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COMMERCIAL SURROGACY IS THE SALE OF CHILDREN?: AN ARGUMENT THAT COMMERCIAL SURROGACY DOES NOT VIOLATE INTERNATIONAL TREATIES

Lily Johnson[†]

Abstract: Rates of commercial surrogacy have risen with the proliferation of in vitro fertilization. The process is unique in allowing intending parents the opportunity to raise a child of their own genetic material even if they cannot procreate through their own bodies. However, commercial surrogacy has been abused and caused physical and legal problems for all parties involved. In an attempt to remedy the problems associated commercial surrogacy, some scholars and humanitarians claim commercial surrogacy is already illegal under an international treaty that bans the sale of children. These legal scholars and human rights advocates argue that commercial surrogacy is the sale of children as banned by The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. However, this paper argues that commercial surrogacy is not the sale of children as described in the Protocol, and any legal challenge to commercial surrogacy based on the Protocol is not only futile but distracts from the treaty's purpose. Ultimately, this paper argues that the necessary international legal protections already exist without banning commercial surrogacy as the sale of children.

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I. INTRODUCTION

Most issues surrounding beginning of life are fraught with controversy.¹ Surrogacy is no exception. Surrogacy offers individuals or couples the opportunity to raise children that are genetically their own without carrying the child themselves. Indeed, for infertile and some same-sex couples this may be the only opportunity to raise children of their own genetic material. It also allows couples to plan for children and regulate the conditions of pregnancy in a way that adoption cannot. However, surrogacy can only

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¹ Abortion rights and contraceptive regulation continue to be front page news almost daily. *See, e.g.*, Opheli Garcia Lawler, *Georgia's 6-Week Abortion Ban Is Even More Terrifying Than It Seems*, THE CUT (Mar. 28, 2019), <https://www.thecut.com/2019/03/everything-to-know-about-georgia-heartbeat-abortion-bill.html>.

happen when a woman is willing to carry a child for another person.² Given the gravity of this requirement, some couples must incentivize potential surrogates with compensation for her services, also known as “commercial” surrogacy.

In recent years, with the wide availability of in vitro fertilization³ technology, commercial surrogacy has been on the rise.⁴ However, even after decades of this practice, surrogacy, and commercial surrogacy in particular, remain fraught with controversy.⁵ Specifically, the rapid increase in surrogacy agreements has amplified the legal and philosophical problems that can accompany the practice. Surrogacy-related issues include questions of parentage and nationality of the child,⁶ exploitation of poor women,⁷ and the opportunity for scams against surrogates and intended parents.⁸ It is these associated issues that cause scholars and human rights advocates to question the necessity and legality of commercial surrogacy.⁹

One creative argument espoused by opponents of commercial surrogacy is that commercial surrogacy should already be considered illegal in countries that have signed on to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child

² Surrogacy is “[t]he process of carrying and delivering a child *for another person.*” *Surrogacy*, BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis added).

³ In vitro fertilization is a form of assisted reproductive technology. An egg is extracted from a woman’s body and combined with sperm in a laboratory, then the resulting embryo is implanted in a woman’s womb. *See In Vitro Fertilization*, AM. PREGNANCY ASS’N., <http://americanpregnancy.org/infertility/in-vitro-fertilization/> (last visited May 22, 2018).

⁴ *See* Permanent Bureau of the Hague Conference on Private International Law, A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, Preliminary Document No. 10, p. 6 (Mar. 2012), <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>.

⁵ *Compare* Hugh McLachlan, *Commercial Surrogacy: Lifting Legal Restrictions is the Moral Thing to Do to Help People Trying to Have Babies*, THE CONVERSATION (Dec. 19, 2018, 9:48 AM), <http://theconversation.com/commercial-surrogacy-lifting-legal-restrictions-is-the-moral-thing-to-do-to-help-people-trying-to-have-babies-108999> with Susan L. Bender & Phyllis Chesler, *Handmaids for Hire: Should Commercial Surrogacy Be Legalized in NYS?*, N.Y. L.J. (Feb. 22, 2019, 2:00 PM), <https://www.law.com/newyorklawjournal/2019/02/22/handmaids-for-hire-should-commercial-surrogacy-be-legalized-in-nys/>.

⁶ ALEX FINKELSTEIN ET AL., COLUMBIA LAW SCHOOL SEXUALITY & GENDER LAW CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 18–20 (2016).

⁷ *Id.* at 24–37.

⁸ *See, e.g., Egg Donation and Surrogacy Scam: California Woman Robbed Would-Be Parents of Money and Hope*, F.B.I. (Feb. 16, 2016), <https://www.fbi.gov/news/stories/-egg-donation-and-surrogacy-scam>.

⁹ *See* 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 PEPP. L. REV. 265 (2016).

pornography (“the Protocol”). The Protocol calls on nation states to ban sale of children, child prostitution, and child pornography.¹⁰ The definition of the “sale of children” provided in the Protocol is: “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”¹¹ In addition to the obvious acts which fall under that definition—such as the sale of children for the purposes of sex trafficking—some scholars, nongovernmental organizations, and human rights officials have argued that commercial surrogacy is the sale of children as well.¹² Consequently, one new approach to remedying the problems associated with commercial surrogacy is to argue for a blanket ban because it should already be considered prohibited as the sale of children under the Protocol.¹³

This paper considers the argument that commercial surrogacy is the “sale of children” as defined by the Protocol. However, for the reasons articulated herein, commercial surrogacy does not violate the Protocol, and hinging a commercial surrogacy ban on the Protocol is not only unnecessary, but it could detract from the original purpose of the Protocol.

There already exists a plethora of scholarship considering how best to regulate commercial surrogacy.¹⁴ This paper does not seek to create a new method for regulation. Instead, I argue that the necessary international legal protections already exist.

To come to this conclusion, Part II considers the definitions of surrogacy and some of its benefits. Part III lays out the problems associated with commercial surrogacy, subsequently, Part IV discusses the movement to ban commercial surrogacy. Part V introduces the Protocol and the definition of the sale of children. Then, Part VI explains the reasons that the Protocol

¹⁰ Optional Protocol to the Convention on the Rights of the Child on the sale of Children, child prostitution and child pornography, *opened for signature* May 25, 2000, TIAS 13095 (entered into force Jan. 18, 2002) [hereinafter Protocol].

¹¹ *Id.*

¹² See, e.g., Katherine Wade, *The regulation of surrogacy: a children’s rights perspective*, CHILD FAM LAW Q. (Jun 29, 2017); 29(2): 121.

¹³ See, e.g., Smolin, *supra* note 9; *Commercial Maternal Surrogacy Amounts to Sale of Children*, EUROPEAN CENTRE FOR LAW & JUSTICE, <https://eclj.org/surrogacy/hrc/dclaration-conjointe--la-34me-session> (last visited May 22, 2018).

¹⁴ See, e.g., Katrina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT’L L. 627 (2011); Yasmine Ergas, *Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT’L L. REV. 117 (2013); PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, A PRELIMINARY REPORT ON THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS (2012), <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>.

fails to provide anti-surrogacy advocates with legal recourse to effectively attack commercial surrogacy as already illegal. Additionally, Part VII articulates why countries should decide not to ban commercial surrogacy under the Protocol. Part VIII analyzes the dangers of any comprehensive ban on commercial surrogacy. Finally, Part IX briefly lays out why there are already sufficient international treaties and regulations to target the problems that often accompany commercial surrogacy.

II. WHAT IS SURROGACY?

In order to consider whether commercial surrogacy is the sale of children, it is important to understand what surrogacy is and why human rights advocates and law makers are concerned with its regulation.

Surrogacy is “[t]he process of carrying and delivering a child for another person.”¹⁵ Surrogacy comes in two general forms: either traditional surrogacy or gestational surrogacy. In traditional surrogacy, the surrogate mother carries a child that is genetically her own.¹⁶ Traditional surrogacy has existed for centuries.¹⁷ Gestational surrogacy, on the other hand, is a more recent development. It involves a surrogate mother carrying a child with which she shares no genetic material, accomplished by in vitro fertilization.¹⁸ In both types of surrogacy, an agreement must be made between the surrogate mother and intended parents *before* the child is conceived.¹⁹ Then the surrogate mother delivers the baby to the intended parents when the child is born.²⁰ Surrogacy does not require intended parents to be genetically related to the child in either scenario; however, unlike adoption, it does allow for at least one intended parent to contribute genetically to the procreation of the child.

One additional nuance to surrogacy is that it may be either “altruistic” or “commercial.” Altruistic surrogacy arrangements often occur between

¹⁵ BLACK’S LAW DICTIONARY, *supra* note 2.

¹⁶ *Id.*

¹⁷ In fact, the book of Genesis, within the Bible, refers to a traditional surrogacy arrangement. Sarah, wife of Abraham, could not bear children, so she offered her slave to him to bear children on her behalf. *See Genesis* 16:2.

¹⁸ BLACK’S LAW DICTIONARY, *supra* note 2.

¹⁹ This differs from adoption where the agreement to give the child to the intended parents happens after conception. Liezl van Zyl & Ruth Walker, *Surrogacy, Compensation, and Legal Parentage: Against the Adoption Model*, 12 J. BIOETHICAL INQUIRY 383, 385 (2015).

²⁰ *Id.*

close friends or family members and the surrogate mother receives no compensation beyond what is reasonably necessary for medical care.²¹ However, when a surrogate receives additional compensation, it is considered commercial surrogacy.²²

The focus of most surrogacy opponents, and therefore this paper, is commercial surrogacy.²³

III. IS SURROGACY A PROBLEM?

Surrogacy advocates articulate many benefits to surrogacy. For instance, “[s]urrogacy allows infertile couples, single people and members of the LGBT community to become parents when they may not be able to have children otherwise.”²⁴ Also, because surrogacy agreements are in place before conception, the process may also allow intending parents to be present for important birth milestones, such as finding out the baby’s sex.²⁵ In contrast, adoption agreements are usually made at later stages in pregnancies, which prevents adoptive parents from experiencing such milestones. Additionally, “[i]ntended parents may face fewer restrictions with surrogacy than with adoption; those who cannot adopt due to agency restrictions on factors like age can still pursue surrogacy.”²⁶ The list goes on, but one of the most enticing benefits is that surrogacy is completely unique in allowing some infertile and same-sex couples to have a child that shares their genetic material.²⁷

In vitro fertilization made gestational surrogacy possible for couples starting in the 1970s,²⁸ but it has been the skyrocketing demand for surrogacy since the early 2000s²⁹ that has allowed manipulation and fraud to flourish.

²¹ *What is Altruistic Surrogacy*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-altruistic-surrogacy> (last visited May 9, 2019).

²² *What is Commercial Surrogacy*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-commercial-surrogacy/> (last visited May 9, 2019).

²³ However, it is worth noting that the definition of the sale of children in the Protocol is quite broad and if the arguments of those opposed to surrogacy are taken to the extreme, it could be argued that even altruistic surrogacy is the sale of children.

²⁴ *Benefits of Surrogacy for Everyone Involved*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/surrogacy-101/benefits-of-surrogacy-for-everyone-involved> (last visited May 9, 2019).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Finkelstein, *supra* note 6, at 38.

²⁸ Sinem Karipcin, *We’ve Come a Long Way, Baby: The History of IVF*, U.S. NEWS (July 26, 2018, 12:16PM), <https://health.usnews.com/health-care/for-better/articles/2018-07-26/weve-come-a-long-way-baby-the-history-of-ivf>.

²⁹ Preliminary Document No. 10, *supra* note 4, at 6.

Over the past few decades, there have been horrific stories of commercial surrogacy and greed—either by those with money, taking advantage of surrogate mothers who need money, or disingenuous individuals taking advantage of those who desperately want to be parents.

Take, for example, the baby selling ring established in California in the early 2000s. In that case, a California lawyer and a woman who had previously acted as a surrogate, created a scheme in which they recruited women from California³⁰ to be surrogates.³¹ The surrogates were recruited before intended parents were matched—which, unbeknownst to the surrogate mothers, was illegal under California law.³² The perpetrators of this scheme offered the surrogate mothers a substantial sum of money to travel to Ukraine, where surrogacy is inexpensive and surrogacy laws are not as closely monitored, to be implanted with an embryo from Ukrainian donors.³³ All the while, the surrogates were unaware that there were no intended parents at the time of implantation.³⁴ It was not until the women were twelve-weeks pregnant that the lawyer then “shopped” the babies around to prospective parents for prices ranging from \$100,000 to \$150,000, telling those parents that a different surrogacy agreement had fallen through.³⁵ While the scheme in essence amounted to commercial adoption—which is illegal³⁶—it was only made possible by relaxed surrogacy laws. For example, in Ukraine, doctors do not insist on seeing a completed surrogacy agreement before completing the in vitro procedure, and in California, where the mothers were required to give birth, “parents of a biologically unrelated baby carried by a surrogate can be listed on a birth certificate without going through an adoption.”³⁷ The resulting gap in oversight allowed two greedy individuals to “create” babies for the sole purpose of selling them—an unethical and illegal practice.

This baby selling ring was the doing of bad actors, but it would not have been possible if it were not for the laws allowing commercial surrogacy, and,

³⁰ Commercial surrogacy is legal in California. See CAL. FAM. CODE § 7962 (West 2018).

³¹ Alan Zarembo, *Scam Targeted Surrogates as Well as Couples*, L.A. TIMES, (Aug. 13, 2011), <http://articles.latimes.com/2011/aug/13/local/la-me-baby-ring-20110814>.

³² CAL. FAM. CODE § 7962(d) (West 2018) (“The parties to an assisted reproduction agreement for gestational carriers shall not undergo an embryo transfer procedure . . . until the assisted reproduction agreement for gestational carriers has been fully executed.”).

³³ Zarembo, *supra* note 31.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

unfortunately, these problems associated with the scheme in California are not entirely unique. While the act of carrying a child for someone else may not be inherently dangerous,³⁸ the anecdotal stories below illustrate how conflicting surrogacy laws, commercialization of surrogacy, and malicious individuals have caused physical and/or legal harm for surrogate mothers, intended parents, and the babies themselves.

The case of surrogacy in India offers a good illustration of the legal, medical, and ethical concerns surrogate mothers face in the commercial surrogacy industry. In 2002, India legalized international commercial surrogacy and it quickly became a hotspot for such agreements.³⁹ Many potential surrogate mothers were living in extreme poverty, and surrogacy contracts offered them a chance to support their families.⁴⁰ A woman with no education or technical training could earn enough money to buy a house by carrying a child for someone else.⁴¹ Commercial surrogacy brokers offered these women a once in a lifetime financial opportunity, and in essence gave them an offer they could not afford to turn down.⁴² This grossly disproportionate bargaining power has even been described as coercion.⁴³ Given that the surrogate mothers had very little leverage, surrogate mothers were treated horribly and misinformed about the dangers of their agreements.⁴⁴ One such example occurred during the Nepal earthquake of 2015.⁴⁵ The Israeli government sent helicopters to rescue newborn babies from the destruction in Northern India, but abandoned the surrogate mothers amongst the rubble.⁴⁶ As a result of the mistreatment of surrogate mothers, after little more than a decade, India reversed its stance and banned all commercial surrogacy because it “violated women’s right to life and liberty.”⁴⁷

³⁸ All pregnancy has its dangers. This is only to say that carrying someone else’s child is not more dangerous than other types of pregnancies.

³⁹ Sharmila Rudrappa, *Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015*, 44 *CRITICAL SOC.* 1087, 1097 (2017).

⁴⁰ Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 *BERKELEY J. INT’L L.* 412, 445–46 (2012).

⁴¹ *See id.*

⁴² *See id.*

⁴³ Finkelstein et al., *supra* note 6, at 27.

⁴⁴ Seema, *supra* note 40, at 466.

⁴⁵ *See Rudrappa, supra* note 39, at 1091–92.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1092.

Intended parents have also experienced severe mental and financial distress due to surrogacy complications. Take for instance, the Le Roch family. The Le Rochs were citizens of France, where surrogacy is illegal, but they wanted to have babies that were genetically their own.⁴⁸ The couple chose to hire a surrogate in Ukraine where the intended parents are the only recognized legal parents.⁴⁹ Therefore, the Le Rochs were listed on the twins' birth certificate. However, when the couple applied for French passports for their children, the authorities suspected the Le Rochs had used a surrogate and refused to issue the babies passports.⁵⁰ Additionally, Ukrainian authorities refused to issue the twins Ukrainian passports because it considered the twins to be French citizens.⁵¹ The babies were then stateless and were stuck in Ukraine, unable to leave without a passport. This led the parents to take extreme measures, even attempting to smuggle their children out of Ukraine in the back of a van.⁵² Mr. Le Roch and his father were arrested and charged with baby smuggling.⁵³ These were extreme measures, but the conflicting surrogacy laws left these parents with no recourse for returning home with the children that were genetically their own.⁵⁴

The parents were not the only ones harmed in the Le Roch case. Their children were left stateless and living in a hospital. Unfortunately, this is only one example of ways in which surrogate babies have been harmed through surrogacy laws or agreements. Another case, referred to as the *Baby Manji* case, involved a Japanese couple who contracted with a woman in India to carry a baby genetically related to the intended father and an egg donor.⁵⁵ The couple divorced during the pregnancy and the intended mother no longer wanted the baby.⁵⁶ However, the intended father still planned to raise his daughter.⁵⁷ Unfortunately, he could not apply for a passport for his daughter because nationality in Japan is based on the citizenship of the mother.⁵⁸

⁴⁸ Seema, *supra* note 40, at 420.

⁴⁹ *Id.*

⁵⁰ *Id.* at 421.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *French Family Detained for Smuggling 2 Infants from Ukraine*, KYIV POST (Mar. 24, 2011), <https://www.kyivpost.com/article/content/ukraine-politics/french-family-detained-for-smuggling-2-infants-fro-100738.html>.

⁵⁴ There seems to be no follow up information on the outcome of this case.

⁵⁵ Bríd Ní Ghráinne & Aisling McMahon, *A Public International Law Approach to Safeguard Nationality for Surrogate-born Children*, 37 J. SOC'Y. LEGAL SCHOLARS 324, 330 (2017).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

Additionally, he was unable to adopt the child in India because India does not allow a single father to adopt.⁵⁹ Further still, India would not issue a birth certificate to the baby because there was no one to list as a mother on the birth certificate.⁶⁰ It took more than three months and an appeal to the Indian Supreme Court⁶¹ before Japan issued a visa on humanitarian grounds and the baby was allowed to travel to Japan and get citizenship upon proof of a parent-child relationship.⁶² Although Baby Manji ended up with her father in Japan, she was left stateless for months and was unable to begin forming a bond with her family at an important stage in her life.

With stories such as those described above it is easy to see why commercial surrogacy bans have received support from the media, governments, and general public.⁶³ Indeed, in recognition of the problems surrogacy can cause for surrogate mothers, intended parents, and babies, many countries ban all types surrogacy, others prohibit commercial surrogacy, and still more regulate it in other ways.⁶⁴ However, it is worth noting that there is very little research on the negative side-effects of commercial surrogacy on children.⁶⁵

IV. THE MOVEMENT TO BAN SURROGACY

As noted above, commercial surrogacy is potentially problematic for the surrogate mother, intended parents, and the baby. Therefore, some human rights advocates, feminists, policy makers, and medical and legal scholars have argued to ban surrogacy, either completely, or at least the commercial variety.⁶⁶ Curiously, even though all parties involved in a commercial surrogacy contract can be negatively affected by the process, opponents have turned to a child protection mechanism for banning it. Specifically, these

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Baby Manji Yamada v. Union of India & Anr*, (2008) SCR 1656 (India).

⁶² *Ghráinne & McMahon*, *supra* note 55, at 331.

⁶³ *See* Kajsa Ekis Ekman, *All Surrogacy is Exploitation—The World Should Follow Sweden’s Ban*, THE GUARDIAN (Feb. 25, 2016), <https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban>.

⁶⁴ Roli Srivastava, *Fact Box: Which Countries Allow Commercial Surrogacy?*, REUTERS (Jan. 18, 2017), <https://www.reuters.com/article/us-india-women-surrogacy-factbox/fatcbox-which-countries-allow-commercial-surrogacy-idUSKBN1530FP>.

⁶⁵ Based on the author’s research at the time of writing, researcher Susan Gombok of the University of Cambridge seems to be the only researcher studying the psychological and developmental effects of surrogacy on the surrogate born children.

⁶⁶ *See, e.g.*, Smolin, *supra* note 9; Ekman, *supra* note 63; EUROPEAN CENTER FOR LAW & JUSTICE, *supra* note 13.

opponents claim the Protocol requires countries to ban commercial surrogacy.⁶⁷

Scholars have debated whether or not commercial surrogacy is baby selling for decades.⁶⁸ However, it is only in the past few years that this new argument arose.⁶⁹ The argument is that commercial surrogacy is already prohibited under international law, and any signatory that does not ban commercial surrogacy is not compliant with the Protocol.

The “sale of children” argument is well outlined in David Smolin’s law review article titled “Surrogacy as the Sale of Children.”⁷⁰ In the introduction of the article, Smolin references the Protocol and explains how he will “argue that most surrogacy arrangements as currently practiced constitute the “‘sale of children’ under international law and hence should not be legally legitimated.”⁷¹ However, Smolin’s argument presupposes his conclusion; in essence, he argues that surrogacy is the sale of children in the Protocol because surrogacy is the sale of children. His argument lacks the “why.”

To support his conclusion, Smolin sets the stage by discussing a number of international treaties and reports that purport to condemn the sale of children.⁷² He then notes that the Protocol contains the only definition of “the sale of children.”⁷³ Smolin’s framing therefore implies that the Protocol’s definition should be read into all references to the sale of children. However, Smolin fails to offer a compelling reason why the Protocol should be read into other treaties and reports. Instead, he examines historical, cultural, and even religious perspectives and strongly implies that surrogacy is always problematic.⁷⁴ He then goes on to a part titled “Surrogacy as the Sale of

⁶⁷ See Smolin, *supra* note 9; EUROPEAN CENTER FOR LAW & JUSTICE, *supra* note 13.

⁶⁸ See Barbara Katz Rothman & Margaret Stacey, *The Products of Conception: The Social Context of Reproductive Choices [with Commentary]*, 11 J. MED. ETHICS 188 (1985) (lamenting trend toward commodification of child birth as long ago as 1985); *but see* R. Jo Kornegay, *Is Commercial Surrogacy Baby-selling?*, 7 J. APPLIED PHIL. 45 (1990) (arguing that commercial surrogacy is not the sale of children, but is the sale of a service).

⁶⁹ See EUROPEAN CENTER FOR LAW & JUSTICE, *supra* note 13.

⁷⁰ Smolin, *supra* note 9.

⁷¹ *Id.* at 269.

⁷² *Id.* at 272–75.

⁷³ *Id.* at 277.

⁷⁴ See *id.* at 289–98.

Children” in which he presupposes that all commercial surrogacy is the sale of children.⁷⁵

The “Surrogacy as the Sale of Children” part begins with the findings of two Committees on the Rights of the Child in which the committee reports express concern about the sale of children as it relates to illicit adoption.⁷⁶ Smolin highlights the Committee’s concern that “widespread commercial use of surrogacy . . . can lead to the sale of children.”⁷⁷ However, Smolin takes this concern too far, and seems to gloss over the portion of the report that calls on countries to respond by ensuring that future legislation “contain provisions which *define, regulate and monitor* the extent of surrogacy arrangements and *criminalizes the sale of children for the purpose of illegal adoption.*”⁷⁸ The committee recognizes that some forms of commercial surrogacy can be allowed, and merely seeks to have countries monitor and regulate such agreements to prevent illegal adoption. However, because Smolin reads the Protocol and the reports more broadly, he focuses on definitional nuances, rather than addressing the ultimate issue of why exactly commercial surrogacy is illegal under the Protocol.⁷⁹

The argument raised by Smolin, and others, that commercial surrogacy is not legal relies on the assumption that the Protocol already makes commercial surrogacy illegal. However, nowhere in his article does Smolin explain how the Protocol is an enforcement mechanism against most commercial surrogacy transactions. On the contrary, for the reasons articulated below, it is more likely that the Protocol does not preclude commercial surrogacy agreements. Further, Part VII discusses why a ban on commercial surrogacy would not solve the problems of surrogacy.

⁷⁵ See *id.* at 302–36.

⁷⁶ *Id.* at 302–11.

⁷⁷ *Id.* Citing U.N. Convention on the Rights of the Child, *concluding observations on the report submitted by India under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, ¶23(f), U.N. Doc. CRC/C/OPSC/IND/CO/1 (July 7, 2014).

⁷⁸ U.N. Convention on the Rights of the Child, *concluding observations on the report submitted by India under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, ¶23(f), U.N. Doc. CRC/C/OPSC/IND/CO/1 (July 7, 2014) (emphasis added).

⁷⁹ Smolin, *supra* note 9 at 311–37.

V. INTERNATIONAL LEGISLATIVE BACKGROUND OF THE PROTOCOL

The international community, with overwhelming support, considers the health and wellbeing of children to be of utmost importance. One of the most widely ratified treaties in the world is the Convention on the Rights of the Child (“the Convention”),⁸⁰ with 196 signatories or ratifying states.⁸¹ The Convention text represents over ten years of work by members of the General Assembly.⁸² The preamble articulates some of the values that drove the drafting of the Convention and proclaims that children should “grow up in a family environment, in an atmosphere of happiness, love and understanding”⁸³ Countries that sign or ratify the Convention agree to uphold its values and abide by the requirements of the treaty.

Shortly after the Convention entered into force in 1990, representatives from around the world sought to expand the Convention to include optional protocols to address some specific concerns.⁸⁴ An optional protocol is a treaty as well, but is drafted to “provide for procedures with regard to the [original] treaty or address a substantive area related to the treaty.”⁸⁵ In 1995, the United Nations began drafting an optional protocol to remedy the growing problems of child pornography and prostitution, as well as the practice of selling children.⁸⁶ Following years of deliberation, the United Nations passed the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.⁸⁷

The Protocol seeks to address the ratifying countries’ “[g]rave[] concern[s] [with] the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography.”⁸⁸ The drafters aimed “further to achieve the purposes of the

⁸⁰ *Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/crc/> (last visited May 22, 2018).

⁸¹ *Convention on the Rights of the Child*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited May 22, 2018).

⁸² *Convention on the Rights of the Child*, AUDIOVISUAL LIBR. INT’L L., <http://legal.un.org/avl/ha/crc/crc.html> (last visited May 9, 2019).

⁸³ *Convention on the Rights of the Child*, preamble, *opened for signature* Nov. 20, 1989, 3 U.N.T.S. 1577.

⁸⁴ *Convention on the Rights of the Child*, AUDIOVISUAL LIBR. INT’L L., <http://legal.un.org/avl/ha/crc/crc.html> (last visited May 9, 2019).

⁸⁵ *What is an optional protocol?* U.N. WOMEN, <https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm> (last visited May 22, 2018).

⁸⁶ *Convention on the Rights of the Child*, AUDIOVISUAL LIBR. INT’L L., *supra* note 82.

⁸⁷ *Id.*

⁸⁸ Protocol.

Convention on the Rights of the Child” by “extend[ing] the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography.”⁸⁹ Nearly three dozen member states of the United Nations contributed to the drafting of the Protocol, and it has since been signed or ratified by 174 countries.⁹⁰

VI. IS COMMERCIAL SURROGACY THE SALE OF CHILDREN?

As alluded to above, a number of arguments have been raised to bolster the proposition that commercial surrogacy is the sale of children which is prohibited by the Protocol.⁹¹ First, a commercial surrogacy contract could fit within the Protocol’s expansive definition of the “sale of children.”⁹² Second, the drafters of the Protocol specifically made the language of the definition broad so that it could encompass unforeseen circumstances—such as commercial surrogacy.⁹³ Third, a treaty should be read as a whole, and therefore, the protective language of the Convention guides the interpretation of the Protocol and incorporates commercial surrogacy.⁹⁴ Finally, because commercial surrogacy was not something countries were aware of at the time of drafting, the Protocol should be read broadly to encompass unanticipated situations.⁹⁵ However, for the reasons below, these arguments fail to show that commercial surrogacy is the sale of children as intended by the Protocol, and reliance on these arguments offer little legal recourse for banning commercial surrogacy.

A. *The Expansive Definition*

Article Two of the Protocol defines the sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”⁹⁶

⁸⁹ *Id.*

⁹⁰ *Status of Ratification, Interactive Dashboard: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, U.N. HUM. RTS., <http://indicators.ohchr.org> (last updated May 23, 2018).

⁹¹ See John Tobin, *To Prohibit Or Permit: What Is The (Human) Rights Response To The Practice Of International Commercial Surrogacy?*, 62 INT. & COMP. L.Q. 317 (2014) (summarizing and analyzing the sale of children under the Protocol).

⁹² *Id.* at 335.

⁹³ *Id.* at 336.

⁹⁴ *Id.* at 335–36.

⁹⁵ *Id.* at 337.

⁹⁶ Protocol, art. 2.

This definition of the “sale of children” is extremely broad. The committee who drafted the Protocol chose to use the terms “*any act*,” “transferred by *any person* to another,” and “for remuneration” to describe what constituted a sale.⁹⁷ Therefore—the argument goes—since commercial surrogacy (any act) includes a surrogate mother (any person) giving the child to the intended parents, in exchange for money for her time and expenses (remuneration), commercial surrogacy fits the definition of the sale of children.

This is a straightforward application of the definition. Indeed, given those broad parameters, commercial surrogacy does fit within this definition of the sale of children.⁹⁸ However, it is important to remember that the definition must be read in the context and parameters of the entire Protocol.

B. The History of the Language of the Protocol

Admittedly, the definition within the Protocol is broad. However, historical context provides a more accurate interpretation of this language. The precursor definitions of the sale of children were much narrower and confined to the sale of children for illicit purposes.⁹⁹ Consequently, scholars have argued that the broad definition was a purposeful scheme for including unanticipated wrongs.¹⁰⁰ However, prior drafts of the definition are indicative of the intent of the drafting—and later ratifying—states.

In fact, no document relating to the Protocol in the United Nations archive references surrogacy in any form.¹⁰¹ Instead, working group documents illustrate that the drafters were focused on how to address the sexual exploitation of children. For instance, the report that came out of the second session of the working group memorializes the group’s debate around whether or not to focus generally on sexual exploitation, or to focus specifically on sale for child prostitution and child pornography.¹⁰² Further, the second session ended with the following draft definition of the “sale of children”:

⁹⁷ *Id.*

⁹⁸ Tobin, *supra* note 91, at 336.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *Convention on the Rights of the Child*, AUDIOVISUAL LIBR. INT’L L., *supra* note 82.

¹⁰² Comm. on Human Rights, Economic and Social Council, 9 E/CN.4/1996/101 (1996).

“Sale of children” means the act of buying and selling of a child . . . for the purpose of child prostitution [or] child pornography [work of any kind, adoption for commercial purposes, criminal activities, trading in and transplantation of organs] for any form of compensation or reward.¹⁰³

The draft definition explicitly refers to the sale of children for illicit purposes. Also, in later discussions it was noted that although the sale of children for non-sexual exploitation presents serious concerns, those could be addressed by other international instruments.¹⁰⁴ It was argued that the Protocol “should be carefully targeted to address the . . . gap in international standards regarding sexual exploitation of children.”¹⁰⁵ At that same session, the working group proposed the following two options for definitions of the sale of children:

[Sale of children means any kind of transaction or illicit transfer, [including abduction, kidnapping, stealing, trafficking of children for the purpose of such transaction,] where the child is the object [and any part of the body of a child], regardless of the form it takes and any remuneration for it, for whatever purpose.]
OR [Sale of children means any kind of buying and selling of a child between any person . . . and any other person for any form of compensation or benefit with a view to the sexual exploitation of the child.]¹⁰⁶

Yet again, the working group focused on child trafficking and sexual exploitation and failed to make any reference to surrogacy.

By 1997, there was internal and external pressure to come to a consensus. In the second paragraph of the general discussion from that working group session, the notes indicate that, due to recent events which brought awareness to the sexual exploitation of children, “an optional protocol dealing with matters relating to the sexual exploitation of children should be drafted as soon as possible.”¹⁰⁷ It seems it was this session where the final definition was originally drafted. Although this fact is not clearly articulated, paragraph 44 notes some countries’ inclination to make the definition as broad

¹⁰³ *Id.* at 12 (brackets in original).

¹⁰⁴ Comm. On Human Rights, Economic and Social Council, at 7–8 E/CN.4/1998/103 (1999).

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.* (brackets in original).

¹⁰⁷ Comm. On Human Rights, Economic and Social Council, at 5, E/CN.4/1997/97 (1997).

as possible and to “delet[e the] square brackets around the words ‘for any purpose or in any form’ in the text of the definition.”¹⁰⁸ Since this language appears in the final definition, this particular working group report offers insight into the final decision-making process. Therefore, the discussions at this working group session are of particular importance. Even as some countries lobbied for this broad definition, other countries like China, Germany, and France continued to express a preference for a definition which focused on the sale of children for the purposes of sexual exploitation.¹⁰⁹

Ultimately, the drafters adopted the broad definition. However, the purpose of the Protocol and the intent of the drafting parties is readily discernible from the working group’s reports. Considering the continuous focus on preventing the sale of children for the purposes of sexual exploitation, it is unlikely the Protocol was drafted with the intention of banning something as unrelated to sexual exploitation as commercial surrogacy.

C. *Reading the Protocol as a Whole*

The Vienna Convention on the Law of Treaties establishes that treaties should be read in their entirety.¹¹⁰ Therefore, our inquiry should not stop at the definitions laid out in Article Two of the Protocol. Some scholars have taken that to mean that “sale of children” should be read in conjunction with Article 35 of the overarching Convention, which says: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of[,] or traffic in children for any purpose or in any form.”¹¹¹ The argument advanced here is that the words “for *any* purpose or in *any* form” are unambiguous and should therefore apply to commercial surrogacy.¹¹² We are therefore asked to condemn commercial surrogacy as the sale of children, because the sale of children is prohibited by the Convention.

The problems with this argument are twofold. First, the Convention was written before the Protocol and fails to define the sale of children, which implies the Protocol and its definitions are an elaboration of the Convention, not the other way around. Second, to say that commercial surrogacy is the sale

¹⁰⁸ *Id.* at 11 (indicating that the broad language would be adopted).

¹⁰⁹ *Id.* at 12.

¹¹⁰ Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

¹¹¹ Convention on the Rights of the Child, art. 35, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

¹¹² Tobin, *supra* note 91, at 337.

of children and because the sale of children should be banned in all forms, is conclusory and skirts the question of whether or not commercial surrogacy is the sale of children at all.

In its preamble, the drafters refer to the Protocol as an extended measure of protection beyond the Convention: “Considering that, in order further to achieve the purposes of the Convention . . . especially article[] 35 . . . it would be appropriate to *extend* the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children”¹¹³ Put another way, the Protocol was created to extend protections to issues not fully addressed by the Convention. It does so by clarifying and addressing the type of sale of children which should be prohibited. While it is important to consider the Convention to offer context and guidance when interpreting the definition and prohibitions of the Protocol, the Convention was created first and should not be construed as clarifying any portions of the Protocol.

Instead of relying on the Convention for further elaboration, the Protocol itself should be used to give context to the definition. Although the definition of the sale of children is laid out in Article Two, Article Three of the Protocol articulates how a state must apply the Protocol. Article Three requires each ratifying state to, *at a minimum*, criminalize “[o]ffering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit; c. Engagement of the child in forced labour”¹¹⁴ Additionally, countries must criminalize “[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.”¹¹⁵ Article Three cabins the language of Article Two by explicitly enumerating what constitutes a violation of the Protocol. Commercial surrogacy is not banned by the Protocol unless the surrogacy agreement is entered into for the purpose of sexual exploitation of the child, transfer of the organs of the child for profit, or for forcing the child into labor.¹¹⁶ It is true that the requirements of Article Three are minimums, and therefore do not entirely preclude one from reading commercial surrogacy into the sale of children.¹¹⁷ However, a logical reading of Article Three, along with the entirety of the Protocol—which bans child prostitution and child

¹¹³ Protocol art. 3. (emphasis added).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Tobin, *supra* note 91, at 336.

pornography—fails to draw such a conclusion. It requires an intellectual leap to apply the intent of the Protocol to the transfer of a child from a surrogate to parents who intend only to raise the child as their own.¹¹⁸

Finally, a complete reading of both treaties indicates that commercial surrogacy actually advances rather than contradicts the goals of the Convention. Specifically, commercial surrogacy can allow children to “grow up in a family environment, in an atmosphere of happiness, love and understanding”¹¹⁹ While such an arrangement may not guarantee this outcome, there exists little evidence that commercial surrogacy strips a child of this opportunity.¹²⁰ On the contrary, longitudinal studies performed in the United Kingdom indicate that there is no difference in the mother-child relationship experienced by children born of surrogacy, those born of egg donation, or those born through natural conception.¹²¹ It would seem unlikely that the Protocol, when read in conjunction with the Convention, would be intended to restrict a practice that does not violate the Convention as a whole.

D. *Surrogacy in the World at the Time of the Protocol*

It is true that the lack of discussion around surrogacy does not affirmatively prove the drafters’ intent to leave out commercial surrogacy. Instead, given that surrogacy rose in popularity significantly in the years following the passing of the Protocol, it has been argued that drafters simply did not think of commercial surrogacy when drafting the Protocol.¹²² To that point there are two main arguments: first, although it was not yet popular, commercial surrogacy did exist at the time of the Protocol and already raised problems; and second, it is precisely because the drafters were not thinking of commercial surrogacy when writing the Protocol that it would be unsuccessful to try to criminalize surrogacy under the Protocol.

Directly related to the first argument is the now infamous case of *In re Baby M* from 1988.¹²³ That case raised the issue of parentage, and the overall legality of surrogacy agreements, when a surrogate mother in New Jersey

¹¹⁸ Indeed, the child may be their own genetic child.

¹¹⁹ Convention on the Rights of the Child, preamble, *opened for signature* Nov. 20, 1989, T.S. 1577.

¹²⁰ With the exception of the anecdotal stories which are referred to above, the author has found no research or data indicating that commercial surrogacy harms the growth or maturation of children.

¹²¹ S. Golombok et al., *Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7.*, 47 DEVELOPMENTAL PSYCHOLOGY 1579, 1585 (2011).

¹²² See Tobin, *supra* note 91, at 337.

¹²³ *In the Matter of Baby M*, 109 N.J. 396 (1988).

refused to give the baby to the intended parents.¹²⁴ The case was widely publicized at that time and even inspired a television miniseries.¹²⁵ Although this case was in the United States, it is illustrative of the point that surrogacy and surrogacy issues were being raised nearly a decade before the Protocol was proposed. Additionally, at the time that the Protocol was drafted, France had already banned all forms of surrogacy.¹²⁶ France was part of the working group and, as noted in Section VI.C above, France continued to advocate for a narrower definition of sale of children. Therefore, it is likely naïve to say that the drafters did not know of surrogacy when drafting the Protocol.

Further, to acknowledge that the drafters did not think of commercial surrogacy, but still argue that it should be banned under the Protocol is borderline disingenuous. Put another way, attempting to address the issues surrounding commercial surrogacy by leveraging the Protocol misrepresents the purpose of the Protocol.

Countries signed on to the Protocol with the understanding that it was inclusive of the issues presented. To apply the definition beyond what the countries anticipated would present problems for enforcement. For instance, by reading commercial surrogacy into the prohibited activities, the United Nation runs the risk of countries pulling out of the agreement—those like the United States that do not regulate commercial surrogacy on the national level. Finally, even if countries were to read commercial surrogacy into the definition of the sale of children, the Protocol does not require countries to ban the sale unless it is for sexually, or physically exploitive purposes.¹²⁷

VII. SHOULD COUNTRIES BAN COMMERCIAL SURROGACY UNDER THE PROTOCOL?

Countries should not ban commercial surrogacy under the Protocol. Although countries can choose to ban commercial surrogacy for any reason, focusing on the Protocol as the motive is an unwise decision. Applying a broad interpretation to the Protocol, and instituting a ban on commercial surrogacy because of it, misrepresents the purpose of the Protocol. If different countries have varying interpretations of the Protocol, the resulting disconnect could

¹²⁴ *Id.*

¹²⁵ *Baby M*, IMDB, <http://www.imdb.com/title/tt0094696/> (last visited May 22, 2018).

¹²⁶ Claire Legras, *Why has France Banned Surrogate Motherhood?*, BLOG OUP (Feb. 23, 2015), <https://blog.oup.com/2015/02/france-surrogate-motherhood-ban/>.

¹²⁷ Protocol art. 3.

diminish the effectiveness of the Protocol. Countries would be well advised not to take this approach.

Neither the Convention, nor the Protocol include their own enforcement mechanisms.¹²⁸ Instead, as with most treaties, the Convention and Protocol rely on adopting countries to enforce the provisions therein. Specifically, the Convention articulates that “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention,”¹²⁹ and the Protocol elaborates that “States Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol.”¹³⁰ This means these treaties are only as effective as the laws countries adopt to enforce them.

For the reasons articulated in Part VI the Protocol does not call on nations to make commercial surrogacy illegal and in signing the Protocol a country does not bind itself to that requirement. Instead, the only activities that countries are required to ban under the Protocol are the sale of children for sexual exploitation, forced labor, organ sales, or illegal adoption.¹³¹ However, if a country chooses to ban commercial surrogacy by claiming that it violates the Protocol, such a proclamation would send a message to other countries, and the United Nations, that commercial surrogacy is already illegal under international law. This could lead to international disagreement, because it is unlikely that a commercial surrogacy ban would be universally adopted. Currently, some countries are moving away from commercial surrogacy, while others are pushing to add commercial surrogacy as an option.¹³² Although “[l]egally speaking, State parties to international conventions cannot escape their international legal obligations by redefining essential terms under their domestic law contrary to how those terms are defined under binding international law,”¹³³ history has proven otherwise.

¹²⁸ See Convention on the Rights of the Child, preamble, *opened for signature* Nov. 20, 1989, T.S. 1577; Protocol, art. 9.

¹²⁹ Convention on the Rights of the Child, art. 4, *opened for signature* Nov. 20, 1989, T.S. 1577.

¹³⁰ Protocol, art. 9.

¹³¹ Protocol, art. 3.

¹³² Just this year another state in the United States has passed a bill allowing commercial surrogacy. See Meg Ledebuhr, *Washington's New Surrogacy Law*, CONCEIVE ABILITIES <https://www.conceiveabilities.com/about/blog/washington-state-legalizes-commercial-surrogacy> (last visited May 11, 2019).

¹³³ Smolin, *supra* note 9, at 312.

If one looks to the United States for instance, legal challenges to treaty-made laws tend to favor state or federal laws over treaties.¹³⁴ If another country or an international governing body were to attempt to adopt the broader interpretation of the sale of children and classify commercial surrogacy as illegal, the United States, and each individual state that allows commercial surrogacy, could argue that its laws preempt the treaty. This would put the United States in the position of either leaving the treaty, or staying in and reducing the power of the treaty overall.

Although a country can ban commercial surrogacy for any reason at all, they should refrain from banning based on the Protocol because this could lead to differing interpretations of the same treaty, leading to inconsistent application, and potential international conflicts.

VIII. CONSEQUENCES OF BANNING COMMERCIAL SURROGACY

As noted above, it is not appropriate to hinge a commercial surrogacy ban on the Protocol. However, nothing prevents a country from banning it for other reasons. This leaves open the question of whether or not a country should ban commercial surrogacy to prevent the physical and legal harms enumerated here. The answer to that question is also no.

Banning commercial surrogacy does not prevent injuries to the parties involved. Instead, it may push the practice further underground.¹³⁵ One scholar noted that “[a] global ban on surrogacy would simply move surrogacy arrangements to the black market, thereby exposing the parties to a greater risk of exploitation.”¹³⁶

The black market in China and an emerging grey market in India offer telling examples of the dangers of commercial surrogacy bans. In China, surrogacy falls into a legal grey area, but it is understood that “Chinese law has a negative attitude toward surrogacy.”¹³⁷ However, with “recent

¹³⁴ See *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that Vienna Convention rights were not directly enforceable domestic federal law that could preempt state limitations on filing of successive habeas petitions).

¹³⁵ See CBC News, *Paid Surrogacy Driven Underground in Canada: CBC Report*, C.B.C. (May 1, 2007, 2:22PM), <https://www.cbc.ca/news/technology/paid-surrogacy-driven-underground-in-canada-cbc-report-1.691254>.

¹³⁶ Katarina Trimmings & Paul Reid Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT’L L. 622, 647 (2011).

¹³⁷ Chen Silin & Yao Tianchong, *The Status Quo and Legal Regulation of Surrogacy in China*, 246 ADVANCES SOC. SCI., EDU. & HUMAN. RES. 363, 363 (2018).

relaxation of the one-child-per-family policy and a cultural imperative to have children,” a market for commercial surrogacy has emerged.¹³⁸ The government seems to be aware of these arrangements but has not stepped in to regulate the practice.¹³⁹ The commercial surrogacy market that now exists is primarily reserved for the elite—with some surrogacy arrangements costing over USD \$200,000.¹⁴⁰ However, with agreements organized in the shadow of the law, there is very little information on what, if any, protections exist for the surrogate mothers.

At nearly a quarter of a million dollars, many Chinese citizens cannot afford to hire a commercial surrogate in China. However, the demand still exists. This has caused some Chinese to look elsewhere. The poverty in neighboring Cambodia has led to an illegal cross border commercial surrogacy market.¹⁴¹ These arrangements are even more dangerous, because surrogacy is illegal in Cambodia as well.¹⁴² Women who are caught participating in commercial surrogacy contracts could be arrested and charged with human trafficking.¹⁴³ These women may face years of imprisonment and fines, all for the promise of a few thousand dollars.¹⁴⁴ In some instances, women are arrested but then sent back to their homes with the babies to raise a child that is not theirs.¹⁴⁵

India offers a slightly different cautionary tale. As noted previously, India saw rampant commercial surrogacy abuse in the early 2000s.¹⁴⁶ However, as the government began to crack down on surrogacy agreements, an underground market for surrogacy arose.¹⁴⁷ For example, in 2012, even

¹³⁸ Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Surrogate Motherhood*, N.Y. TIMES (Aug. 3, 2014), <https://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html>.

¹³⁹ Alice Yan, *Why China Keeps Surrogacy a Grey Area*, S. CHINA MORNING POST, (Apr. 3, 2017), <https://www.scmp.com/news/china/society/article/2083072/why-china-keeps-surrogacy-grey-area>.

¹⁴⁰ *Id.*

¹⁴¹ Danielle Keeton-Olsen & Sineat Yon, *Poverty and Demand from China Fuel Illegal Cambodia Surrogacy*, ALJAZZERA (Dec. 12, 2018), <https://www.aljazeera.com/news/2018/12/poverty-demand-china-fuel-illegal-cambodia-surrogacy-181211042242119.html>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Chhavi Sachdev, *Once the go-to place for surrogacy, India tightens control over its baby industry*, PUB. RADIO INT’L (July 4, 2018, 9:00AM), <https://www.pri.org/stories/2018-07-04/once-go-place-surrogacy-india-tightens-control-over-its-baby-industry>.

¹⁴⁷ Sharmila Rudrappa, *India outlawed commercial surrogacy – clinics are finding loopholes*, THE CONVERSATION (Oct. 23, 2017, 12:20PM), <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784>.

though India banned surrogacy agreements for same-sex couples, but that did not stop surrogacy brokers from making such arrangements¹⁴⁸ and creating intricate schemes wherein surrogate mothers were shuttled to different countries to give birth.¹⁴⁹ Now that commercial surrogacy is illegal in India, some people are concerned that the ban will incentivize another complex and dangerous underground system.¹⁵⁰

At this point, there is very little evidence of how a complete ban on commercial surrogacy affects the health and safety of the potential parties to such an agreement. Still many advocates are adamant that a theoretical black market is not grounds for allowing commercial surrogacy to continue: “The mere potential, however, for development of a black market trafficking in babies, is an insufficient basis to justify enforcing preconception agreements that essentially amount to a cottage industry in bartering for babies.”¹⁵¹

IX. ALTERNATIVES TO BANNING COMMERCIAL SURROGACY

On a practical level, it seems no country is looking to change its stance on commercial surrogacy based on whether or not it is the sale of children under the Protocol. Instead, most decisions to ban commercial surrogacy so far have been based on other considerations.¹⁵² As discussed previously, India identified the abusive and manipulative environment that commercial surrogacy created for surrogate mothers and decided to ban it based on those atrocities.¹⁵³ However, as noted above, a blanket ban may not actually address the issues associated with commercial surrogacy. A better approach would be to allow countries to regulate commercial surrogacy by tackling these problems on an issue-by-issue basis.

Although there are underlying themes and issues in commercial surrogacy, depending on a country’s legal infrastructure, the solutions for each country may be vastly different. A country-by-country approach to commercial surrogacy regulation offers a better means for addressing the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Chhavi, *supra* note 146.

¹⁵¹ Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 481 (2004).

¹⁵² *As Demand for Surrogacy Soars, More Countries are Trying to Ban It*, ECONOMIST (May 13, 2017), <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it>.

¹⁵³ Saptarshi Ray, *India bans commercial surrogacy to stop ‘rent a womb’ exploitation of vulnerable women*, TELEGRAPH (Dec. 20, 2018, 4:40PM), <https://www.telegraph.co.uk/news/2018/12/20/india-bans-commercial-surrogacy-stop-rent-womb-exploitation/>.

problems that affect each country individually and is more likely to garner support within that particular country.

It is because countries experience unique issues related to surrogacy that anti-surrogacy advocates should change their approach. Commercial surrogacy is not the sale of children as prohibited by the Protocol and continuing to focus on it as a mechanism for banning surrogacy creates confusion in interpreting the Protocol and minimizes the real issues that arise with surrogacy. In order to effectively address the physical or legal harms for surrogate mothers, intended parents, and the babies themselves, advocates should tailor proposed solutions to those harms directly. By taking that approach, it is quite likely that the legal mechanisms already exist to protect against those harms.

For instance, instead of trying to use the Convention on the Rights of the Child to address the horrific injustices that surrogate mothers face, it may be better to use The Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) as an enforcement mechanism.¹⁵⁴ CEDAW seeks to “eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”¹⁵⁵ Additionally, CEDAW prohibits discrimination in relation to economic power as well.¹⁵⁶ Therefore, reliance on this treaty could provide greater protections for women entering into commercial surrogacy agreements. This would not require a ban on commercial surrogacy, but instead would allow states to target laws at protecting women’s equal bargaining rights.

Also, on the individual country level, direct regulation is an ideal next step. Countries with strong legal infrastructures need not ban commercial surrogacy, because the legal protections are likely readily available. Australia, for example, already seems to be taking this approach.¹⁵⁷ Its International

¹⁵⁴ United Nations Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 (hereinafter CEDAW).

¹⁵⁵ *Id.* at art. 12.

¹⁵⁶ *Id.* at art. 13.

¹⁵⁷ Karen Smith Rotabi et al., *Regulating Commercial Global Surrogacy: The Best Interests of the Child*, 2 J. HUM. RIGHTS SOC. WORK 64, 70 (2017).

Social Services has developed eleven safeguards that must be included in surrogacy regulation.¹⁵⁸ These safeguards include:

- Cross-jurisdictional recognition of birth certificates and parentage orders
- Processes for counseling, education, and legal advice for all parties relating to psychosocial, legal, and medical issues
- Medical standards for the care of the surrogate-born child and surrogate mothers
- Regulation of financial transactions so as not to constitute sale of a child
- Measures to guard against child trafficking¹⁵⁹

As Australia and the United States illustrate, regulation does not need to mean total restriction.

As global awareness of commercial surrogacy continues to rise, and countries seek to address these issues collectively, one final alternative is to seek to create a new treaty which addresses surrogacy alone. The United Nations took this approach when it passed the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the “Adoption Convention”).¹⁶⁰ The Adoption Convention specifically addresses inter-country adoption and requires states to regulate certain adoption behaviors.¹⁶¹ It strives to promote the best interests of children by respecting their fundamental rights.¹⁶² Given the goals of the Adoption Convention, and the similarity to the Convention on the Rights of the Child, the committee who drafted the Adoption Convention could have found it to be redundant. Specifically, the Adoption Convention tracks closely with the preamble of the Convention and “tak[es] into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child”¹⁶³ However, the committee found it necessary to address this singular issue. Similarly, surrogacy involves complicated family dynamics which most likely cannot be addressed by the Convention alone. In addition, the unique issues presented by commercial surrogacy affect all parties

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 29 May 1993, 32 I.L.M. 1134 (1998).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

involved—not just the child. A new convention need not ban commercial surrogacy altogether; instead, it could factor in all the proposed suggestions and address the potential harms to all parties involved.

This proposed alternative may not be comprehensive, but the issues countries face when dealing with commercial surrogacy are not all the same. Consequently, short of an entirely new convention, any current one-size-fits-all approach to commercial surrogacy would suffer from many of the same issues referenced in relation to the Protocol. For such a nuanced problem, flexibility will be key.

X. CONCLUSION

Commercial surrogacy is unlikely to end because people have an innate need to procreate. Indeed, attempts to limit and ban the practice have created an underground market that has caused an additional set of issues. This is not to say that nothing should be done. But successfully addressing the problems associated with commercial surrogacy will require a more targeted and nuanced approach to regulation.

The Protocol is not the appropriate regulating mechanism. The international community created the Protocol to target the horrific crimes of the sale of children, child prostitution, and child pornography. Any attempt to bootstrap a commercial surrogacy ban on to the Protocol is not only contrary to the drafters' intent, it would most likely fail to be implemented by signatory countries or cause international disagreement if any one country were to adopt this interpretation.

Given the important human rights concerns implicated by commercial surrogacy, and the benefits it can provide to those looking to have a baby, a better alternative would be to target those harms directly instead of blanket banning commercial surrogacy. Looking for protections under CEDAW or the Adoption Convention are much more likely to succeed in holistically addressing the problems surrounding commercial surrogacy.