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## Notes

### Womb for Rent: The Future of International Trade in Surrogacy

*Iris Leibowitz-Dori*

In 1995, young Polish women were brought to the Netherlands to serve as surrogates for infertile couples.<sup>1</sup> They were recruited through advertisements in Polish newspapers which promised “good fees” and “discretion” in return for their service as surrogate mothers.<sup>2</sup> To participate, they were instructed to contact an “agent” on the docks of Szczecin who would then take them to the Netherlands to live with their prospective customers. This recruitment process occurred despite the fact that surrogate motherhood for commercial gain has been banned in the Netherlands for two years and carries a prison sentence of up to one year.<sup>3</sup>

Illegal international trade in surrogacy is not unique to the Netherlands,<sup>4</sup> and the demand for surrogates will only increase in the future. Surrogacy targets the same market as its counterpart, adoption, where demand greatly exceeds supply.<sup>5</sup> To meet the high demand for reproductive services, surrogacy may become more common as a solution for childless couples because it provides a better solution to infertility than adoption.<sup>6</sup> Even if

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1. Abi Daruvalla, *Poles Hired as Surrogate Mums in Illegal Trade*, INDEP.-LONDON, June 4, 1995, at 16.

2. *Id.*

3. *Id.*

4. *Id.* Similar operations take place in other European nations, among them Germany and Belgium. *Id.* International trade in surrogacy is not limited to Europe. Recent studies estimate that the market in Taiwan alone could absorb 10,000 surrogates. Ken Chiu, *Infertile Women Want Ban on Surrogate Mothers Lifted*, FREE CHINA J. (Taiwan), May 17, 1996, at 4.

5. Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989). Posner also states that the most important factor in explaining the growing popularity of surrogacy is “the acute shortage of babies for adoption.” *Id.* at 22.

6. See Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29, 62 (stating that the shortage of healthy white newborns is one of the reasons childless couples have turned to surrogacy instead of adoption); see also Posner, *supra*

there was no shortage of babies for adoption, there would be a demand for surrogate motherhood;<sup>7</sup> people desire genetic continuity, and surrogacy enables them to satisfy this desire.<sup>8</sup>

In a market driven by high demand, profit-minded intermediaries will increase supply in any way possible. One way to do this is to expand internationally like the adoption industry.<sup>9</sup> As with adoption, however, unregulated international trade in surrogacy can lead to the widespread abuse of women

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note 5 (stating that surrogacy is a better substitute for adoption). American citizens have increasingly turned to international adoptions in response to the shortage of babies and the length of the adoption process. Sara Goldsmith, *Critique of the Immigration and Naturalization Service's New Rule Governing Transnational Adoptions*, 73 WASH. U. L.Q. 1773, 1774 (1995). Although relatively quicker than domestic adoption, international adoption is still complicated, involving state adoption laws, federal immigration law, and the law of the child's native country. *Id.* On an international level the same argument applies; surrogacy is a better substitute for adoption.

7. Posner, *supra* note 5, at 22.

8. *Id.* Currently, there are two types of surrogacy arrangements: biological and gestational surrogacy. ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 109-10 (1995).

*Biological Surrogacy* typically consists of artificial insemination of a surrogate with the sperm of a man whose wife is infertile. . . . This form of surrogacy does not require sophisticated medical technology; it is a social and legal arrangement whereby the surrogate agrees to provide one-half of the genetic material, carry the fetus to term, deliver the baby, and surrender it to the father and his wife. But the term "surrogate" in this scenario is a misnomer because the "surrogate" is providing one-half of the genetic material and therefore is, in reality, the mother. . . .

Recent developments in technology have made possible other forms of surrogacy. In *gestational surrogacy*, the surrogate agrees to carry a fetus to which she typically has no biological relationship. For example, if the wife produces ova but cannot become pregnant, her ova can be removed surgically, fertilized in vitro with her husband's sperm, and implanted in a gestational surrogate.

*Id.* at 109-10.

9. Although international adoption helped solve the demand crisis following World War II, it did not become an alternative for domestic adoption until recently. Rosanne L. Romano, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545, 549 (1994). See also Holly C. Kennard, Note, *Curtauling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention In Respect of Intercountry Adoptions*, 14 U. PA. J. INT'L BUS. L. 623, 623 (1994) (stating that each state has its own baby-selling rules to stop "profitable" adoptions). During the last twenty years, the domestic market has been flooded with regulations. *Id.* As a result, an increasing number of childless couples turn to international markets for children. See Goldsmith, *supra* note 6, at 1773 (stating that American citizens have increasingly turned to international adoptions in response to the delay in the domestic adoption process). Because of the similarities between adoption and surrogacy, the demand for surrogacy will likely create a significant international market.

and children.<sup>10</sup> The economic disparity of consumers of surrogacy and the women who offer their reproductive services for sale is so extreme that the potential for abuse is very high.<sup>11</sup> Without safeguards, the international trade in surrogacy will only increase this abuse. While the exploitation of both surrogates and their babies already exists, no international regulation protects them.<sup>12</sup> Ideally, there should be a treaty covering surrogacy to address this problem. However, due to the controversy surrounding surrogacy, it is unlikely that such a treaty will be formulated in the near future.<sup>13</sup>

Part I of this note provides a background on international trade in surrogacy, while Part II looks at regulating surrogacy internationally. Part III analyzes the adoption market and its trends. Part IV suggests a regulatory scheme that encompasses surrogacy within existing international treaties. Finally, Part VI concludes with measures that would regulate surrogacy.

## I. INTERNATIONAL TRADE IN SURROGACY

It is inevitable that surrogacy services will be traded internationally. The current economic conditions in the "baby market" have created strong incentives for both adoption and surrogate services to pursue international trade channels.

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10. See CARMEL SHALEV, *BIRTH POWER* 151 (1989). Fears about the exploitation of women are well founded. The socioeconomic disparity between the consumers of surrogacy and the women who are likely to offer their reproductive services for sale could lead to an international commerce in human reproduction, using and exploiting women from developing countries. *Id.* See Gena Corea, *The Reproductive Brothel*, in *MAN-MADE WOMEN* 38, 38 (1987) (asserting that the greater the disparity, the greater the potential abuse of the less powerful group). Yet, as well founded as the fears may be, the best way to handle them is through regulation rather than prohibition:

Assuming an unsatisfied demand of childless couples, any legal restriction on permissible forms of reproductive collaboration would merely drive the activity underground, creating a black market. . . . [I]ntermediary exploitation and dishonesty is granted effective immunity where the activity is illegal, since the parties lack access to courts of law to enforce the terms of their transaction.

SHALEV, *supra*, at 158.

11. See Nadin Taub, *Surrogacy: Sorting Through the Alternatives*, 4 *BERKELEY WOMEN'S L.J.* 285, 288 (1990) (stating that there is an inevitable imbalance in bargaining power between the surrogate and the potential parents; given limited employment, educational and other opportunities available for women, the intended parents will have greater social and economic resources than the prospective birth mother).

12. See *infra* notes 34-52 and accompanying text.

13. Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 *AM. J.L. & MED.* 329, 333 (1991).

Adoption intermediaries have already taken advantage of these incentives and surrogacy will soon follow as a natural substitute for adoption.<sup>14</sup>

"Babies, like any commodity, are subject to the law of supply and demand."<sup>15</sup> In the United States and Europe, declining birth rates, combined with the largest number of infertile couples in history, create an insatiable demand for babies.<sup>16</sup> Due to this demand, both adoption and surrogate services sell at lucrative prices with high profit margins. Adoption intermediaries<sup>17</sup> are often paid thousands of dollars by childless couples desperate to find a baby.<sup>18</sup> Surrogates "[b]uffered by the pressures of commercial interests and near-desperate clients searching for a technological miracle" are also paid large amounts.<sup>19</sup> Intermediaries earn as much as \$20,000 per surrogate in some parts of the world.<sup>20</sup> Financial incentives combined with a strong demand and a severe shortage in the domestic supply of babies lead both adoption and surrogate intermediaries to pursue new supply channels abroad.<sup>21</sup>

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14. See Posner, *supra* note 5 (stating that surrogacy is a better alternative to adoption for some couples). See also Todd M Krim, *Beyond Baby M.: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 218 (1996) (stating that the number of cross cultural surrogacy arrangements is on the rise).

15. Kennard, *supra* note 9, at 625.

16. See *id.*; see also BLANK & MERRICK, *supra* note 8, at 85-86.

17. Agents or intermediaries "are defined as individuals or organizations which are not authorized to place children for adoption but intervene in some manner in the process of adoption." Kennard, *supra* note 9, at 625. They include attorneys, social workers, or simply persons acting as intermediaries between the adoptive parents and the birth parents or institutions. *Id.*

18. *Id.* at 628. Prices range from \$2,500 to \$15,000 per baby; attorney services can cost as much as \$13,000. *Id.* See also Kathleen Hunt, *The Romanian Baby Bazaar*, N.Y. TIMES MAGAZINE, Mar. 24, 1991, at 23, 28 (reporting that intermediaries in Romania offered a set of twins for \$20,000).

19. BLANK & MERRICK, *supra* note 8, at 95. For example, in 1987 infertile couples spent \$70 million on in vitro fertilization services alone. *Id.*

20. Dennis Bueckert, *Womb Rental Thriving Business: Critics Demand Outlawing of Practice*, WINDSOR STAR, Aug. 31, 1994, at B6. A writer posing as a prospective client interviewed two lawyers who acted as surrogacy intermediaries in Canada. One of them acknowledged that the going rate for a surrogate is \$15,000 and that attorney fees are within the \$20,000 range. *Id.*

In the United States, Noel Keane's centers currently charge an agency fee of \$16,000 and surrogate's fee of \$13,000. Keane is an attorney from Michigan who conducted the transaction between the Sterns and the surrogate Whitehead. After giving birth to the baby, Whitehead changed her mind and brought a custody suit against the Sterns in the famous Baby M. case. BLANK & MERRICK, *supra* note 8, at 113.

21. The domestic supply of babies in the United States is limited. The market supply shortage in babies can not be satisfied through domestic channels.

Adoption has already expanded into the international market as desperate, childless couples turn to intercountry adoptions after unsuccessful attempts to adopt domestic babies.<sup>22</sup> Nearly 20,000 children are involved in intercountry adoptions every year.<sup>23</sup> International adoption provides significant income in some parts of the world. For example, the adoption business in South Korea yields an estimated \$15-20 million annually.<sup>24</sup> In Guatemala, adoptions account for \$5 million per year,<sup>25</sup> and adoptions of Honduran children in 1991 alone generated more than \$3 million in revenue.<sup>26</sup>

Given the demand for babies in the domestic market and the success of adoption in the international market, surrogacy should also be internationally traded. Surrogacy provides an alternative to adoption for "desirable" babies.<sup>27</sup> When a market opportunity exists and a substitute can be at least as profitable

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Lucrative profits provide an incentive for agents to find other ways to profit from this shortage. If the domestic supply channels remain limited or less attractive, agents will attempt to expand internationally and capture additional supply channels. See Goldsmith, *supra* note 6, at 1773 (stating that in response to a declining number of American children available for adoption and the delays associated with the process, couples have turned to international adoptions); see also Richard R. Carlson, *Transnational Adoption of Children*, 73 TULSA L.J. 317 (1988) (stating the reasons for the decline in American children available for adoption).

22. Kennard, *supra* note 9, at 628. The factors that contributed to the increased interest in international adoption include: 1) a decline in the number of healthy American babies due to the increased availability of abortion and contraceptive use; 2) an increase in the number of unwed mothers who choose to keep their babies because they are more accepted in society than in the past; 3) the increased number of Americans who postpone marriage and childbearing; 4) the shorter waiting period for international adoption (six months to one year, compared to as long as ten years for a healthy American Caucasian child); 5) the procedural "red tape" and stringent requirements for domestic adoption complicated by the involvement of U.S. adoption agencies in the adoption process; and 6) Americans' increased acceptance of children from other cultures. Mary Ann Candelario McMillan, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT'L L. REV. 137, 138-39 (1993).

23. Kennard, *supra* note 9, at 629.

24. Matthew Rothschild, *Babies for Sale*, PROGRESSIVE, Jan. 1988, at 20.

25. Michael S. Serrill, *The Gray Market in Third World Children*, TIME INT'L, Nov. 4, 1991, at 47.

26. *Honduras: Report on Child Trafficking*, CENTRAL AMERICA UPDATE, Nov. 29, 1991, available in 1991 WL 2554440.

27. Posner, *supra* note 5, at 22. The shortage is in white infants—there is no shortage of black, handicapped, or older children for adoption. Unfortunately, this is because there is very little demand for such children. *Id.*

as the product traded, chances are high that the substitute will also expand to the same market.<sup>28</sup>

Surrogacy is in many ways superior to adoption. International surrogates are less expensive than domestic surrogates and adoption intermediaries.<sup>29</sup> Because the broker is not required by law to provide additional services to the international surrogate, such as professional and psychological counseling, the broker will incur fewer expenses than in adoption.<sup>30</sup> In the absence of clear regulation, the transaction costs of intercountry surrogacy will also be lower than intercountry adoption.<sup>31</sup>

Although surrogacy is not yet commonly traded in the international market, intermediaries and potential parents have shown interest. Brokers have already considered using foreign women as surrogates,<sup>32</sup> and foreign women have responded by providing surrogate services. For example, a man who took out

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28. The comparison is between two services: adoption and surrogacy. In surrogacy, however, the services are supplied internationally.

29. Corea, *supra* note 10, at 43-44. John Stehura of the Biogenetic Foundation, a surrogate agency, suggests that in poverty-stricken parts of the United States surrogates could be found for half of the \$10,000 standard fee and that in the Third World one tenth of the standard fee would suffice. *Id.* at 44. Mexican women, for example, would generally charge a lower fee than American women. *Id.* As the president of a U.S. foundation that helps arrange surrogate pregnancies stated, "If we could cross international lines, then \$1,000 is a significant sum of money, whereas here [in the U.S.] it is just a week or a month's wages." *Id.*

30. In countries such as the United States the broker will, of course, have to obey the specific state laws. However, domestically and on an international level, the broker will end up shopping around for the countries with the least stringent regulation which will allow him to collect the highest profit margins. For example, an investigation in the Canadian press has confirmed that there is a growing commerce centered in Toronto involving recruitment, screening, and impregnation of surrogate mothers. Bueckert, *supra* note 20, at B7. It is done quietly without government interference by independent agencies and thus is less regulated. *See id.*; *see also* Krim, *supra* note 14, at 220 (stating that surrogate brokers shop around for unregulated countries for their transactions).

Further, "[a] Third World surrogate mother would not even need to be healthy." Corea, *supra* note 10, at 43. Even serious health problems might be overlooked if a potential surrogate's "diet is good and other aspects of her life are o.k." *Id.* If not regulated, intermediaries will choose to save the money and increase their profits, rather than provide health care services to international surrogates.

31. *See supra* note 30. Currently, an intercountry adoption costs on average as much as \$12,000, not including potentially costly travel and residency requirements, lodging expenses, meals, ground transportation, and translation services. Romano, *supra* note 9, at 554.

32. Krim, *supra* note 14, at 220-23. A British newspaper reported that "adoption brokers" have tried to diversify their business to encompass international surrogacy. *Id.* at 221. A British adoption specialist is under investigation because he was planning to exploit liberal surrogacy laws in the United

a tiny classified advertisement in the San Francisco Chronicle received 160 responses from potential surrogates in eighteen countries, including New Zealand, Australia, Kenya, and Bangladesh.<sup>33</sup>

## II. REGULATING SURROGACY INTERNATIONALLY

The problem with international trade in surrogacy is its potential for abusing and exploiting women.<sup>34</sup> Like adoption, surrogacy needs to be regulated on an international level. Poor women and children are especially vulnerable to exploitation.<sup>35</sup> In the past, women were bullied to give up their babies and sell them for a price as low as a piece of jewelry.<sup>36</sup> As the adoption market became more promising, poor children were abducted from their families and sold internationally, leaving their parents without any hope of ever seeing them again.<sup>37</sup> Unless the surrogacy market is regulated internationally, it will face similar market abuses.<sup>38</sup> To support their families, it is estimated

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States by impregnating Eastern European women with the sperm of U.S. men. *Id.*

33. NOEL P. KEANE & DENNIS L. BREO, *THE SURROGATE MOTHER* (1981). The ad suggested payment of \$7,000 to the mother and another \$3,000 in legal and medical expenses. *Id.*

34. Krim, *supra* note 14, at 221-23.

35. See BLANK & MERRICK, *supra* note 8, at 122 (noting that in America, a socioeconomic gap clearly exists between surrogates and potential parents). Typically, couples seeking surrogate services are "white, married, and in their late thirties or early forties." *Id.* at 113. Many had attended graduate school and reported household income in excess of \$50,000. *Id.* Surrogates were generally younger, most were married, a small percentage attended college and most reported income of less than \$30,000 per year. In another study of women who had applied to be surrogates, 40% of the women were unemployed or receiving some form of financial assistance. *Id.*

If on a domestic level there is a clear socioeconomic gap between the surrogate and the potential parent, that gap will only further increase if the transaction involves a Third World surrogate and a western couple.

36. See *Baby Market Still Flourishes in Romania*, CLEVELAND PLAIN DEALER, Sep. 4, 1994, at 15A (reporting the story of a Romanian couple who gave their son away to a Nebraskan couple, believing that they gave him a better future; the parents consented to the adoption because they wanted to save their son from living in an institution). *Id.*

37. See James Rupert, *Baby-Stealing Scandal in Ukraine*, S.F. CHRON., Mar. 23, 1995, at A11 (reporting a Ukrainian investigation of local doctors who stole or bought newborn Ukrainian babies and supplied them to foreign couples, sometimes falsely declaring to the parents that the infants had died); see also Laurie C. Merrill, *Peru's Public Enemy No. 1*, RECORD (Northern New Jersey), Oct. 7, 1992, at A1 (noting reports in Peru that an American attorney helped abduct and sell more than 4,000 Peruvian babies).

38. See JULIA J. TATE, A.B.A., *SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH AND ZILPAH!* 20-26 (1994). The 1987 case of Alejandra Nuno is a classic



that in some developing nations, women sell their services for as low as \$1,000—ninety percent less than surrogates in the United States.<sup>39</sup>

The lack of international surrogacy regulation is similar to the historic treatment of international adoption, which until recently went virtually unregulated. The Hague Convention was ratified in response to atrocious cases of illegal trafficking in Romanian children.<sup>40</sup> When Romania's dictator Nicolae Ceausescu fell, families across the world witnessed the suffering that Romanian children in orphanages endured.<sup>41</sup> Many families flocked to Romania hoping to adopt available and "desirable" children.<sup>42</sup> With no international regulation, a black market developed in response to the increased demand.<sup>43</sup> "Tales of bribery, forged documents, and bullied mothers" have shocked the world.<sup>44</sup>

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example of such socioeconomic exploitation: Alejandra, a Mexican citizen, was reportedly brought to San Diego illegally to participate in an embryo transfer for her infertile cousin, Natie Haro, and Natie's husband, Mario. She claimed that after she was inseminated, she was told the embryo transfer could not be completed and that she would have to bear the child. She signed a handwritten agreement stating that she would be paid approximately \$1,500, well below the typical surrogacy fee. Munoz claimed that someone added the statement, "I will give up my rights to the baby" after she had signed the agreement. Several months after the birth she contacted the Haros, demanding a higher fee; a custody battle ensued. Munoz does not speak English, has a second-grade education, and is not able to read. The child now lives with the biological father, and Munoz has only visitation rights. *Id.*

39. See *supra* note 29.

40. Kristina Wilken, *Controlling Improper Financial Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL'Y 85, 89 (1995). The Hague Conference on Private International law initiated the intercountry adoption project, which developed the convention on protection of children and cooperation in respect of intercountry adoption. *Id.*

41. *Id.* The project of the convention was inspired by new reports of atrocities involving international adoption in Romania after the fall of Ceausescu. *Id.*

42. Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 204 (1994) (asserting that Romanian children are desirable because they are Caucasian); see also Joan D. Ramos, *Ethical Questions About Adoption of Romanian Children*, SEATTLE TIMES, Apr. 1, 1991, at A7.

43. Liu, *supra* note 42, at 204.

44. *Id.* See also Chris Stephen, *Alleged Baby Smuggler Defends Adoptions; Charity Targeted in Several Probes*, S.F. EXAMINER, May 15, 1995, at A9. In 1993, Hungarian police investigated allegations that a man named John Davies supervised a group of 28 Romanian mothers who crossed the border, gave birth, and then returned on their own. Investigators found the babies already matched to American families, and the U.S. government allowed the children to stay in order to keep the families intact. See also Bill Frost et al., *Lawyers Play Lead Role in Black Market Trade*, TIMES (London) Oct. 15, 1994, available in 1994 WL 9188365 (reporting concerns of Save the Children Romania that some children were sold "for their organs or for sexual exploitation"). The absence of

The Romanian case and its massive media coverage forced the UN to address international adoption. The UN recognized that international trade in adoption is unavoidable,<sup>45</sup> and that similar abuses would recur if this market went unregulated.<sup>46</sup> Consequently, a task force comprised of thirty-six nations and sixteen private groups was created to draft a treaty to curb abuses in international adoptions.<sup>47</sup> In 1993, The Hague Convention specifically identified the need to eliminate baby-selling, child abduction, and trafficking in children.<sup>48</sup>

Surprisingly, even though these objectives also apply to children of international surrogacy, no international treaty either mentions or defines the scope of surrogacy arrangements.<sup>49</sup> Currently, children of surrogacy and their surrogate mothers lack clear legal status.<sup>50</sup> Surrogate children can be sold

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any checks on the suitability of parents means that the child's welfare is not assured in Romania. In addition, desperate parents who are rural and uneducated are willing to sell their children for prices ranging from a pair of gold earrings to 10,000 pounds. *Id.*

45. See Wilken, *supra* note 40, at 87. The Hague Convention of 1993 was the first time at which the UN directly and unambiguously referred to intercountry adoption. Previous conventions vaguely referred to it by illegalizing baby-trafficking and recognizing the rights of the child. The 1993 Convention, however, specifically identified the scope of international adoption. By defining what would constitute a legal intercountry adoption, the UN accepted that intercountry adoption is a legal activity. *Id.*

46. See, e.g., Rupert, *supra* note 37, at A11; Merrill, *supra* note 37, at A1.

47. Liu, *supra* note 42, at 205.

48. Hague Conference on Private International Law: Final Act of the 17th session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter Hague Convention].

The three goals of the Hague Convention were:

- a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

*Id.* art. 1.

49. Although some of the major treaties on the rights of the child do address these concerns, see *infra* notes 64-72 and accompanying text, based on the experience with international adoption, the only way to deal with these market ills is to directly address them.

50. Currently, international law does not define the legal identity of a "parent" in the case of surrogacy; possibilities include the surrogate, the prospective mother, the husband of the surrogate, and the prospective father.

internationally and exploited as a commodity.<sup>51</sup> Surrogate women can be exploited, abused, manipulated, and intimidated, and yet have no legal recourse.<sup>52</sup> Rather than wait until a "Romanian surrogacy case" surfaces, the UN must directly identify surrogacy within the Hague Convention.

### III. THE ADOPTION MARKET—A CASE STUDY

The surrogacy and adoption markets are so similar that analysis of one can suggest solutions for the other. The UN realized that the only way to protect the parties involved in adoption was to first recognize the activity as a legally traded service and then explicitly define its scope.<sup>53</sup> The same analysis may be used in determining how to regulate international surrogacy.

Until recently, the international community took no explicit steps to address international adoptions.<sup>54</sup> In the past, it responded by drafting documents that regulated general abuses against children.<sup>55</sup> These agreements, however, were not expansive enough to curb trafficking in adoptive children.<sup>56</sup>

It is very likely that the UN avoided the abuses occurring in international adoption because of the controversy surrounding it. Developing nations are the primary sources of adoptive chil-

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51. Even though the general conventions against trafficking in children could apply, in the case of surrogacy it would be more difficult to identify the transaction because there is less documentation involved than in the case of adoption. If the surrogate negotiates the price with the couple and there is no supervising intermediary or a frame or structure that would give the parties an idea of the scope and limits of the agreement, the child may be used as a commodity by the surrogate to increase her compensation.

52. Krim, *supra* note 14, at 218-23 (discussing cases of abuse and predicting that the "uncontrolled growth" in this industry will further produce a potential for exploitation). Patrick McDonnell, *Surrogate Motherhood Draws New Fire; U.S. Case Raises Spectre of Third World Poor Becoming 'Baby Factories' for the Rich*, MONTREAL GAZETTE, Jan. 6, 1989, at C9 (reporting expert's predictions that the next step in the surrogacy process will be to use Third World rather than Western women as surrogates). Matt Pawa, the head of the National Coalition Against Surrogacy has stated that "[i]t's only a matter of time before we start crossing more borders and start hiring Third World breeders for families in this country." *Id.*

53. Wilken, *supra* note 40, at 87 (stating that the Hague Convention was the first U.S. Treaty to explicitly address and provide a procedural framework for international adoption). Previous to the Hague Convention, the U.S. passed different treaties generally covering the rights of the child, but from documents such as the Declaration on Protection of Children it was unclear whether the UN was a proponent of international adoption. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

dren.<sup>57</sup> Those countries have a surplus in children because they experience exploding population growth and a concurrent inability to provide for these children financially.<sup>58</sup>

Furthermore, many citizens of developing countries oppose international adoption due to their history of colonialism. To these nations, adoption perpetuates historic exploitation: "first you want our labor and raw materials; now you want our children."<sup>59</sup> Adoption is not perceived as a potential source of loving families for a child, but simply "another means to satisfy the greed and selfishness of others."<sup>60</sup>

It is thus not surprising that the UN did not take a stand on international adoption before the Romanian crisis.<sup>61</sup> Before 1993, the UN only addressed child trafficking and child abuse through very general conventions. For example, in 1956 the UN passed the Supplementary Convention on the Abolition of Slavery.<sup>62</sup> Although this agreement prohibited trafficking in children, it only helped children who were "sexually exploited or used as laborers."<sup>63</sup> In 1986, the UN passed the *Declaration on Social and Legal Principles Relating to the Protection on Welfare of Children, with Special Reference to Foster Placement and*

57. Liu, *supra* note 42, at 192. As one commentator states,

This vicious cycle is difficult to escape. With less money and more children, families are less able to or completely unable to provide for their children. As a result, children are frequently abandoned and left to fend for themselves. If they are not left to the streets, they are placed in institutions that may not be adequately prepared to care for them.

*Id.*

58. MARY KATHLEEN BENET, *THE POLITICS OF ADOPTIONS* 122 (1976) Underdevelopment results from a nation's production of wealth for its exploiters rather than production of what it needs to maintain itself. *Id.* at 123. The more a country gives up its exports and primary products to the United States and Western Europe, the worse off that nation will be. *Id.*

59. *Id.* at 194-95 (quoting Jane Rowe, *Perspectives on Adoption, in* ADOPTION: INTERNATIONAL PERSPECTIVES 6 (Euthymia D. Hibbs Ed., 1991)).

60. Liu, *supra* note 42, at 195.

61. Although the UN passed the *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions* in 1965, the treaty was very general, discussing only applicable jurisdiction. See *Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, Oct. 28, 1964, 4 I.L.M. 338 (1965) [hereinafter *Hague Convention 1965*]. The Convention does not actively recognize international adoption or discuss the potential abuses; it discusses only jurisdiction issues. See *id.*

62. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institution and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 40.

63. Wilken, *supra* note 40, at 88.

*Adoption Nationally and Internationally*.<sup>64</sup> This Declaration, although referring to adoption, failed to establish a procedural framework to combat the ills arising from international adoption.<sup>65</sup> Soon after, the UN passed the *Convention on the Rights of the Child*, "which included the first international declaration specifically prohibiting child trafficking for any reason."<sup>66</sup> The declaration, however, did not specifically address the placement of adopted children.<sup>67</sup>

In 1988, after massive media coverage of the adoption market in Romania, the UN could no longer remain silent. The media coverage of Romania<sup>68</sup> inspired the Hague Conference on Private International Law to initiate the Intercountry Adoption Project, which developed the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*.<sup>69</sup> The Seventeenth Session of the Hague Conference on Private International Law adopted the final text of the Convention in 1993. Significantly, that was the first time the UN accepted international adoption as an existent trade,<sup>70</sup> directly specified the

64. United Nations: General Assembly Resolution Adopting the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Sept. 7, 1986, reprinted in 26 I.L.M. 1096 [hereinafter Declaration on Protection and Welfare of Children].

65. Wilken, *supra* note 40, at 88. The declaration did not specifically cover the issue of adoption for payment or baby selling, for example. *Id.* In addition, the Declaration did not explicitly support adoption as a reasonable option. Article 17 is the only one that clearly mentions intercountry adoption. Declaration on Protection and Welfare of Children, *supra* note 64, art. 17. It states that "if a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family." *Id.* Thus, it appears that intercountry adoption is treated as last resort only. Article 18 vaguely states that "[g]overnments should establish policy, legislation, and effective supervision for the protection of children involved in intercountry adoption." *Id.* art. 18. It is very vague as to how to treat intercountry adoption and leaves the procedural responsibility to the individual countries.

66. Wilken, *supra* note 40, at 88; *Convention on the Rights of the Child*, Nov. 20, 1989, 28 I.L.M. 1456, (1989). Article 35 of the *Convention on the Rights of the Child* requires that states 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." *Convention on the Rights of the Child*, *supra*, art. 35.

67. Wilken, *supra* note 40, at 88.

68. See Kennard, *supra* note 9, at 631.

69. Hague Convention, *supra* note 48.

70. *Id.* at 1139 ("The states signatory to the present Convention . . . [recognize] that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.").

objectives of the Convention,<sup>71</sup> and required that all signatories follow the same procedures and requirements.<sup>72</sup>

#### IV. POTENTIAL REGULATION OF SURROGACY

If surrogacy, like adoption, becomes increasingly international, it should be regulated to protect women and children. Initially, the Hague Convention provides a framework to develop appropriate surrogacy regulation. Within this framework, the UN should accept surrogacy as a legal activity, enforce it in such a manner as to afford legal protection to the surrogate, and define it within the scope of an international convention so that countries can consistently follow it.

##### A. SURROGACY AS A LEGAL TRADE

Several compelling reasons dictate that surrogacy should be legalized. First, research shows that as both the incidence and publicity surrounding surrogacy have grown, more and more people consider it to be an acceptable means of becoming a parent.<sup>73</sup> Second, due to the high demand for surrogacy, prohibiting it will only move it to the black market, leaving the parties no legal recourse against potential abuses.<sup>74</sup>

More and more people accept surrogacy as an appropriate means for childless couples to become parents. In the United States, surrogacy arrangements have increased from approximately 500 through the end of 1986 to roughly 4,000 in the mid-1990's.<sup>75</sup> In the 1980's, potential parents spent more than \$33 million dollars in more than 1,200 commercial surrogacy

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71. *Id.* art. 1.

72. *Id.* art. 1(b). One of the three objectives is "to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children." *Id.* This differs from the previous Convention, in which the states were independently responsible for regulating adoption. See generally Hague Convention 1965, *supra* note 61. Articles 4 and 6 of the 1993 Convention specifically discuss the requirements that each signatory state will follow. Hague Convention, *supra* note 48, arts. 4, 6.

73. See *infra* notes 75-78 and accompanying text.

74. See *supra* notes 10-11, 17-21 and accompanying text.

75. See MARTHA A. FIELD, SURROGATE MOTHERHOOD 5 (1988) (stating that by the end of 1986 approximately 500 children had been born as a result of surrogacy contracts); Jay Mathews, *California Surrogate Stirs Dispute*, WASH. POST, Sept. 21, 1990, at A8 (stating that experts estimate that as many as 4,000 babies have been born to surrogate mothers in the United States).

births.<sup>76</sup> Even the widely publicized Baby M decision, in which the New Jersey Supreme Court held that paid surrogacy contracts violated that state's baby-selling laws, did not undermine public approval of surrogacy contracts.<sup>77</sup> Furthermore, recent polls indicate that a majority of adults accept surrogacy as a valid solution to infertility.<sup>78</sup>

In addition, surrogacy should be legalized because both of the parties involved benefit economically. As Judge Richard A. Posner states:

[t]he case for allowing people to make legally enforceable contracts of surrogate motherhood is straightforward. Such contracts would not be made unless the parties to them believed that surrogacy would be mutually beneficial. Suppose the contract requires the father and his wife to pay the surrogate mother \$10,000. . . . The father and wife must believe that they will derive a benefit from having the baby that is greater than \$10,000, or else they would not sign the contract. The surrogate must believe that she will derive a benefit . . . that is greater than the cost to her of being pregnant and giving birth and then surrendering the baby. . . . [A]n economist would say . . . all of the parties to the contract are made better off.<sup>79</sup>

Furthermore, recognizing surrogacy as a legal activity would provide a new source of income for economically disadvantaged women.<sup>80</sup> Associated with this new source of income are two positive distributive effects. First, legalizing surrogacy and allowing women to benefit financially will shift wealth from childless consumers to less advantaged surrogates.<sup>81</sup> It is only fair that the surrogate be paid for her labor, as sperm donors and other physical laborers are paid for their work.<sup>82</sup>

Legalization would limit profiteering activities by surrogacy intermediaries; it would shift the return of profits to the surrogate mother rather than to various agents.<sup>83</sup> Regulation would allow the surrogate to profit from the arrangement and would protect her right to be compensated. These marketplace changes would reinforce the woman's autonomy.<sup>84</sup> "It is particu-

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76. Rebecca Powers & Sheila Gruber Belloli, *The Baby Business*, DETROIT NEWS, Sept. 17, 1989, at 1C.

77. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1489 (1992).

78. *Id.*

79. Posner, *supra* note 5, at 22-23.

80. SHALEV, *supra* note 10, at 158.

81. *Id.*

82. John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 24, 32 (Larry Gostin ed., 1988).

83. SHALEV, *supra* note 10, at 158.

84. *Id.*

larly paternalistic to assume that the state can dictate a woman's choice because it knows better than she what is in her interests as a human being.<sup>85</sup>

However, many consider surrogacy to be far more morally objectionable than does Judge Posner. In the United States, several states deem surrogacy contracts void as against public policy.<sup>86</sup> Many countries prohibit parties from ever entering such contract.<sup>87</sup> Even though society generally has grown to accept it, many interest groups with legislative power oppose it. Various religious,<sup>88</sup> academic,<sup>89</sup> and political<sup>90</sup> groups have rallied against surrogacy.

Legally prohibiting surrogacy will only shift the transactions to the black market. The surrogacy market cannot be controlled or eliminated simply by addressing the criminal behavior of those who create the demand—the childless.<sup>91</sup> Further

85. Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 3, 10 (Larry Gostin ed., 1988).

86. See Yvonne M. Warlen, *The Renting of the Womb: An Analysis of Gestational Surrogacy Contracts Under Missouri Contract Law*, 62 *UMKC L. REV.* 583, 591-93 (1994). Twelve States (Arizona, Indiana, Kentucky, Louisiana, Michigan, Nebraska, New York, North Dakota, Oklahoma, Oregon, Utah, and Washington) and the District of Columbia prohibit surrogacy or make surrogacy contracts unenforceable. Several of these States impose criminal sanctions for violations. Florida, Nevada, New Hampshire, and Virginia prohibit commercial surrogacy but specifically allow surrogacy without compensation. *Id.*

87. *Id.* at 593-94 ("Internationally, laws and policies clearly establish that surrogacy contracts, especially if commercial, are illegal, unenforceable, contrary to public policy and/or void.")

88. See, e.g., Gwen Ackerman, *Supreme Court Overturns Ban on Surrogate Motherhood*, Associated Press, July 17, 1995, available in 1995 WL 4397606 (describing religious opposition to legalization of surrogacy in Israel).

89. See, e.g., Institute on Women and Technology, *Women and Children Used in Systems of Surrogacy: Position Statement of the Institute on Women and Technology*, reprinted in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY*, 322, 322 (Larry Gostin ed., 1989).

The image of woman as reproductive sexual object, is rooted in most societies. It is this image of woman as reproductive object at the disposal of men which must be changed. Surrogacy targets women in vulnerable situations: women who are both emotionally and economically vulnerable. The harm of surrogacy includes the de-humanization, the objectification and the commodification of women. It contributes significantly to lowering the human dignity, worth, and civil status of women, and undermines women's equal exercise of civil rights by the constraints of the surrogate contract.

*Id.*

90. *Id.* Politically, some feminists argue against surrogacy as promoting the idea of women as second-class citizens. Many like to compare it to prostitution even though there are major differences between the two.

91. SHALEV, *supra* note 10, at 53.



criminalization would merely entrench the underground nature of surrogacy.<sup>92</sup> "In economic terms, increasing the risk of unpleasant consequences merely raises the cost of production where the demand is more or less set."<sup>93</sup> Consequently, the high demand for babies will override market prohibitions.<sup>94</sup> The results will not be an elimination of the practice, but simply an increase in prices for services traded on the black market.<sup>95</sup>

Prohibiting surrogacy would also leave the parties vulnerable to a variety of abuses. When a service is traded illegally, the parties providing them have no legal recourse. Intermediary exploitation and dishonesty is effectively granted immunity where the activity is illegal, since the parties lack access to courts of law to enforce the terms of the transaction.<sup>96</sup>

The United Kingdom's prohibition of surrogacy was a failure.<sup>97</sup> After the first test-tube baby, Louise Brown, was born in England in 1978,<sup>98</sup> the British government established the Warnock Committee to study emerging reproductive technologies, especially their social and legal implications.<sup>99</sup> The Committee recommended criminalizing both profit and non-profit organizations that recruit women to be surrogates.<sup>100</sup> It also sought express statutory language declaring all surrogacy contracts unenforceable and void.<sup>101</sup> In support of its recommendation, the committee stated that the danger of exploitation of women

92. *Id.*

93. *Id.*

94. *Id.* The same applies to adoption. When Romania completely prohibited international adoption, the trafficking of children did not stop. Indeed, many had a vested interest in continuing it. Tales of payments to birth parents from baby dealers and kickbacks to corrupt judges or lawyers persist, and some Romanian institutions reportedly "resist efforts to reunite families because it interferes with the lucrative international adoption." *Baby Market Still Flourishes in Romania*, *supra* note 36, at 15A.

95. SHALEV, *supra* note 10, at 53 (stating that cost of production will increase).

96. *Id.* at 158.

97. Arthur Serratelli, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?*, 26 GEO. WASH. INT'L L. & ECON. 633, 639-49 (1993).

98. *Woman Gives Birth to Baby Conceived Outside the Body*, N.Y. TIMES, July 26, 1978, at A1.

99. REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION & EMBRYOLOGY, 1984, Cmnd. 9314, ¶ 1.2.

100. *Id.* ¶ 8.18.

101. *Id.* ¶ 8.19.

outweighed the potential benefits of surrogacy.<sup>102</sup> The recommendation of the Warnock committee became law in 1985.<sup>103</sup>

Ultimately, the United Kingdom's prohibition of surrogacy backfired. The Act punishes only third parties for creating commercial surrogacy agreements. Consequently, it encourages the exploitation of those women who are financially desperate enough to enter an agreement without third-party representation.<sup>104</sup> It discourages women from seeking legal, medical, and psychological assistance because, under the Act, they might be considered third parties.<sup>105</sup> The Act encourages surrogates to enter into "amateurish or exploitative do-it yourself arrangements" without the benefit of medical, legal, or other counseling.<sup>106</sup>

Although the intent behind prohibition (i.e., protecting parties from potential abuses) is laudable, it can be satisfied more effectively by improving the bargaining position of the exploited person.<sup>107</sup> The surrogate mother can be provided socioeconomic power to negotiate the services that she legally provides.<sup>108</sup> Additionally, legal empowerment would shift income from the in-

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102. *Id.* ¶ 8.17.

103. Surrogacy Arrangements Act, 1985, ch. 49 (Eng.). The act specifically prohibits two activities. First, it prohibits third-party intermediaries from receiving a fee. It states that the Act applies to such arrangements regardless of whether they are lawful and whether they are enforceable by or against the person making them. *Id.* § 1(9). Thus, it targets the third-party intermediaries who make, negotiate, or facilitate surrogacy arrangements for a fee. Second, the Act forbids advertising one's availability to enter into or negotiate a surrogacy agreement. *Id.* § 3. The reason behind this prohibition is that "advertising may well be a first step towards commercial activities of the kind that the Bill is designed to prohibit." Serratelli, *supra* note 97, at 643-44.

104. Serratelli, *supra* note 97, at 647. Because the Act allows direct and non-commercial negotiation, it may encourage "amateurish" surrogacy arrangements which can leave both parties vulnerable. The law is so broadly written as to discourage parties from seeking legal advice to ensure that their rights are protected. Thus, the surrogate mother could be exploited even further when entering into an agreement that does not require the contracting couple to provide her with medical and psychological services.

105. *Id.*

106. *Id.*

107. SHALEV, *supra* note 10, at 53. The analysis applies to prohibiting alcohol, drug sales, or prostitution. In the case of illegal adoption, the remedy might be to provide the infertile couple readily available and satisfactory legal alternatives, such as surrogate mother arrangements and other variations of reproductive technology. In the case of surrogacy, it might be to allow the surrogate some legal protection to ensure her right to fight unscrupulous intermediaries. *Id.*

108. *Id.* at 158.

termediaries to the surrogate, thus improving the financial position of the surrogate mother.<sup>109</sup>

## B. SURROGACY SHOULD BE REGULATED TO PROTECT THE SURROGATE'S RIGHTS

Rather than condemn surrogacy, the UN should recognize the woman's right to serve as a surrogate. In addition, the UN must recognize rights that the surrogate should have in performing her services. Those rights include the freedom to terminate the pregnancy and the freedom to keep the child after giving birth.

The right to be a surrogate can be derived from current UN documents. Initially, the right to serve as a surrogate should be derived from the woman's right to privacy in making an intimate personal decision about reproduction.<sup>110</sup> A strong commitment to procreative liberty ensures that women's interests are protected.<sup>111</sup> Consequently, many Western societies place a high priority on private discretion and choice in reproductive matters.<sup>112</sup> Extending this argument, if a woman has a recognized right to procreate, that right should also encompass the woman's right to procreate for the benefit of others.<sup>113</sup>

A number of international documents recognize and protect the woman's right to decide whether to procreate. If they recog-

109. *Id.*

110. *Id.*

111. As one commentator has stated:

Although a rights-based approach to reproduction cannot eliminate the inherent inequalities in male and female procreation, it can provide substantial protection for women. . . . Legal recognition of procreative liberty will protect women from public sector impositions on their procreative choice. Respecting this liberty will stop the state from outlawing early abortion. Respect for this right will also protect women against forced sterilization [or] forced abortion.

JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 229 (1994). This feminist critique, analyzing surrogacy as rights-based, fails because it does not acknowledge that there are two women involved: one the surrogate and the other the adoptive mother. Women should have the freedom to control their reproduction. They should have complete control over their reproductive system.

112. Robertson, *supra* note 82, at 24-25.

113. A.M. Capron & M.J. Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 59, 70 (Larry Gostin ed., 1988) (even if the Constitution should be understood as including a right to bear a child for someone else, it should not be interpreted as including the right to be paid for it). The right of the surrogate to be paid for services is derived from the right to be compensated for services provided. See *infra* notes 119-21 and accompanying text.

nize the general right to procreate, those documents should be interpreted to also recognize the right to surrogate. The right to procreate, or more specifically, the right to decide the number and spacing of children was first declared a private human right in 1968 in the Proclamation of Teheran.<sup>114</sup> Other declaratory instruments also recognized this right, most notably the 1969 Declaration on Social Progress and Development.<sup>115</sup> The rights became enforceable in 1981, upon ratification of the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>116</sup>

In addition to the right of the woman to surrogate, she should also have the right to be compensated for it. Banning payment for surrogate services would deprive the surrogate of compensation for her labor.<sup>117</sup> Surrogate services—which encompass conception, gestation and birth—are not only arduous for the surrogate, they satisfy a worthwhile social goal.<sup>118</sup> Women are entitled to compensation for the physical changes in

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114. G.A. Res. 2542, art. 4, 22(b), U.N. GAOR, 24th Sess., 1829th plen. mtg., reprinted in 12 UNITED NATIONS RESOLUTIONS SERIES 1: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 257, 258, 260 (Dusan J. Djonovich ed., Oceana Publications, Inc. 1975). For a discussion of the evolution of this right, see *Proclamation of Teheran*, art. 16, (May 13, 1968), reprinted in 1 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS at 51, 54, U.N. Doc. ST/HR/IV/Rev.5 (1994).

115. *United Nations Standards Concerning the Relationship Between Human Rights and Various Population Questions*, reprinted in U.N. DEPT OF ECON. & SOC. AFF., THE POPULATION DEBATE: DIMENSIONS AND PERSPECTIVES PAPERS OF THE WORLD POPULATION CONFERENCE, BUCHAREST 1974, at 349, 350 U.N. Doc. ST/ESA/SER.A/57/Add.1, U.N. Sales No. E/F/S.75.XIII.5 (1975) (the right to family planning is an "exclusive right" of parents "to decide freely and responsibly on the number and spacing of children").

116. *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979). The General Assembly adopted the Women's Convention on January 22, 1980. Inclusion of the right to family planning in the Women's Convention supports it with the force of an international treaty law. The provision addressing the right to family planning states:

Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and familial relations and in particular shall ensure, on a basis of equality of men and women:

...

The same right 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.

*Id.* art.16.1(e).

117. Gostin, *supra* note 85, at 9-10.

118. *Id.*

their bodies, the changes in lifestyle, the work of carrying a fetus, and the pain and medical risk of labor and partition.<sup>119</sup>

In addition to compensation, the surrogate should also receive adequate medical treatment where necessary. Both of these rights can be interpreted from the Global Tribunal on Violations of Women's Human Rights.<sup>120</sup> The Tribunal's panel on socio-economic rights of women recognized the need to protect women from socioeconomic exploitation.<sup>121</sup> The Tribunal recognized a woman's right to equal remuneration and benefits, including equal treatment for work of similar value.<sup>122</sup> Furthermore, it recognized that employers should be obligated to provide medical benefits to all employees. The Tribunal concluded that women should be fairly compensated for their services, a finding which can be interpreted to mean that women should also be compensated for services such as surrogacy.<sup>123</sup> Because medical treatment is a necessary part of surrogacy, it is a benefit which must also be part of the surrogate's compensation.<sup>124</sup>

While the woman's right to surrogate should be recognized within her right to privacy, such recognition should not limit her other rights. In consenting to provide surrogate services, the woman still has a right to terminate her pregnancy.<sup>125</sup> The surrogate should not be able to waive this right.<sup>126</sup>

119. See, e.g., *Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 211-12 (Ky. 1986) (holding that payments to the woman under surrogacy contract were for her services rather than for the baby).

120. See CHARLOTTE BUNCH & NIAMH REILLY, *DEMANDING ACCOUNTABILITY: THE GLOBAL CAMPAIGN AND VIENNA TRIBUNAL FOR WOMEN'S HUMAN RIGHTS* 63 (1994).

121. *Id.* at 66.

122. *Id.* at 63-73.

123. *Id.* The problem with this analysis is its implication toward the recognition of prostitution. This argument, however, should not be read to recognize the right to be compensated for prostitution, a criminal offense in many jurisdictions. Prostitution is not a normatively accepted activity, while the desire to have a child is internationally accepted and respected by all societies. Gostin, *supra* note 85, at 9-10.

124. See BUNCH & REILLY, *supra* note 120, at 106 (stating that women should have the right to enjoy the highest standard of mental and physical health).

125. See Gostin, *supra* note 85, at 13 (asserting that there are some rights that cannot be irrevocably waived; i.e., the person can change her mind even after she agrees to waive her rights).

126. See *supra* notes 10-11 and accompanying text (discussing the disparity in bargaining positions of the surrogate and the prospective parents).

Within the right to procreate also lies the right to terminate the pregnancy. Arguably, the same treaties that recognize the woman's right to make decisions regarding procreation should encompass the woman's right to have an abortion.<sup>127</sup> The rights of individuals to decide the number and spacing of their children makes sense only if it includes the right to abort an unwanted pregnancy.<sup>128</sup> Currently, however, the issue of whether a woman has an international right to have an abortion is controversial.<sup>129</sup> The language of international agreements indicates an unwillingness to recognize this right.<sup>130</sup>

Finally, the surrogate must have the right to change her mind and keep the child.<sup>131</sup> Surrogacy agreements should not deny a surrogate the choice to assert her parental claims over the child.<sup>132</sup> When agreeing to the exchange, the surrogate may have no interest in keeping the child, and she may see the arrangement as simply compensating her for work.<sup>133</sup> Yet, once the surrogate mother is faced with the actual decision, her rights become of utmost importance.<sup>134</sup> To deny her the freedom to keep the child punishes her for failing to foresee future emotional developments.

From a practical perspective, the right of the surrogate to change her mind will also dispel the concern that surrogacy is merely another form of baby-selling.<sup>135</sup> If the woman has the right to change her mind and keep the child, any compensation she receives is not for the baby, which she has the right to keep, but for the services. As a result, the surrogate should be paid for her services regardless of whether she relinquishes the child.<sup>136</sup> If so, the payment is not for the child that may or may not be relinquished, but rather for the services that the surrogate provides.<sup>137</sup>

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127. Ivonne Prieto, *International Child Health and Women's Reproductive Rights*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 143, 162 (1993).

128. *Id.*

129. *Id.* at 151-52, 171-75.

130. *Id.* at 151-52.

131. Gostin, *supra* note 85, at 15-16.

132. *Id.*

133. *Id.*

134. *Id.* at 16.

135. *Id.* at 12-13.

136. Gostin, *supra* note 85, at 12-13; *see also* Krim, *supra* note 14 at 224-25 (stating that proponents of surrogacy distinguish it from baby-selling because the surrogate is paid equal amounts throughout the pregnancy term even if the fetus is stillborn).

137. Gostin, *supra* note 85, at 3, 8-9.

## C. DEFINING THE SCOPE OF SURROGACY

While the surrogate should have the right to provide reproductive services, the other parties to the transaction should also be protected.<sup>138</sup> To achieve this, the best approach is to explicitly regulate it on an international level.<sup>139</sup> This regulation should explicitly define the scope of the transaction and clearly state the rights of the parties involved. Unfortunately, surrogacy is currently too controversial for countries to agree on its scope, and it is unlikely that a specific convention explicitly recognizing surrogacy as a human right will be accepted in the near future.<sup>140</sup> The more practical approach would be to include surrogacy within an already existing treaty.

One approach would be to include surrogacy within the *Convention on Intercountry Adoption*. Based on the similarities between adoption and surrogacy, and the potential abuses that both encompass, surrogacy could be incorporated within this adoption treaty. However, adoption differs from surrogacy arrangements in two obvious respects: first, the mother has already become pregnant by the time any issue of adoption presents itself; second, the baby usually does not have any biological connection to either of the adopting parents.<sup>141</sup> However, some courts have found the two similar enough to apply adoption laws to surrogacy.<sup>142</sup>

It remains unsettled whether courts should recognize the surrogate agreement before the child's birth. The court must always recognize the rights of the child, even if conceived pursuant to an unenforceable agreement. After the child is born, the courts have to consider issues that are very similar to adoption—determining which family should have custody over the

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138. See FIELD, *supra* note 75, at 101-02. The surrogate should have equal, but not more, bargaining power than the potential parents. In an ideal world, the surrogacy convention could address issues such as extortion by the surrogate. Noel Keane, for example, reports on two surrogates, both of whom agreed to serve without payment of a fee, and later used their position to make demands upon the contracting parties. Keane relays that each surrogate threatened to abort the fetus or to refuse to relinquish her child at birth if the parents didn't pay. *Id.*

139. See Wilken, *supra* note 40 (discussing the need for uniform regulation on a national level).

140. Knoppers & LeBris, *supra* note 13, at 357-58.

141. FIELD, *supra* note 75, at 84.

142. *E.g.*, Surrogate Parenting Assoc., Inc. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 211-12 (Ky. 1986).

child and what the child's best interests are.<sup>143</sup> The fact that the potential parents in the case of surrogacy are genetically related to the infant does not change the best-interest analysis.<sup>144</sup> In addition, for the potential parents to secure the child, they will have to adopt the baby because most countries will recognize the woman who gave birth to the baby as the natural mother.<sup>145</sup>

The legal dispute in surrogacy arises when the surrogate changes her mind and wants to keep the baby. Under many states' adoption laws, there is a time period during which the biological mother has the right to change her mind.<sup>146</sup> The same time period should also apply to surrogacy.<sup>147</sup> If the surrogate chooses to keep the baby after the time period has expired, the potential parents may sue to enforce their custody rights to the child. The potential parents' rights will, however, remain secondary to those of the surrogate because the woman who actually gave birth to the baby will be considered the natural mother.<sup>148</sup> Even then, the potential parents have some legal recourse in attempting to enforce the adoption. In most cases, the courts will follow the "child's best interest" approach and place the infant with the family which will best satisfy its interests.<sup>149</sup>

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143. *Johnson v. Calvert*, 851 P.2d 776, 788-89 (Cal. 1993) (Kennard, J., dissenting), affg sub nom. *Anna J. v. Mark C.*, 28 Cal. Rptr. 369 (Cal. Ct. App. 1991). Justice Kennard's dissent argues that the "best interest of the child standard" should be used in surrogacy in a similar way that it is used in traditional child welfare disputes, such as custody and adoption.

144. FIELD, *supra* note 75, at 89.

145. See Warlen, *supra* note 86, at 593-94. Because the United Kingdom has banned commercial surrogacy, its law defines the birth mother as the legal mother of any child born of a surrogacy arrangement regardless of whether she is genetically related to the child. *Id.* The Council of Europe has also banned surrogacy arrangements except in exceptional cases and has specifically found that motherhood is to be determined "by the fact of giving birth rather than genetics . . . because of the necessity of giving the child a clear legal situation at birth." *Id.* at 594. The laws of Bulgaria and Spain also stipulate that motherhood is determined by the fact of giving birth. *Id.*

146. FIELD, *supra* note 75, at 89-93.

147. *Id.*

148. *Id.* at 92-94.

149. See *In re Baby M*, 525 A.2d 1128, 1166-67 (N.J. Super. Ct. Ch. Div. 1987). This was the type of analysis that the Baby M court decided to follow. Even though it did not enforce the surrogacy contract, it allowed the baby to stay with the adoptive parents rather than with the surrogate, arguing that the best interests of the child should prevail. The New Jersey Supreme Court affirmed in part and reversed in part, invalidating the surrogacy contract as contrary to state law, naming the birth mother as the child's mother, but granting custody to the father because doing so was in the best interests of the child. 537 A.2d 1227, 1234-35 (N.J. 1988).



Natural parents have a fundamental right in the companionship, care, custody, and management of their children. Their rights supersede the rights of any third persons, including the adopting parents.<sup>150</sup> Thus, although the potential parents may be genetically related to the baby, if they are not considered the natural parents, courts will presume that the best interests of the child require placement with the birth mother.<sup>151</sup> Nevertheless, when the natural parents are unfit, plan to give the child for adoption or file for divorce, they threaten the child's welfare. In that instance, the court must act to protect the child's rights.<sup>152</sup>

On an international level, surrogacy should be included in the Hague Convention. With minor modifications in interpretation, all three objectives of the Convention could encompass surrogacy.<sup>153</sup> The first objective of the Convention is to "ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights."<sup>154</sup> The same objective applies to surrogacy. In determining the rights of the parties involved in international surrogacy, the best interests of the child should prevail. The difference between surrogacy and adoption becomes important only because the Convention presumes a child's best interest lies with the natural parents. The Convention states that as a matter of priority the child should remain with his family of origin.<sup>155</sup> However, in the case of surrogacy the "family of origin" is not readily

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150. ARNOLD H. RUTKIN, FAMILY LAW AND PRACTICE § 32.01[1] (1981) (there is a presumption that placement with parents serves the child's best interests). In most cases the surrogate will be found to be the natural parent, as she is the one who actually gave birth to the baby. The father may have some recognized rights, but the Uniform Parentage Act limits the recognition of paternal rights of the sperm donor. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987). Yet one case involving gestational surrogacy did recognize the potential or donating parents as the natural parents. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). (holding that the "intent" of the parties to the surrogacy agreement should determine parenting).

151. *But see Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). In *Calvert*, the court held that the natural parents are the genetically related parents, i.e., the potential parents. The court stated that "the intended [parents] merit full credit as conceivers." *Id.* at 783. Thus, to determine who was the "natural" mother, whether the embryo donor or the carrier, the court analyzed the "intent" of the parties. *Id.*

152. Brian J. Carney, *Where Do the Children Go?—Surrogate Mother Contracts and the Best Interests of the Child*, 22 SUFFOLK U. L. REV. 1187, 1205 (1988).

153. See Hague Convention, *supra* note 48.

154. *Id.* art. 1(a).

155. *Id.* pmb1.

apparent—the child may be of a race or culture decidedly different than the surrogate mother. In such a case the priority of the country of origin may be inappropriate; the child may assimilate more easily with his genetic parents than with the surrogate.<sup>156</sup>

The second objective of the Convention is to “establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.”<sup>157</sup> These same concerns apply to surrogacy. In order to eliminate the potential for commodifying the child, surrogacy should likewise be regulated.<sup>158</sup> Like adoption, the exchange of a baby for cash should be deemed illegal and punished.<sup>159</sup> A greedy surrogate who uses extortion and increases the price of her services above the agreed value should be punished as well.<sup>160</sup> Treating a child as a commodity is against public policy regardless of whether the child is the center of an adoption or a surrogacy controversy.<sup>161</sup> Thus, the articles of the Convention that specifically apply to the implementation of adoption safeguards should apply equally to surrogacy.

The last objective of the Convention is to ensure that the contracting states recognize those adoptions that accord with the Convention.<sup>162</sup> By requiring all member countries to follow the same guidelines, the Convention ensures that the safeguards are actually implemented. By requiring that the contracting states recognize adoptions, the Convention ensures that a child who is the subject of international adoption will have a legal status in both countries. Indeed, the child resulting from surrogacy should have the same assurance that she has a legal status in the country in which her new parents reside.

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156. Of course this should not be the only factor that the court considers when determining the best interests of the child. However, even in the United States the issue of race is a factor in placing children for adoption. See e.g., *In re Petition of R.M.G.*, 454 A.2d 776 (D.C. 1982); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

157. Hague Convention, *supra* note 48, art. 1(b).

158. See *supra* notes 9-13 and accompanying text.

159. Gostin, *supra* note 85, at 9.

160. FIELD, *supra* note 75, at 101.

161. *Id.*

162. Hague Convention, *supra* note 48, art. 1(c); see also *id.* arts. 17-24 (discussing procedures for rules and procedures for intercountry adoptions).

## VI. CONCLUSION

International trade in surrogacy is becoming far more common. Surrogacy targets a market in which demand for babies greatly exceeds supply. Furthermore, surrogacy is a better option than adoption for many families. Adoption has expanded significantly internationally, and surrogacy is following the same trend. Unfortunately, the high demand for babies is likely to perpetuate the exploitation of surrogates and their children. However, no international convention currently covers surrogacy.

While an international treaty specifically covering surrogacy would be the best approach to deal with this rapidly emerging market, the passage of such regulation at this point in time is unlikely because of its controversial nature. Consequently, an alternative approach is to incorporate the transaction and the rights of the surrogates into already existing treaties concerning international adoption.