HRC/37/60), in her recommendation: [At the international level]:

> *78. The Special Rapporteur invites the international community to:*
> *[...] (d) Support the work of the International Social Service in developing international principles and standards governing surrogacy arrangements that are in accordance with human rights norms and standards and particularly with the rights of the child. [...]*

In keeping with the original aim of the exercise and the UN Special Rapporteur's recommendation, the drafting focuses on laying the foundations for worldwide consensus on effectively protecting the human rights of children who are born through surrogacy arrangements. These Principles are consequently drafted from the standpoint of these children's rights and within the overall human rights framework.

The first draft of the Principles was prepared by a core group of experts convened and coordinated by Mia Dambach on behalf of ISS: Claire Achmad, Nigel Cantwell, Patricia Fronek, Olga Khazova, John Pascoe, David Smolin, Katarina Trimmings and Michael Wells-Greco. This core group has since taken responsibility for regularly reviewing and adjusting the draft in the light of wider consultations. These consultations have involved a broad group of experts and observers including the UN CRC Committee, Governments, HCCH, UNICEF, the UN Special Rapporteur on the Sale and Sexual Exploitation of Children, academics and practitioners from multi-disciplinary backgrounds representing all regions in the world. The lived experience of donor conceived and surrogate born persons was also sought and received. Securing inputs has been ensured notably through a series of international, regional and national consultations since 2016, including in Verona, Zurich, Israel, The Hague, Cape Town, London and Geneva, as well as Cambodia (chronological order). Other regional meetings were also foreseen in the Americas and Eastern Europe but could not take place due to the COVID-19 pandemic. It was nonetheless possible to include input from experts from these regions in the drafting.

Given the substantive consultations and contributions from over 100 experts covering multiple disciplines and perspectives, regions and national and international contexts, these Principles are now being published in 2021. These Principles are designed to inspire and provide guidance on legislative, policy and practical reforms on the upholding children's rights born through surrogacy. The Principles are created in the expectation of complementary and evolving efforts in the wider human rights framework. Although global consensus on surrogacy has not yet been reached, the rights of children born through surrogacy need to be addressed urgently.

Contents

Published by: 2
Prefatory note 3
Background 5
Glossary 7
Preamble 8
Principle 1: Human dignity 10
Principle 2: The child as an independent rights holder 11
Principle 3: The child's right to non-discrimination 11
Principle 4: The child's right to health 12
Principle 5: Pre-surrogacy protections 12
Principle 6: Best interests of the child 14
Principle 7: Consent of surrogate mother 16
Principle 8: Consent of intending parent(s) 17
Principle 9: Consent of persons providing human reproductive material 17
Principle 10: Legal parentage and parental responsibility 18
Principle 11: Protection of identity and access to origins 20
Principle 12: Birth notification, registration and certification 21
Principle 13: Prevention of statelessness 22
Principle 14. Prevention and prohibition of the sale, exploitation and trafficking in children 23
Principle 15: Transparency in financial matters 25
Principle 16: Intermediaries 25
Principle 17: Responding to unexpected developments in surrogacy arrangements 26
Principle 18: Cooperation among States, regions and local authorities 27

Glossary

The terminology used in these Principles reflects the terms that are the more commonly used worldwide, while other terminology may be used in national legislation and practice.

Altruistic surrogacy	A surrogacy arrangement is where there is no payment to the surrogate mother or, if there is payment, it is only for reasonable expenses associated with the surrogacy.
Child	Every person below the age of eighteen years.
Commercial surrogacy	Commercial (or for profit) surrogacy exists where the surrogate mother agrees to provide gestational services and/or to legally and physically transfer the child, in exchange for remuneration or other consideration. One indication of commercial surrogacy is the involvement of for-profit intermediaries.
Competent authority	An entity designated or appointed by the State that has the legally delegated or invested responsibility, power and capacity to perform a mandated function.
Identifying information	Information about the genetic, gestational, social and legal origins of the child
Intermediary	A person, organisation or network facilitating the initiation, continuation and/or finalisation of a surrogacy arrangement. Those providing only medical, psychosocial or legal services related to a surrogacy arrangement do not meet this definition.
Intending parent(s)[1]	Person(s) who request a surrogate mother to carry and give birth to a child for them.
States encountering surrogacy	States that do not permit surrogacy by law but nevertheless are faced with its consequences.
Surrogacy[2]	"surrogacy arrangement" means an agreement – i) between a prospective surrogate mother and (an) intending parent(s); ii) made before a child is conceived; iii) which provides that, following the child's birth, the parties plan for the intending parent(s) to be the child's legal parent(s), and for the surrogate mother to surrender the child into their care.
Surrogate mother	A woman who agrees to carry and give birth to a child for (an) intending parent(s).[3]
Transfer	Covers the de jure or de facto transfer or relinquishment of legal parentage or parental responsibility.

Preamble

The Verona Principles are designed to respond to the urgent need for guidance for ensuring respect for the human rights of children born through surrogacy in the context of diverse State approaches to the practice of surrogacy. The Verona Principles are inspired by and grounded in the provisions of the Convention on the Rights of the Child, its Second Optional Protocol on the sale of children, child prostitution and child pornography and other relevant international human rights instruments. Given that surrogacy is not explicitly addressed in these instruments but raises significant children's rights issues, guidance is needed to ensure the proper protection of the rights of the child in the context of surrogacy. Continued work of these Principles was recommended by the United Nations Special Rapporteur on the Sale and Sexual Exploitation of Children (UN Doc. A/HRC/37/60).

Surrogacy, including international commercial surrogacy, is taking place in a number of States and is prohibited in others. These principles provide a framework which safeguards the rights and best interests of the child born through surrogacy. The principles are not an endorsement of surrogacy. Particular attention is drawn to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, to which most States are party.

All States have an obligation to uphold the rights of children born through surrogacy. The Principles are intended to apply regardless of whether any form of surrogacy is permitted or prohibited in the corresponding State of birth and/or the State of destination, or any other implicated State.

The Verona Principles are based on the premise that no child should be disadvantaged, suffer harm, be punished because of the circumstances of their birth, whether through discrimination, exploitation or any other action that might deprive them of a right established in international law. If the duly considered interests of any other concerned parties conflict with the best interests of a child born through surrogacy, the best interests of the child should be the determining factor for validating or invalidating any decision or course of action concerning that child.

Compliance with the procedures and safeguards set out in these Principles requires that regulation of surrogacy in any form excludes 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.

The Verona Principles stipulate that comprehensive safeguards and protections for children born through surrogacy should be clearly established in relevant legislation, policy, decision-making processes and practice. The Principles seek to inform the development of such safeguards. The Principles are therefore addressed to all States, public and private entities, civil society organisations, professionals, and individuals – including surrogate mothers, intending parents and persons providing human reproductive material – who are, or may be, directly or indirectly involved in surrogacy. The Verona Principles are based on the premise that, where surrogacy occurs, it creates and severs relationships. There should be openness in these relationships and where appropriate, they should be valued and sustained.

In implementing these Principles, States should consider other rights considerations, socio-economic and cultural disparities and profit incentives. In determining whether or not to permit surrogacy, States should consider whether as a minimum, they have the capacity to implement a regulatory regime in compliance with these Principles.

Ethical considerations as to whether surrogacy in any form should be permitted or prohibited fall outside the scope of the Principles. As such, the existence of the Principles should not be used as a basis for condoning or encouraging surrogacy. Nothing in the Verona Principles should be understood as disparaging or disregarding the human rights of others concerned.

The Verona Principles are designed for the protection of the rights of the child born through surrogacy, and are developed in the expectation of complementary and evolving efforts in the wider human rights framework. In implementing these Principles, States should consult broadly and in particular should take into account the views and experiences of children born through surrogacy.

Principle 1: Human dignity

1.1 Human rights derive from the inherent dignity of the human person.[4] Legal regulation on surrogacy arrangements, at domestic and international levels, shall be consistent with fundamental human rights norms on the protection of human dignity.[5]

1.2 All children, irrespective of the circumstances of their birth, have inherent and equal human dignity.[6]

1.3 The sale, trafficking and exploitation of children violates human dignity and negates the child as an independent rights holder.[7] States shall prohibit those surrogacy arrangements that promote or constitute the sale, trafficking and exploitation of children, and shall ensure that safeguards against the sale, trafficking and exploitation of children apply in the context of surrogacy.[8]

1.4 Children born through surrogacy, surrogate mothers, intending parents, and persons providing human reproductive material are each subject to particular vulnerabilities and at risk of exploitation.[9] National legislative, judicial and policy approaches to surrogacy should be based on a human rights framework to ensure the human rights of children and all parties involved and to prevent exploitative practices and provide effective remedies. [10]

1.5 Consistent with the human dignity of the child, States should ensure that the law does not allow contractual provisions to irrevocably determine legal parentage or any other decisions regarding the status and/or care of a child in surrogacy. States should indicate in which cases oversight by a court or other competent authority is required.

1.6 In determining their laws and policies, States may consider the possible impacts on the child's human dignity as a result of being born through various kinds of surrogacy arrangement *including inter alia*:[11]

a. commercial arrangements;
b. when there is no genetic link to one or both the intending parent(s);
c. altruistic arrangements and the possible impact on future relationships of the child with relevant persons;
d. when separation of the child occurs from persons who are their genetic, gestational or social parent(s), sibling(s), and extended family may impact human dignity throughout life.[12]

1.7 The practice of surrogacy may create false expectations that adults have a right to a child,[13] or to a child with particular characteristics. Such expectations should be discouraged as they may reduce children to a means of fulfilling exclusively the intentions and desires of adults and would therefore be contrary to human dignity.[14]

1.8 International law and other relevant domestic law do not provide any person, including intending parent(s) in surrogacy arrangements, with a right to a child.[15] Similarly, intending parent(s) should not be able to claim a "*right*" to exclusive legal parentage and parental responsibility of a child born through surrogacy.[16] The inherent human dignity of the child, the child's status as an independent rights holder, the child's rights to preserve identity and to access origins and other rights, preclude acceding to such claims.[17]

Principle 2: The child as an independent rights holder

2.1 All human beings are born free and equal in dignity and rights.[18] Throughout their lives, every child is an independent rights holder in their own capacity.[19]

2.2 States shall ensure that every child born through a surrogacy arrangement, independent of circumstances leading to their birth, country of birth, status and legal parentage, can throughout their childhood claim and benefit from all rights provided in the Convention on the Rights of the Child and other international instruments, on an equal basis with all children. Particular attention should be paid to rights relating to birth registration and identity (including but not limited to name, nationality and family relations).

2.3 In all matters affecting the child who is capable of forming his or her own views, the child has the right to express those views freely. Due weight should be given to his or her views in accordance with the age and maturity of the child.[20] In cases requiring a post birth best interest determination, the child should have their rights independently represented by a legal guardian or other competent authority.

2.4 All children, irrespective of their status at birth shall enjoy the same social protection.[21]

Principle 3: The child's right to non-discrimination

3.1 All children are entitled to have their rights respected, protected and promoted without discrimination of any kind. States should take all appropriate measures to ensure that the child is protected from all forms of discrimination on the basis of:

a. birth status;
b. multiple birth or any other aspect connected with their birth;
c. any aspect of the status of their parent(s) including legal parentage;
d. sex;
e. health;
f. disability;
g. genetic characteristics;
h. race;
i. religion; or
j. any other status.

3.2 Notably, the child's right to non-discrimination applies regardless of:

a. whether or not surrogacy is permitted;
b. whether or not the child's birth has been registered;
c. whether or not legal parentage has been established;
d. whether or not nationality has been determined;
e. the child's health status or disability status;
f. whether or not the child has been a victim of sale, trafficking or exploitation;
g. any aspect of the status of the surrogate mother;
h. any aspect of the status of the intending parent(s); or
i. any other status.

The above must be interpreted consistently with other principles, *inter alia*, best interests of the child, human dignity, the prevention and prohibition of the sale of children and trafficking in children, protection of identity and access to origins.

3.3 Parent(s) or legal guardian(s) of a child born through surrogacy should be guided by the best interests of the child and not discriminate against the child for any reason including sex, health status, genetic characteristics or disability.[22]

Principle 4: The child's right to health

4.1 All children have a right to the highest attainable standard of health and equitable access to health care, on a par with other children, irrespective of the circumstances of their birth.

4.2 In order to safeguard the child's rights at birth, States permitting surrogacy should ensure regulatory requirements and standards are in place to ensure that:

a. whenever human reproductive material is used other than from the intending parent(s), there is screening of transmissible disease(s) and/or genetic disorders and notification of results to the surrogate mother and intending parent(s);
b. health insurance is available for the child born through surrogacy;
c. pre-surrogacy arrangements guarantee that intending parents are prepared to make provision[23] for health care, including in those circumstances where a child is born with additional medical needs or a disability; and
d. adequate pre-and post-natal health care should be provided at no cost to the surrogate mother

Principle 5: Pre-surrogacy protections

5.1 An established framework for pre-surrogacy arrangements which promotes the rights of children born of surrogacy is required. Pre-surrogacy arrangements include among others, screenings, multi-disciplinary assessment, informed consent of parties and reviews of these arrangements.

5.2 All such services should be provided by independent professionals free from any actual or perceived conflict of interest. In States permitting surrogacy, all services related to pre-surrogacy arrangements should be free of charge for the surrogate mother and any related expenses should be borne by the intending parent(s), if not covered otherwise.

Legal issues

5.3 States should give due consideration to minimizing the risk of disagreement about legal parentage at birth through pre-surrogacy arrangements which should include but not be limited to:

a. the provision of independent legal advice for the surrogate mother (i.e. independent of intermediaries representing intending parent(s) and clinics)
b. criminal background checks and child abuse registries of intending parents and surrogate mothers;
c. a record of the intentions of the surrogate mother and intending parent(s) should be kept but not considered binding, and include acknowledgements of the range of potential outcomes and decision-making during the surrogacy arrangement, future guardianships arrangements, medical insurance and financial support provisions for the child; and
d. confirmation of consent of providers of human reproductive material to the surrogacy arrangement.

Psycho-social and health issues

5.4 Pre-surrogacy arrangements for surrogate mothers should include psycho-social suitability assessment and ongoing supportive counselling from independent and qualified practitioners,[24] which should include but not be limited to:

a. mental health and cognitive ability to make decisions, her understanding of the surrogacy arrangement and the overall impact on her life and her family, including unforeseen consequences;
b. confirmation of an absence of coercion and exploitation;
c. assess understanding of legal and financial arrangements, criminal background and child protection checks, financial arrangements, and physical and mental health screening to make decisions freely;
d. spouse/partner and child(-ren) of the surrogate mother who will be impacted by a surrogacy pregnancy and relinquishment; and
e. ascertain expectations regarding selection of intending parent(s) and future relationships with intending parent(s) and the child.

5.5 Pre-surrogacy arrangements for intending parent(s) should include a psycho-social suitability assessment and counselling from an independent and qualified practitioner,[25] which should include but not be limited to:
a. each intending parent and any child(-ren) of the intending parent(s) according to age and maturity;
b. review of their understanding of legal and financial arrangements, criminal background and child protection checks, guardianship, pregnancy and birth expectations, wishes of the surrogate mother and including unforeseen circumstances;
c. mental health and physical health, including declaration of transmissible disease(s);
d. stability of relationship, support systems and home life;
e. willingness and capacity to cover health insurance costs of child(ren) and surrogate mother;
f. independent assessment of capacities to ensure the child's social, physical, emotional and educational well-being and development, and protection from harm, including for example, past rejection of a child born through surrogacy or adoption;[26]
g. communication about the child's origins;
h. expectations and intentions concerning future relationships with the surrogate mother, and persons providing human reproductive material; and
i. in international surrogacy arrangements, determining whether intending parents understand the legal implications, including regarding legal parentage and prevention of sale.

5.6 In surrogacy arrangements where there have not been adequate pre-surrogacy arrangements and/or where consents have not been properly obtained, a court or other competent authority of the State of birth shall conduct a post-birth best interests of the child determination in proceedings concerning legal parentage and/or parental responsibility.

Principle 6: Best interests of the child

6.1 The best interests of the child shall be the paramount consideration in all decisions concerning legal parentage and parental responsibility related to a child born through surrogacy.[27] The risk of short- and long-term harm to the child including but not limited to psychological and physical harm should also be considered.

6.2 Protection of the best interests of the child precludes enforcement of contractual terms in surrogacy agreements purporting to transfer, establish, or relinquish legal parentage and parental responsibility.[28]

6.3 It is generally in the best interests of children born through surrogacy to have at least one genetically-related intending parent.[29]

6.4 The best interests of children born through surrogacy should be promoted and protected at all times, including "when screenings and reviews of surrogacy arrangements prior to pregnancy are carried out".[30] Such pre-surrogacy arrangements accomplish some of the purposes of a post-birth best interests of the child determination (see para 6 below).

6.5 A court or other competent authority of the State of birth shall, at a minimum, conduct a post-birth best interests of the child determination in proceedings concerning legal parentage and/or parental responsibility or if child protection measures are being considered in domestic and international surrogacy arrangements where:

a. there have not been adequate pre-surrogacy evaluations and/or arrangements (see Principle on pre-surrogacy protections); or
b. national laws provide that the surrogate mother is the legal parent at birth and a transfer of legal parentage is required; or
c. there is a conflict between the surrogate mother and intending parents(s) or between the intending parents after birth in regard to legal parentage or parental responsibility; or
d. there are unforeseen developments, particularly where neither the surrogate mother nor intending parents are able or willing to care for the child, or information has subsequently come to light that may affect the child's well-being, such as indications of sale, exploitation and trafficking or other illicit activity.
e. any other circumstances which may jeopardise the rights or best interests of the child

6.6 In international surrogacy arrangements where there is at least one State that does not permit the specific arrangement, a best interests of the child determination should be conducted additionally by a court or any other competent authority of the State where the intending parent(s) intend to reside with the child.

6.7 The best interests of the child determination shall be carried out on the basis of the best interests assessment,[31] which in proceedings concerning legal parentage and/or parental responsibility in surrogacy cases should include but not be limited to the following considerations:[32]

a. The parties' intentions when entering into the surrogacy agreement;
b. The child's genetic and gestational links to each of the parties to the surrogacy agreement;
c. All sibling relationships of the child;
d. The suitability of each of the parties to be a fit and proper parent and/or carer of the child;
e. The ability of each of the parties to facilitate the child's relationships with other parties;
f. The value of a stable family unit in the child's development;
g. The likely effect on the child including psychological and emotional impact, throughout the child's life, of the decision;

h. Any harm which the child has suffered or is at risk of suffering
i. The likely effect of the decision on future generations;
j. The child's ascertainable wishes and feelings regarding the decision, taking account of the child's age and understanding;
k. The child's characteristics which are considered relevant, including age and sex;
l. The child's particular needs, including physical and health needs;
m. The child's emotional and/or physical attachment to each of the parties;
n. All circumstances in relation to the surrogacy arrangement;
o. Potential involvement of illicit practices;
p. Transparency in financial transactions; and
q. The role of intermediaries.

Principle 7: Consent of surrogate mother

7.1 Confidence in the integrity of the circumstances surrounding their surrogacy arrangement is of great importance to the child's rights. The surrogate mother should be in a position to make independent and informed decisions free from exploitation and coercion.

7.2 Free and informed decision making in all legal, social, financial and medical matters by the surrogate mother shall be supported pre surrogacy arrangements, throughout the pregnancy and post birth. Conditions shall be provided and ensured that enable the surrogate mother to exercise self-determination. Surrogacy should be permissible only when the surrogate mother *inter alia*:

a. is legally an adult;
b. has experienced as an adult, at least one prior birth which was not a surrogacy arrangement;
c. is competent and has the cognitive ability to make decisions, give consent and exercise autonomy and self-determination.

Consent in legal matters

7.3 Consent to legal arrangements shall be free and independent, including:

a. informed and free from all forms of coercion and fraud;
b. all information provided shall be explained and provided in writing in her own language and presented in a way that she understands; and
c. the surrogate mother shall be allowed sufficient time to consider legal matters and discuss during independently conducted psycho-social assessments and counselling.

Consent in medical matters

7.4 To support self-determination and autonomy, the informed medical consent procedure between the surrogate mother and medical professionals performing each **medical procedure**[33], should occur prior to each procedure and include, as a minimum:

a. effective access to independent medical advice and/ or a second opinion;
b. informed consent for each procedure that is free from all forms of coercion and fraud
c. the provision of information and education about the medical procedure, lifestyle restrictions[34] and short- and long-term risks, as well as possible complications in a language the surrogate mother understands and in a way that she understands[35];
d. the number of embryos implanted and donor information;
e. the right to maintain control over her own body including to refuse, restrict or request a medical procedure;
f. the right to decide on birth conditions including labour, delivery and persons to be present; and
g. information on post-birth implications related to the surrogate mother's future health and on subsequent births.

7.5 In addition to paragraphs 7.3 and 7.4, the consequences of the consent and arrangements with the **agency or clinic facilitating the procedure if their operation is permitted in national law**[36] should be clearly set out with respect to:

a. financial arrangements;
b. selection of intending parent(s) by the surrogate mother with the opportunity to meet intending parents and any other children in the family to inform her decision;
c. each medical procedure and pregnancy and birthing arrangements; and
d. transfer of legal parentage and/or parental responsibility.

Principle 8: Consent of intending parent(s)

8.1 Confidence in the integrity of the circumstances surrounding their surrogacy arrangement is of great importance to the child's rights. Intending parent(s) should be in a position to make independent and informed decisions free from exploitation and coercion.

8.2 Free and informed consent in all legal, medical, social and financial matters shall be sought from the intending parent(s) prior to any surrogacy arrangements and following all screening and preparatory processes.[37] Such consent should be recorded in writing and preserved. Surrogacy should be permissible only when the intending parent(s) *inter alia*:

a. have been screened and assessed;
b. understand the psychosocial issues that impact on a child born to surrogacy and all parties involved;
c. are at an age to parent a child to independent adulthood;
d. has/have provided consent in the required legal form, and expressed or evidenced in writing in their own language, free from all forms of coercion and fraud;
e. have agreed to responsibilities identified in these principles including nominating guardians, providing medical insurance and financial support, especially when unforeseen circumstances arise

8.3 Intending parents and the child should have appropriate opportunities to know the surrogate mother, her immediate family and community for the benefit of the child.

Principle 9: Consent of persons providing human reproductive material

9.1 Confidence in the integrity of the circumstances surrounding their surrogacy arrangement is of great importance to the child's rights. Donors should be in a position to make independent and informed decisions free from exploitation and coercion.

9.2 In States where human reproductive material is used for surrogacy, transparent and comprehensive information should be provided to the donor including on medical complications, intended use of material, retention and accessibility of identifying information, to ensure pre-and post-surrogacy protections have been respected and that there is informed consent.

9.3 Free and informed consent and agreement in all legal, financial and medical matters shall be sought from the donor. Such consent should be recorded in writing in the donor's own language and preserved. Donations intended for surrogacy should be permissible only when the donor *inter alia*:

a. is an adult;
b. is competent and has cognitive ability to make decisions;
c. has provided written and signed agreement in accordance with applicable national law, together with certification that they have understood that agreement;
d. has effective access to independent legal and medical advice;
e. has received independent counselling from a qualified practitioner with respect to the future impact of the surrogacy arrangement such as:
    i. importance of limiting the number of donation(s);
    ii. disclosure of identifying information; and
    iii. any potential relationships that may result.

Principle 10: Legal parentage and parental responsibility

10.1 States recognise the primary responsibility of parents for the upbringing and development of the child,[38] and therefore have the obligation to provide appropriate assistance to parents in regard to these responsibilities.[39] The best interests of the child will be the parents' basic concern.[40]

10.2 States that permit surrogacy may have different rules regarding legal parentage and parental responsibility including related to:

a. the establishment of legal parentage at birth, by operation of law, bearing in mind that in the vast majority of States, a surrogate mother has legal parentage at birth;
b. transfer of legal parentage;
c. requirements about genetic relations, if any, to the child with either the surrogate mother and/or intending parent(s).

10.3 States that do not permit but nevertheless encounter surrogacy should ensure that there is a legal framework governing parentage and parental responsibility applicable to children born through surrogacy.[41] This framework shall ensure that the child has legal parent(s) at birth.

Determination of legal parentage at birth, by operation of law

10.4 Where the surrogate mother is a legal parent by operation of law at birth, a court or other competent authority should determine the post-birth wishes of the surrogate mother after an appropriate reflection period. If the surrogate mother wishes to:

a. relinquish and/or transfer legal parentage and parental responsibility, an expeditious post-birth legal and safe mechanism should be available.
b. retain legal parentage and/or parental responsibility, then a court or other competent authority should expeditiously conduct a post-birth best interests of the child determination.

10.5 Where the surrogate mother is not a legal parent by operation of law at birth, an expeditious procedure that comes into effect after an appropriate reflection period, should be provided by which the surrogate mother post birth:

a. has access to a suitably qualified neutral third party as part of informed consent procedures;
b. freely confirms or revokes her consent that the intending parent(s) have exclusive legal parentage;
c. provides her consent without any financial consequences as to either payments or reimbursements related to the surrogacy arrangement

10.6 States may provide intending parent(s) with exclusive legal parentage and parental responsibility by operation of law at birth only if the following two conditions are met:

a. the surrogate mother confirms consent post-birth (see para 10.5 above)
b. a post-birth best interests of the child determination is not required under these Principles (see paras 10.8, 10.9 & 10.10 below).

Transfer of legal parentage

10.7 A court or other competent authority of the State of birth shall, at a minimum, expeditiously conduct a post-birth best interests of the child determination in proceedings concerning legal parentage and/or parental responsibility or where child protection measures are being considered in domestic and international surrogacy arrangements where:

a. there have not been adequate pre-surrogacy arrangements; or
b. there is a conflict between the surrogate mother and intending parents(s) or between the intending parents after birth in regard to legal parentage or parental responsibility; or

c. there are unforeseen developments, particularly where neither the surrogate mother nor intending parents are able or willing to care for the child, or information has subsequently come to light that may affect the child's well-being, such as indications of sale, exploitation and trafficking or other illicit activity.

10.8 In international surrogacy arrangements where there is at least one State that does not permit the specific arrangement, a best interests of the child determination should be conducted additionally by a court or any other competent authority of the State where the intending parent(s) intend to reside with the child.

10.9 If the surrogate mother either revokes consent or fails to confirm consent, then a court or other competent authority should conduct a best interests of the child determination with particular attention to a psycho-social assessment of both parties.

10.10 States shall prohibit, as constituting the sale of children, any termination or transfer of legal parentage and/or parental responsibility, or promise to terminate or transfer legal parentage and/or parental responsibility, in exchange for remuneration or any other consideration.[42]

Parental responsibility

10.11 Courts and competent authorities should provide such interim orders as to parental responsibility as are necessary, including for the period immediately after birth.

10.12 Neither a surrogate mother nor intending parent(s) should be forced to maintain parental responsibility, for forced parenting is generally contrary to the best interests of a child. States may however require intending parent(s) to:

a. have some degree of financial responsibility even in the absence of legal parentage or other exercise of parental responsibility;
b. provide advance provision for the surrogacy arrangement and/or maintenance of the child for a reasonable period, especially in international surrogacy arrangements where there is often a large disparity between the economic situation of the parties.

10.13 Courts and competent authorities may use alternative dispute resolution procedures designed to assist the parties in resolving their conflicts. By this or other means, courts and other competent authorities should seek to avoid destructive ongoing conflicts that could be harmful to the child and should seek to maximize opportunities for positive ongoing relationships important to the child's identity.

Principle 11: Protection of identity and access to origins

11.1 Every child should be able to enjoy and exercise their right to preserve their identity (*nationality, name and family relations*) with appropriate assistance and protection. The child's ability to preserve their identity, including their genetic, gestational and social origins[43], has an on-going, lifetime impact on the child and future generations, in particular from the perspective of the child's right to identity, health and cultural rights.

11.2 States have a duty to ensure that every child born through surrogacy has the opportunity to access information concerning their identity, including genetic, gestational and social origins. This should include access to information as an adult. States should assist in this process.

11.3 Surrogacy arrangements should only involve surrogate mothers who provide verified and accurate identifying information about themselves, and who agree that their identifying information may be transmitted to persons to whom they gave birth.

11.4 Human reproductive material in surrogacy should only be used from persons who provide verified and accurate identifying information about themselves, and who agree that their identifying information may be transmitted to persons with whom they have a genetic connection.

11.5 In instances where children are born through surrogacy, open surrogacy arrangements should be encouraged, in order to provide a safeguard for protection of identity rights and access to origins. States should therefore encourage education about the benefits of post birth contact between the child born through surrogacy, surrogate mother, intending parent(s) and extended family, persons providing reproductive material where such opportunities exist.

11.6 States should ensure rigorous collection and storage to preserve in perpetuity identity information relating to all surrogacy arrangements. States should clarify under what conditions identity information will be stored and kept up-to-date, who can access this information, and when and how this information can be accessed. This should include preservation of data when changes occur, such as when intermediaries close down.

11.7 States that permit surrogacy should establish and maintain registers and national records containing information about the genetic and gestational origins of children born through surrogacy, to which children can seek access, in accordance with the age and maturity of the child and subject to conditions set out in national legislation. States should appropriately train persons collecting, storing and facilitating identity information in the context of surrogacy.

11.8 Consistent with the best interests of the child, intending parent(s) undertaking surrogacy should ensure, from the earliest opportunity, the collection and preservation of all available information relevant to the child's identity, including all aspects of their origins.

Principle 12: Birth notification, registration and certification

12.1 Irrespective of the circumstances of their birth, a child's birth should be expeditiously notified to, and registered by, the appropriate competent authority in the State of birth. Every child "shall be registered immediately after birth"[44] and such registration should be without any discrimination related to the circumstances of birth.

12.2 States must register the birth of all children born on their territory, including those born to a foreign parent or if the parents are unknown.

12.3 The notification and registration of the birth should be as complete as possible including in States which permit surrogacy arrangements or [States of destination] which subsequently register the child in their national registries. Identifying information should include date and place of birth, the surrogate mother, intending parent(s) and information relating to persons providing human reproductive material if any. Medical clinics, providers and/or registries of human reproductive material should make all identifying information available to national registries.

12.4 States should ensure that there is a national register that records identifying information. States should devise a procedural framework to ensure that such identifying information is recorded and preserved in accordance with applicable data protection law. States may also consider establishing a separate registry for children born through surrogacy.

12.5 Certification of the birth should be issued for all children born through surrogacy. This should not lead to any discrimination for reasons of the child's birth or other status. The certification of a birth is closely linked to the fulfilment of many other rights, *inter alia*, to a name, nationality[45] and identity,[46] the enjoyment of the highest attainable standard of health[47] and education.[48]

12.6 The right to privacy of children born through surrogacy is important. In many States, a birth certificate must be presented to register for official services in order to fully access their rights to education, health and economic, social and cultural rights. In addition to a birth certificate, States may consider providing a supplementary document with identifying information to the child born through surrogacy.

12.7 Birth records should be updated upon a subsequent change of legal parentage while preserving the original records and the history of those changes.

12.8 All persons should be able to access their own birth records. States should ensure that a child born through surrogacy or their representative has access to such information, under appropriate guidance and counselling in accordance with his or her age and maturity.

12.9 Information on the child, intending parent(s), surrogate mother or any person providing human reproductive material should only be disclosed to competent authorities and other persons with legitimate interest(s) in accordance with applicable data protection law.

12.10 Registers of providers of human reproductive material and other relevant registries shall preserve such information and complement the use of birth notification, registration and certification.

Principle 13: Prevention of statelessness

13.1 Irrespective of the circumstances of their birth[49], all children have a right to a nationality.[50] The right to acquire a nationality requires States to prevent statelessness of children as part of the right to identity.

13.2 A State's application of nationality law should be without any discrimination related to circumstances of birth, including surrogacy. The policy of States regarding the nationality of a child born through surrogacy should be guided by the overriding importance of avoiding a situation in which a child is stateless.

13.3 States shall act in an expeditious manner when determining nationality.[51]

13.4 With a view to reducing the risk of statelessness of children born through surrogacy arrangements and facilitating their access to a nationality[52]:

a. If legal parentage is established or recognised by a State, that State should apply its provisions on the acquisition of nationality under the same conditions as any other child born to that legal parent.[53] Where this is not possible, the State(s) of nationality of an intending parent(s) is encouraged to provide the necessary assistance to ensure the child obtains such nationality; failing which,
b. States should grant their nationality at birth to a child born on its territory in cases where the parents are unknown or do not have that State's nationality, and the child would otherwise be stateless[54]; failing which,
c. States of which the surrogate mother is a national should grant their nationality if the child would otherwise be stateless; failing which,
d. Other States connected to the surrogacy arrangement should consider the discretionary grant of nationality if the child would otherwise be stateless.

13.5 The granting of nationality for the child does not automatically imply the recognition of legal parentage between the child and intending parent(s).

13.6 If the law of a State entails a loss of nationality as a consequence of any change in legal parentage, such loss should be conditional upon possession or acquisition of another nationality.[55]

13.7 States should provide that revocation or annulment of legal parentage will not cause the permanent loss of the nationality acquired by the child, if the child is habitually resident on their territory for a specific period of time.[56]

13.8 States should take measures, where necessary and appropriate, to grant without delay a visa and/or discretionary status to the child to remain in and/or travel from the State of birth pending any determination of legal parentage and/or nationality, in the best interests of the child.

13.9 States should devise a procedural framework during the determination of nationality and train relevant professionals including immigration officials and border guards in the application of this principle.[57]

Principle 14. Prevention and prohibition of the sale, exploitation and trafficking in children

14.1 States shall prohibit surrogacy arrangements that constitute or promote the sale of or traffic in children as defined by international law, including the CRC and the OPSC.[58] States should create safeguards to prevent the sale of children in the context of surrogacy.[59]

14.2 Sale of children includes "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."Sale therefore occurs in a surrogacy context when these three elements concur:

a. transfer ("a child is transferred by any person or group of persons");
b. payment ("remuneration or any other consideration"); and
c. exchange ("for"---payment for transfer).

14.3 Transfer exists in all completed surrogacy arrangements, because such includes physical and/or legal handover of the child . If for any reason, the surrogate mother is not considered a legal parent at birth, handover of the child by the surrogate mother still constitutes a transfer.

14.4 Commercial surrogacy by definition includes payment, and therefore meets at least two of the three elements of sale of a child: payment and transfer. Commercial surrogacy constitutes the illicit sale of children where such payment is made "for" (in exchange for) transfer. In commercial surrogacy, payment is made as a minimum for gestational services; the question is whether payment includes payment for transfer.

14.5 One approach to commercial surrogacy views payment for gestational services and payment for transfer as an inseparable whole envisioned from the beginning and hence views all commercial surrogacy as constituting, or unduly risking, the sale of a child. States that view commercial surrogacy as constituting or unduly risking the sale of children should prohibit commercial surrogacy.

14.6 Another approach to commercial surrogacy views it as possible, under certain circumstances, to separate payment for gestational services from payment for transfer, in which case there is no payment for transfer and hence no sale of a child.

14.7 Accordingly, States that permit commercial surrogacy shall ensure, at a minimum, that all payments are separate from the determination or transfer of legal parentage and parental responsibility. Measures should include that:

a. the surrogate mother at birth retains the right to decide whether or not to consent to transfer of legal parentage and parental responsibility;
b. any remuneration or any other consideration provided to the surrogate mother (or anyone on her behalf) be made in advance of any post birth transfer of legal parentage and parental responsibility to the intending parent(s) or post-birth confirmation of the surrogate mother's consent, and be non-refundable (absent fraud);
c. all payments and reimbursements are reported and properly regulated by law; and
d. intermediaries are properly regulated by law.

14.8 Surrogacy purporting to be altruistic and non-commercial may nonetheless result or unduly risk the sale of children when:

a. there is a provision of unregulated, excessive or lump sum "reimbursements" or consideration in any other form; or

b. there are reimbursement categories like “pain and suffering”, which can be similar to payment in commercial surrogacy; or
c. reimbursement occurs which cannot be separated completely from the establishment or transfer of legal parentage and/or parental responsibility. (See para. 7).

14.9 Sale of children occurs where legal parentage is assigned or transferred based primarily on contractual provisions (see Principle on legal parentage). Written agreements describing the intentions of the parties as to legal parentage and/or parental responsibility do not violate the prohibition of sale of children, as long as they are understood to be non-binding.

14.10 Sale of the child may occur if “remuneration or any other consideration” is promised or paid to obtain exclusive legal parentage and parental responsibility for intending parent(s).

14.11 Activities of intermediaries can constitute or lead to the sale of the child:
a. due to the intermediaries’ creation and control of commercial surrogacy markets and networks;
b. if the intermediaries exercise such control over the surrogate mother and/or child as to be responsible for transferring the child for remuneration or any other consideration.
c. intermediaries and other professionals involved in surrogacy arrangements receive remuneration for services rendered which are excessive, according to the standards of comparable work in the same profession where the work is performed.

14.12 States shall likewise prohibit surrogacy arrangements that constitute or promote the trafficking and/or exploitation as defined by international law, including the CRC, Palermo Protocol and ASEAN Convention Against Trafficking in Persons, especially women and children. States should create safeguards to prevent the trafficking and/or exploitation in the context of surrogacy.

14.13 States generally should prohibit commercial surrogacy where it is not possible to reliably separate payment for gestational services from illicit payment for transfer of the child including, but not limited to, where:
a. there may be unregulated exchanges of payments for children;
b. the surrogate mother is a genetic parent of the child;
c. payment is only made if/when child is transferred to intending parent(s);
d. the intending parents for the child were not identified prior to pregnancy;
e. there may be unregulated or under-regulated intermediaries;
f. the legal system does not accord the surrogate mother the right, after birth, to either provide consent or revoke consent to the transfer of legal parentage and parental responsibility to the intending parent(s).

Principle 15: Transparency in financial matters

15.1 States shall take all appropriate measures to prevent improper financial or other gain in connection with surrogacy.[60]

15.2 States that permit surrogacy should require transparency and accountability in any financial transaction, relating to surrogacy by, *inter alia*:

a. requiring the keeping of written accounts which clearly identify each fee and cost incurred for each different service, ideally outlined in a standard list of services to be covered, connected with each surrogacy arrangement;[61]
b. requiring that such written accounts be made available to the court or other competent authority for purposes of monitoring individual surrogacy arrangements as well as for the purpose of oversight of persons, intermediaries and others involved in surrogacy arrangements.[62]

15.3 Intermediaries and other service providers should not receive remuneration which is unreasonably high in relation to services rendered, according to the standards of comparable work done where the work is performed.

Principle 16: Intermediaries

16.1 The actions of intermediaries in surrogacy arrangements may impact the rights of the child born through surrogacy. Regulation of intermediaries is therefore of prime importance.

16.2 In States where surrogacy is permitted, all intermediaries should be subject to authorisation and regulation by a designated competent authority. A designated competent authority also should ensure regular monitoring and evaluation of ongoing compliance on the part of intermediaries with appropriate regulatory standards. Criteria for authorization and ongoing compliance should cover, *inter alia*:

a. financial and administrative probity;
b. relevant competencies;
c. legality of contractual arrangements; and
d. ethical standards of overall operations.

16.3 States should prohibit the surrogacy-related operations of intermediaries who fail to comply with regulatory standards or fail to cooperate with regular monitoring and evaluation of ongoing compliance.

16.4 States encountering surrogacy should monitor the activities of intermediaries acting within their jurisdiction and offering services prohibited in their State. If such States do not have specific surrogacy laws, including related to intermediaries, States should consider legislation to prohibit intermediary activities due to potential risks, including the sale of children.

16.5 Intermediaries should uphold these Principles as applicable to their activities. Intermediaries should not offer or advertise services where such services are prohibited by law.

16.6 Intermediaries should be required and appropriately trained to collect, store, and facilitate identity information in the context of surrogacy in order to uphold the child's right to identity and access to origins.[63] Identifying information shall be handled in accordance with applicable data protection law.

16.7 Intermediaries and other service providers involved in surrogacy arrangements should not receive remuneration which is unreasonably high in relation to services rendered, according to the standards of comparable work where the work is performed.[64]

16.8 Where an intermediary is not authorized to provide surrogacy services in the country where it is operating and/or is involved in the sale or trafficking of a child, appropriate sanctions and liability should be imposed on the intermediary.[65]

Principle 17: Responding to unexpected developments in surrogacy arrangements

17.1 States that permit surrogacy and/or encountering surrogacy should ensure that child protection systems are able to respond to sudden unexpected developments, such as situations where:

a. there is a conflict with respect to child-care arrangements;
b. neither a surrogate mother nor an intending parent(s) are able or willing to care for the child;
c. illicit practices are revealed that are linked to a surrogacy arrangement;
d. situations of emergency; and
e. changes in social, political and legal conditions

17.2 In the event of an unexpected development and consequent increased vulnerability of the child born through surrogacy, States should act expeditiously to:

a. ensure that the competent authority in the State where the child is present is notified immediately;
b. activate immediate measures to provide suitable care to ensure physical, emotional and psychological well-being of the child;
c. encourage the use of mediation services in circumstances where there is disagreement with respect to legal parentage and/or parental responsibility. Where there is no agreement, the court or other competent authority should consider providing appropriate orders;
d. ensure that psycho-social reports are prepared to assist with best interest determination;
e. if neither the surrogate mother nor the intending parent(s) is able or willing to parent the child, competent authorities should make guardianship orders and/or other care arrangements relating to the child consistent with the UN Guidelines for the Alternative Care of Children. Opportunities for appropriate kinship care should be considered before envisaging placements in other suitable care settings, and siblings born of the surrogacy arrangement should be placed together. Placement in residential care facilities should be avoided.
f. When the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration.
g. keep records of all decisions made in relation to the child, and ensure these are available to the child.

17.3 When illicit practices are linked to surrogacy arrangements (see Principles on best interest and on prevention and prohibition of sale of children and trafficking):

a. the child's best interests should be the paramount consideration in determining legal parentage and/or parental responsibility and if there is evidence of involvement by any party in illicit practice(s) such involvement, including its possible long-term consequences, should be taken into account;
b. sanctions should primarily be focused on intermediaries involved and authorisation, if any, should be withdrawn for improper conduct.

17.4 Regardless of legal parentage and/or nationality, States may determine that intending parent(s) are responsible for child maintenance, welfare and health.[66]

17.5 States should have policies which allow for timely decision-making in relation to the child's best interests, and ensure that child protection systems are implemented expeditiously.

Principle 18: Cooperation among States, regions and local authorities

18.1 All States should take appropriate measures to provide information concerning the laws and other general information related to surrogacy. This information should be made available to the general public and accessible to surrogate mothers, intending parent(s), and persons providing human reproductive material, in their own language and one they understand.[67]

18.2 States should cooperate to deter all practices contrary to the aims of these Principles. States should cooperate to uphold the principles, in particular:

a. when there are unexpected circumstances (see Principle);
b. in relation to legal parentage and/or parental responsibility, specifically in international surrogacy arrangements;
c. to prevent and respond to sale, trafficking and exploitation of children;[68]
d. facilitating access to origins; and
e. any other circumstances requiring a best interest determination.

18.3 States that permit surrogacy should limit access to surrogacy to intending parents from States which permit surrogacy.

18.4 Surrogacy should only be permitted in international arrangements when the States concerned are satisfied that the child will:

a. be able to enter the country of habitual residence of at least one of the intending parent(s);
b. have legal parentage of at least one of the intending parent(s);
c. acquire the nationality of at least one of the intending parent(s); and
d. be able to fully enjoy all his or her rights included in these Principles and other international standards.

18.5 States should prohibit the advertising of surrogacy-related services within or direct toward States where surrogacy is prohibited, including through social media.

18.6 In implementing these Principles, cooperation among States, regions and local authorities should be promoted, strengthened and enhanced.

18.7 To ensure appropriate international cooperation in relation to surrogacy, States are encouraged to consider:

a. entering into bilateral or multilateral instruments related to surrogacy where it occurs;
b. for the purposes of parental responsibility, ratifying or acceding to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996.

18.8 For the purposes of responding to requests from other States regarding individual surrogacy arrangements, competent authorities should take all appropriate measures, in particular to [69]

a. collect and preserve information about the child, surrogate mother, persons providing human reproductive material, intending parent(s), child's place of birth, intermediaries and/or surrogacy clinic(s) involved etc.);
b. reply, in so far as is permitted by the law of their State, to requests from other competent authorities for information about a particular surrogacy situation.

18.9 In States where surrogacy is permitted and/or occurs, States should establish an appropriate framework

to enable, upon request, the effective exchange of all relevant information for promoting and protecting the rights and best interests of the child.

Endnotes

[1] HCCH, A Preliminary Report On The Issues Arising From International Surrogacy Arrangements (2012) https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf
[2] HCCH, A Preliminary Report On The Issues Arising From International Surrogacy Arrangements (2012) https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf
[3] HCCH, A Preliminary Report On The Issues Arising From International Surrogacy Arrangements (2012) https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf
[4] International Covenant on Civil and Political Rights, U.N. Doc. A/6313, at preamble (1966 - hereinafter ICCPR); *See*, e.g., UN Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 at preamble (1989 - hereinafter CRC); Council of Europe, 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Convention on Human Rights and Biomedicine, at preamble & art. 1 (hereinafter Oviedo Convention); Universal Declaration of Human Rights, G.A. res. 217 A(III) at preamble and art. 1 (1948).
[5] Committee on the Rights of the Child, Concluding Observations on the Report Submitted by India Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, CRC/C/OPSC/IND/CO/1, §23(f) (June 13, 2014 - hereinafter 2014 India CO); Oviedo Convention at arts. 1, 14 and 21.
[6] *See* CRC, art. 2; UN SR Study on Surrogacy as the Sale of Children [hereinafter UN SR Study].
[7]CRC at preamble, art. 35; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. A/RES/54/263 (2000 - hereinafter Optional Protocol on Sale of Children); Oviedo Convention at art. 1 and 21; UN SR study at para. 35, 41 – 78; see, e.g., S. L. GOSSL (2013). *Germany*. In K. TRIMMINGS & P. BEAUMONT (ed.). *International Surrogacy Arrangements* at 131-132 for a summary of German law.
[8] Optional Protocol on Sale of Children; CRC at art. 35; Cf. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) at art. 1 (Hereinafter 1993 Hague Convention); UN SR Study.
[9] *See*, e.g., UN SR Study.
[10] CRC at arts. 32-36; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing United Nations Convention Against Transnational Organized Crime, at art. 3(a), (2000 - hereinafter Palermo Protocol); UN SR Study at para. 77
[11] CRC at preamble, art. 3(2), 7-9, 20.
[12] CRC at preamble, art. 7-9, 20.
[13] *Cf*. UN SR Report at para. 78(b).
[14] *Cf.* CRC at arts. 2-3 and 21; UN SR Study at para. 64-65; Principle on child as an independent right holder.
[15] *See*, e.g., ICCPR at art. 23(2); UN SR Study at para. 64-65; cf. Council of Europe, Commissioner for Human Rights, N. CANTWELL (2011). *Adoption and Children: A Human Rights Perspective* at pages 12-13, available at https://rm.coe.int/16806dac00; *See* Council of Europe, Parliamentary Assembly, Doc. 14140, Children's rights related to surrogacy, at para. 27.
[16] *See* UN SR Study at para. 58-59, 64-65.
[17] *See* sources cited *supra* notes 1, 12.
[18] Universal Declaration of Human Rights
[19] CRC
[20] Cf. CRC art. 12
[21] Cf UN Declaration of Human Rights at art. 25(2)
[22] Cf. art 18(1) CRC
[23] Such advance provision is particularly important where there is a large disparity between the economic situation of the intending parent(s) and that of the surrogate mother, or where child protection and health systems are inadequate to meet the child's health needs.
[24] *See* UN SR Study at para. 73, 77(f).
[25] *See* UN SR Study at para. 73, 77(f).
[26] *See* CRC at art 3, 7-9, 20-21; P. FRONEK and M. CRAWSHAW (2014). The 'new family' as an emerging norm: A commentary on the position of social work in assisted reproduction. British Journal of Social Work; See Principle on protection of identity and access to origins. See also article 8(1)c of Embryo Agreements Laws (Agreement, authorisation of the new born child) 1996 in Israel.
[27] *Cf.* CRC at art.21 and UN Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180 at art.16(f) (Hereinafter CEDAW); *See* UN SR Study on Surrogacy and the Sale of Children, A/HRC/37/60 (Jan. 2018), at para. 77(e), hereinafter UN SR Study.
Why the Principles propose that the best interests of the child born through surrogacy arrangements be qualified as "the paramount consideration" and not just "a primary consideration".
The CRC sets a basic standard for the "best interests of the child" as "a primary consideration" in all decision-making affecting a child. On a small number of specific issues, however, the CRC explicitly elevates those best interests to the status of the determining factor in decision-making. Two of these issues are of special relevance to the situation of children born through surrogacy arrangements:
-Separation from parents: under CRC Art 9.1., States shall ensure that a child is not separated from his or her parents against their will "except when […] such separation is necessary for the best interests of the child."
- Adoption: under CRC Art. 21, States that "recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration…"
When the CRC was drafted and approved, medical science had not yet advanced sufficiently to make surrogacy a significant phenomenon, and the practice was therefore not considered in the treaty. Given the approach espoused by the drafters in relation to the separation of a child from parents and the permanent transfer of legal parentage, as reflected in Arts 9 and 21 above, there is every reason to believe that a similar stance would have been taken in relation to children born through surrogacy arrangements. It is therefore logical to propose that the best interests of a child born through surrogacy arrangements be "the paramount consideration" (i.e. the determining factor) as opposed to simply "a primary consideration" (i.e. one of the important factors) to be taken into account in decision-making regarding children born through surrogacy.
[28] *Cf.* CRC at arts. 3, 5, 7-9, 18, 21 and 35; Optional Protocol on the Sale of Children at arts. 2-3; UN SR Report at para. 22-78; and Council of Europe, Principles set out in the report of the Ad hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI, 1989) at principle 15, point 2.

[29] *Cf.* CRC at arts. 3, 7-9.
[30] UN SR Study at para. 73. See also it is in the best interests of the child to be protected from "all forms of physical or mental violence, including injury or abuse, neglect or negligent treatment, maltreatment or exploitation," see CRC art. 19(1), "all forms of sexual exploitation and sexual abuse," CRC art. 34(1), the "sale of or traffic in children for any purpose or in any form," CRC art. 35, and "all other forms of exploitation," see CRC art. 36.
[31] *Cf.* Committee on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) at para. 47.
[32] *Cf*. UK Law Commissions, 'Building families through surrogacy: a new law: A joint consultation paper' at paras. 8.107-8.117.
[33] See also: "The signing of a surrogacy contract provides an initial point at which information sharing may take place; this includes explanation of the medical procedures involved, complications, risks, counselling, and taking consent". In: TANDERUP, M., REDDY, S., PATEL, T., & NIELSEN, B. B. (2015). *Reproductive ethics in commercial surrogacy: Decision-making in IVF clinics in New Delhi, India*. Journal of Bioethical Inquiry, 12(3) at 491-501.
[34] Fronek P. (2018) Current perspectives on the ethics of selling international surrogacy support services. *Medicolegal and Bioethics* 8: 11-20
[35] See: KNOCHE, J. W. (2014). *Health concerns and ethical considerations regarding international surrogacy.* International journal of gynecology and obstetrics, 126(2), 183-186. (e.g. hyperstimulation syndrome when donating eggs, invasive procedures, sex selection and embryo reduction, risks associated with single and multiple embryo transfers, medication, caesarean sections) See also Oviedo Convention, Art 5(2)
[36]"Their consent for various procedures is taken for granted once they commit to be surrogates". In: TANDERUP, M., REDDY, S., PATEL, T., & NIELSEN, B. B. (2015). "Informed Consent in Medical Decision-Making in Commercial Gestational Surrogacy: A Mixed Methods Study in New Delhi, India". *Acta Obstetricia et Gynecologica Scandinavica.*
[37] 1993 Hague Convention at art. 4(4)1.
[38] *Cf.* CRC at art. 18(1).
[39] *Cf.* CRC at art. 18(2).
[40] *Cf.* CRC at art 18(1).
[41] *See* CRC at art 3(1), 21: UN SR at para. 73, 74, 75, 77 (e), (f).
[42] *Cf.* CRC at arts. 11 and 35; OPSC; UN SR Report
[43] Oviedo Convention https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf98
[44] Article 7(1) CRC
[45] Article 7(1 CRC
[46] Article 8(1) CRC
[47] Article 24 CRC
[48] Article 28 CRC
[49] Article 2 CRC is a general non-discrimination clause which applies to all substantive rights enshrined in the CRC, including Articles 7 and 8. It explicitly provides for protection against discrimination on the basis of the status of the child's parents or guardians. Article CRC sets out a general principle and also applies in conjunction with Articles 7 and 8, requiring that all actions concerning children, including in the area of nationality, shall be undertaken with the best interests of the child as a primary consideration
[50] Inter alia, Article 15 UDHR, Article 7 CRC, Article 24 ICCPR, Convention on the Reduction of Statelessness 1961, Article 9 CEDAW, Article 5 CERD, Article 18 CPD, Article 6 African Charter on the Rights and Welfare of the Child, Article 20 American Convention on Human Rights, Article 7 Covenant on the Rights of the Child in Islam, and Article 6 of the UN Declaration on the Rights of Indigenous Peoples. See also, generally, the 1961 Convention on the Reduction of Statelessness, the 1997 European Convention on Nationality, and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession
[51] Article 10(1) CRC. *See* also, in cases of adoption, section 8.4.5 of the Guide to Good Practice, Guide No 1 under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. It follows from Articles 3 and 7 CRC that a child shall not be left stateless for an extended period of time: a child shall acquire a nationality at birth or as soon as possible after birth. The obligations imposed on States by the CRC are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, such as through legal parentage or residence
52 States must bear in mind, that they "are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he [or she] is born", as expressed by the Human Rights Committee in its general comment No. 17.
[53] Principle 11 Recommendation CM/Rec (2009)13 of the Committee of Ministers to member states of the Council of Europe on the nationality of children and para. 32 of the Explanatory Memorandum to Recommendation 2009/13. See *Sylvie Mennesson v. France* (application no. 65192/11) and *Francis Labassee v. France* (application no. 65941/11) (stipulating that aspects relating to one's social identity need to have consequences for the nationality position of children born from cross-border surrogacy arrangements). See also M. Wells-Greco *The Status of Children arising from Inter-Country Surrogacy Arrangements: the Past, the Present, the Future*, Maastricht University, Eleven International Publishing: The Hague, Chapter 5
[54] Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, in particular paras. 8 to 12; Article 20(2) American Convention and Article 6(4) of the African Children's Charter; UNHCR Expert meeting, "interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation", Tunis, Tunisia, 31 October – 1 November 2013
[55] Article 5(1) Convention on the Reduction of Statelessness 1961. Art. 7(1)(f) and 7(1)(g) European Convention on Nationality 1997. See also, ILEC Guidelines 2015, para. 5,; UN High Commissioner for Refugees (UNHCR), Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions"), March 2014, in particular paras. 13 and 14; G.-R. de Groot, *Avoiding Statelessness caused by Loss or Deprivation of Nationality: Interpreting Articles 5-9 of the 1961 Convention on the Reduction of Statelessness and Relevant International Human Rights Norms*, Background paper, October 2013, Geneva: UNHCR
[56] Principle 15, Recommendation 2009/13
[57] UN Guidelines for the Alternative Care of Children
[58] *See* CRC at art. 35; OPSC, at art. 1, 2, 3; UN SR Study on Surrogacy and the Sale of Children, A/HRC/37/60 (Jan 2018)[hereinafter UN SR Study]. Article 2a OPSC "(a) 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"
[59] CRC at art. 35; OPSC; UN SR Study, para. 77; Cf. 1993 Hague Convention at art. 1.
[60] *Cf.* 1993 Hague Convention at art. 8, 32; see UN SR Study at para. 72 - 78.
[61] *Cf.* Summary List of Good Practices on the Financial Aspects of Intercountry Adoption. Available at https://assets.hcch.net/upload/wop/list33fa2015_en.pdf; 1993 Hague Convention at art. 8, 32; see UN SR Study at para. 77.
[62] *Cf.* 1993 Hague Adoption Convention at art. 8, 32; HCCH (June 2014). *Summary List of Good Practices on the Financial Aspects of Intercountry Adoption*. Available at https://assets.hcch.net/upload/wop/list33fa2015_en.pdf.; UN SR Study at para. 77.
[63] *See* Principle 8, para 6.
[64] *See* Principle 5, para. 2

[65] *See* Principle 13, para. 3.
[66] *See* case cited in http://www.bionews.org.uk/page_93040.asp. The decision in relation on the intending father's maintenance obligation was preceded by the court granting the residence of the child to the surrogate mother (in CW v NT & Anor [2011] EWHC 33 (Fam)).
[67] 1993 Hague Convention at art. 7(2).
[68] Cf 1993 Hague Convention at art. 8.
[69] Cf 1993 Hague Convention at art. 9.