



Surrogacy | *White Paper* World**Youth**Alliance

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INTRODUCTION

Surrogacy as a means of becoming parents for those who are unable to have children naturally has proven to be one of the most controversial practices of our time.¹ A surrogacy agreement might be welcome in some countries and penalized with imprisonment in others. Moreover, this can even happen within the same country.² Therefore a unified approach is needed more than ever in order to avoid cross-country controversies with huge human rights implications.³

Commercial surrogacy has become a widespread business in some areas, especially in India, where it represents an industry worth several hundreds of millions of dollars every year.⁴ General contract law may appear to control surrogacy as commercial activity, but in practice raises several human rights concerns due to the subject of the contract being human beings.⁵ It is not clear whether surrogacy agreements belong to the group of sale contracts or to that of provision of services.⁶ On the other hand, the presence of some elements typically related to those contracts makes it difficult to regulate them only within family law.⁷

The practice of surrogacy also implicates significant human rights concerns related to family, legal status, and nationality rights, among others.⁸ These potential human rights violations need to be examined in the development of regulations and laws regarding surrogacy, including within the use and application of contract and family law. As recognized in the Universal Declaration of Human Rights, human dignity is at the “foundation of freedom, justice and peace in the world.”⁹ Therefore, it must also be central to discussions of surrogacy in practice, as must “the equal and inalienable rights of all members of the human family.”¹⁰

¹ Royal Commission on New Reproductive Technologies, *Proceed with Care: The Final Report of the Royal Commission on New Reproductive Technologies* 683-84 (1993), available at <http://publications.gc.ca/site/eng/472278/publication.html>.

² See *infra* Section II.A.5 Countries with decentralized legislation.

³ Yasmine Ergas, *Thinking 'Through' Human Rights: The Need for a Human Rights Perspective With Respect to the Regulation of Cross-border Reproductive Surrogacy*, INTERNATIONAL SURROGACY AGREEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL (Trimmings, K & Beaumont, P, eds. 2013) [hereinafter INTERNATIONAL SURROGACY AGREEMENTS].

⁴ Kari Points, THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji 3* (2009), available at <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf>. In light of difficult cases related to international surrogacy, India is considering banning foreign surrogacy. *India to ban foreign surrogate services*, BBC NEWS, Oct. 28, 2015, <http://www.bbc.com/news/world-asia-india-34655084>.

⁵ See generally Susan A. Ferguson, *Surrogacy Contracts in the 1990's: The Controversy and Debate Continues*, 33 DUQ. L. REV. 903 (1995).

⁶ See *infra* Section I.A.

⁷ Hague Conference on Private International Law, *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, Convention 29 (May 1993), art. 4(c)(4) (“the consent of the mother, where required, has been given only after the birth of the child”). This Convention has been ratified by most UN Member States, although not by Russia, the Republic of Korea or Japan.

⁸ See *infra* Section I.C.

⁹ Universal Declaration of Human Rights, G.A. Res. 217A, Preamble, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹⁰ *Id.*

Surrogacy is “a practice whereby a woman becomes pregnant with the intention of giving the child to someone else upon birth.”¹¹ Surrogate motherhood is an agreement between two parties: a surrogate mother, who carries a baby and gives birth, and another party, usually a woman who either cannot conceive or carry a baby successfully, or even a woman who does not want to be pregnant herself.¹² Historically, some have made the distinction between traditional surrogacy and gestational surrogacy.¹³ The first consists of a woman both providing the genetic material (as biological mother) and carrying the pregnancy, whereas in the second the surrogate mother is not genetically related to the baby. Her role is limited to pregnancy and birth.¹⁴

Surrogate motherhood existed in early human civilizations. There are some examples in the Code of Hammurabi and in the Bible’s Old Testament, although nowadays its practice presents both new technological and ethical elements and controversies.¹⁵ The first documented agreement for surrogacy by means of artificial insemination took place in 1976.¹⁶ However, the first judicial decision regarding surrogate motherhood burst onto the scene in 1988 in the United States,¹⁷ and several other American courts took up the issue in the years that followed.¹⁸ Those decisions held that surrogacy contracts were void for several reasons and commonly found a parallel between surrogacy and child trafficking.¹⁹ Nevertheless, this tendency changed during the following years, and surrogacy became a legally accepted practice both in several parts of the United States and in other countries, despite the fact that many jurisdictions consider these agreements void.²⁰

This paper will analyze the legal framework surrounding surrogacy, both at the international (including regional) and national levels, as well as seek to understand judicial

¹¹ A COMPARATIVE STUDY ON THE REGIME OF SURROGACY IN EU MEMBER STATES 12, EUROPEAN PARLIAMENT (2013) [hereinafter SURROGACY IN EU MEMBER STATES], available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET%282013%29474403_EN.pdf.

¹² Swapnendu Banerjee, *Gestational surrogacy contracts: altruistic or commercial? A contract theoretic approach*, 81 THE MANCHESTER SCHOOL 438, 439 (2013).

¹³ Traditional surrogacy can be referred as “straight surrogacy” or “natural surrogacy”. Gestational surrogacy is also called “host surrogacy.” See generally Banerjee, *supra* note 12.

¹⁴ Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN’S L.J. 245, 247 (2012).

¹⁵ Claire Fenton-Glynn 2014, *Human Rights and Private International Law: regulating international surrogacy*, 10 J. PRIV. INT’L L. 157, 157 (2014).

¹⁶ José López Guzmán & Ángela Aparisi Miralles, *Aproximación a la problemática ética y jurídica de la maternidad subrogada (An approach to the legal and ethical problem of surrogate motherhood)*, 23 CUAD. BIOÉT. 253, 257 (2012).

¹⁷ Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perceptive*, 20 WM. & MARY J. WOMEN & L. 423, 428 (2014) In the *Baby M* case, the Supreme Court of New Jersey ruled that surrogacy contracts were against public policy. However, it remanded the case to the family court to decide custody based on an analysis of what was in the “best interests of the child,” a common principle in family law.

¹⁸ See, e.g., *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992); *Huddleston v. Infertility Ctr. of America Inc.*, 700 A.2d 453 (Penn. 1997); *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998).

¹⁹ Margalit, *supra* note 17, at 429.

²⁰ *Id.*

precedents and other relevant legal aspects surrounding the practice. The paper will address the human rights implications not only with regard to the surrogate mother, but also concerning the child. It will also provide an overview of surrogacy laws from around the world and those related to regional and international bodies.

I. LEGAL ANALYSIS OF SURROGACY LAW

A. The legal nature of surrogacy agreements

The formalization of surrogacy practices usually relies on contract law. Since surrogacy is an agreement between two parties, in which one pledges to perform a positive obligation either freely (altruistic surrogacy) or in exchange for economic consideration (commercial surrogacy), it seems logical to apply the classical rule of the free will of the parties as the supreme law. But this principle—one of the most important in contract law—has several limitations stemming from the nature of contract law itself.

A.1. Commercial surrogacy

Commercial surrogacy contracts present several differences from other standard private agreements (e.g. contracts of sale). First, the buying party is usually economically more powerful than the woman who carries the child,²¹ which can lead to manipulation of the latter by the former.²² This is particularly concerning in developing countries where surrogacy is legal and widespread.²³ Women may engage in surrogacy arrangements which may have lasting effects on their own health and fertility because they are in dire financial circumstances.

Second, it is relatively common for changes to arise from the initial conditions that motivated the agreement.²⁴ Changed circumstances can include death or health complications of the fetus, medical problems of the woman who bears the child, divorce, loss of legal capacity, etc. These difficulties have already led to unenforceable contracts in surrogacy arrangements.²⁵ The case of Baby Gammy is a good example of the difficulty of contract enforceability. After a pre-natal diagnosis of Down syndrome, Gammy's Australian intended parents asked the Thai surrogate mother to abort him and only carry his twin to term.²⁶ She refused, and the intended parents left Gammy with her in Thailand while taking his sister home to Australia.²⁷ Thailand

²¹ Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 236 nn.93–97 (2009).

²² Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 341 (2004-05).

²³ Margalit, *supra* note 17, at 431.

²⁴ *Id.* at 436.

²⁵ *Id.* at 437.

²⁶ *Calls for clearer surrogacy rules after Thai Down's case*, BBC News (Aug. 3, 2014), available at <http://www.bbc.com/news/world-asia-28627374> [hereinafter *Calls for clearer surrogacy rules*, BBC News].

²⁷ *Id.*

later enacted legislation to ban commercial surrogacy, to end the perception that “Thailand is a baby factory” for foreigners.²⁸

A.2. Altruistic surrogacy

Altruistic surrogacy avoids issues related to economic incentives, but still implicates a foundational principle of contract law, namely the principle of *contra bonos mores*, under which contracts are void if they violate public policy.²⁹ This notion comes from Roman law³⁰ and refers to clauses or terms of agreement that may be against the public good (e.g., incentive to crime, obligation prejudicial to the feeling of a third party or offensive to decency or morality).³¹ A surrogacy agreement may imply at least one of these consequences.³² There is no consensus on whether surrogacy agreements entail practices against public policy. Those who base their objections on this general principle of law mainly do so out of the belief that the parties treat the newborn child as merchandise.³³

Some legal scholars and practitioners have argued that the surrogacy agreement does not belong to the sale contracts group but it rather constitutes a contract for the provision of services.³⁴ This approach takes into account the fact that the woman carries a baby for nine months, and therefore performs a service. But it fails to grasp the whole picture, in which an exchange does in fact take place. The surrogacy agreement is not only a contract for the provision of services, but it also involves a delivery: handing the child over to the intended parents.

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B. Surrogacy as a part of family law

Some others have emphasized the relationship between surrogacy agreements and adoption laws. Most of these agreements present a clear analogy with adoption, since the biological mother gives her child up for adoption. In this case, commercial surrogacy would be illegal because the true and primary intention of the biological father and his spouse—if she is not the genetic mother—is that the biological mother gives up her parental rights to the newborn in

²⁸ *Thai parliament votes to ban commercial surrogacy trade*, BBC News (Nov. 28, 2014), available at <http://www.bbc.com/news/world-asia-30243707>.

²⁹ *Black's Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS.

³⁰ 1 QUESTIONS OF INTERNATIONAL LAW 59 (G. Haraszti, ed. 1977).

³¹ *Black's Law Dictionary*, *supra* note 29.

³² For instance, the German *Bürgerliches Gesetzbuch* (BGB) §138(1), states that any transaction violating public policy is void. Similarly, the state of Louisiana has decided that “a contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.” LA. CIV. CODE § 2713 (2015).

³³ See, e.g., Ferguson, *supra* note 5, at 906; Denise E. Lascarides, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 35 HOFSTRA L. REV. 1221, 1240 (1997).

³⁴ Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J.L. & MED. 243, 250 (1984).

exchange for money.³⁵ Nonetheless, even if the analogy seems apt on the surface, surrogacy is essentially different from adoption, because it gives away a future child before she has been conceived. International adoption law forbids surrendering a child for adoption before birth.³⁶

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Therefore, if surrogacy were categorized as adoption, it would run contrary to this international instrument.

Moreover, adoption proceedings include screening potential parents, whereas surrogacy typically does not.³⁷ Professor Julie Shapiro of University of Seattle School of Law points out that natural parents also do not undergo any screening to determine whether they will be fit parents.³⁸

However, surrogacy differs from natural childbearing in several key aspects. Whereas natural childbearing results from sexual contact, which is traditionally considered beyond the state's purview (outside of criminal conduct), surrogacy involves no such conduct. Parties to surrogacy agreements may seek legal enforcement of certain provisions and require special legal norms to recognize parental relationships, all of which implicate judicial systems. Finally, surrogacy intentionally separates a child from one or both biological parents, which implies a violation of a child's right to know and be cared for by his or her parents.³⁹ States have an obligation to protect the rights of children and an interest in regulating practices which by their nature require legal support to exist.

Surrogacy also runs contrary to the legal maxim *mater semper certa est* ("the mother is always certain"), which comes from Roman law.⁴⁰ This principle indicates a presumption according to which there can be no doubt regarding maternity, since the mother is necessarily the one who gives birth to her child.⁴¹ This imputes certain rights to the woman giving birth, based on the presumption that gestational motherhood is the clearest indicator of biological motherhood.

A surrogate may or may not be biologically related to the child, but she is not the "intended" mother for the child. However, a surrogacy agreement may imply that the child belongs genetically to a mother other than the one who gives birth, or that the surrogate is both a gamete donor and a gestational surrogate, thus breaching that principle, and placing both mothers in a difficult situation vis-à-vis the law. Once the motherhood relationship is broken, the law

³⁵ *Sees v. Baber*, 74 N.J. 201, 217 (1977) (The "use of money for this purpose—and we have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead—is illegal and perhaps criminal."). Some suggest that the grant of an economic benefit comes from the services that the biological mother performs (i.e. implantation, pregnancy and birth), but a child is delivered to the intended parents following and as a result of the "services."

³⁶ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 4(c)(4), *opened for signature* May 29, 1993.

³⁷ See Julie Shapiro, J.D., *Qualifying for Parenthood*, Related Topics Blog, <https://julieshapiro.wordpress.com/2011/08/21/qualifying-for-parenthood/> (Aug. 21, 2011).

³⁸ *Id.*

³⁹ See Convention on the Rights of the Child art. 7(1) *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

⁴⁰ INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 28 (K. Zweigert & K. Drobniig, eds., 1991).

⁴¹ *Id.*

protects neither the natural nor the genetic mother, since their rights are not subject to a legal presumption but must instead be created by legislation or judicial decision.

This principle is so strong that some jurisdictions have decided that traditional surrogacy contracts are unenforceable.⁴² In this line, some case law has affirmed the principle that the mother cannot be certain that she wants to surrender the baby until he or she is born.⁴³ Scholars have recognize that it is not lawful to compel a woman to give up her child

just because she pledged to do so before giving birth when the surrogate mother is also the biological mother of the child.⁴⁴ The issue is less clear when the woman giving birth is not the biological mother, as in the case of gestational surrogacy. Legislatures often do not want to take a stand on this situation and usually leave the decision to the courts.⁴⁵

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C. Human rights implications

As previously noted, there are no international treaties or conventions directly dealing with surrogacy. However, some texts refer to human rights that are closely related to surrogacy practices.

C.1. Rights to acquire a nationality, to know and be cared by parents and to preservation of identity

The United Nations Convention on the Rights of the Child (CRC) explicitly states that every child has the rights to acquire a nationality and to know and be cared by his parents as far as possible,⁴⁶ and to preserve his or her identity.⁴⁷ The Convention also states that “States 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”⁴⁸ and sets forth a general clause

⁴² See *infra* Section II.A.5 (D.C., Michigan, Nebraska, North Dakota).

⁴³ *Surrogate Parenting Assoc. v. Commonwealth of Kentucky ex rel. Armstrong*, 704 S.W.2d 209, 213 (1986) (“the policy [...] is to preserve to the mother her right of choice regardless of decisions made before the birth of the child”).

⁴⁴ Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 374 (2012).

⁴⁵ See, e.g. MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME SEX AND UNWED PARENTS 111 (2001) (assuming traditional surrogacy); DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 85 (2006).

⁴⁶ CRC, *supra* note 37, art. 7(1). Although many countries have ratified the Convention on the Rights of the Child, some have not, and others made substantial reservations. Signatures and ratifications can be found at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en.

⁴⁷ *Id.* art. 8(1).

⁴⁸ *Id.* art. 35.

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according to which States shall ensure the rights in the Convention to each child regardless of, inter alia, disability or birth.⁴⁹

In the case of commercial surrogacy, the Council of Europe drafted the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, which was ratified by twenty-nine states. Known as the Oviedo Convention, it prohibits the use of the human body for financial gain.⁵⁰ However, even altruistic surrogacy poses several acute problems in reference to the child's right to know and be cared for by his parents as far as

possible⁵¹ and to preserve his or her identity.⁵²

Children born through surrogacy—especially international surrogacy—are at high risk of having these rights violated. The case of Baby Manji illustrates some of these risks. A Japanese couple arranged to have an Indian gestational surrogate carry a child for them with the husband's sperm and donor eggs.⁵³ Her intended parents separated before her birth.⁵⁴ The intended mother, who was biologically unrelated to the child, no longer had an interest in raising her.⁵⁵ However, the intended and biological father wanted to raise her.⁵⁶ Therefore the newborn was found to have three different mothers (i.e. the contracting mother, the gestational surrogate and the egg donor) and undetermined nationality.⁵⁷ Under international law, a child has a right to a nationality,⁵⁸ which provides legal protections and personality for them. International surrogacy agreements coupled with poor record keeping or donor anonymity may lead to violations of this right.

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Other cases demonstrate problems that may arise during pregnancy and after birth, to the extent that they can undermine the child's most fundamental rights, such as the prohibition of discrimination set forth in article 2(1) of the Convention on the Rights of the Child, which proscribes discrimination on the grounds of "race, color, sex, language, religion, political or

⁴⁹ *Id.* art. 2(1).

⁵⁰ Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) art. 21, *opened for signature* April 4, 1997, C.E.T.S. 164.

⁵¹ CRC, *supra* note 39, art. 7(1).

⁵² *Id.* art. 8(1).

⁵³ J. Venkatesan, *SC grants custody of Manji to grandmother*, THE HINDU NEWSPAPER, Aug. 15, 2008, <http://www.thehindu.com/todays-paper/tp-national/sc-grants-custody-of-manji-to-grandmother/article1316830.ece>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ POINTS, *supra* note 4, at 2.

⁵⁸ CRC, *supra* note 39, art. 8(1).

other opinion, national, ethnic or social origin, property, disability, birth or other status.”⁵⁹ In the Baby Gammy case, an Australian couple contracted with a Thai woman to serve as their surrogate.⁶⁰ Pattaramon Chanbua, the surrogate mother,

The couple left the disabled child, Gammy, who also had other illnesses, with [the surrogate mother] in Thailand, but took his healthy twin sister home.

became pregnant with twins but said the intended parents asked her to abort one when he was diagnosed with Down syndrome, a disability.⁶¹ The couple left the disabled child, Gammy, who also had other illnesses, with her in Thailand, but took his healthy twin sister home.⁶² Gammy was the biological child of the intended father⁶³ and a Thai egg donor.⁶⁴

The International Covenant on Civil and Political Rights (ICCPR) includes an article entirely devoted to the rights of the child which includes provisions similar to the CRC related to non-discrimination, birth registration, and right to nationality.⁶⁵ At the regional level, human rights concerns are similar, in the sense that human rights instruments usually point out the same contradictions between human rights and surrogacy practice.⁶⁶

Beyond treaties, customary law also shapes the body of accepted international law. Surrogacy—especially commercial surrogacy—poses a big problem in relation to the peremptory norms of general international law, also known as *ius cogens*.⁶⁷ Slavery and human trafficking are prohibited under these norms⁶⁸ although there is no consensus on whether surrogacy comes within this prohibition. It is clear that some elements of this practice share important connections with these two categories, although surrogacy does not include all of them, because the intention of the parties is for the child to be raised as part of a family.⁶⁹

With regard to human trafficking, the Convention on the Rights of the Child bans the sale of children⁷⁰ and its optional protocol defines sale as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other

⁵⁹ CRC, *supra* note 39, art. 2(1).

⁶⁰ *Calls for clearer surrogacy rules*, BBC NEWS, *supra* note 26.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Baby Gammy granted Australian citizenship*, BBC NEWS, Jan. 20, 2015, <http://www.bbc.com/news/world-australia-30892258>.

⁶⁴ Lindsay Murdoch, *Wendy Farnell did not supply the egg, Gammy’s Thai mother says*, SIDNEY MORNING HERALD, Aug. 10, 2014, <http://www.smh.com.au/world/wendy-farnell-did-not-supply-the-egg-gammys-thai-mother-says-20140810-102joz.html>.

⁶⁵ International Covenant on Civil and Political Rights art. 24, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁶⁶ *See infra* Section II.B Regional Mechanisms.

⁶⁷ Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

⁶⁸ These *ius cogens* norms have been inserted into the catalog of positive international law through the Slavery Convention, *opened for signature* Sept. 25, 1926, 212 U.N.T.S. 17, and amended by the Protocol amending the slavery convention, *opened for signature* Dec. 7, 1953, 182 U.N.T.S. 51 [hereinafter together, the Slavery Convention] and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, entered into force April 30, 1957) 226 U.N.T.S. 3 [hereinafter Supplementary Slavery Convention].

⁶⁹ Supplementary Slavery Convention, *supra* note 68, art. 1(d).

⁷⁰ CRC, *supra* note 39, art. 35.

compensation.”⁷¹ This definition does not belong to the body of *ius cogens* law, nor is it a main part of international human rights law—the sentence is written in an optional protocol. However, legal actors cannot ignore it, because it provides a framework according to which international stakeholders have interpreted the sale of children.

C.2. There is no “right to a child” in international law

International law does not contemplate a right to a child. Some law supports the existence of a right to raise a child that has already been born⁷² but this would not include the right to actually “conceive” or “bring to existence” a new human being.⁷³ International law does mention the right to marry and found a family,⁷⁴ but this is understood as freedom from state interference with reproduction.⁷⁵ The closest right found in international law to a right to have children is found in the Convention on the Rights of Persons with Disabilities, and it is a right to freedom from interference with their fertility on the basis of disability, not a right to children.⁷⁶

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Moreover, there is also a debate on whether “reproductive rights” would include a “right to a child.” The suggestion that they do presents serious inconsistencies. First, the term “reproductive rights” is still under discussion in the international arena, since there are no international legally binding texts that mention the term. Although it is possible to group several legally-recognized rights under the label of “reproductive rights,” some organizations have suggested an expansive definition of the term that goes beyond even the definition (and limitations) of non-binding UN consensus documents, such as the International Conference on Population and Development Programme of Action.⁷⁷ Therefore it is not legally accurate to qualify these alleged entitlements as “reproductive rights.”

Second, in the event that “reproductive rights” might only refer, as mentioned before, to legally-recognized human rights—mainly related to women’s sexual and reproductive health—there is no provision nor is there any international custom that contemplates directly or indirectly

⁷¹ Optional Protocol to the Convention on the Rights of the Child art. 2(a), *opened for signature* May 25, 2000, 2173 U.N.T.S. 222 [hereinafter CRC Optional Protocol].

⁷² Barbara Stark, *The Women’s Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL’Y 261, 274-78 (2011).

⁷³ Stark, *supra* note 44, at 372.

⁷⁴ ICCPR, *supra* note 65, art. 23.

⁷⁵ Stark, *supra* note 44, at 372 n. 29.

⁷⁶ Convention on the Rights of Persons with Disabilities art. 23(1)(d), *opened for signature* Mar. 30, 2007, 46 I.L.M. 433.

⁷⁷ International Conference on Population and Development, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, Ch. I, Res. 1, Annex, U.N. Doc. A/CONF.171/13/Rev.1 (Oct. 18, 1994) [hereinafter ICPD Report]. This report affirms that States should take steps with the aim to assist both couples and individuals “to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice.” (ICPD ¶ 7.16). Numerous countries introduced reservations to those paragraphs mentioning “reproductive rights” and moreover there is no “right to a child” in the ICPD—the references in §7.16 need to be read in light of international law currently in force which, as stated, does not contemplate such a right.

the existence of a right to a child. The Convention on the Elimination of All Forms of Discrimination against Women establishes that States Parties shall ensure the “rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”⁷⁸ This constitutes recognition of the *freedom* of women to decide *when* and *how many* children they want to have, but it is not a *right to have children*.

II. OVERVIEW OF SURROGACY LAWS

A. National jurisdictions

Most countries do not have laws or case law on surrogacy. However, the lack of regulation does not necessarily imply that surrogacy practices are nonexistent. It is precisely through this legal gap that some hospitals and health institutions justify their action. Some of the most relevant countries that include provisions on surrogacy in their legal framework are the following:⁷⁹

A.1. Countries that do not prohibit altruistic or commercial surrogacy

Georgia: The laws allow both types of surrogacy. All parties must consent in writing.⁸⁰

India: Surrogacy has been legal in this country since 2002, subject to the Indian Council for Medical Research guidelines.⁸¹ These guidelines were updated in 2005.⁸² In 2008, the Supreme Court issued a decision establishing that commercial surrogacy was permitted in the country with the need for the legislature to pass an appropriate law that regulated it.⁸³ That same year the *Lok Sabha*—the Lower House of the Parliament—enacted the Assisted Reproductive Technology Bill, but passage of this law is still pending.⁸⁴ Indian officials have stated their intent to prohibit international surrogacy in the future.⁸⁵

⁷⁸ Convention on the Elimination of All Forms of Discrimination against Women art. 16.1(e), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Some States Parties have introduced reservations with regard to this article. In addition to that, some countries have not ratified this Convention, like the United States, Iran or Sudan.

⁷⁹ The following analysis will be based on the permission/prohibition of surrogacy in all its forms. It will not delve into considering the legal status of surrogate born babies.

⁸⁰ Law on Healthcare art. 143 (Geo. 1997) available at <https://matsne.gov.ge/en/document/view/29980>.

⁸¹ Banerjee, *supra* note 12, at 447.

⁸² Points, *supra* note 4, at 3.

⁸³ *Baby Manji Yamada v. Union of India & ANR*, (2008) INSC 1656 (India).

⁸⁴ Surrogacy Laws India: Legally Yours, *Legality*, available at http://www.surrogacylawsindia.com/legality.php?id=%207&menu_id=71.

⁸⁵ *India to ban foreign surrogate services*, BBC NEWS, *supra* note 4.

Israel: Surrogacy contracts—both commercial and altruistic—need to be approved directly by the State in Israel, meaning that they need an official administrative permission.⁸⁶ The surrogate and both intended parents must belong to the same religion in order to ensure that the child has a clear religious status,⁸⁷ which is important for countries which use laws of personal status.⁸⁸

Russia: Surrogacy is allowed by law in the Russian Federation: “Each adult woman of a childbearing age has the right to artificial fertilization and implantation of an embryo.”⁸⁹ Upon the surrogate mother’s consent, the intended parents can register the child as their own, and the surrogate mother’s rights terminate, without any formal legal procedure, such as an order of adoption.⁹⁰ Moreover, commercial surrogacy is not prohibited, and some surveys show that remuneration is set around US\$20,000.⁹¹

Ukraine: Both commercial and altruistic surrogacy are legal.⁹² Only spouses who have registered their marriage can access surrogacy services⁹³ and the surrogate mother has to enter into the agreement freely and be objectively informed about it.⁹⁴

A.2. Countries that only prohibit commercial surrogacy

Australia: Altruistic surrogacy is legal.⁹⁵ Every State and Territory, except for the Northern Territory,⁹⁶ has legislation regulating it. Generally speaking, altruistic surrogacy agreements are

⁸⁶ *Surrogacy in Israel*, New Family, available at <http://www.newfamily.org.il/en/surrogacy-in-israel/>; Irit Rosenblum, *Israel’s double game on the surrogacy issue*, Opinion, THE JERUSALEM POST, May 8, 2015, <http://www.jpost.com/Opinion/Israels-double-game-on-the-surrogacy-issue-402477>.

⁸⁷ Law on Agreements for the Carriage of Fetuses 1996, 5756-1996, SH No. 1577 p. 176, § 2 (Isr.). See also *Surrogacy in Israel*, supra note 86.

⁸⁸ Some countries have separate laws of personal status that are applied based on the religion of the citizen. The idea is to provide legal process for everyone while respecting different religious traditions in areas traditionally associated with religion, such as marriage, which is often entered into via a religious ceremony.

⁸⁹ *Basic Law for Citizens’ Health Protection 1993*, art. 35 Public Health Code of the Russian Federation (Excerpts) No. 5487-1 of July 22, 1993, found in Konstantin, Legal regulation of assisted reproduction treatment in Russia, 20 REPROD. BIOMEDICINE ONLINE, 892, 892. available at [http://www.rbmojournal.com/article/S1472-6483\(10\)00174-4/fulltext](http://www.rbmojournal.com/article/S1472-6483(10)00174-4/fulltext) (English version). [21 May 2015]. A right to surrogacy, rather than just permitting it, is troubling in that it creates a right to use of another person’s body.

⁹⁰ Svitnev, supra note 89, at 893. See Semeinyi Kodeks RF [SK] [Family Code] art. 51 (Rus.).

⁹¹ Svitnev, supra note 89, at 893-94.

⁹² Family Code of Ukraine, art. 123 (2002).

⁹³ *Id.*

⁹⁴ On the Approval of the Procedure of assisted reproductive technologies appliance in Ukraine *Order of the Ministry of Health* No. 787 (2013).

⁹⁵ See Assisted Reproductive Treatment Act, No. 76 of 2008 (Vic.), available at [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3ADFC9FBA2C0F526CA25751C0020E494/\\$FILE/08-076a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3ADFC9FBA2C0F526CA25751C0020E494/$FILE/08-076a.pdf); Surrogacy Act 2010 (Qld.), available at <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SurrogacyA10.pdf>; Surrogacy Act 2008 (W.A.) available at [http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:14284P/\\$FILE/Surrogacy%20Act%202008%20-%20\[00-b0-06\].pdf?OpenElement](http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument:14284P/$FILE/Surrogacy%20Act%202008%20-%20[00-b0-06].pdf?OpenElement); Statutes Amendment (Surrogacy) Act, No.

legal but they cannot be enforced—these contracts are not unlawful themselves but the parties in the contract cannot rely on the judiciary in order to put them into practice.⁹⁷ Legislation may vary from one State to another, although commercial surrogacy is a criminal offense in all the States.⁹⁸

Brazil: The Constitution prohibits all kinds of sale of human organs, tissues and substances,⁹⁹ which has been interpreted as including commercial surrogacy.¹⁰⁰ Altruistic surrogacy is not expressly regulated by law but there are sufficient indications to conclude that it is possible to carry out an unpaid surrogacy in Brazil.¹⁰¹

China: Surrogacy is totally prohibited in China.¹⁰² However, the Hong Kong Special Administrative Region has its own regulation: “No person shall—(a) whether in Hong Kong or elsewhere, make or receive any payment for the supply of, or for an offer to supply, a prescribed substance intended to be used for the purposes of any reproductive technology procedure, embryo research or surrogacy arrangement.”¹⁰³ The law prohibits using donated gametes in this context¹⁰⁴ and establishes the unenforceability of surrogacy arrangements.¹⁰⁵ Nevertheless, this does not mean that altruistic surrogacy is prohibited, because *unenforceable* does not mean *forbidden*—a contract may be executed, but it cannot be legally enforced.

64 of 2009 (S.A.), available at

[http://www.legislation.sa.gov.au/LZ/V/A/2009/STATUTES%20AMENDMENT%20\(SURROGACY\)%20ACT%202009_64/2009.64.UN.PDF](http://www.legislation.sa.gov.au/LZ/V/A/2009/STATUTES%20AMENDMENT%20(SURROGACY)%20ACT%202009_64/2009.64.UN.PDF); Surrogacy Act, No. 2 of 2010 (N.S.W.), available at

<http://www.legislation.nsw.gov.au/inforcepdf/2010-102.pdf?id=803647c4-1180-ccfc-f6b9-e6ffdf769e48>; Surrogacy Act, No. 34 of 2012 (Tas.), available at

http://www.austlii.edu.au/au/legis/tas/num_act/sa201234o2012185/.

⁹⁶ *Call for surrogacy laws in the NT, commercial surrogacy in Australia*, AUSTRALIAN BROADCASTING CORPORATION (ABC) NEWS, ug. 6, 2014, <http://www.abc.net.au/news/2014-08-06/advocacy-group-urges-nt-to-regulate-surrogacy/5653704>.

⁹⁷ THE LAW HANDBOOK, *Fact Sheet #38*, http://www.lawhandbook.org.au/fact_sheets/ch38.php.

⁹⁸ *Id.* The difference among the States and the Territories is that, in some of them, their residents are allowed to enter into overseas surrogacy agreements (Victoria, Tasmania, South Australia, Western Australia or the Northern Territory) whereas it is illegal for others (Queensland, New South Wales and the Australian Capital Territory).

⁹⁹ *Constituicao Federal §199(4)* (Brazil). English translation provided by the Library of the Chamber of Deputies, available at

http://www.stf.jus.br/repositorio/cms/portaltstfinternacional/portaltstfsobrecorte_en_us/anexo/constituicao_ingles_3ed2010.pdf.

¹⁰⁰ ROCÍO CARBAJAL, ANÁLISIS DE LA MATERNIDAD SUBROGADA EN ARGENTINA. UNA MIRADA EXTENSIVA A PAÍSES DE AMÉRICA LATINA 41 (2014).

¹⁰¹ Resolution no. 1975/10 (December 15, 2010), Federal Council of Medicine (Part VII) (Brazil) (establishing that altruistic surrogacy is allowed when there is a medical problem preventing or complicating the gestation by the intended mother).

¹⁰² Administrative Measures on Assisted Human Reproduction Technology of 2001 art. 3, Ministry of Health Order No. 14 (China).

¹⁰³ Human Reproductive Technology Ordinance 2007 (L.N. 164) § 17 (China).

¹⁰⁴ *Id.* § 14.

¹⁰⁵ *Id.* § 18.

Denmark: Altruistic surrogacy is not directly prohibited in this country. However, current legislation strongly discourages this practice, making it very difficult to enforce such contracts. In addition, commercial surrogacy is strictly prohibited.¹⁰⁶

Netherlands: The present regulations permit private surrogacy arrangements compensation for costs.¹⁰⁷ There is no regulation regarding the civil aspects of the surrogacy agreement¹⁰⁸ (e.g. parenthood transfer) but publicly promoting or seeking surrogacy services or arranging them as a business is a criminal offense.¹⁰⁹

Thailand: The National Legislative Assembly passed a bill in February 2015 to protect children born through Assisted Reproductive Technology (ART).¹¹⁰ This law forbids commercial surrogacy in the country and reduces the scope of this practice to heterosexual lawful spouses, at least one of them being Thai¹¹¹ and the surrogate being a blood relative of either of them, other than parent or descendant.¹¹² The legislation addressed gaps in law which had allowed international commercial surrogacy in the country, which had provoked public outcry in situations such as the one involving Baby Gammy.¹¹³ The law sets penalties of imprisonment up to ten years or a fine up to 200,000 Baht (more than US \$6,000).¹¹⁴

United Kingdom: Surrogacy agreements are unenforceable in the UK.¹¹⁵ However, they are not in themselves illegal. Since the Human Fertilisation and Embryology Act in 1990, intending

¹⁰⁶ Janne Rothmar Hermann, *Maternity for another: country report Denmark (2010)*, available at http://www.academia.edu/860100/Maternity_for_another_country_report_Denmark. Fertility treatment must not be provided if the woman seeking to become pregnant has entered into an agreement with another on being a surrogate mother (Act on Artificial Fertilization 2006, Consolidated Act No. 923, § 13 (Den.)). Moreover, fertility treatment must only be provided if the ova used to induce pregnancy originate from the woman in whom pregnancy is being induced or sperm from her partner is being used (*id.* § 5). Measures to facilitate the meeting or the arrangement between a woman and another wishing the woman to bear a child for him/her are prohibited, including advertising (*Act on Adoption 2004*, Consolidated Act No. 928, § 33 (Den.)). Adoption cannot be authorized in case any of the parties required to consent to adoption have received financial compensation, compensation for lost income or any other type of ‘quid pro quo’ service, fee or benefit (*Id* in §15). Any agreement on the transfer of a child to another woman after birth is legally invalid (*Act on Children 2001*—Act no. 460, §31).

¹⁰⁷ *Surrogate Mothers: Legal and Illegal Aspects of Surrogacy*, GOVERNMENT OF THE NETHERLANDS, <https://www.government.nl/topics/surrogate-mothers/contents/surrogacy-legal-aspects>.

¹⁰⁸ M. Vonk, *Netherlands: Maternity for another: a double Dutch approach*, NETHERLANDS COMPARATIVE LAW ASSOCIATION (2011), *Gestation pour autrui: Surrogate motherhood* (dir. F. MONÉGER), coll. Colloquies, vol. 14, Proceedings of the 8th Congress of International Comparative Law, held in Washington DC from July 25-31, 2010, Paris, Society of Comparative Legislation, 206.

¹⁰⁹ S.R. (Criminal Code) art. 151(b) (Netherlands 2015), http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelIV/Artikel151b/geldigheidsdatum_06-11-2015.

¹¹⁰ *Thailand bans commercial surrogacy for foreigners*, BBC NEWS, Feb. 20, 2015, available at <http://www.bbc.com/news/world-asia-31548930>.

¹¹¹ *Global Legal Monitor: Thailand: New Surrogacy Law*, LIBRARY OF CONGRESS, Apr. 6, 2015, available at <http://www.loc.gov/law/foreign-news/article/thailand-new-surrogacy-law/>.

¹¹² *Id.*

¹¹³ *Calls for clearer surrogacy rules*, BBC NEWS, *supra* note 26.

¹¹⁴ LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR, *supra* note 39 (referring to §§ 24 and 48 of the new law).

¹¹⁵ Surrogacy Arrangements Act, 1985, c. 49, § 1A (U.K.).

parents can acquire legal parentage of their kids to the exclusion of the surrogate by a parental order.¹¹⁶ Compensation for these surrogate services is, however, prohibited,¹¹⁷ although the intended parents may cover the reasonable expenses for the surrogacy procedure.¹¹⁸

A.3. Countries that prohibit both types of surrogacy

France: All surrogacy agreements are void in France, both altruistic and commercial, following a 1994 law.¹¹⁹

Germany: The Embryo Protection Act sets serious sanctions for those who “attempt to carry out an artificial fertilization of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her.”¹²⁰ Moreover, the Procurement Adoption Act establishes that the procurement of a surrogate mother is prohibited¹²¹ and punishable by law.¹²² Therefore the German legal framework prohibits surrogacy both in the altruistic and commercial cases.

A.4. Countries without clear legal frameworks surrounding surrogacy

Japan: There are no laws governing surrogacy. The Health, Labor and Welfare Ministry and the Japan Society of Obstetrics and Gynecology have generally opposed surrogacy,¹²³ but several members of the Liberal Democratic Party—the main political party in Japan, which holds a huge majority in the Parliament—are currently drafting two bills on assisted reproductive technology, one permissive and the other prohibitive.¹²⁴

Mexico: Tabasco is the only one of the 31 states that regulates surrogacy. It officially recognizes the concept of ‘intended parents’, but there are no rules regarding either the methods or the circumstances in which surrogacy is allowed.¹²⁵ Several attempts have been made to pass a law in the Federal District, but none of these drafts has become law.¹²⁶

¹¹⁶ Human Fertilisation and Embryology Act, 1990, c. 37 § 30 (U.K.). A parental order is an official document that grants parental rights to the ones who hold it.

¹¹⁷ *Id.*

¹¹⁸ Human Fertilisation and Embryology Act 2008, c. 22 § 54(8) (U.K.).

¹¹⁹ C. CIV. art. 16-7 (France), available at

<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721> (“*Toute convention portant sur la procréation ou la gestation pour le compte d'autrui est nulle.*”).

¹²⁰ Embryonenschutzgesetz [Embryo Protection Act] § 1(1)(7), Dec. 13, 1990, RGBI. I at 2746, Nov. 21, 2011, RGBI. I at 2228 (Ger.).

¹²¹ Adoptionsvermittlungsgesetz [Procurement Adoption Act] §13c., Dec. 21, 2001, RGBI. I. at 354, Aug. 31, 2015, RGBI. I. at 1474 (Ger.).

¹²² *Id.* §14(b).

¹²³ INTERNATIONAL SURROGACY AGREEMENTS, *supra* note , at 248.

¹²⁴ *Editorial: Plan for surrogate births*, THE JAPAN TIMES, June 15, 2014,

http://www.japantimes.co.jp/opinion/2014/06/15/editorials/plan-surrogate-births/#.VSaIV_nF_RY.

¹²⁵ Código Civil de Estado Tabasco [Civil Code of the State of Tabasco], *as amended*, art. 92, Periódico Oficial [P.O.], 9 de Abril de 1997 (Mex.) (“En el caso de los hijos nacidos como resultado de la participación de una madre gestante sustituta, se presumirá la maternidad de la madre contratante que la presenta, ya que este hecho implica su aceptación.”).

¹²⁶ Carbajal, *supra* note 100, at 42.

A.5. Countries with decentralized legislation

Canada: Only altruistic surrogacy is permitted.¹²⁷ The Quebec Civil Code establishes, however, that “any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.”¹²⁸

United States: According to the Full Faith and Credit Clause of the United States Constitution, each State has to respect “the public Acts, Records, and judicial Proceedings of every other State.”¹²⁹ However, there is an exception for family law, based on public policy, through which States do not give full faith and credit to all those judgments that are not in accordance with their public policy.¹³⁰ This means that States are not compelled to recognize any judgment from any other State dealing with surrogacy. Every State has its own approach to the issue of surrogacy—sometimes very different from each other—though it is still possible to classify them:

States that expressly prohibit surrogacy: Arizona,¹³¹ the District of Columbia,¹³² Indiana,¹³³ Michigan,¹³⁴ Nebraska¹³⁵ and New York.¹³⁶

States that allow only altruistic surrogacy: New Jersey,¹³⁷ Oregon,¹³⁸ Virginia¹³⁹ and Washington.¹⁴⁰

¹²⁷ Assisted Human Reproduction Act, S.C. 2004, c. 2, art. 6 (1) (Can.).

¹²⁸ QUEBEC CIV. CODE (1991, c. 64), art. 541, *available at* http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html (Can.).

¹²⁹ U.S. CONST. art. IV, § 1.

¹³⁰ Ira M. Ellman et al., *FAMILY LAW: CASES, TEXT, PROBLEMS* 175 (5th ed. 2010). However, in practice, couples from states with restrictive surrogacy laws may be able to travel to other states for surrogacy services.

¹³¹ ARIZ. REV. STAT. § 25-218 (2015) (“No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.”).

¹³² D.C. CODE § 16-402 (2015). Surrogacy agreements are prohibited and unenforceable in the capital district of the United States, and commercial surrogacy is subject to a penalty up to \$10,000 and/or up to one year in prison.

¹³³ IND. CODE § 31-20-1-1 (2015). The Indiana General Assembly decided that surrogacy goes against public policy.

¹³⁴ MICH. COMP. LAWS § 722.851-861 [2009]. Commercial surrogacy is completely forbidden in Michigan, to the point that it constitutes a felony whose punishment could oscillate between a fine up to \$50,000 and five years in prison. Altruistic surrogacy is not enforceable. *See, e.g., Doe v. Att’y Gen.*, 487 N.W.2d 484 (Mich. Ct. App. 1992); *Doe v. Kelley*, 307 N.W.2d 438 (Mich. Ct. App. 1981); *Syrkowski v. Appleyard*, 362 N.W.2d 211 (Mich. 1985).

¹³⁵ NEB. REV. STAT. § 25-21 (2015).

¹³⁶ N.Y. DOM. REL. LAW § 123.1 (2015). Commercial surrogacy is strictly prohibited in New York, with some exceptions. Moreover, “surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable,” including altruistic surrogacy agreements. *Id.* § 122.

¹³⁷ *In re Baby M*, 537 A.2d 1227 (N.J. 1987). *Baby M* is a landmark surrogacy case in New Jersey and the United States. Ms. Whitehead underwent artificial insemination as part of a surrogacy agreement but then decided to keep the newborn girl. The Supreme Court of the State ruled that the surrogacy agreement was invalid according to public policy and acknowledged that Ms. Whitehead was the legal

States that allow both commercial and altruistic surrogacy: Arkansas,¹⁴¹ California,¹⁴² Florida,¹⁴³ Illinois,¹⁴⁴ Nevada,¹⁴⁵ New Hampshire,¹⁴⁶ North Dakota,¹⁴⁷ Utah¹⁴⁸ and Texas.¹⁴⁹

mother. However, the Supreme Court of New Jersey ordered the Family Court to determine who should, according to the best interests of the child, have custody of the child. The lower court ruled that Mr. and Ms. Stern, the intended parents, would be in a better position to raise the child, although it granted Ms. Whitehead visitation. Margolit, *supra* note 17, at 428.

¹³⁸ The Criminal Code of Oregon establishes that the crime of buying or selling a person less than 18 years of age does not apply to “fees for services in an adoption pursuant to a surrogacy agreement.” OR. REV. STAT. § 163.537(2)(d) (2015). This means that surrogacy agreements are decriminalized unless there is an economic compensation—other than these fees—specifically granted for these services.

¹³⁹ VA. CODE ANN. § 20-159. (2015) (requiring a court to approve it first and permitting the payment of “reasonable medical and ancillary costs,” with any further compensation excluded).

¹⁴⁰ WASH. REV. CODE § 26.26.230 (2015). The State of Washington views surrogacy as a way to establish a parent-child relationship, and therefore accepts this procedure. However, compensation is strictly prohibited. *Id.*

¹⁴¹ ASK. CODE ANN. § 9-10-201 (2015). The Arkansas Code envisages the possibility of surrogacy by regulating the paternity presumptions in case there is a surrogate mother. The Code does not include further specific clauses, which means both altruistic and commercial surrogacies are included.

¹⁴² In 1993, a California court established that the procreative intent of the parties would determine the legal parents in a surrogacy relationship. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). This was a controversial judgment because the Court held that the gestational surrogate had no right to the baby, partly due to the surrogate mother being African American while the intended parents and child were white. The state recently passed a bill that goes further in protecting surrogacy agreements, both commercial and altruistic, Assembly Bill No. 1217, Chapter 466, approved by Governor on September 23, 2012, amending CAL. FAM. CODE § 7960 (2015).

¹⁴³ Surrogacy agreements are legal and enforceable in Florida. FLA. STAT § 742.15(1) (2015). However, the only expenses shall be those related to “reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods.” *Id.* § 742.15(4).

¹⁴⁴ 750 ILL. COMP. STAT. 47/5 (2015). Both commercial and altruistic surrogacy are permitted.

¹⁴⁵ Nevada became the most progressive territory in the United States in terms of surrogacy laws in 2013. The new law expands parental denominational possibilities, allows compensation to gestational carriers and includes modifications to the rights of donated egg and embryo recipients. NEV. REV. STAT. §§ 126.500-126.810 (2015).

¹⁴⁶ The General Court of New Hampshire (legislature) enacted an Act relative to surrogacy, protecting all parties to the agreement regardless of their marital status, sexual orientation or genetic connection, no matter whether the surrogacy agreement is with or without economic compensation. N.H. REV. STAT. ANN. § 168-B (2015).

¹⁴⁷ A specific statutory provision states that surrogacy agreements that foresee assisted conception are void. N.D. CENT. CODE §14-18-05 (2015). However, the same law further establishes that “[a] child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier’s husband, if any.” *Id.* § 14-18-08. This means that North Dakota legislation distinguishes between surrogates and gestational carriers, meaning that traditional surrogacy is null and not enforceable, whereas gestational surrogacy is allowed and legal. There is no reference with regard to economic compensation. Logically, if there is no explicit prohibition, this reward is allowed.

¹⁴⁸ Surrogacy agreements are legal and regulated in Utah. Gestational surrogacy is permitted in this State, while traditional surrogacy is expressly prohibited. UTAH CODE ANN. § 78B-15-801(1)(a) (2015). Nevertheless, agreements are heavily regulated. The law allows paying the gestational mother a reasonable consideration. *Id.* § 78B-15-803(2)(h).

Six States (Iowa, Louisiana, New Mexico, Rhode Island, Tennessee and Wisconsin) have not fully developed their laws related to surrogacy.¹⁵⁰ These States have statutory authority to regulate surrogacy but have not passed any regulations that clarify whether surrogacy is permitted or prohibited.

Fourteen States (Alabama, Connecticut, Delaware, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Ohio, Oklahoma, Pennsylvania, South Carolina and Vermont) have some case law but no statutory authority.¹⁵¹ These States have not yet decided how they wish to regulate this practice.

Twelve States (Alaska, Colorado, Georgia, Hawaii, Maine, Mississippi, Missouri, Montana, North Carolina, South Dakota, West Virginia and Wyoming) remain completely silent on surrogacy.¹⁵²

B. Regional mechanisms

B.1. Europe

The legal framework in the European Union (EU) does not directly regulate surrogacy.¹⁵³ Some authors argue that it is possible to build a “right to reproduce” around articles 7 and 9 of the EU Charter of Fundamental Rights.¹⁵⁴ However, this interpretation does not stem from the wording of the Charter.¹⁵⁵ Moreover, the Charter forbids making the human body and its parts as such a source of financial gain.¹⁵⁶

The Court of Justice of the EU has not delivered any judgment with surrogacy as its primary focus. The topic of surrogacy is indeed present in some judgments, but it constitutes a secondary issue in all of them.¹⁵⁷ However, the Court stated in one of its judgments that a woman

¹⁴⁹ Texan family law envisages the possibility of gestational surrogacy provided that pregnancy occurs by means of Artificial Reproductive Technology (ART) and, at the same time, the surrogate relinquishes all the parental rights and duties. The same law sets other conditions to validate and enforce the contract. Since no clause specifies whether it is either commercial or altruistic, both types of surrogacy are therefore permitted. *See* TEXAS FAM. CODE ANN. §§ 160.751-63 (2015).

¹⁵⁰ Thomas J. Walsh, *Viewpoint: Wisconsin’s Undeveloped Surrogacy Law*, 85:3 WISCONSIN LAWYER, available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=3&ArticleID=2445> (2012).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ SURROGACY IN EU MEMBER STATES, *supra* 11, at 140.

¹⁵⁴ *Id.* at 141.

¹⁵⁵ Susan Millns, *Reproducing inequalities; assisted conception at the challenge of legal pluralism*, 24:19 J. SOC. WELFARE & FAM. L. 19, 32 (2002); Charter of Fundamental Rights of the European Union arts. 7 & 9, Dec. 7, 2000 [hereinafter European Charter of Fundamental Rights] (recognizing the right to privacy and the right to marry and found a family).

¹⁵⁶ European Charter of Fundamental Rights, *supra* note 155, at 3.2.

¹⁵⁷ Decisions of the Court of Justice of the European Union may be found at <http://curia.europa.eu/>.

who has a child through surrogacy has not suffered discrimination if she is not granted benefits such as maternal or adoption leave.¹⁵⁸

Meanwhile, the European Court of Human Rights (ECtHR) has issued several judgments on surrogacy. The Court has recognized that because there is no European law on surrogacy, states enjoy a wide margin of appreciation, but also said this margin was relative to the circumstances.¹⁵⁹ In that case, a couple with two children born via surrogate in the U.S. alleged that France's failure to recognize them as the children's parents violated their right to respect for family life (art. 8 of the European Charter of Fundamental Rights).¹⁶⁰ The French government gave effect to the American documents to the effect that it permitted the children to stay with the intended parents, but refused to register the children as French citizens or in the French birth registries.¹⁶¹

The ECtHR concluded that the parents' right to respect for private and family life had not been violated.¹⁶² However, it found that the *children's* art. 8 rights had been violated, as lacking legal parents put into question other rights, such as citizenship and inheritance, despite being the biological children of the husbands in the marriages.¹⁶³ According to the Court, the fact that the

The Court does not have any specific criteria when dealing with surrogacy, but it applies the doctrine of the margin of appreciation flexibly, allowing States to either legalize or prohibit this practice.

children's identity was at stake justified reducing the margin of appreciation.¹⁶⁴ This means that the Court does not have any specific criteria when dealing with surrogacy, but it applies the doctrine of the margin of appreciation flexibly, allowing States to either legalize or prohibit this practice.

In addition, the ECtHR recently issued a judgment in *Paradiso and Campanelli v. Italy*, in which this latter has been condemned on the grounds of article 8 of the European Convention of Human Rights.¹⁶⁵ A child had been born in Russia as a result

of a gestational surrogacy process and was registered in this country as the son of his intended parents, Ms. Paradiso and Mr. Campanelli, both of them Italians. However, the child was denied registration in Italy based on alleged false information contained on his birth certificate.¹⁶⁶ According to Italian law, the child was considered abandoned, because their intended parents could not be referred as such according to this legal framework.¹⁶⁷ Therefore Italian authorities removed the child from the plaintiffs and placed him under guardianship.¹⁶⁸

¹⁵⁸ *Z v. A Government Department and the Board of Management of a Community School*, Court of Justice of the European Union, Case C-363/12, March 18, 2014, ¶¶ 48, 62-65, 68. The Court refers to the possibility this woman benefits from specific grants reserved to pregnant woman, and it states that their denial does not imply discrimination.

¹⁵⁹ *Mennesson v. France*, no. 65941/11 ¶¶ 75-80, Eur. Ct. H.R., June 24, 2014.

¹⁶⁰ *Id.* ¶ 43.

¹⁶¹ *Id.* ¶ 71.

¹⁶² *Id.* ¶¶ 91-94.

¹⁶³ *Id.* ¶¶ 96-101.

¹⁶⁴ *Id.* ¶ 80.

¹⁶⁵ *Paradiso and Campanelli v. Italy*, no. 25358/12 §§ 86-87, Eur. Ct. H.R., Jan. 27, 2015.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

According to the Court, Italian authorities had not preserved the necessary balance between the Italian laws on international adoption and surrogacy and the interests of the child. Specifically, the ECtHR concluded that the best interest of the child is more important than the provisions of these laws, thus pointing out a violation under article 8 of the Convention (right to respect for private and family life).¹⁶⁹ This judgment does not set a legal analysis on the issue of surrogacy, but it just determines a violation of a provision of the Convention once the surrogacy procedure had already been undergone. This is a judgment from the Chamber of the Court.¹⁷⁰ Taken together, these cases suggest that European States will likely have to grant legal status to children born via international surrogacy arrangements, even if the arrangements would be illegal domestically.

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The Parliamentary Assembly of the Council of Europe has registered a motion stating that “surrogacy undermines the human dignity of the woman carrier as her body and its reproductive function are used as a commodity.”¹⁷¹ This motion has not yet been approved by the Assembly, but it shows a concern about this matter by a number of Members of this Assembly. In January 2015, Dr. Petra de Sutter, who provides assisted reproductive technology services, was appointed as Rapporteur on this topic.¹⁷²

“[S]urrogacy undermines the human dignity of the woman carrier as her body and its reproductive function are used as a commodity.”

– Motion of the Parliamentary Assembly of the Council of Europe

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B.2. Americas and Africa

The Inter-American Court of Human Rights has not dealt with any case related to surrogacy. This body of the Organization of the American States has not issued any judgment on this topic at the moment.¹⁷³ Likewise, the recently created African Court of Human and Peoples’ Rights has not released any document on this topic.¹⁷⁴

¹⁶⁹ *Id* at §75.

¹⁷⁰ PACE AS/Soc (2015) 13, Draft: Human rights and ethical issues related to surrogacy (April 13, 2015).

¹⁷¹ PACE Motion for a resolution (Doc. 13562), “Human Rights and ethical issues related to surrogacy,” July 1, 2014, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21092&lang=en>.

¹⁷² PACE AS/Inf (2015) 10, at 26, available at <http://website-pace.net/documents/10643/59254/RepPrepSOC-E.pdf/1b1d25ac-757f-4916-9c44-9180531dfae6>.

¹⁷³ The database of the Interamerican Court of Human Rights may be accessed at <http://www.bjdh.org.mx/BJDH/>.

¹⁷⁴ The database of the African Court on Human and Peoples’ Rights may be accessed at <http://african-court.org/en/index.php/2012-03-04-06-00-00/all-cases-and-decisions>.

C. International mechanisms

C.1. The United Nations Human Rights Treaty System

Surrogacy appears only once within the International Human Rights treaties system and it does so in the context of a report of the Committee on the Rights of the Child on the situation of surrogacy rights in the United States. The reference is merely incidental—the Committee referred to the necessity of the United States to pay attention to those practices related to the sale of children, being especially careful with the “reasonable costs” that surrogacy agreements include.¹⁷⁵ Apart from this minor reference, there are no other reports or decisions in the United Nations human rights system that directly relate to surrogacy.

C.2. The Hague Conference on Private International Law

Some have defended the need to draft an international convention on surrogacy in order to regulate international agreements. They argue that real problems do not stem from the agreements themselves but rather from the lack of protection associated with some of their consequences. The solution they provide lies in the careful regulation of the surrogacy industry.¹⁷⁶ However, some risks are intrinsic to the very nature of the contract. The only way of avoiding them is not to conclude the contract at all.¹⁷⁷

Some risks are intrinsic to the very nature of the [surrogacy] contract. The only way of avoiding them is not to conclude the contract at all.

Moreover, these risks have a very strong connection with serious human rights violations.¹⁷⁸

The Hague Conference on Private International Law (HCCH) is currently working on a project of a multilateral instrument in international surrogacy.¹⁷⁹ The Conference released a note on February 2015 in which it commented on the status of this process, both analyzing the changes that have taken place in different countries’ legislation and pointing out the different problems that still remain in a surrogacy agreement.¹⁸⁰ However, this organization aims at developing and

¹⁷⁵ Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, adopted by the Committee at its sixty-second session, July 2, 2013, No. 30 (b), CRC/C/OPSC/USA/CO/2, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPSC/USA/CO/2&Lang=En.

¹⁷⁶ Bruce Hale, Regulation of International Surrogacy Arrangements: do we regulate the market, or fix the real problems?, 36 SUFFOLK TRANSNAT’L L. REV., 501, 506 (2013).

¹⁷⁷ GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 376-77. Intended parents could be at the mercy of a surrogate who threatens to abort if they do not increase the fee.

¹⁷⁸ See *infra* I.C Human Rights implications

¹⁷⁹ Hague Conference on Private International Law (HCCH), The private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (Mandate), available at http://www.hcch.net/index_en.php?act=text.display&tid=179..

¹⁸⁰ HCCH, *The parentage / surrogacy Project; an updating note, drawn up by the Permanent Bureau*, Preliminary Document No 3A of February 2015 for the attention of the Council of March 2015 on General Affairs and Policy of the Conference.

implementing common rules of private international law.¹⁸¹ Its role does not consist of pondering human rights issues, but in harmonizing different national legislations. It does not analyze their compatibility with international human rights law. This means that it is possible that the HCCH could present legal provisions that are opposed to one or more international human rights.

III. RECOMMENDATIONS

Both commercial and altruistic surrogacy pose serious problems with regard to existing international human rights law norms, especially when confronted with the rules of *ius cogens*. Not only do current surrogacy arrangements seem to overlook these basic legal norms, but they also pose many problems and contradictions with established human rights instruments. This highlights the fundamental incompatibilities of surrogacy with the principle of human dignity, and the need to establish clear governing principles to address this issue at the national and international level.

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The global dimension of surrogacy, as well as the increasing practice of multi-State surrogacy contracts, raises the need for regional and international collaboration and the development of principles to guide legal norms. Principles enshrined in national and international human rights instruments, stemming from the centrality of human dignity, need to inform and guide the development of contract and family law.

Parents struggling with infertility need care and support, but the practice of surrogacy is not an appropriate means of providing that because of the lack of respect for the human dignity of the child and the surrogate. The myriad problems which have arisen from disputes regarding surrogacy agreements point to the fundamental problem undergirding surrogacy: making a human body the subject or means of a contract treats a human being like an object. Compassion for couples in difficult situations does not override these concerns.

Solutions for infertility should respect both the natural and good desire of couples to become parents and the rights of children not to be treated like objects. Neither should women be reduced to their reproductive capacities through agreements that function almost as rental agreements for their organs. The potential for exploitation, as in surrogacy tourism, is also high, and therefore a serious concern. As some feminist groups have noted, surrogacy is analogous to human trafficking, violates both women's and children's rights, and risks their physical and mental health.¹⁸²

¹⁸¹ HCCH, *Vision, Mission, Strengths and Values*, available at http://www.hcch.net/index_en.php?act=text.display&tid=27.

¹⁸² See, e.g., EUROPEAN WOMEN'S LOBBY, Stop Surrogacy Now, May 13, 2015, available at <http://www.womenlobby.org/spip.php?article7221> ("We believe that the practice of commercial surrogacy is indistinguishable from the buying and selling of children. Even when non-commercial (that is, unpaid or 'altruistic'), any practice that subjects women and children to such risks must be banned. "); Sveriges Kvinnolobby (Swedish Women's Lobby), Policy Paper: Surrogacy motherhood –

For these reasons, alternatives should be pursued to help couples struggling with infertility which respect the lives and dignity of all involved. Medical research is leading to important discoveries about reproductive systems and can help address causes of infertility. Research and medical care should be supported. For those with health conditions which preclude successful medical treatments, adoption is a solution that serves both children in need and prospective parents. Laws and programs should foster positive attitudes about adoption and help couples seeking to adopt to do so. These solutions are not cure-alls for infertility, but they avoid the pitfalls of surrogacy.