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International Mother of Mystery: Protecting Surrogate Mothers' Participation in International Commercial Surrogacy Contracts

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COMMENT

INTERNATIONAL MOTHER OF MYSTERY:
PROTECTING SURROGATE MOTHERS’
PARTICIPATION IN INTERNATIONAL
COMMERCIAL SURROGACY CONTRACTS

JAMIE COOPERMAN*

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INTRODUCTION

In 2015, Gilad and Amir Vogel Greengold, two Israeli male citizens who wanted to start a family together, considered surrogacy.¹ Unfortunately, Israeli laws prohibited them from using a surrogate mother in Israel because of their sexual orientation.² They decided instead to have the Tammuz International Surrogacy agency help them become parents through an international commercial surrogacy contract,³ which compensates the surrogate mother for both her services and her medical expenses.⁴ Due to the complex web of laws regarding surrogacy, a variety of individuals from different countries were required to come together for this arrangement.⁵

Gilad and Amir are just one of the many couples across the world banned from contracting with women to serve as surrogates in their own countries. Consequently, such couples must resort to international commercial surrogacy contracts to form their families.⁶ Gilad and Amir first shipped their frozen sperm to Thailand, where a South African egg donor was waiting.⁷ Once the egg was fertilized, the embryo was then sent to Nepal to be implanted into an Indian woman who agreed to serve as the gestational surrogate.⁸

Each country involved had different regulations on surrogacy contracts. For example, South African law allowed egg donation for surrogacy.⁹ Even though South Africa's Children's Act of 2005 prohibits women from serving as surrogates for commercial purposes, they may enter into such agreements for altruistic reasons.¹⁰ In contrast, Nepali law prohibited Nepali women from serving as surrogates in the country.¹¹

¹ Emily Harris, *Israeli Dads Welcome Surrogate-Born Baby In Nepal On Earthquake Day*, NAT'L PUB. RADIO (Apr. 29, 2015, 6:19 PM), <http://www.npr.org/sections/goatsandsoda/2015/04/29/403077305/israeli-dads-welcome-surrogate-born-baby-in-nepal-on-earthquake-day>.

² *Id.*

³ *Id.*

⁴ See Jessica M. Caamano, Note, *International, Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention*, 96 B.U. L. REV. 571, 575 (2016); see also Harris, *supra* note 1.

⁵ See Harris, *supra* note 1.

⁶ See Danielle Preiss & Pragati Shahi, *The Dwindling Options for Surrogacy Abroad*, THE ATLANTIC (May 31, 2016), <http://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/> (demonstrating the participation of an Australian homosexual couple); see also Israel Story Podcast, *Birthstory*, TABLET MAG. (Dec. 2, 2015, 12:00 AM), <http://www.tabletmag.com/jewish-life-and-religion/195497/birthquake>.

⁷ Harris, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ Children's Act 2005, No. 38, 2005, part 295(c)(v) (2006), http://www.gov.za/sites/www.gov.za/files/a38-05_3.pdf.

¹¹ Preiss & Shahi, *supra* note 6.

Nepali law did not, however, prohibit Indian women from serving as surrogates, thus creating a loophole for agencies to bring Indian women into Nepal to serve as surrogates.¹²

The lack of uniform international laws regarding surrogacy exposes all parties involved in surrogacy arrangements to a variety of problems. Challenges include determining the status of children, the rights of intended parents, and the protection of surrogates.¹³ Issues regarding the citizenship of babies born to surrogacy agreements tend arise when the child leaves the birth country and enters the intended country of citizenship.¹⁴ For example, babies born in Nepal as a result of surrogacy agreements face great challenges to gaining the same citizenship as their Australian, intended parents.¹⁵ Other issues, such as protecting surrogate mothers and ensuring that their side of the surrogacy contract is upheld, are prevalent in international surrogacy arrangements.¹⁶ Tal and Amir, another set of Israeli intended parents who had three children born from surrogacy agreements, specifically sought out particular agencies that ensured adequate compensation would be paid to surrogate mothers.¹⁷ To their dismay, this couple learned that the women were paid a mere fraction of what they were promised.¹⁸

Overall, international surrogacy arrangements present three central problems: (1) the citizenship of children, (2) the rights of intended parents, and (3) the rights and protection of women who serve as surrogates.¹⁹ This Comment focuses on the third issue; specifically, the exploitation of women who serve as surrogates contrasted against their right of reproduction and right to freely enter into international surrogacy contracts.

¹² *Id.* (explaining when “India’s laws tightened, clinics there quietly began sending the Indian mothers to Nepal to give birth”).

¹³ See e.g., Sarah Mortazavi, Note, *It Takes A Village To Make A Child: Creating Guidelines for International Surrogacy* (2012) 100 GEO. L.J. 2249, 2252.

¹⁴ See e.g., Brittany M. Nichol, Note, *A Child Without a Country: Dissolving the Statelessness of Children Born Through Surrogacy* (2016) MICH. ST. L. REV. 907, 912.

¹⁵ See Preiss & Shahi, *supra* note 6 (discussing the citizenship of the babies born in Nepal to Australian intended parents after a ban was placed on commercial surrogacy agreements).

¹⁶ See Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective* (2014) 20 WM. & MARY J. WOMEN & L. 423, 431 (explaining this issue is prevalent for “inferior classes of society, which in the international context means citizens of third world countries, especially India, who may make wrong decisions due to the strong economic temptation. Thus the existing gap between unequal bargaining powers of individuals, groups, and even different countries will be further deepened” in the international context.).

¹⁷ Israel Story Podcast, *supra* note 6, at 50:48-51:00 (Israeli couple thought \$12,000 was going to go to the surrogate but likely the surrogate received only \$5,300).

¹⁸ *Id.* at 51:03 (Israeli couple thought \$12,000 was going to go to the surrogate but likely the surrogate received only \$5,300).

¹⁹ See e.g., Caamano, *supra* note 4, at 579.

Like the couples portrayed above, many couples must rely on international surrogacy agreements. Individuals frequently seek surrogates in other countries because it has been proven futile for them to engage in the surrogacy process domestically.²⁰ For example, some countries ban surrogacy all together; some ban surrogacy for certain individuals only; and some allow surrogacy, but the surrogacy options in those countries are extremely costly.²¹ As a result, the growth of international commercial gestational surrogacy agreements is attributed to this increased demand for alternative means of achieving reproduction in countries where more favorable and less burdensome laws govern the surrogacy process.²²

Although the need to address the growth of international surrogacy has been recognized by the Hague Convention, there currently is no international treaty on surrogacy that countries may adopt or refer to for guidance.²³ The Hague Convention has thus far established a Parentage/Surrogacy Project, a committee within the Permanent Bureau of the Hague Conference on Private International Law, that is exploring “the feasibility of advancing work in this area” to determine whether it is necessary to create an international treaty on surrogacy.²⁴

The Parentage/Surrogacy Project has a narrowed focus given that it only acknowledges the issues “regarding the legal status of children in cross-border situations” without truly addressing challenges the surrogate mothers face.²⁵ For this project, nations were asked to weigh in on creat-

²⁰ See generally *id.* at 577.

²¹ See generally Darlena Cunha, *The Hidden Costs of International Surrogacy*, THE ATLANTIC (Dec. 22, 2014), <https://www.theatlantic.com/business/archive/2014/12/the-hidden-costs-of-international-surrogacy/382757/> (for example, as of 2014, surrogacy in the U.S. costs at least \$60,000, surrogacy in India is regularly cited as under \$30,000 where the surrogates are paid \$800-\$8,000 and the clinics and staff pocket the rest); see also Sarah Jefford, *Surrogacy- How much will it cost?*, GAFFNEY LAW (Mar. 1, 2017), <http://www.gaffneylaw.com.au/how-much-will-cost/> (another example is that “surrogacy in Australia will cost anywhere from \$15,000 to over \$100,000 [and t]he major variable is the cost fertility treatment, which will depend on what sort of treatment you require, and the success of any treatment and when the surrogate falls pregnant.”).

²² Caamano, *supra* note 4, at 572.

²³ See Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & Pol’y 41, 69 (2015); see also *The Parentage/Surrogacy Project*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> [<https://perma.cc/45ML-LRUS>] (last visited Feb. 19, 2017) (“[A] particularly ‘burning issue’ has come to light in recent years: a brief internet search of ‘surrogacy’ and in today’s world one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilisation techniques and surrogacy. It is now a simple fact that surrogacy is a booming, global business.”).

²⁴ See HAGUE CONF. ON PRIV. INT’L L., *supra* note 23; see also Nichol, *supra* note 14, at 931.

²⁵ HAGUE CONF. ON PRIV. INT’L L., *Report on the February 2016 Meeting of the Experts’ Group on Parentage/Surrogacy* (2016), <https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf>.

ing a possible Hague Convention on private international law that covers international surrogacy arrangements.²⁶ When the United States was asked to provide its suggestion as to whether an international treaty on surrogacy should be created, members from the American Bar Association (“ABA”) urged the United States Department of State to intervene.²⁷ The concern was that the creation of this type of international regulatory framework would not adequately address the issues of international surrogacy and would, in fact, create more problems for nations.²⁸ The ABA report focused on issues that the children and intended parents face, and explained that any potential problems for surrogate mothers should be addressed separately.²⁹ The ABA report presented the opinion that international surrogacy arrangements should focus only on the status of children, choice of law issues, and issues of legal parentage.³⁰

Although it is unknown how much weight will be given to the input from member states on this subject, the Hague Convention has not yet determined whether an international treaty on surrogacy arrangements is necessary. Nonetheless, individuals continue to engage in these contracts, which give rise to many concerns unaddressed by the international community. Current international treaties³¹ adopted by countries around the world can address the issues of exploitation of women, the protection of the child, and the infringement of the parties’ rights.³² These treaties can serve as a resource for the Hague Committee and its Parentage/Surrogacy Project if it ultimately assumes the responsibility of creating a treaty addressing international surrogacy.

²⁶ See HAGUE CONF. ON INT’L L., *supra* note 23.

²⁷ See A.B.A., Section of Family Law, Section of Real Property, Trust and Estate Law, Section of Science and Technology Law (2016), *Report to the House of Delegates, Resolution*, http://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ This article focuses on the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, three current international treaties already adopted by countries. See G.A. Res. 34/180, annex, Convention on the Elimination of all Forms of Discrimination Against Women (Dec. 18, 1979), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/378/07/img/NR037807.pdf?OpenElement>; see G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts. (Dec. 16, 1966), <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>; see G.A. Res. 2200A (XXI), Int’l Covenant on Econ., Soc. & Cultural Rts. (Dec. 16, 1966), <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>.

³² There are many more issues that arise not discussed in this article such as what happens when there is a revocation on the part of either party; choice of law issues. See *e.g.* Erin Nelson, *Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy*, 41 J.L. MED. & ETHICS 240, 241 (2013).

Since the practice of international surrogacy is likely to continue, this Comment recommends using existing regulatory framework to govern the surrogate mother's role in international surrogacy contracts. Three international treaties, already adopted by countries, should be used to ensure that parties to these contracts are protected while exercising their contractual and reproductive rights.³³ The three international treaties addressed in this article, namely, (1) the Convention on the Elimination of All Forms of Discrimination Against Women;³⁴ (2) the International Covenant on Civil and Political Rights;³⁵ and (3) the International Covenant on Economic, Social, and Cultural Rights,³⁶ can protect women's reproductive and contractual rights within the surrogacy process.

Part I addresses the background of surrogacy, including the different types of surrogacy processes, the ways in which countries regulate surrogacy, and conflicting values that are presented by surrogacy arrangements. Part II analyzes and applies the Convention on the Elimination of All Forms of Discrimination Against Women,³⁷ the International Covenant on Civil and Political Rights³⁸ and the International Covenant on Economic, Social, and Cultural Rights³⁹ to international commercial surrogacy agreements. Part III proposes the implementation of a new international treaty that focuses on the surrogate mothers of these agreements. Finally, Part IV summarizes the reasons international authority should be used to protect surrogate mothers who participate in international commercial surrogacy contracts.

I. BACKGROUND

A. TYPES OF SURROGACY PROCESSES

Over time, there have been two main methods for the surrogacy process.⁴⁰ One type is the traditional surrogacy arrangements, which can be traced back to biblical times.⁴¹ In these traditional surrogacy arrange-

³³ See G.A. Res. 34/180, annex, *supra* note 31; see G.A. Res. 2200A (XXI), Int'l Covenant on Civ. and Pol. Rts., *supra* note 31; see G.A. Res. 2200A (XXI), Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31.

³⁴ G.A. Res. 34/180, annex, *supra* note 31.

³⁵ G.A. Res. 2200A (XXI), Int'l Covenant on Civ. and Pol. Rts., *supra* note 31.

³⁶ G.A. Res. 2200A (XXI), Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31.

³⁷ G.A. Res. 34/180, annex, *supra* note 31.

³⁸ G.A. Res. 2200A (XXI), Int'l Covenant on Civ. and Pol. Rts., *supra* note 31.

³⁹ G.A. Res. 2200A (XXI), Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31.

⁴⁰ See e.g., Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 16-21(2009).

⁴¹ *Id.* at 16.

ments, after insemination occurs, the surrogate agrees to carry and later give up a child that is genetically related to her.⁴² For example, in the Bible, Abraham's infertile wife, Sarah, requested that Abraham sleep with their maid in order to have a child.⁴³ The Bible also mentions that when Rachel was found to be infertile, she asked her husband, Jacob, to sleep with their maid Bilhah to have a child.⁴⁴ In traditional surrogacy processes, sperm from either the intended father or a sperm donor is used to impregnate the surrogate using artificial insemination.⁴⁵

Another type of surrogacy arrangement is gestational surrogacy,⁴⁶ which is more commonly used today.⁴⁷ Gestational surrogacies occur through use of assisted reproductive technology.⁴⁸ The assisted reproductive technology uses the egg and sperm from either the intended parents or from a donor to create an embryo.⁴⁹ Once an embryo is created, it is then placed into a genetically unrelated surrogate's uterus.⁵⁰ The assisted reproductive technology used in the gestational surrogacy process makes parenthood possible.⁵¹

Surrogacy arrangements, whether traditional or gestational, can be either altruistic or commercial.⁵² When the intended parents compensate the surrogate only for her medical expenses, it is considered an altruistic surrogacy arrangement.⁵³ In contrast, commercial surrogacy arrangements occur when the intended parents compensate the surrogate for her services in addition to her medical expenses.⁵⁴ For the surrogate mother, commercial surrogacy arrangements are highly preferred from an economic standpoint because she will receive more compensation for the service she is providing.⁵⁵ In the United States today, a woman who provides just her egg is compensated anywhere from \$5,000 to \$10,000.⁵⁶

⁴² Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 193 (2012).

⁴³ See *Genesis* 16.

⁴⁴ See *id.* at 30:1-8; see also Smerdon, *supra* note 31, at 16.

⁴⁵ Mohapatra, *supra* note 42.

⁴⁶ EUROPEAN PARLIAMENT, *Comparative Study on the Regime of Surrogacy in EU Member States* (2013), at 12, [http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf).

⁴⁷ Mohapatra, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jillian Casey, Courtney Lee & Sartaz Singh, *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 83 (2016).

⁵² Caamano, *supra* note 4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1168 (2014).

⁵⁶ See *Egg Donor Compensation*, EGG DONOR AMERICA, <https://www.eggdonoramerica.com/become-egg-donor/egg-donor-compensation> (last visited Feb. 19, 2017); see also *Egg Donor Com-*

Serving as the surrogate, a woman can be compensated anywhere from \$40,000 to \$60,000 in the United States, compared to \$16,000 in Ukraine, \$12,000 in Kenya, and \$13,000 in Georgia.⁵⁷ In India, women who serve as surrogates only make around 400,000 rupees, which is equivalent to \$5,900 absent medical costs.⁵⁸ Overall, surrogacy agencies in the United States charge intended parents anywhere from \$100,000 to \$150,000 for the complete gestational surrogacy process.⁵⁹ These costs usually include: agency fees, attorneys' fees, screening and surrogacy fees, immigration help, and medical and insurance costs.⁶⁰

1. Countries' Regulation of Surrogacy

Countries across the world have taken different stances on regulating surrogacy agreements. Some countries ban surrogacy agreements all together, including Bulgaria, France, Germany, Italy, Portugal, Spain, Switzerland, Thailand, and Nepal.⁶¹ Other countries, like the UK, Canada, Ireland, Denmark, New Zealand, Belgium, Netherlands, and Australia, only allow altruistic surrogacy arrangements.⁶² Additionally, the Ukraine, Russia, Georgia, Mexico, and parts of the United States allow both commercial and altruistic surrogacy.⁶³ In the United States, some states allow commercial surrogacy arrangements, but there is no federal legislation concerning surrogacy.⁶⁴ Finally, there are countries such as India and Israel that generally allow commercial surrogacy and altruistic surrogacy, but only for heterosexual couples.⁶⁵ Homosexual couples in Israel and India are prohibited from initiating the surrogacy process in

persentation, GROWING GENERATIONS, <https://www.growinggenerations.com/egg-donor-program/egg-donors/egg-donor-pay/> (last visited Feb. 19, 2017).

⁵⁷ *What You Need to Know About Surrogacy Costs*, SENSIBLE SURROGACY, <http://www.sensiblesurrogacy.com/surrogacy-costs/> (last visited Jan. 3, 2018).

⁵⁸ Roli Srivastava, *Factbox - Which Countries Allow Commercial Surrogacy?*, REUTERS (Jan. 18, 2017, 9:05 PM), <https://uk.reuters.com/article/uk-india-women-surrogacy-factbox/factbox-which-countries-allow-commercial-surrogacy-idUKKBN1530FR>.

⁵⁹ *Anticipated Costs for Gestational Surrogacy*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/costs> (last visited Feb. 19, 2017); *see also Surrogacy Fees & Costs*, CONCEIVEABILITIES, <https://www.conceiveabilities.com/parents/surrogacy-cost> (last visited Feb. 19, 2017).

⁶⁰ CIRCLE SURROGACY, *supra* note 59; *see also* CONCEIVEABILITIES, *supra* note 59; *see also* SENSIBLE SURROGACY, *supra* note 57.

⁶¹ Srivastava, *supra* note 58; *see also Worldwide Surrogacy: Surrogacy Laws Around the World*, SENSIBLE SURROGACY, <http://www.sensiblesurrogacy.com/surrogacy-law-worldwide/> (last visited Feb. 19, 2017).

⁶² Srivastava, *supra* note 58; *see also* Helier Cheung, *Surrogate Babies: Where Can You Have Them, and is it Legal?*, BBC NEWS (Aug. 6, 2014), <http://www.bbc.com/news/world-28679020>.

⁶³ Srivastava, *supra* note 58; *see also* Caamano, *supra* note 4, at 578.

⁶⁴ Srivastava, *supra* note 58.

⁶⁵ Caamano, *supra* note 4, at 579.

their homeland and must seek surrogacy abroad if they wish to have a child through surrogacy.⁶⁶

Although global consensus as to the regulation of surrogacy arrangements is highly unlikely to occur, even a majority opinion amongst the countries is absent, which has led to the increased use of international commercial surrogacy contracts. Individuals who are restricted by domestic law turn to forum shopping to find the fertility treatment most favorable to them.⁶⁷ As such, regulation on an international level would provide guidance to all parties to the surrogacy. Because “regulation is slow and does not provide immediate solutions to the problems facing intended parents and surrogates engaging in surrogacy today,” this Comment places great emphasis on the use of provisions from current international regulatory framework that can remedy challenges for surrogate mothers.⁶⁸

2. *Conflict Between Values of Protection and Freedom*

The role of the surrogate mother is a highly contested component of international commercial surrogacy arrangements.⁶⁹ Some commentators argue that a high level of regulation, which prohibits women from providing these services, is necessary to protect women from exploitation.⁷⁰ Others argue that women should not be restricted from engaging in surrogacy arrangements, but rather should be encouraged to make the choice to exercise their rights of reproduction and to contract.⁷¹ In the global marketplace, where women should receive equal treatment to men to participate in the economy, a woman’s right to provide surrogacy services and engage in these contracts should be protected and encouraged.

⁶⁶ Gavriel Fiske, *65 Surrogate Babies Born to Israeli Gay Couples Stuck in Thailand*, TIMES OF ISR. (Jan. 19, 2014, 2:55 PM), <http://www.timesofisrael.com/65-surrogate-babies-born-to-israeli-gay-couples-stuck-in-thailand/>; Tarishi Verma, *What are the Surrogacy Laws in India: Here is Everything You Need to Know*, THE INDIAN EXPRESS (Mar. 6, 2017, 9:19 AM), <http://indianexpress.com/article/research/karan-johar-surrogate-children-yash-roohi-what-are-the-surrogacy-in-laws-in-india-here-is-everything-you-need-to-know-4555077/>.

⁶⁷ Smerdon, *supra* note 40, at 26.

⁶⁸ Mohapatra, *supra* note 42, at 200.

⁶⁹ Caamano, *supra* note 4, at 580.

⁷⁰ See e.g., Emily Stehr, Note, *International Surrogacy Contract Regulation: National Governments’ and International Bodies’ Misguided Quests to Prevent Exploitation*, 35 HASTINGS INT’L & COMP. L. REV. 253, 260 (2012) (“[I]t is the international community’s collective responsibility to prevent, or at least to regulate, these arrangements to prevent the surrogate from being financially or otherwise coerced into becoming a production tool for a wealthier family.”).

⁷¹ Caamano, *supra* note 4, at 581.

a. Protection for the Surrogate Mother

Some scholars are concerned that women who serve as surrogates are used just for their bodies.⁷² These scholars are concerned that surrogate mothers are viewed as “nothing more than ‘a means of production,’ seen as a disposable part of a contractual arrangement who could be easily replaced with another willing surrogate.”⁷³ In a time of high demand, individuals believe that women are used just for their uteruses and are treated “as merely a womb” to maximize the number of babies that can be produced by surrogacy arrangements.⁷⁴

Another concern arising from commercial surrogacy agreements is the effect the compensation has on many surrogate mothers.⁷⁵ Although surrogate mothers are compensated for giving birth to a child, which “may provide them with the means to better afford necessities or luxuries that may not otherwise have been possible, the surrogacy marketplace does nothing to better the conditions in the societies or communities from which these surrogates come from.”⁷⁶ Compared to their average living wage, surrogates are compensated in substantial amounts and “the possibility exists that the heightened financial coercion or duress will put some women in situations of involuntary servitude”⁷⁷ Instead of encouraging women to engage in surrogacy agreements, such commentators and scholars believe it is vital to protect surrogate mothers from a heightened possibility of exploitation.⁷⁸

Yet other scholars are concerned with the potential for unequal bargaining powers between the parties to international surrogacy contracts.⁷⁹ Although less common, the intended parents can have less bargaining power than the women who serve as gestational carriers.⁸⁰ In many cases, intended parents who seek surrogates are more economically privileged than the surrogate.⁸¹ However, such intended parents often

⁷² See e.g., *id.* at 583.

⁷³ *Id.*

⁷⁴ April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 271 (2014); see also Shashank Bengali, *India Scales Back ‘Rent-A-Womb’ Services*, L.A. TIMES (Jan. 25, 2016), <http://www.latimes.com/world/asia/la-fg-india-surrogacy-20160125-story.html> (discussing “rent-a-womb” culture and subsequent Indian legislation that would prevent women from being a surrogate multiple times) (last visited Nov. 15, 2016).

⁷⁵ See e.g., Mohapatra, *supra* note 42, at 197.

⁷⁶ *Id.*

⁷⁷ Stehr, *supra* note 70, at 258-59.

⁷⁸ See e.g., Cherry, *supra* note 74, at 284.

⁷⁹ See generally Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT’L L. REV. 671, 679 (2013).

⁸⁰ See Mohapatra, *supra* note 42, at 197-98.

⁸¹ *Id.* at 197.

seek surrogacy services as a last resort, diminishing their bargaining power.⁸² Intended parents turn to international surrogacy because they are unable to become pregnant and surrogacy services are unavailable to the couple or are prohibitively expensive in their home countries.⁸³ Even though the intended parents' bargaining power may be compromised, the process is so complex and unregulated that surrogate mothers frequently become the less powerful party in the bargaining dynamic.⁸⁴

Often, surrogate mothers are in a vulnerable position to be taken advantage of and have less bargaining power in the dynamic of the arrangement.⁸⁵ First, international surrogacy arrangements usually involve wealthy individuals who hire economically disadvantaged women to serve as surrogates, thus creating a financial advantage over the surrogates.⁸⁶ Second, economically disadvantaged women will often enter one-sided agreements where their labor grossly outweighs the benefit they receive.⁸⁷ These one-sided agreements provide parties with ample opportunity for abuse, which is especially harmful to many of the women as a result of their education level and inability to understand or properly consent to the terms and conditions of the contract.⁸⁸ Concerning surrogacy processes in particular, countries' provisions of contract law are often violated due to surrogate women not being provided with the proper opportunity to exercise informed consent and lacking full understanding of contractual obligations and rights.⁸⁹ Therefore, international scholars urge countries to be alert to the heightened possibility of the woman being coerced into making a life altering decision to serve as a surrogate.⁹⁰ There has not been any case brought by a surrogate mother to provide authority on violations of international surrogacy agreements.⁹¹ The lack of case law on this subject may stem from the absence of adequate resources for surrogate mothers to utilize the judicial system where the surrogacy agreements are arranged. Overall, the disparities be-

⁸² *Id.* at 198.

⁸³ *Id.*

⁸⁴ *See generally id.* at 197-98.

⁸⁵ *See e.g.*, Catherine London, Note, *Advancing A Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 *CARDOZO J.L. & GENDER* 391, 392.

⁸⁶ *E.g.*, Vincent & Aftandilian, *supra* note 79 (discussing Indian women who serve as surrogates); Field, *supra* note 55, at 1173.

⁸⁷ Vincent & Aftandilian, *supra* note 79.

⁸⁸ *Id.* at 679-80.

⁸⁹ *See generally* London, *supra* note 85, at 395.

⁹⁰ *See* Margalit, *supra* note 23, at 75.

⁹¹ Cases focusing on surrogacy have been brought in international courts by intended parents dealing with their rights as parents and the citizenship right of children born to surrogacy arrangements. *E.g.*, *Menesson v. France*, 2014-III Eur. Ct. H.R. 219 (2014), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-145389"\]}](https://hudoc.echr.coe.int/eng#{); *Paradiso v. Italy*, 2017 Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-170359>.

tween the economic and educational levels, class status, and races⁹² of the surrogate and the intended parents lead to various inequities throughout the international surrogacy agreement that must be addressed in the absence of an international regulatory framework that directly covers surrogacy.⁹³

b. Promoting Liberties of the Surrogate Mother

On the other hand, surrogacy involves the importance of women's autonomy—the guarantee that women should be allowed to “exercise[] her right to contract with anyone, for anything—even her reproductive abilities.”⁹⁴ Many countries protect women's reproductive liberties such as the right to an abortion or contraception, which is associated with the contractual autonomy of women.⁹⁵

It is vital that women be able to exercise reproductive liberties, economic liberties, and contractual liberties as they see fit. Women who serve as surrogates have an “individual right to use [their] reproductive capacities for financial gain.”⁹⁶ Furthermore, women contemplating becoming a surrogate should be able to make their own choice to use their bodies to provide surrogacy services. Surrogacy “is one of the few jobs where women face no competition from men” and as individuals who belong to the specific gender class that can provide these services, women should be able to access this type of economic opportunity.⁹⁷

Finally, international commercial surrogacy contracts can be “mutually beneficial to both parties” when the women receive proper compensation for surrogacy services and the intended parents receive a baby

⁹² Although race is an important factor that influences the experience and treatment of surrogate mothers, this Comment does not focus on this factor. See Khiara M. Bridges, *Windsor, Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1125-27 (2014) (explaining how surrogacy arrangements can “magnify racial inequalities inasmuch as wealthy white people will look to poor women of color to carry and give birth to the white babies that the couples covet”).

⁹³ E.g., Field, *supra* note 55, at 1173; Margalit, *supra* note 23, at 42.

⁹⁴ Caamano, *supra* note 4, at 581; see also Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259, 265 (2011) (discussing that the “essential aspect of personal autonomy . . . is the right to control one's physical being”).

⁹⁵ Caamano, *supra* note 4, at 581; see also Devon Haynie, *Countries Where Abortion is Illegal Under Most Circumstances*, U.S. NEWS, Feb. 8, 2016, <https://www.usnews.com/news/best-countries/articles/2016-02-08/10-countries-where-abortion-is-illegal-under-most-circumstances> (last visited July 27, 2017) (“Most nations, about 96 percent, permit abortion to save a woman's life, according to a 2015 Pew Research Center analysis of 196 countries based on 2013 United Nations data. The six countries that outlaw abortions under any circumstances are Chile, the Dominican Republic, El Salvador, Nicaragua, Vatican City and Malta, according to Pew.”).

⁹⁶ Stehr, *supra* note 70, at 259-60.

⁹⁷ Mohapatra, *supra* note 42, at 199.

after the process is completed.⁹⁸ Women can control and dictate terms of the arrangement because the intended parents will likely want their surrogate treated well, so that the surrogate will not “engag[e] in behavior that could harm the child, or reconsider[] her decision mid-course.”⁹⁹ Nations’ restrictions on surrogacy arrangements infringe upon many rights granted to women by their country or state, such as the right to procreative autonomy, freedom to contract, and self-determination.¹⁰⁰ In order to protect women from potential exploitation while at the same time ensuring that they can access their rights, those affected by problematic surrogacy arrangements should look to provisions in existing international treaties for guidance.¹⁰¹

II. APPLICATION OF EXISTING INTERNATIONAL TREATIES TO INTERNATIONAL COMMERCIAL SURROGACY CONTRACTS

Although “independent comprehensive international regulation is urgently required in order to preserve the rights and welfare of the different parties to international surrogacy agreements,” three already existing international treaties provide guidance for the creation of a new international treaty on surrogacy that specifically addresses the role of surrogate women.¹⁰²

A. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) is the first international treaty with provisions that can provide guidance for forming an international surrogacy treaty to protect the rights of surrogate women.¹⁰³ In 1979, the United Nations adopted CEDAW, which was created in order to protect the cultural, economic, and social rights of women.¹⁰⁴ Specifically, CEDAW serves as an international bill of women’s rights.¹⁰⁵ CEDAW was adopted after acknowledging that although there are various human

⁹⁸ Angie Godwin McEwen, Note, *So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT’L L. 271, 293 (1999).

⁹⁹ *Id.*

¹⁰⁰ London, *supra* note 85, at 409.

¹⁰¹ See G.A. Res. 34/180, annex, *supra* note 31; see G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts., *supra* note 31; see G.A. Res. 2200A (XXI), Int’l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31.

¹⁰² Margalit, *supra* note 23, at 70.

¹⁰³ G.A. Res. 34/180, annex, *supra* note 31.

¹⁰⁴ *Id.* at intro.; see also Vincent & Aftandilian, *supra* note 79, at 673.

¹⁰⁵ G.A. Res. 34/180, annex, *supra* note 31, at intro.

rights instruments that purport to protect women, “extensive discrimination against women continues to exist.”¹⁰⁶

The Convention’s provisions are vital for governing surrogacy arrangements because it requires that all countries that adopt it¹⁰⁷ take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.”¹⁰⁸ CEDAW continues to demand that countries defend women’s “right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”¹⁰⁹ Furthermore, through the adoption of CEDAW, countries are obligated to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”¹¹⁰

Regardless of the set-up of each country’s social and economic systems, CEDAW mandates mutual cooperation among all countries.¹¹¹ CEDAW also establishes a committee that monitors the implementation of the provisions of the treaty.¹¹² The committee enforces the treaty’s mandate to eliminate discrimination against women by collecting reports from countries, conducting its own investigations, and making general recommendations to countries.¹¹³

CEDAW’s provisions are useful in both protecting against exploitation of surrogate mothers and in upholding the surrogate mothers’ rights.¹¹⁴ First, CEDAW explicitly mandates countries to suppress all forms of exploitation and traffic of women.¹¹⁵ CEDAW also addresses countries’ concern that surrogacy leads to exploitation of women, and especially the exploitation of rural or poor woman who tend to have less bargaining power.¹¹⁶ CEDAW guides countries to examine “the particu-

¹⁰⁶ *Id.*

¹⁰⁷ “There are currently 99 signatories and 188 states parties to CEDAW. The United States is the only signatory that has not yet ratified the Convention. The other five UN member states that have not ratified or acceded to the Convention are Iran, Nauru, Somalia, Sudan and Tonga.” A.B.A., *CEDAW*, IMPOWR, <http://www.impowr.org/pages/cedaw> (last visited Jan. 3, 2018).

¹⁰⁸ G.A. Res. 34/180, annex, *supra* note 31, at art. 3; *see also* Vincent & Aftandilian, *supra* note 79, at 673.

¹⁰⁹ G.A. Res. 34/180, annex, *supra* note 31, at art. 11(f); *see also* Vincent & Aftandilian, *supra* note 79, at 673-74.

¹¹⁰ G.A. Res. 34/180, annex, *supra* note 31, at art. 16; *see also* Vincent & Aftandilian, *supra* note 79, at 674.

¹¹¹ G.A. Res. 34/180, annex, *supra* note 31, at intro.

¹¹² *Id.* at art. 17(1).

¹¹³ *Id.* at art. 18(1).

¹¹⁴ G.A. Res. 34/180, annex, *supra* note 31.

¹¹⁵ *Id.* at art. 6.

¹¹⁶ *See generally id.* at art. 14(1).

lar problems faced by rural women and the significant roles which rural women play in the economic survival of their families.”¹¹⁷ Countries such as India, which are concerned that rural women would constantly “rent out their wombs” and serve as surrogates, should regulate surrogacy in a way that does not completely eliminate it as a possibility for women to make a living.¹¹⁸ CEDAW supports the right of rural and poor women to serve as surrogates because this is an important way for these women to contribute to the economic survival of their families.¹¹⁹ Additionally, CEDAW acknowledges that “the right to work [is] an inalienable right of all human beings.”¹²⁰ Women are guaranteed the “right to free choice of profession and employment,” which would include any choice a woman makes to serve as a surrogate carrier.¹²¹

Furthermore, CEDAW serves as a regulatory framework that also enables women to access their contractual and economic rights.¹²² CEDAW mandates those who adopt the treaty to “give women equal rights to conclude contracts.”¹²³ Additionally, CEDAW provides a method for countries to protect women from the potential of abuse in exercising their rights to work. CEDAW demands that all contracts “with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.”¹²⁴ Overall, these provisions of CEDAW can provide the Parentage/Surrogacy Committee guidance to address potential conflicts such as: (1) if intended parents breach any provision in the international surrogacy contract, (2) if the woman serving as the surrogate is at risk of being exploited, or (3) if a country uses its police powers to take away or limit the rights of the women to serve as surrogates.¹²⁵

B. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (“ICCPR”) is the second international treaty with provisions that can provide guidance for forming an international surrogacy treaty that would ensure the

¹¹⁷ *Id.*

¹¹⁸ See Abby Rabinowitz, *The Trouble with Renting a Womb*, THE GUARDIAN (Apr. 28, 2016), <https://www.theguardian.com/lifeandstyle/2016/apr/28/paying-for-baby-trouble-with-renting-womb-india> (discussing why rural and poor women serve as surrogates).

¹¹⁹ See generally G.A. Res. 34/180, annex, *supra* note 31, at art. 14(1).

¹²⁰ *Id.* at art. 11(1)(a).

¹²¹ *Id.* at art. 11(1)(c).

¹²² See *id.* at art. 15.

¹²³ *Id.* at art. 15(2).

¹²⁴ *Id.* at art. 15(3).

¹²⁵ See *id.* at art. 15(2)-(3); see also HAGUE CONF. ON PRIV. INT’L L., *supra* note 23.

protection of surrogate women.¹²⁶ In 1966, the United Nations adopted ICCPR, which acknowledged the most basic human rights, such as the right to life for all humans.¹²⁷ The treaty was entered into force in 1976.¹²⁸ ICCPR explains that all individuals have the fundamental “right of self-determination” and this right guarantees individuals the ability to “freely determine their political status and freely pursue their economic, social, and cultural development.”¹²⁹ Furthermore, ICCPR protects individuals’ rights and freedoms by providing an effective remedy to violations.¹³⁰ Additionally, ICCPR prohibits the performance of compulsory labor by granting individuals the right to contract and “dispose of their natural wealth and resources based upon the principle of mutual benefit.”¹³¹

Like CEDAW, ICCPR establishes a method for nations “to submit reports on the measures they have adopted which give effect to the rights recognized [in ICCPR] and on the progress made in the enjoyment of those rights.”¹³² The reporting procedure holds countries accountable for their efforts, or lack thereof, to protect civil and political rights of all human beings.¹³³ The reporting procedure also provides a way for countries to receive input from the Secretary-General of the United Nations and the Committee regarding how to address factors and difficulties these countries face that affect the implementation of the provisions in ICCPR.¹³⁴

ICCPR’s provisions, if mirrored in an international treaty addressing surrogacy, can be utilized by parties to surrogacy agreements in the event that the surrogate woman’s rights are infringed.¹³⁵ The Convention requires mutual benefit for agreements and the women cannot be forced into using their bodies to serve as surrogates.¹³⁶ At the same time, wo-

¹²⁶ G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts., *supra* note 31.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at art. 1(1); see also Vincent & Aftandilian, *supra* note 79, at 674.

¹³⁰ G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts., *supra* note 31, at art. 2(3).

¹³¹ Vincent & Aftandilian, *supra* note 79, at 674; see also G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts., *supra* note 31, at art. 1(2).

¹³² G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts., *supra* note 31, at art. 40(3).

¹³³ For example, the United States acknowledges its responsibility abiding by ICCPR by providing the reports and making them accessible on the United States Department of State’s website. See *U.S. Treaty Reports*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/reports/treaties/index.htm#ftn2> (last visited July 27, 2017); see also *One-Year Follow-up Response of the United States of America to Priority Recommendations of the Human Rights Committee on its Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights*, U.S. DEP’T OF STATE (Mar. 31, 2015), <https://www.state.gov/documents/organization/242228.pdf>

¹³⁴ G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts., *supra* note 31, at art. 40(2).

¹³⁵ G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts., *supra* note 31.

¹³⁶ See *id.* at art. 1(2).

men can use ICCPR to demonstrate their right to “dispose of their . . . resources” by using the resource of their bodies to enter into these international commercial surrogacy arrangements.¹³⁷ Furthermore, with the right of self-determination established, women can use ICCPR to demonstrate to their home countries the need to allow women to serve as surrogates and “freely pursue their economic, social, and cultural development” through these contracts.¹³⁸

C. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) is the third international treaty that creators of an international treaty on surrogacy should reference to enforce and protect surrogate mothers’ rights.¹³⁹ Established in 1966, but not given force until 1976, ICESCR, for the 160 countries that ratified it, mainly serves as a “globally accepted international instrument on workers’ rights.”¹⁴⁰ The Covenant orders countries to acknowledge “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing and to the continuous improvement of living conditions.”¹⁴¹ This right to safe working and living conditions, as well as all other economic, social, and cultural rights, extends to both women and men.¹⁴²

ICESCR’s provisions serve as an important resource to protect women who serve as surrogates if their rights are disregarded by the other parties to the contract or by the countries that are involved in the process.¹⁴³ ICESCR enforces women’s “right to work, which includes the right . . . to the opportunity to gain [her] living by work which [s]he freely chooses or accepts.”¹⁴⁴ If a woman decides to become a surrogate carrier, she is entitled to full compensation promised to her because acting as a surrogate carrier is a way in which she can gain her living.¹⁴⁵ Additionally, this Covenant entitles women to “fair wages and equal re-

¹³⁷ *Id.*

¹³⁸ *See id.* at pt. I, art. 1(1).

¹³⁹ G.A. Res. 2200A (XXI), Int’l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31.

¹⁴⁰ Vincent & Aftandilian, *supra* note 79, at 674.

¹⁴¹ G.A. Res. 2200A (XXI), Int’l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31, at art. 11; *see also* Vincent & Aftandilian, *supra* note 79, at 675.

¹⁴² G.A. Res. 2200A (XXI), Int’l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31, at art. 3.

¹⁴³ G.A. Res. 2200A (XXI), Int’l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31.

¹⁴⁴ *Id.* at art. 6(1).

¹⁴⁵ *See id.* at pt. III, art. 6(1).

muneration¹⁴⁶ for work” as well as any working conditions that she is guaranteed.¹⁴⁷ This provision in ICESCR provides guidance to enforce any promised section in a surrogacy contract that details the surrogate mother’s working conditions and the fair compensation that she is owed.¹⁴⁸

ICESCR allows states to furnish reports regarding any “factors and difficulties affecting the degree of fulfilment of obligations” of the Covenant.¹⁴⁹ By using the report protocols, the Covenant provides an opportunity for countries to protect surrogate mothers from exploitation, while at the same time permitting commercial surrogacy agreements that affect their citizens.¹⁵⁰ Guidance from the committee set up by the Covenant presents a method of oversight during surrogacy processes.¹⁵¹ Overall, the provisions in ICESCR can fortify individuals’ rights involved with this economic process.

III. PROPOSAL FOR INTERNATIONAL TREATY ON SURROGACY WITH A FOCUS ON SURROGATE MOTHERS AND ITS ENFORCEMENT

The creation of an international treaty on surrogacy that focuses on the rights of surrogate mothers should be considered in order to ameliorate issues that surrogate mothers face as crucial parties to international commercial surrogacy arrangements. Since the international community is already alerted and focused on other issues that stem from these agreements, such as the citizenship of the children and the status of parentage for the intended parents, this Comment suggests that the international community should redirect its focus to protecting surrogate mothers from a potentially exploitive process and enable them to actively participate in these agreements. Once an international treaty is created and adopted by member states, it can be enforced either by the words of the treaty itself, by providing methods to remedy a violation of the treaty within the text,

¹⁴⁶ “The term ‘remuneration’ goes beyond the more restricted notion of ‘wage’ or ‘salary’ to include additional direct or indirect allowances in cash or in kind that should be of a fair and reasonable amount paid by the employer to the employee, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities.” Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the Right to just and favorable conditions of work*, ESCR-NET, <https://www.escr-net.org/resources/general-comment-no-23-2016-right-just-and-favorable-conditions-work> (last visited Feb. 28, 2018).

¹⁴⁷ G.A. Res. 2200A (XXI), Int’l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31, at pt. III, art. 7(a)(i).

¹⁴⁸ *See id.* at pt. III, art 6(1).

¹⁴⁹ *Id.* at pt. IV, art. 17.

¹⁵⁰ *See generally id.*

¹⁵¹ *See generally id.*

or by parties to international commercial surrogacy contracts bringing their claims in front of the regional international court system.

Appropriate models for drafting an international treaty on surrogacy arrangements can be found by pulling applicable provisions from CEDAW, ICCPR, and ICESCR. The adoption of these treaties demonstrates that member states to the United Nations already place a high priority on protecting the rights of both men and women, and that women are as equally deserving as men of accessing and exercising their reproductive, economic and contractual rights.

From CEDAW, an international treaty can be drafted to include similar provisions that serve the dual purpose of preventing exploitation of women and enabling women to access their rights to serve as surrogate mothers.¹⁵² CEDAW provisions that protect surrogate mothers from exploitation and encourage their right to engage in these contracts can provide guidance for the creation of a new treaty acknowledging that because rural women, in particular, face certain problems, they should be able to take advantage of economic opportunities to support their families.¹⁵³ Additionally, CEDAW's provision guaranteeing women's "right to free choice of profession and employment" can be used in a new international surrogacy treaty because it would explicitly support the choice of a woman to serve as a surrogate mother.¹⁵⁴ The provisions of CEDAW can be used to strengthen a new international treaty on surrogacy that protects surrogate mothers in the event of a breach of an international surrogacy contract, lessens the risk of women serving as surrogates from being exploited, and enhances the overall rights of women to serve as surrogates.¹⁵⁵

Using ICCPR as a model, an international treaty should be drafted that will preemptively rectify any infringements on the rights of the surrogate mother that may arise during an international commercial surrogacy arrangement.¹⁵⁶ ICCPR mandates that there must be mutual benefit for agreements and that women have a right to "dispose of their . . . resources" by using the resource of their bodies to enter into these international commercial surrogacy arrangements.¹⁵⁷ ICCPR also provides that women serving as surrogates should be able to "freely pursue their economic, social, and cultural development" through these contracts.¹⁵⁸

¹⁵² See generally G.A. Res. 34/180, annex, *supra* note 31, at pt. I, art. 6; pt. IV, art. 16; see also Vincent & Aftandilian, *supra* note 79, at 674-75.

¹⁵³ See generally G.A. Res. 34/180, annex, *supra* note 31, at pt. III, art. 14.

¹⁵⁴ *Id.* at pt. III, art. 11(1)(c).

¹⁵⁵ See generally *id.* at pt. I, art. 1.

¹⁵⁶ See G.A. Res. 2200A (XXI), Int'l Covenant on Civ. & Pol. Rts., *supra* note 31.

¹⁵⁷ See *id.* at pt. I, art. 1(2).

¹⁵⁸ See *id.* at pt. I, art. 1(1).

Both of these provisions help ensure that, even if a surrogate mother comes to the contract with lower bargaining power than other parties to the contract, her right to engage in these contracts, her right to personal autonomy, and her self-determination to serve as a surrogate will be guarded by the treaty.

Furthermore, ICESCR's provisions should also serve as a model for an international commercial surrogacy treaty that focuses on the surrogate mother.¹⁵⁹ ICESCR can provide guidance for a new international treaty with provisions that ensure women's "right to work, which includes the right . . . to the opportunity to gain [her] living by work which [s]he freely chooses or accepts."¹⁶⁰ This provision can guide how the international treaty will address a woman's right to become a surrogate mother and the right to collect full compensation for the services that she provides.¹⁶¹ Additionally, ICESCR can be modeled by a new international treaty with a method to enforce any provision of a surrogacy contract that lays out the surrogate mother's working conditions and fair compensation.¹⁶² Finally, a new international treaty can adopt ICESCR's provisions that demand proper working opportunities for surrogate mothers.¹⁶³

The creation, adoption, and ratification of a modern international treaty that protects surrogate mothers will level the playing field between the parties to international commercial surrogacy arrangements and will rectify the unequal bargaining power of women. In situations where surrogate mothers may not have enough resources to resolve any issue that may arise, an international treaty focusing on surrogate mothers can provide these women with an opportunity to receive an adequate remedy.

Moreover, an international treaty can guide nations to focus their attention on fortifying the rights of women within their countries. This treaty will foster cooperation between nations and encourage them to work together to resolve issues that may arise from inconsistent laws in each nation. This will allow them to protect the women in their countries who engage in this surrogacy process. Not only can an international treaty help ensure cooperation between nations involved in an international commercial surrogacy contract, but also this treaty could help nations craft their own domestic legislation that regulates surrogacy processes. This type of international treaty can heighten awareness of women's rights to provide surrogacy services, which should lead to do-

¹⁵⁹ See generally G.A. Res. 2200A (XXI), Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 31.

¹⁶⁰ See *id.* at pt. III, art. 6(1).

¹⁶¹ See generally *id.*

¹⁶² See generally *id.*

¹⁶³ See generally *id.*

mestic regulations that address many of the other potential problems involved in surrogacy, such as the status of children and parentage of intended parents.

Although a clash between domestic law and international regulation is a likely outcome when addressing these issues of international surrogacy arrangements, this type of proposed international regulatory framework can at least act as a resource to remind nations to be mindful of all the parties involved in these processes. Furthermore, this proposed regulatory framework is a start toward broader recognition of the surrogate mother's rights to reproduction, economic power, and contract.

To ensure that member nations to the international treaty on surrogacy abide by its provisions, this international treaty on surrogacy can distinguish itself from the other international treaties mentioned above that protect the rights of women. Instead of having only a reporting system to determine if member nations abide by the provisions, it would be beneficial for the United Nations to use its authority to mandate sanctions, rather than mere admonishment if a member to the treaty violates its provisions. By imposing sanctions, the treaty would ensure that a higher burden is placed on the member nation, which gives the treaty stronger authority.

Additionally, once there is an international treaty that draws from the provisions of CEDAW, ICCPR, and ICESCR to focus on the rights of surrogate mothers, surrogate mothers can bring their conflicts before the international regional court systems to seek guidance if their own country has violated their rights. The regional human rights court systems "monitor, promote and protect human rights in several geographic regions around the world."¹⁶⁴ The regional courts include the African Court on Human and Peoples' Rights, European Court of Human Rights, and the Inter-American Court of Human Rights.¹⁶⁵ There are also regional commissions and committees including the African Commission on Human and Peoples' Rights, Arab Human Rights Committee, ASEAN Intergovernmental Commission on Human Rights, European Committee of Social Rights, and the Inter-American Commission on Human Rights.¹⁶⁶

These systems provide a manner in which states alone "may be held accountable for human rights violations . . . [while the systems] do not prosecute individuals or decide individuals' responsibility for human rights violations."¹⁶⁷ By virtue of creating and adopting an international

¹⁶⁴ *Regional Systems*, INT'L JUST. RES. CTR., <http://www.ijrcenter.org/regional/> (last visited Jan. 3, 2018).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

treaty that protects the rights of women who serve as surrogates, states will thus agree to protect the freedoms enumerated in the treaty for all the people within their states and these regional courts will serve to monitor, reinforce, and promote all that is outlined in the treaty. The regional court system can hold states “accountable for violations of these freedoms that are caused by the State’s laws or policies or by actions of State agents, as well as for violations that the State or its agents allowed to occur or failed to prevent.”¹⁶⁸ Regional courts do not take the place of national courts; rather, individuals must first try to resolve issues using local or national remedies.¹⁶⁹ Adjudications from these international regional courts would provide important precedent for other countries to utilize when resolving issues between the parties to international surrogacy agreements.

In sum, this proposed version of an international treaty that focuses on the surrogate mothers, drawing from the provisions from CEDAW, ICCPR, and ICESCR, provides a recommendation to the international community to acknowledge the realities of the global market for reproductive services, while at the same time focusing on the impact these services have on the surrogate mother.

IV. CONCLUSION

Despite concerns regarding the exploitation of women who serve as surrogates for international surrogacy agreements, methods exist to ensure that the rights of all parties to these arrangements are protected. Although currently there is no uniform set of laws that regulate international commercial surrogacy agreements, other United Nations regulatory frameworks can serve as a resource both to those who may draft an international treaty on surrogacy and to the parties that engage in these international commercial surrogacy contracts.

An international treaty on surrogacy should not only address the well-being of the child created from the international surrogacy arrangements and the rights of intended parents, but also the surrogate mothers’ and the choices they make. The main provisions of three international treaties already adopted by countries—the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights—should be used as resources

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (“States will only be considered internationally responsible for human rights violations that the government failed to remedy, in a suitable and timely manner, when it had the opportunity to do so.”).

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for this international authority addressing surrogacy that would ensure that parties, specifically surrogate women, to these contracts are protected while exercising their contractual, economic, and reproductive rights.

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