


2016

## From Baby M to Baby M(anji): Regulating International Surrogacy Agreements

Yehezkel Margalit

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### Recommended Citation

Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J. L. & Pol'y (2016).  
Available at: <http://brooklynworks.brooklaw.edu/jlp/vol24/iss1/2>

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**FROM BABY M TO BABY M(ANJI):  
REGULATING INTERNATIONAL SURROGACY  
AGREEMENTS**

*Yehezkel Margalit\**

*In 1985, when Kim Cotton became Britain's first commercial surrogate mother, Europe was exposed to the issue of surrogacy for the first time on a large scale. Three years later, in 1988, the famous case of Baby M drew the attention of the American public to surrogacy as well. These two cases implicated fundamental ethical and legal issues regarding domestic surrogacy and triggered a fierce debate about motherhood, child-bearing, and the relationship between procreation, science, and commerce. These two cases exemplified the debate regarding domestic surrogacy—a debate that has now been raging for decades. A new ethical and legal debate has emerged concerning international surrogacy agreements. One aspect of this debate, which I will explore in this Article, is that international surrogacy requires a more robust regulatory regime. I will articulate a variety of solutions to effectuate this regulatory regime and will enumerate the advantages and disadvantages of these solutions. Against this background, I propose a Hague international convention to regulate international surrogacy agreements, similar to the*

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\* Visiting Research Scholar, New York University Law School (2011-2012); Senior Lecturer of Law, Netanya Academic College and Bar-Ilan University; PhD (Law); M.A. (Law); LL.B. Bar-Ilan University. Special thanks are due to Hannah Baker, Glenn Cohen, Daphna Hacker, and Pamela Laufer-Ukeles who provided me with helpful comments while I was writing this article. Thanks are also due to participants in the conferences at which I have discussed earlier versions of this Article including the ISFL Israel Conference 2014 and the 10th World Conference on Bioethics, Medical Ethics, & Health Law 2015. Special thanks are also due to the editorial staff of the *Journal of Law & Policy* for their excellent comments and work on the initial drafts of this Article. I am grateful to them all.

*existing Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption. Notwithstanding my support for a Hague convention, this alone will be insufficient to address some of the issues raised by international surrogacy. Therefore, domestic regulation similar to the proposed 2010 Indian Assisted Reproductive Technology (Regulation) Bill and Rules or Israel's 2012 expert committee recommendations and 2014 proposed regulation should be implemented.*

## INTRODUCTION

The debate surrounding surrogacy agreements was sparked approximately thirty years ago with the heart-wrenching cases of Baby M in the United States and Baby Cotton in England.<sup>1</sup> Since then, issues related to surrogacy have been debated at length.<sup>2</sup> These discussions, however, have largely concerned domestic surrogacy. This Article will discuss the legal and ethical problems associated with international surrogacy agreements. In order to address these problems, a Hague convention on international surrogacy is needed, supplemented with domestic regulation to counteract some of its limitations.

International surrogacy agreements highlight economic, social, racial, and gender disparities between the surrogates and intending parents.<sup>3</sup> These disparities are more pronounced when the intending parents are wealthy and the surrogates live in developing countries, which leads to questions concerning the

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<sup>1</sup> See generally MARY BETH WHITEHEAD, *A MOTHER'S STORY: THE TRUTH ABOUT THE BABY M CASE* (1989); KIM COTTON & DENISE WINN, *BABY COTTON: FOR LOVE AND MONEY* (1985). For analysis of the negative impact of the Baby Cotton case on British legislation, see Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 *UMKC L. REV.* 507, 524 (2010).

<sup>2</sup> See CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989); *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 35 (Rachel Cook et al. eds., 2003); *SURROGACY, LAW, AND HUMAN RIGHTS* (Paula Gerber et al eds., 2015).

<sup>3</sup> Emily Stehr, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation*, 35 *HASTINGS INT'L & COMP. L. REV.* 253, 287 (2012).

commodification and exploitation of women and the poor.<sup>4</sup> Although these concerns arise in domestic surrogacy arrangements, the issues become exacerbated in the international context and therefore demand a more robust regulatory framework.<sup>5</sup> This framework will enable the continuation of international surrogacy agreements while thoroughly preserving the best interests and the human rights of the contracting parties, particularly the conceived child. Only comprehensive regulation will minimize the ethical and legal fears that have emerged concerning these cross-border agreements.

This Article proceeds in five parts. Part I provides historical background on surrogacy and describes the growth in international surrogacy tourism. It describes the cases of Baby M and Baby Manji, two of the most important international surrogacy disputes, as well as other prominent cases. Part II explores the various medical, ethical, and legal pitfalls of cross-border surrogacy agreements. Part III argues in favor of regulating cross-border surrogacy and discusses the methodologies for addressing the problems associated with international surrogacy agreements. Part IV contemplates a new Hague convention on international surrogacy<sup>6</sup> similar to the existing Hague conventions on the

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<sup>4</sup> See *infra* text accompanying notes 53, 127.

<sup>5</sup> See Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 51–56 (2008); Maya Unnithan, *Thinking Through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women*, 1 J. LEGAL ANTHROPOLOGY 287, 288 (2013) (“Controversy regarding reproductive justice, autonomy and choice is particularly rife in the context of transnational commercial surrogacy . . .”).

<sup>6</sup> For two preliminary studies addressing the merits of a Hague convention on international surrogacy, see PERMANENT BUREAU, HAGUE CONFERENCE, PRIVATE INTERNATIONAL LAW ISSUES SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (2011) [hereinafter HCCH 2011], <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>; PERMANENT BUREAU, HAGUE CONFERENCE, A PRELIMINARY REPORT ON THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (2012) [hereinafter HCCH 2012], <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>.

Protection of Children and Inter-country Adoption.<sup>7</sup> It also discusses the advantages and disadvantages of adopting such a convention. Part V proposes domestic and unilateral regulation to supplement the international convention. The 2010 proposed Indian Assisted Reproductive Technology (Regulation) Bill and Rules<sup>8</sup> and the 2012 Israeli expert committee recommendations and 2014 proposed regulations serve as a framework for domestic regulation.<sup>9</sup>

## I. BACKGROUND: FROM BABY M TO BABY MANJI AND THE RISE OF INTERNATIONAL SURROGACY TOURISM

### A. Surrogacy

Modern surrogacy is an arrangement whereby a woman agrees to carry a fetus for another individual or individuals and deliver it after birth. There are two types of surrogacy: traditional surrogacy and gestational surrogacy. “Traditional surrogacy means that the surrogate mother provides two components of motherhood: the genetic material of the ovum and the gestational contribution.”<sup>10</sup> “The gestational surrogate provides only one component of

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<sup>7</sup> *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HCCH, [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69) (last visited Nov. 6, 2015).

<sup>8</sup> The Assisted Reproductive Technology (Regulation) Bill 2010 (India) [hereinafter Draft ART Bill 2010], <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

<sup>9</sup> See THE ISRAELI MINISTRY OF HEALTH, THE PUBLIC COMMISSION FOR REVISION OF THE LEGISLATIVE REGULATION OF FERTILITY AND CHILDBEARING IN ISRAEL 68 (2012) [hereinafter the Mor-Yossef Commission], <http://www.health.gov.il/PublicationsFiles/BAP2012.pdf>; MEMORANDUM OF SURROGACY AGREEMENTS LAW (2014) [hereinafter Surrogacy Agreements Memorandum], <http://knesset.gov.il/Laws/Data/BillGovernment/886/886.pdf>.

<sup>10</sup> Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 426 (2014) [hereinafter Margalit, *In Defense of Surrogacy*]; see also Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN'S L.J. 245, 247 (2012).

motherhood: the gestational contribution.”<sup>11</sup> Both types of surrogacies may be either commercial or altruistic. In commercial surrogacy, monetary consideration generally incentivizes the surrogate mother. In altruistic surrogacy, the surrogate mother is generally motivated by a desire to help desperate infertile couples.<sup>12</sup> This Article focuses only on international commercial surrogacy which is not only the most prevalent form but also that which raises the most troubling implications.<sup>13</sup>

### B. Baby M

The American public was first exposed to the practice of domestic surrogacy in 1988 with *In the Matter of Baby M*.<sup>14</sup> In that case, William and Elizabeth Stern entered into a surrogacy agreement with Mary B. Whitehead, whom they found through a newspaper.<sup>15</sup> According to the agreement, Whitehead would be artificially inseminated, bring the pregnancy to term, and relinquish her parental rights to the Sterns after delivering the baby.<sup>16</sup> Finding it impossible to comply with the contract, Whitehead suffered an emotional crisis and disappeared with the baby, returning the baby to the Sterns only after an arrest and court order.<sup>17</sup> William and Elizabeth Stern then sued to be recognized as the child’s legal parents.<sup>18</sup> After a long, bitter, and well publicized legal struggle, the New Jersey Supreme Court reversed the trial court’s validation of the contract and authorization of the baby’s

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<sup>11</sup> Margalit, *In Defense of Surrogacy*, *supra* note 10; Ladomato, *supra* note 10, at 247–48.

<sup>12</sup> Margalit, *In Defense of Surrogacy*, *supra* note 10.

<sup>13</sup> “I do not, however, distinguish between the [international] traditional and gestational surrogacies since my general argument is consistent and applicable to both surrogacy types (despite the fact that there is some difference between them) because the gestational contribution of the gestational surrogate mother is so great that it creates similar complications as those that arise in a traditional surrogacy.” Margalit, *In Defense of Surrogacy*, *supra* note 10, at 426.

<sup>14</sup> *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

<sup>15</sup> *Id.* at 1236.

<sup>16</sup> *Id.* at 1235.

<sup>17</sup> *Id.* at 1236–37.

<sup>18</sup> *Id.* at 1237.

adoption by the Sterns.<sup>19</sup> The court decided that Mr. Stern was the legal father and Mrs. Stern was asked to adopt the baby in order to be recognized as her legal mother. For her part, Ms. Whitehead received some parental rights over the child, including a visitation right.<sup>20</sup> This ethical-legal confusion illustrates the complexity surrounding surrogacy, which is further heightened in the international surrogacy context.

### C. Surge in Surrogacy Tourism

*Baby M* brightly illustrates the legal and ethical difficulties and challenges that confront domestic surrogacy. Nonetheless, in the two decades since *Baby M* the number of couples and individuals traveling abroad in order to privately obtain medical care has dramatically increased.<sup>21</sup> Due to factors both numerous and complex, including expanded internet access, the medical tourism industry has become a multibillion-dollar industry involving thousands of patients from the United States alone.<sup>22</sup> An estimated 6 million people traveled abroad for medical reasons in 2008.<sup>23</sup>

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<sup>19</sup> *Id.* at 1234.

<sup>20</sup> *Id.* For the biographies of both the surrogate and the conceived child, see WHITEHEAD, *supra* note 1 and LOUISE BROWN & MARTIN POWELL, LOUISE BROWN: MY LIFE AS THE WORLD'S FIRST TEST-TUBE BABY (2015). For a general discussion of the importance of the ruling in *In re Baby M.*, see J. Herbie Difonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345 (2011).

<sup>21</sup> See I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1471–73 (2010) [hereinafter Cohen, *Protecting Patients*] (discussing the recent growth of medical tourism in the U.S. and abroad).

<sup>22</sup> Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 L. & INEQ. 277, 287–89 (2009) (explaining why “many commentators credit the internet with facilitating reproductive tourism”).

<sup>23</sup> See, e.g., *Legal and Social Issues Surrounding Medical Tourism Changes in the Stance Toward Commercial Surrogacy in India*, CINI, <http://ci.nii.ac.jp/naid/120005349394> (last visited Nov. 6, 2015). For another suggested figure as according to the Centers for Disease Control and Prevention, an estimated 750,000 United States residents travel abroad for medical care each year, see *Medical Tourism*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Feb. 23, 2015), <http://www.cdc.gov/features/medicaltourism/>.

The global market for the medical tourism industry is valued at approximately \$60 billion<sup>24</sup> and is predicted to continue growing at a fast pace.<sup>25</sup>

Patients leave their home country and seek medical care overseas for a variety of reasons: overseas treatment can be cheaper and, in some cases, may be covered by the patient's insurance.<sup>26</sup> Specific care or services may only be available overseas.<sup>27</sup> A foreign country might also provide improved medical service or offer more amenable social or religious norms. Foreign countries may better protect patient privacy or allow them to fulfill personal preferences, such as dictating the race, ethnicity, or gender of a child born to a surrogacy arrangement.<sup>28</sup> Individuals also engage in "circumvention tourism," a process by which patients travel abroad for services that are legal in their destination country but illegal at home.<sup>29</sup> Procreative, or reproductive, tourism is a branch of medical tourism.<sup>30</sup> In reproductive tourism,

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<sup>24</sup> See KRISTA WENDT, *MEDICAL TOURISM: TRENDS AND OPPORTUNITIES* (Dec. 2012) (unpublished MBA thesis, University of Nevada), <http://digitalscholarship.unlv.edu/thesesdissertations/1483/>; NEIL LUNT ET AL., *MEDICAL TOURISM: TREATMENTS, MARKETS AND HEALTH SYSTEM IMPLICATIONS: A SCOPING REVIEW* 14 (2011), <http://www.oecd.org/els/health-systems/48723982.pdf>.

<sup>25</sup> See, e.g., Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 *BERKELEY J. INT'L L.* 412, 450 (2012) ("The international surrogacy industry will continue to grow . . ."); Mark S. Kopson, *Medical Tourism: Implications for Providers and Plans*, 3 *J. HEALTH & LIFE SCI. L.* 147, 147 (2010) ("Although there are wide variations in estimates of current outbound medical tourism, virtually all published studies have found potential for expansion, and some have projected potentially explosive growth in the near-term future.").

<sup>26</sup> See Cohen, *Protecting Patients*, *supra* note 21, at 1472, 1486–88.

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 *CORNELL J. L. & PUB. POL'Y* 349, 356–61 (2012); Ikemoto *supra* note 22, at 286, 301.

<sup>29</sup> See I. Glenn Cohen, *Circumvention Tourism*, 97 *CORNELL L. REV.* 1309, 1309 (2012).

<sup>30</sup> Ikemoto, *supra* note 22, at 293–94 (distinguishing between the broader category of medical tourism and its subset reproductive tourism). For the notion of "procreative tourism," see Linda Nielsen, *Procreative Tourism, Genetic*



individuals, due to their social or medical infertility, seek to utilize reproductive technology in foreign countries in order to conceive a child.<sup>31</sup> As this practice spreads all over the globe, its consequential challenges and drawbacks are almost inevitable.

#### D. *Baby Manji and Beyond*

Although, as the Baby M case illustrates, domestic surrogacy can lead to a variety of difficult issues, international surrogacy presents a host of different and sometimes more complex concerns. A 2008 case concerning international surrogacy, *Yamada v. Union of India*, or “Baby Manji,” highlights the problems of the parentless and the stateless child.<sup>32</sup> In *Yamada*, a Japanese couple used a gestational surrogate with a donor egg in India.<sup>33</sup> The couple divorced before the baby was born and only the father wanted to keep the baby.<sup>34</sup> In order to be recognized as the legal parent, the father faced an uphill legal battle in both India and Japan. At the time, Japanese law did not recognize the legality of surrogacy agreements and Indian law strictly prohibited single-parent adoption.<sup>35</sup> Accordingly, the baby was stuck in India for almost six months waiting for her Japanese passport following her recognition as the legal daughter of the Japanese father.<sup>36</sup> India ultimately issued Baby Manji a certificate of identity, a legal document given to those who are stateless.<sup>37</sup> With this certificate, her father obtained a Japanese visa and could bring her home to

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*Testing and the Law*, in FAMILIES ACROSS FRONTIERS 831 (Nigel Lowe & Gillian Douglas eds., 1996); Margaret Brazier, *Regulating the Reproduction Business?*, 7 MED. L. REV. 166 (1999); Lisa Hird Chung, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 MINN. J. INT’L L. 263 (2006); Stehr, *supra* note 3; Debra Spar, *Reproductive Tourism and the Regulatory Map*, 352 NEW ENG. J. MED. 531 (2005).

<sup>31</sup> See, e.g., Chung, *supra* note 30, at 270.

<sup>32</sup> *Yamada v. Union of India*, AIR 2008 SC 1554.

<sup>33</sup> Mohapatra, *supra* note 25, at 418.

<sup>34</sup> *Id.*

<sup>35</sup> The process is further complicated when a male asks to adopt a female child, as occurred in this case. *Id.* at 419.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Japan.<sup>38</sup> Unfortunately, given the unregulated international surrogacy framework, legal battles involving parentless and stateless children like Baby Manji often arise.

In *Re: X & Y*, a British couple entered into a surrogacy arrangement with a Ukrainian woman who gave birth to twins.<sup>39</sup> Due to the difficulty of obtaining English citizenship, the court was concerned that the children were at risk of being “marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home.”<sup>40</sup> Citing the best interests of the child, the court recognized them as legitimate children of the intending parents and therefore citizens of the U.K.<sup>41</sup> The court also approved payments to the Ukrainian surrogate mother of €27,000.<sup>42</sup> The Constitutional Court of Austria also heard a case dealing with twins born pursuant to an international surrogacy agreement between Austrian intending parents and a Ukrainian surrogate.<sup>43</sup> The court could not determine

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<sup>38</sup> Anika Keys Boyce, *Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Agreements*, 36 SUFFOLK TRANSNAT’L L. REV. 649, 664 (2013). For similar cases and for the accompanying legal discussion of those cases, see generally *Re G (Surrogacy: Foreign Domicile)* [2008] 1 FLR 1047 (involving a Turkish couple who enlisted a British surrogacy agency to conceive and carry their child); Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240 (2013); Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT’L L. 120 (2012); *Balaz v. Anand Municipality*, LPA 2151/2009 (Gujarat H.C. 2009); Tina Lin, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT’L & COMP. L. 545, 571–74 (2013); Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT’L L. REV. 117, 122–31 (2013).

<sup>39</sup> *See Re: X & Y (Foreign Surrogacy)* [2008] EWHC (Fam) 3030 (Eng.).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* For a discussion of the legal frameworks governing international surrogacies, see Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009 (2010); Ergas, *supra* note 38, at 122–31.

<sup>43</sup> POLICY DEP’T C: CITIZENS’ RIGHTS & CONSTITUTIONAL AFFAIRS, A COMPARATIVE STUDY ON THE REGIME OF SURROGACY IN EU MEMBER STATES, at 103–04 (2013) [hereinafter SURROGACY IN EU MEMBER STATES],

the parentage of the children because the only proof available was foreign and unreliable Ukrainian birth certificates.<sup>44</sup> Doubt also arose as to whether the surrogate mother was an Austrian citizen.<sup>45</sup> The Austrian government therefore refused to validate the children's birth certificates and designate the intending parents as the legal parents of the children.<sup>46</sup>

A case in Germany also addressed the uncertainties that surround international surrogacy. In the case, an Indian surrogate was inseminated in India with the "sperm of a German intended father."<sup>47</sup> The father requested an "acknowledgement of his paternity in order to take the resulting twin children into German territory without a visa."<sup>48</sup> Germany, however, considers the surrogate mother to be the legal mother, and, as a result, the court found the children to be Indian and denied them entrance.<sup>49</sup> Moreover, the intended father could not establish parentage in India. Quite surprisingly, the court circumvented this issue by suggesting that the intended parents attempt adoption in order to establish a relation to the children.<sup>50</sup> These prominent cases highlight how often surrogacy tourism results in challenges and obstacles for preserving the rights of children. The uncertainty surrounding these cases demonstrates the need for comprehensive and thorough regulation.

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[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI\\_ET\(2013\)474403\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 113.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 113.

<sup>50</sup> *Id.* at 113–14.

## II. THE CURRENT MEDICAL, ETHICAL AND LEGAL CHALLENGES POSED BY INTERNATIONAL SURROGACY AGREEMENTS

### A. *The Medical and Ethical Problems Arising from Surrogacy Tourism*

International surrogacy raises many ethical problems, specifically when intending parents rely on the procreative ability of women in developing countries. It is reasonable that many of the ethical, medical, and legal costs involved in international surrogacy are outsourced to the country of the surrogate. By the same token, this causes the acute problems of surrogacy to fall on the destination country—often a country in the developing world. These destination countries often lack the basic legal and medical infrastructure to address the medical, legal, and ethical concerns of the surrogates.<sup>51</sup> Surrogacy agreements may risk the exploitation and dehumanization of the surrogate, given the unequal power of the contracting parties.<sup>52</sup> In some respects, the inequality between the parties, in and of itself, has become a “driver of reproductive tourism.”<sup>53</sup> The socioeconomic disparity between parties is vastly different in international surrogacy agreements and intending

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<sup>51</sup> See Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1267–73 (2013); Mutcherson, *supra* note 28, at 365–68, 378–79.

<sup>52</sup> See Margalit, *In Defense of Surrogacy*, *supra* note 10, at 430–32.

<sup>53</sup> Ikemoto, *supra* note 22, at 309; see also SUSAN MARTHA KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 140–59 (2000); Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS 969, 971 (2010) (describing commercial surrogacy in India as a “survival strategy and a temporary occupation for some poor rural women”); Imrana Qadeer, *Social and Ethical Basis of Legislation on Surrogacy: Need For Debate*, 6 INDIAN J. MED. ETHICS 28, 30 (2009) (“The commercialisation of surrogacy, however, creates several social conflicts rather than resolving a few. It generates family pressure on poor women to offer their wombs for a price . . . [F]inancial gain through surrogacy becomes a key push factor.”); Sheela Saravanan, *An Ethnomethodological Approach to Examine Exploitation in the Context of Capacity, Trust and Experience of Commercial Surrogacy in India*, 8 PHIL. ETHICS & HUMAN. MED., no. 10, 2013, at 1, 2 (“The socio-ethical concerns of exploitation in commercial surrogacy are premised on asymmetric vulnerability and the commercialization of women’s reproductive capacity to suit individualistic motives.”).

parents may feel more comfortable with a poor, obedient, and distant surrogate than a domestic surrogate who may insist more strongly on her rights and interests.<sup>54</sup> Surrogacy arrangements may provide income for the surrogate equivalent to several years' salary, but they also raise concerns of exploitation and coercion.<sup>55</sup> These concerns have prompted calls for regulation.<sup>56</sup>

Because the vast majority of international surrogacy arrangements take place in the third world, issues of substandard medical care often arise.<sup>57</sup> This can put the intending mother (in a case where she uses her own ova), the native surrogate mother, and the conceived child at risk.<sup>58</sup> Medical tourism can have "unintended and undesired effects upon patients' home healthcare systems."<sup>59</sup> Procreative tourism, as a branch of medical tourism, may produce these same effects. For example, the surrogacy consumer's home healthcare system is affected when intending parents return to their home country with their child, but without adequate information on the child's medical needs and how to administer proper follow up care to the child.<sup>60</sup>

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<sup>54</sup> Stehr, *supra* note 3, at 258.

<sup>55</sup> See Margalit, *In Defense of Surrogacy*, *supra* note 10, *passim*.

<sup>56</sup> See, e.g., Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 327–29 (2005); Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J. L. & MED. 329, 356–60 (1991).

<sup>57</sup> See Leigh Turner, "Medical Tourism" and the Global Marketplace in Health Services: U.S. Patients, International Hospitals, and the Search for Affordable Health Care, 40 INT. J. HEALTH SERV. 443 (2010).

<sup>58</sup> See generally Leigh Turner, 'First World Health Care at Third World Prices': Globalization, Bioethics and Medical Tourism, 2 BIOSOCIETIES 303, 319 (2007); Ikemoto, *supra* note 22, at 293–94.

<sup>59</sup> See Valorie A. Crooks et al., *Ethical and Legal Implications of the Risks of Medical Tourism for Patients: A Qualitative Study of Canadian Health and Safety Representatives' Perspectives*, 3 BMJ OPEN, no. 2, 2013, at 1, 6.

<sup>60</sup> See *id.* ("Concern was expressed that medical tourism might have unintended and undesired effects upon provincial/territorial healthcare systems. In particular, participants noted that individual choices of medical tourists could have significant public consequences if domestic healthcare facilities must expend resources treating postoperative complications of medical tourists."); Ikemoto, *supra* note 22, at 293.

Aside from these medical problems, ethical and legal concerns become exacerbated in the cross-border surrogacy context.<sup>61</sup> In some cases, intending parents may be so eager to bring a child into the world that they rely on misinformation disseminated by fertility treatment clinics.<sup>62</sup> These misrepresentations are very common in the international realm where the Internet plays a significant role in bridging the geographical, cultural, and linguistic barriers between the intending parents and the surrogate.<sup>63</sup> Blind reliance on these misrepresentations, as well as their desperation to have a child, may damage the intending parents' informed consent. This can lead parents to agree to contracts with unfavorable terms, which may increase their expenses or lower their chances of bringing home a healthy newborn child.<sup>64</sup> Thus, cross-border reproductive tourism not only endangers the surrogate mother but also negatively affects the intending parents.

Finally, surrogacy tourism reduces access to health care for the destination country's poor population. The large amount of money involved in surrogacy tourism logically may divert physicians away from public hospitals to private clinics that specialize in surrogacy procedures, as private clinics are more profitable than public hospitals.<sup>65</sup> This may create a shortage of doctors where care is most needed and decrease overall access to healthcare in

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<sup>61</sup> See THE GLOBALIZATION OF HEALTH CARE: LEGAL AND ETHICAL CHALLENGES (I. Glenn Cohen ed., 2013); I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS (2014).

<sup>62</sup> See, e.g., J. Brad Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 J. HEALTH CARE L. & POL'Y 241, 249–51, 254 (2011); see also Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 IND. L.J. 1147 (2013).

<sup>63</sup> Hawkins, *supra* note 62, at 1149.

<sup>64</sup> Margalit, *In Defense of Surrogacy*, *supra* note 10, at 430–37.

<sup>65</sup> See Ikemoto, *supra* note 22, at 302–03 (“One question is whether the effort and resources that are put into fertility clinics and hospitals, in order to attract foreign patients, divert resources to private facilities that provide care for the elite.”); Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L.J. 71, 109–11 (2008) (“The major debate in developing countries is whether the campaign to attract foreign patients will ignore the health needs of local citizens and divert resources to private hospitals that cater to foreign clientele.”).

these countries.<sup>66</sup> When developing countries shift their focus to fertility treatment centers, there is a risk that the country's healthcare priorities will be tainted, depriving poorer patients of necessary services.<sup>67</sup>

*B. The Legal Problem of the Parentless and Stateless Child*

Unregulated cross-border surrogacy arrangements also result in parentless and stateless children. Historically, children conceived via fertility treatments, like sperm and ova donations, suffered from the stigma of illegitimacy.<sup>68</sup> This stigma of illegitimacy was rooted in a fear that the participation of third parties in the reproductive process undermined the legitimacy of the conceiving family.<sup>69</sup> Over time countries began to accept the legitimate benefits of reproductive technologies and, now, children born through these procedures face far less stigma than in the past.<sup>70</sup> However, a remnant of the ancient notion of illegitimacy still exists in the context of international surrogacy.<sup>71</sup> If a couple attempts to evade the scrutiny of a home country with strict

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<sup>66</sup> This is the well-known "brain drain" problem. See Laura Hopkins et al., *Medical Tourism Today: What Is the State of Existing Knowledge?*, 31 J. PUB. HEALTH POL'Y 185 (2010) ("[M]edical tourism will weaken public health care by incentivizing an internal brain drain of providers to private facilities offering higher salaries and better working conditions.").

<sup>67</sup> See Cortez, *supra* note 65; see also I. Glenn Cohen, *Medical Tourism, Access to Health Care, and Global Justice*, 52 VA. J. INT'L L. 1, 4–6 (2011).

<sup>68</sup> See Richard Storrow, "The Phantom Children of the Republic": *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 561, 565–66 (2012) [hereinafter Storrow, *Phantom Children*].

<sup>69</sup> See *id.* at 565–66 ("Since reproductive technology removes sex from the reproductive process, this . . . illegitimacy has nothing to do with the fear that illicit sexual behavior will result in children. It arises from the fear that children will be created *without* sex and in some cases will be born to gay and lesbian couples or single individuals, all with the participation and contribution of third parties . . . . The participation of third parties . . . calls into question the legitimacy of even the family of a married husband and wife who chose to reproduce in this fashion.").

<sup>70</sup> See Ladomato, *supra* note 10, at 247.

<sup>71</sup> This is exactly the essence of Storrow's article, see Storrow, *Phantom Children*, *supra* note 68, at 595–604.

familial norms by crossing the border to another country, the home country may not legally recognize the child as the “legitimate” offspring of the parents.<sup>72</sup> This is true even when the child is the genetic offspring of the parents.<sup>73</sup> As a result, the child may be left with no parents and no nationality. This is referred to as the problem of the stateless child.<sup>74</sup>

The problem of the stateless child has grown steadily over the years.<sup>75</sup> In France, an estimated 400 couples suffer from this new illegitimacy each year.<sup>76</sup> Nonrecognition of the parent-child relationship causes a number of serious consequences for the rights and welfare of the child, particularly regarding the child’s right to acquire a nationality. This problem stands in stark contrast to a nation’s general obligation to ensure that children do not end up stateless.<sup>77</sup> Even if the conceived child is eventually permitted to travel home, the child may suffer for her entire life from the “limping” legal parentage and thus “may be in a position in which [she is], in effect, discriminated against because of the circumstances of [her] birth.”<sup>78</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> A stateless person is one who is “not considered as a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117.

<sup>75</sup> Yehezkel Margalit, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage*, WHITTIER J. OF CHILD & FAM. ADVOC. (forthcoming 2016) [hereinafter Margalit, *Bridging the Gap*].

<sup>76</sup> See Storrow, *Phantom Children*, *supra* note 68, at 566 n.39.

<sup>77</sup> See G.A. Res. 44/25, annex, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

<sup>78</sup> See respectively HCCH 2012, *supra* note 6, at 4; PERMANENT BUREAU, HAGUE CONFERENCE, A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS 16, 68–79 (2014) [hereinafter HCCH March 2014], [http://www.hcch.net/upload/wop/gap2014pd03b\\_en.pdf](http://www.hcch.net/upload/wop/gap2014pd03b_en.pdf); see also SURROGACY IN EU MEMBER STATES, *supra* note 43, at 10; HCCH 2011, *supra* note 6, at 4.



C. *The Criminal Aspects of International Surrogacy Agreements*

Various states in the United States, as well as several European and Asian nations, do not validate surrogacy agreements.<sup>79</sup> For instance, Italy,<sup>80</sup> Norway, Spain, France, and Germany have entirely prohibited surrogacy.<sup>81</sup> Similarly, China (mainland), Switzerland,<sup>82</sup> Canada, the Czech Republic, Ireland, the Netherlands,<sup>83</sup> Greece, South Africa, Israel,<sup>84</sup> Australia,<sup>85</sup> New

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<sup>79</sup> HCCH 2011, *supra* note 6, at 7 n.26.

<sup>80</sup> “So far the [Italian] regime of surrogacy restrictions, providing an absolute ban with penal consequences, has not been applied; no criminal case has emerged; no intended parents or surrogate mothers have ever been criminally convicted.” SURROGACY IN EU MEMBER STATES, *supra* note 43, at 297.

<sup>81</sup> Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2273 (2012). For a survey of the negative legal attitudes toward surrogacy inside and outside the United States, see Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97 (2010). For further discussion of State bans on surrogacy, and its resulting consequences, see Storrow, *Phantom Children*, *supra* note 68, at 596–601.

<sup>82</sup> In China or Switzerland, entering into a surrogacy arrangement can subject the parties involved or any intermediaries or medical institutions facilitating the agreement to criminal sanctions. See HCCH 2012, *supra* note 6, at 9 & n.44.

<sup>83</sup> “[I]n [Canada, the Czech Republic, Ireland, and the Netherlands] commercial surrogacy is prohibited through either express criminal law provisions or general criminal law provisions . . . [such as those] relating to child trafficking.” HCCH 2012, *supra* note 6, at 10–11 & n.52. In the Netherlands, although there is no specific legal regulation of noncommercial surrogacy, commercial surrogacy is prohibited by certain provisions of the Criminal Code that “criminalize the commission of certain acts committed as part of a commercial surrogacy arrangement . . . . The Dutch legislat[ures] objective to fight against commercial surrogacy resulted in the introduction in 1993 of article 151(b) to the Dutch Criminal Code.” SURROGACY IN EU MEMBER STATES, *supra* note 43, at 302.

<sup>84</sup> In Greece and Israel entering into any arrangement which is not compliant with certain legislation constitutes a criminal offense. SURROGACY IN EU MEMBER STATES, *supra* note 43, at 350. Practically speaking, while the penalties for engaging surrogacy in South Africa and Greece are harsh, including imprisonment “for two years at least, and a payment of damages of at

Zealand, the United Kingdom,<sup>86</sup> France,<sup>87</sup> and Bulgaria,<sup>88</sup> have all, to varying degrees, limited or prohibited surrogacy agreements.<sup>89</sup> Parents in countries that prohibit surrogate agreements enter into arrangements with surrogates in countries that allow them. Globalization, along with expansion of online advertising of services, makes these cross-border arrangements increasingly possible. While criminal conduct is possible in the context of domestic surrogacy arrangements, it is more common and problematic in the cross-border scenario.<sup>90</sup> This is often due to the disparity between the regulation of surrogacy in the country of the intending parents and that of the surrogate mother.<sup>91</sup> This disparity is often not taken into consideration *ex ante*, when signing the surrogacy contract.<sup>92</sup> Once intending parents achieve the goal of producing a child overseas, they often find that the road home is fraught with difficulty.<sup>93</sup>

In some cases, desperate intending parents may resort to criminal measures to attempt to bring a child home.<sup>94</sup> Some parents in the European Union have presented foreign birth certificates to civil registrar and asked for “transcription” into civil status

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least 1,500 Euros,” no criminal sanctions have ever been ordered in a surrogacy case. *Id.*

<sup>85</sup> See *Surrogacy Act 2010* (Qld) (Austl.).

<sup>86</sup> See *International Surrogacy Sheet*, CHILD YOUTH & FAM., <http://www.cyf.govt.nz/documents/adoption/is-information-sheet-june2011.pdf> (last visited Nov. 6, 2015) (detailing New Zealand’s surrogacy regime). In the U.K the Surrogacy Arrangements Act of 1985 criminalizes certain activities relating to commercial surrogacy. See *Surrogacy Arrangements Act 1985*, c.49 (Eng.).

<sup>87</sup> Since 1994, French law prohibits all forms of surrogacy. See *SURROGACY IN EU MEMBER STATES*, *supra* note 43, at 105.

<sup>88</sup> “Current Bulgarian legislation contains a series of restrictive and prohibitive provisions relating to surrogacy.” *SURROGACY IN EU MEMBER STATES*, *supra* note 43, at 234.

<sup>89</sup> For a fuller discussion of those states, see *HCCH 2012*, *supra* note 6, at 9–13.

<sup>90</sup> See *HCCH 2012*, *supra* note 6, at 25; *HCCH 2011*, *supra* note 6, at 20.

<sup>91</sup> See *HCCH 2012*, *supra* note 6, at 4–6.

<sup>92</sup> *Id.*

<sup>93</sup> See *HCCH 2011*, *supra* note 6, at 3–6.

<sup>94</sup> *HCCH 2012*, *supra* note 6, at 4.

records.<sup>95</sup> The parents omit the fact that the child was born to a surrogate and the home country records the births as overseas births with the intending parents acquiring legal parentage in their home state.<sup>96</sup> This omission, however, amounts to a criminal offense in most of these countries.<sup>97</sup> Italian prosecutors reportedly started to more robustly prosecute “intending parents who . . . have fraudulently registered themselves as the legal parents of a child born abroad following a surrogacy arrangement.”<sup>98</sup> Intending parents have also resorted to smuggling children across borders into their home country.<sup>99</sup>

The unregulated nature of international surrogacy also encourages fraud. In one Dutch case, the court dealt with a surrogacy agreement that was carried out in Belgium between a Belgian surrogate mother and Belgian intending parents.<sup>100</sup> The surrogate mother was inseminated with sperm from the intending father.<sup>101</sup> As a result of the “deterioration of the relations between the surrogate mother and the Belgian couple, the surrogate mother pretended” that she had a miscarriage.<sup>102</sup> After the birth, the surrogate mother entrusted the baby, who was called baby Donna, to a Dutch couple in return for payment.<sup>103</sup> The Dutch couple informed the Dutch authorities of their intention to adopt the newborn without specifying that the child was born abroad. Finally, after the fraud was revealed, the Dutch couple was prosecuted by the public prosecutor and the Criminal Court of Oudenaarde sentenced the surrogate mother and her husband to a term of deferred imprisonment for one year.<sup>104</sup>

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<sup>95</sup> See HCCH 2012, *supra* note 6, at 20 n.123.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> HCCH 2012, *supra* note 6, at 25 n.152 (“This amounts to a violation of Art. 567(2) of the Italian Penal Code.”).

<sup>99</sup> *Id.* at 25.

<sup>100</sup> SURROGACY IN EU MEMBER STATES, *supra* note 43, at 223–24, 312–13, 319; Machteld Vonk, *Maternity for Another: A Double Dutch Approach*, ELECTRONIC J. COMP. L., Dec. 2010, at 1, 9–10.

<sup>101</sup> See *supra* note 100.

<sup>102</sup> SURROGACY IN EU MEMBER STATES, *supra* note 43, at 223.

<sup>103</sup> *Id.*

<sup>104</sup> Vonk, *supra* note 100, at 9.

The unregulated international surrogacy market has also resulted in the “baby-selling ring.”<sup>105</sup> Three women “recruited American and Canadian women between 2005 and 2011 to purportedly serve as surrogates.”<sup>106</sup> The women inseminated the surrogates and, when the surrogates were in their second trimester, sold the fetuses.<sup>107</sup> Eventually, the FBI arrested the three women, Theresa Erickson, Hilary Neiman and Carla Chambers, for deceiving the Superior Court of California and the prospective parents of the unborn babies.<sup>108</sup>

#### *D. The Inadequacy of International Human Rights Conventions*

Preexisting regulatory regimes, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), and international United Nations (“U.N.”) conventions, do not sufficiently address the challenges of international surrogacy. Article 8 of the ECHR protects the right to privacy and family life from government intrusion.<sup>109</sup> This includes the right to produce a child via surrogacy either domestically or internationally.<sup>110</sup> Article 7 of the United Nations’ Convention on the Rights of the Child (“CRC”) maintains a child’s right to be registered, cared for by parents, and to have a nationality, immediately after birth.<sup>111</sup> The convention requires

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<sup>105</sup> See, e.g., Mohapatra, *supra* note 25, at 415–17; Mortazavi, *supra* note 81, at 2282–83. For less known additional “rings” in India near Mumbai and in Thailand, see, respectively, From the Press, *Cut-Price Babies*, 9 INDIAN J. MED. ETHICS 86, 86 (2012) and *Thai Police Free Women from Surrogate Baby Ring*, VIETNAMNET (Feb. 25, 2011), <http://english.vietnamnet.vn/fms/society/4940/thai-police-free-women-from-surrogate-baby-ring.html>.

<sup>106</sup> Mohapatra, *supra* note 25, at 415.

<sup>107</sup> *Id.* at 415–17.

<sup>108</sup> *Baby-Selling Ring Busted*, FED. BUREAU INVESTIGATION (Aug. 9, 2011), <http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted>.

<sup>109</sup> European Convention on Human Rights art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>110</sup> *Id.*

<sup>111</sup> CRC, *supra* note 77.

parties to avoid the possibility of stateless children and ensure that children are not separated from parents against their will.<sup>112</sup>

Most states in the European Union have a very stringent approach toward surrogacy. Given this hostility, even a broad and lenient interpretation of these treaties and conventions may be of little utility in defending the rights of the surrogate and the conceived child. Different localities maintain varying interpretations as to what constitutes the best interests of the child. For example, Australia prohibits commercial surrogacy and only allows gestational surrogacy in limited circumstances.<sup>113</sup> This was justified as being in the best interests of the child as it ensured that the child would not be left stateless or parentless.<sup>114</sup> Reliance on idiosyncratic regional notions of the best interests of the child can be problematic and a broader solution is needed. Local interpretations of the best interests of the child can vary between countries and therefore only a global definition can solve this confusion.<sup>115</sup> Relying on local approaches to cross-border surrogacy arrangements undermines the plain meaning of the treaties and conventions discussed. Moreover, even when courts apply these treaties, they do so only in an ad hoc, *post factum* manner.<sup>116</sup> Courts use these treaties only as a last resort and generally only to return children to their parents' home

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<sup>112</sup> *Id.*

<sup>113</sup> See SURROGACY IN EU MEMBER STATES, *supra* note 43, at 63.

<sup>114</sup> *Id.* For a similar academic argument that the best interests of the child support invalidating surrogacy agreements, see Sonia Allan, *Commercial Surrogate and Child: Ethical Issues, Regulatory Approaches, and Suggestions for Change* (Working Paper, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2431142](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431142). Eventually, the paper was published in a slightly different form as: *The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations*, in SURROGACY, HUMAN RIGHTS AND THE LAW 113 (Paula Gerber ed., 2015).

<sup>115</sup> For examples of international treaties that reference the “best interests of the child” see Boyce, *supra* note 38, at 660–61, 665–66, 668–69.

<sup>116</sup> These local interpretations are evident in the cases discussed above. See *supra* text accompanying notes 39–50.

residence.<sup>117</sup> Furthermore these cases emphasize that the decisions rendered are not binding precedent.<sup>118</sup>

General human rights treaties also do not sufficiently regulate cross-border surrogacy arrangements. The League of Nations and the U.N. have delineated and bolstered various human rights, including certain basic rights for children. The Declaration of the Rights of the Child (“DRC”) generally recognizes that “mankind owes to the Child the best that it has to give.”<sup>119</sup> The Universal Declaration of Human Rights (“UDHR”) articulates a child’s right to enjoy social protection.<sup>120</sup> The International Covenant on Civil and Political Rights (“ICCPR”) explicitly bolsters the right of every child to acquire a nationality and be registered immediately after birth.<sup>121</sup> The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) emphasizes that every child is deserving of “special measures of protection and assistance.”<sup>122</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> See, e.g., Bruce Hale, *Regulation of International Surrogacy Arrangements: Do We Regulate the Market, or Fix the Real Problems?*, 36 SUFFOLK TRANSNAT’L L. REV. 501, 525–26 (2013) (discussing the Child Protection Convention and its method for determining jurisdiction over cases involving “parental responsibilities in matters relating to children”).

<sup>119</sup> G.A. Res. 1386 (XIV), at 19, Declaration of the Rights of the Child (Nov. 20, 1959); Michael Freeman, *Whither Children: Protection, Participation, Autonomy*, 22 MAN. L.J. 307, 310–12 (1994).

<sup>120</sup> G.A. Res. 217A (III), Universal Declaration of Human Rights, at 76 (Dec. 10, 1948) (“Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”); see also Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1180–81 (1998); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35, 51 n.130 (1988).

<sup>121</sup> International Covenant on Civil and Political Rights art. 24, Dec. 19, 1966, 999 U.N.T.S. 171 (“Every child shall be registered immediately after birth and shall have a name; Every child has the right to acquire a nationality.”); see also Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT’L J. REFUGEE L. 156, 166, n.28 (1998); Shani M. King, *Toward a Functional Definition of Family That Protects Children’s Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 541 n.111 (2010).

<sup>122</sup> International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1966, 993 U.N.T.S. 3 (“Special measures of protection and assistance

As one can deduce from the previous paragraphs, these treaties and declarations each recognize the basic rights of children, whether conceived by traditional or nontraditional measures. They also emphasize a child's general right to be recognized as the legal child of his parents and to a nationality.<sup>123</sup> However, these generalized statements do not adequately deal with all the sensitive and complex legal and ethical issues involved in cross-border surrogacy and can be easily undermined in that context. This is particularly true given the negative view of surrogacy held by many countries.<sup>124</sup> As cross-border arrangements and the technology of reproduction become more complex and prevalent, the sociological, ethical, and legal challenges posed by these arrangements will only increase.

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should be taken on behalf of all children . . . ."); Adam Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 251, 256–58 (1996).

<sup>123</sup> See CRC, *supra* note 77 (“[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth . . . . The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.”). For a discussion of children's rights in light of the broader international human rights discourse, see Boyce, *supra* note 38, at 659 and Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 *ILSA J. INT'L & COMP. L.* 369, 377–86 (2012). For a survey of the recent European Court of Human Rights' verdicts recognizing children's rights via international surrogacy arrangements, see PERMANENT BUREAU, HAGUE CONFERENCE, *THE PARENTAGE/SURROGACY PROJECT: AN UPDATING NOTE* (2015) [hereinafter *HCCH 2015*], [http://www.hcch.net/upload/wop/gap2015pd03a\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03a_en.pdf).

<sup>124</sup> See *supra* text accompanying notes 114–16.

### III. METHODOLOGIES FOR ADDRESSING THE PROBLEMS POSED BY INTERNATIONAL SURROGACY<sup>125</sup>

#### A. Fully Permit or Ban International Surrogacy

As a solution to the problems posed by international surrogacy, many have called for a full prohibition or criminalization of the practice.<sup>126</sup> On a fundamental level, these calls embody the view that surrogacy agreements commodify children and the procreative capacity of their surrogate mothers.<sup>127</sup> Others contend these agreements violate the dignity of the mother and the child; some even equate these agreements to baby selling *per se*.<sup>128</sup> These criticisms are informed by the notion that it is unethical to conceive a child with the intention of relinquishing it immediately after birth, especially when the main incentive to do so is financial.<sup>129</sup> These concerns are exacerbated by the fact that surrogate mothers are often racially, socially, and economically

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<sup>125</sup> The discussion of how private international law can be used for regulating cross-border surrogacy arrangements is beyond the scope of this research. For an initial discussion of this issue, see Sonia Bychkov Green, *How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC'Y 25, 34–35, 47–51, 58–72 (2009); Ergas, *supra* note 38; SHARON SHAKARGY, DETERMINING PARENTHOOD IN SURROGACY CASES INVOLVING A FOREIGN ELEMENT (2007) (M.A. Thesis, Hebrew University).

<sup>126</sup> For a typical call to totally ban surrogacy, see Allan, *supra* note 114.

<sup>127</sup> For an up-to-date discussion of the commodification argument see Laufer-Ukeles, *supra* note 51, at 1235–47; M. Elliott Neal, *Protecting Women: Preserving Autonomy in the Commodification of Motherhood*, 17 WM. & MARY J. WOMEN & L. 611, 628–30 (2011); RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams, eds., 2005); I. Glenn Cohen, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 689–710 (2003).

<sup>128</sup> For an overview of 1980's German case law "treating surrogacy as a form of illegal adoption which violates the child's and mother's human dignity," see Susanne L. Gossl, *Germany*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 131, 131 & n.5 (Katarina Trimmings & Paul Beaumont eds., 2013).

<sup>129</sup> See Allan, *supra* note 114, at 11–13.



disadvantaged, raising the ethical question of coercion.<sup>130</sup> Legal problems arise if the surrogate changes her mind or undergoes a change of circumstances anywhere in the process.<sup>131</sup> Lack of adequate screening increases the risk that intending parents may be unfit, potentially causing harm to the child.

In India, the majority of surrogates are induced to enter into arrangements by poverty and pressure from a husband, family member, or surrogacy broker.<sup>132</sup> There is also a concern that the surrogate does not receive the financial benefit of the agreement as the broker or husband takes it.<sup>133</sup> Indeed, surrogates in developing states may feel compelled to provide for a husband, other children, and family members by engaging in surrogacy.<sup>134</sup> These concerns cause some to call for a complete prohibition of international surrogacy, which can be accomplished through bilateral or multilateral agreements.<sup>135</sup> Others call for criminalizing the practice in a manner similar to the Palermo protocols against human trafficking.<sup>136</sup>

There are, however, numerous problems with banning international surrogacy, including the difficulty of achieving a transnational consensus.<sup>137</sup> In international treaties and conventions, only rare prohibitions, such as international bans on reproductive cloning, typically gain enough support to be broadly effective.<sup>138</sup> A complete ban would also likely exacerbate the black

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<sup>130</sup> *See id.*

<sup>131</sup> *See generally* Margalit, *In Defense of Surrogacy*, *supra* note 10.

<sup>132</sup> *See* CTR. FOR SOC. RESEARCH, SURROGATE MOTHERHOOD-ETHICAL OR COMMERCIAL 37–38 (2012), <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>. For a more nuanced bioethical conceptualization of coercion and exploitation see ALAN WERTHEIMER, *EXPLOITATION* (1996) and ALAN WERTHEIMER, *COERCION* (1987).

<sup>133</sup> CTR. FOR SOC. RESEARCH, *supra* note 132, at 48.

<sup>134</sup> *See* GLOBALISATION AND TRANSNATIONAL SURROGACY IN INDIA: OUTSOURCING LIFE, at xii (Sayantani Dasgupta & Shamita Das Dasgupta eds., 2014).

<sup>135</sup> *See* Allan, *supra* note 114.

<sup>136</sup> Ergas, *supra* note 38, at 172–73.

<sup>137</sup> *See* Smerdon, *supra* note 5, at 82 & n.402.

<sup>138</sup> For an explanation of the urgent need to ban this practice, see Karen J. Maschke & Thomas H. Murray, *Ethical Issues in Tissue Banking For Research: The Prospects and Pitfalls of Setting International Standards*, 25 *THEORETICAL*

market for the sale of children. In the black market, the conditions and the stipulations of surrogacy agreements would be much more problematic for surrogate mothers.<sup>139</sup> Moreover, such a preventative approach may simply raise the transaction costs and negative externalities associated with international surrogacy, without actually preventing the practice.<sup>140</sup>

A more effective solution would be a bilateral or multilateral agreement or convention between a coalition of states. Similarly, international organizations could recognize that a woman is sovereign with respect to her body and capable of contracting with an intending parent who is interested in hiring her procreative ability.<sup>141</sup> Such agreements could determine and recognize the reciprocal fundamental rights possessed by the parties to surrogacy agreements. One scholar even aspires to achieve a U.N. substantive human rights proclamation recognizing the contractual procreative rights of women and the use of procreative capacity for economic benefit.<sup>142</sup> Such a tailored regulatory regime would be the most effective and most appropriate response to the challenges of

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MED. & BIOETHICS 143 (2004) (“[S]cientists from 66 countries expressed support for an international ban on reproductive cloning.”); *Cloning: Frequently Asked Questions*, NPR, [http://www.npr.org/news/specials/cloning/faq\\_blanknav.html](http://www.npr.org/news/specials/cloning/faq_blanknav.html) (last visited Nov. 6, 2015) (“Nearly every poll shows virtually unanimous support for a ban on reproductive cloning.”).

<sup>139</sup> See CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 53, 158 (1989); Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 341–44 (1997). For a discussion of and counterargument to this contention, see JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN’S FREEDOM 206–08 (1993) and Smerdon, *supra* note 5, at 81–85.

<sup>140</sup> See Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 41 (Michelle Bratcher Goodwin ed., 2010); Ergas, *supra* note 38, at 140. Recently, one scholar questioned whether even a cautious liberalization would bring an end to surrogacy tourism. See Martin Engel, *Cross-Border Surrogacy: Time for a Convention?*, in FAMILY LAW AND CULTURE IN EUROPE: DEVELOPMENTS, CHALLENGES AND OPPORTUNITIES 199, 205 (Katharina Boele-Woelki et al. eds. 2014).

<sup>141</sup> See Stehr, *supra* note 3, at 286.

<sup>142</sup> *Id.*

international surrogacy.<sup>143</sup> Further, since cross-border surrogacy is an international phenomenon, there is an international collective responsibility to regulate this industry, and prevent harmful, exploitive, or coercive arrangements.<sup>144</sup>

*B. Domestic Surrogacy as a Tool to Address the Challenges of International Surrogacy*

Channeling surrogacy agreements into the domestic context can dramatically reduce the need to look overseas to jurisdictions that are relatively more lenient with respect to the process.<sup>145</sup> A more conducive environment for domestic surrogacy will raise the number of potential domestic surrogates and lower the average payment for this local service. Similarly, the local health system of the intending parents may more effectively provide comprehensive health services to the surrogate, child, and the intending parents. Finally, clear, uniform, and accessible domestic surrogacy laws will protect surrogates from potential exploitive and coercive stipulations and even, in certain cases, from their own uninformed choices.<sup>146</sup>

Compelling normative justifications support universally permitting domestic surrogacy. Surrogacy endorses a woman's right to make choices concerning her own body and reproductive potential.<sup>147</sup> Permitting and regulating this practice also helps keep pace with technology and shifting societal norms while providing

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<sup>143</sup> For a discussion of one proposed regime, see Mary Keyes, *Cross-Border Surrogacy Agreements*, 26 AUSTL. J. FAM. L. 28, 48–49 (2012) (discussing how surrogacy contracts should not be governed by “express choices of law,” but rather by “the law of the birth mother’s habitual residence, subject to the law of the intended mother’s habitual residence”).

<sup>144</sup> Stehr, *supra* note 3, at 259–60.

<sup>145</sup> See Guido Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. INST. MED. ETHICS 337, 338 (2002).

<sup>146</sup> See Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 484–85, 509, 514 (2011).

<sup>147</sup> See Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 554 (2007).

clarity and predictability to the parties.<sup>148</sup> In many countries, surrogacy has become a legal and ethically accepted practice. Even a superficial reading of the recent scientific literature indicates a shift towards a modest and conditioned liberalization of domestic surrogacy.<sup>149</sup> A similar shift can be seen in legislative developments all over the world, such as Greece and the U.K, which have liberalized their surrogacy laws.<sup>150</sup> “Argentina is about to pass a bill which allows for [altruistic] gestational surrogacy” and will be the first Latin American country that allows the practice.<sup>151</sup> Reducing demand for international surrogacy, however, will only address part of the problem and an international regulatory regime is still necessary.

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<sup>148</sup> Adam Quinlan, Case Note, *Recognizing Gestational Surrogacy Contracts: “Baby-Steps” Toward Modern Parentage Law in Maine After Nolan v. Labree*, 65 ME. L. REV. 807, 821 (2013).

<sup>149</sup> See Margalit, *In Defense of Surrogacy*, *supra* note 10, at 437–40; see also Difonzo & Stern, *supra* note 20, at 410–11 (“[A] rule based on preconception intent plus consistent behavior would serve both parents and children in the new family.”); Craig Dashiell, Note, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 RUTGERS L. REV. 851, 853 (2013) (“[J]urisdictions where groups of people are denied their liberty and privacy interests in starting a family through surrogacy run afoul of the Constitution . . . .”); Brittney M. McMahon, Note, *The Science Behind Surrogacy: Why New York Should Rethink its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 383 (2011) (“With proper regulation, New York can both permit gestational surrogacy contracts and avoid the threats of child trafficking . . . .”); Chelsea VanWormer, Note, *Outdated and Ineffective: An Analysis of Michigan’s Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911, 937 (2012) (“Michigan should amend the [Surrogate Parenting Act] to uphold the validity of gestational surrogacy contracts . . . .”).

<sup>150</sup> See Engel, *supra* note 140, at 202.

<sup>151</sup> *Id.*; Marcela Valente, *Argentina to Legalise Surrogate Motherhood*, INTER PRESS SERV. (Mar. 8, 2013), <http://www.ipsnews.net/2013/03/argentina-to-legalise-surrogate-motherhood>. For including Argentina as part of the permissible states, generally and even for same-sex couples, see <http://coreethics.org/wp-content/uploads/Surrogacy-Laws.pdf>.

IV. PROPOSING A HAGUE CONVENTION ON INTERNATIONAL SURROGACY<sup>152</sup>A. *The Acute Need for a Tailored Convention*

The globalization of surrogacy has caused many families to live in legal limbo.<sup>153</sup> International law has struggled to define whether individuals in a cross-border surrogacy arrangement are the legal parents of their children and whether these individuals owe the children various parental obligations.<sup>154</sup> As international surrogacy becomes more common, the traditional legal and ethical surrogacy concerns become increasingly exacerbated.<sup>155</sup> Only significant cooperation between countries, on a multilateral treaty basis, will adequately remedy these growing concerns. International cooperation is particularly necessary in this area because unilateral domestic regulations and bilateral agreements can be easily circumvented by simply crossing the border to another state and contracting with a surrogate mother who is a resident of a noncontracting state. Only a Hague Convention, with its unique global capacity to regulate international familial arrangements, will achieve the strength and wide acceptance

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<sup>152</sup> It is worth noting that the option of proposing a new Hague Convention for regulating transnational surrogacy has already been discussed in academic circles. See, e.g., Hannah Baker, *A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to be Learnt from the 1993 Hague Intercountry Adoption Convention?*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 411 (Katarina Trimmings & Paul Beaumont eds., 2013); Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT'L L. 627, 634 (2011) [hereinafter Trimmings & Beaumont, *An Urgent Need*]; Engel, *supra* note 140; Allan, *supra* note 114, at 23; Lin, *supra* note 38, at 587; Mohapatra, *supra* note 25, at 449. Nonetheless, the essence of this article is not only to address the needs of an international convention, but also to articulate the need for parallel domestic regulation. For a similar suggestion, but one that is not supportive of broadening surrogacy practices but rather of protecting women and children, see Allan, *supra* note 114, at 19.

<sup>153</sup> See Mohapatra, *supra* note 25, at 441, 417–21.

<sup>154</sup> See *supra* note 125.

<sup>155</sup> See Mortazavi, *supra* note 81, at 2254–56.

required to successfully address the pitfalls of international surrogacy. Indeed, the past Hague conventions have successfully devoted time, money, and efforts necessary to achieve their intended goals.<sup>156</sup>

While existing Hague conventions offer guidance, no convention adequately addresses the issue of international surrogacy. A special commission concluded in June 2010 that it was inappropriate to use the Hague Adoption Convention in cases of international surrogacy, given the differences between the two situations.<sup>157</sup> The main goal of international adoption is finding transnational parents for an already existing child. The purpose of a surrogacy arrangement, by contrast, is to bring a planned and desired child into the world. In the vast majority of these cases at least one of the intending parents is a genetic parent of the child.<sup>158</sup>

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<sup>156</sup> See William Duncan, *Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau*, 33 N.Y.U. J. INT'L L. & POL. 103, 103–12 (2000). See generally PERMANENT BUREAU, HAGUE CONFERENCE, THE IMPLEMENTATION AND OPERATION OF THE 1993 INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE (2008), [https://assets.hcch.net/upload/adoguide\\_e.pdf](https://assets.hcch.net/upload/adoguide_e.pdf); PERMANENT BUREAU, HAGUE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS OF THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 (2006), [https://assets.hcch.net/upload/concl28sc5\\_e.pdf](https://assets.hcch.net/upload/concl28sc5_e.pdf); PERMANENT BUREAU, HAGUE CONFERENCE, TRANSFRONTIER CONTACT CONCERNING CHILDREN: GENERAL PRINCIPLES AND A GUIDE TO GOOD PRACTICE (2008) [hereinafter HCCH 2008], [http://www.hcch.net/upload/guidecontact\\_e.pdf](http://www.hcch.net/upload/guidecontact_e.pdf).

<sup>157</sup> HAGUE CONFERENCE, SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION: CONCLUSIONS AND RECOMMENDATIONS (2010), [http://www.hcch.net/upload/wop/adop2010concl\\_e.pdf](http://www.hcch.net/upload/wop/adop2010concl_e.pdf); HAGUE CONFERENCE, THE DESIRABILITY AND FEASIBILITY OF FURTHER WORK ON THE PARENTAGE/SURROGACY PROJECT 20 (2014) [hereinafter HCCH April 2014], [http://www.hcch.net/upload/wop/gap2015pd03b\\_en.pdf](http://www.hcch.net/upload/wop/gap2015pd03b_en.pdf) (“All agreed on the need to avoid conflating intercountry adoption with international surrogacy.”).

<sup>158</sup> It is noteworthy that the majority of the modern surrogacy arrangements are gestational and not traditional surrogacy. See *What is a surrogate mother?*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/surrogates/surrogate-definition> (last visited Nov. 6, 2015) (“[G]estational surrogacy arrangements . . . account for the vast majority of modern surrogacy arrangements.”).

Thus, in the surrogacy process, the intent to become a parent is evident at the outset, and strongly signals that the intending parents will likely be the best parents for the conceived child.<sup>159</sup>

Independent comprehensive international regulation is urgently required in order to preserve the rights and welfare of the different parties to international surrogacy agreements. The public can also benefit, as tragic cases such as those discussed above can be avoided. Notwithstanding the differences between international adoption and international surrogacy, they both attempt to couple a child with parents.<sup>160</sup> This similarity suggests that a Hague Convention, similar to the Hague Adoption Convention, can be used to address the major issues in the international surrogacy context.<sup>161</sup>

### B. Historical Background

The Hague Conference on Private International Law (“Hague Conference”) drafts treaties to cope with the inadequacy of domestic and international family law.<sup>162</sup> The Hague Conference has conducted four conventions concerning children’s issues: (1) child abduction, (2) inter-country adoption, (3) child protection, and (4) family maintenance.<sup>163</sup> These conventions focused on

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<sup>159</sup> For this contention, and for a survey of research that supports it, see Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. CHILD & FAM. ADVOC. 39, 59 n.51 (2013); Margalit, *Bridging the Gap*, *supra* note 75. For additional discussion contrasting international surrogacy and international adoption, see Baker, *supra* note 152, at 417–19.

<sup>160</sup> For additional discussion of the similarities and dissimilarities between those two children-parent relationships, see Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 638.

<sup>161</sup> See Baker, *supra* note 152 (discussing how to avoid ethical inconsistencies between the adoption and surrogacy treaties); Carolyn McLeod & Andrew Botterell, *A Hague Convention on Contract Pregnancy (Or ‘Surrogacy’): Avoiding Ethical Inconsistencies With the Convention on Adoption*, 7 INT’L J. FEMINIST APPROACHES BIOETHICS 219 (2014).

<sup>162</sup> See HCCH, [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php) (last visited Nov. 6, 2015).

<sup>163</sup> For a more detailed discussion of the four children’s convention, see Ann Laquer Estin, *Families Across Borders: The Hague Children’s Conventions*

increasing cooperation between different countries in order to help children involved in transnational agreements. By and large, these conventions have been successful; nearly 100 countries have participated in at least one of them and various scholars have observed that these conventions have achieved their intended results.<sup>164</sup>

The Hague Conference has also invested enormous efforts in researching the necessity and efficacy of a convention on international surrogacy.<sup>165</sup> In April 2010, The Council on General Affairs and the Policy of the Hague Conference (the “Council”), composed of all members, first discussed the idea of a unique Hague convention regulating cross-border surrogacy.<sup>166</sup> The Council acknowledged the complex issues in this field and agreed that the area should be kept under review by the Permanent Bureau.<sup>167</sup> In April 2014, after a series of discussions at annual meetings and following studies, reports, and online questionnaires, the Hague Conference agreed to continue to explore the feasibility of an international convention on surrogacy.<sup>168</sup> A final determination was deferred to the upcoming 2015 annual meeting.

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and the Case for International Family Law in the United States, 62 FLA. L. REV. 47 (2010).

<sup>164</sup> See RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 438 (2013). *But see* Elizabeth Bartholet, *The Hague Convention: Pros, Cons and Potential* (Sept. 9, 2013), <http://ssrn.com/abstract=2279583> (unpublished manuscript) (finding that the “influence of the Hague Convention [on Intercountry Adoption] to date has been entirely negative,” but acknowledging its potential “to be a positive force” for children).

<sup>165</sup> See COUNCIL ON GEN. AFFAIRS & POLICY, HAGUE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS 3 (2010) [hereinafter COUNCIL CONCLUSIONS & RECOMMENDATIONS 2010], [http://www.hcch.net/upload/wop/genaff2010concl\\_e.pdf](http://www.hcch.net/upload/wop/genaff2010concl_e.pdf).

<sup>166</sup> See *id.* at 3–4.

<sup>167</sup> *Id.*; see also *Private International Law Issues Surrounding the Status of Children*, HCCH, [http://www.hcch.net/index\\_en.php?act=text.display&tid=182](http://www.hcch.net/index_en.php?act=text.display&tid=182) (last visited Nov. 6, 2015) (providing a chronology of the project); Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 633–35 (providing a historical account of the project).

<sup>168</sup> See COUNCIL ON GEN. AFFAIRS & POLICY, HAGUE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS 1 (2014) [hereinafter COUNCIL CONCLUSIONS & RECOMMENDATIONS 2014], [http://www.hcch.net/upload/wop/genaff2014concl\\_en.pdf](http://www.hcch.net/upload/wop/genaff2014concl_en.pdf); HCCH April 2014, *supra* note 157; HCCH March



*C. The Main Contours of the Proposed Convention*

A convention targeting international surrogacy must strive to find the widest common denominator between the various countries.<sup>169</sup> This is particularly critical because international surrogacy evokes such a wide range of opinion.<sup>170</sup> As previous Hague treaties demonstrate, it is difficult to harmonize the differing points of view of various nations in the area of family law. The convention should remain neutral regarding its approval or disapproval of the practice of international surrogacy. Rather, recognizing that surrogacy arrangements occur with or without state approval, the convention should aim to foster cooperation between states and regulate these agreements. Such regulation is not, in and of itself, an endorsement of surrogacy.<sup>171</sup> Rather, it is an attempt to alleviate the abuses and uncertainty attendant to unregulated cross-border surrogacy agreements. The convention should focus on the three main parties to surrogacy arrangements—the child, the surrogate mother, and the intending parents.

First, the convention must ensure the suitability of the intending parents in order to protect the best interests of the child. The convention must also preserve the intending parents' rights and interests. Second, the convention should make a clear

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2014, *supra* note 78; HCCH 2012, *supra* note 6; HCCH 2011, *supra* note 6; COUNCIL CONCLUSIONS & RECOMMENDATIONS 2010, *supra* note 165.

<sup>169</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 635 (“[A] Convention on surrogacy should not aim at the unification of the conflict rules.”); HCCH April 2014, *supra* note 157, at 16 (“The challenges . . . make clear the importance of remaining focused in international work on building bridges *between* (differing) legal systems, rather than seeking to harmonise laws in this area.”) (emphasis in original); HCCH April 2014, *supra* note 157, at 23 (“[D]ue to the apparent (at this stage) variation in the connecting factors currently applied by States, unification of these rules poses challenges.”).

<sup>170</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 635, 637.

<sup>171</sup> See Allan, *supra* note 114, at 23–25; Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 467 (2004). For the claim that a surrogacy treaty should be neutral towards the dilemma of whether to support or deny this practice, see McLeod & Botterell, *supra* note 161, at 220.

determination of legal parentage at the outset, even before the birth of the child, to preserve the child's best interests and legal rights. It is crucial that, regardless of what happens during the pregnancy, the child is not left stateless once it is born. Third, the convention must ensure the suitability of the surrogate mother and preserve her welfare and autonomy in the process. In addition, the convention should facilitate an efficient method to collect accurate information about the various parties to the agreement.<sup>172</sup> Once this information is gathered, administrative agencies from the respective countries could collaborate to determine whether the surrogacy agreement should be recognized. Previous Hague conventions established a "Central/Competent Authority" to facilitate the information sharing between various agencies and such a mechanism should be imitated in the proposed convention.<sup>173</sup>

### 1. The First Pillar—The Child

An international surrogacy convention can solve the problem of the parentless and stateless child. Differences in the laws of each

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<sup>172</sup> In Israel and in the U.K., where there are very restrictive domestic regulations, few if any disputes arise around surrogacy arrangements. This stands in stark contrast to the prevailing deregulation in the United States, which manifests itself in bitter legal disputes. Indeed, perhaps the most well known American surrogacy case of Baby M involved a clinic which knew that the surrogate mother, Ms. Whitehead, "demonstrated certain traits that might make surrender of the child difficult," but preferred not to reveal this crucial fact to the intending parents, who eventually sued the clinic. *See In re Baby M*, 537 A.2d 1227, 1247–48. (N.J. 1988).

<sup>173</sup> *See* HAGUE INTERCOUNTRY ADOPTION CONVENTION OUTLINE, HCCH (2013) [hereinafter INTERCOUNTRY ADOPTION CONVENTION OUTLINE], <http://www.hcch.net/upload/outline33e.pdf>; HAGUE APOSTILLE CONVENTION OUTLINE, HCCH [hereinafter APOSTILLE CONVENTION OUTLINE], <http://www.hcch.net/upload/outline12e.pdf> (last visited Nov. 6, 2015); HAGUE CHILD SUPPORT CONVENTION OUTLINE, HCCH (2012), <http://www.hcch.net/upload/outline38e.pdf>; CARMEN SOLOMON-FEARS & ALISON M. SMITH, HAGUE CONVENTION TREATY ON RECOVERY OF INTERNATIONAL CHILD SUPPORT AND H.R. 1896 (2013), <https://www.fas.org/sgp/crs/row/R43109.pdf>. For the differences between the Central Authority and the Competent Authority in the adoption convention, see HCCH 2008, *supra* note 156, at 15, 39, 45–59. For a description of those authorities in the four children conventions, see Estin, *supra* note 163.

party's jurisdiction can leave the parentage of children born to international surrogacy agreements uncertain. A transnational tailored regulatory regime would only permit a surrogacy arrangement where both of the involved countries would validate the agreement.<sup>174</sup> Administrative agencies in these countries could inspect the agreement and ensure that the terms do not harm the child and that the child is recognized as the legal child of the intending parents. The convention would dictate that, upon birth, the child would receive a nationality and the required visa to be transferred to the intending parents. Indeed, given the prevalence of this problem, a main focus of the convention would be ensuring that both contracting states will cooperate to recognize the nationality of the child in an expedited way. This process has been successfully implemented in the international adoption context and can be supplemented by necessary domestic and unilateral regulation.<sup>175</sup>

The convention must include the following safeguards to further these goals: (1) The appointment of a local guardian who would be legally responsible for caring for the child until he/she is surrendered;<sup>176</sup> (2) the issuance of emergency travel certificates by the receiving country so that the child may remain with the intending parents in the event the matter pends in a foreign court;<sup>177</sup> and (3) the issuance of entry visas on a humanitarian basis or by court decision.<sup>178</sup> Similarly, the receiving state should enable

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<sup>174</sup> For a view of the feasibility of such a convention in response to legal diversity, see Engel, *supra* note 140, at 211.

<sup>175</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 646.

<sup>176</sup> See Draft ART Bill 2010, *supra* note 8, at 26–27; see also Smerdon, *supra* note 5, at 42–43; Ryznar, *supra* note 42, at 1021; Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT'L L. REV. 671, 679 (2013); Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1440–41 (2009).

<sup>177</sup> See Jyothi Kanics, *Preventing and Addressing Statelessness in the Context of International Surrogacy Arrangements*, 19 TILBURG L. REV. 117, 124–25 (2014).

<sup>178</sup> For the practical implementation of this suggestion, see Mark Henaghan, *International Surrogacy Trends: How Family Law Is Coping*, 7 AUSTL. J. ADOPTION 1, 6–10 (2013); Usha Rengachary Smerdon, *Birth Registration and Citizenship Rights of Surrogate Babies Born in India*, 20

the intending parents to immediately bring home the child. If a dispute arises that requires adjudication, the intending parents could be required to supply a security deposit for removing the child to a foreign jurisdiction, should it be later determined that the child is not their genetic child.<sup>179</sup>

## 2. The Second Pillar—The Surrogate Mother

In addition, the convention must ensure that the surrogate mother is not abandoned, coerced, or required to accept draconian terms. She must be physically and emotionally fit to agree to this complicated arrangement, exercising informed consent and fully understanding her contractual obligations and rights. To achieve this goal, the convention should impose guidelines defining what actions constitute human trafficking for the purposes of rendering an international surrogacy agreement unenforceable and illegal under international law.<sup>180</sup> For example, any agreement in which the surrogate mother is brought outside of her home country to a less developed country for the purpose of acting as a surrogate mother could constitute an act of human trafficking, since issues of coercion would arise.<sup>181</sup> Similarly, the convention could dictate terms that are unconscionable, coercive, and exploitive, as well as the terms that are appropriate and necessary for a surrogacy agreement. In doing so, the convention would create a uniform set of ethical and legal norms regarding issues of exploitation. Developing a consensus is particularly important given the wide range of opinions regarding this issue.<sup>182</sup>

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CONTEMP. S. ASIA 341, 345 (2012); Lin, *supra* note 38, at 550; Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 623 (2013).

<sup>179</sup> See CA 7414/11 Attorney General v. Anonymous (unpublished, Nov, 29, 2011) (Isr.).

<sup>180</sup> For a discussion of why the proposed surrogacy convention is crucial to curtail the improper sale of children, see generally McLeod & Botterell, *supra* note 161.

<sup>181</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 636, 639.

<sup>182</sup> See Hale, *supra* note 118, at 526.

Further, the convention must screen surrogates for financial, mental, and medical suitability. Surrogates should also receive independent legal consultation as well as psychological assistance before, during, and after their pregnancy, paid for by the intending parents. This would ensure that the surrogate understands the agreement and that her consent to the agreement is informed.<sup>183</sup> The convention must ensure that all parties to the agreement fully understand the monetary compensation that the surrogate will receive. It must also allow the mother to receive payment in the event of a miscarriage or stillborn child. The intending parents will be responsible for supplying the surrogate with the agreed compensation and for paying her life insurance during the pregnancy period. In furtherance of this goal, the clinic facilitating the pregnancy and birth should open an independent bank account on behalf of the surrogate that belongs solely to her and in which these funds could be deposited. Additionally, the surrogate should be free to decide to terminate the pregnancy. Lastly, the convention should set minimum standards for the medical treatment received by the surrogate. These prerequisites and provisions ultimately ensure the safety, predictability, and feasibility of surrogacy arrangements, which is urgently needed in this unregulated arena.

### 3. The Third Pillar—The Intending Parents

Finally, the convention should set forth a transparent process for inspecting and screening the medical, financial, and psychosocial suitability of the intending parents. This will ensure that parents are capable of fully understanding their contractual obligations and rights.<sup>184</sup> This process could set limitations that are

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<sup>183</sup> See CTR. FOR SOC. RESEARCH, *supra* note 132; HCCH March 2014, *supra* note 78, at 87–88; McLeod & Botterell, *supra* note 161, at 224–25; Allan, *supra* note 114, at 12–15; Vida Panitch, *Global Surrogacy: Exploitation to Empowerment*, 9 J. GLOBAL ETHICS 329 (2013) (discussing the appropriate process of accepting and inspecting the informed consent of the surrogates). For the argument that “judicial and administrative cooperation will be necessary to ensure compliance” with new standards and safeguards, see Baker, *supra* note 152, at 421.

<sup>184</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 641–43.

similar to the adoption convention, such as an upper age limitation.<sup>185</sup> In addition, the convention would require that the criminal record and any child services records of the parents be scrutinized.<sup>186</sup> Further, the proposed convention should make sure that the intending parents receive accurate information regarding the prevailing legal practices in both countries involved in the agreement and an accurate picture of the ramifications of the agreement.

Practically speaking, this process could be facilitated like other regulatory regimes. The convention would require all the intending parents to apply to their country's central authority to receive approval to enter into an international surrogacy agreement. That central authority would then be required to prepare a report affirming the couple's eligibility to enter into the agreement.<sup>187</sup> The central authority in the receiving state would then be required to provide the central authority in the state of origin with a report approving the agreement. The implementation of such a system of cooperation would ensure that those who are precluded from entering into surrogacy agreements are unable to circumvent their countries' laws and do so outside of this regulatory system.<sup>188</sup>

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<sup>185</sup> The convention could set limitations in order to avoid exploitive cases, such as the case in which a foreign couple undertook a surrogacy arrangement in India in order to obtain an organ for their sick child. See CTR. FOR SOC. RESEARCH, *supra* note 132, at 5.

<sup>186</sup> See Allan, *supra* note 114, at 20; see also *Australia Investigates 'Paedophile' Father in Thai Surrogate Baby Scandal*, YAHOO NEWS (Aug. 6, 2014, 3:52 AM), <http://news.yahoo.com/australian-couple-thai-surrogate-mother-misled-world-071951328.html>; Noah Barkam, *Convicted Pedophile Raises Surrogate Daughter*, YNETNEWS (June 2, 2013, 5:21 PM), <http://www.ynetnews.com/articles/0,7340,L-4387303,00.html>.

<sup>187</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 636; McLeod & Botterell, *supra* note 161.

<sup>188</sup> The infrastructure of this suggested mechanism is articulated in article 17 of the adoption convention, which provides:

Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if – a. the Central Authority of that State has ensured that the prospective adoptive parents agree; b. the Central Authority of the receiving State has approved such decision . . . c. the Central Authorities of both States have agreed that the adoption may proceed, and d . . . the prospective adoptive parents are eligible and suited to adopt and that the child is or

To summarize, the fundamental aims of the convention would be as follows: (1) to establish internationally centralized bodies that will have the duty to approve surrogacy agreements prior to their inception and to ensure, *ex ante*, that a child is given a nationality upon birth; (2) to obtain consent from the intended parents' central authority before proceeding with reproductive procedures; (3) to establish a process by which parental rights and responsibility, recognized amongst contracting states, are imposed upon the intending parents at the birth of the child; (4) to establish a system of cooperation amongst contracting countries to ensure that authorities work together to uphold the objectives of the convention; (5) to establish a system to recognize agreements and to honor parenthood rights in member states;<sup>189</sup> and (6) to oversee the organizations and clinics involved in arranging and conducting reproductive procedures and ensure against the improper payment of money in excess of reasonable expenses.

#### D. *The Advantages*

Given the prevalence and risks associated with international surrogacy, the international community must engage in transnational regulation of these agreements. Regulating this issue on an *ad hoc*, patchwork basis will be ineffective.<sup>190</sup> Only international cooperation meaningfully addresses the various implications of surrogacy agreements while setting forth some

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will be authorised to enter and reside permanently in the receiving State.

HCCH, CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, art. 17 (1993), <http://www.hcch.net/upload/conventions/txt33en.pdf>.

<sup>189</sup> See HCCH April 2014, *supra* note 157, at 25 (“[T]here also seems to be considerable agreement between many States and other stakeholders that . . . the child’s legal status is secure prior to the commencement of any medical procedures.”).

<sup>190</sup> See, e.g., Keyes, *supra* note 143, at 49–50; Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT’L L.J.* 665, 679–81 (2012); Allan, *supra* note 114, at 21; Stehr, *supra* note 3, at 287 (“[I]ndividual nations’ attempts to protect vulnerable populations have both failed to incorporate diverse points of view and failed to confront the cross-border aspect of surrogacy arrangements.”).

minimum safeguards and standards.<sup>191</sup> An international convention ensures predictability and certainty for all the parties involved, including the conceived child, and that the agreement will be effectuated properly. Likewise, a convention is the best method to ensure that the child will be recognized as the legal child of the intending parents. It will also supply the child with a nationality and visa for the purpose of returning home with the intending parents.<sup>192</sup> Such a convention will likely reduce the chances that the surrogate mother will have a change of heart and seek custody of the child.

A convention would also incentivize individuals seeking to engage in international surrogacy to partake in safe and transparent procedures. Parties that conduct surrogacy agreements outside the confines of the convention will be subject to uncertainty and risk. Without a convention, there is no assurance that intending parents will make surrogacy arrangements through authorized agents, and thus it becomes less certain that the child will be recognized as the legal child of the intending parents.<sup>193</sup> In addition, a regulated and thoroughly scrutinized mechanism of approving such agreements could eliminate misrepresentations made by many surrogacy clinics concerning matters such as fees.<sup>194</sup> Only accredited clinics will be able to conduct these arrangements and they will be required to accurately itemize and disclose the fees and estimated expenses associated with the surrogacy process, or risk losing accreditation. A comprehensive and thorough multilateral system will make sure that only the ethically and legally proper agreements will be executed. This can help mitigate coercion and exploitation and reduce the current racial and socioeconomic disparities in the surrogacy process.<sup>195</sup>

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<sup>191</sup> See, e.g., HCCH March 2014, *supra* note 78, at 92; Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 635; Mohapatra, *supra* note 25, at 448–50; Baker, *supra* note 152, at 418; Allan, *supra* note 114, at 15, 21–24.

<sup>192</sup> See Mohapatra, *supra* note 25, at 449–50.

<sup>193</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 643 (“This will send a clear message to potential intended parents and encourage surrogacy arrangements only through authorized agencies.”).

<sup>194</sup> HCCH March 2014, *supra* note 78, at 90–91; Mohapatra, *supra* note 25, at 449.

<sup>195</sup> For a similar hope, see Mohapatra, *supra* note 25, at 449–50.



While conventions are often imperfect measures, reflecting agreed upon compromises, they are often the best option available to develop a basic framework for the ethical operation of an international system.<sup>196</sup> Creating such a framework in the context of international surrogacy is a crucial first step on the road to alleviating some of the risks and problems associated with the practice.

### *E. The Disadvantages*

The proposed convention to regulate international surrogacy agreements is not without its drawbacks. Some contend that Hague children conventions, especially the adoption convention, “do not sufficiently guard against abuse.”<sup>197</sup> Therefore, critics argue it is misguided to replicate a similar treaty in the context of international surrogacy.<sup>198</sup> The enormous differences in legal treatment, and in some cases acceptance, of commercial surrogacy around the globe raise questions regarding whether an agreeable international solution is possible.<sup>199</sup> Countries may not relinquish their basic desire to regulate the meaning of child-parent relationships, filiation, nationality, and citizenship and, instead, adopt a compromised view of these fundamental issues.<sup>200</sup> Moreover, some fear that the desire to reach a broad agreement will result in a “race to the bottom,” ultimately limiting the effectiveness of the final convention.<sup>201</sup>

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<sup>196</sup> See Trimmings & Beaumont, *An Urgent Need*, *supra* note 152, at 635; Baker, *supra* note 152, at 426; Allan, *supra* note 114, at 23–24; HCCH April 2014, *supra* note 157, at 20–21 (“[P]articularly in the ISA context, soft law measures, such as nonbinding principles or guidelines, might be contemplated as a useful first step.”).

<sup>197</sup> See Lin, *supra* note 38, at 567.

<sup>198</sup> *Id.* at 567–69.

<sup>199</sup> *Id.* at 567.

<sup>200</sup> See, e.g., Engel, *supra* note 140, at 211; HCCH April 2014, *supra* note 157, at 17 (“States’ laws on these issues do not seem to be quickly converging.”).

<sup>201</sup> See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 610 (2005); Brugger, *supra* note 190, at 684–85; Nelson, *supra* note 38, at 248 (“[I]t is difficult to imagine that the resulting rules would provide ‘meaningful protections.’”).

In addition, “surrogacy requires regulation in so many areas of law that any” convention may not “achieve the necessary political support” for ratification.<sup>202</sup> A new regulatory regime “will require a long-term renegotiation” of the meaning of various notions involving family and international contract law.<sup>203</sup> Further, regulation on the international scale is often slow and would not provide immediate solutions to the current problems facing both intending parents and surrogates.<sup>204</sup> Further delays are likely given the time it will take for a contracting state to implement the convention. Developing and implementing this infrastructure would cost substantial time, effort, and money. Countries may not consider a convention to regulate international surrogacy a priority. Additionally, even a well crafted treaty will be useless if many countries refuse to ratify it. If the treaty is not unanimously ratified by all the states, the convention would be easily circumvented and the problem of the stateless surrogate children may still persist in countries not parties to the proposed convention.<sup>205</sup>

#### V. ADDITIONAL NECESSARY DOMESTIC AND UNILATERAL REGULATION

While there are many justifications for advancing such a convention, there are significant challenges as well. Supplemental domestic regulation is necessary to help address some of these needs. Domestic regulation will continue to be effective even after the implementation of an international surrogacy convention since certain countries will likely refuse to ratify the convention. Two pending regulatory proposals, one Indian and the other Israeli, provide a domestic regulatory framework for states around the world to adopt.<sup>206</sup> The next subsections describe these proposals to

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<sup>202</sup> Brugger, *supra* note 190, at 680; *see also* Nelson, *supra* note 38, at 248.

<sup>203</sup> *See, e.g.*, Ergas, *supra* note 38, at 118.

<sup>204</sup> Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 200 (2010).

<sup>205</sup> *See* Lin, *supra* note 38, at 568–69; Baker, *supra* note 152, at 420.

<sup>206</sup> For a similar contention, *see* Allan, *supra* note 114, at 22 (“[U]ltimately domestic laws will also be required.”); HCCH 2015, *supra* note 123, at 9 (“[D]evelopments at the national level also continue to demonstrate starkly the significant issues which remain in the absence of international regulation.”).

provide a possible foundation for building an infrastructure for domestic, unilateral regulation of international surrogacy in states around the globe.

*A. The 2010 Proposed Indian Assisted Reproductive Technology (Regulation) Bill and Rules*<sup>207</sup>

In 2002, India became the first country to legalize commercial surrogacy.<sup>208</sup> Over the past decade, India has become the “surrogacy capital of the world.”<sup>209</sup> It is estimated that the surrogacy business in India involves approximately \$500 million annually as a subpart of broader Indian fertility tourism that yields approximately \$2–2.5 billion each year.<sup>210</sup> In 2005, the Ministry of

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These two states are perceived as “fertility superpowers” but in very different ways: while Israel is engaged with producing children for (Jewish) Israelis, India is preoccupied with producing children for citizens of other countries. *See generally* DAPHNA HACKER, *LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION* (forthcoming 2016).

<sup>207</sup> It is beyond the scope of this Article to discuss the Thai Protection of Children Born from Assisted Reproductive Technologies Act, which took effect July 30, 2015, after this article was accepted for publication. For an official translation of the Thai law draft, see *Thailand Draft Surrogacy Law*, THAI L. FORUM, <http://www.thailawforum.com/thailand-draft-surrogacy-law/> (last visited Nov. 6, 2015). For an initial discussion of this draft, see HCCH 2015, *supra* note 123, at 11; Paul Beaumont & Katarina Trimmings, *Recent Jurisprudence of the European Court of Human Rights in the Area of Cross-Border Surrogacy: Is There Still a Need for Global Regulation of Surrogacy?* 15 n.19 (Univ. of Aberdeen, Sch. of Law, Working Paper No. 2015/2 2015), [http://www.abdn.ac.uk/law/documents/Recent\\_jurisprudence\\_of\\_the\\_European\\_Court\\_of\\_Human\\_Rights\\_in\\_the\\_area\\_of\\_cross-border\\_surrogacy.pdf](http://www.abdn.ac.uk/law/documents/Recent_jurisprudence_of_the_European_Court_of_Human_Rights_in_the_area_of_cross-border_surrogacy.pdf).

<sup>208</sup> *See* Mula. Sneha Goud & Abhiram Sunkara, *Is Legalising Surrogacy-An Outsourcing Motherhood?*, 1 INT’L J. ADVANCEMENTS RES. & TECH., Sept. 2012, at 1, 3; Mohapatra, *supra* note 25, at 432–33.

<sup>209</sup> *See* Aditi Kapur & Sreetama Sen, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 1 INTELLECTUAL TODAY, Oct.–Dec. 2011, at 46, 48, [http://www.intellectualtoday.com/journal/intellectual\\_today\\_vol-1issue2.pdf](http://www.intellectualtoday.com/journal/intellectual_today_vol-1issue2.pdf).

<sup>210</sup> *See* Anil Malhotra & Ranjit Malhotra, *All Aboard for the Fertility Express*, 38 COMMONWEALTH L. BULL. 31, 31 (2012); Laufer-Ukeles, *supra* note 45, at 1266 n.254; Cohen, *Protecting Patients*, *supra* note 21, at 1472 n.9. For a broader discussion of surrogacy transformation in India from a marginalized and socially unacceptable procedure to a multimillion-dollar

Health and Family Welfare with the Indian Council of Medical Research (“ICMR”) and the National Academy of Medical Sciences (“NAMS”) drafted the National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (“ART”) clinics in India.<sup>211</sup> These guidelines set forth medical criteria and procedures for the examination of treatment practices and fertility clinics across India.<sup>212</sup> In August 2009, the Law Commission of India delivered Report No. 228 entitled “Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy.”<sup>213</sup>

In 2010, the ICMR published the revised Assisted Reproductive Technology Bill and Rules (“ART Bills and Rules”), a draft bill that would impose stronger regulatory oversight on India’s surrogacy industry.<sup>214</sup> The draft bill recognizes the legality of surrogacy and the enforceability of surrogacy agreements.<sup>215</sup> It also includes safeguards that are similar to the international convention proposed in this Article. Under the bill, Indian ART clinics are prohibited from administering In Vitro Fertilization (“IVF”) treatments unless intending parents furnish documentation from a regulatory body of their home country, establishing that (a) the country permits surrogacy, and (b) the child born through surrogacy in India will be permitted entry in the receiving state as a

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industry, see generally GITA ARAVAMUDAN, *BABY MAKERS – THE STORY OF INDIAN SURROGACY* (2014).

<sup>211</sup> See INDIAN COUNCIL OF MED. RESEARCH, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA (2005), [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm).

<sup>212</sup> *Id.*

<sup>213</sup> LAW COMM’N OF INDIA, NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY (2009), <http://lawcommissionofindia.nic.in/reports/report228.pdf>.

<sup>214</sup> See Lin, *supra* note 38, at 561–62. Although the regulation is still pending, some believe that the bill may be nearing enactment. See Smriti Kak Ramachandran, *New Law Would Deny Surrogacy for Single Parents: Assisted Reproductive Technologies (Regulation) Bill 2014 to be Tabled in Winter Session*, HINDU (Oct. 4, 2014), <http://www.thehindu.com/todays-paper/new-law-would-deny-surrogacy-for-single-parents/article6470175.ece>.

<sup>215</sup> Lin, *supra* note 38, at 554.

legal child of the intending parents.<sup>216</sup> In addition, a local guardian would be appointed in order to ensure that the child's welfare is not neglected in the event the transfer of the child to the intending parents is delayed.<sup>217</sup> The guardian may also assist in the transfer of the child to an adoption agency in the event the intending parents fail to claim the child within one month of birth. In this scenario, the child would be given Indian citizenship.<sup>218</sup>

Finally, the draft bill demands that ART clinics screen the health of the surrogate as well as the intending parents.<sup>219</sup> Clinics provide the most comprehensive and accurate information in order to obtain the informed consent of the surrogate.<sup>220</sup> Supporters of the bill believe this proposed legislation protects surrogates from the dangers of being misrepresented, induced, coerced, and exploited.<sup>221</sup> These proponents also approve of the progressive posture of the bill, which recognizes and seeks to preserve the rights of both the intending parents to have children and the right of the surrogate to be paid for her reproductive labor and related

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<sup>216</sup> The draft bill also establishes, in Chapter two, a national advisory board which would be responsible for regulating permissible ART practices. Draft ART Bill, *supra* note 8, at 5–11. In 2014, Israel called for a similar national fertility advisory authority. See Mor-Yossef Commission, *supra* note 9, at 7; Yehezkel Margalit, *Scarce Medical Resources – Parenthood at Every Age, In Every Case and Subsidized By the State?*, 9 NETANYA ACAD. C. L. REV. 267, 305–09 (2014), <http://www.netanya.ac.il/Schools/LawSchool/Journal/Documents/Yehezkel-Margalit.pdf>; Yehezkel Margalit, *Scarce Medical Resources? Procreation Rights in a Jewish and Democratic State* (Apr. 12, 2011), <http://ssrn.com/abstract=1807908> (unpublished manuscript).

<sup>217</sup> See Draft ART Bill, *supra* note 8, at 27–28.

<sup>218</sup> *Id.* Similarly, under the proposal, the surrogate mother would relinquish her parental rights and the conceived child would be the legitimate child of the intending parents. *Id.* at 26, 29. Since the proposal automatically renders the child a legal child of the intending parents, the child's birth certificate would reflect this fact. *Id.* at 27.

<sup>219</sup> *Id.*

<sup>220</sup> See *id.* at 17–18, 25. For discussion of this proposed law, see Malhotra & Malhotra, *supra* note 210, at 35–41. For the history of different Indian efforts at domestic legislative reform, see Ryznar, *supra* note 42, at 1016–22; Lin, *supra* note 38, at 554–55, 561–65; Stehr, *supra* note 3, at 267–68; Smerdon, *supra* note 5, at 42–45; Patton, *supra* note 1, at 525–26; Boyce, *supra* note 38, at 655–59; Ergas, *supra* note 38, at 132–33, 136.

<sup>221</sup> See Unnithan, *supra* note 5, at 288.

expenses during the pregnancy.<sup>222</sup> Current Indian regulations ignore both of these rights.<sup>223</sup>

Critics have identified a number of issues with the proposed legislation, including concerns that the proposed bill has been significantly influenced by the local surrogacy industry and that it does not address the diverse range of services and standards found at different Indian fertility clinics.<sup>224</sup> Moreover, the bill increases the number of “permitted successful live births” from three to five, which disregards potential health risks to surrogates.<sup>225</sup> Additionally, the proposal is structured principally to regulate the contractual relationship between the intending parents and the clinic, and has a limited focus on the rights of both the surrogate mother and the child.<sup>226</sup> This ultimately “renders both the surrogate mother and child more vulnerable,” since the main focus of the bill is to preserve the rights of the stronger party to those arrangements, the intending parents, instead of the more vulnerable parties, the surrogate and child.<sup>227</sup>

In January 2013, the Indian Ministry of Home Affairs published new visa regulations for foreigners travelling to India seeking an Indian surrogate mother.<sup>228</sup> According to the

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<sup>222</sup> See Malhotra & Malhotra, *supra* note 210, at 36.

<sup>223</sup> See Vincent & Aftandilian, *supra* note 176, at 682 (“[T]he Assisted Reproductive Technologies Bill must be adopted with a few adjustments.”).

<sup>224</sup> See Mohapatra, *supra* note 25, at 433–34; Unnithan, *supra* note 5, at 288. There were 350 infertility treatment facilities offering surrogacy services in 2009. Mohapatra, *supra* note 25, at 433–34. Those clinics yielded “1,500 pregnancy attempts using surrogates,” 1/3 of which were foreign commissioned. *Id.*

<sup>225</sup> Goud & Sunkara, *supra* note 208, at 7 (explaining that the five “permitted successful live births” include the surrogate’s own children). The maximum number of ova transfer, also previously limited to three, is now unspecified in the new draft of the bill. Unnithan, *supra* note 5, at 294.

<sup>226</sup> Liz Bishop & Bebe Loff, *The Rights to the Gestational Mother and Child in Surrogacy: A Bill to Regulate Surrogacy in India*, 7 AUSTL. J. ADOPTION, no.3, 2013, at 1, 4.

<sup>227</sup> *Id.* Feminists in particular have criticized the proposed bill, arguing that “patriarchal and medical control” results in discrimination towards surrogate mothers and their rights. Saravanan, *supra* note 53, at 1, 2. For further feminist critiques, see Unnithan, *supra* note 5, at 288.

<sup>228</sup> Although the regulations were not publicized until 2013, they were circulated to embassies in July 2012. Lin, *supra* note 38, at 563; *see also*

regulations, intending parents must apply for medical visas instead of a tourist visas.<sup>229</sup> These regulations state that applicants who do not meet a list of preset conditions will have their applications denied.<sup>230</sup> While these additional mandates can minimize the possible legal and ethical obstacles, they fall short in providing the regulatory scope needed to truly police this industry. Indeed, given the pressure of various business interests and interest groups who derive huge profits from medical tourism in general and from surrogacy tourism in particular, the implementation of more comprehensive regulation will likely continue to be delayed.<sup>231</sup> As a result, there should be a dual emphasis on promoting both domestic regulation and an international convention in order to achieve progress in this area.

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Memorandum from Government of India Ministry of Home Affairs to Government of India Ministry of External Affairs (Jul. 9, 2012) [hereinafter Ministry of Home Affairs Memorandum], [http://icmr.nic.in/icmrnews/art/MHA\\_circular\\_July%209.pdf](http://icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf) (explaining that the Ministry of Home Affairs had been alerted to foreigners “visiting India on Tourist visa[s] for [the purpose of] commissioning surrogacy”).

<sup>229</sup> Lin, *supra* note 38, at 563.

<sup>230</sup> The prerequisites are as follows: (1) The surrogate mother cannot be cheated; (2) the intending man and woman must be married for at least two years; (3) regulatory documentation must be provided from the home country of the intending parents; (4) the intending parents must “furnish an undertaking that they will take care of the child”; (5) the fertility treatment may only take place at an accredited ART clinic recognized by the ICMR; (6) there must be a duly notarized surrogacy agreement; and (7) the intending parents must obtain permission to exit the country prior to leaving India. Ministry of Home Affairs Memorandum, *supra* note 228; *see also* Lin, *supra* note 38, at 563; HCCH March 2014, *supra* note 78, at 61 n.527.

<sup>231</sup> *See* Engel, *supra* note 140, at 205 (“Critics and pressure groups have promptly issued a warning that this might diminish the surrogacy business by 90% and cause significant economic damage to a whole commercial sector.”); Ergas, *supra* note 38, at 133 (“Attempts to bring order to surrogacy are therefore caught between two conflicting trends: one favoring India’s economic use of the reproductive capacities of women in an extension of the health tourism that has been actively fostered [and] the other highlighting fears of exploitation . . .”); *see also* Nilanjana Bhowmick, *Why People are Angry About India’s New Surrogacy Rules*, TIME (Feb. 15, 2013), <http://world.time.com/2013/02/15/why-people-are-angry-about-indias-new-surrogacy-laws/>.

*B. Israel's Proposals: Expert Committee's  
Recommendations of 2012 and 2014 Regulation*

Israel became the first state to regulate and permit domestic surrogacy, including commercial surrogacy, when it enacted the 1996 Embryo Carrying Agreement Act.<sup>232</sup> Superficial research in the various Israeli legal databases reveals that during the past two decades there has not been a single reported dispute between intending parents and a surrogate mother. The few reported Supreme Court verdicts concerning surrogacy deal with individuals, mostly single mothers and homosexual couples,<sup>233</sup> who requested the right to utilize the service of an Israeli surrogate mother. This proactive, comprehensive method should be adopted by other countries both as a model for domestic surrogacy and as the basis for an international convention. Under the Israeli regulations, an approval committee is petitioned in advance of each domestic surrogacy agreement.<sup>234</sup> The committee ensures that each agreement is obtained through informed consent and does not cause foreseeable harm to the parties.<sup>235</sup> The committee can demand additional information and documentation from the parties and will only approve an agreement following a comprehensive review.<sup>236</sup> The existence of an independent and neutral committee ensures adherence to basic legal and ethical standards.<sup>237</sup>

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<sup>232</sup> See *Surrogacy*, NEW FAM. ORG. (May 23, 2011), <http://www.newfamily.org.il/en/2148/surrogacy/>. The act is often referenced by its unofficial name: Surrogate Motherhood Agreements (Approval of Agreement and Status of the Newborn) Law. For an unofficial translation of it, see D. KELLY WEISBERG, *THE BIRTH OF SURROGACY IN ISRAEL* 219–28 (2005).

<sup>233</sup> See H CJ 2458/01, *New Family v. The Approval Committee* 57(1) PD 419 (2002) (Isr.); H CJ 1078/10 *Pinkas v. The Approval Committee* (Apr. 14, 2010) (Isr.); H CJ 625/10 *John Doe v. The Approval Committee* (July 26, 2011) (Isr.).

<sup>234</sup> Sharon Shakargy, *Israel*, in *INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* 231, 231–37 (Katarina Trimmings & Paul Beaumont eds., 2013).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> For a survey of the Israeli Act, see Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT'L L.J. 313, 318–21, 329–33 (1999); Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood?* A



In May 2012, an expert committee, the Mor-Yossef Commission, discussed various possible revisions to Israel's regulations.<sup>238</sup> In part, the Commission recommended felony prosecution of any physician or intending parent engaging in an international surrogacy arrangement through an unapproved intermediary or with an uncertified clinic.<sup>239</sup> The Commission recognized that criminal penalties would not prevent all Israeli citizens from being involved in such unregulated arrangements.<sup>240</sup> Nevertheless, it observed that criminal penalties would significantly reduce circumvention of Israel's surrogacy regulations.<sup>241</sup>

After opening the legislation for public comment in January 2014, the Israeli Knesset passed the bill on July 23, 2014.<sup>242</sup> This legislation, known as the Memorandum of Surrogacy Agreements Law, contained various innovations concerning the proactive regulation of international surrogacy.<sup>243</sup> It requires an approval committee to inspect every international surrogacy agreement in order to ensure the preservation of the welfare and rights of all

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*Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL'Y 91, 95–98, 112–15 (2002); Jacqueline Hand, *Surrogacy in Israel: A Model of Comprehensive Regulation of New Technologies*, 7 UTS L. REV. 111 (2005); Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple – the Israeli View*, 9 GEO. J. GENDER & L. 115, 128–31 (2008). For criticism of the law due to Jewish influence and a refutation of this critique, see Carmel Shalev, *Halakha and Patriarchal Motherhood—An Anatomy of the New Israeli Surrogacy Law*, 32 ISR. L. REV. 51 (1998); Rhona Schuz, *Surrogacy in Israel: An Analysis of the Law in Practice*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 35 (Rachel Cook et al. eds., 2003).

<sup>238</sup> See Mor-Yossef Commission, *supra* note 9.

<sup>239</sup> *Id.*

<sup>240</sup> See *id.* at 17, 69.

<sup>241</sup> *Id.* For further discussion of the Mor-Yossef Commission's recommendations, see Shakargy, *supra* note 234, *passim*; Shahar Lifshitz, *Neither Nature Nor Contract: Toward An Institutional Perspective on Parenthood Essay*, 8 L. & ETHICS HUM. RTS. 297, 309, 325–26, 329 (2014) (“I welcome the conclusions of the Mor Yosef Committee that wish to create a supervised track of overseas surrogacy and create incentives to use this track.”).

<sup>242</sup> See Surrogacy Agreements Memorandum, *supra* note 9.

<sup>243</sup> *Id.*

involved parties.<sup>244</sup> The approval committee validates such agreements only after concluding that the surrogacy process will take place in a clinic certified by an official Israeli intermediary.<sup>245</sup> The committee also requires that the agreement ensures that the foreign state permits surrogacy and would consider the child the child of the intended parents and not that of the surrogate mother.<sup>246</sup> The committee also confirms that the child can be taken out of the surrogate's home country.<sup>247</sup> Additionally, the Israeli intermediary,<sup>248</sup> which is supervised by an inter-ministerial committee, is required to act with high ethical and medical standards in facilitating such agreements.<sup>249</sup> By operating within this regulatory regime, intending parents can ensure that they will be recognized as the legal parents of the child, and thereby obtain an Israeli passport for the child to be transported to Israel.<sup>250</sup>

### C. *The Desired Normative Domestic and Unilateral Regulation*

The most important aspect of these desired regulations is the need for administrative preauthorization of surrogacy agreements. The common denominator between the Israeli and Indian unilateral

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *See id.* at 17 X(A).

<sup>247</sup> *See id.* at 17.IV (“No person shall implant a fertilized egg into a surrogate mother, outside of Israel, unless in a certified clinic and in the framework of a surrogacy agreement outside of Israel made through an approved intermediary or by an independent agreement approved by the advisory committee . . . and under the terms of the agreement.”).

<sup>248</sup> For additional discussion of intermediaries in the global surrogacy industry, see Marcy Darnovsky & Diane Beeson, *Global Surrogacy Practices* 18–19, 52–53 (Int’l Inst. Soc. Stud, Working Paper No. 601, 2014), <http://repub.eur.nl/pub/77402>.

<sup>249</sup> *See Surrogacy Agreements Memorandum, supra* note 9, at 17.XV(B).

<sup>250</sup> *See id.* (“An approved intermediary will carry out its activities under this chapter in good faith, integrity and under the full provisions of the law, while ensuring the best interests of the parties to the external surrogacy agreement and the welfare of the child to be born as a result of the agreement and respecting the basic rights of all parties involved, including those recognized in international law.”).

regulations is the *ex ante* inspection and approval of the legality of the surrogacy agreement as a prerequisite for signing and initiating the whole arrangement. This is the most reasonable and efficient method for ensuring that only ethically and legally appropriate agreements are validated and that problematic arrangements are rejected. This ensures that the rights of the surrogate mother, the conceived child, and the intending parents are preserved. Notably, in the United States, some states, including Virginia, Utah, and New Hampshire, require preauthorization.<sup>251</sup> Administrative preauthorization can also be found in prominent domestic legislative proposals and Uniform Acts.<sup>252</sup> Similarly, countries around the globe demand prior approval of domestic surrogacy agreements.<sup>253</sup> This administrative mechanism can be extended to other countries as well.

The desired domestic regulation should be modeled after the Indian and Israeli systems. Such unilateral regulation preserves the interests, welfare, and rights of the three parties involved in surrogacy agreements. This required domestic regulation should build an international administrative infrastructure which will enable the relevant authorities to collect the necessary information

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<sup>251</sup> Others, such as Texas and Illinois, make preauthorization a voluntary option. See Margalit, *In Defense of Surrogacy*, *supra* note 10, at 466; Yehezkel Margalit & John Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 129–30 (2014).

<sup>252</sup> See 1988 Uniform Status of Children of Assisted Conception Act (“USCACA”); 2002 Uniform Parentage Act (“UPA”); 2008 Model Act Governing Assisted Reproduction Technology (“Model Act”); Tex. Fam. Code Ann. § 160.751-63 (Vernon 2002 & Supp. 2005); 750 Ill. Comp. Stat. 47/25 (2005); Va. Code Ann. § 20-159-20-160 (2008); Utah Code Ann. § 78-45g-801(4); N.H. Rev. Stat. Ann. 168-B:20–B:24. See also Randall P. Bezanson et al., *Model Act: Model Human Reproductive Technologies and Surrogacy Act*, 72 IOWA L. REV. 943 (1987); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L. J. 597, 661 n.446, 663 n.453-57, 677 n.575 (2002); Robert E. Rains, *What the Erie “Surrogate Triplets” Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000)*, 56 CLEV. ST. L. REV. 1 (2008).

<sup>253</sup> Australia, Mexico (in draft legislation), and New Zealand are countries which require prior approval of domestic surrogacy agreements. See HCCH March 2014, *supra* note 78, at 17 n.116, 19–20.

about the surrogacy agreement's parties and make sure *ex ante* that only legal and ethical contracts are signed. This process best confronts the legal implications of cross-border fertility tourism and best protects the rights of the child, intending parents, and surrogate mother. This process also mitigates the possibility that the child will be left stateless after birth.

Regulations must also ensure that the services provided are safe and ethical, and that a surrogate mother's medical, social, and legal interests are protected. This can be accomplished through subjecting the entire process to comprehensive inspection by the relevant governmental authorities in the birth country. This ensures that the mother fully understands her contractual undertakings and risks when entering into a surrogacy agreement.<sup>254</sup> Making sure that only the most legally, ethically, and medically appropriate agreements are validated will dramatically address the problems associated with international surrogacy.

## CONCLUSION

Nearly thirty years have passed since the heart-wrenching cases of Baby M in the United States and the case of Baby Cotton in England.<sup>255</sup> Since then, the discourse surrounding surrogacy has changed significantly as countries around the world begin to accept the legitimacy of these agreements.<sup>256</sup> The Hague Conference should establish a convention on international surrogacy in a

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<sup>254</sup> For a discussion of the expansion of reproductive tourism in Europe, see Britta C. Van Beers, *Is Europe 'Giving in to Baby Markets?'* *Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets*, 23 *MED. L. REV.* 103 (2015). For further discussion of the general expansion of reproductive tourism, see generally Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 *MICH. J. GENDER & L.* 217 (2009); DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006).

<sup>255</sup> See *supra* note 1.

<sup>256</sup> For examples of this changing surrogacy discourse in the United States, see *A.L.S. v. E.A.G.*, No. A10-443, 2010 WL 4181449 (Minn. Ct. App. Oct. 26, 2010); *In re F.T.R.*, 833 N.W.2d 634 (Wis. 2013); *In re Baby*, No. M2012-01040-COA-R3-JV, 2013 WL 245039 (Tenn. Ct. App. Jan. 22, 2013); Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 *J. HEALTH CARE L. & POL'Y* 85 (2015).

manner consistent with the proposals contained in this Article. The complexity of such regulation, however, coupled with the time it will take for any such regulation to become effective, requires domestic regulation in various countries. Such regulation can be modeled after Israeli legislation and proposed Indian regulations. This dual process of achieving a long term international convention while simultaneously advancing domestic regulation will help address the risks and pitfalls of international surrogacy, and thereby protect the thousands of parents and surrogates who will utilize international surrogacy in the future, as well as the resulting children.