

# Surrogacy, Law & Human Rights

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ADF INTERNATIONAL

# Summary

Surrogacy: a marvel of modern biotechnology, or a threat to the inherent dignity of women and children? This paper explores the human rights implications involved with the process of splitting motherhood across two or more parties. The compromise of principles that should protect female bodies from exploitation as 'gestational ovens', accompanied by factors that pose serious risk to women's health, bears alarming consequences for women across the world. Such is particularly accentuated by the experience of women in developing countries, typically hired for their wombs by wealthy westerners. Equally, a child carried via surrogacy faces severe violations of their rights – including through their sale upon birth and deprivation of access to their true identity. After investigating the outcomes faced by the most vulnerable parties in a surrogacy arrangement, this paper analyses global patterns of surrogacy laws and provides recommendations for policy-makers looking to deal with the complex issue.

# About the Authors

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# Introduction

*'A long time ago there were a king and queen who said every day, 'Ah, if only we had a child,'...'<sup>1</sup>*

So begins the Grimm Brothers' original tale of Sleeping Beauty, in which the same supernatural forces that grant the deepest desire of the King and Queen also cause a curse to fall upon their beautiful daughter, upon themselves and upon all the members of the Court. Today, fairy-tale creatures are replaced by a burgeoning surrogacy industry which, taking advantage of well-intentioned, sincere, and emotionally-vulnerable wishes to be parents, profits from the commodification of both women and children.

The Covid-19 pandemic brought to light the deep-rooted violations that occur throughout the process. In Europe's 'surrogacy capital' of Ukraine, would-be surrogates apply every day to carry children for payment.<sup>2</sup> When global travel ceased due to public health regulations, commissioning parties outside of the post-Soviet country were unable to retrieve the children they had commissioned. As of May 2020, 100 babies already were 'stranded' in birth facilities, cared for by nurses in a state of 'limbo'. Authorities predicted that as many as 1,000 babies would be born before Ukraine's travel ban for foreigners was lifted.<sup>3</sup> The babies fell victim to becoming the 'stock' of a commercial business transaction gone wrong. But they weren't the only ones.

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<sup>1</sup> Brothers Grimm, Little Briar-Rose (Margaret Hunt (tr), Vol. 50, first published 1857, ebook edition, Saga Egmont 2020), 1.

<sup>2</sup> Kevin Ponniah, 'In search of surrogates, foreign couples descend on Ukraine' BBC News (13 February 2018) <<https://www.bbc.co.uk/news/world-europe-42845602>>.

<sup>3</sup> Andrew E. Kramer, '100 Babies Stranded in Ukraine After Surrogate Births' New York Times (16 May 2020) <<https://www.nytimes.com/2017/03/23/world/americas/as-mexican-state-limits-surrogacy-global-system-is-further-strained.html>>.

Bridget, now four, moved last year into the Sonechko Children's Home in the Ukrainian city of Zaporizhzhya. She lived most of her life in the hospital where she was born. The only mother she's known was a surrogate from Donetsk—a war-torn area known for low wages, food insecurity, volatile currencies, and large loss of life due to regional hostilities.<sup>4</sup> Bridget was born prematurely at 25 weeks and weighed just over 800 grams. Her twin did not survive. Bridget was diagnosed with multiple disabilities. The American couple who had commissioned her conception abandoned her. At five months, when Bridget was critically ill, they sent a legal letter asking her life support to be switched off.<sup>5</sup>

*'We will not take her to America. This baby is incurable'*

Bridget's story is not an isolated instance. Multiple cases have emerged all over the world of babies being abandoned by commissioning parties when they do not meet expectations—perhaps because of disability, or gender, or 'mix-ups' relating to the baby's race or genetic make-up.<sup>6</sup> By transforming a child into a commodity, they have become dehumanized—discarded if expectations are not met. Even when not abandoned, the child's interests are jeopardized—amongst other challenges, being denied access to their genetic information and family history.

And it is not only the child who is manipulated for profit by the industry.

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<sup>4</sup> 'War-scarred neighborhoods in Ukraine's rebel-held Donetsk' Reuters (12 December 2017) <<https://www.reuters.com/article/us-ukraine-crisis-donetsk-dwellers-idUSKBN1E61DO>>.

<sup>5</sup> Samantha Hawley, 'Damaged babies and broken hearts: Ukraine's commercial surrogacy industry leaves a trail of disasters' ABC News (19 August 2019) <<https://www.abc.net.au/news/2019-08-20/ukraines-commercial-surrogacy-industry-leaves-disaster/11417388#:~:text=The%20child's%20full%20name%20is,documents%20seen%20by%20Foreign%20Correspondent.>>>

<sup>6</sup> For example, see Lindsay de Freitas, 'Couple left 'devastated' after surrogate baby is born with 'Asian' features' News24 (22 August 2019) <<https://www.news24.com/you/parenting/couple-left-devastated-after-surrogate-baby-is-born-with-asian-features-20190822>>. See also, Jennifer Lahl and Matthew Epinette [directors], *Breeders: A Subclass of women?* [documentary] (Center for Bioethics and Culture, 2014).

In India by 2012, over 25,000 babies had been born via surrogacy.<sup>7</sup> Women signed surrogacy contracts in the hope of building financial security. They spent much of their pregnancies living in tightly-controlled hostels with limited access to their families. They signed contracts written in languages that they did not understand. At the whim of western couples, they agreed to abortions, or to caesarean sections according to flight schedules.<sup>8</sup>

Finally ending the exploitation of their women on a global scale, India prohibited surrogacy in most cases from 2015. Agencies took their clinics across the border to nearby Nepal—then to Thailand, and to Laos, following a repeating cycle of exploitation and then prohibition. The pattern has emerged globally, putting particularly the most vulnerable women across all continents at risk.

With increasing interest at the level of human rights courts, UN mechanisms, and media outlets alike, the practice of surrogacy is moving to the forefront of legal, political, and popular discourse. A full understanding of the implications of surrogacy has lagged behind rapid developments in biotechnology, leaving gaps in the framework for applying international and human rights law to surrogacy.

In its opening line, the Universal Declaration of Human Rights enshrines ‘the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’ as ‘the foundation of freedom, justice and peace in the world.’<sup>9</sup> The belief that human beings are set apart from animals and objects, and can therefore not be commodified into property, is at the core of human rights philosophy, and is an ethical rule underpinning one the greatest legal reformations of

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<sup>7</sup> Kishwar Desai, ‘India’s surrogate mothers are risking their lives. They urgently need protection’ *The Guardian* (5 June 2012) <<https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>>.

<sup>8</sup> Amrita Pande, ‘Commercial surrogacy in India: Manufacturing a perfect mother-worker’ (2010) 35 *Signs* 969; Amrita Pande, *Wombs in labor: Transnational commercial surrogacy in India* (Columbia University Press, 2014) 117.

<sup>9</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) preamble.



history—the abolition of the slave trade. Surrogacy flouts these principles by commodifying women and the babies that they can carry.

This paper examines the phenomenon of 21<sup>st</sup> century surrogacy as a human rights violation, and, in studying regional and global trends, explores the options available to best protect the lives at stake. It will examine the argument that surrogacy in all its forms amounts to the sale of children and, as an emerging form of reproductive exploitation, is a driving factor in human trafficking. It will further explore how the practice violates women and children's human right to the highest attainable standard of physical and mental health and deprives children of the right to preserve their identity. Simultaneously, in fragmenting motherhood and family relations, surrogacy deconstructs the integral personhood of the human being and the foundations of any legal system based on the concept of parentage and the family. By unravelling legal certainty on the identification of mothers and fathers, it can leave a child torn between warring parties, or even abandoned by all. The paper will thus conclude with recommendations that states expressly prohibit surrogacy within their national legislation and take steps to protect women and children from this exploitative practice.

# Terminology

**Surrogacy** is a practice whereby a woman becomes pregnant with the intent of giving the child to someone else upon birth.

Surrogacy arrangements can be distinguished in a number of ways:

- a. In **'traditional surrogacy'**, both the surrogate mother's womb and ova are used. She is therefore the genetic mother of the child. The sperm is provided either by the commissioning party or by a donor, and pregnancy comes about either by natural or (more commonly) artificial insemination.
- b. In **'gestational surrogacy'**, the surrogate carries the child to term in her womb, but her own gametes are not used. Therefore, there is no genetic relationship between her and the child (though the prenatal environment greatly influences not only foetal growth, development, and birth outcomes, but also children's psychology, behaviour, neural development, and various health conditions in later life).<sup>10</sup> The pregnancy comes about through an in vitro fertilization (IVF) procedure using egg and sperm donors, one or both of whom can be (though not are not necessarily) the 'commissioning parties'.

Both 'traditional' and 'gestational' surrogacy arrangements can be further categorized according to the nature of the agreement made:

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<sup>10</sup> Shuman Tao and Fangbiao Tao, 'The effects of prenatal environmental exposures on child development and health' (February 2016) 50, 2 Zhonghua Yu Fang Yi Xue Za Zhi 192-7 <<https://pubmed.ncbi.nlm.nih.gov/26926732/>>; Sunaid Barua and Mohammed A Junaid, 'Lifestyle, pregnancy and epigenetic effects' (2015) 7, 1 Epigenomics 85-102 <<https://pubmed.ncbi.nlm.nih.gov/25687469/>>.

- c. **'Expenses-only surrogacy'**, often referred to as 'altruistic surrogacy', describes an agreement in which the surrogate gives away the child upon birth without receiving a financial payment (although the 'pregnancy expenses' which are claimed are often very extensive).
- d. **'Commercial surrogacy'** describes an agreement in which the surrogate and the 'commissioning parties' enter into a commercial contract that foresees payment for the surrogate in exchange for the carrying and delivering of the child.

In cases of surrogacy, up to six adults (or possibly more) can claim parental rights in respect of the child:<sup>11</sup>

- a. The **genetic mother**, who donates the ovum;
- b. The **genetic father**, who donates the sperm;
- c. The **gestational mother**, who carries the child in her womb and gives birth;
- d. The husband of the gestational mother, who in many legal systems is presumed to be the **legal father**;
- e. One or more **'commissioning parties'**, sometimes referred to as the 'intended parents', who commission the surrogate to carry the child with the intention to be legally recognized as the parents of the child. The commissioning party can be an individual or a homo- or heterosexual couple. In some instances, polyamorous groups have used surrogacy to create

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<sup>11</sup> Indeed, this number is already expanding. In 2016, the world's first baby with three genetic parents was born in New York City using a spindle nuclear transfer technique—combining the nucleus of a commissioning woman's ovum with a donor ovum, with the intention of eradicating mitochondrial disease. See Jessica Hamzelou, 'Exclusive: World's first baby born with new "3 parent" technique' New Scientist (27 September 2016) <<https://www.newscientist.com/article/2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique/#ixzz6dqRQQReV>>.

an unconventional family through a variety of legal or informal arrangements.<sup>12</sup>

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<sup>12</sup> See Debora L. Spar, 'The poly-parent households are coming' *The New York Times* (12 August 2020) <<https://www.nytimes.com/2020/08/12/opinion/ivg-reproductive-technology.html?auth=login-email&login=email>>; Bill Johnson, "Three Dads and a Baby" tells journey of a polyamorous family' *Patch* (29 September 2020) <<https://patch.com/california/san-diego/three-dads-baby-tells-journey-polyamorous-family>>.

## 1) The Impact of Surrogacy on Women's Rights

Surrogacy violates the human rights and inherent dignity of women, whether money is exchanged for the service or not. This chapter explores how the commodification of female bodies poses risks to their life, personhood, and dignity by first examining, within an international legal framework, the harm caused by even 'best case scenario' surrogacy arrangements to the physical and mental health of the surrogate mother. Section 1.2 will explore the damage the practice inflicts upon the social institution of motherhood, disintegrating family roles otherwise celebrated in law and foundational to society. Finally, having established the integral harms caused by the practice to women and to womanhood, the chapter will explore the illicit links between surrogacy and the criminal enterprise of human trafficking. Throughout each section, the argument that surrogacy can be an 'empowering' experience shall be dismantled, given that consent is never a justification for the abuse of human rights, and that the inherently exploitative nature of surrogacy can easily create conditions of coercion.

### A. Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health

The right to 'a standard of living adequate for the health and well-being of himself and of his family' is enshrined in Article 25 of the UDHR, which in part (2) states that 'Motherhood and childhood are entitled to special care and assistance.'<sup>13</sup> This right is reaffirmed in Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR), which has been ratified by 170 states.<sup>14</sup> Drawing on this provision, the UN Committee on Economic Social and Cultural Rights—the body charged with monitoring the implementation of this Treaty—affirmed that 'every human being is

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<sup>13</sup> UDHR (n8) art 25.

<sup>14</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12.

entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.<sup>10</sup>

The health dangers of surrogacy are numerous and shouldered exclusively by the women: the egg donor and the surrogate mother. While there is a paucity of longitudinal studies on the consequences of egg donation, and despite assurances from fertility companies that the procedure is 'safe',<sup>15</sup> multiple medical researchers have raised concerns that breast and endometrial cancers are related to total endogenous oestrogen exposure, as occurs during the oocyte harvesting procedure.<sup>16</sup> Indeed, the hyper-stimulation of any human tissue can lead to malignant transformation.<sup>17</sup> Gestational mothers are often expected to maximize the investment of the commissioning parties by carrying twins, triplets or, in some countries, higher multiples, thus placing them at a higher risk of experiencing pre-eclampsia and/or gestational diabetes.<sup>18</sup> The US Food and Drug Administration (FDA) label for the drug, Lupron, which is used to transfer embryos, also notes considerable side effects.<sup>19</sup>

Even following a birth, the process of post-partum separation of mother and child can be mentally and emotionally distressing. It is relatively rare that a woman will place herself willingly at such risk if not under severe social, economic, or emotional pressure.

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<sup>15</sup> ConceiveAbilities, 'Is Egg Donation Safe?' <<https://www.conceiveabilities.com/about/blog/is-egg-donation-safe#:~:text=Yes%2C%20egg%20donation%20is%20safe,risks%20attached%20to%20fertility%20drugs>>.

<sup>16</sup> I Kamphuis Esme, S Bhattacharya, F van der Veen, B W J Moll and A. Templeton, 'Are we overusing IVF?' (28 January 2014) 348 British Medical Journal, 252; Jennifer Schneider, Jennifer Lahl and Wendy Kramer, 'Long-term breast cancer risk following ovarian stimulation in young egg donors: a call for follow-up, research and informed consent' (1 May 2017) 34, 5 Journal of Reproductive Biomedicine Online, 480-485.

<sup>17</sup> *Ibid.*

<sup>18</sup> A Conde-Agudelo, JM Belizán and G Lindmark, 'Maternal morbidity and mortality associated with multiple gestations' (2000) 95, 6(1) Obstetrics & Gynecology, 899-904.

<sup>19</sup> US Federal Drug Agency, 'Label - Lupron Depot' <[https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2012/019943s031,020011s038,020708s031lbl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2012/019943s031,020011s038,020708s031lbl.pdf)>. See also Joshua DO Alexander and Leah Levi, 'Intracranial Hypertension in a Patient Preparing for Gestational Surrogacy With Leuprolide Acetate and Estrogen' (September 2013) 33,3 Journal of Neuro-Ophthalmology 310-311.

On the other hand, in surrogacy contracts, ‘termination clauses’ are often included. These purport to bind the gestational mother to have an abortion at the will of the commissioning parties—most commonly triggered in order to eliminate children developing in a multiple pregnancy, or in cases of foetal disability.<sup>20</sup>

In the 2015 case of *C.M. v. M.C.*, California-based, pregnant surrogate mother Melissa Cooke refused to comply with the (single) male commissioning party (‘C.M.’)’s request for her to abort one of the triplets she was contracted to carry. The babies had been conceived via the sperm of C.M. and an anonymously-donated ova. Cooke, concerned that this request indicated C.M. would not be willing or able to care for all the children, went before the Court to claim legal rights as a mother, and custody of at least one child. Though the father’s demand for abortion did not prove enforceable, Cooke was unable to achieve any recognition as a parent, nor take custody despite numerous legal battles and appeals.<sup>21</sup> Indeed, egg donor Katie O’Reilly published thoughts about her own grief in the *Atlantic* in 2016, noting that she was given no input into what she suspected was a decision to ‘selectively reduce’ her triplet children to a single baby in the surrogate’s womb.<sup>22</sup> In Melissa Cooke’s case, as is allowed under California law, the place for ‘mother’s name’ on the birth certificates of the children was simply left blank. The controversy surrounding Cooke’s decision, alongside the rejection of her claim to any parental rights whatsoever, demonstrates the degradation of a surrogate mother into a ‘womb for hire’.

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<sup>20</sup> See *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 363 (Ct. App. 2017); See case of Crystal Kelley in Holly Jones, ‘Contracts for Children: Constitutional Challenges to Surrogacy Contracts and Selective Reduction Clauses’ (2018) 70 Hastings Law Journal 595, 600; Elizabeth Cohen, ‘Surrogate Offered \$10,000 to Abort Baby’ (6 March 2013) CNN <<https://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html>>.

<sup>21</sup> *C.M. v. M.C.* (n19).

<sup>22</sup> Katie O’Reilly, ‘When Parents and Surrogates Disagree on Abortion’ *The Atlantic* (18 February 2016) <<https://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323/>>.

As in the case of Melissa Cooke, ‘termination clauses’, when robustly objected to, are unlikely to be legally enforceable. Yet, the intense pressure placed on the woman to comply may amount to a forced abortion—especially for those many surrogates without the social, economic, and legal support structure which Cooke enjoyed in order to robustly object to the imposition. The Beijing Declaration and its Platform for Action, agreed at the Fourth World Conference on Women, includes ‘forced abortion’ in a list of ‘grave violations of the human rights of women...’<sup>23</sup>; while its preceding agreement in Cairo, signed by 179 governments, encourages a negative view of abortion as a whole.<sup>24</sup> The Committee on the Rights of Persons with Disabilities (ICPD) has noted forced or coerced abortion to be a ‘brutal’ form of discrimination.<sup>25</sup>

More broadly, there is no specific mention of surrogacy in international legal instruments. Article 12 of the Convention on the Elimination of Discrimination Against Women (CEDAW) could be disingenuously interpreted as endorsing the practice by guaranteeing women and men ‘equal access to health care services, including those related to family planning’.<sup>26</sup> Similarly, the ICPD calls upon States to protect women’s ‘capability to reproduce and the freedom to decide if, when, and how often to do so’ and, even more specifically, the provision of access to ‘techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.’<sup>27</sup>

However, such an interpretation is fundamentally flawed. The extent to which surrogacy could constitute ‘health care’, rather than a

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<sup>23</sup> Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women (27 October 1995) UN Doc. A/CONF.177/20 and A/CONF.177/20/Add.1 ¶ 11.

<sup>24</sup> Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (1995) UN Doc. A/CONF.171/13/Rev.1 (ICPD) ¶ 7.24.

<sup>25</sup> Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination (26 April 2018) UN Doc. CRPD/C/GC/6 ¶ 7.

<sup>26</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1989) 1249 UNTS 13 (CEDAW) art 12.

<sup>27</sup> ICPD (n23) ¶ 7.2.



social circumvention of infertility, is weak. While philosophical trends have moved towards a definition of 'health' that encompasses well-being rather than mere freedom from disease,<sup>28</sup> the biological underpinnings of healthcare and treatment to achieve such a bodily state remain and are distinct from social interventions. The United Journal of Medicine and Healthcare defines healthcare as:

The maintenance or improvement of health via the prevention, diagnosis, and treatment of disease, illness, injury, and other physical and mental impairments in human beings. Medicine is the science and practice of the diagnosis, treatment, and prevention of disease. Medicine encompasses a variety of health care practices evolved to maintain and restore health by the prevention and treatment of illness.<sup>29</sup>

The UK's National Institute for Health Care and Excellence (NICE) clearly distinguishes between medical care and social interventions:

In medical terms, [intervention] could be a drug treatment, surgical procedure, diagnostic test or psychological therapy. Examples of public health interventions could include action to help someone to be physically active or to eat a more healthy diet. Examples of social care interventions could include safeguarding or support for carers.<sup>30</sup>

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<sup>28</sup> The World Health Organization (WHO) defines health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.' See WHO, 'Constitution' <<https://www.who.int/about/who-we-are/constitution>>. Nevertheless, their definition of 'primary health care' remains rooted in 'meeting people's health needs through comprehensive promotive, protective, preventive, curative, rehabilitative, and palliative care throughout the life course,' rather than social circumvention. See WHO, 'Primary Health Care' (Factsheet) (27 February 2019) <<https://www.who.int/news-room/fact-sheets/detail/primary-health-care>>.

<sup>29</sup> United Prime Publications, 'United Journal of Medicine and Healthcare' <<https://www.untprimepub.com/united-journal-of-medicine-and-health-care/#:~:text=Health%20care%20is%20the%20maintenance,treatment%2C%20and%20prevention%20of%20disease.>>>.

<sup>30</sup> National Institute for Health Care and Excellence (NICE), 'Glossary: Intervention' <<https://www.nice.org.uk/Glossary?letter=I>>.

By carrying a child, the surrogate does not solve the reproductive health problems of the commissioning parties. It is no cure or treatment—it is not health care. At most, it is a social intervention. It provides a child by other means.

Even if one accepts the argument adopted by certain lobby groups that surrogacy is a form of reproductive health service,<sup>31</sup> access to such services must not come at the expense of human rights, including the right to health, of another person. Indeed, the ICPD itself affirms that women should never be subjected to ‘harmful practices and sexual exploitation’<sup>32</sup>, and furthermore, states more explicitly that:

Governments should secure conformity to human rights and to ethical and professional standards in the delivery of family planning and related reproductive health services...In-vitro fertilization techniques should be provided in accordance with appropriate ethical guidelines and medical standards.<sup>33</sup>

While the ICPD notes that ‘appropriate’ treatment for infertility should be accessible;<sup>34</sup> it is clear that techniques fail this qualification when they clearly encroach on the rights and dignity of other human beings. Whether or not a financial payment is received, surrogacy is inherently a process whereby one’s right to health is jeopardized for another. Consent in such a scenario does not alleviate the human rights abuse; as will be explored further in Section 1.3.

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<sup>31</sup> See for example, Center for Reproductive Rights, ‘Submission from the Center for Reproductive Rights following the call for inputs by the Special Rapporteur on the Sale and Sexual Exploitation of Children on Safeguards for the protection of the rights of children born from surrogacy arrangements’ (Report) <<https://reproductiverights.org/sites/default/files/2019-07/Submission-Sale-Of-Children-Surrogacy.pdf>>.

<sup>32</sup> ICPD (n23) ¶ 4.2.

<sup>33</sup> *Ibid.* ¶ 7.17.

<sup>34</sup> *Ibid.* (n23) ¶ 7.6.

## B. Protection of Maternity and the Family in International Law

International law strongly supports the family as a foundational social institution. Simultaneously, it protects this natural unit from manipulation and exploitation.

Article 10 of the ICESCR requires States to accord 'the widest possible protection and assistance' to the family, which is described as 'the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'<sup>35</sup> Article 23 of the International Covenant on Civil and Political Rights (ICCPR) affirms the right of men and women of marriageable age to marry and to found a family.<sup>36</sup> Researchers who pioneered IVF in the 1970s and '80s premised their work on these provisions,<sup>37</sup> with supporters of surrogacy today using this foundation to argue for the existence of a human right to procreate, no matter the technology required.<sup>38</sup> However, legal scholar Maja K. Eriksson notes that the family principle affirmed in, *inter alia*, ICCPR Article 23 is a 'reaction against Nazi racial and reproductive policies that culminated in genocide', rather than a demand for States to provide a spouse and/or children to those who cannot conceive on their own.<sup>39</sup> International law does not,

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<sup>35</sup> CESCR (n13) art 10.

<sup>36</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 23.

<sup>37</sup> Robert Edwards & Patrick Steptoe, *A Matter of Life: The Story of a Medical Breakthrough* (William Morrow and Company, 1980) 101-102; Carl Wood & A. Westmore, *Test Tube Conception* (Hill of Content, 1983) 102.

<sup>38</sup> For example, see G. Hanscombe, 'The Right to Lesbian Parenthood' (1983) 9 *Journal of Medical Ethics* 133; for further discussion, see Suzanne Uniacke, 'In Vitro Fertilization and the Right to Reproduce' (1987) 1 *Bioethics* 241 at 24; Marleen Eijkholt, 'The Right to Found a Family as a Stillborn Right to Procreate?' (2010) 18 *Medical Law Review* 127–151 <doi:10.1093/medlaw/fwq013>; Michael Boucai, 'Is Assisted Procreation an LGBT Right?' (2016) *Wisconsin Law Review* 1065 <[https://digitalcommons.law.buffalo.edu/journal\\_articles/70](https://digitalcommons.law.buffalo.edu/journal_articles/70)>.

<sup>39</sup> Maja K. Eriksson, *The Right to Many and to Found a Family: A World-Wide Human Right* (Justus Förlag AB, 1990).

therefore, endorse a right to surrogacy and there is no obligation to make it available.

Rather, international law highlights the significance of maternity. CEDAW Article 4 invites States to 'adopt special measures aimed at protecting maternity'<sup>40</sup>, while the preamble of the same Convention affirms:

...the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.<sup>41</sup>

From a developmental perspective, surrogate mothers play a more significant maternal role in the gestational process than was previously thought. Recent studies in epigenetics are uncovering the strong influence that the prenatal environment has upon gene expression, even between an unrelated surrogate mother and the child she carries. The diet of the mother and the hormonal environment of her womb have a long-term impact on the child's life.<sup>42</sup> Research conducted by the University of Southampton with the University of Singapore revealed that genetic differences alone best explained 25 per cent of the epigenetic variation between babies, with the remaining 75 per cent best explained by the interaction of

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<sup>40</sup> CEDAW (n25) art. 4.

<sup>41</sup> CEDAW (n25) preamble.

<sup>42</sup> See studies into epigenetic influences on neurodevelopmental disorders such as Attention-Deficit Hyperactivity Disorder (ADHD), for example, Ai Ling Teh et. al., 'The effect of genotype and in utero environment on interindividual variation in neonate DNA methylomes' (2014) 24 Genome Research 1064–74<<https://genome.cshlp.org/content/early/2014/06/04/gr.171439.113.full.pdf>>.

genetic differences and the prenatal environment.<sup>43</sup> Biologically then, the surrogate mother cannot simply be dismissed as playing a time-limited and discrete function. Asking that she socially distance her role as mother from the biological function of her body fractures not only the concept of parenthood, but also her own personhood as a unified mind and body.

Rather than protecting maternity, surrogacy fragments motherhood, thus fracturing the personal integrity of each woman involved. Each has a possible claim to involve or un-involve themselves in parenthood at will. This intervention in nature puts the legal clarity of the family into chaos; the results of which are further explored in Chapter 3. Dividing biological capabilities from the unique personhood and motherhood of the gestational carrier undermines her human dignity, leading to further rights violations.

### **C. Surrogacy as a Form of Reproductive Prostitution and Exploitation**

Philosopher Stephen Wilkinson's study of 'exploitation' identifies two key factors of the term's definition:

- f. that the exploited person derives (or is at risk of deriving) an unfairly low level of benefit and/or suffers an unfairly high level of cost or harm;
- g. that the exploited person's consent to the arrangement is defective or invalid.<sup>44</sup>

The low level of benefit and high level of harm that surrogate mothers derive (or are at risk of deriving) has been thus far expounded in the

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<sup>43</sup> Ai Ling Teh et. al., 'The effect of genotype and in utero environment on interindividual variation in neonate DNA methylomes' (2014) 24 *Genome Research* 1064–74 <<https://genome.cshlp.org/content/early/2014/06/04/gr.171439.113.full.pdf>>.

<sup>44</sup> Stephen Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements' 33, 2 *Journal of Applied Philosophy* 125-145 <<https://doi.org/10.1111/japp.12138>>.

paper. Yet the practice's qualification as 'exploitation' under the 'defective or invalid consent' criterion is also demonstrable. Such consent may be nullified by the promise of 'life-changing' amounts of money in return for the significant risk shouldered by the woman. Or, for those who engage in surrogacy without payment, the very uniqueness of the pregnancy she is about to undergo and her unforeseeable physical, emotional and psychological reaction to the point of severance with the child she carries defies the concept of 'informed consent'.

Let us turn firstly to the argument of economic tantalisation. An oft-cited qualitative survey of surrogate mothers attests that the altruistic wish to 'help a childless couple' was the most common motivator for their actions, rather than financial incentive.<sup>45</sup> However, such results have been subsequently challenged within the literature as to the selectivity of sample sizes and the failure to account for external pressures.<sup>46</sup> Surrogacy agencies encourage their contractors to adopt an altruistic outlook in their narration, considering themselves 'angels' who 'make dreams come true'.<sup>47</sup> However, the fact that surrogacy 'hotspots' have thrived in areas of economic depravity defies claims that money does not motivate. Indeed, a study by leading UK surrogacy lawyer Natalie Gamble affirmed that the business is driven out of the UK and into foreign countries because of a quantitative lack of willing surrogates in the UK—most likely driven by a ban on financial payments above expenses.<sup>48</sup>

Ukraine—the poorest country in Europe, according to the International Monetary Fund (IMF)—plays host to a soaring surrogacy industry. With an average wage of €237 per month and a state of ongoing

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<sup>45</sup> Jadva et. Al., 'Surrogacy: the experiences of surrogate mothers' 18, 10 Human Reproduction (October 2003) 2196-2204 <<https://doi.org/10.1093/humrep/deg397>>.

<sup>46</sup> See Olga B.A. van den Akker, 'Psychosocial aspects of surrogate motherhood' 13 Human Reproduction Update 1 (2007) 53–62 <<https://doi.org/10.1093/humupd/dml039>>.

<sup>47</sup> See A Patel et al., "'The Miracle Mothers and Marvelous Babies": Psychosocial Aspects of Surrogacy - A Narrative Review' 13, 2 Journal of Human Reproductive Sciences (1 April 2020) 89-99 <<https://europepmc.org/article/pmc/pmc7394089>>.

<sup>48</sup> Natalie Gamble, 'Crossing the line: the legal and ethical problems of foreign surrogacy', RBM Online 19,2 (2009) 151–152.

international conflict, many low-income women are tempted to provide for their families in this unusual way; resulting in an estimated 2,000-2,500 surrogacy contracts signed throughout the country every year. Commissioning parties pay €39,900-€49,900—a far cry from the \$120,000 fees that California commands.<sup>49</sup> Unfortunately, this high demand for the production of children at comparatively low cost has exposed the reality of female exploitation that is embedded in the nature of the trade.

Ukrainian surrogates have testified in the media to having been ‘treated like cattle and mocked by doctors’.<sup>50</sup> In an interview, one woman identified as ‘Alina’ complained that she was kept under oppressive watch in an apartment from 32 weeks onwards in her pregnancy, having to share a bed with another surrogate, and threatened with fines as a penalty for being out after 4pm, openly criticizing the company, or contacting the commissioning parties. Alina also recounted the very poor standard of healthcare she received before and after delivery. She had no access to hot water, and claims to have been rebuked with contempt by doctors when suffering from post-partum bleeding.<sup>51</sup> Yuriy Kovalchuk, a former state prosecutor whose office oversaw a series of criminal investigations into major surrogacy operator BioTexCom in 2018 and 2019, says at least three other women went to the police after having their wombs removed following surrogate pregnancies organized by the company.<sup>52</sup> Alina pointed to an online forum in the interview where other surrogate mothers shared similar experiences to hers. The blog has since been removed.

Alina’s story highlights the degradation of destitute women into reproductive machinery within the structures of the surrogacy trade.

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<sup>49</sup> Silvia Blanco, ‘The dark side of Ukraine’s surrogacy boom’ *El Pais* (1 October 2018) <[https://english.elpais.com/elpais/2018/09/27/inenglish/1538051520\\_476218.html](https://english.elpais.com/elpais/2018/09/27/inenglish/1538051520_476218.html)>.

<sup>50</sup> Madeleine Roache, ‘Ukraine’s ‘baby factories’: The human cost of surrogacy’ *Al Jazeera* (13 September 2018) <<https://www.aljazeera.com/features/2018/9/13/ukraines-baby-factories-the-human-cost-of-surrogacy>>.

<sup>51</sup> *Ibid.*

<sup>52</sup> Oksana Grytsenko, ‘The stranded babies of Kyiv and the women who give birth for money’ *The Guardian* (15 June 2020) <<https://www.theguardian.com/world/2020/jun/15/the-stranded-babies-of-kyiv-and-the-women-who-give-birth-for-money>>.

Such exploitation is perhaps most visible in stories of extreme economic juxtaposition between commissioner and contractor—but testimonials, recorded by the Center for Bioethics and Culture, of more affluent US women attest to similar unexpected experiences of coercion and commodification. Women who simply wished for extra cash in order to, *inter alia*, give up a ‘day job’ talk of abandonment in the face of pregnancy challenges—their own physical and mental wellbeing disregarded. Several spoke of a breakdown in relationship between the two parties, even where friendship and familial bonds had existed.<sup>53</sup>

Furthermore, surrogacy contracts require women to give advanced consent to rescind control of significant medical decisions – whether paid or unpaid. The surrogacy procedure requires a commitment to months of invasive medical treatments, usually beginning with various hormones and fertility drugs, and IVF; and continuing with efforts to implant fertilized embryos in the womb. Next comes the various screenings and medical interventions of pregnancy and finally the birth itself, which is increasingly done by C-section.<sup>54</sup> While standard medical practice usually mandates a meaningful, informative conversation before each treatment or operation takes place, with full and clear consent obtained at the time; the surrogate in essences waives the right to give full consent on interventions which affect both her body and that of the baby she carries. As was explored earlier in this chapter, the contracts can even see the surrogate mother purport to sign away her right to object to an unwanted abortion. In comparison, in medicine, there are very few other circumstances where personal patient consent at the point of treatment is waived. Although living wills and advanced directives provide consent in advance to medical decisions, they are fully revocable in ways that surrogate contracts are

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<sup>53</sup> Lahl & Epinette (n5).

<sup>54</sup> Pamela Laufer-Ukeles, ‘The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood’ (2018) 43 *North Carolina Journal of International Law* 96; Keith J. Hey, ‘Assisted Conception & Surrogacy – Unfinished Business’ (1993) 26 *John Marshall Law Review* 775, 811; Abigail Lauren Perdue, ‘For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy’ (2011) 27 *Journal of Contemporary Health & Policy* 279, 281, 300.



not and made without the presence of a third or other party.<sup>55</sup> US courts first faced the matter of surrogacy in 1987 in the case of *Baby M*, when a New Jersey surrogate mother, Beth Whitehead, refused to relinquish her parental rights in respect of the child she had carried. The court ruled that the surrogacy contract that Beth Whitehead had signed was invalid, both because of the questionable legality of the exchange of money for a child, and also on the grounds of uninformed consent. The judge accepted the argument brought forward by Whitehead's counsel that 'until Mrs. Whitehead felt the emotion of birth and sensed the child, she could not give informed consent at the time she signed the contract.' The judgment read:<sup>56</sup>

In addition to the inducement of money, there is the coercion of contract: the natural mother's irrevocable agreement, prior to birth, even prior to conception, to surrender the child to the adoptive couple. Such an agreement is totally unenforceable in private placement adoption...Integral to these invalid provisions of the surrogacy contract is the related agreement, equally invalid, on the part of the natural mother to cooperate with, and not to contest, proceedings to terminate her parental rights, as well as her contractual concession, in aid of the adoption, that the child's best interests would be served by awarding custody to the natural father and his wife - all of this before she has even conceived, and, in some cases, before she has the slightest idea of what the natural father and adoptive mother are like.<sup>57</sup>

A 2016 report of the Parliamentary Assembly of the Council of Europe summarized similar concerns that the practice amounted to 'exploiting surrogate mothers, who cannot give their consent freely, unconditionally,

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<sup>55</sup> Laufer-Ukeles (n54), 36.

<sup>56</sup> *Re Baby M.*, 525 A.2d 1128, 1149 (Supreme Court of New Jersey 1987).

<sup>57</sup> *Re Baby M.*, 537 A.2d 1227, 1249 (Supreme Court of New Jersey, 1988).

and with full understanding of what is involved'.<sup>58</sup> Thus, there is a clear case that surrogate mothers – both paid and unpaid – can be considered to be in a position of exploitable vulnerability in the surrogacy paradigm, being burdened with a high risk of harm and without giving valid informed consent.

Indeed, when further analyzed through the lens of legal prohibitions against human trafficking, it becomes clear that surrogacy is a violation of rights.

'Trafficking in persons' is defined by the UN Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter 'Palermo Protocol') as follows:

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>59</sup>

According to the above definition, the crime of human trafficking involves three elements, notably:

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<sup>58</sup> Petra de Sutter (rapporteur), Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of Europe (PACE), 'Children's rights related to surrogacy' (23 September 2016) Ref. Doc. 13562 (PACE report).

<sup>59</sup> United Nations Convention against Transnational Organized Crime 'Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children' (15 November 2000) 2237 UNTS 319 (Palermo Protocol) art 3(a).

- 1) Action: recruitment, transportation, transfer, harbour or receipt of persons;
- 2) Means: threat or use of force or other means of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability or the giving or receiving of payments to achieve the consent of having control over another person;
- 3) Purpose: exploitation including forced labour or services and practices similar to slavery.<sup>60</sup>

The parallels between human trafficking and surrogacy are clear:

- 4) Advertisements offering large sums of money for women to sell their eggs or rent their wombs as part of the surrogacy process are a direct means of **recruitment**. There is evidence that fertility agencies concentrate efforts for egg donors and surrogate carriers on college campuses and military bases in the West in order to recruit women of higher economic vulnerability.<sup>61</sup> In developing countries, midwives are recruited to entice women who have young children and have a high financial burden.<sup>62</sup> Additionally, under some transnational surrogacy arrangements,

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<sup>60</sup> United Nations Office on Drugs and Crime, 'Issue Paper: The Concept of 'Exploitation' in the Trafficking in Persons Protocol' (United Nations, 2015) 5.

<sup>61</sup> Elizabeth Ziff, "'The Mommy Deployment': Military Spouses and Surrogacy in the United States' (4 March 2017) 32,2 Sociological Forum 406-425; Annie M. Lowery, 'Will You Be My Baby's Mama?' (29 April 2004) The Crimson <<https://www.thecrimson.com/article/2004/4/29/will-you-be-my-babys-mama/>>.

<sup>62</sup> Pande 2010 (n7) 975.

women are **transferred** from one country to another in order to circumvent prohibitive laws.<sup>63</sup>

- 5) **Coercion, deception, and fraud** are evident throughout the testimonials of ethnographic studies. Many women claim to have not been fully informed of the risks of entering into either an egg donation or surrogacy agreement.<sup>64</sup> In Asian contexts, contracts have reportedly been provided in languages not understood by the surrogates.<sup>65</sup> Even in 'best case scenarios' when full understanding of the risks is assured and consent is fully obtained, the surrogate arrangement cements an asymmetrical power dynamic in which a wealthier party uses either financial or emotional enticement to assert control over the body—an integral part of the person—of the party in greater socio-economic vulnerability. Such a situation amounts to the abuse of a position of vulnerability or the giving or receiving of payments to achieve the consent of having control over another person.
- 6) **'Exploitation'** is not precisely defined under international law, but according to the Palermo Protocol, the term includes, 'at a

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<sup>63</sup> For example, in 2012 when India banned the use of surrogates for many groups including male homosexual couples, the commercial agencies in Delhi simply moved their pregnant contractees across the border to Nepal for delivery, where the practice was still legal. Following the decision of the Nepalese government to restrict surrogacy in 2015, Mumbai clinics began recruiting women from Kenya to be fertilized in India and kept under strict observation in a 'hostel'; and then, flown back to Nairobi towards the end of their second trimester. Intended parents came from Western nations to pick up their children in Kenya, and the clinics maintained claims to legal adherence, having not interacted with the surrogate transaction within their borders but rather having provided a 'healthcare' service to those seeking 'IVF'. See Sharmila Rudrappa, 'India outlawed commercial surrogacy – clinics are finding loopholes' *The Conversation* (23rd October 2017) <<https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784>>.

<sup>64</sup> See Sheela Saravanan, *A Transnational View of Surrogacy Biomarkets in India* (Springer, 2018); Jennifer Lahl and Justin Baird, 'Eggsplotation' (Film, Center for Bioethics and Culture, 2011).

<sup>65</sup> Pande 2010 (n7) 976.

minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>66</sup> The common thread throughout these examples is a power dynamic between two or more parties that degrades the human dignity of one for the profit of another. Each example fits Wilkinson's philosophical framework of exploitation, explored above, as the vulnerable person is at a high risk of harm while being able to give only defective or invalid consent.

Clear parallels exist between surrogacy and prostitution. Both the prostitute and the surrogate mother are expected to be able to detach their personhood from their body. Just as the prostitute's body is commodified for the benefit of another at the expense of her human dignity and personal integrity, so is the surrogate's. The act of prostitution can be described as the sale of a woman's body for sex without the consequence of reproductive responsibility. The act of surrogacy is simply the same in reversal—the sale of a woman's body for the act of reproduction without sexual intercourse.<sup>67</sup> In neither case is 'consent' a sufficient defence for the extreme degradation of a woman's personhood. The preamble to the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others is clear that 'prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person'.<sup>68</sup> Given these parallels, surrogacy may amount to *reproductive* prostitution, and be damaging to dignity and worth in accordance with the principles of the Convention outlined above.

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<sup>66</sup> Palermo Protocol (n60) art 3(a).

<sup>67</sup> Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self* (Spinifex, 2013).

<sup>68</sup> Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (adopted 2nd September 1949, entered into force 25 July 1951) 96 UNTS 271, pp1.

Where the ‘means’ criteria have been fulfilled, there is hardly a case of transnational surrogacy in which the act cannot be considered demonstrably exploitative. As explored more fully in Chapter 3, the transnational market functions on a global wealth imbalance, often serving the generally ‘white west’—notably couples from countries such as the UK and Australia—with impoverished surrogate women in developing countries.

Article 6 of CEDAW compels parties to ‘take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’<sup>69</sup> Moreover, in line with the ICPD, States have committed themselves to ‘take full measures to eliminate all forms of exploitation, abuse, harassment and violence against women, adolescents and children.’ This commitment goes beyond the mere prohibition of trafficking, but also of ‘degrading practices’ such as ‘exploitation through prostitution’, of which surrogacy is demonstrably legally analogous.<sup>70</sup>

The drafters of the Palermo Protocol offered guidance that ‘once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defense.’<sup>71</sup> As demonstrated in chapters 1.1 and 1.2 of this paper, surrogacy engenders serious risks to the health and wellbeing of the gestational carrier, thus invoking the ‘harm principle’ which restricts freedom of contract.<sup>72</sup> This is not an isolated example of such a phenomenon—for example, contracts to sell organs, even if the seller is a willing signatory, are not enforceable due to discordance with international law and with *ordre public*. Similarly, in the instance of euthanasia, most States prohibit the practice because

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<sup>69</sup> CEDAW (n25) art 6.

<sup>70</sup> ICPD (n23) ¶ 4.9.

<sup>71</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (United Nations, 2004) 270.

<sup>72</sup> Adeline Allen, ‘Surrogacy and Limitations to Freedom of Contract: Toward being more Fully Human’ (2018) 41 Harvard Journal of Public Policy, 753.

to end the life of another human being is a violation of their dignity, whether consensual or not. The willingness of a woman to participate in surrogacy is an insufficient defence for its legal permissibility. In order to fulfil their obligations to protect the human rights and fundamental dignity of women, States are required to prohibit the act of surrogacy in their national legislation.

## 2) The Impact of Surrogacy on the Rights of the Child

Surrogacy not only violates the human dignity and rights of the surrogate woman, but also the child she carries. The preamble to the Convention on the Rights of the Child (CRC) highlights that ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’.<sup>73</sup> Yet, as children are commodified for the benefit of others at the expense of their own wellbeing, the rights of children born via surrogacy are compromised from conception, through gestation, at birth, and throughout the rest of their lives.

Building on the UDHR, the ICCPR, and the ICESCR, the CRC affirms that the family is ‘the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.’<sup>74</sup> By placing a child in a position of planned abandonment and fragmenting parenthood across multiple stakeholders, surrogacy fractures this fundamental unit and thus compromises the child’s wellbeing. In permitting surrogacy, States shirk their duties to accord the ‘widest possible protection and assistance’ to the family unit as laid out in a plethora of international treaties.<sup>75</sup> As such, the best interests of the child are not prioritized, contrary to the principle enshrined in Article 3 of the CRC.

By analyzing the rights of the child to health and identity in international law, Sections 2.1 and 2.2 of this chapter will argue that surrogacy violates the entitlements of children as summarized in the Programme of Action of the ICPD:

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<sup>73</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) preamble.

<sup>74</sup> *Ibid.*

<sup>75</sup> ICESCR (n13) art 10(1); CRC (n67) pp5; see also, ICCPR (n35) art 23. See also, UDHR (n8) art 16.



All States and families should give the highest possible priority to children. The child has the right to standards of living adequate for its well-being and the right to the highest attainable standards of health, and the right to education. The child has the right to be cared for, guided and supported by parents, families and society and to be protected by appropriate legislative, administrative, social and educational measures from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sale, trafficking, sexual abuse, and trafficking in its organs.<sup>76</sup>

Section 2.3 will focus on the links between surrogacy and the sale of children—thus demonstrating a further breach of children’s dignity and wellbeing. The risks posed to their rights are overlooked for the sake of the fulfilment of the ‘faux right’ to use novel technologies to have a child. While the desire to have genetically-related offspring can be emotive and compelling, such an overriding right does not exist within international law and should be weighed against the well-evidenced impact on others.

#### **A. Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health**

The child’s right to the enjoyment of the highest attainable standard of physical and mental health is codified in Article 24 of the CRC. Despite the increasing practice of surrogacy, its negative impact on the healthy development of surrogate-born children has been under-researched and is often disregarded by national laws that permit the process, leaving children as the unintended victims of placing an adult’s desire first.

There is consistent evidence that the risk of poor birth outcomes is higher for children conceived through medically-assisted reproduction

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<sup>76</sup> ICPD (n23), principle 11.

(MAR) than for children conceived naturally.<sup>77</sup> A systemic review of perinatal/IVF studies published by McDonald et. al. concluded that children conceived through IVF, even when not twins or multiples, are at 'significantly increased risk' of pre-term birth, low (<2500g) or very low (<1500g) birth weight, or intrauterine growth restriction (birth weight <10 per cent for gestational age).<sup>78</sup> The World Health Organization (WHO) has noted that 'low birth weight is not only a major predictor of prenatal mortality and morbidity, but recent studies have found that low birth weight also increases the risk for noncommunicable diseases such as diabetes and cardiovascular disease later in life.'<sup>79</sup> In a General Comment, the Committee on the Rights of the Child specifically highlighted attention to low birth weight as one of the necessary interventions that States must take as part of an obligation to reduce child mortality.<sup>80</sup>

Studies in perinatology have shown that the bonding process between a mother and the infant begins in utero. The baby learns to recognize the mother's voice and her scent in amniotic fluid.<sup>81</sup> Oxytocin triggers a hormonally-bonding process between the mother and baby during labour, and furthermore, the odour of the gestational mother is proven to play a soothing role in post-birth adjustment. There is a lack of comprehensive studies on the development of children born from surrogacy in the research field, thus making clear analysis of the full extent

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<sup>77</sup> Roger Hart and Robert J. Norman, 'The longer-term health outcomes for children born as a result of IVF treatment: Part I-General health outcomes' (2013) 19, 3 Human Reproduction Update 232-243; Anja Pinborg et al., 'Congenital anomalies after assisted reproductive technology. Fertility and Sterility' (2013) 99, 2 Fertility and Sterility, 327-332.

<sup>78</sup> Sarah D. McDonald et. al., 'Preterm birth and low birth weight among in vitro fertilization singletons: A systemic review and meta analyses' (2009) 146 European Journal of Obstetrics and Gynecology and Reproductive Biology 2, 138-148.

<sup>79</sup> World Health Organization (WHO), 'WHA Global Nutrition Targets 2025: Low Birth Weight Policy Brief' (2014) <<https://apps.who.int/iris/handle/10665/149020>>.

<sup>80</sup> UN Committee on the Rights of the Child (CRC Committee), 'General Comment No.15 on the right of the child to the enjoyment of the highest attainable standard of health' (17 April 2013) UN Doc. CRC/C/GC/15

<sup>81</sup> Sullivan et.al., 'Infant bonding and attachment to the caregiver: Insights from basic and clinical science' (2011) 38, 4 Clinics in Perinatology, 644.

of the impact of surrogacy difficult. However, credible longitudinal studies on development do suggest that children who experience separation from their gestational mothers are, by the age of seven, more likely than their peers to suffer from adjustment difficulties and to be vulnerable to the effects of maternal distress.<sup>82</sup>

Thus, placing a child in a state of deliberate separation undermines his or her health and wellbeing. States that permit surrogacy fail in their obligation to ensure *'the healthy development of the child,'* as enshrined *inter alia* by ICESCR Article 12(2(a)), and Article 6 of the CRC.<sup>83</sup>

## **B. Identity/Access to origins**

The CRC recognizes the right of children to a name and nationality from birth. It also recognizes a right for them to be in the preferential circumstance of being cared for by *his or her* parents as far as possible:

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.<sup>84</sup>

Surrogacy models vary widely. Some feature two commissioning parties and a surrogate; others require either one or two additional gamete donors; and the assumed legal parentage of a birth mother's husband within many legal systems brings the count of parental claims up to a potential six. In some rare cases, the commissioning parties have been in 'polyamorous' relationships of three or more people, all hoping to become

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<sup>82</sup> Susan Golombok et al., 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54, 6 *Journal of Child Psychology and Psychiatry* 653.

<sup>83</sup> ICESCR (n13) art. 12(2(a)).

<sup>84</sup> CRC (n74) art 7(1).

parents together; thus raising the number of participants yet again.<sup>85</sup> To varying degrees too difficult to socially- or medically- determine, all six adults have a claim to be the baby's 'parents' in some sense—an unnatural phenomenon that can deny the baby a stable family structure. The fragmentation of parenthood across more than two individuals inevitably means that the child will not be able to fully enjoy a relationship with his or her parents in **every** capacity—genetically, socially, and through perinatal biology (a situation which can be readily distinguished from processes like adoption where an 'existing' child's needs are met following abandonment—as distinct from the pre-conception planned abandonment of surrogacy to satisfy the desires of adults). In most scenarios involving a third-party donor, the child will not grow up to know the genetic lineage of the gamete donors involved in his or her conception, nor the mother by whom he or she was carried for nine months, and birthed. This deliberate withholding of information constitutes a further violation of Article 8:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.<sup>86</sup>

The negotiation records of the Working Group on the CRC infer that the term 'identity' refers to 'true and genuine personal, legal and family

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<sup>85</sup> See 'Meet the three men in a polyamorous relationship planning to start a family with their sisters' help' *The Mirror* (16 October 2015) <<https://www.mirror.co.uk/news/world-news/meet-three-men-polyamorous-relationship-6638612>>.

<sup>86</sup> CRC (n74) art 8(1).

identity'.<sup>87</sup> When this right is applied within the context of international adoption, the Committee on the Rights of the Child ('the Committee') has urged State Parties to ensure that children have the right to access information about their biological parents<sup>88</sup>. The same committee has also raised specific concerns about States that permit 'anonymous births' by simply entering 'x' as the mother on the birth certificate and has called upon them to take all necessary measures to prevent the practice.<sup>89</sup> Unlike the case of a single mother, in which one parent's name is entered, 'anonymous births' render children with no identifiable parents at all. This differs even from scenarios in which the child is adopted—adopted children generally have opportunities to access the names on their original birth certificate later in life.

Some States have undertaken to ensure a donor register that allows surrogate-born children to access medical information regarding heightened risks to particular diseases.<sup>90</sup> However, such recent initiatives do not protect the rights of many children born before the creation of the register; nor do they remedy the separation of a child from knowing his genetic origins. Albert Frantz, himself born through donor-conception, draws attention to the emotional effects of being denied the Rights articulated under Articles 7 and 8:

We want a natural relationship with our natural parents and that doesn't exclude a relationship with the parents whom we're not genetically related to. But many of us do crave that relationship

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<sup>87</sup> Working Group on the Convention on the Rights of the Child, 'Report of the Working Group on a Draft Convention on the Rights of the Child' (1985) UN Doc. E/CN.4/1985/6 4 Annex 11, 1, ¶ 35.

<sup>88</sup> CRC Committee, 'Concluding Observations: Armenia' (26 February 2004) UN Doc. CRC/C/15/Add.225, ¶ 38.

<sup>89</sup> CRC Committee, 'Concluding Observations: Luxembourg' (31 March 2005) UN Doc. CRC/C/15/Add.250 ¶ 28, 29.

<sup>90</sup> See, for example, UK Government, Human Fertilisation and Embryology Act (1990); UK Government, Human Fertilisation and Embryology Act (2008).

because, without it, something deep is missing emotionally and psychologically.<sup>91</sup>

Research in behavioural genetics by Professor Robert Plomin of Kings College London shows that a great deal of our personality traits are hereditary. Nature, Plomin argues, has a strong pull over nurture in our psychological development.<sup>92</sup> A child's likeliness of experiencing bullying has a heritability of over 70 per cent; their accident-proneness, 51 per cent, and even the length of time preferred to be spent watching TV, 45 per cent.<sup>93</sup> Significant skills and attributes are pre-disposed to us at conception. In situations of adoption, a loving, stable, non-genetically related family placement is intended to place first the needs of the child, to whom the option of a biological family has been denied by often tragic circumstances. Adoption is a child-centred institution that restores and protects human rights. Surrogacy, on the other hand, treats children as commodities, and is adult-centred. To knowingly conceive a child with the intention to sever his belonging with his or her genetically-related parents and siblings—who would best understand his or her natural identity, character attributes, weaknesses, and strengths—is a deliberate compromise of their optimal wellbeing.

Though countries face pressure from surrogacy lobbies to civilly register surrogate-born children as if they were born of the commissioning parties, the implications that this would erode legal truth and sever children from important social and medical information are cause for widespread concern. Yet, even where countries seek to rectify this by upholding legal truth on a birth certificate, problems remain: including the risk of violating

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<sup>91</sup> Juxhina Malaj, 'The Impact of Reproductive Technology on Identity: An interview with Albert Frantz' Teds Vienna (27 July 2020) <<https://www.tedxvienna.at/blog/the-impact-of-reproductive-technology-on-identity/>>.

<sup>92</sup> Robert Plomin, *Blueprint: How DNA Makes Us Who We Are* (MIT Press, 2018).

<sup>93</sup> Attributed to Robert Plomin in 'Modern genetics will improve health and usher in "designer" children' *The Economist* (November 2019) <<https://www.economist.com/science-and-technology/2019/11/07/modern-genetics-will-improve-health-and-usher-in-designer-children>>.

the right of a child to his/her nationality. In certain instances, children can be left at risk of statelessness when conflicts arise between different governments' interpretations of the validity of a surrogacy contract. In the case of *X & Y*, for example, a heterosexual British couple attempted to bring the twin babies they had commissioned—originating from the commissioning male's sperm and anonymously donated eggs, carried by a Ukrainian surrogate—to the UK following the birth. The Ukrainian administration recognized the British couple as the legal parents of the twins, and thus did not grant the infants citizenship or leave to remain in the territory. At the same time, the UK, where commercial surrogacy is illegal, recognized the Ukrainian surrogate and her husband as the legal parents and did not grant the babies British nationalities and the appropriate entry requirements. As a result, the children were left 'marooned, stateless and parentless'.<sup>94</sup> After a lengthy delay, the UK High Court eventually granted the children exceptional rights of entry, in view of honouring their 'best interests'. However, Justice Hedley clearly noted that such an outcome may not always be possible, depending on the facts of the case. Therefore, it is evident that while a diplomatic solution was found in order to *reinstate* the priority of the child in a surrogacy situation, their wellbeing was undoubtedly jeopardized by this form of international transaction.

In a similar case, the Supreme Court of India, in *Jan Balaz v. Anand Municipality and Others*, was faced with the problem as to whether twin babies conceived via an anonymous Indian donor egg and born by an Indian surrogate to a German commissioning man and woman qualified for Indian citizenship.<sup>95</sup> Such citizenship was essential for the twins to receive passports to be brought 'home' to Germany. Essentially, due to a traditional understanding of citizenship through inheritance, and with no option under Indian law to recognize dual citizenship, the Court was asked to choose whom it deemed the 'real mother'—were the children Indian or

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<sup>94</sup> *Re X & Y* (Foreign Surrogacy), (2008) EWHC (Fam) 3030, 10.

<sup>95</sup> *Jan Balaz v. Anand Municipality & Ors* (2010) AIR Guj 21.

German? The Court found ‘the only conclusion that is possible is that a gestational [surrogate] mother who has blood relations with the child is more deserving to be called the natural mother.’<sup>96</sup> This position allowed for the children to receive the citizenship, and therefore, exit documents. Upon entry to Germany, the commissioning couple underwent a formal adoption process, in line with Germany’s ban on surrogacy and refusal to implicitly endorse the harmful practice by recognizing such contracts. These two examples demonstrate the different approaches governments have taken to solve the problem of retrospective citizenship questions after a surrogacy arrangement has taken place, and thus, unrecognized by one or more of the territories involved.

The number of adults implicated in a surrogacy arrangement has been often discussed with regard to parentage claim tensions. Whereas the focus is normally on situations where a conflict arises, the fragmentation of parentage could potentially result in a situation where *all* adults deny their responsibility to the child, and abandonment ensues. When the child is wanted neither by the surrogate mother, nor by the adults for whom he/she was commissioned (for example, due to circumstances of divorce or dissatisfaction with the child), then the possibility of statelessness and concerns for the welfare of the child intensify. The case of *Baby Manji Yamada v. Union of India & Anor* demonstrates this complexity.<sup>97</sup> Baby Manji was born to an Indian surrogate, via an Indian egg donor and commissioned by a Japanese married couple. However, prior to her birth, the commissioning parties divorced, and Mrs Yamada refused any responsibility of caring for the new child. Indian officials decided, after deliberation, to issue a birth certificate with no named mother on the document.

Mr Yamada, who wished to be a single parent to his daughter with support from his mother, then faced difficulty in transporting her home. The Japanese government required that Mr. Yamada formally adopt the

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<sup>96</sup> *Ibid.*

<sup>97</sup> *Baby Manji Yamada vs Union Of India & Another* (2008) AIR 2009 SC 84.



child and obtain for her an Indian passport before a visa could be obtained. The Japanese government too had problematic restrictions for the child entering their country. Amidst administrative difficulty, a local Indian NGO filed a petition against Mr Yamada taking custody of Baby Manji, claiming that such surrogacy contracts should be invalidated, and the baby should remain in their care. Eventually, after reaching the Supreme Court, Mr Yamada won his battle. The Supreme Court's decision, combined with public interest in Baby Manji's plight, was the catalyst for a movement that would radically change surrogacy law in India over the coming years, rendering surrogacy completely inaccessible to foreigners.

What these cases, and many more, demonstrate is the complex set of legal and societal circumstances into which a commercialized, surrogate-carried child is born. Varied international stances on parentage, contract enforceability, and rights to citizenship jeopardize the rights of a child and unfairly destabilize their social environment during their most crucial developmental stages. The Hague Conference on International Private Law (HCCH) has signified an intention to develop an instrument to govern settlement of cross-border parentage disputes. The agreement would not govern, regulate, or prohibit surrogacy itself, but rather serve to determine the relevant competent authorities and applicable law. However, such a document should be a cause for concern for all States. Even if the outcome avoids expressly accepting the practice of surrogacy, it nevertheless facilitates the transnational process. States will be asked to accept practices carried out abroad, even if they are prohibited domestically, thus completely undermining sovereignty and the State's ability to uphold human rights standards.

Clearly, as a tool developed to restore order to the legal chaos caused by international surrogacy arrangements, this instrument cannot go far enough to restore the rights of a child to fully know and be cared for by his or her parents. Without a universal prohibition on the global trade, harm will inevitably arise from the commodification of children. While courts are then left to wrestle with the elusive question as to what is in the best interests of the child on a case-by-case basis, the analysis above

makes clear that if we are to be truly concerned with that question, the practice of surrogacy must be prohibited.

### C. Sale of Children

The sale of children is clearly prohibited in Article 35 of the CRC:

State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.<sup>98</sup>

The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC) defines the sale of children as:

any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.<sup>99</sup>

Notably, unlike the definition of human trafficking in the Palermo Protocol, the criterion of exploitative purpose is not required to meet the threshold for this crime. Thus, the good intentions of the commissioning parties are irrelevant to the consideration of whether a child's dignity and fundamental freedoms have been compromised.

In their guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, the CRC Committee suggested that surrogacy '*...may* also constitute the sale of children.'<sup>100</sup> Regrettably, this non-committal statement led them to weaken their call for State

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<sup>98</sup> CRC (n74) art 35.

<sup>99</sup> United Nations, Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25th May 2000, entered into force 18th January 2002, U.N. Doc. A/RES/54/263) art 2(c).

<sup>100</sup> CRC Committee, 'Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography' (10 September 2019) UN Doc. CRC/C/156, ¶ 52.

parties to take 'all necessary measures...to avoid the sale of children under surrogacy arrangements' by including 'regulation' as a suggestion.<sup>101</sup> Nonetheless, it at least recognizes the issue as real and concerning. The OPSC leaves no room for doubt as to whether any transaction of a child from one person to another, either in exchange for money *or any other consideration*, constitutes the sale of a child. No form of regulation or safeguarding can alter what is at the core of every surrogacy deal.

In her 2019 report, the UN Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, warned that the sale of children can occur in the context of commercial surrogacy. A report from the Parliamentary Assembly of the Council of Europe (PACE) took the same path, with the rapporteur justifying the focus on the estimated basis that 98-99 per cent of international surrogacy arrangements are for profit.<sup>102</sup> However, neither of these comments went far enough. The emphasis placed on the *commercial* form of surrogacy suggests that in some cases, money does not change hands and the surrogate, motivated through altruism, simply receives expenses only. However, this is an overly-simplistic filter to apply to the practice. Even in situations where money is not transferred, surrogacy still meets the OPSC Article 2 definition of the sale of children because of the reference to 'remuneration *or any other consideration*.' Such considerations may include payments in-kind, such as accommodation, payment of household or grocery bills, medical care and medication bills, etc. All forms of surrogacy, then—not just those deemed to be commercial—meet the criteria identified in Article 2(c) of the OPSC, and thus violate the rights affirmed in the CRC.

In the United Kingdom, where only the 'expenses-only' form of surrogacy is permitted, a 2015 survey of 177 commissioning parties found that five (2.82 per cent) paid between £40,000-60,000 for their surrogacy. Thirteen (7.3 per cent) paid between £30,000 and 40,000, with

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<sup>101</sup> *Ibid.*

<sup>102</sup> PACE report (n58).

the modal average (30.5 per cent) paying between £20,000-30,000. The majority of surrogate mothers (almost 70 per cent) found that the average 'reimbursements' received were between £10,000-15,000. Today, UK surrogacy agency Brilliant Beginnings openly promotes the opportunity for financial gain on their website, confessing 'Let's be straight: UK surrogates do get paid.'<sup>103</sup> They advertise an average payout of £12,000-18,000.<sup>104</sup> They further add that expenses in the UK can include anything from travel costs, treatment costs, maternity clothes, counselling or professional support in connection with surrogacy, childcare costs, and any loss of earnings.<sup>105</sup> It is clear that further payments can be made 'in kind' in a variety of forms.

Notably, even in cases where payments have exceeded this average, no court has ever refused an application for a parentage order due to an unacceptably large financial exchange. Yet, in approving high payments, the High Court has noted unease. Justice Hedley stressed:

I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare.<sup>106</sup>

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<sup>103</sup> Brilliant Beginnings, 'How much can UK surrogates get paid?' < <https://www.brilliantbeginnings.co.uk/how-much-can-uk-surrogates-get-paid/>>.

<sup>104</sup> Kirsty Horsey, 'Surrogacy in the UK: Myth busting and reform' (report) (University of Kent Academic Repository, November 2015) <<https://kar.kent.ac.uk/59740/1/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf>>.

<sup>105</sup> Brilliant Beginnings (n97).

<sup>106</sup> X & Y (n95) 23.

By allowing 'expenses-only' surrogacy reimbursements to take place, governments open the door to commercial surrogacy, rendering courts powerless to close it due to their obligation to prioritize the best interests of the child after the fact in accordance with Article 3 of the CRC. This loophole enables the sale of children to occur with only very passive intervention from the judiciary.

More broadly, the sale of children is egregious because, whether payment is made through cash remuneration or in any other kind, any process of commercialization can change the understanding or significance of what is being bought and sold. It can be at odds with values we associate with the commercialized object and can be instrumental in undermining these values.<sup>107</sup> When, therefore, a human life is commercialized, it jeopardizes the intrinsic worth and fundamental rights of the person, which can lead to further violations of human rights codified in international law.<sup>108</sup>

The payment for a child as a commodity can generate an expectation of receiving a product 'in good condition' to the value of the monetary worth. The process of gestational surrogacy requires the use of IVF technology and, as such, opens the opportunity for gene selection. Embryos can be chosen, or even edited to have, preferential features or a genetic likelihood for success in athleticism or academia.

The high expectations generated by commodification led to the abortion of 'imperfect' babies through termination clauses, as discussed in Chapter 1.3, and the abandonment of those babies born that do not meet the chosen criteria.

In 2019, an ABC news investigation covered the story of surrogate-born baby Bridget Irmgard Pagan-Etnyre, who had been abandoned in the

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<sup>107</sup> Michael J. Sandel, 'What Money Can't Buy – The Moral Limits of Market' (Penguin Books, 2012), 118.

<sup>108</sup> See, for example, ICCPR (n35) preamble.

Ukraine by US parents when it became apparent she had special needs.<sup>109</sup> The famous, though disputed, case of Baby Gammy saw an Australian couple take their healthy baby girl home from Thailand after she was born via surrogacy, leaving her twin brother, born with Down's Syndrome, behind with his gestational mother.<sup>110</sup> Internationally-negotiated political agreements call upon states to take 'effective steps to address the *neglect*, as well as all types of exploitation and abuse, of children, adolescents and youth, such as abduction, rape and incest, pornography, trafficking, *abandonment* and prostitution...'.<sup>111</sup> The prohibition of surrogacy would prevent the commodification of children and thus prevent the unfortunate outcomes of children left unwanted in foreign countries.

The evaluation of a child's worth based on their genetic characteristics or the presence of a disability is a violation of the international principle, embodied in the Universal Declaration on Human Rights (UDHR), that 'the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.<sup>112</sup> The UNESCO Universal Declaration on the Human Genome and Human Rights, endorsed in 1998 by the UN General Assembly, asserts, 'Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics'.<sup>113</sup> The principle of equal prioritization, treatment, care and rights for children with disabilities is further affirmed in the Convention on the Rights of Persons with Disabilities (CRPD), which furthermore states: 'In all actions concerning children with disabilities, the best interests of the child shall

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<sup>109</sup> Samantha Hawley, 'Damaged babies and broken hearts: Ukraine's commercial surrogacy industry leaves a trail of disasters' ABC News (21 August 2019) <<https://www.abc.net.au/news/2019-08-20/ukraines-commercial-surrogacy-industry-leaves-disaster/11417388>>.

<sup>110</sup> *Farnell & Anor and Chanbua* [2016] FCWA 17. Emphasis added.

<sup>111</sup> ICPD (n23) ¶ 6.9, emphasis added.

<sup>112</sup> UDHR (n8) pp1.

<sup>113</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Universal Declaration on the Human Genome and Human Rights' (11 November 1997) art 2(a).

be a primary consideration.’<sup>114</sup> The planned separation of a child from a birth mother, even before conception, as well as an increased risk of abandonment from all stakeholders, is never in his/her best interests.

Therefore, it is clear that surrogacy, in all its forms, constitutes the sale of children according to the definition agreed in the OPSC. A process that deliberately places a child’s wellbeing and human dignity second to the desires of adults must be prohibited universally.

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<sup>114</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 7(2).

### 3) Current Practices under National Laws

Due to the lack of universal agreement in regard to the extent surrogacy should be prohibited, clashing interpretations emerge in the realm of international private law. This chapter explores the diverse legal issues generated through an analysis of regional laws and practices. While approaches vary within and between continents, global trends have emerged. Countries with a high ‘demand’ for commercial surrogacy have witnessed great profitability; until high costs and increasingly protective regulation pushed consumers to look overseas. Countries with a rich supply of ‘raw material’—willing surrogate mothers—in turn have likewise experienced a temporary enjoyment of profit maximization, before exploitation proliferates and triggers prohibition on grounds of protecting human rights. Prohibition frequently pushes agencies to migrate to neighbouring countries, where the cycle repeats. From North America to Asia to Europe, this pattern has spread from region to region. South America and Africa must take heed of the lessons of those who have undergone this painful transformation.

#### A. North America

So-called ‘Big Fertility’<sup>115</sup> has thrived in many parts of the USA, which has been the cradle of modern surrogacy since the first gestational instance took place in 1985.<sup>116</sup> California has often been referred to in this context as the ‘wild, wild west’ of permissive legislation. Laws vary from state to state, encouraging an internal form of ‘reproductive tourism’. Lax laws in some States allow for the issuance of a parentage order *before* birth—thus avoiding post-natal adoption and further restricting the freedom of the

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<sup>115</sup> See Jennifer Lahl, ‘#BigFertility: It’s All About the Money’ (Film, Center for Bioethics and Culture 2018).

<sup>116</sup> Bonnie Johnson, ‘And Baby Makes Four: for the First Time a Surrogate Bears a Child Genetically Not Her Own’ *People* (4 May 1987) <<https://people.com/archive/and-baby-makes-four-for-the-first-time-a-surrogate-bears-a-child-genetically-not-her-own-vol-27-no-18/>>.



surrogate to change her mind. This accommodation of the preferences of commissioning parties has attracted interest internationally, and a number of fertility agencies have reported that over half of their clients are hopeful parents from overseas.<sup>117</sup> An international agreement on parentage will not be a solution to the inherently asymmetrical power dynamic of even domestic surrogacy; nor will it protect women's human rights in the context of commodification; nor will it preserve the vital, integral structure of the family. This dynamic is best presented in the case of *C.M. v. M.C.*, in which surrogate Melissa Cooke was forced to allow custody of the baby she bore to the commissioning male, who had previously asked her to abort the child.<sup>118</sup>

California surrogate agreements are widely thought to be the most costly in the world, with the estimated price per pregnancy in the range of \$90,000-\$130,000. It is for this reason that US commissioning parties increasingly look East for affordable alternatives. As the prices rose, they began to turn their attention to India and the surrounding region at the turn of the 21<sup>st</sup> century.

## B. Asia

The evolution of surrogacy laws in Asia stands as a testament to the failure of uncoordinated action against the practice. While the Arab region has shown a clear stance against the industry—with the practice forbidden in Islam, and its illegality according to Sharia Law confirmed in the rulings of the Federal Shariat Court of Pakistan<sup>119</sup>—other parts of the continent prohibited the practice on a slower, ad hoc basis, resulting

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<sup>117</sup> Tamar Lewin, 'Coming to U.S. for Baby, and Womb To Carry It' (July 5, 2014) New York Times <<https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies>>.

<sup>118</sup> *C.M. v. M.C.* (n19).

<sup>119</sup> *Farooq Siddiqui v. Mst. Farzana Naheed Sh.* Petition No.2/I of 2015, (Federal Shariat Court (FSC), 16 February 2017).

in a demonstration of how the industry simply moves from one State to another to evade protective laws.

Commercial surrogacy was legalized in India in 2002. In the decade that followed legalization, an estimated 25,000 children are now thought to have been born to surrogates in India; with at least 50 per cent delivered to commissioning parties from the West.<sup>120</sup> While US counterparts at the time could offer the 'service' for \$80,000-\$100,000, a surrogate pregnancy in India could be arranged for \$35,000-45,000.<sup>121</sup>

In 2012, the Home Ministry took the significant step of announcing that a medical visa for surrogacy would only be granted to couples who had been married for two or more years, and only if surrogacy was legal in their home country. This drastically lowered India's appeal to a large portion of the surrogate market—often same-sex couples, and/or couples or singles seeking to circumvent bans in their home countries. Finally, in 2015, the Department of Health issued a letter of instruction which restricted surrogacy to national, married (heterosexual) couples, indicating an intent to legislate against commercial surrogacy entirely. A proposed Bill that solidifies further regulation is currently moving through the legislative process.<sup>122</sup>

As a result of the increasingly protective measures, from 2012, clinics in New Delhi simply proceeded to impregnate their contracted mothers with the sperm samples delivered from abroad, and then moved them across the international border to Nepal for the latter part of their pregnancy and birth. The commissioning parties could fly in to collect their child at the appointed time—often timed through the implementation of a caesarean section at 36-38 weeks gestation—and collect the delivered child, at which point the post-partum mother returned home to India. The experience of surrogate mothers travelling across borders in this process

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<sup>120</sup> Priya Shetty, 'India's unregulated surrogacy industry' (2012) 380 *The Lancet*, 1633–1634.

<sup>121</sup> Sharmilla Rudrappa, 'Discounted Life: The Price of Global Surrogacy in India' (NYU Press, 2015) 5.

<sup>122</sup> Government of India, Surrogacy (Regulation) Bill (2020).

heightens parallels of surrogacy to other, more traditional forms of human trafficking. Meanwhile, clinics native to Nepal and Thailand began to multiply and fill the gap in the market left by India, particularly appealing to a market of wealthy singles and couples from Australia.

In 2015, Nepal was struck by a devastating earthquake. The exploitative treatment of women in the surrogacy industry came to the media's attention when the state of Israel reportedly rescued around thirty surrogate-born babies intended for Israeli commissioning parties, while leaving the surrogate mothers behind. Many of the babies taken were under six weeks old, at least nine of which were born prematurely.<sup>123</sup>

During the same year, Thailand also closed its doors as a source for the surrogacy supply chain, in the wake of the scandal of the Baby Gammy case.<sup>124</sup>

Cambodia was the next country in which the demand for contract motherhood to serve overseas clients swelled. Following a surge in high-risk, low-cost fertility services, in 2016 the Health Ministry announced that the Law on the Regulation of Donation and Adaption of Human Cells, Tissues and Organs banning the commercial donation of human organs would be applied to the process of gestational surrogacy in Cambodia thus, in effect, implementing a ban.<sup>125</sup> A permanent prohibition was made the following year by the Ministry of Women's Affairs, ready for implementation in 2020.<sup>126</sup>

As one of the Asian countries yet to prohibit the practice, Laos has emerged as a new global competitor on the 'supply' chain, with

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<sup>123</sup> 'Israeli Parents, Newborns Stranded by Nepali Earthquake' (25 April 2015) The Times of Israel <<https://www.timesofisrael.com/israeli-parents-newborns-stranded-by-nepal-earthquake/>>.

<sup>124</sup> *Farnell & Anor.* (n111).

<sup>125</sup> Sek Odom, 'Surrogacy Ban Temporary as Government Drafts Law' The Cambodia Daily (4 November 2016) <<https://english.cambodiadaily.com/news/surrogacy-ban-temporary-government-drafts-law-120174/>>.

<sup>126</sup> Marie Lamy and Va Sonyka, 'Surrogacy law in the kingdom long overdue' Khmer Times (10 April 2020) <<https://www.khmertimeskh.com/711396/surrogacy-law-in-the-kingdom-long-overdue/>>.

neighbouring Thai clinics reportedly transferring women and frozen genetic material across the border for implantation.<sup>127</sup> These cases unambiguously demonstrate the need for every country to take urgent action to prohibit the practice nationally, which is already mandated in international law. Where there are differences in approach across borders, the industry simply moves from one State to another, intensifying the trafficking process for the contracted women, who are transported to endure the birthing process and ensuing separation whilst far from home.

### C. Europe

Europe's role in the supply and demand of surrogacy varies from country to country. In Europe, surrogacy has been widely prohibited in an increasing number of States which, as of November 2020, stands at twenty-one: Austria, Bulgaria, Croatia, Denmark, Estonia, Finland, France, Germany, Italy, Iceland, Latvia, Lithuania, Malta, Norway, Poland, Slovakia, Slovenia, Spain, Sweden, Serbia, and Switzerland.<sup>128</sup> Lithuania joined this number in June 2020, putting forward a strong example of prohibition that shall provide a model example in the conclusion of this paper. Many countries do not prohibit surrogacy, but consider surrogacy arrangements void and unenforceable, including Belgium, the Czech Republic, and the Netherlands. Other countries do not explicitly prohibit surrogacy, but without definitive laws on the matter, the legality of surrogacy arrangements remain ambiguous: for example, this is the case in Albania, Andorra, Bosnia-Herzegovina, Hungary, Monaco, Romania, and San-Marino. Surrogacy is permitted in a few countries such as the UK and Greece, but only if payments are expenses-only. Only a few countries—including the Russian Federation, Ukraine, and Georgia—authorize both

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<sup>127</sup> See Jonathan Head, "Baby factory' mystery: Thailand's surrogacy saga reaches uneasy end" (26 February 2018) BBC News <<https://www.bbc.com/news/world-asia-43169974>>.

<sup>128</sup> As of August 2020.

commercial and expenses-only surrogacy models.<sup>129</sup> As more and more countries have implemented bans or regulations, the predictable reaction of clinics materializing across borders can be observed. Ukraine has emerged as a front runner destination for 'supply' in the surrogacy market worldwide. Popularity has been attributed to the financial crisis confronted by Ukrainian nationals, and legal permissibility.

The European Parliament has taken a clear stance against the practice. The Resolution on Priorities and Outline of a New EU Policy Framework to Fight Violence against Women (2011) explicitly condemns 'the serious problem of surrogacy which constitutes an exploitation of the female body and her reproductive organs.' It emphasizes that 'these new reproductive arrangements, such as surrogacy, augment the trafficking of women and children and illegal adoption across national borders.'<sup>130</sup> This stance was consolidated further by the adoption of the 2014 Annual Report on Human Rights and Democracy in the World, which expressed that the practice 'undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity,' and thus that the Parliament 'considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments.'<sup>131</sup>

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<sup>129</sup> Council of Europe, Committee on Bioethics, 'Surrogacy: Addendum to replies to questionnaires on access to medically assisted procreation' (5 January 2017) <<https://rm.coe.int/inf-2016-4-addendum-e/168077cac9>>. See also European Parliament, Citizen's Rights and Constitutional Affairs, 'A Comparative Study on the Regime of Surrogacy in EU Member States' (2013) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURLET\(2013\)474403](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURLET(2013)474403)>. See also European Parliament, Legal Affairs Briefing, 'Regulating International Surrogacy Arrangements - State of Play' (August 2016) <[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_BRI\(2016\)571368](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2016)571368)>.

<sup>130</sup> European Parliament, Resolution on Priorities and Outline of a New EU Policy Framework to Fight Violence Against Women (5 April 2011) 2010/2209(INI) ¶ 21.

<sup>131</sup> Committee on Foreign Affairs (EU), Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter (30 November 2015) 2015/2229(INI) ¶ 114.

Yet, the European judicial institutions have opened the door for the practice to continue. In *Society for the Protection of the Unborn Child v. Grogan*, the Court of Justice of the European Communities (ECJ) ruled that while it was within the discretion of an EU Member State to prohibit access to certain medical 'services' (in this case, abortion), the same State could not restrict the free movement of their citizens to receive access to the service within other Member States in which it is legal.<sup>132</sup>

As a result, parents from countries with a partial or complete ban have sought surrogacy in other EU Member States where the practice is legal. What *Grogan* does not foresee, however, is how to deal with the rights, citizenship, and claims to family of the resultant child of a reproductive 'service' which does not end a life, but creates one. Cases have proliferated before the European Court of Human Rights (ECtHR) regarding problematic cross-border surrogacy situations that leave children 'marooned, stateless and parentless'.<sup>133</sup> In response, the ECtHR has made some widely criticized rulings relating to the practice, in an attempt to resolve the fuzzy standard of the best interests of children where these interests were initially neglected. In the cases of *Labassée v. France* and *Menesson v. France*, the court compelled France to set aside its own *ordre public*, which defines a child's mother as the woman who gave birth to him or her.<sup>134</sup> In *Paradiso and Campanelli v. Italy*, the court condemned Italy for revoking custody of an infertile couple a child whom they had purchased from a Russian fertility clinic for €45,000.<sup>135</sup> In *Laborie and Others v. France*, ECtHR opened the door further to normalizing surrogacy as a method to construct a non-traditional family.<sup>136</sup>

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<sup>132</sup> *Society for the Protection of the Unborn Child v. Grogan and others* (Case C-159/90) (1991) ECR 4685.

<sup>133</sup> *X & Y* (n95) 10.

<sup>134</sup> *Labassée v. France* App no 65941/11 (ECtHR, 26 June 2014); *Menesson v. France* Application no. 65192/11 (ECtHR, 26 June 2014).

<sup>135</sup> *Paradiso and Campanelli v. Italy* Application No 25358/12 (European Court of Human Rights (ECtHR), Grand Chamber, 24 January 2017).

<sup>136</sup> *Laborie v. France* Application no. 44024/13, (ECtHR, 19 January 2017).

In each of these decisions, the Court has incrementally eroded the sovereignty of States, undermining national law in order to resolve complex situations that have already sacrificed the best interests of the child.

In 2019, the issue of surrogacy came to the forefront of European law when the ECtHR provided its first ever advisory opinion, on the request of France, which tackled the issue of civil registration in the context of surrogacy. The Court was asked whether States had an obligation to transcribe the foreign birth certificate of a child born by surrogacy when the details list the 'commissioning mother' as the 'legal mother'. The Court took the opportunity to opine on a much broader question than it had been asked—as whether or not the State had a general duty to provide for the recognition of the legal relationship between such a child and the 'intended mother'. The resulting answer, regrettably, left the door open to surrogate exploitation worldwide. The Court affirmed there was in fact such an obligation to legally recognize the relationship between a child and a commissioning female, even in the absence of a genetic link, thereby undermining the laws of twenty-three States that explicitly and implicitly prohibit surrogacy and, in the process, pushing for surrogacy to be *de facto* permitted.<sup>137</sup>

This failure of the ECtHR to condemn the practice delays a growing resistance of States to surrogacy in a way that could jeopardize the rights and wellbeing of thousands of women. A clear prohibition across the region would minimize the problem of citizenship disputes where different countries recognize different members of the contract as legal 'parents'. Forbidding agencies from capitalizing on contract pregnancy—whether in exchange for commercial payments, or the still-significant allowances for 'pregnancy expenses'—would minimize the likelihood of couples seeking out women abroad for this purpose, as well as minimizing the recruitment drive for vulnerable women to offer themselves for exploitation in this way.

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<sup>137</sup> Grand Chamber of the European Court of Human Rights, 'Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother' (10 April 2019) Request no. P16-2018-001.

## D. South America

With the supply of Asian surrogate women decreasing due to the enactment of laws to protect their human rights, the global industry has begun to turn towards Africa and South America. Few countries in South America have clear legislation on surrogacy—leading to what can be dangerously interpreted as a ‘free-for-all’.

The state of Tabasco in Mexico emerged as a capital for South American surrogacy after both India and Thailand closed their doors. The region has the highest unemployment rate throughout Mexico. However, following the trend set before them, the local government proceeded to restrict the practice to heterosexual, Mexican commissioning parties in 2017, thus in effect, halting the success of the industry in this ‘supply’ country.<sup>138</sup>

Since the surge and decline of Mexico’s participation, Colombia has emerged as one of the countries most eager to embrace fertility tourism, with Global Star Surrogacy proudly advertising online that ‘the average cost of surrogacy can be \$80,000-\$100,000 less [in Colombia] than the surrogacy costs in the United States.’ It continues, ‘Colombia is the most economical, low-cost gay-friendly surrogacy country.’ Time will tell whether Colombia too will see an imperative for change to protect women and children, shifting the surrogacy ‘hot spot’ across borders yet again.

## E. Africa

Similar to South America, very few African states have laws that explicitly address surrogacy, other than South Africa, which permits the practice in its ‘expenses-only’ form. Kenya, Nigeria, and Ghana have therefore become increasingly popular destinations for ‘maternity tourism’. With the general

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<sup>138</sup> Victoria Burnett, ‘As Mexican State Limits Surrogacy, Global System Is Further Strained’ (23 March 2017) The New York Times <<https://www.nytimes.com/2017/03/23/world/americas/as-mexican-state-limits-surrogacy-global-system-is-further-strained.html>>.



trend of international surrogacy being one in which couples from wealthier, developed nations commission women of greater economic vulnerability, African women stand vulnerable to exploitation. This is especially true in countries where the maternal mortality rate (MMR) already stands higher than average.

Banning surrogacy under human trafficking provisions in Africa is essential, given the region's long-term struggle against the crime in its wider form. UNESCO first reported as early as 2006 that in Nigeria, home to one of the worst records on human trafficking worldwide, victims are being increasingly exploited for 'baby harvesting'— term popularized in the media to depict the act of impregnating a women, confining her until birth, and profiting from the sale of the child in the international adoption market, or for slave labour or sexual exploitation.<sup>139</sup>

The colonial connotations of the wealthy white profiteers commodifying African bodies to meet Western demands is perhaps most stark here. Concerted action is required from Western countries who create the 'demand' for the sale of children via surrogacy to forbid surrogacy arrangements, particularly in the international context. African countries must act early to prohibit reproductive exploitation, rather than allow the 'wave effect' to sweep through the continent as it had in Asia. Such a prohibition would set a standard which honours commitments to combat human trafficking worldwide, and to affirm the human rights of all people, particularly women.

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<sup>139</sup> UNESCO, 'Policy Paper No.14.2(e): Human Trafficking in Nigeria: Root Causes and Recommendations' (2006) UN Doc. SHS/CCT/2006/PI/H/2, p31.

## 4) Evaluation & Recommendations

This chapter assesses the proposed solutions to the challenges of surrogacy, determining the shortcoming of each proposal to adequately deal with the extent of human rights violations generated by this practice. Finally, the paper offers recommendations to address the concerns identified in previous chapters.

### A. Evaluation

Various international experts and entities have acknowledged the plethora of human rights issues that arise in every surrogacy arrangement. The UN Committee on the Rights of the Child first drew attention to the need for action in 2014, issuing a General Observation stating that ‘commercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children’s rights’.<sup>140</sup> In 2019 they reaffirmed this link, stating that surrogacy ‘may...constitute sale of children.’<sup>141</sup> The 2016 PACE report similarly condemned commercial surrogacy, recognizing not only that it ‘reduc[ed] children to commodities to be bought and sold...putting them at risk of abandonment or abuse’, but that it also exploits surrogate mothers who cannot give their consent ‘freely, unconditionally, and with full understanding of what is involved’, especially when a ‘life-changing’ amount of money changes hands’, which can ‘put into question the validity of the consent given.’<sup>142</sup>

While this helped to draw attention to the commodification of children, these comments all left the door open for the possibility of ‘regulated’ commercial surrogacy, and it did not address the rights violations that occur even in ‘expenses-only’ arrangements.

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<sup>140</sup> CRC Committee, ‘Concluding observations on the consolidated third and fourth periodic reports of India’ (13 June 2014) UN Doc. CRC/C/IND/CO/3-4, ¶ 57(d).

<sup>141</sup> CRC Committee, (n101) ¶ 52.

<sup>142</sup> PACE report (n52).

The UN Special Rapporteur on the Sale and Sexual Exploitation of Children released two reports on surrogacy in 2018 and 2019, respectively. The Rapporteur affirmed the concerns of the CRC Committee regarding commercial surrogacy and the sale of children. However, rather than condemning the practice, she called for regulation, recommending, amongst other things, 'safeguards', including:

...either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother...<sup>143</sup>

The argument that payments are made *prior* to the transfer of the child is advanced to circumvent the accusation that a child is being handed over in exchange for money. Rather, it is argued, the payments are simply for the services of the surrogate. Such a proposal allows supporters to deny that a pre-born child is a 'person', and thus refutes that payments made while the child is in utero result in the commercialization of a person's life. The 'solution' has clear flaws. Payments made for a custom car to be created and eventually transferred over the course of a nine-month period are not in exchange for the service of the car dealer, but for the car itself. A refusal to hand over the car at the end of the agreed period without returning payments would result in a disgruntled client with grounds to take the dealership to court. Similarly, a commissioning couple would not

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<sup>143</sup> UN Human Rights Council, 'Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material' (15 January 2018) UN Doc A/HRC/37/60, ¶73.

be satisfied to learn that, having handed over \$130,000 over a nine-month period, they had paid merely for the surrogate's services and would not be receiving the child. It is very clear what the payments are made for.

Perceiving a gap in legal guidance, a group of experts met at the Hague Conference on International Private Law (HCCH) in 2017,<sup>144</sup> and determined that an international legal instrument on the matter was a feasible goal. The Council on General Affairs and Policy (CGAP) of the HCCH later mandated the group to develop a general private international law instrument on the recognition of foreign judicial decisions on legal parentage, and a separate protocol on the recognition of foreign judicial decisions on legal parentage rendered as a result of international surrogacy arrangements.

However, while this future instrument may provide guidance on how to settle parentage disputes where they arise between adults of differing citizenships, the scope of the still-developing instrument does not propose a framework for considering whether the abusive process of surrogacy as a whole should be prohibited—starting rather from an assumption that surrogacy is already considered legal. Though the instrument could provide a reference for Courts addressing complex parentage matters, it will not avoid the fact that the sale of a child or the exploitation of a woman has already taken place. Moreover, there is no adequate solution to determining parentage that does not cause the separation of a child from either his/her birth mother *or* genetic mother, thus having a detrimental effect on the rights, dignity, and wellbeing of the most vulnerable parties involved.

Adoption, rather than the transcription of inaccurate birth certificates in the case of non-genetically related parents, could be one approach to upholding the right of the child to have access to his/her family history and genetic information. On one hand, this approach does allow biological truth to be upheld in law and in the child's own records.

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<sup>144</sup> Having been commissioned for this work in 2015. See Hague Conference on International Private Law (HCCH), 'The Parentage/Surrogacy Project' <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>>.

On the other, this partial solution again is insufficient to address the core issue of the trade—the commodification of a child, and a woman’s body, as a product for sale. Furthermore, the delayed step could result in a deferral of responsibility from the commissioning parties, who may decide *not* to adopt upon birth—resulting in legal chaos whose implications mainly fall on the child.

The giving or withholding of payment, the obtaining of full consent, and the affirmation of biological truth on a birth certificate, even together, cannot repair the negative impact on a child and a woman’s physical and emotional health following separation at birth. Surrogacy cannot take place without commodifying and denigrating the dignity of a person. Nor can any ‘solution’ resolve the fundamental fracturing of the traditional family unit which is cherished in the CRC as the ‘natural environment for the growth and well-being of all its members and particularly children’.<sup>145</sup>

## **B. Recommendations**

The proposals outlined above are insufficient to address the concerns outlined in this paper. None can fully avoid the exploitation of women and children involved in all forms of surrogacy; and none can address the slow rollover of bans from country to country, bringing harm across borders to impact one nation and its women at a time. In light of the shortcomings of proposed international solutions, and in consideration of all the arguments outlined in this paper, ADF International recommends that each state protects their citizens by following the recent example set by Lithuania in adopting a ‘resolution to condemn all forms of surrogacy’,<sup>146</sup> which comprehensively prohibited surrogacy in the following manner:

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<sup>145</sup> CRC (n74) preamble.

<sup>146</sup> Seimas of the Republic of Lithuania, ‘Resolution on condemning all forms of surrogacy’ (25 June 2020) No XIII-3160.

- 1) **A grounding in international law:** The Lithuanian text introduces its protections by noting the incompatibility of surrogacy with human rights principles. The drafters invoked the principle of human equality found in Article 1 of the UDHR, alongside the call for all States Parties to prevent the abduction, sale of, or traffic of children for any purpose and in any form in Article 35 of the CRC. The resolution next refers to the United Nations Slavery Convention's definition of slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised (Article 1)', and to the Convention on Human Rights and Biomedicine's prohibition of financial gain and disposal of a part of the human body (Article 21).
- 2) **Recognition that surrogacy specifically violates commitments to combat human trafficking and the sale of children:** The text unequivocally condemns surrogacy as 'a driver of human trafficking' and 'a form of the sale of children' by connecting the obligations already placed on States by the Palermo Protocol and the CRC to actions necessary to combat the practice of surrogacy.
- 3) **Unequivocal condemnation of all forms of surrogacy:** The text emphasizes 'that women and children are subject to the same forms of exploitation and both can be regarded as commodities on the international reproductive market, and that these new reproductive arrangements augment the trafficking of women and children and illegal adoption across national borders.' Though references to a 'reproductive market' can often be construed as applying only to commercial surrogacy transactions, the text is careful to equally condemn 'expenses-only' arrangements too. The text later states that it 'condemns all forms of surrogacy as they entail instrumentalization of women and children' and insists that 'any form of surrogacy, both the altruistic and commercial ones, is a modern form of slavery

and trafficking in human beings' and 'points out the European Parliament, which has condemned the practice of surrogacy on several occasions, has never distinguished between its altruistic and commercial aspects.'

- 4) **Differentiation between the harmful practice of surrogacy from the good practice of adoption:** The text stresses that 'in their essence, surrogacy and adoption are distinct practices that reflect two fundamentally different approaches to the rights of the child, since adoption is linked to the specific needs of the already born child, and surrogacy is focused on adult desires with regard to a non-existing child.' The text goes on to underscore that while surrogacy 'involves deliberate termination of existing family relationships,' adoption 'is aimed at creating family for a de facto abandoned child' and therefore recommends that 'couples unable to have children of their own should go for adoption rather than surrogacy, the former being in the best interests of the child.'
- 5) **Acknowledgment of the international legal 'chaos' created by surrogacy:** The text notes the complications that arise from parental rights being claimed on different genetic, biological, or legal bases, leading to chaos and unresolvable, competing claims both in national and international situations.
- 6) **A refusal to seek solutions through 'regulations', which have been proven insufficient:** The text closes the door to manipulation through regulations which allow the practice to covertly continue by noting that 'the attempts by states to regulate surrogacy in law have only given rise to reproductive tourism and increased the exploitation of women and trafficking in children in poor countries.' Indeed, Lithuania committed to 'take active steps, at the international level...to ban surrogacy as a form of trafficking in human beings and women.' Such a proactive response is particularly relevant in light of international

conferences such as the HCCH, which have the potential to see surrogacy legalised in States via the 'back door'.

- 7) **A reaffirmation of the sovereign right of States to refuse to recognize surrogacy arrangements:** The text calls upon the government to exercise its right to decline recognitions of parentage claims based on surrogacy arrangements. It also stresses that, in declining to recognize parentage, the State has the right to turn to adoption procedures formalized under the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption.
- 8) **Introduction of penalties for enablers and facilitators of the practice:** The text urges countries to impose heavy fines on those partaking in international surrogacy agreements, including mediation agencies, healthcare institutions, lawyers, and medical staff. By specifically targeting agents of the industry, the legislation has 'teeth' and penalizes the culprits who manipulate situations of emotional, social, and economic vulnerability. Such legislation tackles the root of exploitation to secure the freedom and safety of women, children, and families.

Such an approach proactively builds on the reactionary prohibitions of countries that have seen the true face of the surrogacy industry. It is guided by the real best interests of children, rather than the desires of adults, and finds its footing in shared international human rights standards. Lithuania is a recent and compelling example; but it is to be hoped that it will become the gold standard for many countries to join them with a strong stance in support of women, children, families, and human dignity.





ADF INTERNATIONAL

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