

Expression of Concern

With regard to the Special Rapporteur on the sale and sexual exploitation of children's call for input on her intended report on "Safeguards for the protection of the rights of children born from surrogacy arrangements"

We, the undersigned organizations, academics and individual experts, write to express our collective concerns and endorse the following points about equating surrogacy where there is a monetary exchange to the sale of children in recent reports by the Special Rapporteur (SR).

We request the Special Rapporteur to consider the following points in preparing her upcoming report to the United Nations General Assembly (UNGA):

- The Special Rapporteur on the sale of children, child prostitution, and child pornography (SR) holds a mandate to address "the root causes of the sale of children, child prostitution, and child pornography and works to identify and promote the best practices for combatting these serious problems." We are concerned that the SR considers surrogacy arrangements to be within her remit and posits these arrangements as the "sale of children".
- While there may be non-trivial concerns related to coercion, exploitation, dignity and autonomy, labelling consensual surrogacy arrangements, whether commercial or altruistic, as inherently exploitative, denies the rights of all parties involved, and ignores the complex, lived experiences of those who seek and those who provide reproductive services. Deciding whether to form a family or not, as well as deciding on the number and spacing of children, are recognized sexual and reproductive rights, with strong connections to health, well-being and non-discrimination.¹ Newer

¹ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted Dec. 18, 1979, art. 1, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46, U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 16, 1966, art. 3, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights (CESCR), adopted Dec. 16, 1966, art. 3, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976); Convention on the Rights of Persons with Disabilities (CRPD), adopted Dec. 13, 2006, art. 6, G.A. Res. A/ RES/61/106, U.N. GAOR, 61st Sess., U.N. Doc. A/61/611, (entered into force May 3, 2008) [hereinafter CRPD]; Convention on the Rights of the Child (CRC), adopted Nov. 20, 1989, art. 29(1)(d), G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990 CEDAW, art. 16(e)

technologies to assist conception, specifically in vitro fertilization (IVF) along with surrogacy arrangements, have expanded possibilities for individuals and couples who for biomedical or social reasons are stymied in their pursuit of family formation.

- While the best interest of the child—once born-- should be taken into account and the risk of exploitation and trafficking of all parties involved in surrogacy arrangements should be carefully and firmly addressed, such considerations must be accompanied by and based on robust human rights principles and founded on sexual and reproductive rights that respect the rights of women to make decisions about their own bodies and reproductive labor, and should ensure the respect, recognition and prevention of discrimination against diverse families/intended parents. Establishing standards and regulations focused on the rights of children born of surrogacy without taking into consideration the sexual and reproductive rights of the persons who act as surrogates, intending parents, and gamete providers can open the door to rights violations through restrictions on reproductive and sexual autonomy.
- Surrogacy is an arrangement in which a person agrees to become pregnant with the intention to deliver the child(ren) to the intending parents. Compensated surrogacy is an arrangement where the person acting as surrogate is paid a fee in addition to reimbursement for “reasonable” medical expenses, where the person acting as a surrogate is being paid for the gestational services and reproductive labor she is providing. Compensated surrogacy does not imply payment done primarily for the transfer of the child.
- The emphasis on compensated surrogacy as being inherently exploitative and of altruistic surrogacy as being somehow less so, is misinformed and misguided. In particular, altruistic surrogacy within families is often legalized and is perceived as an altruistic service that persons who act as surrogates provide for their family members. However, this framing does not consider that “altruistic surrogacy” isn’t always voluntary, and doesn’t take into account the often-existing power hierarchies within families, creating controlling contexts that violate women’s right to bodily autonomy

CEDAW Committee, Decision 57/II Statement by the Committee on the Elimination of Discrimination against Women on sexual and reproductive health: beyond the 2014 review of the International Conference on Population and Development, U.N. Doc. A/69/38 (2014).

CEDAW Committee, Concluding Observations: Sierra Leone, para. 32 (b), U.N. Doc. CEDAW/C/SLE/CO/6 (2014). 42 ICCPR, supra note 2, art. 17. See also K.L. v. Peru, Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc.

CCPR/C/85/D/1153/2003 (2005) (applying the right to privacy to reproductive rights). 43 See, e.g., CEDAW Committee, Concluding Observations: Indonesia, paras. 41-2, U.N. Doc. CEDAW/C/IDN/CO/6-7 (2012); Cook Islands, para. 35, U.N. Doc. CEDAW/C/COK/CO/1 (2007); Burkina Faso, para. 38, U.N. Doc. CEDAW/C/BFA/CO/6 (2010); Human Rights Committee, Concluding Observations: Bolivia, para. 9(b), U.N. Doc. CCPR/C/BOL/CO/3 (2013); CRPD Committee, General Comment No. 1: Article 12: Equal recognition before the law, (11th Sess., 2014), para. 35, U.N. Doc. CRPD/C/GC/1 (2014) [hereinafter CRPD Committee, Gen. Comment No. 1]; CRPD Committee, Gen. Comment No. 3, supra note 5, para. 44; CRC Committee, Gen. Comment No. 15, supra note 4, para 31; Committee Against Torture (CAT Committee), Concluding Observations: Bolivia, para. 23, U.N. Doc. CAT/C/BOL/CO/2 (2013).

and reproductive self-determination, and it denies the agency of women being compensated for their reproductive labour.

- Thus, framing the practice of compensated surrogacy as sale of children fails to acknowledge the reproductive labor of persons acting as surrogates and implies that human rights adhere before birth, thereby undermining the current human rights framework.² Indeed, Human Rights Committee General Comment 36 on the right to life reiterates that the right to life attaches after birth³: considering the provision of gestational services as sale of children implies that the fetus is being considered as a child and has rights, therefore going against well-established human rights standards delineated in many human rights instruments and expanded upon by several mechanisms.
- Laws and regulations to legalize and regulate compensated surrogacy should be developed with significant and authentic engagement with and input from people involved, including women acting as surrogates, gamete providers, intended parent(s), and children born of surrogacy arrangements. It is understood that there are a range of human rights considerations surrounding family formation practices involving third parties --intended parent(s) and persons who offer gametes and surrogacy services. Prudent regulation of such arrangements can ensure that the human rights of all parties are respected, protected, and fulfilled. At the same time, such laws and policies must promote accountability and transparency at every level of the public as well as private actors involved.
- Children born from surrogacy arrangements—whether surrogacy agreements involve monetary compensation or not—must be accorded the same rights under international human rights law as all other children. Inquiries into the rights such children have to health, identity, nationality, information about their origins is well

²UDHR, at art. 1 (“All human beings are born free and equal in dignity and rights.”); Rep. WGDAW, para. 36, (noting that there is no “symmetrical balance between the rights of ... the woman and the fetus... in international human rights law” and that personhood at conception is not a belief that should be imposed on others through the legal system.); CEDAW, at art. 12(2) (“States Parties shall ensure to women appropriate services in connection with pregnancy...); ICCPR, at art. 6(1); CRC, at preamble (“the child, by reasons of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”), *but see* CRC Committee, *Concluding Observations: Chad*, at para. 30, U.N. Doc. CRC/C/15/Add.107 (1999), *Chile*, at para. 55, U/N/ Doc. CRC/C/CHL/CO/3 (2007), and *Uruguay* at para. 51, U.N. Doc. CRC/C/URY/CO/2 (2007) (urging states to reform punitive abortion legislation and ensure access to safe abortion services, irrespective of the legality of abortion); K.L. v. Peru, Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) (establishing that the denial of a therapeutic abortion, where continued pregnancy posed a significant risk to the life and mental health of the pregnant woman, violated the woman’s right to be free from cruel, inhuman, or degrading treatment); L.C. v. Peru, finding that the government violated a pregnant girl’s rights by prioritizing the fetus over her health by postponing an essential surgery until the girl was no longer pregnant); *Evans v. UK*, App. No. 6639/05, Eur. Ct. H.R., para. 54 (2007) (“an embryo does not have independent rights or interests and cannot claim . . . a right to life under Article 2 [of the Convention]”).

³ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc CCPR/C/GC/36, para. 2

within the Special Rapporteur's mandate, as is foundational ensuring their equal protection of the law, especially from exploitation. There is no human rights standard, however, that would consider compensated gestational surrogacy as "sale" of children, per se. Norms against child selling have developed as a response to harms perpetrated by sexual and labour exploitation of children and organ trafficking of children. Conflating surrogacy with sale of children by employing a literal interpretation of the term 'sale of children' amounts to ignoring the basis of the norm, that is, prevention of exploitation and exposure of children to neglect or harm. In addition, it needs to be recognised that a "child," defined under international human rights law "shall mean any person under eighteen years of age"⁴ and a "Person" according to international human rights does not encompass gametes, embryos, or fetus.⁵

- Another implication of framing compensated surrogacy as sale of children is the potential and ongoing criminalization of the practice, with dire consequences for the rights of persons who act as surrogates, including on their right not to be arbitrarily deprived of liberty. The framing of surrogacy as sale of children also has the imperative corollary of criminalizing the practice, which can lead the child born of a surrogacy arrangement to feel that their identity is being criminalized, thus going against the core principle of the best interest of the child.

To conclude, equating compensated gestational surrogacy as the sale of children is deeply problematic. It mischaracterizes and misapprehends the motivations of intended parents and the women who provide gestational surrogacy services. This perspective / position is not that of the Committee on the Rights of the Child (CRC) or other human rights experts or mechanisms.

We urge the Special Rapporteur to consider these concerns as expressed by multiple international, regional and national organizations, academics and individual experts from all over the globe. The undersigned have been engaging with regulation and collating evidence in different countries and regions of the world on issues of assisted reproductive technologies, surrogacy and human rights and look towards the preparation of the Special Rapporteur's upcoming report, with great concern.

⁴ See Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, art. 1

⁵ See, inter alia, UDHR, art. 6 (Everyone has the right to recognition everywhere as a person before the law) and ICCPR, art. 16 (Everyone shall have the right to recognition everywhere as a person before the law).

Submitted by

1. Sama Resource Group for Women and Health, India, www.samawomenshealth.in
2. Centre For Reproductive Rights, <https://reproductiverights.org>
3. Sexual and Reproductive Health Matters, www.srhm.org
4. GIRE, Mexico, <https://gire.org.mx> TARSHI (Talking About Reproductive and Sexual Health Issues), <https://tarshi.net>
5. CREA, India <https://creaworld.org>
6. Tarangini Foundation, Nepal, <https://tarangini.org.np>
7. National Alliance of Women Human Right Defenders (NAWRHD), Nepal, <https://www.nawhrd.org/>
8. GATE, <https://transactivists.org>
9. Asia Pacific Transgender Network, www.weareaptn.org
10. DAWN (Development Alternatives with Women for a New Era), www.dawnnet.org
11. ARROW; Regional non-profit women's organization based in Kuala Lumpur, Malaysia, <https://arrow.org>
12. Sexual Rights Initiative, <https://www.sexualrightsinitiative.com/>
13. Sexual and Reproductive Justice Coalition, South Africa, <https://srjc.org.za/>
14. AWID, <https://www.awid.org/>
15. Promundo, <https://promundoglobal.org/>
16. Global Health Justice Partnership (GHJP) of the Yale Law and Public Health Schools⁶, <https://law.yale.edu/ghjp>
17. Aditya Bharadwaj, Professor of Anthropology and Sociology, Graduate Institute of International and Development Studies, Geneva.
18. Joanna Erdman, MacBain Chair in Health Law and Policy, Schulich School of Law, Dalhousie University
19. Amrita Pande, Author of Wombs in Labor: Transnational Surrogacy in India (2014)
20. Meena Saraswati Seshu, Sangram, Sangli, India
21. Professor Sharmila Rudrappa, Professor, Department of Sociology, University of Texas at Austin; author of Discounted Life: The Price of Global Surrogacy in India
22. Dr Sayani Mitra, Postdoctoral Research Associate, Department of Health Services Research, The University of Liverpool
23. Sabina Faiz Rashid, PhD, Dean and Professor, BRAC James P Grant School of Public Health, BRAC University
24. Dr. Shereen El Feki, Professor of Global Practice, Munk School of Global Affairs and Public Policy, University of Toronto

⁶ This signature reflects the views of the Global Health Justice Partnership. They do not represent official statements or views of Yale Law School or Yale University.

25. Sonia Correa, Research Associate at Brazilian Interdisciplinary Association for AIDS, Co-chair of Sexuality Policy Watch, www.sxpolitics.org
26. Eleonora Lamm, PhD in Law and Bioethics. Human Rights director of the Supreme Court of Mendoza, Argentina
27. Mindy Jane Roseman, Director of International Programs and Director of the Gruber Program for Global Justice and Women's Rights
28. Carole S. Vance, PhD, MPH, Global Health Justice Partnership (GHJP) of the Yale Law and Public Health Schools, USA
29. Sofia Gruskin, Professor, Keck School of Medicine and Gould School of Law, Director, Institute on Inequalities in Global Health, University of Southern California
30. Asha George, School of Public Health, University of the western cape, South Africa
31. Dr. Sneha Banerjee, Centre de Sciences Humaines (CSH), New- Delhi
32. Jaime Todd-Gher, Human Rights Attorney/Advocate, JD, LL.M

Date: 17 June 2019