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HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY

A report by The International Human Rights Clinic of the University of Chicago Law School, submitted to the UN Office of the High Commissioner for Human Rights in order to contribute to on-going work on human rights and global surrogacy.



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University of Chicago Law School
Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637

<https://www.law.uchicago.edu/ihrcl>

HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY

The International Human Rights Clinic of the University of Chicago Law School¹

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¹ This report was researched and authored by the International Human Rights Clinic during the academic year 2018-2019, and was submitted to the U.N. Office of the High Commissioner for Human Rights in order to contribute to ongoing work on human rights and global surrogacy by a team of graduate students in law and law faculty of the University of Chicago Law School. The research and drafting team included the following members: Alexa Rollins, Kelly Geddes, Marcela Barba, and Marie Umbach (student authors); Claudia Flores, Associate Clinical Professor of Law, and Nino Guruli, Lecturer (faculty authors). The report was also edited by Elizabeth Lindberg, Legal Assistant. This report represents the views and perspectives of the authors based on research conducted and is not an institutional position of the University of Chicago Law School.

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I. INTRODUCTION AND METHODOLOGY

The growth of the gestational surrogacy industry in the last few decades has raised concerns about the human rights of the parties involved. Partly due to those concerns, several of the countries where surrogacy was once widespread have recently prohibited the practice. Yet the human rights implications of surrogacy are highly complex, and it is far from clear that a global surrogacy prohibition is the best or even most feasible way to address rights concerns. This report aims to advance an understanding of the human rights impact of laws, policies and practices around surrogacy. The report considers the practice of surrogacy at a global level, as well as in the domestic country context, using Cambodia as a case study. An examination of the intersections between women's rights, gender equality, and the rights of children and intended parent(s) reveals both the ways that surrogacy can protect and promote the rights of those involved in the practice, as well as the ways that surrogacy can threaten the rights of those same parties.

The report was produced by a team of four students and two faculty members (hereafter 'the authors') in the International Human Rights Clinic at the University of Chicago Law School and was submitted to the United Nations Office of the High Commissioner for Human Rights (OHCHR) in order to contribute to on-going work on human rights and global surrogacy during the 2018-2019 academic year. It combines desk research, interviews, and in-country fact-finding. Desk research was conducted over the course of five months (October, November and December 2018, and January and February 2019) and aimed at gaining a holistic understanding of surrogacy practices and their implications. Research areas included the medical and technological process, applicable international and regional human rights principles, comparative domestic surrogacy legislation, academic and interest groups perspectives, harmful practices, surrogacy intermediaries, geopolitical dynamics, and country-specific contexts, especially in Cambodia. To provide a foundation for fact-finding, the authors conducted an initial set of interviews in the United States during early 2019. Interviewed stakeholders included a surrogate, intended parent(s), a surrogacy lawyer and a former public health official. Between March 20 and March 30, 2019, the authors then visited Cambodia, with assistance from OHCHR in Cambodia, to conduct in-country fact-finding. The authors interviewed various stakeholders including three surrogates, high-level public officials at the Cambodian Ministry of Justice, Ministry of Women's Affairs and the National Committee for Counter Trafficking, investigative judges, a scholar, and representatives of non-governmental organizations in the fields of counter-trafficking and public health. The identity of most of the interviewees remains confidential for security reasons, but all interview notes are on file with the authors. This research, along with the foundational desk research, has been consolidated in this report.

Though the report sets forth a comprehensive rights framework for surrogacy, it pays special attention to the rights of surrogate women, a presently underdeveloped focus in existing literature, while placing less emphasis on an investigation of the risks of child exploitation in surrogacy, which authors found has been discussed with greater depth among commentators. Notably, authors did not find any documented instances where surrogacy resulted in the abuse of any child. Authors did receive first-hand information of one instance in which a child was exchanged for compensation by the child's biological parents outside the surrogacy context. In addition, authors concluded that the risks of child exploitation in the surrogacy context are similar, if not less than, the risks present in other contexts, provided adequate screening

mechanisms are implemented. However, authors are not experts on the reality of child exploitation; historical abuses that may offer insights for the surrogacy context, as well as the mechanisms through which illicit enterprises traffic or exploit children today, were not thoroughly studied for the purposes of this report. As a result, while authors caution against alarmism regarding child exploitation through surrogacy, this report should not be viewed as conclusively suggesting that such concerns are without merit. Rather, this report concludes from its limited research that child exploitation can likely be prevented by regulatory protections, but suggests that further research be conducted into the risks of child exploitation and the degree of legal protection necessary to eliminate those risks.

The report begins with background on the practice of surrogacy. It defines surrogacy and gives an overview of the process and its history, and summarizes both the empirical research and the theoretical debates surrounding the practice. Next, the report discusses the various human rights implicated by surrogacy and established by international law. These include women's rights such as reproductive freedom, bodily autonomy, and the right to just and favorable working conditions; children's rights, including the right to an identity and the right to have their best interests promoted; and the rights of individuals and couples to found families. International law prohibitions, such as the prohibition on forced labor and human trafficking, are also relevant. This holistic assessment of the rights involved in surrogacy ultimately reveals that human rights law can promote or protect the rights of all parties involved. Accordingly, surrogacy ought to be permitted to the extent possible, though it may also be restricted as necessary to protect conflicting rights.

To better inform these conclusions, the report uses a case study of surrogacy in Cambodia, which was briefly a popular surrogacy destination before the government banned the practice in 2016. This case study took place in March of 2019, when students and faculty from the International Human Rights Clinic conducted interviews with various stakeholders, including government officials, nonprofit organizations, and former surrogates. These in-depth discussions of the practice of surrogacy in Cambodia are included in the report. They illustrate the importance of assessing surrogacy in its political and social context, and offer a number of insights as to what sorts of factors might be relevant in determining how to regulate surrogacy in a given country.

Using insights from the Cambodian case study, the report then considers the best legal approaches to surrogacy. It stresses the importance of contextualizing surrogacy by weighing its risks against both the benefits of surrogacy and the costs that might arise from surrogacy prohibition. It also considers various contextual factors that should inform a regulatory approach to surrogacy, including a country's existing legal framework, institutional capacity, and health care system. This contextual assessment suggests that in extreme cases, a ban on surrogacy may be justifiable, but under most circumstances, including in Cambodia, human right concerns do not justify prohibition of surrogacy as long as regulations and protections are in place to minimize the risks associated with the process. Moreover, to adequately protect reproductive and other human rights, surrogacy regulation should be implemented in light of a holistic view of the country's laws and circumstances, including its existing ART laws.

The report concludes by summarizing the policy recommendations that follow from the report's analysis, including the minimum protections that must be implemented to ensure a rights-protective surrogacy

industry, as well as some initial thoughts on how both individual countries and the international community can effectively implement those protections. Surrogacy ought to be regulated in order to prevent various rights abuses that can and have occurred in the surrogacy context. Children have been left orphaned or stateless by conflicting legal systems, and surrogate women have been subject to poor medical treatment, unfair contract terms, and infringements on their autonomy. On the other hand, surrogacy has provided new possibilities for many individuals and couples wishing to found a family as well as a new economic opportunity for some women with otherwise limited financial opportunities. Policy approaches to surrogacy should therefore consider regulatory options that provide effective protections for all parties, especially women and children, against abuses without unnecessarily restricting women's reproductive freedom and the promise this scientific advancement provides to many.

II. OVERVIEW OF SURROGACY

A. BACKGROUND

Surrogacy is an arrangement in which a woman agrees to become pregnant and give birth in order to provide a child to a third party, who agrees to act as the parent.¹ Surrogacy is currently legal in ten countries, banned in approximately ten, and unregulated in the remainder.² Over the last few decades, the surrogacy industry has expanded, as more individuals and couples previously unable to reproduce pursue the possibility of having biological children through the practice of surrogacy. Because countries do not consistently record surrogate births separately from other births, there is no reliable global data on the number of annual surrogate births.³

Advances in reproductive medical technology in the last fifty-years have made surrogacy possible. In 1953, doctors carried out the first successful human pregnancy using frozen spermatozoa⁴ which made traditional surrogacy possible. Traditional surrogacy⁵ involves implantation of the egg of a surrogate with the sperm of an intended⁶ or donor parent usually through the process of artificial insemination.⁷ Thus, children born through traditional surrogacy may or may not be genetically related to their intended parent(s) but are always related to the surrogate.⁸

Since the 1950s, the surrogacy process has advanced due to two key scientific developments. In 1978, the first documented case of successful *in vitro* fertilization (IVF) was reported, a process by which an egg is fertilized in a laboratory and then implanted into a woman's uterus.⁹ Then, in 1986, the first frozen egg resulted in a viable pregnancy.¹⁰ These two developments made another form of surrogacy possible: gestational surrogacy. Gestational surrogacy uses IVF to fertilize a third-party egg with the sperm of a third-party donor, or intended parent.¹¹ The embryo from a donated oocyte and sperm, or from the intended parent(s), is transferred to the surrogate's uterus, resulting in the development of a fetus, which may have no genetic relationship to the surrogate.¹² Depending on whether the intended third-party is (1) an individual or couple, and (2) if a couple, whether both sperm and egg were donated by the intended parent(s), zero, fifty, or one hundred percent of the DNA of a child born through surrogacy may be genetic material from the intended parent(s). Today, gestational surrogacy is far more common than traditional surrogacy.

B. SURROGACY PRACTICES AND ARRANGEMENTS

This section provides a broad overview of the surrogacy process, but it is important to recognize that the way surrogacy is practiced varies greatly in different contexts; depending on the context, different human rights concerns may arise, and diverse policy approaches may be needed.¹³ In addition, because the surrogacy industry is fairly new, and much of surrogacy has occurred in an unregulated market or in contravention of surrogacy laws, there is limited data on how surrogacy has been practiced so far. Much of the information relied on for this report comes from India and the United States, where surrogacy has been studied in some depth, and from the case study conducted in Cambodia. As a result, the following description will not apply uniformly to all surrogacy arrangements, but it should nonetheless be helpful in outlining the basic process.

The surrogacy process involves a surrogate, intended parent(s), and medical professionals who perform and monitor the necessary procedures. Other parties may also be involved, including sperm and egg donor banks, intermediary agencies and legal counsel.¹⁴ These entities may be integrated¹⁵ or services provided separately.¹⁶ Typically, a surrogacy arrangement begins with an individual or couple, referred to as intended parent(s), who seek to conceive and raise a child but are unable to do so without assisted reproductive technology (ART). Most intended parent(s) hire an intermediary agency to identify an appropriate surrogate to provide the service of carrying and birthing the child.¹⁷ There are two primary forms of arrangements -- altruistic and commercial. In altruistic surrogacy, the surrogate receives no compensation from the intended parent(s) for the service, but is reimbursed for costs and expenses.¹⁸ Reimbursed expenses can include lost-wages, medical expenses and other costs incurred. In commercial surrogacy, the surrogate is also compensated for her labor, including the labor of becoming pregnant, carrying the fetus, and giving birth to child, as well as the after-effects of the pregnancy.¹⁹ In Australia, for instance, typical costs for altruistic surrogacy can range from AUD 15,000 to over 100,000 (about USD 10,000 to 70,000), depending on the medical expenses.²⁰ In the United Kingdom, costs of altruistic surrogacy reportedly range from GBP 10,000 to 60,000 (about USD 13,000 to 77,000).²¹ On average, altruistic surrogates in the UK are compensated GBP 15,000 (about USD 19,000).²² The cost of commercial surrogacy varies widely, depending on the fees allocated to the surrogate and the cost of medical and other expenses per country. In the United States, such fees can range from about USD 60,000 to 150,000.²³

Intermediary agencies can serve an important role in matching the surrogate and intended parent and ensuring a proper process and arrangement. However, these agencies are currently operating in many jurisdictions with little regulation and oversight. Abuse and negligence have been reported, especially among agencies located in jurisdictions with few legal regulations.²⁴ While the more reputable agencies tend to choose to operate in environments with legal regulation, there are still concerns about the absence of standards and requirements for these agencies.²⁵ An American surrogacy lawyer interviewed by the authors reported cases of mismanaged agencies and even swindling of surrogates and intended parent(s).²⁶

To date, Canada, Denmark, New Zealand, the UK, and Australia have legalized and regulated some forms of altruistic surrogacy.²⁷ The United States, Armenia, Georgia, Ukraine, and Israel have legalized and regulated both altruistic and commercial surrogacy.²⁸ For some of these countries, surrogacy is regulated internally at the state or provincial level.²⁹ Countries that have banned surrogacy entirely include Bulgaria, France, Germany, Italy, Portugal and Spain.³⁰ Unregulated countries include a majority of the countries in Latin America and Africa.³¹

Countries that have legalized and regulated the surrogacy process tend to specify minimal terms of the agreement and impose requirements on the surrogate and intended parent(s).³² For example, surrogates may be required to satisfy a number of prerequisites before being matched with intended parent(s).³³ Common requirements are that surrogates be in a certain age bracket, neither smoke nor abuse alcohol,³⁴ have previously delivered at least one child without health complications,³⁵ and pass certain physical and mental health evaluations.³⁶ Requirements may also be imposed on intended parent(s); common examples include a minimum age,³⁷ being married,³⁸ contributing at least one gamete to the child,³⁹ being unable to give birth to a child themselves,⁴⁰ and satisfying medical and psychological evaluations.⁴¹

Jurisdictions that have extensive regulations on surrogacy usually require a written agreement, often a legally enforceable contract, between the surrogate and intended parent(s).⁴² Some jurisdictions also require certain terms in the written agreement.⁴³ These written agreements will generally include provisions about the rights and duties of the parties,⁴⁴ and in particular, the allocation of financial responsibility for the surrogate's medical expenses,⁴⁵ the allocation of decision-making power in case of pre-birth diagnosis and abortion,⁴⁶ and restrictions on the surrogate's conduct during the pregnancy.⁴⁷ For instance, the American surrogate interviewed by the authors reported that her contract provided that she would have the final say in pregnancy-related decisions if they implicated her health or life, but that the intended parent(s) would otherwise make decisions related to the pregnancy;⁴⁸ it also provided that the intended parent(s) would be liable for all medical expenses, including potential complications and post-natal care.⁴⁹

Depending on the jurisdiction, the parties may engage a legal representative to assist in setting and enforcing the terms of the agreement. In some jurisdictions, surrogates and intended parent(s) engage independent legal counsel while, in others, shared counsel.⁵⁰ In addition, in the most protective jurisdictions, agreements have to be validated by courts before medical procedures can start.⁵¹

In jurisdictions that lack substantial regulation, however, terms and conditions of the arrangements vary widely. For example, in some, the parties may never meet; all agreements are made with the intermediary agency.⁵² The surrogates interviewed by the authors in Cambodia were approached and cared for by intermediaries, but never met the intended parent(s) before the birth of the child.⁵³ In some cases, surrogates are never provided with written terms of their agreement. This was also the case for the surrogates interviewed by the authors in Cambodia: at the outset, they were simply given information about the amount of money they would receive and the fact that they would have to be pregnant and give away the child; later on, other surrogates told them more about the process.⁵⁴ But they did not negotiate or sign a formal contract or receive advice or legal counsel.⁵⁵

Despite variations in agreements, the surrogacy process generally involves either (1) use of sperm and egg donor banks or (2) use of the IVF process to extract genetic material from the intended parent(s).⁵⁶ The surrogate is then implanted with the resulting embryo.⁵⁷ Throughout the process, the surrogate is expected to undergo a series of medical tests, take medication to support development of the fetus and is subject to restrictions on her movement and practices. In countries such as India, Thailand, and Cambodia, surrogates are usually required to stay in particular locations or facilities, such as communal homes run by surrogacy agencies.⁵⁸ In some cases in India, surrogates were not allowed to leave the clinic or hostel where they were kept except under special circumstances.⁵⁹ One of the surrogates interviewed by authors in Cambodia described living in a house with a group of surrogates during their pregnancy.⁶⁰

Surrogates in other countries, including the United States, are not required to move to clinics during the pregnancy. However, various state surrogacy laws within the United States allow gestational surrogacy contracts to restrict the surrogate's activities during pregnancy. For instance, it is typical for surrogacy contracts to place limits on a surrogate's travel outside of her state of residence after a certain number of weeks into the pregnancy.⁶¹ The American surrogate interviewed by the authors stated that her contract provided that after 25 weeks of pregnancy, she could not go further than 50 miles from the hospital she would deliver at; she was also forbidden from flying after a certain week of pregnancy.⁶² State surrogacy laws differ widely on these restrictions. Some states such as Illinois explicitly provide for "the gestational surrogate's agreement to abstain from any activities that the intended parent(s) or physician reasonably believes to be harmful to the pregnancy and future health of the child."⁶³ However, other states outline few restrictions. The surrogacy lawyer interviewed by the authors described these contractual restrictions of surrogates' conduct as necessary and important to make sure that they do not take unnecessary risks during the pregnancy.⁶⁴ Some contracting parties may also see these restrictions as necessary given significant differences between state laws.⁶⁵ However, a policy maker interviewed expressed concern that these restrictions unnecessarily impinged on the surrogate's freedom of movement.⁶⁶

Eventually, when she gives birth to the baby, the surrogate is obligated to give the baby to the intended parent(s). Where surrogacy is regulated, a procedure is usually put into place for the intended parent(s) to be registered as the legal parent(s) of the child on the birth certificate.⁶⁷ One type of regulation provides a procedure to establish the parentage before the birth of the child, in which case the intended parent(s) are the legal parent(s) of the child immediately upon birth.⁶⁸ Another type of regulation requires a validation of the surrogacy agreement pre-birth, then the filing of a notice once the child is born, the court then confirms parentage of the intended parent(s).⁶⁹ A third type of regulation establishes a procedure to grant legal parenthood to the intended parent(s) only once the child is born.⁷⁰ Under some regulations, the procedure to obtain legal parenthood is administrative;⁷¹ under others, it involves a court order.⁷² These procedures usually require the intended parent(s) to show that the legal requirements for surrogacy were respected.⁷³

C. PERSPECTIVES ON ALTRUISTIC AND COMMERCIAL SURROGACY

The practice of surrogacy, both altruistic and commercial, has generated much debate. Some commentators emphasize the potential benefits of surrogacy as providing important opportunities for both intended parent(s) and surrogates.⁷⁴ Individuals and couples who are unable to have children themselves are able to form families, while women seeking to improve their financial situations—especially those with limited economic opportunities—are able to earn significant income as surrogates.⁷⁵

On the other hand, many parties have objected to surrogacy. Some object to surrogacy in all forms, usually for philosophical or religious reasons. Some argue that surrogacy inherently commodifies women or children by reducing them to items bought and sold for money.⁷⁶ Others argue that traditional procreation is the only ethical way to conceive a child.⁷⁷ Still others object to the use of embryos in all forms of assisted reproduction.⁷⁸

Scholars, analysts and policy makers who do not view surrogacy as inherently wrong have still expressed concerns regarding surrogacy in practice. Some have expressed concerns that surrogacy creates too many risks for children, including child trafficking or exploitation.⁷⁹ Some believe that surrogacy exploits women because of power imbalances between surrogates and other parties.⁸⁰ Some have argued that the choice to engage in surrogacy is never truly voluntary because people desperate for money will subject themselves to anything if offered enough compensation.⁸¹ Others worry that, even if women do voluntarily become surrogates, other parties may abuse them by crafting unfair agreements or failing to follow through with their obligations.⁸² These criticisms are sometimes limited to specific contexts. For instance, those who object to commodification, or believe that compensation is what leads to exploitation, may still support altruistic surrogacy.⁸³ Those who fear exploitation may support domestic surrogacy, or surrogacy in certain countries with strong legal protections.⁸⁴

Supporters of surrogacy have, in turn, addressed many of these concerns. Academics have challenged positions that surrogacy inherently commodifies women and children. In response to claims that surrogacy involves selling a child; proponents of surrogacy have argued that the surrogate is providing a service by carrying a child that belongs—and always has belonged—to the intended parent(s).⁸⁵ Another position, most famously advanced by the economist Richard Epstein, objects to the very premises of the commodification argument. Epstein argues that allowing something to be exchanged on the market does not inherently devalue or degrade the thing being sold; indeed, it may ensure that the thing being sold goes to the party that values it the most.⁸⁶ In the surrogacy context, this means that putting a price on the service provided by surrogates does not degrade the value of their labor nor the value of the resulting children.

Philosopher Martha Nussbaum also challenges the commodification criticism, claiming that people often object to supposedly “degrading” forms of labor for reasons ultimately grounded in prejudices against lower classes.⁸⁷ To illustrate, she notes that people historically found opera singers objectionable because they commodified their voices.⁸⁸ Nussbaum also responds to concerns about exploitation, pointing out that the risk of exploitation arises not from the legalization of practices like surrogacy, but rather from the power imbalances that exist in a society generally.⁸⁹ In other words, vulnerable women who engage in

surrogacy may be at risk of exploitation, but they would also be at risk of exploitation if they pursued any other form of work. The solution is therefore not to restrict particular practices, but rather to find ways to empower society's most vulnerable groups. Similar arguments have been made by other scholars as well, who often emphasize the significant benefits of surrogacy to the very women supposedly being exploited.⁹⁰

Even those with serious concerns about the surrogacy industry often caution that banning surrogacy may be even riskier. If surrogacy is prohibited, they argue, a completely unregulated, illegal market will emerge, endangering children, women, and intended parent(s).⁹¹

D. EMPIRICAL ACCOUNTS OF SURROGACY

Empirical research on surrogacy remains in its early stages, but evidence so far suggests that surrogacy, when practiced under the right conditions, can be a positive experience for all parties involved. For instance, doctors in the United Kingdom and the United States have studied surrogacy practices at clinics and found high rates of successful births, low rates of complications, and extremely rare incidents of ethical or legal complications.⁹² Some medical studies have found that pregnancies using donor eggs—which would include any gestational surrogacy—may involve greater health risks than traditional pregnancies, though the research is still limited.⁹³ Psychologists from the University of Cambridge studied a group of surrogates, children, and intended parent(s) for ten years following the children's births. They concluded that children and intended parent(s) were well adjusted and had healthy parent-child relationships, and that by age ten, children had positive attitudes about their surrogate births and their surrogate mothers.⁹⁴ The surrogates studied either reported no significant emotional difficulties, or difficulties that subsided within a few weeks.⁹⁵ Other studies in the United Kingdom have echoed this finding, reporting positive experiences for both gestational and traditional surrogates.⁹⁶ A particularly comprehensive article by Dr. Janice C. Ciccarelli and Professor Linda J. Beckman, two psychologists in California, synthesized various psychological evidence on surrogacy and concluded that the results were generally positive.⁹⁷ They note that despite the preliminary nature of existing data, "the consistency of results is almost impressive," and add that "empirical data offer little support for widely expressed concerns" about emotional damage or exploitation.⁹⁸

"Everybody is benefited by this, the doctors who are involved, the couples who cannot have their own children, and women like us who cannot earn enough to feed our own children."

-Kavita, Indian Surrogate

At the same time, accounts of surrogacy in some contexts have revealed troubling practices, and individual incidents have prompted concern. Much of this evidence comes from South or Southeast Asia, especially India. India has a large surrogacy market and its surrogates tend to be poorer and less educated compared to surrogates in Western Europe or the United States, arguably putting them at greater risk of

exploitation.⁹⁹ Numerous reports on surrogates in India document lack of informed consent to surrogacy procedures, finding that Indian surrogates often had little or no knowledge of the medical processes involved or the terms of their contracts.¹⁰⁰ Intermediaries in India and other countries have also failed to provide adequate medical care in many cases. Surrogates often receive little or no postnatal care¹⁰¹ and, in some cases, surrogates have experienced fatal medical complications.¹⁰² Surrogacy intermediaries have coerced women into entering or continuing surrogacy arrangements, sometimes with financial threats.¹⁰³ Reports also show that surrogacy contracts are usually strict and unfavorable to surrogates. Contracts often provide relatively low compensation, limit surrogates' ability to make medical decisions, and offer little legal protection in the event of disputes or complications.¹⁰⁴ Nonetheless, surrogates in India have often reported that they were glad for the opportunity to become surrogates,¹⁰⁵ and many of them benefited greatly from the money they received.¹⁰⁶

Some of the issues surrounding surrogacy arise from inconsistent or non-transparent state laws, rather than from the kind of poor surrogacy practices discussed above. For instance, there have been instances where children born through international surrogacy were orphaned or left stateless.¹⁰⁷ Surrogate children may be orphaned if the intended parent(s) abandon the child they commission in jurisdictions where the intended parent(s) are recognized as the legal parents.¹⁰⁸ Statelessness may result when neither the state of the surrogate mother nor that of the intended parent(s) grants nationality to the surrogate child—usually because the surrogate's state recognizes the intended parent(s) as legal parent(s), while the intended parent(s)' state does not.¹⁰⁹ In cases brought before courts, the intended parent(s)' state has often allowed the children to enter the country and remain with the intended parent(s), but in at least one case the child was put up for adoption.¹¹⁰ As described in the Cambodia case study below, intended parent(s) have also been denied custody of the resulting child and the surrogate required by the state to raise her or him.

E. GLOBAL COMMERCIAL SURROGACY DEVELOPMENTS AND TRENDS

The market for surrogacy first developed in the United States, making it the first providing country.¹¹¹ The first baby successfully born through commercial surrogacy was born in 1985 in Michigan.¹¹² By 1987, more than twenty surrogacy agencies had opened within the United States, and today, there are more than one hundred-fifty such agencies.¹¹³ Most surrogates in the United States were non-Hispanic whites with incomes likely between USD 15,000 and 30,000 a year.¹¹⁴ The price for surrogacy in the early 2000s was approximately between USD 35,000 and 100,000, and has since increased to between USD 90,000 and 130,000.¹¹⁵ The United States continues to provide surrogacy to foreigners.¹¹⁶ The most frequent receiving country is China.¹¹⁷

Other countries began to engage in commercial surrogacy in the early 2000s. In 2002, India legalized commercial surrogacy and became the largest providing country.¹¹⁸ Surrogate labor was comparatively less expensive in India than many other states, costing approximately USD 10,000–28,000,¹¹⁹ approximately USD 2,000–8,000 of which was given to the surrogate.¹²⁰ As a result, much of the international market demand moved to India.

India significantly changed the global commercial surrogacy landscape. Increased demand for surrogates in India raised concerns about exploitation particularly because Indian women were likely to be generally poorer than American women, and therefore more vulnerable to exploitative practices, whether social, legal, physical or emotional.¹²¹ In 2012, to address concerns, India passed a series of restrictive regulations, including visa guidelines that limited viable applicants to heterosexual couples who had been married for a minimum of two years, and met the criteria for a medical, rather than tourist, visa.¹²² In 2016, India banned transnational surrogacy altogether. Leading up to the ban, some expressed concerns about the fate of surrogate children. For instance, in the widely publicized 2007 *Baby Manji* case, a Japanese couple divorced just prior to the birth of their surrogate child by an Indian surrogate. Following the divorce, the intended mother no longer wanted to raise the child, leaving the surrogate child without clear parentage or nationality.¹²³ The Indian government also expressed concerns about the well-being of surrogate mothers. The government argued that commercial surrogacy exploited India's working-class women.¹²⁴ Headlines proclaimed that Indian women were "renting their wombs" and "pimping their pregnancies," and widely accused surrogates of producing children for wealthy foreigners,¹²⁵ though Indian surrogates countered this narrative, emphasizing their relationships with the intended parent(s) and their desire to help them start families.¹²⁶

Around this same time, surrogacy emerged in other Southeast-Asian countries like Thailand, Cambodia, Laos and Malaysia¹²⁷ and became more prevalent after India passed restrictions in 2012.¹²⁸ As demand for surrogates rose in these countries, their governments also issued restrictions or bans.¹²⁹ Following a famous incident called the *Baby Gammy Case*, Thailand passed the Protection for Children Born through Assisted Reproductive Technologies Act on July 30, 2015, which outlawed the previously unregulated practice of transnational surrogacy in Thailand, but permitted it domestically.¹³⁰ The *Baby Gammy Case* involved a Thai surrogate who became pregnant with twins intended for Chinese parents. Upon learning that one of the twins would be born with Down syndrome, the Chinese parents instructed the surrogate to abort, however she chose to raise the child with Down syndrome herself, while the Chinese parents raised the child without Down syndrome.¹³¹ The *Baby Gammy* case called international attention to some of the legal problems that could arise from surrogacy arrangements. Thailand's Act aimed to mitigate these kinds of legal dilemmas by banning foreigners from contracting for surrogacy. The Act also banned same-sex couples from hiring surrogates, however it permitted Thai couples, or individuals with a Thai partner, who have been married for three years to hire surrogates in Thailand.¹³²

In 2016, one year after Thailand placed restrictions on transnational surrogacy, Cambodia's Ministries of Health and Justice passed legislation limiting the practice as well. In some cases, local enforcement action has backed the national position, however clear policies are still forming.¹³³ In 2017, an Australian nurse and two Cambodian assistants were arrested for illegally running a commercial surrogacy clinic, and thirty-two Cambodian surrogates were detained and charged with human trafficking. The surrogates have since been released, although they were freed on the condition that they raise the surrogate children themselves.¹³⁴ As of 2018, all forms of surrogacy were banned in Cambodia, however no formal regulations have been issued and the Cambodian government is still in the process of drafting legislation that will provide clearer policies.¹³⁵ Without formal legislation, the practice has continued illegally, with a particularly large demand for surrogates coming from China.¹³⁶ Cross-border programs have also

developed between Cambodia and countries like Laos and Malaysia. Since standard fertility treatments are still permitted in Cambodia, embryos can be conceived in Cambodia and then sent to other countries for use by surrogates.¹³⁷

Though many South Asian countries have restricted or banned surrogacy, the practice remains prevalent around the world, both in countries where there are stricter regulations, such as in the United States, and in countries where there are very few regulations, such as countries in North Africa¹³⁸ as well as Eastern European countries like Ukraine, where there have also been recent reports of exploitation of surrogates.¹³⁹

III. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Children, surrogates, and intended parent(s), as well as states and intermediaries, have distinct and often competing interests that must be considered and balanced when assessing the human rights implications of the practice of surrogacy. There are currently no international legal instruments directly addressing surrogacy. However, experts, judicial entities and interpretive treaty bodies have addressed the practice of surrogacy and assisted reproductive technologies more generally within the context of the rights and interests expressed under international law. Among the relevant treaties are the International Covenant on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). These treaties address various rights relevant to the surrogate, including reproductive rights and the right to fair working conditions, and various rights relevant to the child born through surrogacy, including the best interest of the child principle and the right to an identity and nationality. Treaties also address rights and interests relevant to intended parent(s) in the surrogacy process, such as the right to found a family and to do so without discrimination.

The practice of surrogacy is recent as is its treatment under international law. It is unsurprising, therefore, that there has been a difference of opinion on the manner in which it invokes or infringes upon international human rights.¹⁴⁰ This section addresses the human rights law implications of the practice of surrogacy.

As explained further below, the practice of surrogacy does not, *per se*, violate existing international human rights law. In fact, when implemented with proper protective mechanisms, surrogacy could enhance the rights of all stakeholders, and its restriction may impermissibly limit women's reproductive rights and autonomy, rights women, in practice, often hold tenuously as it is. International standards require the protection of these rights regardless of social and economic context and so restriction of these rights requires careful reflection. That said, in the absence of protective mechanisms, or where structural and institutional barriers frustrate attempts at ensuring a rights-protective process, women, children, and intended parent(s) involved in surrogacy may be at risk of other important rights violations. These vulnerabilities are real but, as explored in the following sections, many are not unique to surrogacy but caused by inadequate governance, various forms of social inequalities and discrimination as well as a lack of social services and assistance. This section begins by exploring the human rights implications for the various parties involved in the surrogacy process.

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A. SURROGACY AS A PER SE VIOLATION OF HUMAN RIGHTS

1. SALE OF CHILDREN

International experts, government officials, academics and advocates around the world have raised the concern that surrogacy may amount to the sale of children under international law.¹⁴¹ Under the Convention on the Rights of the Child, the sale of children consists of “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”¹⁴² The sale of children is prohibited under Article 35 of the Convention as well as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.¹⁴³ Prohibited actions include offering or accepting a child for exploitative purposes such as organ sale, sex work and forced labor, as well as improperly inducing consent as an intermediary for the adoption of a child.¹⁴⁴ The prohibition on the sale of children is concerned with the taking of children for “commercial or sexual motive[s].”¹⁴⁵ Article 35 was meant to act as a “fail-safe protection”, to protect children “from being abducted or procured for financial gain, drug trafficking, sex trade, or other forms of exploitation.”¹⁴⁶

The sale of children has long been a concern within the international community, especially in countries where economic desperation is prevalent, though evidence of the extent of this practice has been uneven.¹⁴⁷ Still, sale of children has been documented and authors encountered evidence of one instance of sale of children, outside the surrogacy context, during an interview conducted for this report in Cambodia.¹⁴⁸ The prohibition is aimed at protecting children from exploitation and abuse,¹⁴⁹ and at preventing parents from being coerced into selling their children.¹⁵⁰

In the adoption context, for example, international law prohibits intermediaries and adopting parents from giving money to families putting their child up for adoption.¹⁵¹ According to the foundational report

prepared to inform the 1993 Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, it was concerns over lack of informed consent on the part of biological parents, failure to obtain consent of both parents, the use of coercion, lies, or duress to obtain the child, the use of falsified documents in facilitating an adoption, and bribery in facilitating an adoption, that motivated international action in the context of inter-country adoption.¹⁵² In *Fornero and Daughter v. Argentina*, for example, the Inter-American Court of Human Rights found a violation of numerous human rights in a case in which the father of a child did not give consent for the adoption and where the mother was allegedly paid for giving consent to the adoption.¹⁵³

In the context of surrogacy, some similar concerns that motivated the prohibition on the sale of children exist, including concerns that surrogates could be coerced and a child exploited. However, surrogacy does not by definition or in practice inherently involve the sale of children and evidence is absent to support the conclusion that sale of children concerns are more acute for surrogacy practices. First, as many commentators have noted, the surrogacy process does not itself amount to the sale of children in that it does not exchange a child for money as defined by international law.¹⁵⁴ The elements that constitute the sale of a child are not present. In the context of altruistic surrogacy, the surrogate does not receive any payment.¹⁵⁵ And in the context of commercial surrogacy, the surrogate does not receive a payment in exchange for the child, but rather for the service she provides by carrying the fetus in her womb.¹⁵⁶ Legally, in jurisdictions that allow for commercial surrogacy, there is usually no transfer of parentage from one party to another, because the embryo is considered the intended parent(s)'s from the start. Medically, the gestational surrogate has no genetic link to the embryo and thus is not “selling” her own biological material or offspring.¹⁵⁷

Policy concerns, in fact, counsel against this incorrect and overly rigid framing of surrogacy as the sale of children.

Moreover, the policy concerns that motivated the ban on selling children are no more present in the context of surrogacy than any other case where guardianship of a child is at issue. Because children are not being traded for money, there is no risk that children or society will be harmed by the “commodification” of children. Studies have found no adverse psychological effects on children born through surrogacy, as discussed above, and though children born through surrogacy could theoretically be exploited or abused, there is no evidence that surrogacy practices pose a greater risk than any other process that leads to parenting. In fact, any evidence of dignitary harms to children in the process of surrogacy is at best inconclusive.¹⁵⁸

Policy concerns, in fact, counsel against this incorrect and overly rigid framing of surrogacy as the sale of children. All available evidence indicates that surrogacy practices overwhelmingly are engaged in with the intention by all parties of founding and growing families. Failing to recognize intended parent(s)' role in the creation of the child undermines the integrity of non-traditional families and the protected choices involved in establishing one's family. It also discriminates against same-sex couples and persons whose infertility prevents them from fully enjoying related human rights.¹⁵⁹ An understanding that surrogacy is

not sale of children does not hamper states in any way from addressing circumstances of trafficking and exploitation (discussed below). States can prevent abuse and exploitation of children born through surrogacy by ensuring that intended parent(s) are properly screened and even creating monitoring mechanisms to ensure the child's well-being after birth, as in the adoption context.¹⁶⁰

As set forth in the section that follows, other risk factors for abuse or exploitation, such as imbalance of power between the surrogate and the intended parent(s) or intermediaries, can also be addressed without the sale-of-children concern framing the analysis. There are, of course, numerous policy interventions that can best ensure the process is implemented in a manner that serves the best interest of the resulting child discussed in more detail below.

2. TRAFFICKING OF WOMEN AND CHILDREN

Restrictions or bans on the practice of surrogacy are often justified as a means of protecting vulnerable women and children from the threat of human trafficking.¹⁶¹ Here, again, the practice of surrogacy does not inherently constitute human trafficking. Human trafficking involves the procurement of an individual for the purpose of forced labor and/or sexual exploitation and is prohibited by various human rights instruments, including CEDAW and the 2002 Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children.¹⁶² The Protocol defines human trafficking by three components: an action consisting in the recruitment, reception, transfer or harboring of persons; using improper means to achieve that action (such as coercion, force, fraud or abduction); with an improper purpose (sexual exploitation or forced labor).¹⁶³ At its core, human trafficking prohibits forced or coerced labor of any kind, including sexual services.

In some cases, surrogacy, as any other service or labor, can certainly raise human trafficking concerns of surrogate women and, arguably, because surrogacy is currently performed in unregulated environments by women who are economically vulnerable, concerns may be heightened. In studies on surrogacy in India, where surrogacy was not regulated at the time, some women reported that they were lured by false monetary promises or pressured into engaging in or continuing the process.¹⁶⁴ For the children born through surrogacy arrangements, there is certainly a danger that they could be commissioned by individuals with the intention of exploitation. However, authors were not able to find documented examples of this.¹⁶⁵

In assessing the significance of concerns around human trafficking of women in the context of surrogacy, it is important to distinguish the elements of surrogacy that make it potentially exploitative. A woman may legitimately choose to serve as a surrogate to improve her livelihood, help another family, or both. Human trafficking of a surrogate may only exist if the ability of the surrogate to make her own decisions is undermined through coercion, force or certain forms of deception.¹⁶⁶ Thus, where none of these conditions exist, by participating in surrogacy, a woman is simply exercising her right to make her own choices. To address concerns of the potential for human trafficking of women, states can establish protective measures to ensure that all women who engage in surrogacy do so freely and are fully informed of the implications of their decision.¹⁶⁷ Such measures, discussed at length in the following sections, could include the right for the surrogate to have access to independent counsel to make sure that her rights and

interests are protected¹⁶⁸ and the implementation of an administrative or judicial procedure to review and approve the surrogacy agreement and its observance.¹⁶⁹ Under conditions where there is ensured monitoring and regulation of the process and proper surrogacy agreements are made, respected and enforced, there is no reason for surrogacy to pose human trafficking concerns any more than many other forms of labor.

Similarly, the trafficking of children through surrogacy would only occur where the purpose of the practice is to subject the child to exploitation or sexual services. Surrogacy practices can and have resulted in children being raised by loving parents with surrogate women providing a valuable service and being adequately compensated for it. In fact, available evidence indicates that this may be the norm. To address concerns of trafficking of children through surrogacy, states should put in place mechanisms aimed at ensuring all children born through surrogacy grow up in environments protecting their best interests. Such measures can include regulation of intermediary organizations as well as pre- and/or post-conception screening and monitoring mechanisms.

Moreover, banning surrogacy is likely to increase the risk of human trafficking for some, as a ban risks driving the industry underground and to less protective environments.¹⁷⁰ In countries in which economic desperation is widespread and, in the absence of state regulation, unchecked intermediaries may create dangerous conditions for surrogacy. Human trafficking concerns are likely to be even worse if surrogates themselves are criminalized, as they will not dare come forward after suffering abuses in the black market for fear of being arrested and prosecuted. In such circumstances, an international mechanism for ensuring adequate oversight and protection may be necessary to safeguard against human trafficking concerns. (See Recommendations below).

3. FORCED LABOR

Similar to human trafficking, there is little evidence that surrogacy has been widely performed under conditions of forced labor.¹⁷¹ But as discussed in the previous section, vulnerable women could be coerced or pressured into surrogacy or forced to continue the process against their will. While this can and does happen with other forms of labor (including domestic work, restaurant work and garment labor), because a surrogate provides a service that requires dedication for a period of time and compromises her physical state through pregnancy, concerns of forced or compelled labor are arguably heightened and should be addressed by protective mechanisms to ensure a surrogate has the ability to make choices freely and engage in the process with proper consent.

Many international and human rights instruments prohibit forced labor.¹⁷² The Forced Labor Convention defines this practice as “all work or service which is exacted from any person under menace of penalty and for which the said person has not offered himself voluntarily.”¹⁷³ Cases in which an employer or recruiter makes certain false promises with serious consequences so that a worker takes a job she would not otherwise have accepted can constitute forced labor.¹⁷⁴ Similarly, surrogacy arrangements could amount to forced labor where contract terms make it impossible for surrogates to break the agreement, perhaps by imposing extreme financial penalties for breach.¹⁷⁵

Forced labor raises the same concerns of coercion and lack of informed consent as were examined in the previous section on human trafficking. Proper guarantees must ensure that women engage in surrogacy willingly and are able to retain the necessary control throughout the process. For instance, some jurisdictions specify that until surrogates are pregnant, they cannot be penalized for changing their minds.¹⁷⁶ Similarly, at least one US state provides that surrogates cannot be penalized for terminating the surrogacy agreement.¹⁷⁷ States must ensure that women are not coerced, tricked, or forced into serving as surrogates, either by intermediaries or others, and that contractual terms are honored, including fair compensation and protection from punitive penalties. Restrictions on women's movement (travel restrictions), activities and other aspects of the process must be carefully analyzed to ensure the surrogate's labor (including all elements of the preparation, fertilization, birth and pregnancy) is voluntary and not restricted in a manner that constitutes forced or compelled labor.

B. RIGHTS OF WOMEN

1. REPRODUCTIVE RIGHTS, HEALTH AND BODILY AUTONOMY

Women have a right to control their own bodies and make their own reproductive choices.¹⁷⁸ Decisions to become pregnant, donate an egg, terminate a pregnancy (under some circumstances), or avoid a pregnancy fall within women's rights to make autonomous choices about their own bodies.¹⁷⁹ While these rights may be limited in some jurisdictions, when balanced with other important rights and/or state interests, they are rights under international law nonetheless. In the surrogacy context, complete bans or disproportionate restrictions may undermine women's reproductive choices and health.

Women have a right to control their own bodies and make their own reproductive choices.

The primary foundations for these rights under international and regional law are the right to privacy, the right to health, and reproductive rights. Under Articles 12 Universal Declaration of Human Rights (UDHR), 17 ICCPR, 8 European Convention on Human Rights (ECHR), 11 of the American Convention on Human Rights (ACHR) and Principle 21 of the ASEAN Human Rights Declaration, women are protected against arbitrary and unlawful interferences with their privacy. Under Articles 25 UDHR and Article 12 ICESCR, women have the right to the highest attainable standard of health.

The UN Committees on Civil and Political Rights and on Economic, Social and Cultural Rights have interpreted the right to privacy and the right to health to grant individuals a right to physical integrity.¹⁸⁰ This right protects women against outside interference with their bodies, such as physical assault, inhuman and degrading treatment, forced sterilization, and restrictions on their freedom of movement.¹⁸¹ The Committees have also recognized as components of the rights to health and privacy a right to bodily autonomy which entitles women to make their own informed decisions about their bodies, including reproductive choices.¹⁸² Various human rights treaty bodies have found that sterilization without informed consent,¹⁸³ as well as denial of an abortion where it was legal or where the fetus was not

viable,¹⁸⁴ to violate women's bodily integrity and autonomy. These decisions stressed the importance of freedom of choice for women.

In addition, the right to access to the highest attainable standard of health includes a right to reproductive health, which means that "women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth."¹⁸⁵ Article 16 of the CEDAW reaffirms women's right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to do so.¹⁸⁶ All of these rights are important aspects of sexual and reproductive health rights.¹⁸⁷

Women's decision to engage in surrogacy invokes the foundational health and reproductive rights listed above. However, the surrogacy process, in practice, does not always protect those rights.¹⁸⁸ Where intermediaries recruit surrogates without their informed consent, such as when surrogates are not informed about medical treatments or contract terms, their reproductive rights and right to autonomy are being violated by third parties.¹⁸⁹ Some surrogates, for instance, have had fetal reduction procedures without being warned in advance that they may be asked to undergo such a procedure.¹⁹⁰ Surrogate rights may similarly be violated if they are compelled to live in clinics or hostels and subjected to restrictive rules. As discussed previously, this was often the case for Indian surrogates, who were usually housed in clinics or hostels away from their families and made to observe strict routines.¹⁹¹ Failure to provide adequate medical care also raises concerns over surrogates' reproductive rights and right to health, such as in cases where surrogates were denied post-natal care entirely.¹⁹²

The assumption that surrogacy is not decent work may rest on stereotypical assumptions about women and their roles, which historically leads to undervaluing women's work and seldom leads to greater protection of women and their autonomy.

Regulation and oversight is needed to address abusive or coercive surrogacy to ensure women's reproductive rights are protected. However, a complete ban or overly restrictive limitations on surrogacy may infringe on women's reproductive rights and freedoms as well.¹⁹³ Banning or criminalizing surrogacy threatens women's right to bodily autonomy and reproductive freedom because it takes away their choice, and could also leave women vulnerable to abuse in an illegal market.¹⁹⁴ Regulations and oversight mechanisms to ensure the surrogates' free consent, freedom of movement, and physical integrity protects these rights while guarding against abuse of other core rights.¹⁹⁷

2. NON-DISCRIMINATION AND A WOMAN'S RIGHT TO EQUAL PROTECTION

Prohibitions on gender discrimination and promoting women's equality are also significant to surrogacy. Since only women can become surrogates, laws restricting or prohibiting surrogacy essentially restrict the rights of women alone.¹⁹⁸ CEDAW requires countries to address gender-discrimination and to do so in the

context of reproductive choices and activities, which often impact women disproportionately.¹⁹⁹ In addition, the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (ACHPR), as well as the ICCPR, also require states to ensure non-discrimination in the context of laws and policies around reproductive rights and choices.²⁰⁰ This includes ensuring laws on reproductive choices are not based on gender stereotypes including traditional conceptions of motherhood and maternity.²⁰¹ In states where surrogacy practices are banned or criminalized, including through criminal prosecution of women serving as surrogates, the ban has a severe and discriminatory impact on women, raising equality concerns.²⁰²

As a result, restrictions on surrogacy may violate the human rights treaty provisions on non-discrimination, especially where policymakers cannot show compelling justifications for the restrictions, such as evidence that they are essential to protecting rights of other parties that outweigh women's rights to be free from discrimination. Even where surrogacy restrictions do not violate antidiscrimination laws, a legal system that values women's rights and equality should ensure that surrogacy regulations are consistent with those values by avoiding undue restrictions on women's freedom.

3. LABOR RIGHTS AND JUST AND FAVORABLE WORKING CONDITIONS

Women have the right to work and to choose work freely.²⁰³ While commercial surrogacy has not been designated as "labor" under international law, it is an arrangement in which parties agree, through a contractual arrangement, that a service will be performed in exchange for payment. Common definitions of labor or work require an activity that involves mental or physical exertion in order to achieve a purpose or result.²⁰⁴ This definition suits the services performed by the surrogate which include becoming pregnant, being pregnant, engaging in various behaviors and duties while pregnant and giving birth, a process that takes approximately one year. In exchange, the intended parent(s) provide compensation and additional benefits and services. In many jurisdictions, the intended parent(s) will also cover any lost wages if the woman has to temporarily leave other employment.

Commercial surrogacy provides economic opportunities that may be no less desirable than other forms of difficult work women might otherwise have available such as domestic work, and factory or agricultural work.²⁰⁵ While no international body has recognized surrogacy as a form of work, the assumption that surrogacy is not decent work may rest on stereotypical assumptions about women and their roles, which historically has led to undervaluing women's work and seldom leads to greater protection of women and their autonomy.²⁰⁶ Articles 3 and 5 of CEDAW require states to work towards eliminating such stereotypical assumptions and to adopt appropriate measures to ensure full and equal enjoyment of social, political and economic rights for women. Ultimately, allowing only altruistic surrogacy, for example, may pressure women into providing services for which they would otherwise have been compensated, further devaluing women's work.²⁰⁷

In so far as surrogacy may be understood to constitute work, women engaged in surrogacy are entitled to just and favorable working conditions under Articles 23 UDHR and 7 ICESCR. Just and favorable working conditions include fair wages that ensure workers and their families a decent living, as well as safe and healthy working conditions.²⁰⁸ This applies to altruistic surrogates as well as commercial surrogates:

General Comment 23 of the UN Committee on Economic, Social and Cultural Rights states that “[u]npaid workers, such as workers in the home or in family enterprises, volunteer workers and unpaid interns, [...] have a right to just and favorable conditions of work and should be protected by laws and policies on occupational safety and health, rest and leisure, and reasonable limitations on working hours, as well as social security.”²⁰⁹



Ultimately, allowing only altruistic surrogacy, for example, may pressure women into providing services for which they would otherwise have been compensated, further devaluing women’s work.

To ensure just and favorable working conditions, surrogates’ relationships with agencies and intended parent(s) should be governed by written contracts that are fair and respectful of their rights.²¹⁰ Where such contracts provide for fair compensation, provision of health care or health insurance for pre and post-natal care, these provisions must be guaranteed and enforceable.²¹¹ These minimal standards of protection have not always been respected in past cases: surrogates in India have reported not being paid full compensation, sometimes without reason, sometimes because they failed to deliver a live child.²¹² Surrogates in Cambodia interviewed by authors were provided no written agreement.²¹³

Others have been left without coverage when suffering post-delivery complications.²¹⁴

C. RIGHTS OF CHILDREN

Surrogacy, both commercial and altruistic, has important implications for the rights of children born through surrogacy. As discussed above, though surrogacy does not constitute the sale of children, children must be protected from potential misuse of the surrogacy process through standards, regulations and monitoring. Mechanisms that screen intended parent(s) are critical but not the only concerns regarding children’s rights. Beyond the right to be free from abuse, exploitation or trafficking, children have a general right to have their best interests protected, as well as a specific right to identity and nationality, and these rights must be protected in surrogacy arrangements.

1. THE BEST INTERESTS OF THE CHILD

To adhere to existing rights principles, surrogacy must comply with the ‘best interests of the child’ standard of the CRC. Article 3(1) of the CRC requires that “[i]n all actions concerning children...the best interests of the child shall be a primary consideration.”²¹⁵ According to the Committee on the Rights of the Child, this means that states are required to continually assess how existing laws and policies actually impact children and their interests.²¹⁶ Commercial and altruistic surrogacy are not at odds with ‘the best interests of the child’ standard. In certain circumstances, prohibiting or criminalizing surrogacy may itself violate the ‘best interests of the child.’

Children born through surrogacy must be protected from discrimination based on the circumstances of their birth. However, the CRC does not establish that the best interest of the child standard applies to a child prior to birth, and there are compelling reasons not to introduce this standard until birth.²¹⁷ The

‘best interests’ standard includes, among other things, the right to be free from discrimination and protection from being rendered stateless. Article 2 of the CRC protects children from discrimination based on ‘birth or other status.’ As the Committee has explained, “children may also suffer the consequences of discrimination against their parents, for example, if children have been born out of wedlock or in other circumstances that deviate from traditional values.”²¹⁸ Where children born through surrogacy are prevented from enjoying the same rights, including the right to be with the parents that created them and the citizenship rights that derive from that parentage, their best interests may be violated. For example, a rule or a decision that leaves a child stateless or with a woman/family who did not intend to have a child may violate the best interests of a child born through surrogacy.

Ultimately, ‘the best interests of the child’ is a holistic standard that requires evaluating the specific context and focusing on real effects, not abstract and existential harms, of any given policy or law on children.²¹⁹ The Committee has repeatedly pointed out the importance of parents in ensuring the best interests of the child.²²⁰ When evaluating a practice, and the specifics of a given case, policymakers should recognize the role of the intended parent(s) as key protectors of the best interests of children born through surrogacy. There is nothing so crucial to safeguarding a child’s rights as having willing, committed and supportive parent(s). Pre- and post-conception vetting and monitoring mechanisms can help ensure intended parent(s) are able to fulfill their parental duties.

It is important to remember intended parent(s) are simply individuals who wish to have children but cannot do so without medical assistance. They are no less likely than other parents to value and promote the interests of the child. In such circumstances, once that relationship exists, ‘the best interests of the child’ requires protection of that relationship, including laws that ensure full parental rights. In fact, the European Court of Human Rights, in *Mennesson v. France*, found a violation of the children’s right to respect for private life when French authorities refused to recognize in law the parent/child relationship between intended parent(s) and the children born through surrogacy.²²¹ The Court, in its judgment, referred to and invoked the ‘best interests of the child’ standard in interpreting Article 8 right to private life of the child.²²²

In addition, the CRC Committee in General Comment No. 14 stated that the “term ‘family’ must be interpreted in a broad sense to include biological, adoptive or foster parents.”²²³ Under Article 9 of the CRC, children should not be separated from their parents against their will unless a judicial determination is made of abuse or mistreatment and it is determined such separation is in the best interests of the child. This principle should arguably apply even when there is no genetic link with the intended parent(s). Numerous studies have shown that lacking a genetic link in no way undermines the welfare of a child, as children born through surrogacy have been shown to be well-adjusted with strong and positive ties to their parents.²²⁴ Recently, in a joint report on surrogacy practices in the United Kingdom, the Law Commission of England and Wales and the Scottish Law Commission proposed abandoning the requirement of a genetic link in domestic surrogacy arrangements in cases of medical necessity, recognizing that “removing this requirement would reflect the view that in a surrogacy arrangement, the shared intention of the intended parent(s) and the woman who will be the surrogate to bring the child into the world for the parents to raise, is more significant than the genetic parentage of the child”.²²⁵ Thus,

any restrictions on recognizing the parentage of a child born through surrogacy may significantly undermine the family so crucial to ensuring a child's best interest.

Bans and other restrictions on surrogacy have separated children from their intended parent(s) raising serious questions about whether such separations were in the children's best interests.²²⁶ For example, as a result of recent prosecutions in Cambodia of women serving as surrogates, children born through surrogacy were separated from their intended parent(s)—in many cases those they were genetically linked to. Surrogates were given the choice between criminal prosecution and raising the children as their own.²²⁷ In such circumstances, parents who wanted the children—who likely have prepared financially, mentally, and practically to support the children as part of their family—are prevented from raising the children, while women who had no intention of raising another child are forced to do so. This approach, however well intentioned, raises serious questions about whether the best interests of the child are protected through such restrictive and punitive measures.

2. RIGHT TO CITIZENSHIP AND IDENTITY

Surrogacy implicates the child's right to an identity. This right is protected under Articles 7 and 8 of the CRC; it includes the right to a name, a nationality and family relations, and should be enjoyed by the child from birth. This right may be in jeopardy in the context of transnational surrogacy. As mentioned above, jurisdictional hurdles may arise when intended parent(s) from one country enter a surrogacy arrangement in another.²²⁸ Where the provider country recognizes only the intended parent(s) as parent(s), but the receiving country recognizes only the surrogate as a parent, the children may be left without legal statehood or parent(s).²²⁹

Such a situation violates children's right to an identity and nationality and goes against their best interests as discussed in the previous section. The European Court of Human Rights, for example, has directed states to register children as the intended parent(s)'s child, notwithstanding national laws to the contrary, given the citizenship, nationality and identity rights of the child.²³⁰ According to the Strasbourg Court, in

Even if states decide to ban surrogacy in their own territory, they should not deny the rights of children already born.

order to protect a child's right to private life, national law must provide for the possibility of recognizing the legal relationship established abroad between the child born to a surrogate and the intended parent(s), at least when the parent is genetically related to the child.²³¹

The lack of coordination or consistency among states on surrogacy, parentage, and citizenship give rise to these problems. International cooperation may help to address them.²³² States have the duty to take all appropriate measures to ensure that children's rights are protected and that they have citizenship and parentage from birth, in line with their best interests.²³³ These problems also highlight the fact that children's rights may suffer from a state's blanket ban on recognition of children born through surrogacy. Even if states decide to ban surrogacy in their own territory, they should not deny the rights of children already born.

D. RIGHTS AND INTERESTS OF INTENDED PARENT(S)

1. DISCRIMINATION IN THE ENJOYMENT OF REPRODUCTIVE FREEDOM

Finally, surrogacy facilitates the intended parent(s)'s right to found a family without discrimination on the basis of sexual orientation or disability. The right to found a family is widely recognized in international law: it is contained in Article 16 of the UDHR, Article 23 of the ICCPR, Article 10(1) of the CESC, Article 12 ECHR, Article 17 of the ACHR, Article 18 of the ACHPR, and Principle 19 of the ASEAN Human Rights Declaration. Article 10 ICESCR emphasizes that "the widest possible protection and assistance should be accorded to the family...particularly for its establishment." CCPR General Comment N°19 states that "the right to found a family implies, in principle, the possibility to procreate and live together."²³⁴ The right to found a family, combined with reproductive rights, can establish a right to reproductive assistance. The Inter-American Court of Human Rights recognized the right to personal integrity and liberty and the right to family life in Article 11 ACHR protects access of couples to artificial reproductive technology. While the European Court of Human Rights has extended states deference through the margin of appreciation for regulating reproductive technologies, especially when the states have engaged in careful deliberative processes, the Strasbourg court has noted that the Court would have to keep the issue under review to keep pace with the social and scientific developments in the field.²³⁵

In addition, Article 23 of the CRPD requires states to take measures to end discrimination in order to ensure recognition of the right of persons with disabilities to found a family, to retain their fertility on an equal basis with others, and to decide freely and responsibly on the number and spacing of their children; they must also be provided with "the means necessary to enable them to exercise [this] right."²³⁶ Infertility may constitute a form of disability, defined as "[including] those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."²³⁷ Providing infertile people access to surrogacy is a way of allowing them to fully enjoy their reproductive rights on an equal basis with those who are fertile. According to the the World Health Organization (WHO) more than 180 million couples suffer infertility in developing countries. These couples are severely stigmatized due to childlessness and often isolated and excluded as a result. Resource-poor communities and countries with significant socio-economic challenges especially lack access to reproductive technologies, rendering infertile individuals and couples unable to avail themselves of scientific advancements. This inequality in access to reproductive technologies and processes may violate the right of all to share in scientific advancements and technology, as enshrined in the Universal Declaration of Human Rights and the ICESCR.²³⁸

Access to surrogacy is also a way of allowing same-sex couples to exercise their reproductive rights and their right to found a family on par with heterosexual individuals. Surrogacy is indeed the only option available to couples composed of two biological men who want to have a genetically-related child. Principles of equal protection of the law and freedom from discrimination on the basis of sexual orientation can therefore be frustrated by the limitation of access to reproductive technologies, including surrogacy.²³⁹

These rights may of course be restricted when necessary to protect the rights of other parties. However, because surrogacy facilitates the rights of intended parent(s), regulations restricting it must be adequately justified by a genuine showing that they are necessary to protect competing rights.

IV. CAMBODIA CASE STUDY

A. BACKGROUND

Authors selected Cambodia as a case study to illustrate the challenges and dynamics involved in transnational surrogacy arrangements. Most surrogate women participating in transnational surrogacy are located in countries with comparatively low wages, inadequate health care systems and poorly performing rule of law mechanisms.²⁴⁰ As explained further below, these conditions can create barriers to the development of human rights-compliant surrogacy practices. In Cambodia, unique political and cultural dynamics stemming from the after-effects of the genocide further complicate these shared challenges.

As noted above, in March 2019, authors traveled to Cambodia to conduct fact-finding for this report. Authors interviewed key individuals in relevant government bodies, international agencies, service providers, and three surrogate women. All interviewees, with the exception of government officials, who will be identified, will be referred to by sector.²⁴¹ The three surrogate women interviewed will be referred to as A, C, and K to protect their privacy. This section will address the development of surrogacy in Cambodia, the recent government ban, and the experience of female surrogates. It will also explore the conditions that make human rights-compliant surrogacy arrangements a challenge in the Cambodian context.

B. CAMBODIAN CONTEXT

In recent decades, Cambodia has achieved remarkable improvement across economic, political and social dimensions. The country's economy is growing at one of the highest rates in the world; public services like healthcare are more widely available; and gender inequality has decreased. These achievements demonstrate a significant and positive shift given the country's poor economic, political and social conditions during the 1970s, which resulted from the radical leadership of the Communist Party of Kampuchea. Nonetheless, there are some ongoing obstacles to the achievement of economic and social equality.

During the last few decades, Cambodia has had to recover from the violent and radical regime of the Communist Party of Kampuchea, also known as the Khmer Rouge, which led the country from 1975 to 1979. The Khmer Rouge implemented a radical Maoist and Marxist-Leninist transformation program aimed at creating a rural, classless society.²⁴² As a part of this process, approximately two million people—nearly a quarter of Cambodia's population—died through extrajudicial executions, starvation, disease, and exhaustion.²⁴³ Improvements in areas like the economy, public health, and gender equality indicate

that Cambodia is transitioning out of this period of violence and poverty, however the legacy of this period remains and continues to impact the country.

Indeed, while Cambodia has achieved impressively low levels of crime and civil conflict compared to similarly situated countries,²⁴⁴ its regulatory enforcement and civil justice system remain uneven.²⁴⁵ Limited access to courts and ineffective contractual enforcement mechanisms, especially for lower-income populations, can be particularly challenging to citizens.²⁴⁶

Between 1995 and 2018, the Cambodian economy grew at an average rate of 7.7 percent, which is one of the highest growth rates in the world.²⁴⁷ In 2015, the World Bank classified Cambodia as a lower-middle income economy, noting development across a range of areas, including per capita income and operational lending.²⁴⁸ The majority of employment opportunities are in the agricultural, food and construction industries, as well as in garment manufacturing, real estate and tourism. Garment exports, construction and tourism largely drive the economy's growth.²⁴⁹ Though the economy has grown impressively, poverty remains a widespread issue. Currently, the poverty rate is 13.5 percent, but this does not include the 4.5 million Cambodians who are close to the poverty line,²⁵⁰ and living in rural regions where economic opportunities are limited.²⁵¹ In addition, Cambodia's government is somewhat limited in its institutional capacity, with consistent lower tier rankings in international rule of law indices.²⁵²

Public services like healthcare have progressed over the last decades as well, largely as a result of reforms in the 1990s, combined with continued investment in the health care system. As metrics such as life expectancy and mortality rates indicate, public health has improved alongside developments in public services. In 1990, life expectancy was 53.6 years of age; by 2017, it had increased to 69.3 years of age.²⁵³ Mortality rates for female and male adults fell during this period as well, from 309 to 139 per 1,000 people and 387 to 205 per 1,000 people, respectively.²⁵⁴ Still, Cambodians face obstacles to accessing health care, especially those who cannot afford significant out-of-pocket payments, or who lack knowledge about available health care services, such as reproductive technologies.²⁵⁵

Cambodia has also made significant advances in gender equality. In recent years, women have become increasingly involved in the work force and are attaining higher levels of education, as compared to Cambodian men.²⁵⁶ However, as in most countries, women still receive less education and less pay than men overall, and they are underrepresented in government.²⁵⁷ Culturally, they are often expected to put the interests of their husbands, children, and extended family members before their own.²⁵⁸

Improvements in the economy, in public services, political organization, and social inequality signify Cambodia's progression following a period of radical political upheaval and violence. However, the legacy of the Khmer Rouge continues, indicating ongoing obstacles in the foreseeable future.

C. PRACTICE OF SURROGACY IN CAMBODIA

1. THE GROWTH OF SURROGACY IN CAMBODIA

Surrogacy practices became popular in Cambodia around 2015 following increasing restrictions in neighboring countries in the South-Asian and Southeast-Asian region.²⁵⁹ Surrogacy agencies found Cambodia attractive because, at the time, it lacked regulations on surrogacy or any other form of reproductive technology.²⁶⁰ Furthermore, the cost of surrogacy in Cambodia was still far below the costs in wealthier western countries. Cambodian surrogacy agencies generally charged intended parent(s), often Australian and Chinese, approximately 40,000 USD, about 10,000 USD of which was paid to the surrogate.²⁶¹ This was far more economical than the cost of surrogacy in countries such as the United States, where it costs at least 120,000 USD, approximately 30,000 USD to 40,000 USD of which was given to the surrogate.²⁶² Approximately fourteen agencies and clinics subsequently opened in Phnom Penh after Thailand imposed restrictions on surrogacy.²⁶³

2. CAMBODIA'S BAN ON SURROGACY

Because surrogacy was operating unregulated in Cambodia, some countries and reputable agencies declined to engage Cambodian surrogates. Australia, for example, issued a warning to intended parent(s) from Australia seeking surrogates to avoid Cambodia.²⁶⁴ Families through Surrogacy, one of the more established agencies, also advised intended parent(s) not to engage surrogates in Cambodia because of the lack of legal regulation.²⁶⁵

Cambodia's Ministry of Women's Affairs and Ministry of Justice began to note that surrogacy practices were occurring without regulation shortly thereafter. Both ministries took public positions that surrogacy exploited Cambodian women²⁶⁶ and characterized it as a form of human trafficking in which children were sold as goods.²⁶⁷ In September 2016, the Ministry of Women's Affairs announced that it would take steps to protect women and children involved in surrogacy.²⁶⁸ And in October 2016, Ang Vong Vathana, a justice minister, called for a national prohibition on surrogacy.²⁶⁹

On October 24, 2016, the Ministry of Health banned all forms of surrogacy in Cambodia.²⁷⁰ The Ministry sent a communication to about fifty surrogacy agencies in Phnom Penh declaring surrogacy to be "completely banned."²⁷¹ The Ministry also instituted a prohibition on commercial sperm donation and required clinics and specialist doctors providing in vitro fertilization services to acquire its permission before operating.²⁷² The proclamation did not address enforcement mechanisms or penalties for violation.²⁷³ Nor did it mention the legal status of preexisting surrogacy arrangements.²⁷⁴

As a condition of their bail, the forty-three women must raise the children born through surrogacy as their own. Failure could result in their arrest.

3. CRIMINAL PROSECUTION OF SURROGATES AND AGENCIES

Following the Ministry of Justice's proclamation, the government began to charge surrogacy agencies and surrogates with human trafficking.²⁷⁵ In October of 2016, the Cambodian police arrested an Australian nurse, Tammy Davis-Charles, and two Cambodians on charges of human trafficking, forging documents such as birth certificates, and operating an illegal surrogacy clinic.²⁷⁶ The clinic had managed approximately twenty-five surrogacy arrangements for Australian intended parent(s) who paid approximately 50,000 USD each.²⁷⁷ The Court eventually sentenced the operators to one and a half years in prison for acting as intermediaries as well as for falsifying birth certificates.²⁷⁸ In June 2018, the Cambodian police arrested one Chinese national and four Cambodian women under charges of human trafficking and operating as surrogacy brokers.²⁷⁹ In the same raid, the Cambodian police also arrested thirty-two surrogates, charging them with cross-border human trafficking; their experience is reproduced below in the section entitled "Surrogate Women Interviewed."²⁸⁰ In November 2018, the police arrested fifteen more people for participating in a surrogacy business, eleven of whom were pregnant surrogates.²⁸¹

Not all government officials approved of the prosecutions of the surrogates, noting that detention of the women would have an adverse impact on the babies born from these arrangements.²⁸² Her Excellency Chou Bun Eng, the Secretary of State for the Ministry of Interior and the Chairwoman of the National Committee for Counter-Trafficking, advocated for the release of surrogates detained in favor of supervised probation.²⁸³ She has argued that the surrogates had developed an attachment to the babies, had a desire to keep them, and so should be allowed to do so.²⁸⁴ As a result of this advocacy, the police released—on bail—the thirty-two women of the June 2018 raid in December 2018 and the eleven women of the November 2018 raid in April 2019.²⁸⁵ As a condition of their bail, the forty-three women must raise the children born of surrogacy as their own and report each month to the police with the child until she or he is 18 years old.²⁸⁶ The failure to meet either of these requirements could result in their arrest.²⁸⁷ Thus far, in one case the trial judge has yet to set a court date, in the other, investigation is ongoing.²⁸⁸

Accounts vary as to whether the intended parent(s) of the babies being raised by the Cambodian surrogate mothers have made efforts to claim their children. According to government officials, "very few" intended parent(s) have come forward to claim the babies.²⁸⁹ H.E. Eng stated that "only three or four" people have filed applications claiming parentage of the babies despite the Ministry of Interior giving them until January 2018, or more specifically one year, to do so.²⁹⁰ However, surrogates' and service providers' accounts indicate that more than three or four intended parent(s) have traveled to Cambodia and tried to legally adopt the children.²⁹¹ Some surrogacy agencies have also continued to advocate for the children to be released to them.²⁹² Furthermore, a service provider asserted that the government is adamant that the babies do not leave the country.²⁹³ H.E. Eng corroborated this view by stating that intended parent(s) "do not only want a baby" but "also want to export it out of the country," which "falls under the definition of child trafficking" in Cambodia.²⁹⁴ Given this government attitude and the differing accounts, it is unclear if intended parent(s) have neglected to come forward or have found it impossible to claim the babies due to the government's stance.

4. SURROGATE WOMEN INTERVIEWED

As described above, a total of forty-three surrogate women have been released on bail following their arrest on the condition that they raise the children born of surrogacy.²⁹⁵ Authors interviewed three of these women who were arrested on June 21, 2018 along with twenty-nine other surrogates.²⁹⁶ The three women will be referred to using aliases A, C and K to protect their privacy and allay concerns that sharing their experiences in interviews will compromise their conditional releases from detention. Their experiences as surrogates will be detailed in this section. A, C and K are all around 30 years old and were born in rural provinces. At various points, all three women found work in garment factories, as well as in the construction and service industries.²⁹⁷ Authors were informed that their backgrounds are common for surrogates in Cambodia, who often come from communities in Cambodia's rural provinces to more urban areas, looking for opportunities to work.²⁹⁸

A lives in Phnom Penh, though she plans to eventually return to the province where she was born.²⁹⁹ She has several young children. A used to work as a packager in a garment factory in Phnom Penh, but she currently stays at home to take care of her children. Her husband works as a construction worker.³⁰⁰ C moved to Phnom Penh in 2010 from a province to work as a waitress, but after a year of waitressing, she started to work in a garment factory.³⁰¹ She now stays at home to take care of her children. C's husband also works in construction.³⁰² K lives in the province where she was born with her children. K also used to work in a garment factory, but now she works in construction with her husband.³⁰³ K's mother takes care of K's young children.³⁰⁴

A, C and K were all primarily motivated to work as surrogates for financial reasons.³⁰⁵ When A worked in packaging at a garment factory, she earned around 130 USD per month if she worked nine-hour shifts, and sometimes up to 200 USD if she worked overtime shifts of between eleven and fourteen hours.³⁰⁶ As a construction worker, A's husband usually earns around 5 USD per day, although he sometimes earns up to 10 USD.³⁰⁷ A hoped that becoming a surrogate would help her to pay off her family's debt of 1,800 USD, a debt she incurred when she borrowed money from her bank to start a fishing business in her old province.³⁰⁸ Currently, she pays her bank about 183 USD per month, on top of her other monthly expenses, which total around 150 USD.³⁰⁹

C also worked in a garment factory, after working for a year as a waitress. In the factory, she made around 120-150 USD per month, including overtime, and worked twelve-hour shifts.³¹⁰ As a construction worker, C's husband currently makes 10 USD per day.³¹¹ When she became a surrogate, C owed her bank around 3,000-4,000 USD, a debt accrued from her mother's medical expenses.³¹² At the time, C's husband was unable to pay off the debts, and C hoped that the money earned from surrogacy would help her to cover them. Since then, C's brother has covered the payments.³¹³

Before starting her job as a construction worker, K worked eight-hour shifts in a garment factory, earning 50-60 USD per month.³¹⁴ As a construction worker, K currently earns around 6.25 USD per day for eight hours of work while her husband earns 10 USD per day for the same hours.³¹⁵ K planned to use money earned from surrogacy to buy her own land.³¹⁶ She currently lives on state-owned property, which she could be expelled from.³¹⁷ K also has a debt of over 2000 USD.³¹⁸

a) RECRUITMENT AND PREGNANCY

A, C, and K first learned about surrogacy from a co-worker.³¹⁹ Each was told by their co-worker that they would receive an initial 500 USD payment, in addition to a payment of 300 USD per month, plus a lump sum at the end of the process that would bring the total income to approximately 10,000 USD.³²⁰ They were also told that they would be given housing for the duration of the pregnancy.³²¹ None attested to being coerced. When C was first approached by her co-worker about surrogacy in 2014, she declined the offer and only later accepted due to her family's financial needs.³²²

After expressing interest in working as surrogates, A, C and K were given more specific details about the surrogacy process. A's co-worker gave her an address near A's home where A recalls meeting an older woman who gave her further information about compensation.³²³ A, C, and K were all told that during the pregnancy, they would have to live in a home with other surrogates and would give the baby away once they gave birth.³²⁴ They also met with other surrogates who described the surrogacy process, laid out the difficulties involved, and attested to being paid in full.³²⁵

All three women expressed concerns about surrogacy. A worried about the effects of the pregnancy on her health and that of the baby.³²⁶ C initially feared that she was being cheated, but after receiving an initial 500 USD for the implantation, her fear subsided.³²⁷ C was also concerned for the child's safety upon giving birth.³²⁸ Closer to her due date, when she learned she would have to deliver the baby in China, K expressed reservations about leaving Cambodia, since she had never left before.³²⁹

Before starting any medical processes, each woman had to pass a medical and a blood test. In addition, they were examined by a doctor with whom they met at every subsequent appointment.³³⁰ None of the three surrogates recall that the physician explained the medical risks or performed any psychological evaluations.³³¹ Once they passed their medical examinations, their IDs were taken, photocopied, and returned.³³² None of them signed contracts, nor did they receive any information about the intended parent(s).³³³

Once they passed their medical examinations, each woman went through a slightly different medical procedure to prepare for the pregnancy. A was told she was being given drugs to thicken her uterus; she took this medication for fourteen days.³³⁴ Afterwards, she was given an injection, whose purpose she did not know. Following the injection, the doctor implanted the embryo in her.³³⁵ She then took pills and received daily injections for three months and twelve days, which she was told would help the fetus develop in her uterus.³³⁶ C recalls getting injections for five days. Following the injections, an embryo was implanted. She then received continuous injections for three months.³³⁷ K ingested one pill for five days; she also received daily injections for three months after implantation.³³⁸

Upon successful implantation, the surrogacy brokers paid each woman 500 USD and transported them to a large house where they lived with other surrogates for the duration of their pregnancies.³³⁹ At the "shelter," the brokers provided the women with housekeeping services and cooks that prepared each of the surrogates' meals.³⁴⁰ The cooks ensured that they did not eat anything cold or sour, as cultural norms recommended for pregnant women.³⁴¹ The brokers also directed the surrogates to rest and to remain in the house, telling them they could at most "go around the shelter."³⁴² For each month they stayed at the

home, the brokers paid the surrogates 300 USD.³⁴³ The surrogacy agency also covered all medical expenses.³⁴⁴ All three surrogates stopped working at the garment factory.³⁴⁵ Each woman reported good conditions at the accommodations provided and a relatively easy pregnancy, although C experienced some difficulties due to a thin uterus.³⁴⁶

b) ARREST

None of the interviewed women were aware that surrogacy was banned in Cambodia.³⁴⁷ According to K, the home in which the surrogates stayed was “public”; thus, the Cambodian police’s raid on the house and their arrest on June 21, 2018 came as a shock.³⁴⁸

The police brought the surrogates to the police station where they explained that the Cambodian government had outlawed surrogacy and questioned them about their surrogacy experiences.³⁴⁹ At the time, A was one month pregnant, K was four months pregnant, and C was eight months pregnant.³⁵⁰ A and K were detained for 24 hours, and C was detained for 48 hours.³⁵¹ Upon their release, Agape International Mission (AIM), a Christian anti-trafficking organization, took custody of the women and placed them in their facilities for two weeks following the initial arrest.³⁵²

In July 2018, the surrogates were formally charged with cross-border human trafficking.³⁵³ Phnom Penh’s Social Affairs Department subsequently gained custody of the women and detained them at a police hospital on the outskirts of Phnom Penh.³⁵⁴ AIM provided the surrogates with legal representation.³⁵⁵

The three surrogates were held at the police hospital for five months although they were never convicted of any crimes.³⁵⁶ In December 2018, the surrogates were released on bail on the condition that they raise the children that they birthed.³⁵⁷ They were told that if they tried to give the babies to the agencies or intended parent(s), they would be charged with human trafficking and imprisoned for fifteen years.³⁵⁸

None of the interviewed women were aware that surrogacy was banned in Cambodia.

On the day of their release, K went into labor and gave birth to a healthy child.³⁵⁹ C gave birth in the prison hospital, and A did not give birth until January 2019.³⁶⁰ All three surrogates had caesarean sections.³⁶¹

c) RELEASE AND CURRENT CIRCUMSTANCES

All three interviewed surrogates have been released and are currently being monitored. Each month, they must report to the police and confirm that they still have the child, a requirement they assume will continue until the child is an adult.³⁶² This check-in process is difficult for K. She no longer lives in Phnom Penh, so she has to take a two-hour round trip to report to the police station, costing her 1.25 USD each way.³⁶³ None of the women interviewed received full compensation for surrogacy. Following their arrests, their 300 USD payments ended.³⁶⁴ Ultimately, A only received 500 USD for her successful implantation, C was paid approximately 3000 USD for her eight months of pregnancy, and K was paid 1100 USD for four months of pregnancy.³⁶⁵

According to the surrogates, efforts were made by the surrogacy agency and intended parent(s) to request the child born of the process. A received a phone call while in detention about the baby, though she was

unsure who called and assumed it was the agency.³⁶⁶ C was contacted by the broker following her release from the prison hospital.³⁶⁷ She met with the broker and the intended father, who requested to see and spend time with the baby.³⁶⁸ C allowed the father to see the child, who was the spitting image of the father, but did not allow him to take the baby since she ran the risk of being imprisoned.³⁶⁹ Although she did not accompany the intended father and did not elaborate on how she gathered this information, C claims that the intended father later filed a complaint with the court.³⁷⁰ She does not know what came of the complaint.³⁷¹

The three women described receiving both criticism and pity from their communities as a result of serving as surrogates.³⁷² A, for instance, stated that her neighborhood pities her because she “has been through a lot of difficulties and now has to raise the baby.”³⁷³ At the same time, some members of A’s community believe that she accidentally became pregnant with a child as a result of promiscuous behavior.³⁷⁴ C’s community, on the other hand, told her that she should never have become a surrogate in the first place.³⁷⁵

C has also faced criticism from her family. Her husband did not want her to be a surrogate and is now resentful of the additional burden of raising the child.³⁷⁶ C’s brother-in-law offered to adopt the child, but C refused, uncertain as to how he would treat the child.³⁷⁷

When asked, all three surrogates affirmed that they had become emotionally attached to the children.³⁷⁸ They hope that they have bright futures and can become educated.³⁷⁹ K, in particular, hopes that the baby can grow up to “help [the family] when [it] is older.”³⁸⁰ All three surrogates said they would not consider serving as surrogates again, regardless of its lawfulness.³⁸¹

5. CAMBODIA’S DRAFT SURROGACY LAW

In early 2017, following the issuance of the ban and the arrests of surrogacy brokers, the Cambodian government began the process of drafting regulations on surrogacy. By August of 2017, the Ministry of Women’s Affairs circulated a first draft of legislation that was later revised by the Ministry of Justice. The revised draft banned commercial surrogacy but permitted altruistic surrogacy.³⁸² However, the Ministry of Women’s Affairs remained concerned that altruistic surrogacy would still allow for exploitation.³⁸³ As a result, an Inter-Ministerial Working Group was formed to further study surrogacy³⁸⁴ and the draft was again revised.³⁸⁵ The current draft provides detailed regulation of altruistic surrogacy and imposes “strict conditions” on that process so as to make it extremely difficult to practice legally within Cambodia.³⁸⁶ In interviews of government officials, authors noted differing opinions on the legal status of surrogacy under international law (and whether it was by definition human trafficking of children), its impact on women and children and the policy decisions motivating its restriction.

While the draft law is aimed at “prevent[ing] commercial surrogacy and exploitation of surrogate women,” its scope reaches far beyond surrogacy into the regulation of all assisted reproductive technologies, including the production and use of embryos.³⁸⁷ The law creates a national committee to monitor all surrogacy arrangements (including approving intended parent(s) and surrogates).³⁸⁸ The law also establishes an application process for surrogates and intended parent(s)³⁸⁹ along with an accreditation

process and monitoring of all hospitals and clinics offering ART services.³⁹⁰ Surrogacy intermediaries that charge a fee to facilitate arrangements are illegal under the draft legislation.³⁹¹

Under Article 8, the law sets forth “guidelines and conditions of surrogacy.”³⁹² Clinics are required to confirm the suitability of surrogates and intended parent(s), including “physical and mental health of surrogate women and donated persons to avoid any diseases that can affect the baby.”³⁹³ A duplicate Article 8 in the proposed draft also regulates, in detail, the use of human embryos. The law requires human embryos to be implanted within 14 days and only be used for the purpose of producing a human child (other restrictions include prohibitions on sex selection, cloning or experimentation of any kind), among other restrictions.³⁹⁴ Intended parent(s) of children born through ART are limited to heterosexual married Cambodians between the ages of 25 and 45;³⁹⁵ they must be without children; take responsibility for the child post-birth, regardless of the child’s condition; and pay for all costs related to the surrogacy arrangement.³⁹⁶ Intended parent(s) cannot commission a surrogate more than once.³⁹⁷

Women acting as surrogates must be Cambodian, have previously given birth, be related to the intended parent(s), and voluntarily consent to surrogacy.³⁹⁸ They also must be married and have their spouses’ permission to become surrogates.³⁹⁹ Chapter 9, Article 13 further stipulates that surrogate women must be between 25 and 35 years of age and healthy; more specifically, they must be free of any diseases that may affect the fetus.⁴⁰⁰

In addition, any embryo made for the purpose of surrogacy must (1) have at least one egg or one sperm from the intended parent(s), (2) be only from Cambodian donors if donors are used, and (3) be voluntarily given to the intended parent(s), rather than sold.⁴⁰¹ The egg of the surrogate may not be used.⁴⁰²

The law assigns parentage and guardianship of children born via ART.⁴⁰³ Article 9 asserts that “[t]he child born through the Assisted Reproductive Technologies (ART) under this law is the legitimate child of this legally married couple and shall have rights as stated in the civil code.”⁴⁰⁴ However, if both the husband and wife die before the child’s birth, the woman acting as a surrogate will act as the guardian of the child until the court makes a final decision about guardianship.⁴⁰⁵

The intended parent(s) and the surrogate must enter into a written agreement with The National Committee on the Management of Surrogacy (NCMS).⁴⁰⁶ All parties must be identified,⁴⁰⁷ the intended parent(s) must acknowledge the child as their own, declare responsibility for the child, and prove capable of raising her or him.⁴⁰⁸ The woman, then, must consent to acting as a surrogate, agree to maintain her health and the pregnancy, to “transfer” the child to the intended parent(s) upon birth, and to show proof of her husband’s consent.⁴⁰⁹ If the intended parent(s) use a sperm donor, he must declare that he has volunteered to provide healthy sperm to the intended parent(s) and that he does not know who the intended parent(s) or surrogate are.⁴¹⁰

Chapter 8, Article 12 dictates the conditions for donating sperm, eggs or embryos.⁴¹¹ To donate an egg, sperm, or embryo, donors must volunteer, i.e. they may not be compensated for their donation.⁴¹² They also must have a permanent address in Cambodia, never have been prosecuted for a crime, be healthy, and be free of diseases that may affect the fetus.⁴¹³ Women who donate their eggs must be between the ages of 18 and 40; male donors must be between 18 and 55.⁴¹⁴ If donors meet these criteria, they must

then receive permission from NCMS.⁴¹⁵ Throughout the entire process, the donor's identity must remain confidential.⁴¹⁶ Unwanted embryos must be disposed of, rather than sold.⁴¹⁷

The law criminalizes surrogates, intended parent(s), and clinics operating without proper approvals. In fact, any ART services provided without approval are subject to fines and criminal prosecution as well.⁴¹⁸ If an embryo is created for purposes other than surrogacy, such as for scientific studies, or not disposed of properly, those responsible shall be subject to up to five years' imprisonment and a fine of at most 2446 USD.⁴¹⁹ Municipal and provincial instant courts are tasked with review of any complaints concerning parentage of the child.⁴²⁰ At present, the legislation is still under review by the Inter-Ministerial Working Group.⁴²¹

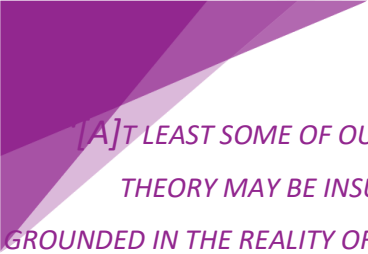
V. CONSIDERATIONS FOR THE REGULATION OF SURROGACY GLOBALLY

As noted above, the practice of surrogacy does not violate human rights, and can promote important rights of women to bodily autonomy, reproductive choice, and self-determination. Surrogacy can also facilitate the rights of individuals and couples to have children and form families. However, there are various aspects of the practice of surrogacy that can, in certain contexts, impair the rights of surrogate women, children born through surrogacy, and intended parent(s). As previous sections have discussed, intermediary organizations have operated largely unregulated and often failed to inform surrogates about important medical and legal processes, provided them with inadequate health care, and subjected them to unreasonably harsh rules or contract terms.⁴²² Conflicting state laws have left children born through surrogacy stateless or orphaned,⁴²³ and some stakeholders have expressed fears that surrogacy practices could be used to sell children for malicious purposes such as organ trafficking or sexual exploitation.⁴²⁴ There is little evidence to suggest that such extreme violations have occurred so far but these concerns often accompany policy recommendations to restrict or ban surrogacy.⁴²⁵

Drawing on the human rights framework set out above, as well as the Cambodian case study, this section will consider how the risks of surrogacy can be minimized without unduly inhibiting the human rights of surrogates and intended parent(s). First, it will discuss the benefits of surrogacy and the risks of restricting or banning it, emphasizing the need for these factors to be weighed against the risks that may arise from surrogacy. It then considers the various contextual factors that will affect surrogacy regulation, such as the existing legal framework in a given country, and the country's institutional capacity to effectively implement a regulatory system. These factors will affect the degree of regulation necessary as well as the types of regulation required. Finally, this section considers the potential for effective regulation of surrogacy practices in a transnational context. The fact that surrogacy often involves parties from different countries may create regulatory challenges but can also provide additional regulatory tools.

A. CONTEXTUALIZING SURROGACY RISKS

Though there are risks associated with surrogacy, it also promotes the rights of women as well as intended parent(s). In addition, permitting and regulating surrogacy protects all parties, including children, from the risks of an illegal or unregulated industry. As discussed above, women have the right to bodily



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Martha Nussbaum

autonomy and reproductive freedom⁴²⁶ as well as the right to work in a chosen profession,⁴²⁷ while intended parent(s) have rights to found families and do so in a manner free from discrimination based on their identity or status.⁴²⁸ These rights must be weighed, of course, against the rights of children born through surrogacy to a safe and protective environment, as well as the rights of women to be free from abusive surrogacy practices that infringe on their autonomy, endanger their health, or subject them to unjust working conditions. Where these rights are in conflict, it may be appropriate to restrict surrogacy to the extent necessary to protect these other rights. However, because surrogacy also promotes and protects important human rights, it should not be restricted beyond the extent actually necessary to protect other human rights.

Given the fundamental rights of women, to reproductive and sexual freedom and freedom from cruel and inhumane treatment (which will likely result if the practice moves underground or is severely restricted and penalized), absolute restrictions are unlikely to prove suitable, necessary or proportionate. Any limitations on women’s reproductive rights need to “be interpreted strictly

and...shall not be interpreted so as to jeopardize the essence of the right concerned”, as provided by the Siracusa Principles. Similarly, given the rights of intended parent(s), including the right to freedom from discrimination and to equal enjoyment of fundamental rights like the right to a family, states cannot adopt measures any more restrictive than absolutely required, limitations must be necessary for and suitable to advance legitimate state interests.⁴²⁹

1. RIGHTS PROMOTED BY SURROGACY

Surrogacy promotes fundamental human rights and therefore should only be circumscribed as necessary to protect conflicting rights. As discussed above, women have the right to bodily autonomy, reproductive choice, self-determination, and choice of profession and therefore have a right to engage in surrogacy if they choose to do so. This right might properly be limited if outweighed by rights violations arising from surrogacy. But it cannot be justifiably limited beyond the extent necessary to address those violations; where the risks of surrogacy can be ameliorated through less restrictive means, such as protective regulation, international standards and state cooperation, surrogacy should not be excessively restricted.

2. RISKS OF ALTERNATIVE WORK

In addition to protecting the human rights of surrogate women and facilitating the human rights of intended parent(s), surrogacy could provide a source of income to women who may have limited options.

This economic opportunity could facilitate innumerable rights, especially socioeconomic rights such as social security, an adequate standard of living, health, and education.⁴³⁰ Many of the risks associated with surrogacy—for instance, the risk that people in financially vulnerable situations will be pressured into an unpleasant or difficult form of labor for low wages—are not unique to surrogacy, but rather are “common to a wide range of activities engaged in by poor working women.”⁴³¹ If surrogacy were banned solely to protect women from exploitation, they might turn to an option with greater potential for exploitation.

Many surrogates in India and Cambodia, for example, worked difficult and dangerous jobs in garment factories before becoming surrogates. They worked long hours for low wages, often in abusive environments.⁴³² Despite widespread attention to the dangerous working conditions of garment factories in South and Southeast Asia—especially following the 2013 collapse of a garment factory in Bangladesh that killed over 1,100 workers—safety in these factories continues to be a major issue.⁴³³ A 2018 article reported over 100 textile worker deaths in Tamil Nadu, a state in southern India, in the preceding four years.⁴³⁴ Indeed, garment factory work is often characterized by some of the very abuses that have been highlighted in the surrogacy context: women have been “lured in” by “dubious employment agents” who persuaded them to sign harsh job agreements, after which they have been “crammed into hostels...with restricted freedom of movement.”⁴³⁵ Similar stories of abuse and exploitation abound of women working as domestic workers globally.⁴³⁶ In other words, women’s health, autonomy, and safety may be endangered by many of the economic opportunities available to them. The risks of surrogacy are not unique, and it may even be the most beneficial option in certain circumstances. Indeed, numerous garment workers, including the three surrogates we interviewed, have seen surrogacy as an attractive economic opportunity that could provide substantial benefits.⁴³⁷

Therefore, while lawmakers must grapple with the risks of surrogacy, a comprehensive understanding of these risks requires that they are viewed in light of the alternatives available to would-be surrogate women. Some risks, such as health risks tied to childbirth, or the risk of child trafficking, may be aggravated in the surrogacy context. But others, such as inadequate compensation, unfavorable contractual terms, and restrictions on freedom of movement, are likely to characterize any economic pursuit available to a

Many of surrogacy’s supposed risks are not the result of surrogacy as an industry, but are instead the inevitable result of extreme social inequality and poor state infrastructure.

surrogate. In other words, many of surrogacy’s supposed risks are not the result of surrogacy as an industry, but are instead the inevitable result of extreme social inequality and poor state infrastructure. Where certain risks accompany the only employment options available to a woman, her rights may be better promoted by allowing her to choose the option she finds most favorable, even if that option would not be her preference among unlimited choices. In other words, laws that restrict a woman’s access to surrogacy as compared to other economic pursuits are only justified to the extent that they address risks

particular to surrogacy, rather than those that arise from the general state of social and economic inequality. States would better promote human rights by fulfilling their obligation to address these structural inequalities themselves, rather than further limiting the choices of women as a result of these imbalances.

The fact that women are uniquely able to pursue surrogacy makes this framework all the more important. Women's choices, including the economic pursuits available to them, are already restricted by gender inequality throughout the world.⁴³⁸ For instance, over 2.7 billion women are legally restricted from having the same job choices as men.⁴³⁹ They are less likely to participate in the labor market, more likely to be unemployed, and receive less pay when they do work.⁴⁴⁰ As a result, it is essential to ensure that any further restriction on women's freedom is justified by legitimate ends, and not motivated by prejudice or by a misguided attempt to protect women from options they would willingly pursue.

Critics of surrogacy might argue that because pregnancy and childbirth are different from other forms of labor, they cannot be compared to other dangerous or arduous forms of work. It is true that such reproductive labor is unique, as it can only be performed by women and entails unique physical and psychological challenges. However, these differences do not indicate that surrogacy should be banned as a form of labor. On the contrary, the argument that it is improper to allow a labor market for a form of labor uniquely performed by women, and closely tied to women's traditional roles, only reinforces the idea that work traditionally or biologically performed by women is less valuable. Women are more likely than men to engage in informal and vulnerable employment, and they bear disproportionate responsibility for unpaid care work, despite the fact that such work is vital for a functioning economy.⁴⁴¹ Those who believe surrogacy somehow tarnishes a woman's act of carrying and birthing a child are ultimately reinforcing this trend by demanding that women continue to perform their traditional roles without obtaining any economic recognition or benefit from them. As traditional gender roles are increasingly challenged, and women are empowered to perform work formerly restricted to men, it is also important that labor traditionally performed by women gains the same legitimacy as work traditionally done by men and is similarly valued. Prohibiting women from enjoying economic gains and empowerment through the labor they perform in carrying children does not protect the sanctity of that labor, but instead risks devaluing both the work and the women who perform it.

3. RISKS OF SURROGACY RESTRICTIONS

Especially given the transnationality of surrogacy, countries are limited in their ability to limit surrogacy or prohibit it entirely. Because of the global nature of the surrogacy industry, intermediaries have been able to adapt to changing laws by shifting from country to country, sometimes recruiting women from one country to act as surrogates in another.⁴⁴² Additionally, demand for childbearing through surrogacy is only likely to grow as technology improves, prices decrease, surrogacy becomes more widely known and understood, and different family structures—including older couples, same-sex couples, and single parents—become increasingly accepted as families that might want to have children. As a result, it is unlikely that prohibitions on surrogacy can be implemented effectively, especially on a large scale.⁴⁴³

This suggests that country-specific prohibitions on surrogacy might undermine global efforts to protect women from exploitative surrogacy arrangements. First, they might leave women in more vulnerable positions by encouraging them to cross borders to become surrogates rather than serve as surrogates in their home countries.⁴⁴⁴ Second, prohibitions could lead to a race-to-the-bottom phenomenon where countries capable of enforcing prohibitions push the industry into the countries with the least capacity for regulation.⁴⁴⁵ In such countries, the risks associated with poor regulation are likely highest. For countries capable of implementing effective surrogacy regulations, this may be a reason to legalize surrogacy so that surrogacy markets remain in countries that can better protect parties' rights, such that intended parent(s) will not turn to riskier supplier countries.⁴⁴⁶

In sum, any policy that restricts access to surrogacy, whether through restrictive surrogacy requirements or an outright ban, requires a careful balancing of rights, interests and risks. On the one hand, surrogacy under certain circumstances may entail risks that undermine the human rights of surrogates, children, and intended parent(s). On the other, it promotes fundamental rights of surrogates and intended parent(s), and if practiced safely it allows children to be born into loving families where their rights will be protected. Further, it may offer surrogates an alternative to even riskier options, and reduces the risk that surrogacy will be practiced illegally or move across borders to locations where women and children would be at greater risk of exploitation.

B. FACTORS TO CONSIDER WHEN REGULATING SURROGACY

In consideration of the above, this report finds that surrogacy should generally be permitted, but regulated in a manner that protects the rights of all parties involved. But before discussing what the substantive content of such regulation ought to include, this report will consider important contextual factors that are relevant to surrogacy policy and its ability to protect parties' human rights. These factors will impact how high the risks associated with surrogacy are likely to be, how well equipped a country may be to manage those risks, and what approach is best suited to ensure adequate protection of the fundamental human rights of the various parties.

First, this section will consider how a country's existing legal system may impact surrogacy or interact with surrogacy laws. Then, it will consider factors that may make surrogacy more or less risky in a given context, such as the strength of the rule of law, the existing health care system, the degree of gender inequality, social perceptions of surrogacy, the level of education, the economic situation, and any relevant historical factors. These factors have implications as to the extent and type of regulations needed to protect human rights.

While this report seeks to provide preliminary thoughts on the sorts of factors that will implicate surrogacy's impact on human rights, and the kinds of regulations that might address these factors, it is essential that surrogates and other parties have the opportunity to voice their own concerns and offer their perspectives. In addition to considering the following factors, surrogacy policy should therefore incorporate a mechanism for hearing and responding to the voices of the people of involved. These considerations are intended to protect vulnerable parties, especially surrogates, but no analysis can stand in for the voices of the affected women themselves.

1. LEGAL FRAMEWORK

A country's existing laws are likely to have implications for surrogacy and how best to regulate it. For instance, parentage and citizenship laws will affect the rights and obligations of surrogates and children born through surrogacy. Laws surrounding IVF generally will also come into play, and countries may want to ensure that any surrogacy-specific laws are consistent with IVF laws. Protective laws surrounding labor, medical care, reproductive autonomy, and contractual rights may also be relevant. While some countries may have in place existing protections that offer substantial protection to surrogates, others may need to supplement existing laws with surrogacy-specific laws that provide certain minimal protections. Additionally, laws regarding the enforcement of prohibitions must be taken into account, especially where a country chooses to prohibit or restrict surrogacy. In that case, it must determine how best to implement such restrictions in a rights-protective manner.

a) PARENTAGE AND CITIZENSHIP LAWS

As illustrated in the section above on the international human rights framework, the way that legal parentage and citizenship are determined has had implications for the rights of surrogates, intended parent(s), and children born through surrogacy.⁴⁴⁷ For instance, if the woman who gives birth to a child is required to assume legal responsibility for that child regardless of a genetic link between them, as is the default rule in most countries,⁴⁴⁸ surrogates could be at risk of parental obligations they neither want nor can afford. At the same time, intended parent(s) could be left with no legal claim to the children, even where no other party makes a contesting claim.⁴⁴⁹ The Cambodian case study described above illustrates this very outcome. This was also what happened in *Paradiso v. Campanelli*,⁴⁵⁰ for instance, when the Italian government denied parental rights to a pair of intended parent(s) and put the child up for adoption.⁴⁵¹ Regulations will need to address how and at what point in the process intended parent(s) ought to assume legal parental rights in order to avoid such violations.

Regulations can assign parentage to intended parent(s) from the start, such that the surrogate is never a legal parent, as is done in numerous jurisdictions currently allowing surrogacy.⁴⁵² However, in such a case, regulations will still need to determine who qualifies as an intended parent. If the surrogacy arrangement is not in agreement with all legal requirements, for instance, this may raise the question as to whether intended parent(s) are legal parents, and who assumes parental responsibility if they are not legal parents.⁴⁵³ For example, in the state of Utah in the United States, surrogacy agreements must be validated by a tribunal in order to be legally enforceable, and tribunals cannot validate agreements unless they meet strict requirements.⁴⁵⁴ This could leave a surrogate vulnerable to unwanted parental obligations if the agreement turned out to be unlawful; however, Utah law specifies that intended parent(s) may still be liable for the child even if the agreement is otherwise unenforceable.⁴⁵⁵ Such protections can be helpful in ensuring that no unforeseen circumstances will leave surrogates with unexpected legal burdens. Similar provisions could protect the rights of children to ensure that they are not left vulnerable if they result from an invalid surrogacy agreement. The state of Washington, for example, provides that if a child is born through an invalid agreement, the court will determine parentage based on the child's best interest and the intent of the parties at the time the agreement was signed.⁴⁵⁶ Such a provision ensures that a child will not be orphaned due to problems with the surrogacy contract. Of course, such protections should not

enable parties to ignore protective regulations with impunity by entering invalid surrogacy arrangements, so other penalties—ones that do not violate the children’s best interests—should be imposed on parties that violate protective surrogacy laws.

Alternatively, a country’s law may assign parental rights based wholly or partly on genetics. The American states of Florida and Virginia, for example, require a genetic link between intended parent(s) and children born through surrogacy. If such a link is not found, the surrogates must assume parental obligations.⁴⁵⁷ The genetic requirement arguably discriminates against intended parent(s) who are unable to provide any genetic material, although some jurisdictions may be uncomfortable with the idea that people could commission children without providing any genetic material themselves. Either way, however, surrogates should not bear the risk of parental obligations in the case that a clinical error results in a child with no genetic link to the intended parent(s). Nor should a child already born, even if lacking a genetic link in violation of the law, be thereby taken from the intended parent(s) in violation of his or her best interests. Accordingly, a jurisdiction that attaches legal significance to a child’s genetic makeup should ensure that the rights of surrogates and children will be protected under all circumstances. This means protecting surrogates from any unwanted parental duties, and ensuring that parental rights will be assigned according to the child’s best interest.

Alternatively, the surrogate, and perhaps her spouse, could be legal parent(s) until parentage is formally transferred to the intended parent(s).⁴⁵⁸ This could leave the surrogate vulnerable to unwanted parental duties if the intended parent(s) decide to abandon the agreement before assuming parental obligations. However, it could also empower surrogates by giving them time to make the decision of whether or not to part with the child. For instance, the state of Washington in the United States allows surrogates a forty-eight hour time frame to decide to keep the child if they decide they want to do so, and South Africa has a similar provision for traditional surrogates (who unlike gestational surrogates are genetically linked to the resulting child).⁴⁵⁹ The goal of this policy is to ensure that surrogates will not be forced to part with children that they have grown emotionally attached to, minimizing the risk of emotional injury to the surrogate in parting with a child she has birthed. In both cases, the surrogate must reimburse the intended parent(s) for costs incurred in the process but may not be charged any additional penalties. These arrangements potentially empower surrogates by allowing them the final decision regarding the children, thereby reducing the power imbalance that often exists between surrogates and intended parent(s) or intermediaries. Also, it need not impose risks of unwanted parental duties for the surrogate; Washington provides that if surrogates do not exercise this right, intended parent(s) will be responsible for the children.⁴⁶⁰ However, allowing the surrogate to choose to keep the child creates significant uncertainties for the intended parent(s). Moreover, it arguably undermines the foundation of the surrogacy arrangement, which treats the surrogate as performing a service by carrying a child that belongs to the intended parent(s), not as having her own child and then transferring it to them.

Citizenship laws are critical to protecting the rights of children, and complications around citizenship are particularly salient to circumstances in which children are born through ART processes, including surrogacy. Citizenship laws must be adjusted to address this advance in medical technology that has made it possible for a child to be birthed by the citizen of one country but genetically linked to the citizen of one or two other countries.⁴⁶¹ The UDHR protects a child’s right to a nationality, as well as the right not to be

arbitrarily deprived of nationality.⁴⁶² Where a child born through surrogacy is not a citizen of the intended parent(s)'s country, the child could be left stateless if the surrogacy country does not recognize its citizenship either, possibly stranding the child in the supplying country.⁴⁶³ Thus, regulations of surrogacy must take into account whether citizenship will be granted to children born through surrogacy and in what form, a consideration that may interact with the parentage laws discussed above. If citizenship will not be granted, regulation must ensure the child's right to citizenship is not violated and consider how to ensure that the receiving country will grant citizenship. This consideration is important for surrogacy arrangements that go smoothly, where the child is taken in by the intended parent(s), and also for surrogacy arrangements where problems arise. Regulations must be in place to address the possibility of child abandonment, and whether the child will be granted citizenship in that place. If a country seeks to prevent abandonment by requiring intended parent(s) to assume parental obligations regardless of whether they want to keep the child, as is a common feature of surrogacy legislation,⁴⁶⁴ it must consider how such a rule would be enforced, especially in an international context.

In sum, to protect the rights of all parties, surrogacy policy must ensure that surrogates will not be treated as legal parents against their will; intended parent(s) will not be deprived of parental rights unless those rights are curtailed to protect the rights of surrogates or children; and children born through surrogacy will ultimately have a nationality and a party responsible for their well-being.

b) RIGHTS-PROTECTIVE LAWS AND POLICIES

The existing legal and policy framework for rights protection will serve as a foundation for a rights-protective approach to surrogacy. Where such laws and policies are already in place, they may already provide a degree of protection for parties in surrogacy arrangements as long as they are fully incorporated into the surrogacy context. Surrogacy regulation should therefore account for existing rights-protective laws and policies, both to determine the extent that additional protections are required and to ensure that existing protections are properly applied to surrogacy. Though there are innumerable rights-protective laws and policies that might be relevant to surrogacy, this section will consider some of the existing laws and policy considerations that are likely to be especially salient. To some extent, these categories mirror internationally recognized rights discussed in Part II.

(1) LABOR

Many policy and legal systems already include various protections for workers' rights. These may include minimum wage laws, limitations on working hours, or a protected right to unionize.⁴⁶⁵ Surrogacy involves labor, including the labor of becoming pregnant (which usually includes hormone treatments and the IVF process), being pregnant (including compliance with medical requirements and restrictions on activity, food consumption and travel),⁴⁶⁶ giving birth to a child (often done by cesarean section in surrogacy contexts), and experiencing the varying and unanticipated physical and psychological side effects often involved in the various stages of pregnancy and childbirth. If surrogacy is acknowledged as labor, existing labor laws should provide protection for surrogates. To ensure that this happens, it may be useful to expressly incorporate labor laws into surrogacy legislation.

Even where existing labor laws and policies are determined not to directly apply to surrogacy, they may offer a guide as to what degree of protection is appropriate. For example, laws setting minimum wages

or maximum working hours may not translate directly to the surrogacy context, where women are essentially performing ongoing labor for a defined period of time, at least for the duration of their pregnancies. Yet such laws establish standards with respect to the value of a person's time and the amount of that time that an employer can reasonably demand. Surrogacy regulations, to be consistent with existing rights frameworks, should comply with those standards. For instance, requiring a surrogate to live in a communal home,⁴⁶⁷ such that she may not be able to see her family for the duration of the process, may be difficult to reconcile with legal frameworks that limit a workweek to forty hours, or mandate certain amounts of vacation time. Surrogacy regulations could prohibit such strict requirements, or could at least establish protections to ensure that surrogates have a reasonable amount of freedom and are fully compensated for the unique burdens that surrogacy imposes.

Moreover, surrogacy, like other forms of labor, can have unanticipated after-effects that do not become evident until after the child is birthed. Serious conditions that may not emerge until after birth include postpartum hemorrhaging, deep vein thrombosis, postpartum preeclampsia, pulmonary embolism, postpartum depression, postpartum thyroiditis, and heart disease.⁴⁶⁸ Some of these can be life-threatening, and surrogates may not show symptoms until months after birth.⁴⁶⁹ Labor laws should consider how to protect surrogates against unanticipated medical costs associated with and following the pregnancy. Though intended parent(s) and surrogacy agencies can simply be required to pay any surrogacy-related health costs, even after the surrogacy arrangement is complete, it may also be helpful to incorporate surrogacy into existing social security or social insurance programs designed to cover health care related costs arising from occupational health risks. As surrogacy involves specific medical procedures that may entail particular sorts of risk, surrogacy-specific health codes could be implemented, as is sometimes done for particularly hazardous industries. The International Labour Organization, for instance, has published a series of Codes of Practice and Guides on Occupational Health for various types of work including forestry, work in underground coalmines, and work in non-ferrous metals industries.⁴⁷⁰ For countries that implement codes of this sort, or that otherwise set minimum health and safety standards and provide for health care coverage for workers, it will be useful to consider how a similar framework might be adapted to surrogacy. Instead of simply requiring surrogacy contracts to provide for health care costs, such frameworks—which might, for instance, require surrogacy intermediaries to contribute to a government-backed health insurance system—could provide more comprehensive and reliable security.

(2) NON-DISCRIMINATION AND WOMEN'S EQUALITY

Laws and policies prohibiting gender discrimination and promoting women's equality are critical to addressing surrogacy in a human-rights focused manner. Since only women can become pregnant, restrictions or prohibitions of individuals from serving as surrogates essentially restrict the rights of women alone. CEDAW requires that countries not discriminate against women in their laws and policies, including restrictions or regulations of women's choices of labor and reproductive choices and activities.⁴⁷¹ In addition, the ECHR and the ICCPR also require states to ensure non-discrimination in the context of laws and policies around reproductive rights and choices.⁴⁷² This obligation includes ensuring laws and policies on reproductive choices are not based on gender stereotypes such as traditional conceptions of motherhood and maternity.⁴⁷³ As a result, a country's anti-discrimination laws must guide any laws and

policies on surrogacy that restrict the practice due to traditional ideas that maternity cannot be treated as valued labor. Policymakers must be able to show strong justifications for the restrictions, such as evidence that they are essential to protecting rights of other parties that outweigh women's rights to be free from discrimination.

Many of women's work-related accidents are not recorded as occupational, not compensated by work insurance systems and not included in thinking about occupational health.

Similarly, where surrogates are inadequately protected from exploitation, women are uniquely placed at risk. Thus, any discrepancy between protections available in other contexts—such as labor laws that protect other employees—and protections available to surrogates could

be viewed as discriminatory to the extent that they leave surrogates more vulnerable than other workers. As discussed above, gendered divisions of labor already deprive women of economic opportunities and devalue the domestic work they perform.⁴⁷⁴ Because their labor is often undervalued, they may also be deprived of equal health and safety benefits. Even when they perform work in the formal economy, their injuries and illnesses are often underdiagnosed, they are more frequently denied compensation than men, and they are often provided more limited treatments.⁴⁷⁵ When their work is not fully acknowledged as such, the disparity is even worse. As the WHO stated in a 2006 report:

[W]omen's work in many countries is still performed in the domestic sphere and in the informal economy, and is thus invisible in the public, economic, and institutional sphere. As a result, many of women's work-related accidents and diseases are not recorded as occupational, not compensated by work insurance systems and not included in thinking about occupational health.⁴⁷⁶

This existing disparity suggests that work performed by women, including surrogacy, is at risk of being undervalued and under-protected. Thoughtful surrogacy policies, however, can ensure that surrogates are offered protection akin to that provided to men in occupations that also carry unique health risks. In sum, while antidiscrimination laws may not absolutely require certain levels of protection, they nonetheless set a standard of gender equality that surrogacy regulations should meet.

(3) REPRODUCTIVE RIGHTS

As discussed in Part II, state signatories to the CEDAW and other human rights treaties have committed to protecting reproductive rights and choices.⁴⁷⁷ This includes the right of individuals to decide when and how to have children or start a family, and it requires access to minimum standards of reproductive and maternal health care.⁴⁷⁸ Laws and policies domesticating these obligations will impact surrogate women. For example, respect for these rights might require certain minimum protections for surrogates, such as the right to have or refuse an abortion without incurring prohibitive penalties, or the right to receive adequate pre- and postnatal care. Relevant laws may also establish a right to start a family or access reproductive technology; such laws would be relevant to intended parent(s). More generally, reproductive rights require regulations of surrogacy to not be overly restrictive unless truly necessary to protect other parties' rights.

Almost all countries also provide some form of maternity protection, which is “a fundamental labour right enshrined in key universal human rights treaties.”⁴⁷⁹ For instance, a 2013 report by the International Labour Organization compared the legal provisions of one hundred and eighty-five countries. It found that ninety-eight of those countries provide at least fourteen weeks of maternity leave,⁴⁸⁰ and one hundred and eighty-three of those countries provided some form of cash benefit to women during maternity leave,⁴⁸¹ just to name a few common provisions. While surrogacy is arguably different than other pregnancies, the values inherent in these laws suggest that they ought to extend to surrogate pregnancies as well. Though a surrogate is being paid for her labor, unlike women who are carrying children they intend to raise themselves, she is still exercising her basic right to carry and give birth to a child, and is performing a valuable service to others who similarly want to fulfill their basic right to form a family. Accordingly, the same respect for the value of carrying children and forming families that underlies legal protections for pregnant women and new parents ought to extend to surrogates and intended parent(s) as well. Variations might be appropriate—for instance, intended parent(s) will not require the same protections during pregnancy, and surrogates may not require the same amount of time off after birth—but the value of maternal and parental activities expressed in existing law should not be discounted in the surrogacy context.

(4) PROTECTIONS OF THE RIGHTS OF CHILDREN

Countries are also obligated to protect the rights of children under various international treaties.⁴⁸² This includes ensuring the best interests of the child in laws and policies that affect children.⁴⁸³ It also expressly includes the right of children to be free from discrimination based on the circumstances of their birth, meaning that they cannot be denied citizenship or other rights as a result of those circumstances.⁴⁸⁴ Most countries have accordingly enacted laws and policies to protect the rights of children, and surrogacy regulations should be consistent with these laws. For instance, laws protecting the best interests of children generally, or the rights of children to nationality or citizenship, would require surrogacy policy and regulations to ensure children will not be left orphaned or stateless, as discussed above.⁴⁸⁵ In addition, a child-protective approach may require a minimum standard of care for children and that children are not taken from intended parent(s)—even where the surrogacy arrangement is unlawful—where such a response would not be in the child’s best interest. Laws protecting children from exploitation may also require that intended parent(s) are adequately vetted before gaining custody.⁴⁸⁶ Laws surrounding adoption may offer guidance as to the degree of vetting necessary. For instance, some jurisdictions have expressly required that intended parent(s) meet the standard set for adoptive parents.⁴⁸⁷

(5) MEDICAL LAWS AND POLICIES

The right to the highest attainable standard of health, including reproductive and maternal health care, is expressed in Article 25 UDHR and Article 12 ICESCR.⁴⁸⁸ Laws and policies implementing this obligation, that establish certain standards of medical care, apply in surrogacy contexts as well. Surrogates should have access to the same level of medical care as is required in other contexts, and privately-operated surrogacy facilities should meet requirements set for other health care facilities. In addition, laws may protect the rights of patients to make their own medical decisions, and this may restrict the ability of intended parent(s) to dictate a surrogate’s medical choices. Indeed, protections of autonomy and informed consent, especially in facilities operated by the surrogacy industry, are likely to be especially

salient. Even though surrogacy may involve more parties with potentially conflicting interests than in other medical contexts, surrogates' fundamental right to bodily integrity and autonomy should not be curtailed. Surrogacy regulations should therefore ensure that medical care in the surrogacy context meets standards established elsewhere, and that surrogacy contracts are not drafted or enforced in a manner that would undermine those standards. This is especially true for health facilities privately operated by surrogacy intermediaries, as have generally been used in South and Southeast Asian surrogacy arrangements, including the ones we researched in Cambodia.⁴⁸⁹ Under human rights instruments such as CEDAW and CESC, states have an obligation not only to refrain from certain rights violations, but also to ensure that private actors are upholding certain rights standards. States have violated CEDAW, for instance, by failing to ensure adequate health care was provided to women at private hospitals.⁴⁹⁰ Accordingly, the general quality of health facilities run by surrogacy intermediaries should live up to the standards that apply elsewhere and should be regulated to ensure that surrogate interests are not subordinated to the interests of the intended parent(s) or the fetus. Because the competing interests in the surrogacy context are unusual, especially where contractual provisions purport to deprive surrogates of control of their medical choices,⁴⁹¹ new protections may be necessary to curb bias and ensure that surrogates' health is prioritized.

(6) REGULATION OF REPRODUCTIVE TECHNOLOGIES

Many jurisdictions already have laws addressing other reproductive technologies such as egg donation, sperm donation, and IVF. While there are no international obligations to provide access to reproductive technology, as discussed, various human rights are implicated in the restriction, limitations and regulation of this technology.⁴⁹² Regulations addressing surrogacy should be developed with reference to regulation of all ART to ensure consistency, and should attempt, to whatever extent possible, to facilitate the right to benefit from scientific progress.

In fact, many of the concerns raised with respect to surrogacy are present to some extent with respect to other reproductive technologies. For instance, egg and sperm donation both involve the sale of a person's reproductive abilities, so prohibiting surrogacy for this reason without similarly prohibiting egg or sperm donation creates inconsistencies with a potential discriminatory impact. In addition, children born through egg or sperm donation may have no genetic link to the parents who raise them, such that it may be inconsistent to allow these technologies to facilitate parenthood but to prohibit surrogacy in the absence of a genetic link. Both surrogacy regulations and the reasons guiding them should be situated within and reconciled with the broader context of reproductive technology laws.

Moreover, care should be taken to ensure surrogacy regulations are not employed to unnecessarily restrict ART technologies. Article 8 of Cambodia's draft surrogacy law, for instance, contains detailed provisions on the use of human embryos generally, which means this provision will regulate IVF practices outside of the surrogacy context as well.⁴⁹³ Such a provision, if intended to restrict surrogacy specifically, could have the unintended result of unduly restricting access to other forms of ART. Such access, as discussed above, facilitates the right to found a family and provides opportunities for individuals in marginalized communities to parent who were previously unable to do so.

(7) PROHIBITIONS AGAINST FORCED LABOR AND HUMAN TRAFFICKING

While surrogacy does not inherently violate forced labor and human trafficking prohibitions, its practice should be regulated to ensure that it complies with such laws and upholds international principles.⁴⁹⁴ For instance, as explained above, contractual clauses that effectively force surrogates to stay in arrangements they wish to leave may amount to forced labor, and may violate the principle that people should always be free to abandon undesirable work. Though surrogates may be required to pay some form of compensation if they breach their agreements, this compensation should not effectively prohibit them from breach.⁴⁹⁵ Some jurisdictions, to avoid such abuses, have incorporated this principle into surrogacy law by guaranteeing that surrogates may abandon their arrangements without penalty under some circumstances.⁴⁹⁶ With regard to human trafficking, it may also be beneficial to protect surrogates from undue restrictions on their movement. For instance, regulations might prohibit intermediaries from taking surrogates' passports when surrogates are recruited from other countries.⁴⁹⁷ Infants must also be protected from trafficking, though this can be accomplished by ensuring that intended parent(s) are adequately vetted as discussed above.⁴⁹⁸

At the same time, prohibitions that address human trafficking may be mistakenly applied to surrogacy arrangements that do not constitute human trafficking. Such prohibitions may need to be amended accordingly. As described above, the surrogates arrested in Cambodia were prosecuted for human trafficking.⁴⁹⁹ But as discussed in Part II, surrogacy is not human trafficking. Human trafficking requires some form of coercion or force that exacts labor,⁵⁰⁰ so surrogates are not trafficked as long as they voluntarily engage in surrogacy. And, as a proper understanding of the science and medical technology involved in surrogacy makes clear, surrogacy for a legitimate intended parent does not constitute trafficking of children.⁵⁰¹ Similarly, laws prohibiting the sale of children might be read to prohibit surrogacy, but the principles and policy motivations underlying such laws do not apply to the surrogacy context. Moreover, where surrogacy is understood as the service of carrying a child that belongs to the intended parent(s), it does not entail the sale of a child because the intended parent(s) have parental rights to the child from the beginning.⁵⁰² Laws prohibiting sale of children must therefore be interpreted, and if necessary revised, in light of a proper understanding of the medical and legal process of surrogacy. Laws that may unintentionally impact surrogacy, or create uncertainty as to surrogacy's legality, including those relating to human trafficking and exploitation of children, need clarification and proper legal definitions in order to harmonize them with the practice of surrogacy in light of the rights and benefits it advances.

c) LAWS REGARDING CIVIL OR CRIMINAL PENALTIES FOR VIOLATIONS

Apart from the question of whether surrogacy should be restricted or limited, countries that do choose to restrict surrogacy and assign criminal or civil penalties to those in violation must be mindful of the human rights implications of those penalties. Where surrogacy prohibitions are violated, penalties can unnecessarily or unintentionally harm all parties involved. For instance, as shown in examples discussed above,⁵⁰³ the choice to prohibit surrogacy often leads states to deny parentage to intended parent(s) and to deny citizenship to children, potentially leaving children orphaned or stateless. The rights of children would be better served by recognizing parentage of intended parent(s) to the extent that it is in the child's best interest, granting citizenship accordingly, and penalizing parties that violate the law through other means, such as imposing fines or other sanctions on intended parent(s) or other parties.

Surrogates may similarly be unnecessarily injured by the enforcement of bans or other restrictions. In Cambodia, surrogates were prosecuted as human traffickers of infants.⁵⁰⁴ But surrogates are often members of vulnerable populations and may not be aware of existing laws.⁵⁰⁵ Moreover, prosecuting surrogates as criminals is unlikely to be the most effective way to deter surrogacy. Authors' factual investigation revealed that the surrogates arrested for child trafficking in Cambodia did not realize they were breaking the law—they believed they were merely providing the service of bearing a child for a third party—which means the prohibition could not have deterred them.⁵⁰⁶ Moreover, since there is already a risk that surrogates will be pressured into surrogacy, or engage in surrogacy under exploitative conditions, laws penalizing surrogates may exacerbate the exploitation of women. Given these considerations, surrogacy operations that violate the law would better promote human rights if they focused on penalizing surrogacy intermediaries.

In sum, where laws are implemented or applied so as to enforce a surrogacy ban or restriction, it is important that they do not injure vulnerable or innocent parties in the process.

2. INSTITUTIONAL CAPACITY TO ENFORCE LAW

Regulation of surrogacy requires effective enforcement. As a result, the strength of the rule of law in each country is an important consideration. For the purpose of this discussion, this report will draw on the definition of rule of law provided by the World Justice Project, which releases a comprehensive Rule of Law report annually, most recently in 2016.⁵⁰⁷ The report defines rule of law as a system in which four principles are upheld: individuals as well as government and private actors are accountable under the law; laws are “clear, publicized, stable and just,” “applied evenly,” and “protective of fundamental rights”; laws are enacted, administered, and enforced in a manner that is “accessible, fair, and efficient”; and “[j]ustice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve.”⁵⁰⁸

Rule of law is important for surrogacy because where rule of law is weak, regulations intended to protect parties' rights may be ineffective or applied unevenly, whether due to impunity for wealthy actors, government corruption, discriminatory enforcement, ineffective administration of justice by under-resourced institutions, or any other such impediment. Surrogacy policies can be responsive to failings in a country's rule of law in several ways. First, effective enforcement mechanisms should be identified in domestic law and institutions regulating surrogacy. Where these mechanisms are strong, direction and proscriptions on surrogacy regulations may be more relaxed, allowing increased party autonomy. For example, a study conducted at Cornell Law School compared unregulated surrogacy practices in the United States and India.⁵⁰⁹ The study found that despite the lack of surrogacy legislation, surrogates in the United States generally enjoyed a number of protections, including independent legal representation paid for by intended parent(s), freedom to choose their own health care providers, and health and life insurance paid for by intended parent(s) if they did not already have it.⁵¹⁰ The study concluded that these benefits may be the result of the strong common law system in the United States, which effectively protects surrogates from many abuses and therefore motivates the surrogacy industry to adopt surrogate-protective practices.⁵¹¹ In India, where the common law system is less effective, surrogates did not have

any of those protections, and in many cases their contracts also failed to address important issues such as compensation altogether.⁵¹²

This illustration demonstrates that very different mechanisms may be necessary to attain the same level of protection in different contexts. Where existing mechanisms are weak, regulations may need to be stricter, sacrificing a degree of flexibility for the parties involved in order to ensure that rights are protected. For example, if regulatory bodies lack the institutional capacity to actively monitor the surrogacy industry, it may be better to require that all surrogacy contracts are pre-approved, even though this imposes additional burdens for the parties to the contract. In cases where domestic mechanisms are wholly inadequate—meaning that protection cannot be effectively guaranteed by any domestic institution, whether it be the judiciary, a regulatory agency, or any other body—international sources of regulation should be considered. International bodies or other countries involved in the surrogacy industry might provide additional enforcement mechanisms, such as a mediation mechanism implemented by an international body.⁵¹³ Parties could also be required to agree to a private arbitration

mechanism.⁵¹⁴

Surrogacy practices have emerged in countries where the rule of law faces serious obstacles.

Surrogacy practices have emerged in countries where the rule of law faces serious obstacles. The WJP Report ranks countries based on government strength, corruption, transparency, fundamental rights, order and security,

regulatory enforcement, civil justice, criminal justice, and informal justice.⁵¹⁵ These factors are all relevant to how well surrogacy can be regulated. For instance, corruption may enable powerful parties to exploit weaker ones, while a powerful civil justice system may provide redress for injured parties. Countries with low rule of law scores where surrogacy has arisen include Ukraine, Mexico, Russia, Guatemala, Kenya, Nigeria, and Cambodia.⁵¹⁶ Many of these countries also show problems in specific areas relevant to the enforcement of surrogacy laws. According to Transparency International's *Corruption Perceptions Index 2017*, for instance, Laos, Kenya, and Guatemala, three countries with currently emerging surrogacy markets, are all considered "highly corrupt."⁵¹⁷ With regard to regulatory enforcement, perhaps the most salient factor for surrogacy, India, Mexico, Cambodia, Russia, Guatemala, Nigeria, Kenya, and Ukraine all rank seventy-first or lower out of one hundred and thirteen ranked countries in the WJP Report.⁵¹⁸

Judiciary competence is also a particularly important factor. Absent the development of a parallel administrative or international mechanism, the judiciary is critical to ensuring surrogacy arrangements are just and enforceable. A written contract is necessary to properly protect the parties to a surrogacy arrangement, unless detailed regulations set all terms of surrogacy arrangements. Even then, a written agreement is likely necessary to ensure that all parties fully understand their rights and obligations. Typically, courts are the venue in which contract terms are enforced. They are therefore critical to ensuring surrogacy arrangements provide and uphold fair terms unless a viable alternative venue is identified, such as a special body tasked with overseeing surrogacy disputes. Even if key protections come from statutes or administrative regulations rather than contracts, courts are often key to holding parties

responsible for violations, whether civil or criminal. As a result, protections designed to protect surrogates and children, regardless of how they are established, may only be as strong as a state's judiciary.

Unfortunately, some countries with current or recent surrogacy markets are lacking in terms of judicial independence and efficacy of courts. In a 2018 report by the World Economic Forum based on a survey of business leaders, for instance, Ukraine, Mexico, and Cambodia were among the lowest-ranked countries in the world for judicial independence.⁵¹⁹ According to the WJP Report, civil justice is also extremely weak in countries such as Nepal, Guatemala, Cambodia, Kenya, India, and Mexico.⁵²⁰ These countries fare similarly in terms of criminal justice.⁵²¹

In countries where such obstacles to effective regulation exist, surrogacy policy should reflect the reality of those obstacles. For instance, where it is difficult for vulnerable members of a population to seek redress for their injuries, either through civil or criminal justice systems, it may be beneficial for governments to take initiative in monitoring and policing the surrogacy industry even where no violations have yet been reported. Similarly, where weak institutions are unlikely to redress injuries after the fact, a possible solution is to regulate surrogacy *ex ante*. For example, some jurisdictions require every surrogacy arrangement to be approved by a government official beforehand.⁵²² Alternatively, surrogacy could be limited to licensed agencies that must be approved by the government before they begin practicing. If the government would benefit from additional protection beyond what is available domestically, it could identify a third party, such as an international institution, capable of providing additional enforcement. This could be particularly helpful where there is extensive government corruption that could undermine the reliability of government oversight.

As with banning surrogacy, however, restrictions on surrogacy also constrain the rights of the parties involved. Administrative obstacles may reduce the availability of surrogacy, depriving some women of the opportunity to become surrogates, or increase surrogacy costs such that surrogates receive less compensation. Accordingly, restrictions should only be implemented to the extent necessary. For instance, requiring all surrogacy practices to be approved in advance is burdensome, and may unduly restrict party rights in places where wrongdoing is already deterred by strong civil courts.

3. HEALTH CARE

Another major factor in ensuring surrogacy is practiced in a rights-protective manner is the country's health care system. As discussed above, to a certain extent surrogacy is no more dangerous than many other forms of labor, including factory work and agricultural labor.⁵²³ While surrogates may be financially pressured into serving as surrogates for inadequate compensation,⁵²⁴ this is also the case for many other forms of labor where power imbalances exist and economic need is paramount.⁵²⁵ However, because surrogacy involves pregnancy, the medical risks of pregnancy accompany the process and pose particular risks to surrogates and children born through surrogacy. The health care system and its ability to provide for prenatal and maternal care is therefore extremely important to ensuring surrogacy is practiced in a safe manner.

Both access to health care and quality of health care are important and may be lacking in some countries with current or former surrogacy markets. According to overall health care efficiency rankings by the WHO in 2000, current and former surrogacy countries such as Kenya, Nigeria, Laos and Cambodia are in the bottom thirty of one hundred and ninety-one ranked countries.⁵²⁶ Mortality rates of mothers and infants are of particular interest. In Cambodia, the maternal death rate as of 2015 was approximately one hundred and sixty-one deaths per one-hundred-thousand live births,⁵²⁷ while the 2018 infant mortality rate was twenty-five deaths per one thousand live births.⁵²⁸ In addition, inadequate health care before, during, and after pregnancy can pose additional health risks to mothers and children.

One solution to inadequate health care systems is for surrogacy intermediaries to provide surrogates and children with better health care than is generally available in the country, but this may not ensure surrogates are fully protected. For instance, not only will surrogates require adequate health care throughout the surrogacy process, but they may also need additional health care if they experience medical complications post-birth. This could be a problem if surrogates no longer have access to surrogacy clinics, especially if the standard health care they have access to is inadequate. In Cambodia, for example, most surrogates were from rural regions, where health care was severely limited.⁵²⁹ Furthermore, health care provided by private actors such as surrogacy intermediaries may not be regulated, which could leave surrogates vulnerable, especially where their best interests do not align with intended parent(s)'.⁵³⁰ However, these problems may be remedied by law or external institutions. Regulations could require that surrogacy agencies guarantee a minimum level of protection for surrogates, including protection for post-birth complications, either by assuming direct liability for that health care or by providing surrogates with some form of health insurance. As discussed above, surrogates could also enjoy benefits of government-sponsored worker compensation or social security programs.⁵³¹ Regulation could also set standards of practice for surrogacy clinics and assign a regulatory body the task of inspecting the clinics to ensure compliance. Finally, a separate third-party mechanism could provide health care for surrogates by way of private sector cooperation or government agreements. This is not an exhaustive list of solutions, but it illustrates that where health care quality in a country is inadequate, alternative mechanisms might provide additional protection for surrogates' health.

4. SOCIETAL CONSIDERATIONS

Social factors may also be relevant to surrogacy policy. Issues such as stigmatization in the community or pressure on women to sacrifice their interests for others may change the way surrogacy is experienced or practiced; poor economic conditions may increase pressure on women to enter surrogacy; and education levels may influence how vulnerable women are to entering agreements they do not fully understand. As explained elsewhere, gender discrimination and traditional views towards women's maternal and reproductive roles often underpin social stigma.⁵³² Efforts to regulate surrogacy should mitigate stigma and other social harms where possible and seek to ensure that surrogates' voices are heard so that their views and interests are understood and protected.

Additionally, regulation should reflect the fact that societal factors can undermine informed consent.⁵³³ For surrogacy to be implemented in a rights-promoting manner, surrogates must be able to fully

understand the surrogacy process and freely agree to it. If women are pressured to enter surrogacy agreements, or are not provided adequate information to fully understand their contracts, they may not be providing informed consent. At the same time, where social factors make surrogacy especially costly—for instance, by stigmatizing women who act as surrogates—the injury that results from surrogacy arrangements entered without informed consent is greater. Where informed consent can be assured, surrogates may willingly incur these costs of surrogacy, but where informed consent is lacking, any costs to the surrogate may amount to injuries against her and so additional protections must be put in place.

Importantly, though these societal considerations should be recognized and addressed, they should not be seen as excuses to undermine the freedom of women to make their own choices. Concerns such as social mores, gender inequality, or low levels of education could easily be used to justify laws that restrict women’s autonomy, supposedly for women’s benefit. But as discussed above, the rights of women are global and uniform: context-specific factors that pose obstacles to the fulfillment of human rights may justify variations in regulatory approaches, but they should be aimed at the same goal of enabling women to make autonomous choices about what they do with their bodies and labor. In a context where the risk of certain rights violations is particularly high, an appropriate approach to protecting surrogates and children may more closely regulate the practice of surrogacy as compared to other contexts where risks are lower. However, these regulations should only be implemented as necessary to address legitimate risks, and they should aim to facilitate women’s freedom rather than limit it. For instance, a requirement that all surrogacy arrangements be preapproved by a government official may be appropriate where risks are high that women will not be adequately informed of surrogacy risks but must also account for other ways such a policy could restrict or hamper women’s rights such as state capacity, accessibility and corruption.

[T]he rights of women are global and uniform: context-specific factors that pose obstacles to the fulfillment of human rights may justify variations in regulatory approaches, but they should be aimed at the same goal of enabling women to make autonomous choices about what they do with their bodies and labor.

Additionally, where societal factors create human rights risks for surrogacy, the state has an obligation to address these underlying problems rather than merely restrict women’s rights to compensate for its failure to do so. For instance, states are obligated under CEDAW and other rights instruments to address gender inequality. While surrogacy regulation should not be blind to existing gender inequality, states should not merely reflect this inequality in surrogacy regulation but should also make broader efforts to combat the inequality itself. Accordingly, where regulations aimed at protecting women in light of gender inequality have the effect of restricting surrogacy to some degree, such regulations should be seen only as a temporary measure while states work to alleviate the underlying inequality.

a) SOCIAL MORES

While some have speculated that surrogacy has the potential to cause psychological harm to the surrogate or child born through surrogacy, studies are inconclusive and the impact of surrogacy appears to vary greatly depending on context. The social mores of a surrogate's community are likely to be important. As discussed earlier, in studies conducted in the United States and United Kingdom, for instance, surrogates have not shown much psychological distress at giving the baby to the intended parent(s).⁵³⁴ By contrast, in India, where there is a stronger cultural norm of considering the birthmother to be the child's true mother, surrogates have expressed more emotional distress at giving the child to the intended parent(s).⁵³⁵ Similarly, a surrogate may experience varying levels of stigma or shame depending on the social mores of her community. Indeed, some segments of a culture may view surrogates as unchaste, or consider them to be selling their children.⁵³⁶

As discussed above, these cultural assumptions and mores impact many issues related to women's rights and autonomy and are often based on issues broader than the surrogacy context related to gender stereotyping and maternity. In the context of surrogacy, as with other issues around women's equality and non-discrimination, states have an obligation to address underlying cultural assumptions, such as gender stereotypes, that impede women's progress and de facto equality. However, to the extent these issues implicate surrogacy, surrogacy regulation could also attempt to mitigate some of surrogacy's social costs. Of course, these cultural contexts are complex: there may not be any single cultural view of surrogacy, and states should always be cautious about policies that reflect majority views and impact minority rights. The voices of surrogates and other parties should be central to informing a state's consideration of cultural factors. States could take affirmative steps towards addressing harmful social mores such as educating the public about the surrogacy process to dispel misconceptions that surrogacy involves sexual behavior or the sale of one's own child. Alternatively, surrogacy intermediaries could be required to conduct similar education initiatives. In another example, during the surrogacy process, it may be particularly important for surrogates facing social stigma, or otherwise subject to social mores that may make surrogacy psychologically difficult, to undergo psychological screening⁵³⁷ and receive counselling during and after the process. Surrogacy policy may also want to consider how legal framing could interact with social perceptions of surrogacy. For instance, structuring surrogacy as adoption by the intended parent(s) may reinforce the idea that the surrogate is giving up her own child, whereas vesting parental rights and obligations in the intended parent(s) from the start reflects the fact that she is merely performing a service by carrying a child that does not belong to her.

At the same time, regulation should recognize that where a given cultural context makes the surrogacy process inaccessible or otherwise emotionally difficult, it is all the more important that surrogates receive the necessary support to fully understand the process. It may be appropriate for regulations to ensure a surrogate receives sufficient information and opportunities for consultation about the process in cultural contexts that view surrogacy in a negative manner. Of course, any additional assistance should not be aimed at discouraging the surrogate but providing her with information necessary to make an informed decision. Other ways to do so could include: case-by-case approval of surrogacy arrangements, a requirement that surrogates be provided with independent counsel, or a requirement that surrogates receive copies of contracts in their native languages. Informed consent and social stigma can be

addressed in a manner that does not unduly restrict the freedom of adult women to make their own choices.

b) GENDER INEQUALITY

As discussed in previous sections, gender inequality also permeates concerns related to surrogacy. Gender inequality remains high throughout the world, impacting the lives of women and girls in innumerable ways. Women often have access to fewer opportunities for lower rates of pay,⁵³⁸ making surrogacy a more desirable option. They are usually underrepresented in government and other positions of power,⁵³⁹ raising concerns about whether women's rights will be prioritized and fully protected. As has been documented, women often face extreme pressure to subordinate their desires to those of their husbands or families. Some have argued that this casts doubt on whether they are able to make autonomous choices.⁵⁴⁰ In addition, women often have fewer educational opportunities than men,⁵⁴¹ leaving them more vulnerable to exploitation. Gender based violence also remains prevalent in many countries,⁵⁴² such that isolating women in surrogacy hostels tightly controlled by private actors⁵⁴³ could create opportunities for abuse. The ways gender inequality manifests in society are innumerable, but in brief, this inequality often leaves women in a more vulnerable position. And gender inequality is particularly high in some countries with current or former surrogacy industries. Countries including Nepal, Guatemala, India, and Cambodia, for instance, rank on the lower end of gender equality according to the World Economic Forum's 2017 Global Gender Gap Report.⁵⁴⁴

Gender inequality is certainly an important factor in determining whether surrogacy can be implemented in a manner that respects women's human rights. However, as with other surrogacy concerns, the risks associated with gender inequality are not particular to surrogacy, but instead present in many aspects of society.⁵⁴⁵ Moreover, any risk that surrogacy could leave women vulnerable to abuse must be weighed against the fact that restricting surrogacy aggravates gender inequality by depriving women of a source of economic empowerment and dictating how they are permitted to use their bodies. Such restrictions may reinforce ideas that women who use their sexual or reproductive capacities in certain ways are immoral, and that these capacities should therefore be controlled. In addition, in jurisdictions where only altruistic surrogacy is permitted, women may be pressured to perform difficult labor without compensation, encouraging the view that women's labor is not valuable or is only worthy when offered for "altruistic" rather than financial reasons.

Accordingly, women's equality is best promoted by a policy that allows women to choose the terms under which they offer their labor—including paid surrogacy if they so choose—but provides them protection from any human rights abuses. This may mean stricter protections in cultures where women are more vulnerable. It may also be helpful to ensure that the actors responsible for enforcing regulations are educated on gender issues and trained to respect women's rights. Since gender inequality could undermine informed consent where women are expected to submit to the decisions of others, added protections to promote informed consent may also help mitigate the risks created by gender equality. For instance, regulation could require that women consent to surrogacy in a private setting, without male relatives present, and that this consent be verified by an official trained in gender issues. In sum, though there is no particular formula for eliminating the power imbalances caused by gender equality, policies that are conscious of this inequality have many tools to ameliorate it.

c) EDUCATION

Finally, a country's educational systems are relevant to how surrogacy is best regulated. Some countries with current or former surrogacy industries have low rates of education. For instance, according to the UN's 2016 Education Index, countries including Cambodia, Laos, Nepal, Guatemala, and Kenya all rank one hundred and twenty-seventh or lower out of one hundred and eighty-nine ranked countries with regard to education levels.⁵⁴⁶

Where women are less educated, greater protection may be necessary to guarantee informed consent. Informed consent requires surrogates to understand the nature of the surrogacy process, the health risks involved, and their legal rights. They agree to undergo complex medical procedures that most laypeople do not understand: they must undergo an IVF implantation process, receive hormone injections for extended periods of time, and often give birth through caesarian sections. Not only are these procedures complex, they have important medical and moral implications. Caesarian sections, for example, carry risks including infection, blood clots, and risks to future pregnancies,⁵⁴⁷ yet many surrogates do not realize they will undergo a caesarian section when they agree to surrogacy.⁵⁴⁸ Surrogacy can also involve a "fetal reduction" process whereby unwanted multiple pregnancies are terminated, though many surrogates are similarly unaware of this process beforehand.⁵⁴⁹ This has been an especially disturbing problem in cases where surrogates are morally opposed to abortion.⁵⁵⁰

Legal aspects of surrogacy are similarly complicated and important. Surrogates should fully understand the terms of their contract, including all of their rights and obligations. They should know, for example, how much compensation they will receive if they have a miscarriage, what their rights are with respect to medical decisions, and whether they will be covered if unexpected medical complications arise, just to name a few important provisions. As discussed above, surrogates in many countries have demonstrated little to no knowledge of their contract terms.⁵⁵¹ Even where they have access to the contracts—which is not always the case⁵⁵²—the contracts may be difficult for lay persons to understand without legal counsel, and many surrogates may not be literate.⁵⁵³

Because the scientific and legal aspects of surrogacy can have important medical, financial, and psychological implications for surrogates, it is vital that anyone entering a surrogacy agreement completely understands what it entails. While women without high levels of education are perfectly capable of understanding surrogacy, they may be more vulnerable to intermediaries who attempt to withhold important information or otherwise mislead them. As the surrogacy industry may want to downplay risks and encourage women to become surrogates, an uneducated population may require a larger degree of protection. This is especially true given that surrogates are likely to be recruited from less educated segments of the population. In sum, a government must consider how vulnerable surrogates are to misinformation about surrogacy—including complex medical and legal aspects of it—as well as whether and how the law might help to promote understanding. Extra protections of informed consent might be required, such as case-by-case approval by a government official who must disclose all relevant information to the surrogate and confirm that she understands. Government efforts to educate the public generally may also reduce the risk that surrogates will be misinformed.

In addition, education within a country impacts public understanding of surrogacy. Even the basic idea of surrogacy—that the surrogate is carrying a baby with no genetic link to her—is widely misunderstood by many people, and the level of understanding varies in different communities. As discussed above, some people assume that surrogates have sex with intended fathers or sell their own biological children, leading to stigma against surrogate women and their families.⁵⁵⁴ Where education is limited, these misperceptions may be more common, and it may therefore be more important to implement policies aimed at informing the public about surrogacy. As mentioned earlier, government entities could make direct efforts to do so, or they could mandate that surrogacy intermediaries make certain efforts to educate the public and dispel common misunderstandings.⁵⁵⁵ Reducing stigma against surrogacy is important not only to ease the emotional burdens of surrogacy, but also to ensure that surrogates and other parties feel comfortable discussing the practice openly. Where surrogacy is taboo, it may discourage public discourse about how best to improve the industry and prevent surrogates from reporting abuses or accessing resources that could help them through the process.

In sum, while low levels of education do not preclude the possibility of rights-protective surrogacy practices, surrogacy regulation should reflect the fact that they might exacerbate problems like lack of informed consent, public misunderstanding, and surrogacy taboos that impede efforts to monitor and improve the industry. Accordingly, regulation should often include measures to educate the public about surrogacy and ensure that women fully understand all aspects of the process before agreeing to it.

5. ECONOMIC CONSIDERATIONS

Women choose to become surrogates for various reasons: ideological motivations, a wish to provide assistance to families struggling to conceive, a desire for an additional source of income, or a combination of the three. Compensation may be particularly motivating in countries where women have limited sources of income and available employment does not offer a living wage. In Cambodia, each of the three surrogates interviewed sought an alternative source of income to garment work, in part to alleviate large debts.⁵⁵⁶ According to various sources, debt is a widespread problem throughout the country, as individuals struggle to pay their basic expenses.⁵⁵⁷

Generally, financial need is not a reason to deprive a population of a possible source of employment. However, economic need can make people vulnerable to many forms of exploitation, including human trafficking and other forms of coerced labor.⁵⁵⁸ In the surrogacy context, women may be drawn to surrogacy to improve their financial situations, even where inadequate regulation exposes them to exploitative intermediaries or unfair contract provisions. Thus, the economic conditions of a country and the labor and employment context are important factors that should be reflected in surrogacy policy.

As with gender inequality, economic pressure is not unique to surrogacy but rather permeates society as a whole. Also, while it may exacerbate some surrogacy-related concerns, it also means that surrogacy may be particularly desirable as a form of economic empowerment. Where surrogacy is available to people in difficult economic positions, regulations should reflect and address the risks arising from that economic pressure. Minimum standards of health and safety should be established to ensure that women do not subject themselves to extreme risks out of desperation. Additionally, certain forms of financial coercion

should be prohibited, such as contract terms that could leave surrogates indebted to agencies if they breach their agreements.

The economic imbalances present in a given country, or between surrogates in that country and intended parent(s) from other countries, are also a factor to consider. Intended parent(s) and surrogacy intermediaries are likely to be in a position of power compared to surrogates. This will likely serve as an obstacle to redress when a surrogate's rights are violated, as legal institutions may favor the interests of other parties. In addition, the relative wealth of intended parent(s) may motivate intermediaries and other actors to prioritize the intended parent(s)'s interests over the surrogates' interests.⁵⁵⁹ In the context of medical decisions, this could infringe on surrogates' right to bodily autonomy. For example, Isabel Fulda and Regina Tamés, advocate for reproductive rights in Mexico, describe a "common perception among people who take part in surrogacy [in Mexico]...that women who sign such agreements give up their ability to make decisions about their own bodies, including pregnancy termination and the conditions of birth."⁵⁶⁰ In cases where the surrogate's health is in conflict with the child's, this preferential treatment of intended-parent(s) interests could even motivate intermediaries to make decisions that endanger surrogates' health. Fulda and Tamés report that they have reviewed contracts forbidding termination of pregnancy even if the surrogate's life were at risk.⁵⁶¹

While such power balances do not necessarily prevent surrogacy from operating in a rights-promoting manner, and could be alleviated by protective legislation, they could nonetheless aggravate other potential problems. For instance, where no government or judicial body can be relied upon to effectively enforce protective laws, surrogates may be at the mercy of intermediaries, which may be harmful where intermediaries prioritize the interests of wealthier or more influential intended parent(s). Once again, the most promising solution is strict protections, both substantive and procedural, that empower surrogates and prevent other parties from taking advantage of surrogates in vulnerable positions.

6. HISTORIC VIOLATIONS

Surrogacy has raised fears of various kinds of exploitation and other abuses. In some cases, similar concerns have arisen with respect to other practices, such as intercountry adoption. These other practices may provide some insight into the risks associated with surrogacy. For instance, where countries have histories of child trafficking, this may indicate a greater risk that surrogacy could be utilized to traffic children. In Guatemala, for instance, intercountry adoption was used to disguise the kidnapping or coerced selling of children for profit.⁵⁶² In light of this history, some scholars have raised concerns about the growing surrogacy market in Guatemala.⁵⁶³ While surrogacy is different from intercountry adoption in numerous ways, child trafficking is one of the most alarming risks of surrogacy, and may be difficult to detect. Thus, any historical factors that indicate a country may be inadequately equipped to fully protect children—or that existing criminal enterprises are likely to take advantage of any opportunity to illicitly acquire children—should be carefully considered.

Similarly, a country might look to other industries and historical practices to determine whether various risks—coercion of women, inadequate medical care, inadequate legal protection, or lack of informed consent, for instance—are likely to be realized. In countries including Vietnam and Cambodia, for instance,

women are sometimes sold by their families, or even kidnapped by strangers, to be given to foreign men as brides.⁵⁶⁴ Where this is already occurring, it may be more likely that women could be similarly pressured or forced into surrogacy. These sorts of existing problems, especially in analogous contexts, should guide countries in determining the extent of various risks and the best way to respond to those risks. As with other considerations discussed above, any increased risks should be reflected through stricter protective policies, and specific risks should be addressed with appropriately tailored regulatory mechanisms.

C. RISKS AND OPPORTUNITIES OF SURROGACY'S TRANSNATIONALITY

Surrogacy is often a transnational enterprise where intended parent(s) engage surrogates from other countries.⁵⁶⁵ This may be because surrogacy is illegal or prohibitively expensive in intended parent(s)'s home countries, or because the process in other countries can provide better quality or a lower cost.⁵⁶⁶ This fact has important implications for a country's regulatory approach. First, it suggests that countries have a limited ability to control and regulate the surrogacy process unilaterally, which could counsel against permitting surrogacy in some cases, or with some intended parent(s)'s countries. However, it also means that countries have a limited ability to prevent surrogacy, as discussed above, which may indicate that regulation is better than total prohibition or excessive restrictions. Finally, it also means that surrogacy provides opportunities for international mechanisms to provide a degree of regulation: countries with weaker infrastructure may be able to leverage international systems, or legal systems in other countries, to promote effective regulation domestically.

1. LIMITED CONTROL OF SURROGACY

Because surrogacy is often transnational, the country where surrogacy takes place may be limited in its ability to regulate surrogacy. For instance, if intended parent(s) refuse to pay for the surrogacy, or attempt to abandon the child, the country may not be able to hold them accountable. Furthermore, the country may be limited in its ability to vet the intended parent(s) and ensure that they intend to provide the child with a good life. Finally, the country will not have control over the rules regarding parentage and citizenship in the intended parent(s)'s home country. If intended parent(s) attempt to bring the child back to a country where surrogacy is prohibited—and indeed, such prohibitions in their home countries are often the motivation for seeking surrogacy arrangements abroad—the child could be taken from them, placed up for adoption, or left stateless.

Some of these problems could be addressed unilaterally. For instance, if intended parent(s) must place money in escrow at the beginning of the surrogacy process, this money could be used to provide for the surrogate's expenses and compensation if the intended parent(s) attempt to break the agreement and refuse to make all required payments. In addition, stricter screening of intended parent(s), including background or credit checks, could help alleviate the risk that intended parent(s) will fail to fulfill their obligations. Countries allowing surrogacy could also prohibit arrangements with intended parent(s) from countries that may not recognize the child's parentage and citizenship.

Another option to address some of the risks arising from transnational surrogacy arrangements is bilateral or multilateral cooperation between countries. If intended parent(s) come from countries whose

governments agree to hold them accountable for any wrongdoing, this could alleviate the risk of intended parent(s) breaking surrogacy agreements. Intended parent(s)'s countries could also provide oversight to ensure that the intended parent(s) are adequately caring for the children. Those countries could also take some responsibility for vetting intended parent(s) in the first place, perhaps by providing helpful information to corroborate their suitability. Finally, such countries could give assurances that children born through surrogacy will be recognized, and will not be taken from the intended parent(s) or denied citizenship. However, such cooperation may be difficult when intended parent(s) come from countries where surrogacy is prohibited altogether. A country considering surrogacy regulations would therefore have to consider (1) whether to allow surrogacy arrangements with intended parent(s) from countries where surrogacy is prohibited, and (2) how to mitigate the risks of such arrangements if they do choose to allow them. While the difficulty of holding intended parent(s) accountable might be surmountable, a country permitting surrogacy probably cannot protect children from being orphaned or rendered stateless without the cooperation of intended parent(s)'s countries.

2. OPPORTUNITIES ARISING FROM TRANSNATIONAL STRUCTURE

In addition to the potential regulatory obstacles posed by transnational surrogacy, its transnational nature also creates opportunities. The surrogacy industry depends on demand from intended parent(s), and these intended parent(s) often come from wealthier countries with stronger infrastructures. As a result, countries that tend to create surrogacy demand are well positioned to play a regulatory role, and might be able to strengthen oversight of agencies operating in countries less able to monitor. For instance, a surrogacy country might be able to impose a licensing system where government agents approve certain agencies, but may be unable to enforce prohibitions on unlicensed operations. Intended parent(s)'s countries could fill the gap by prohibiting surrogacy arrangements with unlicensed intermediaries. Alternatively, an international body might oversee and approve certain surrogacy intermediaries, and intended parent(s)'s countries might similarly legalize surrogacy with respect to approved agencies only. This could provide a degree of protection without relying on the institutional capacity of the surrogacy country. Even where such systems are not backed by legal sanctions, a licensing system such as these—where only agencies that meet certain minimum standards are approved—would likely lead intended parent(s) to agencies that better protect rights. Intended parent(s) would probably be glad to minimize the risks of their surrogacy arrangement and know that it is legal and regulated.⁵⁶⁷ At the very least, international bodies could provide guidelines or model legislation to promote uniformity and cooperation between states. International bodies have done this in areas bearing some similarity to surrogacy, such as organ donation.⁵⁶⁸

VI. POLICY RECOMMENDATIONS

Current trends in parenting, alternative family structures and women's advancement in the workplace suggest that demand for surrogacy will continue, and may expand in the coming decades. A thoughtful approach to surrogacy and the rights and interests of all parties involved is needed. Among the many rights implicated in surrogacy practices are: women's reproductive freedom, bodily autonomy, and privacy; the rights of children to protection from exploitation and to be raised in circumstances that meet

their needs and best interests; and the right of individuals who are unable for reasons of infertility, sexual orientation and otherwise to found a family without this form of reproductive assistance and to do so in a manner that is free from discrimination.

This report has explored the various rights at issue in surrogacy along with practical barriers to their protection and realization. As with any policy decision, there are various contexts and dynamics that make a one-size-fits-all approach to surrogacy ill-advised. However, with the proper infrastructure and regulations, surrogacy practices can take place in a manner that respects, and may even promote, the human rights and interests of all parties.

The recommendations below focus on what authors understand as the fundamental policy decisions to be made around surrogacy: *whether to restrict or ban the practice; whether to allow for domestic or transnational arrangements; whether to permit surrogates to receive compensation or require them to provide the service altruistically; what role, if any, intermediary organizations should play in the process; and how the human rights of surrogates and children can be further protected with specific regulatory interventions.* What follows does not provide a prescription for implementation but merely guidelines and considerations in crafting a human rights-protective approach to the practice of surrogacy.

On general policy approaches, authors recommend consideration of the following:

- ✓ *There is a significant lack of data and information available on existing surrogacy practices. In particular, further research is needed to determine how, whether and under what circumstances surrogacy arrangements are, in fact, serving as mechanisms for exploitation and abuse of surrogates and/or children.*
- ✓ *Policy approaches to surrogacy should be based on the best-available scientific evidence, placed within the larger context of an approach to infertility, reproduction and paths to parentage and should respect, advance and protect the rights of stakeholders.*
- ✓ *State interests and obligations must be balanced in policy approaches to surrogacy. Primary among these interests should be protecting individuals from abuse and exploitation, enabling women's bodily autonomy and reproductive decision-making and supporting the ability of individuals and couples to found and expand their families.*
- ✓ *Regulations and policies on surrogacy should be developed in consultation with the various stakeholders impacted, including surrogate women, intended parent(s), and, where possible, individuals born through the surrogacy process.*

A. LEGALIZATION OF SURROGACY: BANS AND/OR RESTRICTIONS

The initial policy question for states is whether surrogacy should be severely restricted or banned. As discussed above, in most if not all contexts, bans that prohibit surrogacy wholesale unduly infringe on women's rights to bodily autonomy and privacy as well as self-determination and, in the context of

commercial surrogacy, potentially the freedom of choice of labor. Bans also compromise the ability of individuals unable to reproduce due to infertility, sexual orientation or other circumstances to found families. While these rights are not absolute, restrictions must be justified. Care should be taken to ensure bans or severe limitations on surrogacy are not based on speculation or unverified fears of abuse or on conditions of inequality and exploitation that are present more broadly outside the surrogacy context. Nor should restrictions go beyond what is necessary to achieve legitimate ends. Finally, restrictions on surrogacy should be considered in light of the benefits that surrogacy may promote, such as the opportunity to found a family for infertile and LGBTQ+ individuals and couples.

This report has identified ways in which a country's health and legal infrastructure can be critical to the effective practice of surrogacy. However, the absence of a working infrastructure cannot, on its own, justify a wholesale ban on surrogacy, just as an inadequate maternal health care system would not justify severely restricting women's ability to have children. The reality is that substandard conditions exist in many countries in health care, education and government administration, conditions states are already required to address as parties to various human rights treaties. Policy-makers must tread carefully in using these limitations to justify restrictions on women's right to make decisions around such personal and private matters as whether to bear children, even when it is on behalf of another.

Bans may also increase the likelihood of unlawful or irregular surrogate arrangements, which could endanger the rights of all parties, including children. In addition to the risks of illegal arrangements, because surrogacy has become more transnational in nature, citizens of a country that bans surrogacy may turn to opportunities in other states, where their rights as immigrants could be less protected. Blanket bans on surrogacy have the potential to increase women and children's vulnerability to human rights violations.

In fact, wholesale bans on surrogacy, or laws restricting it to excessively narrow circumstances, are likely to limit women's rights impermissibly and beyond the extent necessary to protect surrogates or other individuals. Moreover, such bans may simply push surrogacy into the brown or black market, or to countries with less regulation, further exacerbating women and children's vulnerability. Further, bans often merely create greater burdens for intended parent(s) seeking to found families through surrogacy. In particular, countries with significant demand for surrogacy that restrict surrogacy within their own jurisdictions are often effectively compelling the expansion of a transnational market, as their own citizens travel abroad by necessity or preference to seek such services. A recent estimate from the United Kingdom, which restricts surrogacy to altruistic forms domestically, indicates that nearly half of intended parent(s) based in the United Kingdom participated in transnational surrogacy.⁵⁶⁹

On the issue of bans/significant restrictions of surrogacy, authors recommend consideration of the following:

- ✓ *Available evidence indicates that permanent wholesale bans on surrogacy are not justified by concerns for human rights. Properly implemented regulatory mechanisms can address concerns while enabling important human rights at stake for parties involved.*

- ✓ *States have a duty under various treaty obligations to ensure access to basic health services, including reproductive and maternal services, and to provide legal mechanisms for basic due process and rule of law. Restrictions on surrogacy should not be justified by state failure to comply with these obligations.*
- ✓ *If a state chooses to institute a ban or restriction, the ban should be temporary with a goal towards developing mechanisms that will return this reproductive freedom to women and assisted reproductive option to individuals wishing to have children.*
- ✓ *Bans should categorically avoid criminalizing surrogates for simply engaging in surrogacy.*
- ✓ *States that do institute bans must consider the best interests of the child, including the value to the child of the relationship with the intended parent(s), when faced with unauthorized surrogacy practices. Approaches to such cases should avoid separating children from intended parent(s), rendering children stateless or requiring surrogates to raise children against their will.*

B. SCOPE OF SURROGACY: TRANSNATIONAL AND/OR DOMESTIC

Some countries have determined that surrogacy should be limited to agreements between domestic parties. This, it is argued, allows the state greater supervision and regulation of the surrogate, intended parent(s) and child. This report does not take a position on whether surrogacy should be domestic or transnational but does find that certain considerations should be taken into account before surrogacy is restricted domestically.

First, restricting surrogacy in this way, like prohibiting it altogether, limits opportunities for women globally by preventing them from entering into economically beneficial transnational surrogacy agreements. At the same time, limiting surrogacy to domestic arrangements limits intended parents(s)'s access to surrogacy markets outside their own country, which might deprive them of the option altogether if surrogacy is illegal for certain individuals or prohibitively expensive in their own countries. Prohibiting transnational surrogacy might also create demand for unlawful surrogacy where the rights of women and children would be entirely unprotected. Finally, these kinds of arrangements could motivate women in countries without sufficient demand for surrogacy to travel to neighboring countries to be surrogates, placing them in even more vulnerable circumstances subject to the laws and regulation of another country. This has occurred in countries like Kenya, which has a low rule of law index and low enforcement levels, as discussed above.

Undoubtedly, under the current circumstances, some of the risks associated with surrogacy are exacerbated by transnational arrangements. For instance, it is more difficult to hold intermediaries and intended parent(s) from other countries accountable, and it is more difficult to ensure children will be granted full rights in the intended parent(s)'s home country. However, surrogacy will inevitably implicate the laws of multiple countries, e.g. where a child born through surrogacy moves with her/his parents to a new country.

Ultimately, rather than limit surrogacy to domestic arrangements, developing a transnational mechanism that sets common standards, guidelines and potentially even monitors arrangements may be a better option. To the extent, the concern is that intended parent(s) will “forum shop” for the most inexpensive fees, indirectly creating incentives for intermediaries to solicit economically vulnerable women, a mechanism or agreement on standardized surrogacy fees would better eliminate such incentives. A transnational regulatory mechanism could set minimal terms of agreements, regulate costs and fees, facilitate cooperation between states, ensure conformity in their laws, and mitigate risks that children will be left stateless. An international or regional entity (e.g. European Union) could enact binding surrogacy regulations or a treaty could be developed with an agreed-upon regulatory framework.

On the issue of whether surrogacy should be domestic or transnational, authors recommend consideration of the following:

- ✓ *A transnational mechanism may be the most effective and realistic way to meet the demand for surrogacy services, address forum shopping concerns, establish international standards and protect vulnerable surrogate women from exploitation.*
- ✓ *Domestic arrangements, while clearly benefitting from increased state capacity for oversight, are unlikely to provide a long-term mechanism for surrogacy arrangements. A domestic limitation, however, could be appropriate while a transnational mechanism is under development.*
- ✓ *States that limit surrogacy to domestic arrangements must still contend with transnational arrangements and how to protect the best interests of the child born through surrogacy. States must develop policies and agreements to ensure children born through surrogacy are not rendered stateless or in unrecognized parentage relationships.*

C. COMPENSATION: COMMERCIAL AND/OR ALTRUISTIC SURROGACY

The question of compensation for the service of surrogacy has proven to be controversial. As detailed above, some countries have determined that surrogacy should be limited to altruistic surrogacy, requiring that women who wish to serve as surrogates do so without receiving compensation. Some of the risks of exploitation, it is argued, arise from surrogacy’s commercial nature. Women in economic need are thought to be more likely to enter commercial surrogacy arrangements under exploitative circumstances. In altruistic surrogacy, the surrogate recovers only expenses and, in some cases, lost wages. Altruistic surrogacy regulations sometimes limit surrogacy to arrangements between close friends and family members, where risk of exploitation may be further reduced.

It is possible altruistic surrogacy arrangements better protect against the potential for exploitation but several considerations relevant to women’s human rights should be accounted for. First, altruistic surrogacy limits an economic opportunity for women and requires them to engage in a service that only women can provide that involves a significant amount of labor, risk, time and investment for no

compensation. Second, women may be pressured by family dynamics to provide such a service altruistically as many family structures continue to be organized around women's disempowerment and disproportionate responsibility for familial duties.

Moreover, the approach to surrogacy as only justified when done so altruistically may inadvertently undermine women's equality by continuing a historical undervaluation of labor unique to women. In particular, the view that surrogacy, because it involves the pregnancy and birthing of a child, should by its nature not be compensated, should be questioned for its reliance on conceptions of maternity, motherhood and women's labor that may be based in harmful stereotypes of women's role in society. Determining that surrogacy cannot be compensated may have the effect of disempowering women, devaluing their work, and reinforcing the idea that women's labor should not be treated as economically valuable. As discussed above, historically, numerous activities have been excluded from our conceptions of "labor" for a variety of reasons, often rooted in social stereotypes and inequalities.

Second, altruistic surrogacy limits the ability of intended parent(s) to engage a surrogacy service, as there is likely to be a more limited pool of women willing to perform this service with no compensation. In fact, countries that limit surrogacy to altruistic practices but are also source countries for high numbers of intended parent(s) may merely be compelling the creation of a commercial transnational market. As mentioned above, a recent study by the Law Commission of England and Wales and the Scottish Law Commission estimates that approximately half of surrogacy arrangements entered into by UK-based parents, are transnational.⁵⁷⁰ As domestic surrogacy in the UK is limited to altruistic surrogacy arrangements, it is highly likely these transnational arrangements are commercial and a function of an unmet demand by the altruistic limitations (or alternatively lower costs involved in transnational arrangements vs. altruistic arrangements based in the UK). Regardless, it is possible that altruistic surrogacy limitations could, like bans or restrictions, simply support the growth of commercial industry elsewhere, whether that industry be illicit or sanctioned. This simply redirects the burden of protecting surrogates involved in commercial surrogacy onto another state.

Moreover, the central question is whether limiting surrogacy in this manner is justified by the benefits it provides despite the rights it restricts. Depriving women of an economic opportunity because protections against exploitation are not in place may unfairly burden women with the shortcomings of a state's economic, legal and social infrastructure. Unregulated employment sectors such as garment work, domestic work and farm work are rife with exploitation for the same reasons in many countries – insufficient regulation and ineffective monitoring and accountability mechanisms by the state. Rather than eliminate a form of work or profit, states should work to create environments that are safe for women to work in.

On the issue of whether surrogates should be compensated or surrogacy limited to altruistic forms, authors recommend consideration of the following:

- ✓ *Altruistic surrogacy limitations in high demand states may merely encourage expansion of commercial markets elsewhere, relieving certain states of regulatory burdens but increasing the burden on other states.*

- ✓ *Altruistic surrogacy limitations may encourage “creative” agreements between the surrogate and intended parent(s) to identify a mechanism for compensation, making enforcement of agreements more difficult and legal protections less effective.*
- ✓ *Altruistic surrogacy limitations may be based on gender discrimination and stereotyping of maternal labor or other paternalistic assumptions about monetization of women’s labor.*
- ✓ *Surrogacy services are demanding labor which potentially carry long term physical consequences to the surrogate. Fairness may dictate that compensation for such a service is appropriate.*
- ✓ *Altruistic surrogacy limitations may burden women and result in surrogates being pressured by family or social inequalities to provide this service with little benefit.*

D. REGULATORY PROTECTIONS: INTERMEDIARIES, SURROGATES, CHILDREN AND INTENDED PARENT(S)

1. INTERMEDIARIES

Many of the concerns around exploitation in the surrogacy process can be addressed by increased regulation and standard setting of intermediaries, the organizations which service and connect the surrogates and intended parent(s), sometimes supervising the medical process and often the surrogate’s pregnancy and birth. Currently, such organizations operate with little oversight or regulation. This is an increasingly lucrative industry that often charges more in fees than those collected by the surrogate women. Depending on the context, intermediaries can exercise significant control over the surrogates, including arranging housing, board and medical care. Where no government regulation or intervention exists, surrogates can find themselves in vulnerable positions in relation to the intermediary organization. In fact, surrogacy agencies have been responsible for most reported misconduct and human rights abuses in the past: cheating intended parent(s) and predatory behavior toward potential surrogates, including the making of false monetary promises, enlisting women as surrogates without providing them with a contract or substantial information about the procedures, restraining the physical freedom of surrogates, and using psychological and emotional affirmations to reduce surrogate’s bargaining power for pay.⁵⁷¹ They also, however, can play an important role in connecting parties, structuring and monitoring their relationship to ensure the best possible outcome for all.⁵⁷²

Currently, a number of countries have placed restrictions on the role or existence of surrogacy intermediaries. South Africa, which only allows for altruistic surrogacy, has forbidden advertisement of surrogacy services.⁵⁷³ The United Kingdom, which similarly allows only altruistic surrogacy, forbids commercial agencies but explicitly allows non-profits to play the role of intermediaries.⁵⁷⁴ In New Zealand, which similarly limits surrogacy to its altruistic form, also prohibits commercial agencies and advertising.⁵⁷⁵ Following these examples, allowing only non-profits to operate as surrogacy intermediaries might

constitute a way of limiting risks of abuse by commercial agencies and potentially ensuring the fees charged go primarily to the surrogate.⁵⁷⁶

Other solutions can be found to preserve the intermediaries' role in the process while protecting human rights. One possible solution is to require that private surrogacy agencies obtain licenses and to condition the maintenance of this license upon the respect of certain conditions and standards of conduct. States could, for example, impose ethical requirements on surrogacy agencies such as imposing mandatory reporting of any misconduct they observe, a regulation common to the medical and legal professions. A licensing regime should aim to promote and facilitate transparency between the parties particularly on issues of: decisions intended parent(s) can and cannot make about the pregnancy; what medical and psychological services the surrogate is entitled to; and the obligations of the intended parent(s) toward the resulting child.⁵⁷⁷ Such mechanisms would allow the government to retain ultimate control over the surrogacy process while relying on the private market to provide coordinating services. A recent report from the United Kingdom, for example, recommends regulation of surrogacy agencies by the government authority on human fertilization.⁵⁷⁸

Another solution, as discussed above, would be to develop a transnational mechanism that replaces private agencies by fulfilling a similar coordinating function. Such a body might be more transparent and accountable than private actors for its actions. The United Network for Organ Sharing (UNOS) provides a useful point of reference. UNOS is a private non-profit that manages the national organ transplant system in the United States under contract with the federal government.⁵⁷⁹ This organization manages the national transplant waiting list and matches donors and recipients, keeps a record of every transplant that takes place in the US, provides assistance to patients, serves as a framework to develop policies, and educates stakeholders and the public about organ donations and transplants.⁵⁸⁰ A similar body could be created in the context of surrogacy. That body could screen and match parties, provide them with a framework to reach an agreement that meets all legal conditions, validate the agreement once reached, and assist in its implementation.

To better ensure intermediaries contribute to human rights-compliant surrogacy practices, authors recommend consideration of the following:

- ✓ *Surrogacy intermediary organizations should be regulated at the state and international level, including strict licensing requirements, defined duties and responsibilities and accountability and reporting mechanisms.*
- ✓ *It may be advisable to limit the role of private for-profit surrogacy intermediaries to matching and facilitating arrangements. Instances of intermediaries controlling all aspects of the process are concerning to the extent vulnerable surrogates are subject to uneven standards and practices in an unregulated industry.*
- ✓ *States should consider development of a government apparatus that either serves as a surrogacy intermediary and/or collects data on surrogacy services and monitors the activities of these private organizations.*

- ✓ *The global community should consider developing a transnational mechanism that replaces private agencies and fulfils a coordinating and monitoring function.*

2. SURROGATES

Various policies and regulations would protect women in the surrogacy process, ensuring voluntariness and informed consent; safeguarding reproductive rights and adequate access to health care; and ensuring fair contract terms and favorable working conditions.

a) ENSURING WOMEN'S CHOICE AND INFORMED CONSENT

Any woman who chooses to participate in surrogacy must do so voluntarily and with full knowledge of the process. The requirement of informed consent protects women's right to make decisions about their bodies and reproductive choices, and guards against any undue pressure, coercion and deception. Women's consent must be voluntary and informed as to every aspect of the process, including the decision to become pregnant, the conditions of the pregnancy (e.g., medical interventions and any restrictions on the surrogate's activities) and the process of birthing and post-natal medical care. Policies that would strengthen women's ability to provide informed consent include: a mandatory written agreement between the parties in a language understood by surrogate; regulations that determine the format and content of information provided to surrogate about the surrogacy process and implications; the provision of free independent counsel or advisor throughout the process to the surrogate⁵⁸²; mechanisms that ensure terms of surrogacy agreements are enforceable; and an independent body that is available to the surrogate for consultation, information and monitoring.

b) ADEQUATE STANDARDS OF MEDICAL CARE

The surrogacy process must be conducted in a manner that meets best practices in the field of reproductive medicine. It must be conducted by licensed medical professionals with adequate resources and facilities. Surrogate women must receive the necessary medical care prior, during and for a reasonable period of time after the pregnancy. Financial limitations or interference by third parties (whether it be intermediaries, intended parent(s) or others) can limit women's access to adequate health care. If the state in which surrogacy is taking place does not have the infrastructure for such medical care, regulations on surrogacy should ensure an alternate form of private care is provided to surrogates.

c) ENFORCEABLE AGREEMENTS AND ACCOUNTABILITY MECHANISMS

Surrogacy arrangements must be governed by contractual commitments, the minimal terms of which, must be set in law and enforceable through an effective and accessible mechanism. The state or transnational body should define minimal fair terms and provide adequate administrative and judicial mechanisms for their enforcement. In certain contexts, the contractual terms may be the only explicit provisions governing the parties' interactions and should, therefore, be aimed at protecting all parties. To best ensure fair terms, surrogates should be assisted or represented by legal counsel or an advisor, independent of the intermediary or intended parent(s).⁵⁸³

Contract terms must be reviewed to ensure they do not violate women's reproductive freedoms, freedom of movement or any other rights. Terms cannot, for example, compel a woman to terminate a pregnancy or to undergo a medical procedure involuntarily. They also cannot encroach on surrogates' freedom of movement by placing restrictions that are unreasonable or unnecessary to protect the health of the child. Contracts should be designed to provide protections to the surrogate against non-performance and non-payment. Where commercial surrogacy is legal, terms of the contract should ensure that women will be compensated for their labor at a fair rate, including where the process results in an unsuccessful pregnancy. Where there is risk of non-performance, states should consider requiring intended parent(s) to place an amount of money sufficient to cover the process in escrow in advance.

d) FAVORABLE CONDITIONS OF SURROGACY

Surrogates are entitled to favorable conditions during the surrogacy process, regardless of whether they are providing the service for commercial or altruistic reasons. Whether or not a state designates surrogacy as "work" or "labor", the conditions of surrogacy should be regulated, especially because the labor of surrogacy involves a commitment to the process for a fixed term. Conditions defined by regulations could include compensation mechanisms, benefits, and a protected right to unionize.

To ensure surrogates' human rights are protected throughout the surrogacy process, authors recommend consideration of the following:

- ✓ *Surrogates should be provided with adequate reproductive and maternal health care throughout the process, including during implantation, pregnancy and for a reasonable period of time following conclusion of the pregnancy. If the state cannot provide adequate care via a public health care system, an alternative private system may be employed, at no cost to the surrogate, as long as such a system is subject to regulation and monitoring.*
- ✓ *The informed consent of the surrogate at every stage of the surrogacy process, including all medical procedures and services, is critical to any surrogacy practice. Regulations should determine the format and content of information provided to surrogate about the surrogacy process and implications. The surrogate should receive independent advice and counsel on the process and the terms of any agreements.*
- ✓ *The state should require written agreements with minimal terms that are enforceable through an accessible administrative and/or legal mechanism. The terms of written agreements may not unduly infringe on the surrogate's bodily autonomy, freedom of movement or privacy.*
- ✓ *In the commercial context, measures should be put in place to ensure surrogates receive the appropriate support and compensation. States could require, for example, that intended parent(s) put the cost of the surrogacy process in escrow in advance of the initiation of the process.*

3. CHILDREN

The welfare of children born through surrogacy should be a primary concern of any surrogacy mechanism. Children's rights to be protected from exploitation and abuse, to have their best interest taken into account as primary consideration in all decisions involving them, and to have an identity, including legal parentage and citizenship, are all implicated in the practice of surrogacy.

a) PROTECTION FROM EXPLOITATION AND ABUSE

States have a duty under international law to protect children from exploitation and abuse. To prevent such abuses, states should put in place a mechanism to insure intended parent(s) are willing and able to care for the resulting child. For example, certain existing regulations require that intended parent(s) meet the same standards of fitness that are required for adoptions domestically.⁵⁸⁴ Pre-conception fitness determinations are advisable and should be made with regulatory guidance. Fitness determinations should not perpetuate stereotypes or discriminate against same-sex couples or single parents. States should not presume that the risk of exploitation solely arises from intended parent(s). In certain circumstances, as discussed above, the risks to children may be most acute from unscrupulous intermediaries, or from policies that interfere with the relationship between the child and intended parent(s).

b) BEST INTERESTS OF THE CHILD

The best interests of the child should guide all policies and mechanisms impacting children. As a consequence, even where a state bans surrogacy, the state should provide some mechanism for children born through surrogacy and intended parent(s) to remain together if that is in the best interest of the child. Children should not be discriminated against based on the conditions of their birth. Decisions about the best interest of the child in the surrogacy context should not be based on preconceived assumptions about the intended parent(s) and the practice of surrogacy but on a close examination of the best environment for the child to develop her or his full potential.

Careful review of surrogacy practices and policies should be made to determine how best to support children born through surrogacy. Important questions include whether the child should be able to access information about her or his genetic origins and heritage at a certain age.

c) RIGHT TO PARENTAGE AND CITIZENSHIP

No child born through surrogacy should be left stateless or have their right to identity, parentage and citizenship violated by state laws or the incompatibility of different states' laws on surrogacy and parentage. States must protect children's right to an identity, including legal parentage and citizenship. States must therefore recognize the legal relationship between the child and the intended parent(s) and grant citizenship to the child born to a surrogate abroad if that is in the child's best interest as determined above. States should avoid interference with child-parent relationship formed through surrogacy where there is no evidence of exploitation or abuse.

To protect rights of children born from surrogacy, authors recommend consideration of the following:

- ✓ *Surrogacy policy and regulations must ensure children born of surrogacy arrangements are protected from abuse and exploitation as well as raised in conditions that serve their best interests. Towards this end, pre-conception fitness determinations of the surrogate and intended parent(s) should be made. Regulation of intermediary organizations should also aim to protect the children born of surrogacy in addition to surrogate women and intended parent(s).*
- ✓ *Policies should also consider the particular needs of children born through surrogacy. For example, policies may allow children to access information about their genetic and gestational origin at a certain age.*
- ✓ *State policies on surrogacy should not deprive children of an identity, parentage, citizenship or leave children stateless. In fact, states should avoid interference with the parent-child relationship, even where surrogacy practices were not sanctioned.*

4. INTENDED PARENT(S)

Intended parent(s) have also been impacted by the lack of regulation and standards in the surrogacy industry. Intended parent(s) have been victims of fraud and misrepresentation by intermediary organizations. In some cases, such as in Cambodia, intended parent(s) have been denied parentage of their children birthed through the surrogacy process. Intended parent(s)' right to found a family and to do so without discrimination is implicated in policy decisions around surrogacy.

Childbearing through surrogacy is an important advancement in assisted reproduction for individuals unable to procreate through traditional means. Access to surrogacy has become an important path for same-sex couples to exercise their reproductive rights and found families. Similarly, older couples suffering from infertility and single parents are increasingly benefitting from surrogacy practices. In this context, surrogacy can enable enjoyment of the basic right to found a family for many previously unable to do so.

To protect the rights of intended parent(s) in the surrogacy process, authors recommend consideration of the following:

- ✓ *States should approach regulation of surrogacy practices in the context of efforts to address infertility and facilitate access to the benefits of assisted reproductive technologies. These technologies facilitate the founding and expansion of families in its various forms.*
- ✓ *States should adopt policies that enable transfer of parentage and citizenship for children born of surrogacy. State should prioritize avoiding interference in the relationship between a fit parent and child, especially when such interference will result in the child being placed in state care or raised, under compulsion, by an unwilling surrogate.*

- ✓ *States should enact regulations and monitoring mechanisms that assist intended parent(s) to identify intermediary organizations that will engage in surrogacy practices in a lawful and human rights-compliant manner.*
- ✓ *Fitness determinations of intended parent(s) should not perpetuate stereotypes or discriminate against same-sex couples or single parents.*
- ✓ *States should not presume that the risk of exploitation of children arises from intended parent(s) without evidence to support this presumption. Concerns about human trafficking and organ selling in surrogacy appear to be largely speculative at this stage and can lead to harsh policies that negatively impact well-meaning intended parent(s).*

A great deal is at stake in how the global community and state governments approach this emerging and now growing practice. For intended parent(s), it is the right to have a family that may be imperiled or taken away; for surrogate women it is the chance to earn a decent wage while providing a much needed service; for children born through surrogacy, it is the right to be protected and the right to citizenship and an identity; and for states, it is their ability to guarantee the safety and health of their people. Surrogacy ought to be regulated to prevent human rights abuses that can and have occurred, but the practice should not be banned. A human rights protective and promoting approach must work toward protecting the rights of all, striking the right balance through well informed and measured laws and policies.

¹ *Surrogacy*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

² *What are the International Surrogacy Laws by Country*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/what-are-the-international-surrogacy-laws-by-country/>.

³ Karen Smith Rotabi, Susan Mapp, Kristen Cheney, Rowena Fong, and Ruth McRoy, *Regulating Commercial Global Surrogacy: The Best Interests of the Child*, 2 J. HUM. RIGHTS SOC. WORK 64, 67 (2017).

⁴ Willem Ombelet and Johan Van Robays, *Artificial insemination history: hurdles and milestones*, 7 FACTS VIEWS VIS OBGYN 1, 140 (2015).

⁵ Erica Davis, *The rise of gestational surrogacy and the pressing need for international regulation*, 21 MINN J INT L 1, 120, 121 (Spring 2012).

⁶ The people who engage in surrogacy to obtain children are often called intended parent(s), and this term will be used throughout this report. Elsewhere, they may alternatively be referred to as “commissioning parents.”

⁷ Willem Ombelet and Johan Van Robays, *Artificial insemination history: hurdles and milestones*, 7 FACTS VIEWS VIS OBGYN 1, 140 (2015).

⁸ Erica Davis, *The rise of gestational surrogacy and the pressing need for international regulation*, 21 MINN J INT L 1, 120, 121 (Spring 2012).

⁹ Wulf Utian et. al, *Preliminary experience with in vitro fertilization-surrogate gestational pregnancy*, 52 FERT AND STERIL 1, 633-638 (2001).

¹⁰ Christopher Chen, *Pregnancy after human oocyte cryopreservation* 327, 8486 THE LANCET 1, 884-886 (1986).

¹¹ Viveca Söderström-Anttila, Ulla-Britt Wennerholm, Anne Loft, Anja Pinborg, Kristiina Aittomäki, Liv Bente Romundstad, and Christina Bergh, *Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review*, 22(2) HUMAN REPRODUCTION UPDATE 260, 261 (2015).

¹² *Id.*

¹³ For a full discussion on contextual factors and their implications for surrogacy policy, see Part V.

¹⁴ For a brief explanation of the surrogacy process including the role of gamete donors, see Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, Human Rights Council, A/HRC/37/60, para. 10 (2018). For a discussion of intermediaries, see for instance Jenni Millbank, *Rethinking Commercial Surrogacy in Australia*, 12 J. BIO. INQ. 477, 479 (2014). Concerning the implication of legal counsels, this is a requirement imposed by certain state laws in the United States. See 750 I.L.C.S. 47/20(a)(5); R.C.W.A. §26.26A.705(1)(e); N.R.S. 126.740(1)(b).

¹⁵ Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUMBIA LAW SCHOOL SEXUALITY & GENDER LAW CLINIC 6 (2016), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf.

¹⁶ *Id.*

¹⁷ *Id.* at 7-8.

¹⁸ See for instance Health Ethics, Population Health, Global & Public Health, *The Surrogacy Pathway: Surrogacy and the legal process for intended parent(s) and surrogates in England and Wales*, UK DEPARTMENT OF HEALTH AND SOCIAL CARE 8, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684275/surrogacy-guidance-for-intended-parents-and-surrogates.pdf. See also *About Surrogacy. What is altruistic surrogacy?* SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-altruistic-surrogacy/>.

¹⁹ See for instance *Surrogacy Compensation and Benefits*, WORLDWIDE SURROGACY SPECIALISTS LLC, <https://www.worldwidesurrogacy.org/how-are-surrogates-compensated>.

²⁰ Sarah Jefford, *Surrogacy: how much does it cost?*, <https://sarahjefford.com/altruistic-surrogacy-how-much-will-it-cost/>.

²¹ Henri Bodkin, *Couples paying £60,000 for surrogates despite UK system of 'reasonable expenses' only*, THE TELEGRAPH (July 2, 2018).

²² Kelton Tremellen and Sam Everingham, *For love or money? Australian attitudes to financially compensated (commercial) surrogacy*, 56 AUSTRALIAN AND NEW ZEALAND JOURNAL OF OBSTETRICS AND GYNECOLOGY 558, 562 (2016).

²³ *How much does surrogacy cost?* INTENDED PARENT(S), SURROGATE.COM, <https://surrogate.com/intended-parents/the-surrogacy-process/how-much-does-surrogacy-cost/>.

²⁴ THE PERMANENT BUREAU, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, THE HAGUE CONF. ON INT'L LAW 87 (2014), https://assets.hcch.net/upload/wop/gap2014pd03c_en.pdf.

²⁵ *Id.*

²⁶ Interview with U.S. surrogacy lawyer, by telephone (Feb. 25, 2019).

²⁷ Roli Srivastava, *Factbox: Which countries allow commercial surrogacy?*, THOMPSON REUTERS (Jan. 18, 2017), <https://www.reuters.com/article/us-india-women-surrogacy-fatcbox/fatcbox-which-countries-allow-commercial-surrogacy-idUSKBN1530FP>.

²⁸ *Id.*

²⁹ Now 47 of the 50 allow both altruistic and commercial surrogacy and this number is expected to increase. See *Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, CREATIVE FAMILY CONNECTIONS, LLC (2016), <http://www.creativefamilyconnections.com/us-surrogacy-law-map> (detailing each state's statutes on surrogacy and grouping similar legislation by color); See also *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, HAGUE CONF. ON PRIVATE INT'L LAW 94 (2014).

³⁰ Roli Srivastava, *Factbox: Which countries allow commercial surrogacy?*, THOMPSON REUTERS (Jan. 18, 2017), <https://www.reuters.com/article/us-india-women-surrogacy-fatcbox/fatcbox-which-countries-allow-commercial-surrogacy-idUSKBN1530FP>.

³¹ *Id.*

³² This is, for instance, the case in many US states (see references in the notes that follow).

³³ R.C.W.A. § 26.26A.705(1)(a) (Washington); 750 I.L.C.S. 47/20(a)(1) (Illinois); U.C.A. 1953 § 78B-15-801(6) (Utah). See also F.S.A. § 742.15(1) (18 years of age) (Florida); N.R.S. 126.580 (defining "Gestational carrier" as an "adult woman," though not specifying a precise age) (Nevada). But see V.T.C.A., Family Code § 160.756 (imposing no age requirement) (Texas); VA Code Ann. § 20-160 (same) (Virginia).

³⁴ *Overview of the Surrogacy Process*, HUMAN RIGHTS CAMPAIGN (2018), <https://www.hrc.org/resources/overview-of-the-surrogacy-process>.

³⁵ R.C.W.A. 26.26A.705(1)(b); 750 I.L.C.S. 47/20(a)(2); V.T.C.A., Family Code § 160.756(b)(5); VA Code Ann. § 20-160(B)(6); U.C.A. 1953 § 78B-15-803(2)(f).

³⁶ VA Code Ann. § 20-160(B)(7) (Virginia); 750 I.L.C.S. 47/20(a)(3); R.C.W.A. 26.26A.705(1)(c)-(d). See also N.R.S. 126.740 (requiring only a medical evaluation); F.S.A. § 742.15 (same).

³⁷ R.C.W.A. 26.26A.705(2)(a) (twenty-one-year-old minimum for intended parent(s)); U.C.A. 1953 § 78B-15-803(2)(i) (same); F.S.A. § 742.15(1) (eighteen-year-old minimum).

³⁸ Virginia requires a married, heterosexual couple. VA Code Ann. § 20-156 (providing a definition of "Intended parent(s)" that requires them to be "a man and a woman, married to each other"). Utah, Florida, and Texas also require marriage. U.C.A. 1953 § 78B-15-801(3); F.S.A. § 742.15(1); V.T.C.A., Family Code § 160.754(b).

³⁹ Florida, Illinois, and Virginia require genetic links. F.S.A. § 742.15(2)(e); 750 I.L.C.S. 47/10; VA Code Ann. § 20-160(B)(9). Washington, Texas, Utah and Nevada do not. R.C.W.A. 26.26A.705(2); V.T.C.A., Family Code § 160.754; U.C.A. 1953 § 78B-15-803; N.R.S. 126.590. Internationally, South Africa requires a genetic link. South Africa Children's Act 38 of 2005, §294.

⁴⁰ VA Code Ann. § 20-160(B)(9); U.C.A. 1953 § 78B-15-803(2)(b); V.T.C.A., Family Code § 160.756(b)(2); 750 I.L.C.S. 47/20(b)(2); F.S.A. § 742.15(2)(a). But see N.R.S. 126; R.C.W.A. 26.26A.705. South Africa and Belgium both require medical inability as well. South Africa Children's Act 38 of 2005, §295(a).

⁴¹ Virginia and Washington require both types of evaluations for intended parent(s). VA Code Ann. § 20-160; R.C.W.A 26.26A.705(2)(b)-(c). New Jersey requires a psychological evaluation only. N.J.S.A. 9:17-64(b)(1). Florida, Illinois, and Texas do not require any evaluations for intended parent(s), nor do South Africa or Belgium. F.S.A. § 742.15 (requiring medical evaluation for surrogate but no evaluation for intended parent(s)); 750 I.L.C.S. 47/20 (requiring medical and mental health evaluations for surrogates, but not intended parent(s)); V.C.T.A., Family Code § 160; U.C.A. 1953 § 78B-15-800; South Africa Children's Act 38 of 2005.

⁴² It is usually required that surrogacy agreements be in writing and signed by the surrogate and the intended parent(s); sometimes, the surrogate's partner must also sign the agreement. 750 I.L.C.S. 47/25(b); Cal. Fam. Code 7962(a)(b); UCA 1953 78B-15-801(1); F.S.A. § 742.15(1); N.R.S. 126.710.1; N.J.S.A. 9:17-65(a)(1); V.T.C.A., Family Code § 160.754; VA Code Ann. § 20-159.A; R.C.W.A. § 26.26A.710(4); South Africa Children's Act 38 of 2005 §292; South Australia Family Relationships Act 1975 §10HA.

⁴³ *Id.*

⁴⁴ F.S.A. § 742.15(3); N.R.S. 126.750.4; N.J.S.A. 9:17-65(b).

⁴⁵ V.T.C.A., Family Code § 160.756(b)(6); UCA 1953 78B-15-803(2)(g); N.J.S.A. 9:17-65(c), VA Code Ann. § 20-160.B(5).

⁴⁶ Interview with U.S. surrogate, by telephone (Jan. 31, 2019).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Sonia Allan, *The Surrogate in Commercial Surrogacy: Legal and Ethical Consideration*, in SURROGACY, HUMAN RIGHTS AND THE LAW, 111, 127 (P. Gerber & K. O'Byrne eds., 2015) (citing Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1448 (2009)). See also 750 I.L.C.S. 47/25(b)(3); N.J.S.A. 9:17-65(a)(3); Cal. Fam. Code 7962(b); N.R.S. 126.750.2; R.C.W.A. § 26.26A.710(7).

⁵¹ UCA 1953 78B-15-801(4); South Africa Children's Act 38 of 2005 §292(1)(e); VA Code Ann. § 20-160; R.C.W.A. § 26.26A.760.

⁵² This was for instance the case for the surrogates interviewed by the authors in Cambodia. See Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁵³ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019); See also *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, HAGUE CONF. ON PRIVATE INT'L LAW 94 (2014).

⁵⁴ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁵⁵ *Id.*

⁵⁶ Interview with Commissioning Parent, in Chicago, Illinois, U.S.A. (Jan. 31, 2019).

⁵⁷ According to the U.S. Center for Disease Control, only 26.2 percent of all IVF cycles result in live births. See Assisted Reproductive Technology (ART) Data, CENTERS FOR DISEASE CONTROL AND PREVENTION (2016).

⁵⁸ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019); Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL L.J. & PUB POL'Y 685, 693 (2018).

⁵⁹ Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL L.J. & PUB POL'Y 685, 693 (2018).

⁶⁰ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁶¹ Diane S. Hinson and Linda C. ReVeal, *Surrogacy in the Metropolitan Washington, DC Area*, THE INT'L COUNCIL ON INFERTILITY INFO. DISSEMINATION, <https://www.inciid.org/surrogacy-in-DC-and-Maryland>.

⁶² Interview with U.S. surrogate, by telephone (Jan. 31, 2019).

⁶³ 750 I.L.C.S. 47/25.

⁶⁴ Interview with U.S. surrogacy lawyer, by telephone (Feb. 25, 2019).

⁶⁵ This has been reported as a reason for restricting travel between Washington DC and Virginia, see Diane S. Hinson and Linda C. ReVeal, *Surrogacy in the Metropolitan Washington, DC Area*, THE INT'L COUNCIL ON INFERTILITY INFO. DISSEMINATION, <https://www.inciid.org/surrogacy-in-DC-and-Maryland>.

⁶⁶ Interview with U.S. policy maker in Chicago, Illinois (Feb. 14, 2019).

⁶⁷ 750 ILCS 47/35; Cal. Fam. Code §7962 (e); N.R.S. 126.720 ; U.C.A. 1953 § 78B-15-807; F.S.A. § 742.16; RCW 26.26A.750.

⁶⁸ 750 ILCS 47/35; Cal. Fam. Code §7962 (e); N.R.S. 126.720; RCW 26.26A.750 (the Washington statute provides that the procedure may be commenced and the court order made before or after birth of the child).

⁶⁹ U.C.A. 1953 § 78B-15-802 and 807.

⁷⁰ In Florida, intended parent(s) can only file for parentage after the birth; the original birth certificate is sealed once the new birth certificate is issued by court order. F.S.A. § 742.16(1) and 16(9).

⁷¹ 750 ILCS 47/35.

⁷² Cal. Fam. Code §7962 (e); N.R.S. 126.720; U.C.A. 1953 § 78B-15-802; F.S.A. § 742.16.

⁷³ 750 ILCS 47/35; Cal. Fam. Code §7962 (e); N.R.S. 126.720; U.C.A. 1953 § 78B-15-803; F.S.A. § 742.16(6).

⁷⁴ See, e.g., Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, J. SOC. ISSUES at 7 (2005) (reviewing existing psychology studies of surrogacy and concluding that it can be a positive experience for all parties.).

⁷⁵ See Sarah Huber, Sharvari Karandikar, & Lindsay Gezinski, *Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy*, 33 J. WOMEN & SOC. WORK 69 (2018) (interviewing 25 Indian surrogates and finding that they generally opposed India's surrogacy ban because it deprived both intended parent(s) and surrogates of valuable opportunities).

⁷⁶ See, e.g., Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India*, 29 CUMB. L. REV. 15, 51–56 (2008); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987) (analyzing surrogacy as the commodification of women's reproductive services and of children); Elizabeth Anderson, *Value in Ethics and Economics* 168 (1993) ("I will argue that contract pregnancy commodifies both women's labor and children in ways that undermine the autonomy and dignity of women and the love parents owe to children"); Richard A. McCormick, *Surrogacy: A Catholic Perspective*, 25 Creighton L. Rev. 1617, 1636 (1992) ("I find it difficult to see how any surrogacy arrangement does not reduce a woman to a means.").

⁷⁷ Fr. Jorge Miramontes, *Bishop Morlino explains the 'moral evil' of surrogacy* (The Catholic Herald, May 2017), <http://www.madisoncatholicherald.org/news/around-diocese/7054-moral-evil-of-surrogacy.html>; Sharmin Islam and Rusli Bin Nordin, *Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic Bioethics* 44 J OF THE ISLAM MED ASS OF NA 1, 1 (Apr 2013).

⁷⁸ See, e.g., Joseph G. Schenker, *Assisted Reproductive Practice: Religious Perspectives*, 10 REPRODUCTIVE BIOMEDICINE ONLINE 310, 315 (2005) (discussing objections to surrogacy by the Roman Catholic Church).

⁷⁹ Interview with Her Excellency Ing Kuntha Phavi from Cambodia's Ministry of Women's Affairs. (2019) (raising concerns about organ trafficking); interview with Cambodian investigative judge Kao Vandi (same); *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material* (2018) (raising concerns about sexual exploitation); Kathryn Webb Bradley, *Surrogacy and Sovereignty: Safeguarding the Interests of Both the Child and the State*, 43 N.C. J. INT'L L. 1 (2018) (same).

⁸⁰ See Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215 (1997) (summarizing the exploitation argument against surrogacy and collecting sources).

⁸¹ *Id.*

⁸² See Kishwar Desai, *India's Surrogate Mothers Are Risking Their Lives. They Urgently Need Protection*, THE GUARDIAN (Jun. 5, 2012), <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impooverished-die> (describing some of the abuses Indian surrogates have suffered).

⁸³ See, e.g., A. M. Capron & M. J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 59 (Larry Gostin ed., 1990).

⁸⁴ See, e.g., Karen Smith Rotabi, *Force, Fraud, and Coercion: Bridging from Knowledge of Intercountry Adoption to Global Surrogacy*, INTERNATIONAL FORUM ON INTERCOUNTRY ADOPTION AND GLOBAL SURROGACY 21 (2014) (arguing that in certain countries such as Guatemala, surrogacy cannot be practiced in a manner that protects human rights).

⁸⁵ See, e.g., R. Jo Kornegay, *Is Commercial Surrogacy Baby-Selling?*, 7 J. APPLIED PHIL. 45 (1990).

⁸⁶ Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995).

⁸⁷ Martha Nussbaum, *Whether from Reason or Prejudice*, 27 J. LEGAL STUDIES 693 (1998).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See, e.g., Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215 (1997) (arguing that even if surrogacy does exploit women in vulnerable positions, it may nonetheless be consensual and mutually beneficial, in which case it should not be prohibited).

⁹¹ See, e.g., Sharmila Rudrappa, *Why is India's Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT'L L. 70, 82 (2018).

⁹² See, e.g., Peter R. Brinsden, *Gestational Surrogacy*, 9 HUMAN REPRODUCTION UPDATE 483, 483 (2003) (citing J. Parkinson et al, *Perinatal Outcome After In-Vitro Fertilization-Surrogacy*, 14 HUM. REPROD. 671 (1999)); *Id.* At 486 (citing Paulo Serafini, *Outcome and Follow-up of Children Born after IVF-Surrogacy*, 7 HUM. REPROD. UPDATE 23 (2001)).

⁹³ M. Simopoulou, K. Sfakianoudis, P. Tsioulou, A. Rapani, G. Anifandis, A. Pantou, S. Bolaris, P. Bakas, E. Deligeoroglou, K. Pantos and M. Koutsilieris, *Risks in Surrogacy Considering the Embryo: From the Preimplantation to the Gestational and Neonatal Period*, 2018 BIOMED RES INT. (2018).

⁹⁴ See Vasanti Jadvā et al, *Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins*, 10 HUM. REPROD. 3008 (2012); Susan Golombok et al, *Families Created Through Surrogacy: Mother-Child Relationships and Children's Psychological Adjustment at Age 7*, 47 DEV. PSYCHOL. 1579 (2011); Susan Golombok et al, *Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2*, 47 J. CHILD PSYCHOL. & PSYCHIAT. 213 (2006); Susan Golombok et al, *Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the First Year of Life*, 40 J. DEV. PSYCHOL. 400 (2004).

⁹⁵ Vasanti Jadvā et al, *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUMAN REPRODUCTION 2196 (2003).

⁹⁶ Olga Van Den Akker, *Genetic and Gestational Surrogate Mothers' Experience of Surrogacy*, 21 J. REPRODUCTIVE & INFANT PSYCHOL. 145 (2003).

⁹⁷ Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, J. SOC. ISSUES at 7 (2005).

⁹⁸ *Id.* at 3.

⁹⁹ Though data on surrogate mothers in India is somewhat limited since clinics are not likely to share data with authors, there are indications that they are likely to be of lower social status and educational level, See Raywat Deonandan, *Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy*, 17 RISK MANAGEMENT AND HEALTHCARE POLICY 113 (2015).

¹⁰⁰ See Sharmila Rudrappa, *Why is India's Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT'L L. 70, 77 (2018) (finding that surrogates interviewed in India had not received information about the medical procedures they would undergo, including cesarean sections and "fetal reduction" operations to terminate unwanted embryos if too many embryos resulted in successful pregnancies); "Mala Naveen, Journalist and Author, Norway," *Reproductive Technology and Surrogacy*, NORDIC COUNCIL OF MINISTERS (2015) (stating that surrogates at several Indian clinics "had no knowledge about the hormones injected into them."); Miranda Davies, *Babies for Sale?: Transnational Surrogacy, Human Rights and the Politics of Reproduction* 267 (2017) (finding that surrogates in Mexico were "only vaguely familiar with their contracts."). See also Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL L.J. & PUB. POL'Y 685, 696–97 (2018) (finding that many surrogates interviewed in India did not know the contents of their contracts; that some surrogates did not have copies of the contracts; that at least one surrogate's contract was written in English, which she could not read; and that one contract even forbade the surrogate from keeping a copy of it); Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* 84 (2012) [hereinafter Hague Report] (reporting that one surrogate had "no idea....that she would have no say if the parents chose to have her abort the child"); Malene Tanderup, Sunita Reddy, Tulsi Patel, & Birgitte Burrr Nielsen, *Informed Consent in Medical Decision-Making in Commercial Gestational Surrogacy: A Mixed Methods Study in New Delhi, India*, 94 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 465 (2015) (interviewing 14 surrogates and 20 doctors and finding that surrogates in India were not adequately informed and that doctors rather than surrogates or intended parent(s) were making medical decisions).

¹⁰¹ See, e.g., Sharmila Rudrappa, *Why is India's Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT'L L. 70, 77 (2018) (finding that none of surrogates interviewed in India received post-natal care); Miranda Davies, *Babies for Sale?: Transnational Surrogacy, Human Rights and the Politics of Reproduction* 270 (2017) (reporting that surrogates often give birth through caesarian sections, which are riskier for surrogates, solely for the convenience of intended parent(s));

Id. at 270–71 (describing case where surrogate did not receive medical assistance until the twin fetuses she had been carrying had been dead for over a week, at which point she was sent away from the clinic without full compensation or follow-up health care, or access to her medical records); Kevin Ponniah, *In Search of Surrogates, Foreign Couples Descend on Ukraine*, BBC NEWS (Feb. 13, 2018), <https://www.bbc.com/news/world-europe-42845602> (one surrogate in the Ukraine reporting that “some surrogates had health problems that were not diagnosed correctly or treated on time, leading to complications.”).

¹⁰² Usha Rengachary Smerdon, *India, in*, INT’L SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 216 (Katarina Trimmings & Paul Beaumont ed., 2013); *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, HAGUE CONF. ON PRIVATE INT’L LAW 83 (2014).

¹⁰³ Kanchan Srivastava, *Woman Loses Uterus after Becoming Surrogate Thrice*, DNA (Dec. 27, 2011); Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS: J. WOMEN IN CULTURE & SOC. 969, 975 (2010).

¹⁰⁴ See, e.g., Miranda Davies, *Babies for Sale?: Transnational Surrogacy, Human Rights and the Politics of Reproduction* 269 (2017) (reporting that some contracts in Mexico forbade surrogates from terminating pregnancies even if their lives were at risk); Sheela Saravan, *Addressing Global Inequalities in Surrogacy*, HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 42 (E. Scott Sills, ed. 2016) (finding that surrogates in India received only fifteen to twenty percent of the total amount paid by intended parents); Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL L.J. & PUB. POL’Y 693, 685–715 (2018) (finding that many surrogates in India were not permitted to leave surrogacy hostels during the duration of the process, except under special circumstances); Kishwar Desai, *India’s Surrogate Mothers Are Risking Their Lives. They Urgently Need Protection*, THE GUARDIAN 73 (Jun. 5, 2012), <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die> (surrogates often assume liability for all medical, psychological, and financial risks of surrogacy process); Shaikh Azizur Rahman, *Indian Surrogate Mothers Suffer Exploitation*, AL JAZEERA 22 (Mar. 27, 2015), <http://www.aljazeera.com/news/asia/2014/03/indian-surrogate-mothers-suffer-exploitation-20143276727538166.html>. [<http://perma.cc/CAG8-4VLY>] (surrogates in India were not covered for post-delivery complications); Kevin Ponniah, *In Search of Surrogates, Foreign Couples Descend on Ukraine*, BBC NEWS (Feb. 13, 2018), <https://www.bbc.com/news/world-europe-42845602> (Ukrainian agencies refused to pay surrogates who failed to obey strict requirements or who miscarried); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India*, 39 CUMB. L. REV. 15, 211 (2008) (surrogate forced to choose between aborting fetus and paying medical expenses herself).

¹⁰⁵ See Sarah Huber, Sharvari Karandikar, & Lindsay Gezinski, *Exploring Indian Surrogates’ Perceptions of the Ban on International Surrogacy*, 33 J. WOMEN & SOC. WORK 69 (2018) (interviewing 25 surrogates and finding that surrogates opposed the ban because it denied opportunities for surrogates and intended parent(s)).

¹⁰⁶ Sharvari Karandikar, Lindsay Gezinski, & Sarah Huber, *Exploring the Physical and Emotional Stress of Surrogate Pregnancy among Transnational Indian Surrogates*, 60 INT’L SOC. WORK 1433, 1439 (2017) (study finding that surrogates in India made important financial achievements, such as sending children to school, as a result of surrogacy); Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 J. WOMEN IN CULTURE & SOCIETY 969, 988 (describing a surrogate who built a house with money from surrogacy, and wanted to do surrogacy “again and again” in order to support her children);

Danielle Preisse & Pragati Shahi, *The Dwindling Options for Surrogacy Abroad*, THE ATLANTIC (May 31, 2016), <https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/> (describing a surrogate who used her earnings to “pay for her two sons’ schooling, care for her in-laws, and pay her sister-in-law’s dowry, saving her from abuse by her own in-laws”).

¹⁰⁷ In *Paradiso and Campanelli v. Italy*, (Appl. No. 25358/12) Judgment of 27 January 2015, a child was born through surrogacy to intended parent(s) from Italy. The intended parent(s) were considered the legal parents of the child in Russia, where the child was born, but were not recognized as legal parents in Italy because there was no genetic link. As a result, the child was placed with foster parents and put up for adoption. In another case, twins were born to a surrogate in Ukraine with intended parent(s) from the United Kingdom. Since Ukrainian law recognized the intended parent(s) as legal parents, the children did not receive Ukrainian citizenship, and since the United Kingdom recognized the surrogate as the legal parent, the children did not receive British citizenship either. They were only permitted to enter the United Kingdom when the Border Agency agreed to make an exception for them. Claire Fenton-Glynn, *International Surrogacy before the European Court of Human Rights*, 13 J PRIVATE INT’L L. 546, 547–48 (2017). A similar issue arose when German intended parent(s) had a child through surrogacy in India, and the child was only permitted to enter Germany after two years of litigation and the German government’s agreement to make a one-time exception. *Id.* at 548. See also Sharmila Rudrappa, *Why is India’s Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT’L L. 70, 71–72 (2018) (describing similar cases).

¹⁰⁸ JA Parks and TF Murphy, *So not mothers: responsibility for surrogate orphans*, 44(8) J MED ETHICS 551-554 (2018).

¹⁰⁹ For instance, in the “Volden Case” a single mother in Norway commissioned a surrogate from India to carry twins from anonymous sperm donor and an Indian egg donor. Once born, India would not allow the children Indian citizenship due to Indian Legal Surrogacy Laws. Norway would not allow Norwegian citizenship because surrogacy is illegal there. See Emma Batha, *International surrogacy traps babies in stateless limbo*, THOMSON REUTERS (Sept. 18, 2014), <https://uk.reuters.com/article/uk-foundation-statelessness-surrogacy/international-surrogacy-traps-babies-in-stateless-limbo-idUKKBN0HD1A120140918>.

¹¹⁰ See the discussion of *Paradiso and Campanelli v. Italy* in note 107.

¹¹¹ Various terms are used to classify countries where surrogacy takes place as compared to countries where intended parent(s) come from. This report will refer to these as “providing countries” and “receiving countries,” respectively.

¹¹² *The history of surrogacy: a legal timeline*, WORLD WIDE SURROGACY (Aug 2018), <https://info.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline>.

¹¹³ Heather Dillaway, *Mothers for others: a race, class, and gender analysis of surrogacy* 34 INTER J OF SOC OF THE FAM 1, 302 (Autumn 2008).

¹¹⁴ *Id.* at 312-313.

¹¹⁵ David Ruppe, *Surrogacy prevails where banned via internet*, ABC NEWS (Aug. 2001), <https://abcnews.go.com/International/story?id=80610&page=1>; See also *Surrogate Mother Costs* (West Coast Surrogacy, 2019) (finding that prices now range on average from approximately 90,000 to 130,000), <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost>.

¹¹⁶ Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry it*, N.Y. TIMES (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>.

¹¹⁷ Frank Langitt, *Made in the USA: Childless Chinese Turn to American Surrogates*, NPR (April 21, 2014), <https://www.npr.org/sections/parallels/2014/04/21/305514689/made-in-the-u-s-a-childless-chinese-turn-to-american-surrogates?ft=1&f=>.

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- ¹¹⁸ S.s. Das and Priyanka Maut, *Commercialization of surrogacy in India* 1, 6 DIBRUGARH UNIVERSITY (2014).
- ¹¹⁹ *Id.*
- ¹²⁰ Cyra Akila Choudhury, *Transnational Commercial Surrogacy: Contracts, Conflicts and the Prospects of International Legal Regulation*, OXFORD HANDBOOKS ONLINE (Dec. 2016)
<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-38?print=pdf>.
- ¹²¹ There is little data on surrogate mothers in India because clinics are not likely to share data with authors. There are indications that they are likely of lower social status and educational level, See Raywat Deonandan, *Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy*, 17 RISK MANAGEMENT AND HEALTHCARE POLICY 113 (2015).
- ¹²² Nishat Hyder, *India Limits Surrogacy Visas to Married Couples*, BioNews (Jan. 21, 2013),
https://www.bionews.org.uk/page_93959.
- ¹²³ Sharmila Rudrappa, *Why is India's Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT'L L. 70, 70-71 (2018).
- ¹²⁴ Sharmila Rudrappa, *Reproducing Dystopia: The Politics of Transnational Surrogacy in India*, 2 CRIT SOC 2002-2015 (Nov 2017).
- ¹²⁵ Brosnwyn Parry, *Surrogate labour: exceptional for whom?* 47(2) ECON SOC. 214-233 (Jul. 25, 2018).
- ¹²⁶ See, e.g., Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN JOURNAL OF GENDER STUDIES 141, 165–66 (2009).
- ¹²⁷ S.s. Das and Priyanka Maut, *Commercialization of Surrogacy in India* 1, 6 (Dibrugarh University, 2014).
- ¹²⁸ Laignee Barron & Mom Kunthear, *'Baby Factory' Suspect Living in Cambodia*, PHNOM PEN POST, Aug.18, 2014,
<http://www.phnompenhpost.com/national/%E2%80%98baby-factory%E2%80%99-suspect-living-cambodia>.
[\[http://perma.cc/J3EE-BY2H\]](http://perma.cc/J3EE-BY2H).
- ¹²⁹ *Id.* See also, Nilanjana Bhowmick, *After Nepal, India surrogacy clinics move to Cambodia*, ALJAZEERA (Jun 2016),
<https://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html>.
- ¹³⁰ See Masayuki Kodama, *Risks Present in the Cambodian Surrogacy Business*, 27 EUBIOS J OF ASIAN AND INT'L BIOETHICS at 40(2017); Patricia Fronek, *Current Perspectives on the Ethics of Selling International Surrogacy Support Services*, 8 MEDICOLEGAL AND BIOETHICS 11, 12 (2018).
- ¹³¹ See, e.g., Paul Toohey & Michael Sainsbury, *Final Battle for Babies*, DAILY TELEGRAPH (SYDNEY) (May 21, 2017).
- ¹³² Cyra Akila Choudhury, *Transnational Commercial Surrogacy: Contracts, Conflicts and the Prospects of International Legal Regulation*, OXFORD HANDBOOKS ONLINE (Dec. 2016)
<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-38?print=pdf>.
- ¹³³ *Surrogacy in Cambodia*, SENSIBLE SURROGACY, (2019), <https://www.sensible-surrogacy.com/surrogacy-in-cambodia/>.
- ¹³⁴ Jared Ferrie, *Cambodia frees 32 surrogate mothers charged with human trafficking*, THOMSON REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>.

¹³⁵ Husain Haider, *Stronger surrogacy law anticipated*, THE PHNOM PENH POST (Dec. 25, 2018), <https://www.phnompenhpost.com/national/stronger-surrogacy-law-anticipated>.

¹³⁶ Danielle Keeton-Olsen and Sineat Yon, *Poverty and demand from China fuel illegal Cambodia surrogacy*, ALJAZEERA (Dec. 12, 2018), <https://www.aljazeera.com/news/2018/12/poverty-demand-china-fuel-illegal-cambodia-surrogacy-181211042242119.html>.

¹³⁷ *Surrogacy in Cambodia*, SENSIBLE SURROGACY, (2019) <https://www.sensiblesurrogacy.com/surrogacy-in-cambodia/>.

¹³⁸ *Nigeria: surge in surrogacy despite lack of legislation* (Africa News, 2018), <https://www.africanews.com/2018/12/27/nigeria-surge-in-surrogacy-despite-lack-of-legislation/>.

¹³⁹ Madeline Roache, *Ukraine's 'baby factories': The human cost of surrogacy*, ALJAZEERA (May 21, 2017), <https://www.aljazeera.com/indepth/features/ukraine-baby-factories-human-cost-surrogacy-180912201251153.html>.

¹⁴⁰ See e.g. Human Rights Council, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60 (2018); American Bar Association, Section of Family Law, Section of Real Property, Trust and Estate Law, Section of Science and Technology Law, Report to the House of Delegates and Resolution (February 2016) 16, https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf.

¹⁴¹ For instance, the Committee on the Rights of the Child and the Cambodian Government have expressed these concerns. See CRC/C/OPSC/USA/CO/2, at para 29; CRC/C/IND/CO/3-4, at para. 57 (d); CRC/C/MEX/CO/4-5, at para. 69 (b); CRC/C/OPSC/USA/CO/3-4, at para. 24; and CRC/C/OPSC/ISR/CO/1, at para. 28; and interview of Cambodian public officials. The Special Rapporteur on the sale and sexual exploitation of children published a report in January 2018 which examines under what circumstances surrogacy amounts to the sale of children. See Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/HRC/37/60 (2018); David M. Smolin, "Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children," 43(2) PEPPERDINE LAW REVIEW 265-344 (2016).

¹⁴² Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article 2.

¹⁴³ *Id.* at Art. 35.

¹⁴⁴ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article 3. See also Report of the Special Rapporteur of the Human Rights Council on the Sale of Children, Child Prostitution and Child Pornography, Sale of Children and Forced Labour, A/71/261, 1 Aug. 2016.

¹⁴⁵ UNICEF, Implementation Handbook for the Convention on the Rights of the Child 143, 531-39 (2007).

¹⁴⁶ *Id.* at 531.

¹⁴⁷ Commission on Human Rights, Rights of the Child. Sale of Children. Report submitted by Mr. Vitit Muntarbhorn. Special Rapporteur appointed in accordance with Commission resolution 1990/68, E/CN.4/1992/55 (1992). J.H.A. van Loon, Report on Intercountry Adoption, HAGUE CONF.ON PRIV.INT'L L.(Apr. 1, 1990) ¶ 80 [hereinafter van Loon], https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf (The Report identified rumors of "trafficking in fetuses and the use of children for organ transplants" but was unable to verify any such cases.).

¹⁴⁸ Authors interviewed two blind adults who were being assisted by a non-profit. Interviewees indicated that due to poverty and necessity, they had previously sold a child. Interview with T parents, in Phnom Penh, Cambodia (Mar. 25, 2019).

¹⁴⁹ Preamble, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. This is also reflected in Article 3 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which prohibits sale of children for the purpose of exploitation.

¹⁵⁰ This is also reflected in Article 3 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which prohibits offering money to parents to convince them to give up their child for adoption.

¹⁵¹ Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Article 4(c)(3). See also Report of the Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography, A/HRC/34/55, 22 Dec. 2016 (on illegal adoptions).

¹⁵² J.H.A. van Loon, *Report on Intercountry Adoption*, HAGUE CONF. ON PRIV. INT'L L. (Apr. 1, 1990) ¶ 78-81, https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf.

¹⁵³ *Fornero and Daughter v. Argentina*, Judgement, Series C. No. 242 (IACtHR, Apr. 27, 2012).

¹⁵⁴ Jason K.M. Hanna, *Revisiting Child-Based Objections to Commercial Surrogacy*, 24(7) *BIOETHICS* 341–47 (2010).

¹⁵⁵ In her report on surrogacy and the sale of children, the Special Rapporteur on the sale and sexual exploitation of children recognizes that truly altruistic surrogacy does not constitute sale of children. Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/HRC/37/60 (2018) para. 69.

¹⁵⁶ In her report on surrogacy and the sale of children, the Special Rapporteur on the sale and sexual exploitation of children recognizes that commercial surrogacy does not constitute the sale of children when certain regulations are in place. Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/HRC/37/60 (2018) para. 72.

¹⁵⁷ See generally, Jason K.M. Hanna, *Revisiting Child-Based Objections to Commercial Surrogacy*, 24(7) *BIOETHICS* 341–47 (2010); Michael Meyer, “The Ideas of Selling in Surrogate Motherhood” 4 *Public Affairs Quarterly* 175 (1990).

¹⁵⁸ See generally David Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43(2) *PEPPERDINE LAW REVIEW* 265 (2016); Daniela Danna, *Contract Children: Questioning Surrogacy* (2015). For further discussion of the interests of children in surrogacy, see *infra* Part III(C)(I).

¹⁵⁹ Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 *ILSA J. INT’L & COMP. L.* 369 (2012) 380; Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities*, 20 *MICH. ST. U. COLL. L. REV.* 259 (2012) 268.

¹⁶⁰ The Special Rapporteur also makes this recommendation in her report. Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/HRC/37/60 (2018) para. 73.

¹⁶¹ David Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43(2) *PEPPERDINE LAW REVIEW* 265 (2016).

¹⁶² CEDAW; 2002 Protocol to Prevent, Suppress and Punish Trafficking Persons, Especially Women and Children; ASEAN Convention Against Trafficking in Person, Especially Women and Children.

¹⁶³ The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, art. 3(a), U.N. Doc. A/45/49 (Vol. I) (2001).

¹⁶⁴ Richard S. Ehrlich, *Taiwan Company Accused of Trafficking Vietnamese Women to Breed*, THE WASHINGTON TIMES (Mar. 6, 2011), <https://www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffick-vietnam-women-breed/>.

¹⁶⁵ See e.g. J.H.A. van Loon, *Report on Intercountry Adoption*, HAGUE CONF. ON PRIV. INT'L L. (Apr. 1, 1990) ¶ 78-81, https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf (The Report identified rumors of "trafficking in fetuses and the use of children for organ transplants" but was unable to verify any such cases.).

¹⁶⁶ See e.g. Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN JOURNAL OF GENDER STUDIES 141 (2009); Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements*, 33 JOURNAL OF APPLIED PHILOSOPHY 125 (2016).

¹⁶⁷ Protective measures have for instance been put into place by several US states which allow surrogacy, such as Illinois, Washington, Texas and New Jersey. See R.C.W.A. § 26.26A.700 ff (Washington); 750 I.L.C.S. 47/ ff (Illinois); V.T.C.A., Family Code § 160.751 ff (Texas); N.J.S.A. 9:17-60 ff (New Jersey). South Africa has also put in place extensive and protective surrogacy regulations. See South Africa Children's Act 38 of 2005, §292 ff.

¹⁶⁸ For instance, in the state of Washington, surrogate have a right to the legal counsel of her choosing during the whole duration of the surrogacy arrangement. R.C.W.A. § 26.26A.705(1)(e).

¹⁶⁹ For instance, in South Africa and the state of Washington, the agreement must be validated in court before the procedure starts. South Africa Children's Act 38 of 2005 §292(1)(e); R.C.W.A. § 26.26A.760.

¹⁷⁰ See generally, I. Glenn Cohen, *Medical Tourism and the Creation of Life: A Study of Fertility Tourism in Patients with Passports: Medical Tourism, Law and Ethics* (2014); *Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers*, AMNESTY INTERNATIONAL (May 2016).

¹⁷¹ Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN JOURNAL OF GENDER STUDIES 141 (2009); Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements*, 33 JOURNAL OF APPLIED PHILOSOPHY 125 (2016).

¹⁷² Article 8 ICCPR, the ILO Forced Labor Convention, and regional treaties such as Article 4 ECHR, Article 5 of the Charter of Fundamental Rights of the EU, Article 6 of the American Convention on Human Rights, Principle 13 of the ASEAN Human Rights Declaration.

¹⁷³ Int'l Labour Org. [ILO], *Forced Labour Convention*, 1930, art. 2(1), C29 (June 28, 1930) [hereinafter *Forced Labour Convention*].

¹⁷⁴ ILO, *What is forced labour, modern slavery and human trafficking*, <https://www.ilo.org/global/topics/forced-labour/definition/lang—en/index.htm>.

¹⁷⁵ See, e.g., Kanchan Srivastava, *Woman Loses Uterus after Becoming Surrogate Thrice*, DNA (Dec. 27, 2011) (surrogate tried to decline a third pregnancy attempt after two failures, but agreed to avoid paying a large fee to the surrogacy clinic).

¹⁷⁶ For instance, this protection is guaranteed by the US states of Utah, Virginia, and Washington. U.C.A. 1953 § 78B-15-806(1); VA Code Ann. § 20-161.A; R.C.W.A. § 26.26A.735(1); V.T.C.A., Family Code § 160.759(a).

¹⁷⁷ R.C.W.A. § 26.26A.735(2)(3).

¹⁷⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 2000, para. 8; Committee on Economic, Social and Cultural Rights, General Comment No. 22: On the Right to Sexual and Reproductive Health (Art. 12), E/C.12/GC/22, 2 May 2016.

¹⁷⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 2000, para. 8; Committee on Economic, Social and Cultural Rights, General Comment No. 22: On the Right to Sexual and Reproductive Health (Art. 12), E/C.12/GC/22, 2 May 2016; Committee on the Rights of Persons with Disabilities, General Comment. 3: Article 6: Women and Girls with Disabilities, CRPD/C/GC/3 (2016) ¶ 40,44; Committee on Civil and Political Rights, *Amanda Jane Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016) para 7.8; Committee on Civil and Political Rights, *Siobhán Whelan v. Ireland*, CCPR/C/119/D/2425/2014 para. 7.9 (2017); *Pretty v. The United Kingdom*, 2346/02 Eur. Ct. H.R. (2002) (citing to paragraph 61); *Artavia Murrillo et al. v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

¹⁸⁰ Committee on Civil and Political Rights, *Amanda Jane Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016) para 7.8; Committee on Civil and Political Rights, *Siobhán Whelan v. Ireland*, CCPR/C/119/D/2425/2014 para. 7.9 (2017); Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 2000, para. 8. The European Court of Human Rights has also encompassed bodily integrity under the right to privacy; see for instance *Pretty v. The United Kingdom*, 2346/02 Eur. Ct. H.R. (2002) (citing to paragraph 61).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Committee on Civil and Political Rights, *M.T. v. Uzbekistan*, CCPR/C/114/D/2234/2013 para. 2.1–2.14 (2015); *I.V. v. Bolivia*, Petition 270-07, Inter-Am. Comm’n H.R., Report No. 40/08, OCEA/Ser.L/V/II.134, doc. 5 rev., para. 1-2 and 80 (2008); Committee on the Elimination of Discrimination Against Women, *Szijarto v. Hungary*, CEDAW/C/36/D/4/2004 (2006) para. 2.2–2.3.

¹⁸⁴ Committee on Civil and Political Rights, *Amanda Jane Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016) para 7.8; Committee on Civil and Political Rights, *Siobhán Whelan v. Ireland*, CCPR/C/119/D/2425/2014 para. 7.9 (2017). Article 14 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa also protects women’s reproductive rights in relation to abortion. African Union, *The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, 4 (July 11, 2003), http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

¹⁸⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 2000, para. 14.

¹⁸⁶ Article 16(1)(e) CEDAW.

¹⁸⁷ For a definition of reproductive rights, see ICPD Programme of Action 1994, para 7.3.

¹⁸⁸ See *infra* Part I(D).

¹⁸⁹ Interview with Commissioning Parent, in Chicago, Illinois, U.S.A. (Jan. 31, 2019).

¹⁹⁰ Mala Naveen, Journalist and Author, Norway, “*Reproductive Technology and Surrogacy*,” NORDIC COUNCIL OF MINISTERS (2015); Sharmila Rudrappa, Why is India’s Ban on Commercial Surrogacy Bad for Women?, 43 N. C. J. INT’L L. 70, 77 (2018).

¹⁹¹ Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 Cornell L.J. & Pub. Pol’y 693, 685-715 (2018) (finding that many surrogates in India were not permitted to leave surrogacy hostels during the duration of the process, except under special circumstances).

¹⁹² Kevin Ponniah, *In Search of Surrogates, Foreign Couples Descend on Ukraine*, BBC NEWS (Feb. 13, 2018), <https://www.bbc.com/news/world-europe-42845602>; Sharmila Rudrappa, *Why is India’s Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT’L L. 70, 77 (2018).

¹⁹³ See e.g. Amnesty International, *Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers* (May 2016); Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN JOURNAL OF GENDER STUDIES 141 (2009).

¹⁹⁴ See *infra* Part II(C).

¹⁹⁵ Sarah Huber et al, Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy, 33 J. OF WOMEN & SOCIAL WORK 69, 74 (2017).

¹⁹⁶ *Id.*

¹⁹⁷ See, for instance U.C.A. 1953 § 78B-15-806(1); V.T.C.A., Family Code § 160.759(a); VA Code Ann. § 20-161(A) (allowing surrogates to terminate a surrogacy arrangement either before the IVF process begins, or after an unsuccessful attempt has concluded but before a new attempt is initiated); see also 750 I.L.C.S. 47/25(c)(3); N.J.S.A. 9L17-65(b)(1)(c), N.R.S. 126.750(4)(c) (allowing surrogates to choose their own physicians; see also R.C.W.A. 26.26A.765(1)(b) (allowing surrogates the right to change their minds up to 48 hours after birth and retain custody of the child).

¹⁹⁸ *Amanda Mellet v. Ireland* (UN Human Rights Committee, 2016), ¶¶ 1 - 3.20, 7.2 - 10, and Annex II: Individual opinion of Committee member Sarah Cleveland (concurring).

¹⁹⁹ CEDAW Art. 11.

²⁰⁰ ACHPR Art. 2; ACHR Art. 1, 17, 24; ECHR Art. 14; ICCPR Art. 3; CESCR Art. 2; CEDAW Art. 1, 16. See generally *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para. 8.15; *K.L. v. Peru*, CCPR/C/85/D/1153/2003, para. 6.4; *V.D.A. v. Argentina*, CCPR/C/101/D/1608/2007, para. 9.3.

²⁰¹ C. O'Connell & C. Zampas, *The Human Rights Impact of Gender Stereotyping in the Context of Reproductive Health Care*, 144 INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS 116 (2019). For more on addressing stereotypes in removing discriminatory impact of state practices see OHCHR, *Realisation of the Equal Enjoyment of the Right to Education by Every Girl* (2017); CEDAW Art. 5, 10(c); CRC Art. 2; CEDAW/C/GRC/CO/7, para. 27 (b); CEDAW/C/ALB/CO/3, para. 31; CEDAW/C/BEN/CO/4, para. 27 (c). See also Committee on the Elimination of Discrimination against Women, General Comment No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, CEDAW/C/GC/37, 7 Feb. 2018 (noting how seemingly neutral harms/burdens tend to exacerbate pre-existing inequalities, thereby compounding discrimination).

²⁰² See e.g., Amnesty International, "Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers" (May 2016).

²⁰³ Article 23(1) UDHR, Article 6 ICESCR, Article 11 CEDAW, Article 15 of the Charter of Fundamental Rights of the EU, Principle 27(1) of the ASEAN Human Rights Declaration.

²⁰⁴ *Work*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

²⁰⁵ For further discussion of this point, see *infra* Part III(B)(3).

²⁰⁶ See e.g., Amnesty International, "Sex Workers at Risk: A Research Summary of Human Rights Abuses Against Sex Workers" (May 2016); Working Group on the issue of discrimination against women in law and in practice, "Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends" Oct. 2017, *available at* <https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>.

²⁰⁷ Martha C. Nussbaum, "'Whether from Reason or Prejudice': Taking Money for Bodily Services", 27 Journal of Legal Studies 693 (1998).

²⁰⁸ Article 7 ICESCR.

²⁰⁹ Committee on Economic, Social and Cultural Rights, General Comment No 23 (2016) on the right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights) para. 47(j) (2016).

²¹⁰ See e.g., 750 I.L.C.S. 47/25 (which requires a written contract); See also N.R.S. 126.700 (stating that a donor or the donors and the intended parent or parents may enter into a written agreement).

²¹¹ See e.g., 750 I.L.C.S. 47/20(a)(6) (stating that surrogates should have adequate health insurance). See also N.R.S. 126.750(5)(c) (a gestational agreement is enforceable if it contains the agreement of the intended parent or parents to pay the gestational carrier reasonable compensation); N.R.S. 126.750(5)(d) (if it contains the agreement of the intended parent or parents to pay for or reimburse the gestational carrier for reasonable expenses including, without limitation, medical, legal or other professional expenses, related to the gestational carrier arrangement and the gestational agreement).

²¹² Sharmila Rudrappa, *Why is India's Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT'L L. 70, 87 (2018); Shaikh Azizur Rahman, *Indian Surrogate Mothers Suffer Exploitation*, AL JAZEERA (Mar. 27, 2015), <http://www.aljazeera.com/news/asia/2014/03/indian-surrogate-mothers-suffer-exploitation-20143276727538166.html>. [<http://perma.cc/CAG8-4VLY>].

²¹³ Interview with C in Phnom Penh, Cambodia (Mar. 29, 2019); Interview with Service Provider A in Phnom Penh, Cambodia (Mar. 22, 2019).

²¹⁴ Shaikh Azizur Rahman, *Indian Surrogate Mothers Suffer Exploitation*, AL JAZEERA (Mar. 27, 2015), <http://www.aljazeera.com/news/asia/2014/03/indian-surrogate-mothers-suffer-exploitation-20143276727538166.html>. [<http://perma.cc/CAG8-4VLY>].

²¹⁵ Convention on the Rights of the Child, GA Res. 44/25, adopted 20 November 1989. See also African Charter on the Rights and Welfare of the Child, 1990.

²¹⁶ Committee on the Rights of the Child, General Comment No 5 (2003), General Measures of Implementation of the CRC (arts 2, 42 and 44, para 6), (CRC/GC/2003/5), at paras 1, 9, 45.

²¹⁷ American Bar Association, Section on Family Law, Section of Real Property, Trust and Estate Law Section of Science and Technology Law, Report to the House of Delegates and Resolution (2015) 15-16 ("Before a child is born, there is limited (or no) basis from his or her experience to attribute a 'best interest,' and a best-interests analysis could simply become a pre-determination of whether the child's best interests is in being born at all."). Committee on the Rights of the Child urged states to ensure Convention rights could be extended beginning from early childhood, explaining that the definition was "to encourage recognition of young children as social actors from the beginning of life, with particular interests, capacities and vulnerabilities and of requirements for protection..." In General Comment No. 7, the Committee defines early childhood as: "all young children: at birth and throughout infancy during the preschool years; as well as during the transition to school." Committee on the Rights of the Child, General Comment No. 7 (2005) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1 (Sept. 20, 2006) ¶ 4.

²¹⁸ Committee on the Rights of the Child, General Comment No 7 (2005), Implementing Child Rights in Early Childhood (CRC/C/GC/Rev 1), at para 12.

²¹⁹ See generally, Committee on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, CRC/C/GC/14, 29 May 2013.

²²⁰ Committee on the Rights of the Child, General Comment No 7 (2005), Implementing Child Rights in Early Childhood (CRC/C/GC/Rev 1), at para 13; Committee on the Rights of the Child, General Comment No 5 (2003), General Measures of Implementation of the CRC (arts 2, 42 and 44, para 6), (CRC/GC/2003/5), at paras 54, 56, 66.

²²¹ *Mennesson v. France* (Application No 65192/11) 26 June 2014 and *Labassee v. France* (Application No 65941/11) 26 June 2014.

²²² *Id.*

²²³ Committee on the Rights of the Child, General Comment No 14 (2013), On the Right of the Child to have his or her Best Interests taken as a Primary Consideration (art 3, para 1), (CRC/C/GC/14), para 59.

²²⁴ S Golombok et al, 'The European Study of Assisted Reproduction Families: the transition to adolescence' (2002) 17(3) Human Reproduction 830; S Golombok et al, 'Parenting infants conceived by gamete donation' (2004) 18(3) Journal of Family Psychology 443; S Golombok et al, 'Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006) 21 Human Reproduction 1918; E Illoio and S Golombok, 'Psychological adjustment in adolescents conceived by assisted reproduction techniques: a systematic review' (2015) 21(1) Human Reproduction Update 84.

²²⁵ Law Commission of England and Wales and Scottish Law Commission, "Building Families through Surrogacy: A New Law", Summary of Consultation Paper, p. 11, (2018), https://www.scotlawcom.gov.uk/files/5615/5980/7881/Summary_of_joint_consultation_paper_on_Building_families_through_surrogacy_-_a_new_law_LCCP_244_SLCDP_167.pdf.

²²⁶ American Bar Association, Section of Family Law, Section of Real Property, Trust and Estate Law, Section of Science and Technology Law, Report to the House of Delegates and Resolution (February 2016) 16, available at https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf ("we know that the best interests of any infant—even one not yet born—require certainty of parentage from the moment of birth, as well as not being left stateless."). See also *Mennesson v. France* (Application No 65192/11) 26 June 2014 and *Labassee v. France* (Application No 65941/11) 26 June 2014.

²²⁷ Elaine Chong and Tim Whewell, *Paid to carry a stranger's baby - then forced to raise it*, BBC (Feb. 2019), <https://www.bbc.co.uk/news/resources/idt-sh/surrogates>.

²²⁸ See e.g. *Mennesson v. France*, 65192/11 Eur. Ct. H.R. (2014); *Labassee v. France*, 65941/11 Eur. Ct. H.R. (2014); *Foulon v. France*, 9063/14 Eur. Ct. H.R. (2016); *Bouvet v. France*, 10410/14 Eur. Ct. H.R. (2016); *Laborie v. France*, 44024/13 Eur. Ct. H.R. (2017); Barbara Stark, Transnational Surrogacy and International Human Rights Law, 18 ILSA J. Int'l & Comp. L. 369 (2012) 386.

²²⁹ Barbara Stark, Transnational Surrogacy and International Human Rights Law, 18 ILSA J. Int'l & Comp. L. 369 (2012) 386. This may happen because the intended parent(s) are often recognized as legal parents in the country where the surrogacy process took place; the children then neither possess the nationality of their country of birth, nor of their intended parent(s)' country of residence, and do not have any legal parents in the intended parent(s)' country of residence.

²³⁰ *Mennesson v. France*, 65192/11 Eur. Ct. H.R. (2014); *Labassee v. France*, 65941/11 Eur. Ct. H.R. (2014); *Foulon v. France*, 9063/14 Eur. Ct. H.R. (2016); *Bouvet v. France*, 10410/14 Eur. Ct. H.R. (2016); *Laborie v. France*, 44024/13 Eur. Ct. H.R. (2017).

²³¹ *Id.*; *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, P16-2018-001 Eur. Ct. H.R. (2019). By contrast, in *Paradiso and Campanelli v. Italy*, the Court held that it was not in the best interest of the child to recognize the legal relationship with the intended parent(s) recognized; in that case, the intended parent(s) and the child were not genetically related, which seems to have been an important factor for the Court. *Paradiso and Campanelli v. Italy*, 25358/12 Eur. Ct. H.R. (2017).

²³² Yasmine Ergas, *Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 *Emory Int'l L. Rev.* 117 (2013) 163.

²³³ Convention on the Rights of the Child, GA Res. 44/25, adopted 20 November 1989. See also African Charter on the Rights and Welfare of the Child, 1990, Articles 2, 3, 4, 7 and 8.

²³⁴ Committee on Civil and Political Rights, General comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, 1990, para. 5.

²³⁵ *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Case 12.361, Inter-Am. Ct. H.R. No. -, (Nov. 28, 2012). *S.H. and Others v. Austria* (No. 57813/00), Grand Chamber, ECtHR (2011); *Dickson v. United Kingdom*, ECtHR, Grand Chamber (2007)(finding a violation of Article 8 right to respect for private and family life for a denial of access to artificial insemination facilities to a prisoner, finding the balancing of interests carried out by the minister disproportionate and taking note of the fact that it was the result of an administrative decision, and not a decision reached by Parliament following public deliberations.).

²³⁶ Article 23(1) UDHR, Article 6 ICESCR, Article 11 CEDAW, Article 15 of the Charter of Fundamental Rights of the EU, Principle 27(1) of the ASEAN Human Rights Declaration.

²³⁷ Article 1 of the Convention on the Rights of Persons with Disabilities. Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities*, 20 *Mich. St. U. Coll. L. Int'l L. Rev.* 259 (2012) 268.

²³⁸ Sebastian Porsdam Mann, Helle Porsdam, Christine Mitchell & Yvonne Donders, *The Human Right to Enjoy the Benefits of the Progress of Science and Its Applications*, *THE AMERICAN JOURNAL OF BIOETHICS*, 17:10, 34-36 (2017); See Report of the Special Rapporteur in the field of cultural rights, Frida Shaheed, *The right to enjoy the benefits of scientific progress and its applications*, A/HRC/20/26 (May 14, 2012) ¶ 1.

²³⁹ Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 *ILSA J. Int'l & Comp. L.* 369 (2012) 380.

²⁴⁰ See e.g., Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 *RISK MGMT AND HEALTHCARE POL'Y* 111, 111–119 (2015).

²⁴¹ Interviewees requested not to be identified due to the sensitivity of the information being provided.

²⁴² *Id.*

²⁴³ Mann Bunyanunda, *The Khmer Rouge on Trial: Whither the Defense?*, 74 *S. CAL. L. REV.* 1581, 1582 (2001); Scott Luftglass, *Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 *VA. L. REV.* 893, 893, 895 (2004) (citing Amnesty International, *International Justice Now! Time for an Effective International Criminal Court*, A1 Index IOR 40/15/98 (May 1, 1998)).

²⁴⁴ *Cambodia*, WJP RULE OF LAW INDEX (2019), <http://data.worldjusticeproject.org/#/groups/KHM>.

²⁴⁵ *Id.*; See also *Rule of Law*, THE WORLD BANK (2019), https://tcdata360.worldbank.org/indicators/hf5cdd4dc?country=KHM&indicator=373&countries=BRA&viz=line_chart&years=1996,2017&indicators=944. See generally Bertelsmann Stiftung, *BTI 2018 Country Report: Cambodia*, TRANSFORMATION INDEX BTI, (2018), https://www.btiproject.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Cambodia.pdf.

²⁴⁶ Interview with Service Provider A in Phnom Penh, Cambodia (Mar. 22, 2019); Interview with Nakagawa Kasumi, Professor, Paññāsāstra University of Cambodia, in Phnom Penh, Cambodia (PUC) (Mar. 22, 2019). See also Dolores A. Donovan, *Cambodia: Building a Legal System from Scratch*, 27(2) THE INTERNATIONAL LAWYER 445, 451, 453 (1993); Samean Yun, *Defendants Not Informed of Rights in Cambodian Appeal Court Cases: Study*, RFA: RADIO FREE ASIA (Jun. 23, 2014), <https://www.rfa.org/english/news/cambodia/rights-06232014173104.html>; International Bar Association's Human Rights Institute, *Justice Versus Corruption: Challenges to the Independence of the Judiciary in Cambodia*, INTERNATIONAL BAR ASSOCIATION, 8 (Sept. 2015); Bertelsmann Stiftung, *BTI 2018 Country Report: Cambodia*, TRANSFORMATION INDEX BTI, 10, 18 (2018), https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Cambodia.pdf.

²⁴⁷ *Overview: The World Bank in Cambodia*, THE WORLD BANK (Apr. 11, 2019), <http://www.worldbank.org/en/country/cambodia/overview>.

²⁴⁸ *Id.*

²⁴⁹ *Id.*; *ASEAN Business Guide: Cambodia*, KMPG, 2–3 (2018), <https://assets.kpmg/content/dam/kpmg/mm/pdf/2018/06/asean-guide-cambodia.pdf>.

²⁵⁰ *Overview: The World Bank in Cambodia*, THE WORLD BANK (Apr. 11, 2019), <http://www.worldbank.org/en/country/cambodia/overview>.

²⁵¹ *Id.*

²⁵² *Cambodia*, WJP RULE OF LAW INDEX (2019), <http://data.worldjusticeproject.org/#/groups/KHM>.

²⁵³ *Human Development Data*, UNITED NATIONS DEVELOPMENT PROGRAMME (2019), <http://hdr.undp.org/en/data#>.

²⁵⁴ *Id.*

²⁵⁵ *Healthcare in Cambodia*, PACIFIC BRIDGE MEDICAL (2017), <https://www.pacificbridgemedical.com/publication/healthcare-in-cambodia/>. See generally Dalal K. and Aremu O., *Fairness of Utilizing Health Care Facilities and Out-of-Pocket Payment Burden: Evidence from Cambodia*, 45(3) J BIOSOC SCI 345, 345–357 (May 2013).

²⁵⁶ *The Global Gender Gap Report 2018*, WORLD ECONOMIC FORUM, 21 (2018), http://www3.weforum.org/docs/WEF_GGGR_2018.pdf.

²⁵⁷ *The Role of Women in Cambodia* (THE ASIA FOUNDATION 2013), <https://asiafoundation.org/resources/pdfs/CambodiaWEPFINAL.pdf>.

²⁵⁸ Interview with Service Provider A in Phnom Penh, Cambodia (Mar. 22, 2019). See also *Cambodian Culture*, CULTURAL ATLAS (2019), <https://culturalatlas.sbs.com.au/cambodian-culture/family-e9224d16-17e5-48c1-82b3-b270dca7632e> (Cambodians “have a strong sense of attachment to members of the extended family, close neighbours, and friends”).

²⁵⁹ The progress of surrogacy through-out South and South-East Asia is explained in greater detail in Section 1(E), entitled “Global Commercial Surrogacy Developments and Trends.”

²⁶⁰ *Surrogacy in Cambodia*, SENSIBLE SURROGACY (2018), <https://www.sensiblesurrogacy.com/surrogacy-in-cambodia/>; Katherine Voskoboynik, *Clipping the Stork's Wings: Commercial Surrogacy Regulation and Its Impact on Fertility Tourism*, 26 IND. INT'L & COMP. L. REV. 336, 373 (2016); Masayuki Kodama, *Risks Present in the Cambodian Surrogacy Business*, 27 EUBIOS J OF ASIAN AND INT'L BIOETHICS 37, 40–41 (2017).

²⁶¹ *Surrogacy in Cambodia*, SENSIBLE SURROGACY (2018), <https://www.sensiblesurrogacy.com/surrogacy-in-cambodia/>; Chea Takihiro and Jonathan Cox, *Gov't to Crack Down on Surrogacy Clinics*, KHMER TIMES (Nov. 11, 2015), <https://www.khmertimeskh.com/news/17745/gov---t-to-crack-down-on-surrogacy-clinics/>.

²⁶² *Id.*

²⁶³ See e.g., Lindsay Murdoch, *'Somebody Has to Be the Icebreaker': Aussies Seeking Babies Turn to Cambodia*, SYDNEY MORNING HERALD, Oct. 30, 2015, <https://www.smh.com.au/world/somebody-has-to-be-the-icebreaker-aussies-seeking-babies-turn-to-cambodia-20151027-gkjjfj5.html>. See also Masayuki Kodama, *Risks Present in the Cambodian Surrogacy Business*, 27 EUBIOS J OF ASIAN AND INT'L BIOETHICS 37, 40, 41 (2017); Michael Cook, *Surrogacy Business Shifts to Cambodia*, BIOEDGE (Nov. 2, 2015), <https://www.bioedge.org/bioethics/surrogacy-business-shifts-to-cambodia/11638> (stating that most clinics were relocated Thai and Indian clinics).

²⁶⁴ Chea Takihiro and Jonathan Cox, *Gov't to Crack Down on Surrogacy Clinics*, KHMER TIMES (Nov. 11, 2015), <https://www.khmertimeskh.com/news/17745/gov---t-to-crack-down-on-surrogacy-clinics/>.

²⁶⁵ Lindsay Murdoch, *'Somebody Has to Be the Icebreaker': Aussies Seeking Babies Turn to Cambodia*, SYDNEY MORNING HERALD, Oct. 30, 2015, <https://www.smh.com.au/world/somebody-has-to-be-the-icebreaker-aussies-seeking-babies-turn-to-cambodia-20151027-gkjjfj5.html>.

²⁶⁶ *Cambodia Bans Surrogacy*, THAI LAW FORUM (Nov. 4 2016), <http://www.thailawforum.com/cambodia-bans-surrogacy/>.

²⁶⁷ Lindsay Murdoch, *Cambodia Surrogate Scandal: 'They Immediately Took Her Away from Me. I Didn't Even Get to See Her Face'*, SYDNEY MORNING HERALD, Nov. 26, 2016, <https://www.smh.com.au/world/cambodia-surrogate-scandal-they-immediately-took-her-away-from-me-i-didnt-even-get-to-see-her-face-20161125-gsxbd4.html>; *Cambodia Releases Surrogate Mothers Who Agree to Keep Children*, BBC (Dec. 6, 2018), <https://www.bbc.com/news/world-asia-46466888>.

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²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Surrogacy in Cambodia*, SENSIBLE SURROGACY (2018), <https://www.sensiblesurrogacy.com/surrogacy-in-cambodia/>.

²⁷⁶ Australian Associated Press, *Australian Nurse Freed from Cambodian Jail but 43 Women Arrested over Surrogacy*, THE GUARDIAN, Nov. 13, 2018, <https://www.theguardian.com/world/2018/nov/14/australian-nurse-freed-from-cambodian-jail-but-43-women-arrested-over-surrogacy>; Mike Ives, *Cambodia Police Arrest 5 in Raid on Surrogacy Operation*, N.Y. TIMES, (June 25, 2018), <https://www.nytimes.com/2018/06/25/world/asia/cambodia-arrest-surrogacy-raid.html>.

²⁷⁷ Erin Handley, *Pregnant Women Among 15 Arrested for Alleged Surrogacy in Cambodia*, ABC (Nov. 11, 2018), <https://www.abc.net.au/news/2018-11-12/fifteen-arrested-for-surrogacy-in-cambodia/10486544>; Lindsay Murdoch, *Once Cambodia Closes Its Doors, Where Will Australia's Surrogate Baby Trade Go Next?*, THE SUNDAY MORNING HERALD (Dec. 11, 2016), <https://www.smh.com.au/world/innocence-lost-in-the-barren-lands-of-asias-baby-farmers-20161207-gt5rdp.html>.

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²⁸⁴ *Id.*; *Cambodia Releases Surrogate Mothers Who Agree to Keep Children*, BBC (Dec. 6, 2018), <https://www.bbc.com/news/world-asia-46466888>.

²⁸⁵ *Id.*; Agence France-Presse, *Cambodian Surrogates Freed after Agreeing to Keep Babies*, THE JAKARTA POST, (May 15, 2019), <https://www.thejakartapost.com/seasia/2019/05/15/cambodian-surrogates-freed-after-agreeing-to-keep-babies.html>.

²⁸⁶ Jared Ferrie, *Cambodia Frees 32 Surrogate Mothers Charged with Human Trafficking*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>; Erin Handley and Kong Meta, *Cambodian Surrogates Face an Impossible Choice—Forced Motherhood, or Years in Prison*, ABC: NEWS (May 11, 2019),

<https://www.abc.net.au/news/2019-05-12/cambodian-surrogates-forced-to-be-mothers-or-face-prison-time/11086640>; Agence France-Presse, *Cambodian Surrogates Freed after Agreeing to Keep Babies*, THE JAKARTA POST, (May 15, 2019), <https://www.thejakartapost.com/seasia/2019/05/15/cambodian-surrogates-freed-after-agreeing-to-keep-babies.html>.

²⁸⁷ Erin Handley and Kong Meta, *Cambodian Surrogates Face an Impossible Choice—Forced Motherhood, or Years in Prison*, ABC: NEWS (May 11, 2019), <https://www.abc.net.au/news/2019-05-12/cambodian-surrogates-forced-to-be-mothers-or-face-prison-time/11086640>; Agence France-Presse, *Cambodian Surrogates Freed after Agreeing to Keep Babies*, THE JAKARTA POST, (May 15, 2019), <https://www.thejakartapost.com/seasia/2019/05/15/cambodian-surrogates-freed-after-agreeing-to-keep-babies.html>.

²⁸⁸ Erin Handley and Kong Meta, *Cambodian Surrogates Face an Impossible Choice—Forced Motherhood, or Years in Prison*, ABC: NEWS (May 11, 2019), <https://www.abc.net.au/news/2019-05-12/cambodian-surrogates-forced-to-be-mothers-or-face-prison-time/11086640>.

²⁸⁹ Interview with Chou Bun Eng, Secretary of State at the Ministry of Interior and Vice-Chair of the National Committee for Counter-Trafficking, Ministry of Interior, in Phnom Penh, Cambodia (Mar. 26, 2019); Jared Ferrie, *Cambodia Frees 32 Surrogate Mothers Charged with Human Trafficking*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>.

²⁹⁰ Interview with Chou Bun Eng, Secretary of State at the Ministry of Interior and Vice-Chair of the National Committee for Counter-Trafficking, Ministry of Interior, in Phnom Penh, Cambodia (Mar. 26, 2019).

²⁹¹ Interview with C in Phnom Penh, Cambodia (Mar. 29, 2019); Interview with Service Provider A in Phnom Penh, Cambodia (Mar. 22, 2019).

²⁹² Interview with Service Provider A in Phnom Penh, Cambodia (Mar. 22, 2019).

²⁹³ *Id.*

²⁹⁴ Interview with Chou Bun Eng, Secretary of State at the Ministry of Interior and Vice-Chair of the National Committee for Counter-Trafficking, Ministry of Interior, in Phnom Penh, Cambodia (Mar. 26, 2019).

²⁹⁵ Jared Ferrie, *Cambodia Frees 32 Surrogate Mothers Charged with Human Trafficking*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>; *Cambodia Releases Surrogate Mothers Who Agree to Keep Children*, BBC (Dec. 6, 2018), <https://www.bbc.com/news/world-asia-46466888>; Agence France-Presse, *Cambodian Surrogates Freed after Agreeing to Keep Babies*, THE JAKARTA POST, (May 15, 2019), <https://www.thejakartapost.com/seasia/2019/05/15/cambodian-surrogates-freed-after-agreeing-to-keep-babies.html>.

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²⁹⁷ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

²⁹⁸ Patricia Fronek, *Current Perspectives on the Ethics of Selling International Surrogacy Support Services*, 8 MEDICOLEGAL AND BIOETHICS 11, 14 (2018); Masayuki Kodama, *Risks Present in the Cambodian Surrogacy Business*, 27 EUBIOS J OF ASIAN AND INT'L BIOETHICS 37, 42 (2017); Danielle Keeton-Olsen & Sineat Yon, *Poverty and Demand from China Fuel Illegal Cambodia Surrogacy*, AL-JAZEERA (Dec. 12, 2018), <https://www.aljazeera.com/news/2018/12/poverty-demand-china-fuel-illegal-cambodia-surrogacy-181211042242119.html>

²⁹⁹ Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³⁰⁰ *Id.*
³⁰¹ *Id.*
³⁰² Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³⁰³ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³⁰⁴ *Id.*
³⁰⁵ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).
³⁰⁶ Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³⁰⁷ *Id.*
³⁰⁸ *Id.*
³⁰⁹ *Id.*
³¹⁰ Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³¹¹ *Id.*
³¹² *Id.*
³¹³ *Id.*
³¹⁴ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³¹⁵ *Id.*
³¹⁶ *Id.*
³¹⁷ *Id.*
³¹⁸ *Id.*
³¹⁹ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).
³²⁰ *Id.*
³²¹ *Id.*
³²² Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³²³ Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³²⁴ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).
³²⁵ *Id.*
³²⁶ Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³²⁷ Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).
³²⁸ *Id.*
³²⁹ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³³⁰ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³³¹ *Id.*

³³² Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³³³ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³³⁴ Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³³⁸ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³³⁹ Interview with C and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴⁰ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴¹ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019). *See also* Mellissa Withers, Nina Kharazmi, & Esther Lim, *Traditional Beliefs and Practices in Pregnancy, Childbirth, and Postpartum: A Review of the Evidence from Asian Countries*, 56 MIDWIFERY J 158, 158–70 (2018); Michelle Vachon, *Traditional Post-Birthing Practice May Endanger New Mothers and Children*, THE CAMBODIA DAILY (Mar. 27, 2004), <https://www.cambodiadaily.com/news/traditional-post-birthing-practice-may-endanger-new-mothers-and-children-39349/>; *A Traditional of Giving Birth in Cambodia*, VISIT ANGKOR (Jan. 2, 2013), <https://www.visit-angkor.org/blog/2013/01/03/a-traditional-of-giving-birth-in-cambodia/>.

³⁴² Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴³ Interview with A and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴⁴ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴⁵ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴⁶ Interview with C and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴⁷ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴⁸ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁴⁹ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019). *See also* Jared Ferrie, *Cambodia Frees 32 Surrogate Mothers Charged with Human Trafficking*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>.

³⁵³ *Id.*

³⁵⁴ Mike Ives, *Cambodia Police Arrest 5 in Raid on Surrogacy Operation*, N.Y TIMES, June 25, 2018, <https://www.nytimes.com/2018/06/25/world/asia/cambodia-arrest-surrogacy-raid.html>; Erin Handley, *Pregnant Women Among 15 Arrested for Alleged Surrogacy in Cambodia*, ABC (Nov. 11, 2018), <https://www.abc.net.au/news/2018-11-12/fifteen-arrested-for-surrogacy-in-cambodia/10486544>; Jared Ferrie, *Cambodia Frees 32 Surrogate Mothers Charged with Human Trafficking*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>.

³⁵⁵ Jared Ferrie, *Cambodia Frees 32 Surrogate Mothers Charged with Human Trafficking*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>.

³⁵⁶ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019); Jared Ferrie, *Cambodia Frees 32 Surrogate Mothers Charged with Human Trafficking*, REUTERS (Dec. 6, 2018), <https://www.reuters.com/article/us-cambodia-surrogacy-china/cambodia-frees-32-surrogate-mothers-charged-with-human-trafficking-idUSKBN1O513U>.

³⁵⁷ *Id.*

³⁵⁸ *Cambodia Releases Surrogate Mothers Who Agree to Keep Children*, BBC (Dec. 6, 2018), <https://www.bbc.com/news/world-asia-46466888>. A quick reminder: surrogates are being threatened with and are sometimes imprisoned for fifteen or more years. Compare that to eighteen months that agencies and brokers were sentenced to.

³⁵⁹ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶⁰ Interview with A and C, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶¹ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶² Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶³ *Id.*

³⁶⁴ Interview with A and C, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶⁵ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶⁶ Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶⁷ Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁷¹ *Id.*

³⁷² Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁷³ Interview with A, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁷⁴ *Id.*

³⁷⁵ Interview with C, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁸⁰ Interview with K, Surrogate, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁸¹ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

³⁸² Danielle Keeton-Olsen & Sineat Yon, *Poverty and Demand from China Fuel Illegal Cambodia Surrogacy*, AL-JAZEERA (Dec. 12, 2018), <https://www.aljazeera.com/news/2018/12/poverty-demand-china-fuel-illegal-cambodia-surrogacy-181211042242119.html>; Kong Meta, *Kingdom Surrogacy Law Set to Lift Burden from 'Victims'*, THE PHNOM PENH POST, Sept. 27, 2018, <https://www.phnompenhpost.com/national/kingdom-surrogacy-law-set-lift-burden-victims>.

³⁸³ Kong Meta, *Kingdom Surrogacy Law Set to Lift Burden from 'Victims'*, THE PHNOM PENH POST, Sept. 27, 2018, <https://www.phnompenhpost.com/national/kingdom-surrogacy-law-set-lift-burden-victims>.

³⁸⁴ *Id.*; Danielle Keeton-Olsen & Sineat Yon, *Poverty and Demand from China Fuel Illegal Cambodia Surrogacy*, AL-JAZEERA (Dec. 12, 2018), <https://www.aljazeera.com/news/2018/12/poverty-demand-china-fuel-illegal-cambodia-surrogacy-181211042242119.html>; Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

³⁸⁵ Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

³⁸⁶ *Id.*

³⁸⁷ *Draft Law on Surrogacy*, chapter 1, article 3 (2019).

³⁸⁸ *Id.* at chapter 2, article 5 (2019); Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

³⁸⁹ *Draft Law on Surrogacy*, chapter 10, article 14 and 15 (2019).

³⁹⁰ *Id.* at chapter 3, article 7.

³⁹¹ *Id.* at chapter 4, article 8; Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

³⁹² *Draft Law on Surrogacy*, chapter 4, article 8 (2019).

³⁹³ *Id.* at chapter 3, article 7.

³⁹⁴ *Id.* at chapter 4, article 8 (duplicate).

³⁹⁵ *Id.*; Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Draft Law on Surrogacy*, chapter 9, article 13 (2019).

⁴⁰¹ *Id.* at chapter 4, article 8 (2019); Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

⁴⁰² *Draft Law on Surrogacy*, chapter 4, article 8 (2019).

⁴⁰³ *Id.* at chapter 5, article 9.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at chapter 6, article 10.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at chapter 8, article 12.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

⁴¹⁸ *Draft Law on Surrogacy*, chapter 12, article 22 (2019).

⁴¹⁹ *Id.* at chapter 12, article 23.

⁴²⁰ *Id.* at chapter 11, article 16.

⁴²¹ Interview of Her Excellency Chan Sotheavy, Judge and Secretary of State, Ministry of Justice, in Phnom Penh (Mar. 29, 2019).

⁴²² Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁴²³ See the discussion of *Paradiso and Campanelli v. Italy* in note 107.

⁴²⁴ Interview with Her Excellency Ing Kuntha Phavi from Cambodia's Ministry of Women's Affairs. (2019) (raising concerns about organ trafficking); interview with Cambodian investigative judge Kao Vandi (same); *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material* (2018) (raising concerns about sexual exploitation); Kathryn Webb Bradley, *Surrogacy and Sovereignty: Safeguarding the Interests of Both the Child and the State*, 43 N.C. J. INT'L L. 1 (2018) (same).

⁴²⁵ Our research did not reveal any verified cases where surrogacy led to the exploitation of children. However, several cases do support these concerns. For instance, an Australian intended father of a girl born through surrogacy in India was later found to have been convicted of numerous sex offenses against young girls. *Id.* at 14. Though the Australian courts ultimately determined that he was fit to retain custody of the child—but unfit to be left alone with her—the case heightened concerns about sinister motives for surrogacy. David Prestipino, *Gammy Twin Pipah to Live with Farnell Family Despite Sexual Grooming Fears*, WA TODAY (Apr. 15 2016), <https://www.watoday.com.au/national/western-australia/gammy-twin-pipah-to-live-with-farnell-family-despite-risk-of-sexual-grooming-20160415-go72a3.html>. Additionally, a report from India alleges that a couple was caught trying to secure a surrogacy arrangement in order to get an organ for their sick child. Centre for Social Research, *Final Report: Surrogate Motherhood- Ethical or Commercial* 11.

⁴²⁶ See *infra* Part III(B)(1).

⁴²⁷ See *infra* Part III(B)(3).

⁴²⁸ See *infra* Part III(D).

⁴²⁹ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, <https://www.refworld.org/docid/4672bc122.html>.

⁴³⁰ These are among the rights established in the ICESCR.

⁴³¹ This point was illuminated in the prostitution context in an article by philosopher Martha Nussbaum, “*Whether From Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUDIES 632, 696–7 (2008): “Most, if not all, of the genuinely problematic elements [of prostitution] turn out to be common to a wide range of activities engaged in by poor working women, and...many of women’s employment choices are so heavily constrained by poor options that they are hardly choices at all. ... The legalization of prostitution...is likely to make things a little better for women who have too few options to begin with. ... [A]t least some of our feminist theory may be insufficiently grounded in the reality of working-class lives and too focused on sexuality as an issue in its own right, as if it could be extricated from the fabric of poor people’s attempts to survive.”

⁴³² In the three interviews we conducted with surrogates, each woman worked in a garment factory before becoming a surrogate. Two of them worked close to 12 hours each day in order to make around \$150 per month, while the third worked 8 hours each day and made only \$50 – \$60 each month. All three women owed several thousand dollars in debts. Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019). In India, many surrogates were similarly recruited from garment factories. Sharmila Rudrappa, *Why is India’s Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT’L L. 70, 86 n 102 (2018). Indian garment factories are also known for long hours, low wages, and poor working conditions. See, e.g., Ingrid Stigzelius & Cecilia Mark-Herbert, *Tailoring Corporate Responsibility to Suppliers: Managing SA8000 in Indian Garment Manufacturing*, 25 SCANDINAVIAN J. MANAGEMENT 46, 47 (2009) UN Women has reported “widespread” violence against women in Indian garment factories, “rang[ing] from physical abuse to sexual harassment and rape.” UN Women, *In India’s Garment Factories, Stitching Clothes and a Culture of Non-Violence* (Oct. 7, 2014), <http://www.unwomen.org/en/news/stories/2014/10/india-garment-factory-workers-feature>.

⁴³³ Ashutosh Pandey, *India: Walmart, H&M in Spotlight after String of Textile Workers Deaths* DW NEWS, (Jul. 18, 2018), <https://www.dw.com/cda/en/india-walmart-hm-in-spotlight-after-string-of-textile-workers-deaths/a-44714948>.

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ Domestic Workers, HUMAN RIGHTS WATCH, <https://www.hrw.org/topic/womens-rights/domestic-workers>

⁴³⁷ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019). Notably, each of the three Cambodian surrogates interviewed, if she had ultimately received the expected compensation, would have been able to pay off her family's severe debts. It is impossible to say whether each woman would have been paid in full if not for the government's intervention, but they did receive timely payments up until the point of arrest, and one woman personally knew other surrogates that had received full payments. *But see* Sharmila Rudrappa & Caitlyn Collins, *Altruistic Agencies and Compassionate Consumers: Moral Framing of Transnational Surrogacy*, GENDER & SOCIETY 937, 954 (December 2015) (concluding, based on interviews with 70 surrogates, that costs of surrogacy can undermine expected financial gains).

⁴³⁸ *Facts and Figures: Economic Empowerment*, UN WOMEN, (Jul. 2018), <http://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures>.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² Masayuki Kodama, *Risks Present in the Cambodian Surrogacy Business*, 27 EUBIOS J. OF ASIAN AND INT'L BIOETHICS 40 (2017) (describing a surrogacy agency in Thailand that moved to Cambodia, Laos, and Myanmar following the ban in Thailand, and that continued to recruit surrogates from Cambodia and Thailand after both countries banned the practice); Nilanjana Bhowmick, *After Nepal, Indian Surrogacy Clinics Move to Cambodia*, AL JAZEERA (Jun. 28, 2016), <https://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html> (describing Indian clinics "impregnating and then smuggling Indian surrogates across the border into Nepal for deliveries – a foreign country where the mothers' rights were not clearly defined").

⁴⁴³ Individual countries with unusual circumstances that make surrogacy particularly risky may be able to effectively ban surrogacy so that it is practiced in safer countries. However, if countries ban surrogacy in hope of ending the practice entirely, they are unlikely to succeed.

⁴⁴⁴ Surrogates brought to other countries may be at risk of greater exploitation. In Nepal, Indian surrogates were reportedly kept in overcrowded rooms with inadequate food and hygiene. *Id.* Additionally, some surrogates' husbands travelled with them, making it far more difficult for them to work. *Id.* In Cambodia, a group of Vietnamese surrogates had their passports confiscated by a surrogacy agency, and several of the surrogates alleged that they were convinced to go to Cambodia by false promises of a different form of work. Richard S. Ehrlich, *Taiwan Company Accused of Trafficking Vietnamese Women to Breed*, THE WASHINGTON TIMES (Mar. 6, 2011), <https://www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffick-vietnam-women-breed/>.

⁴⁴⁵ The India-Nepal example is once again illustrative. Nilanjana Bhowmick, *After Nepal, India surrogacy clinics move to Cambodia* (Aljazeera, Jun 2016), <https://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html>. *See also* Danielle Preisse & Pragati Shahi, *The Dwindling Options for Surrogacy Abroad*, THE ATLANTIC (May 31, 2016), <https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/> ("As India's laws tightened, clinics there quietly began sending the Indian mothers to Nepal...No laws on existed on surrogacy in Nepal, so there were seemingly none to break").

⁴⁴⁶ See Claire Fenton-Glynn, *International Surrogacy Arrangements*, 24 MEDICAL L. REV. 59, 59 (“[I]f English law views surrogacy as exploitative, we have a responsibility to protect women both in England and abroad, and the only way to do so effectively is to create a domestic system of regulation that caters adequately for the demand in this country.”).

⁴⁴⁷ See *infra* Part III(C)(2).

⁴⁴⁸ Hague Conference on Private International Law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, 8 (2014).

⁴⁴⁹ Some jurisdictions have abridged the rights of intended parent(s) to children born through surrogacy in order to protect the rights of surrogates. For instance, some laws allow surrogates to keep the children born through surrogacy if they choose to do so at the child’s birth. The goal of such a law is to empower surrogates: where surrogates are able to change their mind at any time, intended parent(s) and surrogacy agencies are motivated to ensure that surrogates fully understand the surrogacy process, are physically and psychologically prepared for it, and are well treated throughout the process. In other words, though such a law may curtail the rights of intended parent(s), it only does so in order to protect and promote the rights of the surrogate. In other cases, where intended parent(s) are denied legal rights to children even where no other party contests those rights, the rights of the intended parent(s) are unjustly violated.

⁴⁵⁰ (Appl. No. 25358/12) Judgment of 27 January 2015.

⁴⁵¹ Claire Fenton-Glynn, *International Surrogacy before the European Court of Human Rights*, 13 J PRIVATE INT’L L. 546, 547–48 (2017).

⁴⁵² South Africa’s surrogacy legislation provides that “any child born of a surrogate mother....is for all purposes the child of the [intended] parent or parents from the moment of the birth of the child concerned” and specifies that “the child will have no claim for maintenance or of succession against the surrogate mother.” South Africa Children’s Act 38 of 2005 §297(1). States permitting surrogacy in the United States often have similar provisions. See, e.g., 750 ILCS 47/15(b)(4) (Illinois); N.R.S. 126.720(1) (Nevada); RCWA 26.26A.715(1) (Washington). See also U.C.A. 1953 § 78B-15-809(3) (Utah) (providing that intended parent(s) may still be held liable for a child resulting from a surrogacy agreement, even if the agreement is otherwise unenforceable because it fails to comply with the law).

⁴⁵³ Different jurisdictions have approached this issue differently. For instance, in the state of Washington, a child resulting from an invalid surrogacy contract will have its parentage determined according to intent of the parties, provided the surrogate does not seek to abandon the agreement. R.C.W.A. § 26.26A.775(2). In Virginia, by contrast, a surrogate may become the legal parent in the case of an invalid contract, potentially creating legal risks for surrogates. VA Code Ann. § 20-158(E).

⁴⁵⁴ U.C.A. 1953 § 78B-15-803.

⁴⁵⁵ *Id.* at § 78B-15-809(3).

⁴⁵⁶ RCWA 26.26A.775(4).

⁴⁵⁷ F.S.A. § 742.15(2)(e); VA Code Ann. § 20-160(D).

⁴⁵⁸ This is, for instance, current practice in Virginia. CA Code Ann. § 20-160(D).

⁴⁵⁹ South Africa Children’s Act 38 of 2005 §298(1)(2); R.C.W.A. 26.26A.765(1)(b). South Africa permits only domestic altruistic surrogacy. *Id.* at § 292, § 295.

⁴⁶⁰ RCWA 26.26A.770(1).

⁴⁶¹ For academic discussion of this issue, see Scott Titshaw, *Sorry Ma'am, Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47 (criticizing inconsistent citizenship laws in the ART context and arguing for deference to the parentage laws in the state where the child was born); Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J. L. MED. & ETHICS 240, 245–46 (2013).

⁴⁶² Article 15 UDHR. See also *infra* Part II(C)(2).

⁴⁶³ See the discussion of *Paradiso and Campanelli v. Italy* in note 107.

⁴⁶⁴ It is common for jurisdictions permitting surrogacy to impose parental obligations on intended parent(s) regardless of the number or condition of the children born. This is the case, for instance, in U.S. states such as Illinois, Virginia, and Washington. A similar provision was included in proposed legislation in Belgium, though surrogacy there currently remains unregulated. Proposition de loi réglant la maternité de substitution n°0969/001, 52e session, (2008), art. 4 §4 6°-7°; 750 I.L.C.S. 47/25(c)(4); VA Code Ann. § 20-163(C); R.C.W.A. 26.26A.715(1)(d).

⁴⁶⁵ Some of these rights and others are also protected by the ICESCR.

⁴⁶⁶ Surrogates in South and Southeast Asia have been subjected to particularly strict restrictions regarding where they can go, what they can do, and what they can eat during pregnancy. See Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019). Though surrogates in Western countries usually live at home rather than living in hostels, and are able to continue other forms of employment during surrogacy, they are also often subject to some restrictions on travel, food, and activity. See, e.g., Jennifer Lahl, *Contract Pregnancies Exposed: Surrogacy Contracts Don't Protect Surrogate Mothers and Their Children*, PUBLIC DISCOURSE (Nov. 1, 2017), <https://www.thepublicdiscourse.com/2017/11/20390/> (“Most contracts explicitly control the surrogate’s diet, exercise, living arrangements, travel, and activities”).

⁴⁶⁷ See *infra* Part II(B).

⁴⁶⁸ *Warning Signs of Health Problems After Birth*, MARCH OF DIMES (Jul. 2018), <https://www.marchofdimes.org/pregnancy/warning-signs-of-health-problems-after-birth.aspx>; *Postpartum Thyroiditis*, JOHNS HOPKINS MEDICINE (2019), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/postpartum-thyroiditis>.

⁴⁶⁹ *Id.*

⁴⁷⁰ *ILO Codes of Practice and Guides on Occupational Health*, INTERNATIONAL LABOUR ORGANIZATION (2019), https://www.ilo.org/global/topics/safety-and-health-at-work/areasofwork/occupational-health/WCMS_117570/lang--en/index.htm.

⁴⁷¹ *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, UN General Assembly (1981), Arts 1,2,10,11,14, and 16.

⁴⁷² *Amanda Mellet v. Ireland* (UN Human Rights Committee, 2016), ¶¶ 1 - 3.20, 7.2 - 10, and Annex II: Individual opinion of Committee member Sarah Cleveland (concurring); See UN Special Rapporteur on the Right to Health: Report to the UN General Assembly on the Criminalization of Sexual and Reproductive Health, (2011).

⁴⁷³ *Id.*

⁴⁷⁴ See *infra* Part III(B)(2).

⁴⁷⁵ Karen Messing & Pirooska Östlin, *Gender Equality, Work and Health: A Review of the Evidence* 14–15 (WORLD HEALTH ORGANIZATION 2008).

⁴⁷⁶ *Id.* at 15.

⁴⁷⁷ See *infra* Part III(B)(1); “Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)”, UN General Assembly (1981), Arts 1,2,10,11,14, and 16. For court cases affirming reproductive rights as essential human rights, see, e.g., *Advocate Prakash Mani Sharma v. Government of Nepal and Others*, Writ No.064 WO 0230 (S. Ct. of Nepal 1999) (stating that reproductive rights are basic human rights incorporated in the right to health, the right to life, and various other foundational rights); *K.L. v. Peru*, CCPR/C/85/D/1153/2003, Communication No. 1153/2003 (United Nations Human Right Committee 2003); *The Center for Health, Human Rights and Development & Ors. v. Nakaseke District*, Civil Suit No. 111 of 2012 (High Court at Kampala 2012).

⁴⁷⁸ See *infra* Part III(B)(1).

⁴⁷⁹ *Maternity and Paternity at Work: Law and Practice Across the World*, x, 1 (INTERNATIONAL LABOUR ORGANIZATION 2014) (citing UDHR, ICESCR, and CEDAW).

⁴⁸⁰ *Id.* at 9.

⁴⁸¹ *Id.* at 16.

⁴⁸² See *infra* Part III(C).

⁴⁸³ See Convention on the Rights of the Child, GA Res. 44/25, adopted 20 November 1989. See also African Charter on the Rights and Welfare of the Child, 1990.

⁴⁸⁴ See *infra* Part III(C)(2).

⁴⁸⁵ See the discussion of *Paradiso and Campanelli v. Italy* in note 107.

⁴⁸⁶ While jurisdictions allowing surrogacy usually set some requirements for intended parent(s), they are often lax, especially compared with surrogate eligibility requirements. See, e.g., 750 I.L.C.S. 47/10 (Illinois).

⁴⁸⁷ See, e.g., Virginia VA Code Ann. § 20-160(B(2)-(3) (Virginia); U.C.A. 1953 § 78B-15-803(2)(c) (Utah); V.T.C.A., Family Code § 160.756(b)(3) (Texas).

⁴⁸⁸ See *infra* Part III(B)(1).

⁴⁸⁹ See, e.g., Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019); Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS: J. WOMEN IN CULTURE & SOC. 969 (2010).

⁴⁹⁰ See, e.g., *Alyne da Silva Pimentel Teixeira v. Brazil*, Comm. No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008.

⁴⁹¹ For example, it is common for surrogacy contracts to provide that intended parent(s) make decisions regarding termination of pregnancies. See Davies at 269. In some cases, contracts have even forbidden surrogates from terminating pregnancies when their lives were at risk. *Id.* Where surrogates have breached contracts by refusing to get abortions at the intended parent(s)’ request, they have faced contract penalties and the threat of being left with unexpected parental obligations. Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391 (2012); Human Rights Council, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/HRC/37/60 (2018) para. 32. One report also found that some surrogacy contracts required surrogates to be sustained with life-support equipment in the case of severe injuries or illnesses in order to protect the fetuses. Kishwar Desai, *India’s Surrogate Mothers Are Risking Their Lives. They Urgently Need Protection*, THE GUARDIAN (Jun. 5, 2012), <https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die>.

⁴⁹² See *infra* Part III(D)(1).

⁴⁹³ *Draft Law on Surrogacy*, chapter 4, article 8 (duplicate) (2019).

⁴⁹⁴ For a discussion of the international law provisions dealing with human trafficking, *see infra* Part III(A)(2).

⁴⁹⁵ This was reportedly the case of one Indian surrogate, who wished to abandon surrogacy after two failed IVF cycles but was prevented by prohibitively high financial penalties. Kanchan Srivastava, *Woman Loses Uterus after Becoming Surrogate Thrice*, DNA INDIA (Dec. 27, 2011), <https://www.dnaindia.com/mumbai/report-woman-loses-uterus-after-becoming-surrogate-mother-thrice-1630429>.

⁴⁹⁶ South Africa allows surrogates to terminate the pregnancy without penalty. In traditional surrogacy, surrogates may terminate the agreement and choose to keep the child without penalty. South Africa Children's Act 38 of 2005 §§ 298–300. In the American states of Illinois and Washington, legislation specifies that surrogates cannot be forced to become pregnant if they choose to abandon the agreement. RCWA 26.26A.785(2); 750 ILCS 47/50(b).

⁴⁹⁷ In one case, a surrogacy agency in Taiwan did reportedly hold the passports of surrogates recruited from Vietnam. Though most of the women stated that they agreed to the surrogacy arrangements, a few claimed they had been tricked into surrogacy under false pretenses. Richard S. Ehrlich, *Taiwan Company Accused of Trafficking Vietnamese Women to Breed*, THE WASHINGTON TIMES (Mar. 6, 2011), <https://www.washingtontimes.com/news/2011/mar/6/thai-company-accused-traffick-vietnam-women-breed/>.

⁴⁹⁸ Part II(A)(2).

⁴⁹⁹ Part III(C)(6)(c)–(d).

⁵⁰⁰ The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, G.A. Res. 55/25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, art. 3(a), U.N. Doc. A/45/49 (Vol. I) (2001). *See infra* Part II(A)(2).

⁵⁰¹ *Infra* Part III(A)(2).

⁵⁰² *Infra* Part III(A)(1).

⁵⁰³ *See* the discussion of *Paradiso and Campanelli v. Italy* in note 107.

⁵⁰⁴ *See infra* Part IV(C)(3).

⁵⁰⁵ Often, women who choose to become surrogates have limited educations and financial resources. For example, Amrita Pande, who spend several years conducted research on surrogacy in India and interviewed forty-two surrogates, reported that “education ranged from illiterate to high-school educated, with the average having attended some middle school.” The majority was also below the poverty line, with a median family income of about \$60 per month. Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS 969, 974 (2010). All three surrogates we interviewed were not aware that surrogacy was illegal. Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁵⁰⁶ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁵⁰⁷ World Justice Project, *Rule of Law Index 2016* (2016) [hereinafter WJP Report].

⁵⁰⁸ *Id.* at 9.

⁵⁰⁹ Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL J.L. & PUB. POL’Y 685 (2018).

⁵¹⁰ *Id.* at 701–02.

⁵¹¹ *Id.* at 687.

⁵¹² *Id.* at 696–97.

⁵¹³ *See infra* Part V(B).

⁵¹⁴ It should be noted that arbitration mechanisms can invite biased decision making to the extent that one party foots the bill for the service. Care should be taken to identify reputable arbitration mechanisms and ensure that the surrogate has independent representation.

⁵¹⁵ *Id.* at 10–12.

⁵¹⁶ *Id.* at 21.

⁵¹⁷ Transparency International, *Corruption Perceptions Index 2017* (Feb. 21, 2018), https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table.

⁵¹⁸ WJP Report at 29.

⁵¹⁹ World Economic Forum, *Judicial Independence* (2018), http://reports.weforum.org/pdf/gci-2017-2018-scorecard/WEF_GCI_2017_2018_Scorecard_EOSQ144.pdf.

⁵²⁰ WJP Report at 41. According to the report, the “civil justice” factor considers “whether civil justice systems are accessible and affordable, free of discrimination, corruption, and improper influence by public officials,” as well as “whether court proceedings are conducted without unreasonable delays” and “decisions are enforced effectively.” It also considers alternative dispute resolution mechanisms. *Id.* at 40.

⁵²¹ *Id.* at 43.

⁵²² In South Africa, as well as the U.S. states of Utah, Virginia, and Washington, courts must validate all surrogacy agreements. UCA 1953 78B-15-801(4); South Africa Children's Act 38 of 2005 §292(1)(e); VA Code Ann. § 20-160; R.C.W.A. § 26.26A.760. In Belgium, as well as the U.S. states of Illinois, California, Nevada, and Washington, each surrogacy arrangement must involve a written contract signed before a notary. 750 I.L.C.S. 47/25(b)(5); Cal. Fam. Code 7962(c); N.R.S. 126.750.3(c); R.C.W.A. § 26.26A.710(6); Chambre des Représentants de Belgique, Proposition de loi réglant la maternité de substitution n°0969/001, 52e session (2008) art. 4 §4.

⁵²³ *See infra* Part III(B)(3).

⁵²⁴ The three Cambodian surrogacy we interviewed were each promised a total of \$10,000, though surrogates in some countries receive over \$30,000. Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁵²⁵ *See infra* Part III(A)(3).

⁵²⁶ Ajay Tandon, Christopher JL Murray, Jeremy A Lauer, and David B Evans, *Measuring Overall Health System Performance for 191 Countries*, 20–21 (2000).

⁵²⁷ WHO, UNICEF, UNFPA, World Bank Group, and the UN Population Division, *Trends in Maternal Mortality: 1990 to 2015*, xi (2015).

⁵²⁸ UN IGME, *Levels & Trends in Child Mortality* (2018).

⁵²⁹ Interview with Nakagawa Kasumi, Professor, Paññāsāstra University of Cambodia, in Phnom Penh, Cambodia (PUC) (Mar. 22, 2019) (most Cambodians live in rural regions); Interview with Choub Sok Chamreun, Executive Director of Khana in Phnom Penh, Cambodia (Mar. 26, 2019) (stating that rural women tend to be more attracted to surrogacy, and describing the limitations of health care in rural provinces).

⁵³⁰ Because intended parent(s) are the ones paying surrogacy intermediaries, many commentators have raised concerns about conflicts of interest in surrogacy clinics.

See, e.g., Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL J.L. & PUB. POL'Y 685, 694 (2018): The same clinic often provides both the fertility treatment and the obstetric care to the surrogate. This creates a potential conflict of interest for the fertility doctors. In one clinic we interviewed, the doctors' fees from the intended parent(s) was tied to the successful birth of the child. This incentivizes fertility specialists to prioritize the desire of the intended parent(s) to successful deliver of a healthy child over the health and well-being of the surrogate (if there were a conflict between the two.) (internal citations omitted).

⁵³¹ *See infra* Part III(B)(3).

⁵³² *See infra* Part IV(C)(4).

⁵³³ For a discussion of documented problems related to informed consent in surrogacy, *see infra* Part II(D). Informed consent is also an important principle in international law. It is relevant to identifying whether fundamental rights—including reproductive rights and the right to be free from human trafficking and forced labor—have been violated. *See infra* Part III.

⁵³⁴ *See, e.g.,* Vasanti Jadvia et al, *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUMAN REPRODUCTION 2196 (2003).

⁵³⁵ *See, e.g.,* Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India*, 39 CUMB. L. REV. 15, 56 (2008).

⁵³⁶ *See, e.g.,* Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN JOURNAL GENDER STUDIES 141, 154 (2009) ("many Indians equate surrogacy with sex work...people are not aware of the reproductive technology which separates pregnancy from sexual intercourse"). *See also* Anna Arvidsson, Polly Vauqueline, Sara Johnsdotter & Brigitta Essén, *Surrogate Mother – Praiseworthy or Stigmatized: A Qualitative Study on Perceptions of Surrogacy in Assam, India*, 10 GLOBAL HEALTH ACTION 1 (2017) (conducting 27 interviews and 15 focus group discussions and finding that commercial surrogacy is seen as opposed to societal norms, and arguing for this perception to be incorporated into surrogacy regulation).

⁵³⁷ Jurisdictions that regulate surrogacy often require psychological screening of surrogates. *See, e.g.,* VA Code Ann. § 20-160(B)(7) (Virginia); 750 I.L.C.S. 47/20(a)(3) (Illinois); R.C.W.A. 26.26A.705(1)(c)-(d) (Washington). While South Africa's legislation does not expressly mandate a psychological screening, it similarly requires that surrogates be found "in all respects [] suitable" and that they are motivated by proper purposes. South Africa Children's Act 38 of 2005 §295(c).

⁵³⁸ *Human Development Data (1990-2017)* (UNITED NATIONS DEVELOPMENT PROGRAMME 2018), <http://hdr.undp.org/en/data> (data indicating that women occupy a minority of leadership roles, earn less money than men, and are more often unemployed).

⁵³⁹ *See Id.* (finding women dramatically underrepresented in parliaments throughout the world).

⁵⁴⁰ *See, e.g.,* Maya Unnithan, *Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women*, 1 J. LEGAL ANTHROPOLOGY 287, 296 (2013) (arguing that surrogates in rural western India lacked real choice because "reproductive decision-making...[is] less the decision of the woman than of her husband and his family").

⁵⁴¹ *See The Global Gender Gap Report 2017*, 9 WORLD ECONOMIC FORUM (2017), http://www3.weforum.org/docs/WEF_GGGR_2017.pdf (finding that women still attain lower levels of education throughout the world).

⁵⁴² *See Id.* (collecting data on prevalence of gender violence throughout the world).

⁵⁴³ As discussed above, this has been common practice for surrogacy in many countries, including South and Southeast Asia as well as Mexico. *See infra* Part II(B); Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS: J. WOMEN IN CULTURE & SOC. 969, 981 (2010) (describing surrogacy hostels in India); Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019) (describing shelters that surrogates in Cambodia lived in during pregnancy); Miranda Davies, *Babies for Sale?: Transnational Surrogacy, Human Rights and the Politics of Reproduction* 269–270 (2017) (describing surrogacy hostels in Mexico).

⁵⁴⁴ *The Global Gender Gap Report 2017*, 8 WORLD ECONOMIC FORUM (2017).

⁵⁴⁵ *See infra* Part V(B)(4).

⁵⁴⁶ United Nations Development Programme, *Human Development Reports* (2017), available at <http://hdr.undp.org/en/composite/trends>.

⁵⁴⁷ *What Are the Risks of a C-Section?*, WEBMD (Oct. 16, 2018), <https://www.webmd.com/baby/risks-of-a-c-section>.

⁵⁴⁸ Sharmila Rudrappa, *Why is India's Ban on Commercial Surrogacy Bad for Women?*, 43 N. C. J. INT'L L. 70, 77 (2018).

⁵⁴⁹ *Id.*

⁵⁵⁰ *See, e.g.*, Human Rights Council, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60 (2018) para. 32 (describing surrogate who refused to undergo fetal reduction procedure at intended parent's request).

⁵⁵¹ *See infra* Part II(D).

⁵⁵² *See, e.g.*, Sital Kalantry, *Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India*, 27 CORNELL L.J. & PUB. POL'Y 685, 696–97 (2018) (describing a contract that explicitly forbade the surrogate from keeping a copy of it).

⁵⁵³ *See* Reema Gehi, *Womb Transfer Relations*, MUMBAI MIRROR (2013), <https://timesofindia.indiatimes.com/life-style/health-fitness/health/Womb-trade-relations/articleshow/19766089.cms?referral=PM> (Indian surrogate stating that when surrogates sign contracts—which are not read to them—literate people are asked to leave the room).

⁵⁵⁴ Amrita Pande, *Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India*, 16 INDIAN JOURNAL GENDER STUDIES 141, 154 (2009) (“many Indians equate surrogacy with sex work...people are not aware of the reproductive technology which separates pregnancy from sexual intercourse”). Pande notes that in India, almost all portrayals of commercial surrogacy equate it with sex. *Id.* at 155. She also describes how surrogates' husbands may be stigmatized as well as the surrogates themselves. *Id.* at 159.

⁵⁵⁵ *See infra* Part V(B)(4)(c).

⁵⁵⁶ Interview with A, C, and K, Surrogates, in Phnom Penh, Cambodia (Mar. 29, 2019).

⁵⁵⁷ Interview with Service Provider A in Phnom Penh, Cambodia (Mar. 22, 2019); Interview with Service Provider B in Phnom Penh, Cambodia (Mar. 25, 2019). *See also* Philip Heijmans, *Cambodia Has a Big Problem with Small Loans*, BLOOMBERG (Oct. 1, 2018), <https://www.bloomberg.com/news/articles/2018-10-01/microfinance-runs-amok-in-cambodia-where-everybody-has-a-loan>.

⁵⁵⁸ This is often the case for women who are trafficked or exploited as domestic workers, for example. For some women, domestic work is “the only option that they have in order to escape poverty,” and “[e]mployers take advantage of this situation” in order to coerce them into becoming domestic workers. Once they agree, they are often placed in situations where they are underpaid, overworked, and vulnerable to physical, psychological, and sexual abuse.

Virginia Mantouvalou, *Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers*, 35 INDUSTRIAL L.J. 395, 396–98 (2006).

⁵⁵⁹ Indeed, some reports have shown that surrogate interests are often subordinated to those of the intended parent(s). See, e.g., Miranda Davies, *Babies for Sale?: Transnational Surrogacy, Human Rights and the Politics of Reproduction* 270 (2017) (discussing how Caesarian sections are used, despite increased health risks to surrogates, for the convenience of intended parent(s)). This may simply arise from the fact that intended parent(s) are ultimately paying the bill. However, since intermediaries rely on the cooperation of both intended parent(s) and surrogates, their preferential treatment of intended parent(s) likely reflects the economic imbalance between intended parent(s) and surrogates.

⁵⁶⁰ *Id.* at 269.

⁵⁶¹ *Id.*

⁵⁶² Karen Smith Rotabi, Force, Fraud, and Coercion: Bridging from Knowledge of Intercountry Adoption to Global Surrogacy, INTERNATIONAL INSTITUTE OF SOCIAL STUDIES (2014).

⁵⁶³ *Id.*

⁵⁶⁴ Interview with Nakagawa Kasumi, Professor, Paññāsāstra University of Cambodia, in Phnom Penh, Cambodia (PUC) (Mar. 22, 2019); Samantha Marshall, *Vietnamese Women are Kidnapped and Later Sold in China as Brides*, THE WALL STREET JOURNAL (Aug. 3, 1999), <http://mx1.samanthamarshallghostwriter.com/files/vietnamese-women.pdf>.

⁵⁶⁵ Comprehensive data on the surrogacy industry is lacking. See Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MANAGEMENT & HEALTHCARE POL. 111, 112 (2015) (“Information on the extent of surrogacy, either within a specific country or transnationally, is scarce indeed”). Nonetheless, it is clear that the industry for transnational surrogacy is big. For instance, one article reported in 2016 that approximately 12,000 foreigners went to India each year to hire surrogates. Julie Bindel, *Outsourcing Pregnancy: A Visit to India’s Surrogacy Clinics*, (THE GUARDIAN, Apr. 1, 2016), <https://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel>. See also Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MANAGEMENT & HEALTHCARE POL. 111, 112 (2015) (“[A]n analysis of Indian clinics’ websites concludes that ‘reproductive tourism comprises a substantial fraction of India’s assisted reproduction clinics’ business focus...and surrogacy may be a strong motivator for international clientele.”) In the United States, referred to in 2015 as “the other great provider of surrogates,” multiple American intermediaries have stated that most of their clients are international. Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MANAGEMENT & HEALTHCARE POL. 111, 111 (2015). Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry it*, (NY TIMES, Jul. 5, 2014), <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>; Arielle Pardes, *How Commercial Surrogacy Became a Massive International Business*, (VICE, Jan. 13, 2016). And in Cambodia, sources suggested that almost all intended parent(s) were from abroad. Interview with Nakagawa Kasumi, Professor, Paññāsāstra University of Cambodia, in Phnom Penh, Cambodia (PUC) (Mar. 22, 2019).

⁵⁶⁶ See Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MANAGEMENT & HEALTHCARE POL. 111, 112 (2015).

⁵⁶⁷ See Rebecca Beitsch, *As Surrogacy Surges, New Parents Seek Legal Protections*, PEW (Jun. 29, 2017) (noting that in the United States, “legal uncertainty is particularly concerning to the intended parent(s), who usually spend about \$100,000...and risk ending up without the child”).

⁵⁶⁸ See C. Rudge, et al., *International Practices of Organ Donation*, 108 BRITISH J. ANESTHESIA 148 (2012).

⁵⁶⁹ Law Commission of England and Wales and Scottish Law Commission, *Building Families Through Surrogacy: A New Law*, Summary of Consultation Paper (2018), p. 19
https://www.scotlawcom.gov.uk/files/5615/5980/7881/Summary_of_joint_consultation_paper_on_Building_families_through_surrogacy_-_a_new_law_LCCP_244_SLCDP_167.pdf.

⁵⁷⁰ *Id.*

⁵⁷¹ Jordan Stirling Davis, *Regulating Surrogacy Agencies through Value-Based Compliance*, 43 J. CORP. L. 663, 666 (2018).

⁵⁷² June Carbone & Jody Lynée Madeira, *The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction Practices*, 90 WASH. L. REV. ONLINE 7, 23-30 (2015).

⁵⁷³ South Africa, Children's Act 38 of 2005, §303(2).

⁵⁷⁴ UK, Surrogacy Arrangements Act 1985, §2.

⁵⁷⁵ New Zealand, Human Assisted Reproductive Technology Act 2004, sections 14 and 15.

⁵⁷⁶ Ya-Wen Tien, *A Study on the Suitability of Non-profit Surrogacy Agencies and Its Possible Related Regulations*, --- (---), http://etds.lib.ncku.edu.tw/etdservice/view_metadata?etdun=U0026-2008201712341400; Jordan Stirling Davis, *Regulating Surrogacy Agencies through Value-Based Compliance*, 43 J. CORP. L. 663, 675 (2018).

⁵⁷⁷ Jordan Stirling Davis, *Regulating Surrogacy Agencies through Value-Based Compliance*, 43 J. CORP. L. 663, 677 (2018) (noting that the ABA Model Licensing Act may be a good starting point for writing the necessary licensing requirements).

⁵⁷⁸ Law Commission of England and Wales and Scottish Law Commission, "Building Families Through Surrogacy: A New Law", Summary of Consultation Paper, (2018), p. 12,
https://www.scotlawcom.gov.uk/files/5615/5980/7881/Summary_of_joint_consultation_paper_on_Building_families_through_surrogacy_-_a_new_law_LCCP_244_SLCDP_167.pdf.

⁵⁷⁹ About UNOS. Who we are, UNOS (2019), <https://unos.org/about/>.

⁵⁸⁰ *Id.*

⁵⁸¹ Sarah Huber et al, *Exploring Indian Surrogates' Perceptions of the Ban on International Surrogacy*, 33 J. OF WOMEN & SOCIAL WORK 69, 74 (2017).

⁵⁸² See Sonia Allan, *The Surrogate in Commercial Surrogacy: Legal and Ethical Consideration*, in SURROGACY, HUMAN RIGHTS AND THE LAW, 111, 127 (P. Gerber & K. O'Byrne eds., 2015).

⁵⁸³ *Id.*

⁵⁸⁴ Texas, Virginia and Utah impose such standards. VA Code Ann. § 20-160(B(2)-(3)); U.CA. 1953 § 78B-15-803(2)(c); V.T.C.A., Family Code § 160.756(b)(3).