

# KEY CONSIDERATIONS: CHILDREN'S RIGHTS & SURROGACY

## Briefing Note

Surrogacy, especially through international arrangements, is increasingly used as a method of family formation around the world. Although there are no precise global figures on how many children have been born through surrogacy, the development of assisted reproductive technology (ART), changes in social norms and the trend for having children later are leading to more children being born through surrogacy.

Children born through surrogacy have the same rights as all children under [the United Nations Convention on the Rights of the Child \(CRC\)](#). Regardless of individual State positions on surrogacy, all States have a duty to protect the human rights of all children born through surrogacy without discrimination, including ensuring appropriate legal and regulatory frameworks exist at the national level to protect and promote their rights. This Briefing Note is intended for use by legislators, decision-makers, policymakers and practitioners in all States where surrogacy issues require attention.

### Main challenges for children born through surrogacy

To date, no internationally agreed definition of the different forms of surrogacy exists. In some instances, surrogacy occurs in ways that protect, respect and uphold, the human rights of children born through surrogacy. However, currently, international human rights law does not provide safeguards specifically focusing on domestic surrogacy and International Surrogacy Arrangements (ISAs), which places children born through surrogacy at risk. Moreover, very few States have domestic legal and policy frameworks that provide safeguards for the rights of children in ISAs and, in some instances, domestic surrogacy. The Concluding Observations and Recommendations of the [CRC Committee](#), the [thematic reports](#) on children and surrogacy of the UN Special Rapporteur on sale and sexual exploitation of children, as well as the [Verona Principles](#), provide guidance on protecting the rights of children born through surrogacy.

Children born through surrogacy, especially ISAs, are at risk of multiple human rights violations – particularly, their right to an identity, including name, nationality, family relations and access to origins; the right to the enjoyment of the highest attainable standard of health; and the right to not be sold [the latter also stated in the [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography \(OPSC\)](#)]. Decisions may be made by adults in surrogacy situations which are discriminatory based on the child's disability and/or gender, and which are contrary to the child's best interests as the paramount consideration.

Given the predominantly commercial nature of many surrogacy arrangements, children born through surrogacy are at risk of being sold and/or exploited. Specific concerns are raised in this regard in ISAs and in surrogacy situations in which parentage is established solely on the basis of private arrangements.

Confidence in the integrity of the circumstances of their surrogacy arrangement is crucial to uphold the child's rights. The human rights of surrogate mothers, in particular the protection of girls, should be protected by preventing the potential for exploitation in surrogacy arrangements – for example, through coercion and a lack of informed consent of all parties.

During a surrogacy arrangement, the rights of children are at risk in the following ways:

*Establishing and preserving identity can be difficult or impossible for children born through surrogacy.* The child's rights under Articles 7 and 8 of the [CRC](#) – which protect the child's rights to be registered at birth, to preserve their identity, and to re-establish their identity if they have been illegally deprived of some or all of its elements – can be negatively impacted by decisions made about the child in surrogacy situations. Decisions about whether to preserve information relevant to a child's identity can have a lifetime impact on the child, and future generations, in several ways. Knowing one's origins is fundamental to the child's physical, psychological, cultural and spiritual development. Having one's own identity is also a gateway to the enjoyment of the child's other fundamental rights, such as those related to protection, health, education, and the maintenance of family ties.

Persons and organisations facilitating and/or undertaking surrogacy are not always aware of the importance of collecting, storing, and preserving identity information of children born through surrogacy, so the child can know their origins. In the absence of systems to preserve the child's identity rights, restoration of the child's identity may be impossible; particularly in circumstances where there is donor and/or surrogate anonymity. This also leads to challenges in birth registration and certification, as only a few civil registration systems are set up to record identity information related to family relations in surrogacy and other forms of assisted reproductive technology.

*Legal parentage in surrogacy raises challenges to the child's rights.* Although it is in the best interests of children to have legal parentage established as soon as possible after birth, the integrity of a child's legal parentage in surrogacy needs to be protected through minimum standards. These include, for example, pre-surrogacy safeguards, best interest determinations (BID), consents of all parties to the arrangement, and protecting the child's right to access their origins. Establishment or transfer of legal parentage cannot be linked to remuneration or other considerations, and the rights of the child should not be sacrificed to create legal certainty in parentage prior to birth, including in the event of unforeseen developments in a surrogacy arrangement. Such developments may include those related to uncertainty created by emergency situations and/or changes in the circumstances, or wishes, of the parties to the surrogacy arrangement.

*Children are at greater risk of being sold in commercial surrogacy arrangements.* Sale and trafficking of children born through surrogacy is occurring, especially in ISAs, due to a lack of protective safeguards being implemented by States. A legally binding contractual relationship between the surrogate mother and the intending parent(s) established **pre-birth**, in which the transfer of the child would be made conditional upon payment, would constitute the sale of a child. It can also lead to incorrect information being included in civil registration systems and falsification of identity information. The financial aspects of surrogacy arrangements often lack clarity, suggesting that they go beyond mere compensation for surrogacy-related expenses, including in purported "altruistic" surrogacy arrangements, amounting to the sale of children under Article 2 of the OPSC. **The identity and family relations of a child cannot be for sale.**

*Children born through surrogacy can be at risk of statelessness.* This is especially prevalent in ISAs when children are born in States that do not recognise the child as a national, nor do any other States. This may occur in situations where the intending parents are nationals of, or reside in, States that prohibit surrogacy and travel to a State that allows surrogacy arrangements. This contravenes State obligations under Articles 7 and 8 of the [CRC](#) and the State's duty to prevent statelessness. It follows that States that permit surrogacy should limit access to surrogacy solely to intending parents from other States which also permit surrogacy.

## Recommendations for protecting children's rights in surrogacy arrangements

States Parties to the [CRC](#) and the [OPSC](#), should take the following actions to protect the rights of the child in all types of surrogacy arrangements by ensuring that:

- **Civil registration and vital statistics (CRVS) systems include and preserve identity information relating to each child born through surrogacy.** Children's access to identity information should be facilitated in accordance with the age and maturity of the child. This will give children the opportunity to access information concerning their identity and origins and will support the child's enjoyment of other rights. Specifically, the identity of surrogate mothers and donor(s) should be known. An agreement to share their identity information with children born as a result of a surrogacy arrangement should be obtained prior to the arrangement being entered into. The child's right to identity can be further supported by openness in surrogacy arrangements.
- **Timely and disaggregated data on children born through surrogacy are collected by States.** CRVS systems should be set up to collect, store and disseminate such data as part of their vital statistics reports.
- **National legislation and regulation include a prohibition of the sale and trafficking of children as outlined in [OPSC](#) and its [Guidelines](#), ensuring this extends to the surrogacy context.** Contractual provisions purporting to determine definitively legal parentage or parental responsibility pre-birth should not be enforceable. States should guard against the falsification of identity information in surrogacy and safeguard the appropriate recording of identity information by the civil registrar.
- **Intermediaries in surrogacy are prohibited from undertaking any activities that may constitute or lead to the sale, trafficking, and/or any other forms of exploitation of children and other persons.** States that permit surrogacy should ensure that intermediaries are regulated and subject to national oversight.
- **A post-birth best interest determination (BID) is conducted in any surrogacy arrangement** when pre-surrogacy evaluations lack sufficient rigor, the surrogate mother and/or intending parent(s) dispute legal parentage, the transfer of legal parentage is considered, or unforeseen developments arise. The best interests of the child must be the paramount consideration in decision-making regarding children born through surrogacy arrangements. The BID should consider the child's full range of rights under the [CRC](#) and should ultimately determine legal parentage and parental responsibility, taking into account any pre-surrogacy safeguards.
- **Children born through surrogacy can enjoy their rights from birth.** States that permit surrogacy should prohibit ISAs involving foreign intending parents from States that prohibit such arrangements.
- **Children are not discriminated against or abandoned on grounds of disability** in those States where surrogacy is sought and practiced. These practices are based on stigma and prejudice and contribute to discriminatory attitudes towards children with disabilities.
- **Mechanisms are in place to prevent any child born through surrogacy being stateless.** Any child born through a surrogacy arrangement shall be granted a nationality from birth, as part of their right to identity.

### Contact

For more information, please contact: [childprotection@unicef.org](mailto:childprotection@unicef.org)  
[info@child-identity.org](mailto:info@child-identity.org)