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**Force, Fraud, and Coercion**  
**Bridging from Knowledge of Intercountry Adoption to Global**  
**Surrogacy**

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The International Forum on Intercountry Adoption & Global Surrogacy (ICA Forum) took place at the International Institute of Social Studies (ISS) from 11 to 13 August 2014. The goal was to provide an opportunity for scholars and practitioners to come together to provide an evidence base for international adoption and surrogacy problems and/or best practices. The ICA Working Paper series summarizes the deliberations that took place at the Forum.

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## **Abstract**

This report discusses concerns raised by participants of Thematic Area 4 (Force, Fraud and Coercion) of the International Forum on Intercountry Adoption and Global Surrogacy held in August 2014. There has been a significant body of research on intercountry adoption practices over the past 30 years; force, fraud, and coercion have been identified in a small but important component of the literature. However, this knowledge in intercountry adoption has not yet truly bridged into research in global surrogacy with some recent exceptions. Learning from the past of ICA and connecting the evidence is particularly relevant due to the fact that the need for international law focused on global surrogacy and issues of parentage has been considered. The lessons learned from a history of corruption and human rights abuses are important to integrate when formulating future international law and regulations to protect vulnerable peoples in global surrogacy practices. Concepts of exploitation and human trafficking are explored with considerations of how to prevent, protect, and prosecute as emergent focal points of discourse. Effective prosecution of crimes, implications for a convention on global surrogacy, exploitation in global surrogacy arrangements, emotional safeguards for surrogate mothers, limited knowledge about the sense of origin, and experiences of children born through surrogacy are all areas in need of continued research.

## **Keywords**

Intercountry adoption, global surrogacy, force, fraud, coercion, exploitation.

## INTRODUCTION

This report is based on the sessions of Thematic Area 4 (Force, Fraud and Coercion) of the International Forum on Intercountry Adoption and Global Surrogacy held at the International Institute of Social Studies in The Hague, the Netherlands, 11–13 August 2014. The number of participants in the different sessions of this Thematic Area varied between 13 and 45; a number of sessions were also joint sessions with two other Thematic Areas. Although participants have provided feedback, the following text is not meant to be a joint declaration that could be accepted by absolutely every participant. Our intention has been to adequately characterize the discussions and concerns raised, while acknowledging that another person might have framed those concerns differently.

There is a strong body of intercountry adoption (ICA) research with some focus on force, fraud, and coercion, especially generated in the disciplines of law and to some degree social work with an orientation to social justice (Roby et al., 2013; Rotabi and Bunkers, 2011). However, this knowledge has only just begun to be applied to the practices and problems of global surrogacy. While The Hague Conference on International Private Law (2014) report applies knowledge from illicit ICAs to global surrogacy, overall there is a gap in the literature. Recently Rotabi and Bromfield (2014)<sup>1</sup> consider exploitation and the development of international private law with protections of the parties involved in global surrogacy. The main concepts are presented with examples of problems and potential social protections, blending knowledge from both areas of ICA and surrogacy research. Surrogate mothers living in poverty, specifically in India, as well as women acting as surrogates in the US are presented.

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Acknowledgements: A number of individuals have been invaluable in the development of Thematic Area 4, including Jini Roby, who has been a leader in the field of ICA and reform of practices necessary to ultimately preserve the intervention. Jini's thoughtfulness in regards to conceptions of *exploitation*, research on families of origin, and contributions in the area of legal intervention and human rights have been important contributions to that which we accomplished as a working group. While Jini was unable to participate due to her busy schedule, it is important to recognize those who help set the framework for our discourse.

Kristen Cheney's commitment to this area of inquiry was also a catalyst, for this particular report and visioning for the forum overall. Kristen's organizing support, including editorial feedback on this report, was very important for developing tangible materials for future progress in this area of inquiry and policy development. Readers of this report who provided insightful input and evaluated its accuracy were Taylor Brown, Rowena Fong, Susan Mapp, Ruth McRoy, Beatriz San Ramón, Mark Riley, and David Smolin. It also must be acknowledged that Lopamundra Goswami has been such an important research assistant that there are not adequate words to express thanks. Also, Carmen Mónico's support of our Guatemalan colleagues was very important for bringing experiences from that country to our discourse, especially highlighting the important work of our esteemed colleagues Norma Cruz, Noe Erazo, and Juan Jose Rodas Martinez. Finally, my thematic co-chairs Marcy Darnovsky, Riitta Högbacka, Sarah Richards, and Peter Selman are appreciated for their spirit of teamwork and commitment to collaborative work across time zones and disciplines.

<sup>1</sup> This paper and others were assigned to Thematic Area 4 as pre-Forum readings. Other assigned readings included Smolin (2006), Roby and Brown (in press), and Rotabi and Gibbons (2012), and Pande (2009a).

Notably, these are the two most common destination countries for surrogacy arrangements. With these considerations at hand, with a particular emphasis on women living in poverty, Thematic Area 4 opened with the following charge:

Force, fraud and coercion are three dynamics in human trafficking, as per the Palermo Protocol, which defines it as the sales of persons into nefarious global networks for the purpose of sex and servitude. When applied to ICA, these three dynamics play out in unique ways (e.g. pressured consent processes, false promises, actual kidnappings, etc.). We will consider an array of these dynamics, specifically the concept of *child laundering* and the various ways the concept of *exploitation* is applied to ICA. Because children are generally not exploited at the 'end point' in ICA, the conception of child trafficking is a challenging idea when talking about illicit child adoption across national boundaries. As we identify major themes and share what we know about these problems, we will eventually move to questions of global surrogacy, drawing parallels as well as divergences in the two phenomena. Included is the application of the idea of 'win-win' versus exploitation of surrogate mothers. Social protection of vulnerable people and new directions will be our focal point as we conclude the session.

## FORCE, FRAUD, AND COERCION: THE CURRENT STATE OF KNOWLEDGE ABOUT ILLICIT ADOPTIONS

Professor David Smolin led an early session, in which the definition of child laundering set the tone for discussion, with an emphasis on force, fraud and funds. The history of ‘child laundering’ as an idea was traced back to a 1990 Hague Permanent Bureau (HPB) report, written by Hans van Loon. This particular report discussed the ‘washing of children’. Smolin framed up the discourse based on his previous research, including the following definition:

...child laundering’ expresses the claim that the current intercountry adoption system frequently takes children illegally from birth parents, and then uses the official processes of the adoption and legal systems to ‘launder’ them as ‘legally’ adopted children. Thus, the adoption system treats children in a manner analogous to a criminal organization engaged in money laundering, which obtains funds illegally but then ‘launders’ them through a legitimate business (Smolin, 2006: 115).

This problem of child laundering largely began in Latin America most often with US-based adoption agencies engaged in unethical practices;<sup>2</sup> serious and persistent problems of adoption fraud jeopardized the long-term practice of ICA. Smolin pointed out that there are different modes of illicit activities involving force, fraud or funds that circumvent good decisions of ‘adoptability’ by making the child appear to be legitimately available for ICA. In this process of laundering a child, she is stripped of her identity and sold into ICA, and a number of her human rights are abused (Smolin 2006, 2007a, 2007b), including her right to protection from adoption fraud. Fundamentally, the child is presented as an orphan, socially and legally, when in fact she has biological family who have been exploited in the process of child laundering (Roby, 2007; Roby and Maskew, 2012; Roby and Ife, 2009; Smolin, 2006, 2007b).

Considering these ideas, *all* family involved in ICA are taken advantage of in the laundering process (Van Loon, 1990); the child, the family of origin, and adopting family are being exploited in such an ICA scenario. This idea was contrasted against the ‘win-win-win’ scenario, usually promoted in the ICA discourse. This idea of a triple win means that the biological family benefits, the prospective adoptive family benefits, and the child benefits.

This 1990 report was a watershed moment in defining illicit activities often carried out by intermediaries; the term *trafficking* was used in relation to ICA, pointing out that the concept is relevant even if there is no exploitation at the end point (Van Loon, 1990). This idea is particularly important given the confusion related to force, fraud, and coercion in ICA: with rare exceptions the future of children trafficked into ICA is *not* exploitative itself; rather the process by which laundered children enter nefarious networks is exploitative.

To illustrate the problems of corruption, various countries were briefly touched upon as examples, beginning in Latin America. As Latin America was

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<sup>2</sup> The vast majority of adoption agencies are based in the US, however agencies located in other countries have also been implicated in unethical and illicit practices.



largely shut down or went into moratorium in the 1980s/early 1990s, ICAs shifted to countries like Vietnam. Of particular emphasis in this early phase of thematic area discourse were Cambodia, South Korea, African countries, and India, with highlights discussed below.

### *Cambodia*

Cambodia was presented as one of the few countries where the US was proactive relatively early in establishing a moratorium on ICAs.<sup>3</sup> However, it should be noted that other countries in Western Europe and elsewhere continued to engage in ICA there, even with mounting evidence of corruption. Problematically, adoptions to countries other than the US persisted even with the exceptionally high profile case against a US adoption agency *Seattle Adoptions International* and their ‘facilitator’ under the *Operation Broken Hearts* federal investigation and prosecution (Smolin, 2006; Maskew, 2004-5; Rotabi, 2012b; Roby and Maskew, 2012). This particular example provides a strong illustration of how force, fraud, and coercion are often carried out to launder children, including (Cross, 2005):

- Payment to a mother when she signs child relinquishment documents.
- Lack of proper counselling and explanation of the relinquishment documents and thus an exploitative, uninformed consent process – often with very sophisticated or inappropriate legal documents, in a second language such as English, given the limited literacy of many poor women in low resource countries.
- False promises such as the family of origin being led to believe that the child was simply going away to another part of the country or a second country for a good education.
- False promises that the child will remain in contact with the family of origin and that they will visit regularly.
- Development of a false paper trail, including falsified birth certificates, to make the child appear to be an ‘orphan’ without biological family available to care for their needs.

It is important to note that the legal charges in this case were conspiracy to commit visa fraud, money laundering and structuring; there was no charge related to human trafficking, given inadequate US laws at the time of prosecution (Cross, 2005; Smolin, 2006, Maskew, 2004-5; Roby and Maskew, 2012).

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<sup>3</sup> In the past, the US frequently allowed for adoption problems to persist even with credible reports of deep problems, as was the case in Guatemala. However, in regards to Cambodia, the US government was proactive with a rigorous federal investigation and instituting a moratorium. It should be pointed out that the US again exercised preventive measures in more recent determinations related to Vietnam as well as other instances as per the HCIA. The US and especially the Department of State (Central Authority) appears to have become more oriented toward prevention with regulatory controls in place and a heightened awareness of the problems and modes of child laundering. Some agencies have come under investigation and other African countries such as the Democratic Republic of Congo have shown more effective preventive management.

### *South Korea*

South Korea was also briefly considered. It is known that, in some cases in the past, extended family members took children to orphanages under false names. Also of current concern is the use of birth mother<sup>4</sup> homes, as these particular environments have proven to be highly problematic. Concerns include the fact that mothers cannot engage in a fair consent process for relinquishment in a social environment where those who execute the consent documentation are also those who provide basic needs and shelter during pregnancy. This is particularly concerning in a society that has traditionally treated unwed pregnancy with stigma and shame (Bergquist et al., 2007; Fronek, 2006).

### *African Countries*

African countries such as Ethiopia and Uganda were also discussed as locations of illicit adoptions and child laundering (see also African Child Policy Forum, 2012; Mezmur, 2010). Traditional care structures of African family life were identified, such as guardianship arrangements, in the context of rapid changes due to ICA pressures (Bunkers et al., 2012). That is, African societies have centuries-old practices of negotiating for the care of children including short- and long-term guardianship decisions amongst the family and kinship group. Institutional care is only a very recent phenomenon, with some exceptions, in many of the continent's countries, especially Ethiopia and Uganda (Cheney and Rotabi, forthcoming; Bunkers et al., 2012). Though residential care institutions are often viewed by biological families as a short-term solution for feeding and educating children, some of these institutions have been organized to supply children for ICA (Mezmur, 2010). Ethiopia has received attention in the international press (Geoghegan, 2009; Bunkers et al., 2012) and Uganda was discussed as an emergent location of similar problems in recent years. Thematic Area 4 participants from Uganda shared a correlated rise in the number of residential care institutions and the rise of ICA (see also Cheney and Rotabi, forthcoming; Riley, 2012). Our Uganda participants identified a clear need for more legal regulation, including strengthened procedures at all stages of the ICA process to prevent child laundering (see also Agaba, 2012).

### *India*

India also has a notorious history of ICA fraud, including child abduction (Smolin, 2005). Bhargava (2005) identifies all manner of force, fraud, and coercion that have manifested in India, including children being snatched in crowded areas like train platforms. As a result, some of the best laws in the world have been drafted in India. According to Smolin, during the 1980s, the

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<sup>4</sup> The use of the term 'birth mother' was recognized to be problematic by many of the forum participants. Word usage is important to consider and whenever possible the term 'families of origin' or simply 'mother' is used. However, for clarity this report does use the term 'birth mother' and in parallel 'surrogate mother' and this editorial decision underscores some of the language problems in the discourse.

Indian Supreme Court asserted that if financial gain in ICA is not limited there would be a problem, and if unregulated the money will destroy the child adoption system. On paper, the laws and the resulting regulatory body look good, but on the ground the reality is different; significant and sustained problems persist (Smolin, 2005). Child abduction remains a problem, and in 2013 families of ‘disappeared’ children have publically protested in street demonstrations to demand legal intervention in child abduction (Raza, 2013).

### **Force, Fraud, Coercion and Exploitation Addressed in International Law, including the Hague Convention on Intercountry Adoption**

As a result of persistent problems and human rights abuses in ICA (Roby, 2007; Roby and Ife, 2009; Smolin, 2007a, 2007b), international law was developed to address child laundering. The 1993 Hague Convention on Protection of Children and Co-operation in Respect to Intercountry Adoption (henceforth simply referred to as the Hague Convention on Intercountry Adoption or HCIA) was established to provide legal protections for orphaned and vulnerable children and their families who interface with ICA (The Hague Conference on Private International Law, 1993, 2008). The concept of the best interests of the child is the guiding principle and the HCIA is intended to prevent the sale and abduction of children into ICA (Roby and Maskew, 2012; Cantwell, 2014). The details on *how* illicit adoptions and child trafficking are orchestrated and may be prevented, at the practice level, are found in the *Guide to Good Practice* (The Hague Conference on Private International Law, 2008). Implementation of the HCIA rests on the principle of subsidiarity, in which domestic care options are the priority; a continuum of care is the expectation beginning with supportive services preserving biological family life, including extended kin networks for childcare. Care arrangements including adoption within the child’s community and the greater country is a priority when such intervention is deemed necessary. When these care options have been exhausted and child welfare officials in the government’s Central Authority assess that ICA is in the best interests of the child, then the child would have an adoptability determination that releases her into the ICA-process with oversight by the Central Authority. This oversight places controls on the process, especially during the interface with adoption agencies in other countries, in order to ensure that ethical practices prevail and only reasonable and professional fees are charged for adoption procedures. It should be noted that long-term institutional care is not a preferred domestic option over ICA (The Hague Conference on Private International Law, 2008).

It should be noted, however, that the concepts of *force*, *fraud*, and *coercion* are actually drawn from another international private law agreement, the United Nations Convention against Transnational Organized Crime, specifically its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, commonly referred to as ‘the Palermo Protocol’. Article 3 defines human trafficking as ‘the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse

of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'. As an open-ended construct in this law, *exploitation* is applied to sex, labour, and organ trafficking, *without* mention of ICA. It should be noted that not all countries have signed and ratified this particular protocol. However, the major concepts in the Palermo Protocol are used widely in the discourse on the phenomena of human trafficking.

While the Convention on the Rights of the Child (CRC) protects children in adoption proceedings, including ICA (Art. 21) the concept of exploitation is not specifically defined in this law (Roby, 2007). The CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography ('Protocol on Sale of Children') provides additional guidance including the definition of the 'sale of children' being 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration' (Art 2.a), and mandates for signatory States to criminalize the improper inducement of consent for the adoption (Art. 3.1.a.ii) (Roby and Maskew, 2012). According to Smolin, there is no need to establish exploitation in this law. However, the requirement to criminalize child sales is clearly important.

## **The Exploitation Concept in the Intercountry Adoption Literature**

Because there is very little clarity in international private law as to what 'trafficking' actually is in regards to ICA, participants aimed for greater clarity at this juncture in thematic discussions, and *exploitation* was a core concept for consideration. According to Roby and Brown (in press) there are three major camps or ideological positions in terms of *what* actually constitutes child trafficking in ICA.

Brown briefly presented on these camps which are mainly constituted of academic scholars and advocacy groups as follows: The first camp argues that in order for ICA to be considered human trafficking, exploitation must occur *to the child* at the *end point* of their adoption. This camp aligns most directly with the language of the Palermo Protocol. Take for example the case of Russian adoptee Masha A., who was exploited for the purpose of child pornography (United States House of Representatives, 2006). This is a particularly egregious case of child exploitation, where ICA was used as a means to secure a child for sexual abuse. Masha was placed with a Matthew Mancusco as an adoptee. After sexually explicit images of her were found in mass quantities on the Internet, Masha was eventually recovered by law enforcement. Mancusco was successfully prosecuted on multiple charges related to child pornography and other crimes; child trafficking via ICA was not included in the charges.

The second position or camp argues that *any* exploitation that occurs at *any* time in the adoption process and to *any* members of the adoption triad (birth parents, adoptive parents, adoptee) is considered to be human trafficking. In this case, charging exorbitant fees for adoption—above and beyond ordinary professional compensation—is categorically child trafficking. Such a

practice was common in Guatemala where adoptions were often \$25,000USD and upwards in a country where many live on less than a dollar per day (Rotabi et al., 2008). Other form of 'child trafficking' in this second ideological camp would include obtaining a child through illegal or irregular means, regardless of any exploitation at the end point. These would be cases of child buying or selling, kidnapping, fraud, etc. in order to acquire children. Aggressive birth mother recruiter tactics and the payment of birth mothers for child relinquishment signatures would also fall within the scope of this 'camp'. While participants in Thematic Area 4 did not attempt to arrive at an agreement on the definition of trafficking or a precise application of exploitation, group discourse indicated that the construct of 'trafficking' was broad and thus discussion remained largely in the second camp.

The third camp argues that ICA is inherently exploitative and often there is a discourse of neocolonialism as a part of the framing of the problem. For this camp, the issue is also one of 'forced migration' (Roby and Brown, in press). This particular framing of the issues at hand were not found in the discourse initiated by the participants in Thematic Area 4. Also, overall participants expressed that the concept of *trafficking* in terms of ICA was vague and needed clarification.

The observation of discourse being predominantly in the second camp and the need for greater definition of trafficking is not to suggest that there was a lack of concrete examples of problems and consequences of illicit adoptions. In fact, multiple examples of illicit adoptions were discussed throughout the sessions, to include a recent case in which a Belgian citizen recently returned to Guatemala to search for her birth family. In the process, she learned that her case was fraudulent, with false paperwork and other markers of exploitation that occurred during the war years (1960-1996) (Dubinsky, 2010). Today the adoptee, now a young woman, has filed a case in Guatemalan courts to seek answers, clarity and accountability as well as criminal justice<sup>5</sup>. Recently there was an arrest in the case. The forum members showed great interest in this case, as it represents the first adult adoptee who has returned to Guatemala, after 28 years, to file legal charges for accountability.

One Thematic Area 4 participant also shared an important example of *Baby J* in the Netherlands. This particular child was sold over the Internet, as has been the case in other scandals (Roby and White, 2010), for 15,000 euros. The child was transferred across state lines from the Netherlands (her home country) to Belgium. Both the biological mother and the adoptive family 'buying' the child were prosecuted. In Belgium, it was determined that a violation of 'human dignity' was the crime and then that finding was repeated in the Netherlands courts. Discussion on this case was particularly attuned to that lack of precedent, language, or law for prosecuting such crimes.

At this juncture, participants suggested some parameters for 'thinking' about exploitation and trafficking based on implementation of the United States Trafficking Victims Protection Act (TVPA), whose response framework

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<sup>5</sup> This case is currently on-going, without legal resolution in Guatemala.

contains three areas of intervention: prevention, protection, and prosecution. Participants agreed that these three areas provide important parameters to better structure discussion.

## **Guatemala as a Case Study and the New System of Care Under the Hague Convention on Intercountry Adoption**

Carmen Mónico presented a study of Guatemala and various forms of force, fraud, and coercion that took place there in recent history (2013). Child abduction into ICA was a focal point of this particular case study. Integrating the voices of the Guatemalan mothers interviewed, Mónico defined abduction based on four conceptual areas, as follows:

- **Child Theft:**<sup>6</sup> Use of force to remove a child unlawfully, kidnapping, or stealing, and subsequent commodification or selling of children that occurs clearly against the will of the birthmother, birth parents, family, and community of origin.
- **Deception:** Lack of fully informed consent on the part of the birthmother throughout the relinquishment process, up to and including the time at which parental rights are legally terminated.
- **Coercion:** Intra- and extra-family coercion exerted on birthmothers and families of origin to induce relinquishment of the child for any reason.
- **Fraud:** Any legal, judicial, administrative, political, cultural, or socioeconomic fraud or deception of birthmothers, such as offering of payment or compensation, that leads to the forced separation or relinquishment of their children.

This definition of abduction, as well as the exploitation of Guatemalan women, cannot be fully embraced without recognizing the social environment that women and marginalized people of Guatemala face on a daily basis. Fundamentally, there is a lack of civil society characterized by inadequate and often non-existent law enforcement. Impunity is a constant reality, as both serious and petty crimes, including homicides and kidnappings, go largely unprosecuted (Myrna Mack Foundation, 2009). This fact was found to be true in a U.N. investigation of illicit adoptions in which wide-scale force, fraud, and coercion were found in the 1500 case files reviewed (Comisión Internacional Contra la Impunidad en Guatemala, 2010). Human rights defenders made similar findings, including a pattern of child abduction into adoption (Casa Alianza et al., 2007). Participants from Guatemala pointed out that ICA force, fraud, and coercion is a violation of women and their right to parent regardless of poverty, as well as violation of fathers, the larger family and kinship group, the community, and the entire society. In Guatemala, which has a notorious history of ‘disappeared’ people during the civil war (1960-96), the children who were abducted into adoption in recent years became symbols of continued ‘disappearances’ of children in the post-conflict context (Mónico, 2013). And, the women who have experienced child abduction during the adoption boom are survivors of violence against women; kidnapping is a particularly cruel

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<sup>6</sup> Women in Guatemala experiencing abduction most frequently refer to the act as theft using terms such as ‘robo de niño’. See Mónico (2013) for an expanded discussion of the phenomenon.

assault that brings about ‘eternal suffering’ for the women and families affected (Cruz et al., 2011).

In this small study, three women who had publically reported their children abducted into adoption were interviewed and their experiences were documented, including the many phases of their steps and process in seeking justice. Their experiences of abduction were different, but all three women reported that they were met with distrust and even contempt when they sought support from law enforcement authorities (Mónico, 2013). As has been the case in other child abductions in Guatemala, the police refused to open any meaningful investigation other than taking a report or denouncement of the events that occurred (Cruz et al., 2012; Mónico, 2013; Rotabi, 2012a, 2012b).

However, in time the nongovernmental organization *Survivor’s Foundation* joined with these women as an advocacy organization to demand justice (Estrada Zapeda, 2009). Among the strategies used by the women and organization was starvation protest – the last such demonstration taking place in July, 2009. International media attention and the resulting pressure was such that the mothers eventually had their main demand for a fair process in courts in which their cases could be heard impartially was finally met. This legal intervention eventually resulted in a court order for a child’s return from the US to Guatemala as a victim of child abduction into adoption. However, this case remains unresolved, as the US adoptive family refuses to comply with the foreign court order. Authorities that could intervene in the US include the Department of Justice and the Department of State. Of these, the latter issued a statement that the adoption occurred prior to HCIA ratification, and thus this particular case did not fall within their purview as a Central Authority with the obligation to enforce the Convention (Cruz et al., 2011).

Nonetheless, the three women interviewed reported a sense of empowerment as a result of their self-advocacy. Poverty and the history of disappearance combined as powerful social forces in shaping the problem. As women, they faced social exclusion and reported a triple victimization: when they went to authorities, they were themselves accused of child sales; the police assumed that they were birth mothers who had simply changed their minds about giving up their children for adoption. Police treated these women with great disrespect as assumptions included the idea these mothers sold their children into ICA and then in remorse made a complaint of kidnapping. The second form of victimization was a loss of resources; that is, selling their personal property to finance their search for their children. Additionally, the community shamed and stigmatized them in this third form of victimization (Mónico, 2013).

Mónico’s (2013) study, conducted with constructionist methodology, focused on the meaning of experience. Three particular findings were important: First, the women were victims and survivors of persistent oppression and multiple forms of victimization. Second, in the process of fighting for justice, they strengthened their own capacities and engaged in complex forms of survival, including self-advocacy and public advocacy. Third, even with profound experiences of loss and the deep desire to know what had happened to their children — and to have contact with them in them in the US — the women reported a sense of empowerment as a result of their legal gains and shifts in the awareness of the rights of mothers and families affected by illicit adoptions.

Turning from this case study, Mr. Noe Erazo, an official of the Guatemalan Central Authority, presented the progress and gains made in reforming ICA under the HCIA. Erazo began with a presentation of the previous system and the various problems in the process, including a notary system which essentially took place outside the authority of the family courts or any system oriented toward social protection. More than 25,000 children were internationally adopted under this system. Erazo said, ‘We do not know what happened to those children. We know that some of them have gone on to amazing lives. But other times we hear about sexual assault of two girls who were en route to the USA for adoption... rumour is a problem versus fact.’ He went on to say that, ‘We don’t know the number of dissolutions and other issues like re-homing.’ All of these problems occurred in a system that operated outside of the protections of the HCIA. During this time, 4-10,000 notary publics were operating unregulated in an Internet-based system in which the notaries themselves completed almost *all* steps in the adoption process. The only interaction with the courts was the execution of a socioeconomic study (social history) that was presented to the judges. This process created a huge amount of corruption in the family courts as ‘expediting’ occurred and poorly written and scant social histories were submitted along with bogus claims of child abandonment (Bunkers and Groza, 2012). The next step was an opinion only — not an approval — at the Attorney General’s office. Child laundering activities took place at many different points of this process and according to Erazo, Guatemala violated the HCIA from 2003-2010, with significant abuses related to force, fraud, and coercion.

Erazo spoke of improvements and gains made recently, including concerns about children with special needs. While the system is largely oriented toward domestic adoption, as per the subsidiarity principle, there is a new initiative to have children with special needs made available for ICA. The case of ‘Sophia’ was presented as an example. She is a young child who received a humanitarian visa from the US so that she could be treated for a serious and life-threatening health condition in the US. She is now in the process of being adopted by an American family. The two Central Authorities have agreed that the adoption process will take place in Guatemalan courts without the presence of the child. That is, the child can remain in the US and receive treatment and care uninterrupted by a court process. This is an example of Guatemala and the US acting in collaborative partnership for the best interests of the child as is the intent of the HCIA.

The major areas of system changes were presented, contrasting the ‘old system’ with the new and improved system under the HCIA, as described in Table 1.

The reforms identified above do not just safeguard the process for ethical adoptions. Also, as a result, new family support interventions and alternative care systems such as trained foster parents have emerged in recent years (Cheney and Rotabi, forthcoming). In this case, illicit adoptions and then HCIA implementation have become catalysts for improved domestic social service practices, including education and training of social workers, psychologists, and actors in the family court system (Roby et al., 2014).



**Table 1**  
**The 'Old' Guatemala System of ICA versus the Reformed System**

Old System	New and Reformed System
Voluntary relinquishment by notary (Intervention of private professionals)	Initiation of declaration of adoptability by the government Central Authority (Intervention of government professionals)
Selection of the child on behalf of prospective parent(s)	Government social workers/psychologists select a suitable child in systematic child-family matching process informed by social assessment
The will of the prospective family prevails	The best interests of the child prevails
High costs to adopt	No cost to adopt
Guatemalan families were excluded, as they simply could not afford to participate	Guatemalan families are now the priority as per subsidiarity principle — completely free to the family
Socioeconomic studies of prospective parents	Psychological, legal, and socioeconomic assessment of prospective parents
No post-adoption monitoring required	Post-adoption monitoring is required
No database of children adopted	Central Authority now has a unit dedicated to collecting and managing this data
No possibility of locating the family of origin of the child using formal information	Adopted children will have the possibility of knowing the family of origin through appropriate record-keeping

Note: This table is an adaptation of a slide from Erazo's presentation during the Forum. For a detailed account of the pre-reform system in Guatemala, see Rotabi et al., 2008.

### *Application of Prevention, Protection, and Prosecution to Guatemala*

The Guatemalans attending the Forum were highly involved in this particular thematic area, and they touched upon the history of criminal convictions in Guatemala as Norma Cruz detailed some of the prosecution gains such as incarceration of at least one residential care institution director and a number of lawyers found to be guilty of illicit adoptions using various techniques of child laundering. However, Cruz noted that the US government did not cooperate in the prosecutions even though the vast majority of Guatemalan adoptees were sent to families in the US.<sup>7</sup> This is an obvious gap in the agreement to collaborate under the Convention.

When applying the principles prosecute, protect, and prevent to the situation in Guatemala, participants identified the following ideas as important: In

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<sup>7</sup> For example, the aforementioned case in which a child's return as a victim of abduction into adoption is of particular concern to Cruz and she has personally advocated for an appropriate and socially just resolution to this case. Cruz's commitment is such that she personally participated in hunger protests as well as using the legal resources of *Survivor's Foundation* to pursue justice. The organization's legal team has worked tirelessly on this and other cases of child abduction and violence against women, bringing attention to the grave and on-going injustices suffered by the families of Guatemala. The fact that the case was determined to fall outside of the HCIA, due to its timeline, appears to be wilful blindness to many of those involved in advocating for justice in the case of child abduction into adoption.

terms of prosecution, we concluded that while there have been some legal intervention and convictions, overall there has been a failure to prosecute actors in illicit adoptions.

In terms of protection, the HCIA catalysed Guatemala to move from a private system to a centralized system, with a parallel domestic law passed at the end of 2007 (Bunkers and Groza, 2012). Our Guatemalan partners saw the HCIA as absolutely essential for this major improvement.

The United States, as a nation that ‘pulls’ children into adoption, received considerable attention in discussion. However, our Guatemalan colleagues also underscored that the US had a stake in the need for change and that a partnership had been forged as a result. The gains made under the HCIA and the improvement of collaborative relationships was an important point that was underscored in discourse.

It was further noted that protection is directly linked to prevention. When we consider how we prevent illicit adoptions, the answer lies in an array of social protections. To prevent force, fraud, and coercion, it is necessary to build a multifaceted approach that involves far more than awareness of the problems and generalized notions of human rights (Roby, 2007). This aspect of the discussion included how we talk about illicit adoptions, and it was suggested that terms such as ‘child abduction into adoption’ be used when appropriate —such as the case of the three women in Mónico’s (2013) study. And, these particular mothers should never be referred to as ‘birth mothers’ because they did not consent to the adoption of their daughters. This point further underscores the issues related to word usage and adoption discourse.

In regards to prevention, the new system as presented by Erazo is a model for developing a system of care with the goal of eventually reopening an adoption system after the moratorium. While this thematic area did not focus on this particular topic as a major point of discussion, clearly new and improved child welfare systems are critical to ultimately addressing the needs of orphaned and vulnerable children and their families. Only with comprehensive systems of care will abuses of illicit child adoption practices be prevented.

## **Evidence: What We Know about Families of Origin**

Moving from a focus on Guatemala, we turned toward research on birth families in a joint session with Thematic Area 2.<sup>8</sup> There have been only a handful of well-designed international family of origin studies, focused mainly on mothers and their relinquishment experience. We began by considering what is known about US birth mothers as a result of longitudinal research.

Ruth McRoy presented a brief overview of the historical and contemporary perspectives on birthmothers in the US considering adoption after learning of their pregnancy. She noted that the experience of unplanned pregnancy typically involved teens who experienced emotional turmoil: regret, guilt, fear of others finding out, loss of relationship, and fear of rejection. Many families sought maternity homes so that their daughters could ‘go away’ and then come back to their communities and pretend that nothing had

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<sup>8</sup> Thematic Area 2 is ‘*Intercountry Adoption, Countries of Origin, and Biological Families*’.

happened because there was no evidence of a baby (Fessler, 2007). Adoption under these circumstances was very difficult for many of the girls who simply returned to school and carried on, despite grieving the loss and suffering silently – often without support and in an environment in which shame and stigma were frequently the painful reality in their daily family and community lives.

Today, such homes and social silence are far less frequent as society is much more open about adoption. Further, because there are fewer unplanned pregnancies today due to availability of contraception and growing acceptance of single motherhood, dynamics have changed (Cheney, 2014). Today only 25 per cent of adoptions are a result of teen pregnancy. Now, birth mothers are more likely to be in their early 20s. These young women report their decision for adoption to be related to their worries about emotional readiness to parent and a lack of adequate resources, including jobs with a living wage. The (lack of) reliability of their partners to take on the role of father is another factor for these young women.

Our knowledge about birth fathers is still very limited in terms of empirical evidence. However, they too quite often have feelings of shame and guilt (Coles, 2011). They ask questions similar to the young women, such as ‘Can I parent a child?’, ‘Do I have the resources?’ Lack of a job with a living wage is also a major problem. They typically experience disenfranchised grief over the loss of a child, their parenting role, and a romantic relationship (Neil, 2006). In many cases, birthfathers can experience guilt and emotional turmoil, and are frequently excluded from the process of decision-making. Often later in life, when they become parents, they reflect on this experience of loss.

Currently about 17 per cent of US adoptions are of children who were placed for adoption by their birthparents, using private agencies or intermediaries, such as attorneys. Although previously the majority of birthmothers were teens, now only about one-fourth are teens and most are young women in their 20s who have finished high school – many of whom have other children (Smith, 2006).

McRoy also spoke of the longitudinal research on openness in adoption that she and Harold Grotevant have conducted since the late 1980s. They have followed a nationwide sample of 190 adoptive couples, 171 adopted children and 169 birthmothers who have participated in various types of openness arrangements in adoption including confidential adoptions, mediated contact adoption, and fully disclosed adoptions in which there is direct on-going contact between birth and adoptive families. Their findings suggested that no one type of adoption fits every person’s wants and needs. However, they reported that being able to choose the adoptive family and having on-going contact and/or knowledge results in lower levels of grief and greater peace of mind with the birthmother’s adoption decision (Christian et al., 1997).

In terms of international families of origin, there are three other important studies to consider in the following countries: the Marshall Islands, India, and South Africa.

### *The Marshall Islands*

The Marshall Islands feature most prominently in the international families of origin research, where the single largest study to date was carried out. Roby and Matsumura interviewed 73 birth mothers in 2001 (Roby and Matsumura, 2002). In this impoverished Pacific Island nation, small clusters of families and kinship groups lived in island communities. Traditional family life, strong extended family networks, and a family-centric culture is a dominant experience for the Marshallese as a social group.

Most of the women interviewed had other children, and they reported that their decision to relinquish their children – many of whom went to US families – was largely financial (Roby and Matsumura, 2002). Mothers reported that they were living in poverty and that the social care structure of this low-resource country is inadequate to provide for the welfare of children and families. As the formal social service structure is limited, there is essentially no help with in-kind assistance for food or cash payments for child welfare. Services that are available are inadequate to meet the needs of families who are unable to provide for their children.

Because childcare often falls upon the entire family, the role of grandmothers featured prominently in the interviews with birth mothers. A significant number of women reported that their own mothers influenced their relinquishment decision, sometimes under pressure, in order to relieve the care giving burden in large families. These women also reported that they believed that their relationship with the adopted child did not end with the adoption decree; they expected an on-going connection with their child. Some women reported a sense of ‘giving’ to someone else, believing that they would be making another family very happy, and gifting a child was one way to bridge to another family. Altruism, which is touched upon in this study, is an overlooked area in the research and a sense of ‘giving’ a child to another is an important finding especially when one considers the bridging of ICA evidence to surrogate mothers.

### *India*

The Tamil Region of India was the location of Pien Bos’ (2007) ethnographic study. The two-year investigation included interviews with birth mothers and others involved in the adoption transaction. Her in-depth research found that the shame and discrimination related to children being born out of wedlock, combined with extreme poverty, were important factors that ultimately led to ICAs (Bos, 2007). There were a variety of forms of deceit reported by these mothers, including coercion by those calling themselves social workers as well as the obligation for legal relinquishment of the child once they had received food and shelter from a ‘home’ for unwed mothers (Bos, 2007). As has been the case elsewhere, many birthmothers in this region of India did not view the mother-child relationship as one that was terminated and their hope was for a continued familial relationship with their child.

## *South Africa*

South Africa was the site of Riitta Högbacka's study in which 32 Black women were interviewed. Högbacka (2012) found that children were highly valued by the birth mothers interviewed. This was consistent with the South African context: extended family life and traditional child care arrangements 'all influence the meanings of child relinquishment. As a large number of children do not live with their birth mothers all the time or are raised by kin or non-kin at some point, adoption tends to be viewed not as a permanent erasing of ties' (2012: 144). Most birth mothers in this study saw ICA as a way to provide their children with better opportunities, including education. Similar to the Marshall Islands and the Tamil Region of India, Högbacka (2012: 144) found that for birth mothers, 'motherhood does not end with the relinquishment of the child' (2014: 144). As a result, many of the respondents did not see their adoption as a complete legal break; instead, they longed for information and an on-going relationship with the child.

Högbacka's 2012 study, like the other two studies, looked at poverty as an undeniable contextual factor in the relinquishment decision, noting that 'Everyday life was a matter of survival' (2012: 147). The basic necessities were the focus of day-to-day living in an environment where unemployment is common and malnutrition is rampant. An evolutionary perspective was applied in this study, adding an important theoretical dimension to long-term survival of a child and the difficult decisions that mothers may make when living in extreme poverty. Under these circumstances, most women reported that they did not see an option other than adoption, as there were no temporary care measures available.

## **Force, Fraud and Coercion of Surrogate Mothers in India**

The vulnerability of surrogate mothers, particularly those from economically disadvantaged backgrounds, as well as of intending parents, often desperate in their search for a way to have a child, suggests that there is also an imperative to prevent the exploitation of all parties to such arrangements. (Hague Conference on International Private Law, 2012: 26-7)

The surrogate mother experience as well as the vulnerabilities of all involved in the global surrogacy equation has received considerable attention, and the term *exploitation* features prominently in a variety of literature, ranging from academic and grey literature to popular press (Bromfield and Rotabi, 2014). In regards to surrogate mothers themselves, vulnerability, exploitation and women's agency to choose work in the surrogacy equation of India has been investigated. Clear evidence about surrogate mothers' perceptions of the global surrogacy experience has been documented in different localities in India (see Pande, 2014; Deomampo, 2013).

In a joint session with Thematic Areas 2 and 5,<sup>9</sup> Goswami and Rotabi presented findings from a very recent study in Gujarat, India, where the well-known Akanksha Fertility Clinic operates (Goswami et al., 2014). Thousands of gestational surrogacy arrangements have been carried out in this facility. In this qualitative research study, based on interviews with 25 women (ages 26-45 years old) who have acted as commercial surrogates, respondents were asked about their experiences, motivations and decisions to become surrogates, and their personal history and views on exploitation. All of the women were living in extreme poverty with poor educational backgrounds; limited literacy was a common problem. Overall, the respondents reported that the decision to become surrogate mothers was based on their need for an income or employment and dire economic circumstances. Most often the respondents referred to their ability to care for their family. For example, one surrogate mother said:

*I had some troubles. My economic condition wasn't good, and my husband didn't have a job. I couldn't even take my kids to the hospital. Then I thought, although I do have a job in the hospital I earn only Rs. 2100 [34.16 USD]. So I was thinking, with this much money, will I educate my kids or get a house for us to live or do something else? So after a lot of thinking and discussion, my husband and I took the decision that I will become a surrogate.*

Another surrogate mother shared, 'I didn't have a house. There was a lot of trouble with food at home.' A third surrogate mother shared her motivation as well as the process of decision-making to participate:

*When we went to the hospital, we were given all the information. They told us that naturally those women who cannot bear children, we can give them children and in our homes we'll have money so that our kids can eat, play, laugh, study and go ahead in life. So both parties benefit from this. So looking at this, I agreed to be a surrogate. A lady from our village had done this, so she told me about it. She talked about how money can better our lives; it's good for our children. Then I came here and met with a few ladies. They told me that in this the other people also benefit and it's also good for our kids. So I came for it...*

At the time of transferring or 'handing over' the infant, the women had mixed responses. One said, 'I was feeling good to give a childless couple a child. I was thinking how happy they must be,' indicating feelings of altruism in the process. However, another woman shared a very different perspective:

*I didn't feel good because I kept them in my belly for 9 months. When they took them away, I cried a lot. I felt like I was giving away my own children, and I regretted it a lot. I went back home and couldn't eat anything. I was crying a lot. Then my husband explained that those were their babies and of course they will take them away. Madam [the clinic owner] also told me that they were not my kids. So like that slowly I forgot about it.*

Another woman spoke of her grief that was particularly complicated because the infants (multiple birth) were not immediately transferred to the commissioning parents. She said:

*I didn't want to give them away, but it's their babies so I had to give them away. I cried a lot. I went to drop them off at the airport as well. I kept them for three months. Now also*

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<sup>9</sup> Thematic Area 2 is 'Intercountry Adoption, Countries of Origin, and Biological Families' and Thematic Area 5 is 'Global Surrogacy Practices'.

*they send me pictures of them. They are very nice. I never felt like they weren't my kids. But then you sign an agreement, and they belong to them so we have to give them away. They give us the money and we give them the baby. We should give them away with a smile and not be upset. You feel upset, of course, but you have to give them away, you sign in the agreement. You have nothing but just lending your womb. Like how you take a house for rent, similarly our womb was taken for rent. They make us sign like this in the agreement. It's theirs so we have to give away. We'll forget slowly. If we can't, then they will send me more pictures and I get happy looking at those pictures.*

This particular surrogate mother referred to staying in contact with use of photographs, and the majority of women reported a wish to have communication and updates from the commissioning parents and child.

Finally, all women were asked quite simply if they felt used or unfairly taken advantage of as a final question in the interview. All women stated that they did not feel taken advantage of. For example, one surrogate mother pointed to the realities of extreme poverty and need for work:

*No. Why will they take advantage? They haven't asked me to become a surrogate. It was my situation that pushed me into becoming a surrogate. I went there myself. I thought if someone else benefits only then will I benefit. They have no advantage here. It's a good work, as someone got a child and our poverty also got erased.*

Another surrogate mother stated,

*No, nothing like that. We come here at our own will. No one pulls us here. We also have some problems, so we come on our own. No one is taking any advantage. We go on our own to the hospital, tell Madam that we want to be surrogate and if she feels that we can be taken in, only then she will agree. We have to be married, should have had our own kids, have to show her pictures etc. and only then she will take us in. If there is any problem, she then refuses.*

Very directly, another surrogate mother stated, 'No. The benefit was mine. They didn't come to my house to ask me to come for it. I was the one in need and so I came. So benefit was mine.'

This final question of the sense of being taken advantage of was an area of great discourse during this particular Forum session. Some inquired if it was even appropriate to ask such a question of being taken advantage of or used. Those Forum participants expressing this concern took the view that the surrogate mother is a participant in her own exploitation and thus such a question is inappropriate and further manipulates her positioning. While this is an important idea to consider, these research findings echo those of others engaged in research in this geographic area of India, specifically Pande's research in this same field site (Pande, 2009a, 2009b, 2010, 2014).

As an alternative way of thinking about the agency of surrogate mothers in India, other participants suggested that in hearing the voices of women it is necessary to recognize that their positioning is that of women engaged in social exchanges where the survival of their families hinged on an environment in which essentially all work is exploitative labor with meager wages. Very frequently the work is dangerous, including sex work (Bromfield and Rotabi, 2014). When making choices about the costs and benefits of participating in surrogacy, surrogate mothers have an important perspective. They can clearly inform on the social exchanges made within their daily realities living in ex-

treme poverty. Finally, their voices and opinions about exploitation should not be dismissed when considering the development of social protections as future laws and policy are debated.



## **MAIN CONCERNS AND TOPICS RAISED AT THE FORUM AND RELATED RECOMMENDATIONS**

### **Effective Prosecution of Crimes is a Problem even in an Environment of Improved Regulation of Intercountry Adoption. What are the Implications for any Potential Convention on Global Surrogacy?**

The number of egregious cases of force, fraud, and coercion starkly contrasts with the limited number of cases successfully prosecuted in various countries, even with major improvements in legal code and regulatory policy as a result of the HCIA. This is particularly true in the US, which has failed to prosecute anyone specifically for illicit laundering activities in the adoption chain.<sup>10</sup> As such, regulation of global surrogacy must have both the legal framework and political will to prosecute individuals involved in force, fraud, and coercion. Prosecution of medical professionals is a likely possibility, and thus the idea of political will is essential. If legal code is expected to be more than symbolic, then some of the most elite members of society (lawyers and fertility/obstetric care doctors and nurses) will face prosecution. Any future legal code must not only focus on prosecution but on the entire continuum of prevention, protection, and prosecution, which must be fully integrated. Finally, any future legal approaches to regulating surrogacy need to be sensitive to the dynamics of *impunity* where the surrogacy contract is carried out. In countries where there is limited law enforcement, deep gender inequalities, violence against women and extreme poverty, one may argue that regulation at domestic and international levels is difficult if not impossible (Rotabi and Bromfield, 2012; Bromfield and Rotabi, 2014).

### **Force, Fraud, and Coercion have been Well Documented in Intercountry Adoption. Evidence of How Illicit Surrogacy Practices Occur is Essential for Developing Legal Code and Regulations**

While the modes of force, fraud, and coercion has been clearly identified in ICA, *how* one is exploited in global surrogacy has just recently been identified in exploratory and descriptive research. However, there is opportunity for greater work in this area for generalizability of evidence. This is asserted because development of social protection requires knowledge of how vulnerable people are abused, grounding this knowledge with research. At this juncture the evidence of force, fraud and coercion in global surrogacy practices is not entirely clear with some exceptions (see Hague Conference on International

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<sup>10</sup> There is a case underway in the US about illicit adoption practices in Ethiopia. Prosecution in this case may be a step towards improved justice in the US, but the case remains unresolved at the time of this writing. See <http://www.justice.gov/opa/pr/four-employees-adoption-services-provider-charged-conspiracy-defraud-united-states-connection>

Private Law, 2012, 2014 for progress in this area). And while we are concerned about practices of surrogacy, we recognize that any movement forward in regulating global surrogacy requires more investigation into the forms of force, fraud and coercion as well as best practices in areas like the consent process, recruitment of women, and other issues related to employment and exploitive labour.

### **The Idea that Motherhood Simply Ends without Yearning for Information about the Child's Wellbeing is Unrealistic**

The empirical evidence in adoption literature clearly shows that while there may be a legal break in relationship, birth mothers consistently report a desire to know about their children's lives in the immediate as well as long term. Openness is a healthy expectation and an increasingly common experience in adoption practice; blocking information from mothers has proven to inhibit healing from the experience of relinquishment. The 'need to know' about the well-being of a child to whom you gave birth, either as a biological or surrogate mother, is instinctive and should not only be recognized but honoured as an emotional experience. The empirical evidence related to surrogate mothers echoes this need to know, even when the child does not have a genetic relationship with the surrogate mother, as is the case with global surrogacy arrangements in India.<sup>11</sup> Any movement towards regulation should include this basic human need as an emotional safeguard for surrogate mothers and also the children born of such arrangements.

### **It is Important to Learn from Adoption Birth Mothers while being Cautious about Generalization to Surrogate Mothers**

For Thematic Area 4, the exploration of the current knowledge about birth mothers was important in thinking about surrogate mothers. While many international birth mothers and surrogate mothers in India and other low-resource countries share poverty as a clear factor in experience, it is also critical to recognize the differences. Most notably, women who relinquish a child in adoption sign the relevant legal documents *after* the birth of the infant/child. On the other hand, surrogate mothers contract an arrangement for gestation and birth long before the transfer of an infant to commissioning parent(s). As a result, surrogate women/mothers are asked to consent prior to the experience of pregnancy and childbirth; they must make a critical decision prior to the full emotional knowledge of the experience. Smolin asserts that this fact alone means that a child is being bought and sold in every commercial surrogacy transaction. The only way to prevent this fact, according to Smolin, is to

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<sup>11</sup> By law, only gestational surrogacy contracts are permissible in India and thus there is no genetic relationship between surrogate mother and the child. It should be noted that most global surrogacy arrangements around the world, including the US, are gestational rather than traditional surrogacy. In this latter form of surrogacy, the surrogate mother uses her own egg and this particular element of the surrogacy arrangement requires attention to social protections related to genetic/biological family relationships.

allow the woman to change her mind after birth. The manner in which global surrogacy arrangements are currently managed essentially makes this change of decision impossible. This assertion, made by Smolin, was not a point of agreement in Thematic Area 4; rather it was a statement that went without debate. However, this idea is an important observation for further consideration of developing regulatory controls. In contrast, for some participants, the key point here was to decide whether pregnancy and infant delivery could be considered as reproductive labour, as in the case of wet nurses. If so, some in this thematic area asserted that the debate should move to labour conditions including proper and complete information for consent as well as health insurance and other protections in order to make a surrogacy arrangement a form of employment in which the risks are controlled.

Concerns about informed consent and how to administer a process in a fair and impartial manner are at the heart of the debate about ICA and global surrogacy (Hague Conference on International Private Law, 2014, 2012). Applying Western standards to the idea of bloodlines and motherhood is problematic when aiming to develop international standards (Pande, 2009b). As such, any movement forward in regulating global surrogacy requires input from women who have acted as surrogate mothers in the past, especially those who live in poverty as they are the most vulnerable. The insight of surrogate mothers is critical to a fair, informed, and socially just approach to domestic and international regulation (Bromfield and Rotabi, 2014).

### **We Need to Know More: Research into the Experience of Children Born through Global Surrogacy Arrangements is Essential**

Perceptions of the individuals born through global surrogacy arrangements must be pursued as an important area for research investigation. While there is a small body of evidence about surrogacy and child adjustment, the global dimensions of reproductive tourism and family formation is an added consideration at this juncture. While many children born of such arrangements are far too young to participate as respondents in research investigation, eventually they must be queried to better understand the costs and benefits of global surrogacy. Such an approach, incorporating evidence, will be imperative in better defining and ultimately implementing practices in the best interests of the child. It should be noted that this recommendation is consistent with that found in the Hague Conference on International Private Law (2014) report on surrogacy.

### **Findings on Perceptions of Exploitation, as Reported by Surrogate Mothers in India, Surprised some Forum Participants**

On the whole, Forum participants took the position that global surrogacy arrangements with poor women must be exploitative by their very nature. While this concern is directly linked to the values of our participants in Thematic Area 4 and other tracks (e.g. Thematic Area 5), defining exploitation and

other experiences of force, fraud and coercion without the voices of surrogate mothers is problematic. The findings of Goswami and Rotabi's research, as well as others engaged in investigating surrogacy in India and elsewhere, require a closer look at the phenomenon and ideas of taking unfair advantage of a woman's circumstances. Fundamentally, the respondents in the study presented viewed themselves as being engaged in work of their own choice. This observation of work or employment has been found in other research in India (Pande, 2009, 2010, 2014; Deomampo, 2013). Pande (2014) asserts that the inherent problems of global surrogacy arrangements must be viewed as labour-related, and protections must therefore be aimed at exploitative labour problems. Framing the issues from this perspective is an area for greater consideration. However, discussion in Thematic Area 4 only briefly touched on this area due to time limitations.

It should be noted that it was clear, during Forum plenary and summary sessions, that there is a fundamental disagreement as to whether surrogacy should be viewed and treated as legitimate 'work'. Most Forum participants appeared uncomfortable with this framing of women and work. However, such a framing is not unlike the discourses surrounding prostitution versus sex work, in which there are heated debates without resolution; ultimately leaving those most affected in vulnerable circumstances because solutions to abuses cannot be agreed upon. As such, any movement forward in regulating global surrogacy requires a clear definition of work with considerations of exploitative labour. This final recommendation is made recognizing that this is the greatest point of disagreement amongst participants because some in Thematic Area 4 simply view global surrogacy as immoral and unjust, regardless of regulatory control.

## CONCLUSION

As would be expected, participants resisted a simplistic view of ICA and global surrogacy, as may be a desire of those who benefit in family building or financially from the practices. The parties who stand to gain from ICA and surrogacy characterize them as *win-win* situations, but the complexity of our discourse discarded this conception quite quickly; though such a phrase may be true in some cases, it certainly is not true for all, and there is far too little known about the perspectives of certain parties, like families of origin in ICA and the children/ individuals born through commercial surrogacy.

Our colleagues from Guatemala reminded us that global surrogacy is a relatively new and complicated phenomenon that lacks a clear understanding (IVF technology, the idea of ‘arrangements’, etc.) in low resource countries. In making this point, Norma Cruz pointed out a recent case in Guatemala where a surrogate mother<sup>12</sup> decided that she wanted to parent the child born of the surrogacy arrangement. This case resulted in a court order in which the child’s custody was split between the Guatemalan surrogate mother and the commissioning parent(s), the latter of whom live outside of Guatemala. In this case, the *best interests of the child* were difficult to determine; the court order resulted in the requirement of equal time distribution between the parents. That is, each party was expected to parent the child in person every other week. Such an order was viewed by Cruz to be impractical, at the very least and not consistent with *best interests* related to the continuity of care of the child.

Obviously a *win-win* scenario is in contrast to a more realistic view that family formation and identity is far more complicated for those affected by ICA and global surrogacy,<sup>13</sup> especially those individuals and families victimized by illicit practices. This is particularly true for poor women, either birth mothers or surrogate mothers. However, to focus only on mothers when considering social protection is short-sighted because the health, safety, and well-being of children requires special consideration and far more discussion than that which was possible in this Thematic Area. Additionally, there is little scholarly attention paid to intended parent(s) and/or other family members when considering global surrogacy (Bromfield and Rotabi, 2014).

More research is therefore needed on critical areas of social protection, especially including the voices of the most vulnerable. Protections in global surrogacy requires clear consideration of the vulnerabilities of all involved: surrogate mothers, children conceived as a result of a surrogacy arrangement, and the commissioning parent(s)<sup>14</sup> (Rotabi et al., in press; Hague Conference on International Private Law, 2012, 2014). The future of international law and

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<sup>12</sup> It was never identified whether this was a case of gestational or traditional surrogacy. However, this case is mentioned here to underscore the legal complexities and problems implementing a child rights/*best interests* approach to a just legal and social resolution in a contested global surrogacy arrangement. Also, Cruz pointed out that the word ‘surrogate’ was not used correctly in this particular legal case.

<sup>13</sup> While there has been ample research into identity of adoptees and the problems encountered, this is an area of great need in global surrogacy research.

<sup>14</sup> While egg and sperm donors are also an area of concern, these particular elements of global surrogacy practices were not considered within this particular thematic area. The reader should refer to Thematic Area 5 for a broader discourse.

regulations for global surrogacy must rest upon at least these three core areas for true social protection.

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