



Surrogate Motherhood and Human Rights

Analysis of Human, Legal and Ethical Issues¹

For several years now, the Hague Conference on international private law has been working on the topic of parentage of children born to a surrogate mother. An international Convention on this issue, even if it would not compel States to legalise surrogate motherhood within their territories, would presuppose the acceptability of such a practice. *De facto*, it would even encourage circumventing the national laws of States forbidding surrogate motherhood.

Thus, before seeking how to solve issues deriving from surrogate motherhood, one should first question this practice with regard to the serious legal and ethical problems it raises.

Context

For over a decade, the issue of surrogate motherhood and its consequences have expanded with the convergence of the development of the artificial procreation techniques and the establishment of a real business in certain countries such as the United States, India, Ukraine or Thailand. Currently, even though the very large majority of countries in the world do not practice the surrogate motherhood, very few national laws explicitly prohibit it, as states have not yet adapted their national legislation to this recent phenomenon. Most of the time, this issue is imported through the *fait accompli* of people who resort to surrogate mothers abroad. In some cases, unacceptable practices arise from this phenomenon, especially the exploitation of poor women used to satisfy the desire of wealthy western citizens, for the greater benefit of various intermediaries, agencies, lawyers or clinics.

Regulation of this practice is sometimes called for in order to prevent these abuses and ensure that it is exercised within an ethical framework. Some draw a parallel with the 1993 Convention on Intercountry Adoption, which does not require States to authorize international adoption but frames it for those who admit it, so that it does not turn into child trafficking. However, the situations are not comparable. Adoption aims at giving a family to a child who no longer has one. The fact that it can be misused does not change its primary purpose, which is the protection of orphaned or abandoned children. On the contrary, surrogacy is intended to give a child to one or more adults. It consists in creating a child deliberately deprived of his family of

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origin, in manipulating its conception and legal parentage to satisfy the desire of adults. Therefore the legitimacy of surrogacy is at least questionable.

The suffering of infertile couples should not conceal the fact that surrogate motherhood raises crucial issues regarding human rights that must be addressed before implementing an international legal framework, which would mean accepting the principle of surrogate motherhood. The issue of the recognition of the filiation and of the civil status of children cannot conceal the serious ethical and legal issues raised by this practice, as it implies, in an unprecedented way, making use of a woman's body and the commodification of the child, object of the contract.

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Introduction

Surrogacy is a contract by which a woman accepts to bear a child for someone else, then abandon it at birth and hand it over to the contracting party.

A contract “A contract is an agreement by which one or several persons obligate themselves to one or several others to give, to do, or not to do something.”² In a contract of surrogacy, the woman has an obligation to do (bear the child) and an obligation to give (hand it over to someone else). The “something,” object of the contract, is therefore the child. Yet according to civil law, “Only things in commerce may be the object of conventional obligations”³. The child is therefore considered as a good, like in commercial transactions.

Regarding the woman, she is used by the sponsors like a robot allowing the development of the foetus, *i.e.* as an incubator. In the case Baby M in New Jersey, 1988⁴, renowned child psychologist Dr Lee Salk openly admitted this, specifying to the court that the couple had not turned to a surrogate *mother* but to a surrogate *uterus*.

Such a contract supposes on the one hand the physical transfer of the child and, on the other hand, the modification of his or her affiliation. By definition, the mother (the one who gives birth) gives the child to the sponsors and disappears from the ancestry of the child whose parentage is established with the name of one or two sponsors who *acquire* the child. The child is the *object* of the contract, which poses in itself a major ethical problem. Moreover, the woman is only considered through her reproductive capacity, as a means to achieve a desired end. This seems hardly compatible with human dignity even in the rare cases where the woman is truly willing to do this procedure.

Surrogacy, generally presented as an altruistic and generous action, actually opens the door to all kinds of abuse because it does not respect the human dignity of the persons concerned (I).

Since there are still no international legal provisions on surrogacy yet, it is necessary to refer to other treaties applicable to comparable situations. A review of surrogacy under international law shows that this practice is contrary to current standards (II).

² Definition in Article 1101 of the French Civil Code.

³ Article 1128 of the French Civil Code.

⁴ Mr and Mrs Whitehead had concluded an agreement with Mr and Mrs Stern according to which Mrs Whitehead would be inseminated with the sperm of Mr Stern and then hand over the child they had conceived. In the end she wanted to keep the child and refused to accept the agreed price. After a series of litigious events, the contract of surrogacy was annulled but the Sterns were awarded custody of the child, with a right for Mrs Whitehead to visit, by the Supreme Court of New Jersey on 3rd February 1988.

I- BREACHES OF HUMAN DIGNITY

In a surrogacy, the child is the object of a contract. It is conceived, carried and delivered according to a contract, usually in exchange for money. The woman, meanwhile, is treated as a means to obtain the desired end, a reproductive machine.

Neither the woman nor the child are treated as human beings. They are treated as objects, as means. This is clearly contrary to the recognition of the inherent dignity of all members of the human family, to quote the preamble of the Universal Declaration of Human Rights.

A. BREACHES OF THE DIGNITY OF THE CHILD

1. The Interest of the Child

Both in domestic and international law, the principle governing the actions concerning the child is his or her interest. Thus, under Article 3 of the Convention on the Rights of the Child, *“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*

The first question to ask about surrogacy is whether it is in the best interest of children or not.

A child born to a surrogate mother is conceived, carried, brought into the world and transferred in execution of a contract. Adults dispose of the child, as owners of an object allowing them to satisfy their desire or earn money. This is clearly in the interests of adults, but is it consistent with respect for the child’s dignity and best interest?

A child born to a surrogate mother can either be conceived by a surrogate mother through artificial insemination with the sperm of the sponsor or a donor (the surrogate is then the genetic and biological mother of the child; this is the case in low cost surrogacy) or be implanted in the uterus of the surrogate mother after *in vitro* fertilization. In this case, the embryo may have been created with gametes of both contracting parties, one of them and a donor, or two donors. A surrogate child can therefore have up to six parents: the genetic mother (egg donor), the genetic father (sperm donor), the surrogate mother, her husband (presumption of paternity) and the couple buying the surrogate child. Is it in the interest of the child to have five or six adults claiming rights over him?

Parentage is an essential part of a person’s identity. In many countries, children are identified by the name of their father (son of ...), which appears in many surnames, including in Europe. How should the parentage of a child born through surrogacy be determined? Who are the parents? Paternity and maternity are each separated into three possible claims. Moreover, as in the case of IVF or artificial insemination with donor, gamete donations are often anonymous. Consequently, the child is therefore deliberately deprived of much of his or her identity. This is

a source of suffering for the child and can lead to mental and psychological difficulties.⁵ Parentage enables the child to envisage their position in their own family tree, which will be difficult to do if it is incoherent and evidently incompatible with natural reality (especially when sponsors are two people of the same sex). Is it in the child's interest to blur his or her origin and identity?

For decades, unanimous research has shown the importance of physiological and emotional bonds created between mother and child during pregnancy, and the influence of pregnancy on the mother and the child. Not only does the child feel all the emotions of his or her mother, but the environment, the alimentation or the stress of the mother affect his development and the health of the adult he will become⁶ as reveals the study of epigenetics. It also shows that the interaction with the mother stimulates or inhibits the expression of certain genes. A surrogate mother avoids creating bonds with the child she is expecting. The child is kept apart during the period when the relationship should be fusional. This cannot but affect its development. From birth, the child recognizes the voices and language heard during pregnancy. Today, this continuity is so well recognized that contact with the mother at birth is favoured, for example through "skin to skin" on the belly of the mother. Newborns are no longer washed to ensure a sensory and olfactory continuum, especially in cases of prematurity, to foster links with the mother through touch and speech, as their beneficial nature for the development of the child is recognised. By definition, in case of surrogacy, the mother abandons the child at birth (often preterm) to hand it over to the sponsor(s). Is his interest to be sidelined in the womb and ripped from his mother at birth?

Researchers have also voiced concerns about the impact surrogacy has on the carrier mother's other children. They could especially suffer from feelings of insecurity and anxiety in the knowledge that they could have been treated in this way, much the same as certain children whose mother has had an abortion suffer from survivor syndrome. Is it the interest of potential other children of the surrogate mother to see how their brother or their sister was treated?

The mere formulation of these questions leads to a negative answer.

Certainly, many of these difficulties resemble those encountered by adopted children. Nevertheless, the objective of adoption is to remedy an existing situation and to give the child a family, in his or her interest. Children know their adoptive parents have tried to remedy an existing painful situation. On the contrary, in surrogacy this situation is deliberately created to satisfy the desire of adults. Surrogacy children will have reason to blame those who rear them for being the cause of their suffering, and having voluntarily amputated a part of their identity to satisfy their own desire. The situation is more complex than in the case of adoption, especially because there are sometimes gamete donors and always a voluntary dimension. For the child, knowing that the abandonment was decided in advance, that he was conceived with

⁵ See, for example, <http://www.anonymousfathersday.com/> or <http://breeders.cbc-network.org/>

⁶ See: <http://www.levif.be/actualite/sciences/l-epigenetique-ou-comment-la-sante-de-bebe-est-influencee-in-utero/article-normal-133383.html>; also see: <http://rue89.nouvelobs.com/2013/07/03/transmet-mere-porte-enfant-nest-genetiquement-sien-243913>

the aim of being abandoned (or sold) is violence and a great source of insecurity because he was treated as an object by the adults whose mission it was to protect him, starting with his mother.

Some frequent difficulties in children adopted are well known. Studies are beginning to show the impact of IVF on children thus conceived; the same consequences will soon appear for surrogacy children, aggravated because surrogacy is more complex and combines both IVF and adoption. Can a false affiliation with the sponsors be imposed on the child with impunity? Psychoanalysts show that abdication before the *fait accompli* is contrary to the child's interest: the word of the child who feels discomfort is prohibited if such parentage is imposed. The child is prevented from naming the transgression of which he was the object and can feel a victim.

2. The Child as an Object

The sponsors try and influence the genetic heritage of the child through the choice of the egg donor and possibly pretransfer diagnosis, including sex selection. Paying large amounts of money, sponsors consider they have a right to obtain a quality product, in line with their expectations, and to refuse it if it does not conform. This happened in the sad case of Gammy, born to a surrogate mother in Thailand and refused by its sponsors because he suffered Down's syndrome.⁷

Like every contract, contracts of surrogacy give rise to litigation, made more complex by the subject matter. The child is the crux of the dispute, claimed or rejected by all parties. One of the principal causes of litigation is the carrier mother changing her mind if, being attached to the child that she bore, she refuses to give it to the contracting parents. She is protected in certain countries such as England,⁸ but has no rights concerning the child in others like Ukraine⁹ and India. In the United States' Baby M Affair, the carrier mother – who was also the biological mother – had to give up the child to the contracting parents but was awarded the right to visit. It can also happen that the sponsors change their minds, for example when the couple separate during the pregnancy¹⁰ or if the child is born disabled. Nobody will want the child object of this contract any longer.

⁷ An inquest revealed a baby factory in Bangkok. On 20 February 2015, the Thai Parliament voted a statute prohibiting surrogate motherhood for foreigners. It will be possible only for Thai nationals married for at least three years; the text also bans adds for surrogacy. A comparable problem may occur in case of ART with sperm donor. Recently, a lesbian couple having had artificial insemination sued the clinic because the latter had, by mistake, used the sperm of a black man <http://www.dailymail.co.uk/news/article-2791053/Should-white-mom-paid-brown-baby-mistake.html>

⁸ These contracts are unenforceable, therefore the carrier mother cannot be obliged to hand over the child; on the other hand, the contracting and biological father of the child can be ordered to pay child support for the education of the child: Reported in the Daily Mail online on 13th April 2011: <http://www.dailymail.co.uk/femail/article-1376349/As-couple-ordered-pay-500-month-baby--Was-surrogate-took-baby-money.html>.

⁹ A Ukrainian carrier mother who wanted to keep the child has applied to the European Court of Human Rights.

¹⁰ Example of a Japanese couple who had "ordered" a child in India and then divorced; in the end it was the "grandmother", mother of the contractor, who took the child: *Baby Manji Yamada vs. Union of India and Another*, Judgments Today 2008 (11) Supreme Court 150. Summary of the affair available at: <http://www.lawgazette.com.sg/2009-3/regnews.htm>.

Numerous questions arise in the case of a problem during pregnancy. For example, if disability is detected during the ultrasound, can the carrier mother be obliged to have an abortion?¹¹ On the other hand, can she be prevented from having one if the pregnancy puts her life or health in danger?¹² If the child is stillborn or dies shortly after birth, how will problems relating to the execution of the contract be resolved? The mother will have born the child, but the contracting parents will not have received it. Should they pay the agreed sum? If she has already been paid, should the mother return the money?

Problems may arise in different areas, such as family relations and risks of confusion, if the carrier mother is close to the sponsors. In Britain, considered as having a strict legal framework on surrogacy, a 46 year-old woman bore the child of her 27 year-old single son, and a court decided in March 2015 that he could adopt the child. This case raised a storm of controversy on the fact that a woman can give birth to her own son's baby, questioning the prohibition of incest. The future difficulties of the child, who is both the son of his grandmother and the brother of his father, have not been taken into account.

Later in life litigation will flourish between children conceived through surrogacy and their numerous "parents," perhaps even their "grandparents," relating to the fulfilment of their obligation to maintain or rights of succession, maybe also with half-brothers and half-sisters, or questions falling under other domains, for example concerning the restrictions on marriage between (half-)brothers and (half-)sisters.¹³ Making parentage confused will inevitably give rise to innumerable legal issues.

A quick search of the internet shows that surrogacy is an expanding market: hundreds of clinics and agencies offer their services in the matter for varying prices, either for a fixed package price or based on the options chosen. In the United States, between \$100,000 and \$150,000 must be paid, around half of that in Russia or Ukraine and a quarter of that in India. Some shamelessly promote their "low cost" carrier mothers and have different prices for the eggs they offer depending on whether the woman who donated them was Indian or Caucasian.¹⁴ It is estimated that the annual turnover of the reproduction market, which was \$400 million in India in 2011,¹⁵ has risen to 2 billion now, according to the Confederation of Indian Industry¹⁶ and \$6.5 billion in the United States.¹⁷

¹¹ A surrogate mother in the States was offered 10.000 \$ to abort, because the baby had a cleft palate <http://edition.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/>

¹² In the United States, surrogacy contracts provide for all these eventualities, like in the Baby M Affair: http://www.gale.cengage.com/free_resources/whm/trials/babym.htm.

¹³ Cases already occur, due to sperm donation http://www.slate.com/articles/life/dear_prudence/2013/02/dear_prudence_my_wife_and_i_came_from_the_same_sperm_donor.html

¹⁴ <http://www.artbaby.in/ivf-packages/>.

¹⁵ 2011 Preliminary Note of the Hague Conference, § 11 <http://www.hcch.net/upload/wop/genaff2011pd11e.pdf>

¹⁶ <http://beta.dawn.com/news/788596/wombs-for-rent-indian-surrogate-mothers-tell-their-tales>

¹⁷ Sigrid Fry-Revere, "Funding Embryonic Stem Cell Research," *Genetic Engineering and Biotechnology News*, Vol. 27, No. 6, March 15, 2007, cited by <http://www.cbc-network.org/issues/making-life/egg-donation-and-exploitation-of-women/>.

An Indian NGO recently denounced the use of very young girls (from 13 years old), victims of trafficking and exploited as surrogate mothers.¹⁸ Mafia-like networks of child sales are not restricted to developing countries. In Summer 2011 a child sale network was foiled in the United States. It was organised by lawyers who were claiming that the children concerned were conceived for contracting parents who had later changed their minds. These children were then sold for \$100,000.¹⁹

B. BREACHES OF THE DIGNITY OF WOMEN

The carrier mother is used as an instrument to get a baby. Thus, she is considered as a means, not an end, which in itself violates her dignity. The fact that, in rare circumstances, she may be a volunteer does not change this since dignity is inalienable. Most of the time, the carrier mother accepts to bear the child for an amount of money. She rents her body, or part of it: her womb. Renting one's body is the characteristic of prostitution, which can hardly be considered as respecting women's dignity.

1. Consequences on Women's Health

Whatever the conditions of surrogacy, pregnancy is the somatopsychic event *par excellence*,²⁰ a time of intense physiological and psychological changes. Imagining the life with the child is one of the necessary steps, and it is impossible when the child is for somebody else. Separation is a cause of suffering for both the newborn and the carrier mother.²¹ The woman, to protect herself, keeps a certain distance from the child that she is expecting, avoiding "engaging" in her pregnancy,²² which prevents the psychic development of pregnancy.²³ In the United States, surrogacy agencies provide psychological support and discussion groups for the carrier mothers to help them prepare for (and cope with) this separation.

Maternal mortality remains high in some countries, such as India, so media seldom reports the deaths of surrogate mothers. However, two cases were made public in 2012. In May, a woman died after giving birth to a child for an American couple. She had two children of her own, who remained motherless.²⁴ In autumn, another woman died after the birth of twins for a Norwegian couple, due to hepatitis contracted during pregnancy.²⁵ Attacks on the life and

¹⁸ <http://www.hindustantimes.com/india-news/tribal-girls-forced-to-conceive-deliver-babies-for-sale/article1-1320239.aspx>

¹⁹ News Release, Office of the United States Attorney Southern district of California, Baby Selling Ring Busted 1 (Aug. 9, 2011).

²⁰ See Bérengère Beauquier-Maccotta, "La dynamique psychique de la grossesse, in Bernard Golse et Marie-Rose Moro, *Le développement psychique précoce, de la conception au langage*, Elsevier Masson, 2014, p. 79s

²¹ See for example ARTE documentary *Bébé en kit* http://www.dailymotion.com/video/xes5mf_google-baby-bebes-en-kit_webcam or that of the Center for Bioethics and Culture « Breeders, a subclass of women ? » <http://breeders.cbc-network.org/>

²² Hazel Baslington, *The Societal Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. Health Psychol. 57,63 (2002).

²³ Bérengère Beauquier-Maccotta, *op. cit.*

²⁴ <http://www.dnaindia.com/ahmedabad/report-surrogate-mom-sees-her-premature-son-dies-soon-after-1690532> 2012

²⁵ <http://www.newsinenglish.no/2013/04/02/surrogate-mother-died-after-birth/>

health of mothers are not limited to developing countries. In the United Kingdom in 2005, a carrier mother died in childbirth.²⁶ In the United States in 2011, another one was only just saved when giving birth but severe complications required intensive care and a long stay in hospital. As the buyers had not purchased the compulsory insurance and had gone back to their country with the child without giving an address, the carrier mother faced a bill of over 200.000\$.²⁷

The carrier mother is not the only woman involved in the process. At present, the majority of sponsors resort to an egg donation, whether they suffer medical infertility, have reached the age of menopause or are a couple of men, by nature sterile. If in France it is really a donation (though sometimes more or less constraint), in most countries it is almost always a *sale* of eggs. In the United States, many young women sell their eggs, sometimes several times, to pay for their studies. Never-ending questionnaires²⁸ help selecting the best suppliers to get a high quality baby: physical appearance, level of study and profession, musical or sports abilities, religion, sexual life and medical history of the potential donor and her extended family. In India, some clinics shamelessly announce a price three times higher if the egg donor is Caucasian rather than Indian. Egg retrieval is an invasive and risky procedure. It requires ovarian stimulation to harvest about 10 eggs, sometimes up to 20. The number of eggs a woman has is limited, so the donor's future fertility is directly affected, and the process may lead to hyperstimulation syndromes and complications such as thromboembolic events, haemorrhage, infection etc.²⁹ This is also a form of exploitation of women.³⁰

Pregnancy causes an immediate risk for the health and sometimes life of women, but it also has long-term consequences. Recent discoveries, especially epigenetics and microchimerism,³¹ show that exchanges between mother and child during pregnancy are more developed than was previously thought and are never neutral.³² Postgestational microchimerism is the existence of foetal cells in the mother (child-mother) or of mother cells in the child (mother-child) after pregnancy. Child-mother migration is more abundant than mother-child and foetal cells are found in the mother's body several decades after giving birth.³³ The consequences of microchimerism on women are still poorly understood.

2. Breaches of Women's Rights

The first question that contracts of surrogacy give rise to concerns the freedom to consent of the mother: if the surrogacy is commercial, the mother is not truly free because she needs money, often so she can provide for her own family. In India, from a single pregnancy she can

²⁶ <http://www.dailymail.co.uk/news/article-335871/Surrogate-mum-dies-giving-birth.html> 2005

²⁷ <http://www.lifenews.com/2011/11/01/surrogate-mother-nearly-dies-left-with-200k-in-medical-bills/>

²⁸ <http://www.egg411.com/download/EggDonorApplication.pdf>.

²⁹ <http://www.gyneco-online.com/fertilite%3%A9/le-syndrome-d039hyperstimulation-ovarienne-le-point-de-vue-du-r%3%A9animateur>

³⁰ See *Eggsplotation* by the Center for Bioethics and Culture <http://www.eggsplotation.com/>.

³¹ <http://www.scientificamerican.com/article/scientists-discover-childrens-cells-living-in-mothers-brain/>

³² Académie nationale de médecine, « La gestation pour autrui au regard du mariage entre personnes de même sexe », 27 mai 2014, <http://www.academie-medecine.fr/publication100100319/>

³³ L. Albano, Microchimérisme postgestationnel, CHU Nice, <http://www.soc-nephrologie.org/PDF/epart/industries/gambro/2011/13-albano.pdf>

earn up to ten times the annual income of her husband.³⁴ In these circumstances the consent is evidently not free, but constrained by economic necessity. Even if it is “voluntary,” the mother can in reality be subjected to emotional blackmail, even to commitments or threats concerning her job. This is already the case regarding egg donation in France, as is mentioned in the IGAS report.³⁵ When the surrogacy is not for a profitable purpose, few women agree to carry a child for somebody else. The consequence of the inadequacy of supply to demand is that either more vulnerable women are pressured into consenting, or the sponsors go abroad, where surrogacy is commercial and there is a risk that the carrier mother will have no protection. In places where commercial surrogacy is permitted, numerous agencies and clinics make profit out of the suffering of couples yearning for a child and the distress of vulnerable women. Depending on where surrogacy is carried out, the price of a child varies from less than 15.000 to more than 100.000\$. The surrogate mother receives less than a quarter of this sum;³⁶ the rest goes to clinics, lawyers and other intermediaries.

The women used as carrier mothers or egg donors are carefully selected. In India, they are chosen according to the criteria of beauty, obedience and economic dependence. In the United States, the recruitment process begins with never-ending questionnaires³⁷, examining the medical history of the potential donor and her family back to her grandparents (including the age and cause of their deaths), and to her uncles and aunts or nephews and nieces, but also the levels of study and professions of all of her family, her sexual life, her musical or sports abilities, her religion (faith and practice), without forgetting her physical appearance: height, weight, ethnic origin, eye and hair colour, etc. Women with a medical or criminal record are eliminated. Finally, the women are chosen from catalogues with photos, to allow the “intended parents” to have the baby “of their dreams,” the perfect baby, which looks like them and fulfils all of their desires. Many clinics also offer the choice of the child’s sex by preimplantation genetic diagnosis.³⁸ The woman and the child therefore become goods that are chosen with all their options, like in the purchase of a car,³⁹ without the contracting parents having to endure the inconveniences of pregnancy and childbirth.⁴⁰

To ensure that the child will conform to all of the set standards, the mother is closely monitored during pregnancy. This can be done in different ways, in some cases in a coercive manner. In the United States, for example, the contract clauses consider in detail what the mother can do or eat during her pregnancy and what she should abstain from, to a point where

³⁴ 2011 Note of the Hague Conference p. 19

³⁵ “Etat des lieux et perspectives du don d'ovocytes en France”, February 2011, Official French Report, p. 25 <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000113/0000.pdf>. See also, concerning the egg market in the United States, the film *Eggsploitation* available at <http://www.eggsploitation.com/>.

³⁶ The carrier mother sometimes receives a derisory sum. In the *Foulon* case, pending in the European Court of Human Rights (Ap. 9063/14) the surrogate mother received 1500€. However, this amounted to three years of wages for her.

³⁷ <http://www.egg411.com/download/EggDonorApplication.pdf>.

³⁸ For example: <http://www.lasvegasfertility.net/index.html>; http://www.fertility-docs.com/fertility_gender.phtml.

³⁹ For example: <http://mother-surrogate.com/anketa.html> ; <http://www.affordablesurrogacy.com/33.html>.

⁴⁰ In 10% of cases, the women who turn to a carrier mother do so to avoid jeopardising their career or affecting their figure, or to avoid the pains of childbirth: <http://www.ewtn.com/vnews/getstory.asp?number=17113>.

it can become very constraining. In many countries the agency exercises a regular control, sometimes with daily visits, and the psychological support can also become a method of surveillance. The sponsors themselves can be in permanent contact with the carrier mother, by telephone or through visits, to the point of encroaching upon the privacy of the carrier mother and maintaining an unhealthy state of confusion.⁴¹

In Belgium, as an example, the contract contemplated in a legislative draft⁴² on surrogate motherhood clearly shows the alienation imposed to the surrogate mother.

- *The surrogate mother, her partner and the applicant couple are submitted to a prior psychological examination, which is carried out by the psychologist of the centre in collaboration with the members of the multidisciplinary team (...).*
- *The intentional parents have an unlimited access to the medical information of the surrogate mother and of her partner (blood analysis, sexually transmitted diseases, etc.).*
- *Once the woman is pregnant, none of the parties can rescind the contract.*
- *The surrogate mother accepts to use contraception methods during her sexual intercourse with her partner, and this starting from the 1st day of the cycle of the treatment and until the confirmation of the pregnancy issued by surrogate motherhood centre. During the pregnancy, she should abstain from unprotected sexual relations if she changes partner, unless her new partner submits to prior exams.*
- *In case the surrogate mother refuses to abort, the contract is no longer valid between the parties.*
- *In case of miscarriage, the surrogate mother can be held responsible.*

The surrogate mother takes also the following commitments:

- *To conduct prenatal examinations fixed by common agreement.*
- *To conduct psychological follow-up for 12 month following the pregnancy.*
- *Not to practice risky sports, or expose herself to radiation or chemical products.*
- *Not to leave Belgium without the agreement of the intentional parents.*
- *To resort to abortion according to the agreed contract.*
- *To accept the risks of disability, illness, death, loss of salary without expectation of payment.*

This monitoring can even become openly coercive, with the women cooped up in a house under the pretence of being well fed and cared for, and obliged to follow a strict regime, including naps and listening to Mozart, as it is good for the baby.⁴³ They are kept away from their own families during the whole pregnancy. Some cases clearly constitute cases of exploitation and trafficking. Women freed from a “baby farm,” where they had been forced to carry a child for somebody else, have told of the recruitment methods used in certain villages:

⁴¹ Such as this English sponsor, who told of how she herself had inseminated the carrier mother with her husband’s sperm to participate in the conception, how the carrier mother had announced to her “We’re pregnant” and how she had rubbed cream on the belly of the carrier mother... Daily Mail online, 13th April 2011: <http://www.dailymail.co.uk/femail/article-1376349/As-couple-ordered-pay-500-month-baby--Was-surrogate-took-baby-money.html>.

⁴² <http://www.lachambre.be/FLWB/PDF/54/0425/54K0425001.pdf>

⁴³ <http://www.bbc.co.uk/news/world-asia-pacific-12575566>.

the promise of a job, rape, the confiscation of their passports and confinement a long way from where they live: these methods are similar in all cases to those used in prostitution rings. Links to mafia networks, not only in Asia but also in Eastern Europe, are known too, even if they are sometimes difficult to prove.

In all cases, only the baby counts: he or she must be a product of good quality, meeting all the desires of the sponsors. For this reason, some Indian clinics require a caesarean section for no medical reason, three weeks before the full term, so that the baby will not be marked by the birth; he or she will have a beautiful, properly rounded head, and the date of birth will fit the sponsors' plane tickets. The mothers do not receive adequate medical attention afterwards, so the maternal mortality rate is high. Preterm caesarean section can also allow a reduction in the remuneration available to the mother, as she is sometimes paid according to the weight of the baby...

The example of the few countries which have decided to admit and regulate surrogate motherhood show that the non-commercial character is illusory. In England for example, only a reasonable compensation is allowed, but as there is no effective control, it is often so high that it in practice constitutes payment. Moreover, regulated and unpaid surrogacy will never meet the demand, both because there will never be enough volunteer women, and because in most cases the candidates will not qualify under the legal conditions meant to protect carrier mothers and children. Many British citizens already go abroad, especially to India, to get children: out of ten children born to surrogate mothers, one is born in the UK, the rest abroad. Since demand exceeds supply, it is unavoidable, if surrogate motherhood is not completely prohibited – including in its consequences – that some people resort to it abroad, thus participating in the exploitation of women and commodification of children. No protection can be sufficient because surrogacy is in itself a violation of human dignity, for the mother as much as for the child.

II- SURROGATE MOTHERHOOD UNDER INTERNATIONAL LAW

Surrogacy is related to existing practices regulated by international treaties. Therefore, it is necessary to examine surrogate motherhood in light of these treaties.

A. ADOPTION

When examining surrogacy in view of the provisions relating to adoption, its incompatibility with the rules of international adoption is evident. Both the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption and the European Convention on the Adoption of Children (Revised) require that the consent of the parents has been given freely, without them having received payment or compensation of any kind, and that the mother has agreed only after the birth of the child. In addition, these conventions state: *“no one shall derive any improper financial or other gain from an activity relating to the adoption of a child.”* Moreover, the Hague Convention forbids contact between adoptive and biological families until the consent has been given, *i. e.* after birth (art. 29). All these provisions are violated in the case of surrogate motherhood.

The aim of these conventions is, as stated in article 1 of the Hague Convention, *“to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and (...) prevent the abduction, the sale of, or traffic in children.”* Such abuses are sadly frequent, as shows the energy with which the Parliamentary Assembly of the Council of Europe has repeatedly denounced them.⁴⁴ PACE especially criticises the transformation of international adoption into a real market, the one-way flow of children from poor countries towards developed countries, the psychological or economical pressure on vulnerable families, the abduction and sale of children, the constraint and manipulation of biological parents, falsification of documents and corruption. It recalls that international adoption should enable children *“to find a mother and father while retaining those rights and not enable foreign parents to satisfy their desire for a child at any price”* (Recommendation 1828 (2008)).

All these abuses, which turn adoption into the sale of a child, are inherent in surrogacy, which consist in creating abandoned children to satisfy the desire of adults.

B. THE SALE OF CHILDREN

In a vast majority of cases, the compensation for the child is an amount of money paid either directly to the mother or to some intermediaries. Now, according to Article 2(a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography: *“Sale of children means any act or transaction whereby a child is*

⁴⁴ Recommendation 1443(2000); Recommendation 1828 (2008), Resolution 1909 (2012)

transferred by any person or group of persons to another for remuneration or any other consideration". According to Article 35 of the Convention on the Rights of the Child, the sale of children is prohibited "*for any purpose or in any form*". Surrogacy then clearly enters into the framework of the sale of a child prohibited by international law.

The surrogate mother – or more often the intermediary – and the sponsors dispose of the child, which is one of the powers attaching to the right of ownership. Now, international law gives a name to the fact of exercising a right of property, even partial, on a person: slavery. "*Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,*" according to the 1926 Slavery Convention. The 1956 Convention adds: "*and "slave" means a person in such condition or status.*"

Even in the – rare – cases where surrogacy is entirely free of charge, the child is *given* to the sponsors, and you can give only what you *own*. A transfer, be it against payment or not, is always an act of disposal, consequence of the right of *abusus*, *i. e.* of the right of ownership. The child is given or sold like a commodity. Whatever the conditions of the contract, even where there is no payment, surrogacy means disposing of the child, in other word exercising a right of property on him. It can thus be said that the child is a slave under international law, irrespective of the intentions of the sponsors and without exploitation. The carrier mother can also be a victim of slavery (she is being used, *usus*, and her child, her *fructus*, is taken away from her) or be subject to servitude or trafficking by the intermediaries, or exploited as a vulnerable person.

The 1926 Convention specifies "*the slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery.*" This definition is developed in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, of 15 December 2000 and Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005. Children objects of surrogacy contracts, transferred for money in a form of slavery, are thus victims of trafficking. Under some circumstances, this statement can also apply to carrier mothers, especially since the treaties specify that the consent of the victim is irrelevant if it has been obtained "*by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits*".

Consequently, surrogacy not only violates international adoption standards, but in most cases it also constitutes case of sale of a child and can be considered a new form of slavery and trafficking. Unless it is decided that surrogacy is a new exception to the prohibition of these crimes – therefore that, under certain circumstances, sale of children and slavery are acceptable – it must be concluded that it is incompatible with positive international law.

C. WOMEN'S RIGHTS

The Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979 and entered into force on 3 September 1981 also applies in this situation.

Article 6 requires that *“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”*. Article 11.f) adds that States must ensure, *“the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”* This perfectly applies to the exploitation of the reproductive function of carrier mothers. After having listed specific rights, Article 11 states in a third paragraph that *“Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.”* The development of surrogate motherhood, due especially to the popularisation of artificial reproduction techniques, undoubtedly creates the conditions to revise domestic laws.

Conclusion

Not only does surrogate motherhood pose numerous problems relating to the development and commodification of children, the health and possible exploitation of mothers, but it is also incompatible with international law.

The only response that can be brought on the international level is banning surrogate motherhood, in the same way as the sale of children, and requiring the adoption of criminal sanctions for offenders, especially the intermediaries.

Regulating the consequences of surrogate motherhood, especially with regard to parentage, would amount to admit this practice is acceptable with regard to human dignity and validate the institutionalisation of a real *“reproductive proletariat”*. It would ratify the purchase of children and the exploitation of poor women. It would mean deliberately ignoring the serious violations of children's rights, as if nothing had happened. It would encourage fraud in States that ban surrogacy, through the *fait accompli*.

A contract the object of which is a human being, a child whose abandonment was planned, whose parentage is deliberately made illegible, such a contract can produce no legal effect in States who claim to respect human dignity.

It then belongs to every State to resolve the individual cases due to the illegal use of surrogacy in the best interest of the child, without as a consequence encouraging this practice. The prohibition should be accompanied with criminal sanctions and refusal to recognise the effects of surrogacy abroad, especially with regard to parentage. It is the most efficient way for States to dissuade their nationals to resort to surrogacy abroad and contribute to the exploitation of women and commodification of children. The interest of the child in a case-by-case basis must be of paramount importance, especially in deciding to entrust the child to social services for adoption or to leave him with his sponsors and granting them parental

rights and related social rights. In the absence of parentage, nationality should be decided on conditions of residence and education (for example, see Article 21-12 of the French civil code which grants French citizenship after five years to every child reared in France by French nationals) or using the 1954 and 1961 conventions on statelessness.

Otherwise, when they are adults, the children born to surrogate mothers will ask for explanations and go to court; then, everyone will have to face their own responsibilities...

Nomaternitytraffic is an initiative launched by the “**International Union for the Abolition of Surrogacy**” on 20 November 2014, the international day of rights of the child.

The initiative calls on the bodies of the Council of Europe to commit themselves for the abolition and the effective prohibition of the practice of surrogate motherhood.

The International Union for the Abolition of Surrogacy works by all legal means to internationally prohibit the commercialization of human body, especially by surrogate motherhood. This Union was founded at the initiative of national and European associations acting for the respect of childhood, women, dignity and human rights, among others the European Center for Law & Justice (special consultative status in the United Nations), l’Appel des professionnels de l’enfance, Alliance VITA (member of the EU Fundamental Rights Platform), FAFCE (participatory status in the Council of Europe), La Manif Pour Tous, l’Agence Européenne des Adoptés, Care for Europe, European Dignity Watch, Fondazione Novae Terrae...

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