Suspension of Citizenship: Ethical Concerns in International Commercial Surrogacy and the Legal Possibility of Stateless Children

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Abstract

Legal issues often exist in ethical gray areas. Advancements in reproductive technologies have increased family-building options for those that were previously unable to procreate. Similarly, globalization has increased family-placement options for children in the adoption context. However, when assisted reproductive technologies advance in a globalized world without regulation or international cooperation, international commercial surrogacy arrangements are governed by contractual systems that often protect the commissioning parties, rather than those who are most vulnerable and in need of protections. This Note examines how the current lack of international regulation and cooperation in the international commercial surrogacy context can leave children stateless and without the protection of citizenship. By suggesting recommendations for international cooperation that prioritize the ethical concerns regarding the best interests of the child, this Note proposes a starting point for balancing the importance of state sovereignty against the dangers of an unregulated surrogacy system.

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I. INTRODUCTION

Throughout the summer of 2020, children born in Ukraine through transnational surrogacy arrangements were left stranded in what has been described as a "baby hotel." 1 Ukraine, a leading nation in commercial surrogacy, responded to COVID-19 by blocking international visitors from entering its borders. 2 With prospective parents unable to retrieve babies delivered during the shutdown, the surrogacy company that facilitated the transactions arranged for the


babies to stay at a small hotel outside of Kyiv.³ While the babies were being cared for by nurses, the prospective parents did not know when they would be able to meet their children.⁴ This particular state of limbo has a fairly clear end: once prospective parents are able to travel into Ukraine, they can presumably be with their children. However, the legal uncertainty surrounding transnational commercial surrogacy transactions (referred to as international commercial surrogacy, or ICS) leaves open the possibility of a more extensive state of suspension.⁵

Developments in assisted reproductive technology (ART) and increased globalization have led to issues in the determination of legal parentage for children born through ICS arrangements.⁶ Individuals seeking to procreate through surrogacy are referred to as the intended, or prospective, parents;⁷ those who are genetically related to the

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⁴. See, e.g., Kramer, supra note 3.


children are referred to as the biological parents; and those who carry and give birth to the children are the gestational, or surrogate, mothers. Beyond the roles of parentage, surrogacy can be divided into altruistic surrogacy (the surrogate is not financially compensated beyond reimbursement for medical costs associated with gestation) and commercial surrogacy (the surrogate is financially compensated beyond reimbursement for medical costs associated with gestation). Some countries prohibit all forms of surrogacy, while others either only prohibit commercial surrogacy or have no prohibitions at all. Three notable geographical areas that allow commercial surrogacy include Russia, Ukraine, and certain US states. Because altruistic surrogacy arrangements typically involve parties that share a personal connection, and most concerns regarding statelessness of children involve commercial surrogacy, this Note will focus on commercial surrogacy arrangements.

Incompatible parentage laws have left gaps in the process for securing citizenship for children born through ICS arrangements. For example, the United Kingdom recognizes the surrogate mother as the legal parent, while giving the prospective parents the ability to transfer parentage through adoption or a parental order after birth. Until such transfer, if the child is born in a foreign country, he or she will not be a UK citizen. This can leave the child stateless if the surrogate's country of citizenship recognizes the prospective parents, and not the surrogate who has surrendered parentage, as the legal parents. A stateless child is not a citizen of any country, thus full protection by means of citizenship-conferred rights and access to public welfare programs may be at risk. A child who is abandoned by his or

9. See id. (defining gestational mothers). This Note refers to the hypothetical or general individual who is pregnant in this context as the surrogate or gestational mother, but recognizes that a specific individual who is pregnant may not identify as such.
10. See id. (distinguishing between altruistic and commercial surrogacy).
12. See, e.g., id.
14. See id. They/them are used as epicene singular pronouns throughout this Note.
16. See id. (asserting that a child's stateless status can deprive them of basic rights and access to healthcare and education).
her intended parents and left stateless may have to wait years for citizenship to be conferred, meaning that the child may not be eligible for adoption until that time. A well-reported instance of abandonment of a child born through ICS is the 2014 case of Baby Gammy. Baby Gammy’s surrogate mother became pregnant with twins through an ICS arrangement with an Australian couple. The surrogate mother reported that the prospective parents ultimately only claimed one twin after learning that the other, Baby Gammy, had been diagnosed with Down Syndrome as well as a heart and lung condition. The Australian couple retrieved the other twin and left Baby Gammy behind with the surrogate mother, who raised him despite her struggle to pay for his expenses. While this case did not ultimately involve difficulty securing citizenship for Baby Gammy, it did bring attention to issues surrounding ICS, namely the lack of protection for children and insufficient coordination among states.

This Note assesses the effect that ICS may have in bringing about child statelessness to highlight flaws that can be remedied to mitigate potential harms to such children. Part II presents the space that ICS has occupied as well as the issues associated with such transactions when coupled with a lack of regulation and international cooperation. Part III discusses different approaches that can be taken in ICS regulation and analyzes how transnational surrogacy arrangements can fit into already-existing best practices for international adoption. Part IV presents a path to a solution that requires cooperative practices and policies.

The proposed solution requires an ethics-based approach supported by the international community through discussion and cooperation. The international community should recognize a best practice policy approach that promotes the interests of children born through ICS arrangements. Such an approach would require an

19. See id.
21. See Fears of Surrogacy Ban, supra note 18.
22. See Wilson, supra note 20 (noting that if Baby Gammy had been born in India he would be left stateless).
international forum to facilitate multistate negotiations that ideally end in ratification of an ICS framework by a host of participating states, with an acknowledgment that as reproductive technologies continue to evolve and more data regarding ICS and related policies are collected, amendments and recommendations for contractual provisions may become necessary. The solution recommends that some policies that already exist in the intercountry adoption context be imported to the ICS context. Finally, the solution addresses the application of ad hoc judgments in jurisdictions that prohibit ICS arrangements.

II. THE LEGAL PROGRESSION OF ICS

A. The Development of Assisted Reproductive Technology (ART)

Advances in technology and medicine have led to an increasing number of people using ART to procreate. ART is a broad term for techniques used to conceive without sexual intercourse; techniques now available include in vitro fertilization, gamete donation, donor insemination, and intrauterine insemination. ART procedures are implemented in surrogacy arrangements that use the surrogate’s egg as well as gestational surrogacy arrangements—in which the embryo is developed in vitro before being transferred to the womb of the surrogate mother. Surrogacy allows individuals who could not otherwise conceive to be biologically related to a child; such individuals include older women, women who have had hysterectomies, other infertile individuals, LGBTQ couples, and single prospective parents.

Surrogacy as a means of procreating has reached a global scale, with interested parties crossing international borders to use surrogacy services available in areas with fewer restrictions. This global movement for surrogacy has multiple names, including procreative tourism, reproductive tourism, reproductive exile, and cross-border surrogacy. Surrogacy is legal in a limited number of countries, including Ukraine, Georgia, Russia, Kazakhstan, Greece, India, and parts of Mexico and the United States. Some areas that do allow

25. See id.
26. See id.
27. See id.
28. See id.
29. See id.
surrogacy have limitations on who can be a prospective parent in a surrogacy arrangement; for example, Greece excludes same-sex couples from eligibility.\textsuperscript{31} Limitations on domestic eligibility increase the number of prospective parents seeking surrogacy arrangements internationally.\textsuperscript{32} Two leading countries of citizenship for prospective parents in ICS are Australia and the United States, which legalized same-sex marriage in 2017 and 2015, respectively.\textsuperscript{33} In 2018, same-sex couples represented approximately 40 percent of surrogacy clients.\textsuperscript{34}

B. The Legal Status of Surrogacy in Asia, Europe, and the United States

A significant consideration when determining where prospective parents will seek surrogacy arrangements is cost. India previously attracted a high volume of international prospective parents seeking surrogates because of comparatively low cost and minimal regulation.\textsuperscript{35} While a surrogacy arrangement in the United States might cost around $70,000 (a conservative estimate), a surrogacy arrangement in India would cost about $25,000.\textsuperscript{36} India has since prohibited the practice of ICS; consequently, by 2018, commercial movement shifted, and Ukrainian surrogacy companies held over a quarter of the global surrogacy market due to less restrictive laws.\textsuperscript{37}

ICS has been criticized on several grounds, including the lack of regulation, the exploitative nature of the business, and the commodification of children.\textsuperscript{38} Monitoring and oversight of ICS is difficult because countries usually do not record surrogate births separately

\begin{footnotes}


\textsuperscript{33} See Lamberton, \textit{supra} note 7 (located in the Money, Opportunity, and Corruption in Ukraine's Surrogacy Market section).

\textsuperscript{34} Id.

\textsuperscript{35} See Sreenivas & Campo-Engelstein, \textit{supra} note 6, at 148.

\textsuperscript{36} See id.

\textsuperscript{37} See Lamberton, \textit{supra} note 7; Piersanti, Consalvo, Signore, Del Rio & Zaami, \textit{supra} note 31, at *11 (noting that Ukraine is becoming a more popular destination as other countries ban or severely restrict commercial surrogacy); see also Shany Noy Kirshner, \textit{Selling a Miracle? Surrogacy Through International Borders: Exploration of Ukrainian Surrogacy}, 14 J. INT'L BUS. & L. 77, 86 (2015) ("[M]any couples decide on Ukraine for surrogacy due to its low tariffs and lenient legislation.").

\textsuperscript{38} See, e.g., Batha, \textit{supra} note 15; Sreenivas & Campo-Engelstein, \textit{supra} note 6, at 143.
\end{footnotes}
from other births, and many surrogacy arrangements are private.\textsuperscript{39} Without regulation or oversight by officials, the global market dictates the operation of the industry, with widespread ethical implications.\textsuperscript{40}

While it is understandable why prospective parents may seek out the cheapest options for surrogacy,\textsuperscript{41} this can lead to the exploitation of low-income women. A significant number of surrogates are underprivileged and may be unable to fight against abusive treatment by surrogacy companies or truly consent to such arrangements due to power imbalances.\textsuperscript{42} Prospective parents are generally wealthier individuals, with greater access to information and institutions of power than surrogates.\textsuperscript{43} These imbalances can lead to coercion by the prospective parents and/or the surrogacy companies they use, thereby reducing the surrogate's bargaining power while entering into a contract.\textsuperscript{44} Because of the contractual nature of ICS arrangements, another prevalent criticism of ICS is that the transportation of children across national borders under transactional agreements violates international prohibitions against the sale of children.\textsuperscript{45} Additionally, there are moral concerns of exploitation tied to the commodification of reproductive labor and the bodies of surrogate mothers.\textsuperscript{46}

Some countries, such as Australia, prohibit commercial surrogacy as violating the Optional Protocol to the United Nations (UN) Convention on the Rights of the Child, which condemns, in any form, the sale or trafficking of children.\textsuperscript{47} Proponents for this reasoning view commercial surrogacy as a transaction, backed by consideration (i.e., monetary payment), under which a child is transferred by one party to another.\textsuperscript{48} Those opposed to this reasoning view commercial surrogacy

\begin{footnotesize}
\begin{enumerate}
\item See Rotabi, Mapp, Cheney, Fong, & McRoy, supra note 39, at 67–68.
\item See Stephen Wilkinson, \textit{Exploitation in International Paid Surrogacy Arrangements}, 33 J. APPLIED PHIL. 125, 125–26 (2016) (comparing general costs of surrogacy in the United States to those in India, including the difference in payment to surrogates).
\item See Lamberton, supra note 7 (located in Legal Representation for Surrogates section); \textit{Finkelstein, Mac Dougall, Kintominas, & Olsen, supra note 30, at 26–27}.
\item See \textit{Finkelstein, Mac Dougall, Kintominas, & Olsen, supra note 30, at 26–27}.
\item See id. at 19.
\item See Sonia Allan, \textit{The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations}, in \textit{SURROGACY, LAW AND HUMAN RIGHTS} 113, 116–17 (Paula Gerber & Katie O’Byrne eds., 2016).
\item See id. at 116.
\end{enumerate}
\end{footnotesize}
as an arrangement under which the payment is not for the child—who is genetically related to the prospective parents—but for the services of gestation rendered by the surrogate. However, this latter argument only applies in surrogacy arrangements that do not include the surrogate's egg (gestational surrogacy) and is weakened by resting wholly on the idea that a child is owned based on genetic contribution. In reality, the development of a child in utero is affected by its environment, which includes the nutrients and gases delivered to the fetus by the surrogate's placenta. The physical and psychological aspects of pregnancy make it difficult to deny a biological connection between the child and the surrogate, even if the prospective parent's egg was used.

1. Regulation in Thailand and India

In 2014, Thailand recognized the need to pass legislation to better regulate the practice after attention was placed on the industry through situations such as Baby Gammy's. Legislation enacted in Thailand in 2015 declares surrogate agreements void on public policy grounds, including the risk such agreements present to the resultant children and the exploitation of surrogate mothers. Because the legislation was specifically aimed at banning surrogacy tourism, non-commercial surrogacy services are still available for those who live in Thailand. Additionally, this ban does not stop Thai surrogates from traveling to nearby countries to provide commercial surrogacy services to foreign prospective parents.

In 2008, the Indian Parliament proposed a bill that intended to regulate surrogacy and, as a result of such regulation, address the statelessness issues that ICS arrangements may create. However, the ethical issues of coercion and autonomy associated with commercial surrogacy arrangements still exist. Surrogates in India are often

49. See id. at 117.
50. See id. at 118.
51. See id.
53. See Stasi, supra note 7.
54. See id.
56. See id. at 138.
57. See Rajan, supra note 32, at 118.
recruited by agencies, and financial issues are generally reported as a motivating factor.\textsuperscript{58} Altruistic language is sometimes used to coerce the participation of surrogates through the guise of committing charitable acts (i.e., helping others conceive).\textsuperscript{59} While India has not fully banned commercial surrogacy, bills like the one proposed in 2008 indicate the government's acknowledgement of the issue and potentially a movement towards regulation or even prohibition.\textsuperscript{60}

2. Regulation in European Countries

Some countries in the European Union (EU),\textsuperscript{61} such as the United Kingdom, Ireland, Denmark, Belgium, and the Netherlands, prohibit any commercial surrogacy while allowing altruistic surrogacy.\textsuperscript{62} Other European countries, such as Italy, Spain, France, and Germany, ban all forms of surrogacy.\textsuperscript{63} The Director of European Advocacy for the Alliance Defending Freedom, Robert Clarke, expressed the view that prohibitions on surrogacy protect children and families "from the raw, undignified commercialization of the human person by the surrogacy industry."\textsuperscript{64} Reflecting this sentiment, France prohibits surrogacy in part because of the commodification of children, the possible psychological and emotional harm to children, and the exploitation and commercialization of women's bodies.\textsuperscript{65} ICS renders such laws largely ineffective—ICS creates the opportunity for French citizens to circumvent penalties for engaging in a surrogacy arrangement by enabling prospective parents to travel abroad to engage in commercial surrogacy transactions and later return to France with their child.\textsuperscript{66}
3. Regulation in the United States

The US states are also inconsistent in their regulation of surrogacy.\(^{67}\) States either expressly allow surrogacy, expressly prohibit surrogacy, or leave the issue partially unaddressed.\(^{68}\) Most states are moving towards regulation of surrogacy rather than fully prohibiting it. In 2016, only four states fully banned surrogacy.\(^{69}\) US courts have disagreed about the importance that biology plays in determining the rights and parentage of a child born through surrogacy.\(^{70}\) Some courts have held that custody should not always be tied to biology, but it is difficult to find a clear trend on this topic in US courts.\(^{71}\)

A comparison of California and Florida law illustrates how different regulations can be across jurisdictional borders in the United States alone. California law permits and regulates only gestational surrogacy contracts.\(^{72}\) The state does not restrict who can be a surrogate or prospective parent and does not impose a residency requirement on any contracting party.\(^{73}\) California does allow prospective parents to seek out a court order for legal parentage before the child is born, at which point the order would become effective.\(^{74}\) Florida regulates gestational surrogacy differently than surrogacy for which the surrogate’s egg is used.\(^{75}\) Florida law only allows gestational surrogacy agreements in which the prospective parents are married and at least eighteen years old, and a physician has certified either that the prospective mother cannot gestate a pregnancy or that gestation would present a health risk.\(^{76}\) Because Florida does not allow pre-birth parentage orders, the prospective parents in gestational surrogacy arrangements must file a petition to amend the birth certificate within three days of the child’s birth.\(^{77}\) The Florida statute does regulate parentage by requiring that, in a gestational surrogacy contract, (1) the surrogate relinquishes parental rights upon birth, and (2) the prospective parents assume full parental rights and responsibilities upon birth, regardless of any possible impairment of the

\(^{67}\) See generally FINKELSTEIN, MAC DOUGALL, KINTOMINAS, & OLSEN, supra note 30 (comparing state laws relating to surrogacy and the arguments for and against the practice).

\(^{68}\) See id.

\(^{69}\) See id. (listing New York, New Jersey, Indiana, and Michigan as states that explicitly banned surrogacy in 2016).

\(^{70}\) See id.

\(^{71}\) See id.

\(^{72}\) See id.

\(^{73}\) See id.

\(^{74}\) See id.

\(^{75}\) See id.

\(^{76}\) See id.

\(^{77}\) See id.
This last requirement does address concerns brought up in cases such as Baby Gammy’s, but the lack of uniformity in the United States alone may still lead to parentage issues.

C. Surrogacy from an International Organization Perspective: The Hague Conference on Private International Law

Documents from international organizations provide a basis for best practice approaches to regulating or otherwise addressing ICS arrangements. For example, the UN Convention on the Rights of the Child (UNCRC) established the principle that children have the right to a nationality and to know and be cared for by their parents.\(^79\) The Universal Declaration of Human Rights also identifies citizenship as a fundamental right for all.\(^80\) Additionally, in Article 24 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee stated that it is a government’s duty to adopt every appropriate measure it can “to ensure that every child ha[s] a nationality when he or she [i]s born.”\(^81\)

In 2010, the Hague Conference on Private International Law (HCCH) invited the Permanent Bureau (the body of the Hague that conducts research), to develop a report studying the issues in private international law affecting legal parentage of children and ICS arrangements.\(^82\) This effort, which the Permanent Bureau assembled an Experts’ Group to lead, has been referred to as the Parentage/Surrogacy Project.\(^83\) The Experts’ Group has continued to meet annually to discuss the Parentage/Surrogacy Project.\(^84\) In March 2020, the Experts’ Group mandate was extended for two years.\(^85\) Participating member nations at the meeting that took place in October–November 2019 notably included India, Russia, Ukraine, and the United States.\(^86\)

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78. See FLA. STAT. § 742.15 (2020).
80. See id. (citing G.A. Res. 217 (III) A, art. 15, Universal Declaration of Human Rights (Dec. 10, 1948)).
81. See Rajan, supra note 32, at 121.
83. See The Parentage/Surrogacy Project, supra note 82.
84. See id.
85. See id.
In 2015, the Parentage/Surrogacy Project released a report to provide an update on its findings. The report references key international and regional developments, including a Concluding Observation issued by the UN committee associated with the UNCRC, which characterizes commercial surrogacy as "leading to the sale of children and the violation of children’s rights" when widespread and not properly regulated. The report also includes a judgment from the European Court of Human Rights (ECtHR), in which the ECtHR held that France violated Article 8 of the European Convention on Human Rights (ECHR) by not allowing a prospective French father to establish legal parentage with a child born in the United States through an ICS arrangement under French law. Article 8 of the ECHR protects a child's right to respect for their private life. By ruling as it did, the ECtHR established its view that Article 8 of the ECHR reflects the right of each person “to establish details of their identity as individual human beings, which includes the legal parent-child relationship.”

D. Surrogacy Today

As surrogacy clinics in countries like India and Thailand have closed, new hubs of commercial surrogacy have emerged to fill the

89. See id. at 4.
90. See id.
space. As of the time of writing, Ukraine is one such hub in the wake of those closures. This dynamic of filling spaces left open in the market makes a cohesive international approach necessary for an effective regulatory scheme to address the ethical concerns surrounding ICS. While the HCCH Experts’ Group is in the process of researching issues of surrogacy and parentage, it has yet to propose a set of rules to be adopted by member nations.

The commercialization of women’s bodies as reproductive avenues, the commodification of children, and the exploitation of vulnerable individuals are all issues that reach core human rights considerations. While these issues should not be overlooked, this Note follows the Experts’ Group’s lead in primarily focusing on establishing a best practice approach to cooperation that allows for more uniformity and security of children’s rights. International organizations such as the UN and ECtHR have already established a solid basis for the absolute right to a nationality. As of now, a variety of ICS situations can lead to the statelessness of a child: the prospective parents’ country of citizenship may prohibit or restrict surrogacy and thus has citizenship laws that deny nationality to the child; the surrogate mother’s country of citizenship may allow surrogacy and thus has laws that deny nationality to the child; and the surrogate mother’s country may recognize the intended parents as the legal parents, meaning that if the prospective parents abandon the child, or the surrogate mother keeps the child, the child may be denied nationality. With the possibility of statelessness resulting from conflicting views of legal parentage in ICS arrangements and a lack of cooperation, the issue of establishing a general best practice approach that states can adopt is a feasible and effective first step towards uniform regulation and better outcomes for the children involved.

In establishing a best practice approach, previous agreements, legislation, and other documents relating to adoption and other international parentage issues can be useful precedent. The Hague Convention on Intercountry Adoption is one such source that international communities can draw from, following its core function.

95. See Lamberton, supra note 7 (located in the Introduction). However, Ukraine’s status in the ICS context is already being affected by the current conflict in Ukraine and may be subject to change in the near future as safety concerns continue to grow. See, e.g., Isabel Coles, Ukraine Is a World Leader in Surrogacy, but Babies Are Now Stranded in a War Zone, WALL ST. J. (Mar. 12, 2022), https://www.wsj.com/articles/ukraine-is-a-world-leader-in-surrogacy-but-babies-are-now-stranded-in-war-zone-11647081997 [https://perma.cc/U3JL-55KL] (archived May 27, 2022).
96. See The Parentage/Surrogacy Project, supra note 82.
97. See generally Parentage/Surrogacy Project 2015 Update, supra note 87 (detailing Experts’ Group championing of children’s autonomy).
98. See supra notes 79–81 and accompanying text.
99. See Rajan, supra note 6.
of protecting the best interests of children, even if that conflicts with the best interests of the adult parties in the cases at issue.100

III. APPROACHES TO ISSUES OF PARENTAGE AND CITIZENSHIP

Because ICS has been largely unregulated in the past, the practices associated with the transactions have largely been determined by market forces. For example, screening in ICS arrangements typically only refers to the surrogacy agency’s screening of the surrogate, rather than screening of the prospective parents who are paying the agency for its services.101 Generally, surrogacy agencies screen surrogates for physical and psychological health to comfort the prospective parents and, ideally, confirm that the surrogate is truly ready to enter into the arrangement.102 Given that the goal of ICS arrangements is to place a child with prospective parents, screening measures should be applied to all parties in the best interest of the children.

The failure to screen may stem in part from the fact that, in many countries, prospective parents are automatically seen as the legal parents of the child.103 This is not the case in widely accepted adoption practices, which generally require diligent screening of potential parents.104 Because adoption and surrogacy have similar core issues of establishing legal parentage and securing the best interests of the child, the more regulated field of adoption may provide guidance for preferred ICS practices. Consider surrogacy regulations with screening requirements such as those in Israel: surrogacy agreements must be approved by a committee consisting of physicians, a psychologist, a social worker, a jurist, and a religious representative.105 Before approving an agreement, the committee examines medical documents

100. See Rotabi, Mapp, Cheney, Fong, & McRoy, supra note 39.
101. See Fronek, supra note 58 (stating that agencies focus on evaluating the surrogate mother to ensure compliance, rather than the commissioning, or prospective, parents); see also Marcy Darnovsky & Diane Beeson, Global Surrogacy Practices 19 (Int’l Inst. Social Stud., Working Paper No. 601, 2014) (stating that domestic legislation in countries does not often compel a surrogacy agency to screen prospective parents).
104. See Darnovsky & Beeson, supra note 101.
105. See Pol, supra note 103, at 1323–24.
that demonstrate the prospective couple's inability to carry out a pregnancy, as well as medical and psychological evaluations of all parties involved.\textsuperscript{106} Additionally, a psychologist or social worker must confirm that the prospective parents have received counseling that includes alternative parenting options before the committee may allow the parties to enter into a surrogacy agreement.\textsuperscript{107} Regulatory schemes such as this, and those that commonly govern adoption practices, reflect the idea that it may be in the best interest of the child to screen prospective parents.

Implementing screening requirements would not be without its own complexities and ethical implications. Typically, adoption screenings involve checking possible criminal records, with the rationale being that certain charges may indicate violent or abusive behavior.\textsuperscript{108} While the best interest of the child should be the primary concern, some may argue that the right to parent exists regardless of criminal record, as supported by the widespread rejection and condemnation of sterilizing the incarcerated as a form of eugenics.\textsuperscript{109} Concerns over blanket bans for people with criminal records are not unfounded, especially when considering that many governments have limited resources to conduct detailed screenings of ICS participants. But, ideally, a holistic approach to regulatory screening requirements would appropriately consider the type and context of the crime committed by prospective parents while still keeping the child's safety and best interests as the priority. Such considerations could include whether past offenses were violent, repetitive, or related to child abuse.\textsuperscript{110} Another potentially controversial point of eligibility is a requirement that prospective parents be unable to conceive naturally. While a main pillar of support for ART is opening avenues for individuals experiencing infertility, requiring proof of medical inability to conceive may be vulnerable to arguments relating to privacy rights.

\textsuperscript{106} See id. at 1324.
\textsuperscript{107} See id.
\textsuperscript{110} See Can I Become a Teacher if I Have a Criminal Record?, TOP EDUC. DEGREES, https://www.topeducationdegrees.org/faq/can-i-become-a-teacher-if-i-have-a-criminal-record/ (last visited Mar. 1, 2021) [https://perma.cc/8EDG-XW6U] (archived Feb. 10, 2022) (noting that offenses related to these characteristics are often disqualifiers in the childcare and teaching context in the United States).
A. Comparing the Hague’s Stance on Surrogacy and Parentage to the 1993 Hague Convention on Intercountry Adoption

The 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH 1993 Adoption Convention) sought to ensure that intercountry adoptions (those in which a party, through permanent legal means, adopts a child from a country in which the adopting party is not a citizen and brings the child back to the country in which the adopting party resides) are made in the best interests of the adopted child.\(^1\) The best interests of the child are determined by a number of factors, including the protection of the child’s fundamental rights, which are recognized to include a right to citizenship.\(^11\)

The protections for the best interests of the child in the HCCH 1993 Adoption Convention align with and reinforce Article 21 of the UNCRC.\(^13\) Article 21 states that parties that permit intercountry adoption shall (1) ensure that the adoption is authorized by competent authorities acting under the applicable law and procedure, (2) recognize that intercountry adoption may be an alternative to child care when the child’s country of origin cannot provide a suitable manner of care (such as when a suitable permanent family cannot be found to adopt the child in his or her country of origin), (3) ensure that the child is afforded the same level of safeguards and standards as a child would receive in a national adoption case, (4) take all appropriate measures to ensure that an intercountry adoption placement does not result in improper financial gain to the parties involved (to protect against the commodification and selling of children), and (5) promote other UN arrangements and agreements when appropriate.\(^14\)

1. Comparing Intercountry Adoption and ICS

The requirement that parties recognize that intercountry adoption may be an alternative to childcare when the child’s country of origin cannot provide a suitable manner of care is the least relevant in the ICS context. Surrogacy arrangements occur under the agreement

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\(^11\) See id.; see also FINKELSTEIN, MAC DOUGALL, KINTOMINAS, & OLSEN, supra note 30, at 23.

\(^13\) See Adoption Section, supra note 111.

of prospective parentage prior to conception, meaning that the fundamental goal of finding a suitable home for a child only exists in the adoption context. Because of this significant difference between adoption and surrogacy goals, as well as the contractual nature of ICS and the biological connection that prospective parents may have with the child, some believe that the intercountry adoption framework should not be applied to ICS.\footnote{115} While it is true that the HCCH 1993 Adoption Convention’s goal of promoting intercountry adoption would not be applied to the surrogacy context, the convention’s other main goal of preventing abusive practices so that children and other involved parties receive protections is a common objective that can be imported into ICS regulations and best practice approaches.\footnote{116} To say that intercountry adoption and ICS cannot be compared because of a single contrasting element would be to disregard the conclusions relating to the best interests of children made by experts around the world.

While it would be ideal if every aspect of the adoption framework fit perfectly into the surrogacy context without additional ethical concerns, the first step in proposing internationally cooperative regulations should be to focus on the protections for the child that have already been considered in the intercountry adoption framework. In fact, the Hague’s Council on General Affairs and Policy (CGAP) has expressed the view that any work done under the HCCH in relation to international surrogacy (including the Parentage/Surrogacy Project) should not be recognized as either support for or opposition to surrogacy.\footnote{117} Likewise, this Note should not be understood to take a definitive position in support or opposition of the general practice of surrogacy.

2. Oversight and Cooperation between Foreign Jurisdictions

The HCCH 1993 Adoption Convention requires contracting states in intercountry adoptions to cooperate with each other through competent government authorities, designated by the states, who are tasked with ensuring compliance with state laws and convention requirements and objectives.\footnote{118} Officials appear to be looking to incorporate a similar element in the ICS context. The Hague’s Experts’ Group on the Parentage/Surrogacy Project recommended the development of a binding multilateral instrument recognizing foreign


\footnote{116. See id. at 44.}


\footnote{118. \textit{See} HCCH 1993 Adoption Convention, supra note 114.}
judicial decisions regarding legal parentage in surrogacy cases.\textsuperscript{119} Such an instrument is intended to assist in the predictability, certainty, and continuity of legal parentage in ICS arrangements by increasing accessibility to up-to-date laws.\textsuperscript{120} While this is not the same as requiring cooperation between competent authorities, it does indicate that the Hague’s Experts’ Group believes that enhancing jurisdictional coordination can help improve protections for children in international surrogacy arrangements, as it does in the intercountry adoption context.

The existence of an instrument that recognizes relevant foreign judicial decisions may also implicate a best practice approach of banning citizens of prohibitionist states from engaging in ICS arrangements. Prohibitionist states in this context are those that refuse to recognize foreign birth certificates of children born out of ICS arrangements, who then may be denied the ability to apply for citizenship in their prospective parents’ state.\textsuperscript{121} Barring individuals from prohibitionist states from engaging in ICS arrangements would be in the best interests of the children because a refusal to grant citizenship status can disadvantage children in a variety of ways, including access to social security and schooling.\textsuperscript{122}

While some may oppose such a restriction on individuals in prohibitionist states who seek to build a family through ICS, the balancing of the best interests of the child and adults’ right to build a family as they choose should weigh in favor of the child under the framework that the Hague has established for intercountry adoption. Additionally, the proposed foreign judicial decision instrument can weaken this restriction. For example, the ECtHR has ruled that a child born through surrogacy should not be disadvantaged because they were born through a surrogacy arrangement.\textsuperscript{123} The instrument recommended by the Hague’s Experts’ Group on the Parentage/Surrogacy Project would presumably include such rulings, which are binding on Council of Europe member states.\textsuperscript{124}

\begin{itemize}
  \item \textsuperscript{119} See Parentage/Surrogacy 2011, supra note 117.
  \item \textsuperscript{120} See id.
  \item \textsuperscript{121} See Regulating International Surrogacy Arrangements, supra note 61, at 1, 2.
  \item \textsuperscript{122} See id.
  \item \textsuperscript{123} See id.
\end{itemize}
3. Comparing Possible Surrogacy Regulations to National Compliance Standards

Similar benefits and concerns are associated with importing the intercountry adoption requirement that participating states ensure that the child is afforded the same level of safeguards and standards as that of a child in a national adoption case. It is first important to determine which national comparison should be used, as this element does not fit neatly into surrogacy. In the surrogacy context, this best practice approach could either mean (1) ensuring that the child of an ICS arrangement is afforded the same safeguards and standards as a child born from a domestic surrogacy arrangement or (2) ensuring that the child of an ICS arrangement is afforded the same safeguards and standards as a child in a domestic adoption case. Because of various levels of national regulations (and lack thereof) for surrogacy, the latter method of comparison is more appropriate.

Domestic adoption regulations typically involve diligent screening procedures to determine the eligibility of prospective adoptive parents. Additionally, the HCCH 1993 Adoption Convention requires that authorities of the receiving state (the state of the adoptive parents) determine the eligibility of the prospective adoptive parents before the adoption takes place.

Using the United States as an example, the Department of Homeland Security requires that an employee confirm that a prospective adoptive parent in an intercountry adoption case meets the adoption regulations of the US state, in compliance with the onus that the HCCH 1993 Adoption Convention places on receiving states. The US government also requires that home studies be conducted to ensure the prospective adoptive parents are suitable, which can include child abuse registry checks, questions about abuse or violence, questions about criminal history, financial suitability considerations, household conditions (including number of children and adults in the household), and serious health conditions of the prospective adoptive parents.

125. See Darnovsky & Beeson, supra note 101.
126. See HCCH 1993 Adoption Convention, supra note 114.
128. See id.
129. See id.
4. Concerns of Discrimination in Eligibility Assessments

Specific factors for suitability determinations differ based on the country, but the above example indicates a basis for opposing the importation of similar suitability determinations into the ICS context. While the intent for each of the considered factors may be to make a holistic decision based on the home environment, an inspector's discretion may lead to more exclusionary determinations. Risks of over-exclusionary practices are concerning because of the associated risk of prospective parents seeking out alternative arrangements outside of the regulatory scheme, thus frustrating the goals of regulation. While this risk should be considered, it should not outweigh the benefits that screening requirements could have in the surrogacy context. If surrogacy is regulated in a way that imports the HCCH 1993 Adoption Convention's requirement that authorities determine compliance with national laws, it may be less complicated to establish a national appeals process for determinations that a complainant believes to be discriminatory or over-exclusionary.

Scholars have identified certain discriminatory grounds on which the importation of intercountry adoption processes to ICS have been criticized. Concerns include discriminatory results from intercountry adoption restrictions against LGBTQ parents, single parents, and other parents that are screened out. Fortunately, adoption laws have been evolving to better reflect a more modern notion of family structures. For example, many countries have amended their adoption laws to allow single individuals to adopt. Optimally, regulating surrogacy in a means similar to adoption may help keep governments accountable to evolve with the changing social standards of their citizens in the surrogacy context.

5. Concerns about ICS Amounting to the Sale or Commodification of Children

Criticism of analogizing ICS to intercountry adoption may be based on the belief that gestational surrogacy arrangements are

131. See Mohapatra, supra note 115, at 35.
132. “Over-exclusionary” in this context means more exclusionary than necessary to ensure that the arrangement would be in the best interests of the child.
133. See Mohapatra, supra note 115, at 37.
134. See id.
136. See id.
private, contractual matters in which the state need not involve itself.\(^{137}\) However, classifying surrogacy in this way may increase concerns that ICS arrangements involve the impermissible sale of children. The HCCH 1993 Adoption Convention specifically prohibits improper financial gain in connection with an intercountry adoption,\(^{138}\) in order to prevent arrangements that effectively engage in the selling of children and prioritize financial gain rather than the best interests of children involved. This concern about commodifying children has been consistently expressed by the UN Committee on the Rights of the Child; therefore, it is appropriate to import the intercountry adoption goal of protecting against the commodification of children into the surrogacy context.\(^{139}\)

To safeguard against the improper sale of children in surrogacy arrangements, an independent expert appointed by the UN Human Rights Council produced a number of recommendations for the international community.\(^{140}\) These recommendations include: (1) supporting the Hague’s work in relation to legal parentage issues in ICS arrangements; (2) ensuring that any international surrogacy regulations created provide for the protection of the rights of the child, surrogate mothers, and intending parents; (3) ensuring that future international regulations relating to legal parentage include public policy exceptions that bar recognition when the foreign government does not protect the rights of the child or surrogate mother; (4) ensuring that future international regulations relating to legal parentage provide post-birth review in ICS arrangements (to prevent the sale and trafficking of children); and (5) preventing statelessness (as in accordance with the best interests of the children) through cooperation in the international community to protect the rights of children born through surrogacy, regardless of the legal status of the arrangement in international or national law.\(^{141}\)

In short, the UN report recommends a best practice approach to put the rights of the child first by protecting against the improper sale of children in the international surrogacy context. The recommendations are not entirely unique to surrogacy—many of the recommendations, including transnational cooperation and government oversight, also exist in the intercountry adoption context.\(^{142}\) Critics of this children’s rights-based best practice approach in

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137. See Mohapatra, supra note 115, at 37.
138. See HCCH 1993 Adoption Convention, supra note 115, art. 32.
140. See generally id.
141. See id. at 20.
142. See supra text accompanying notes 113–24.
surrogacy include the American Bar Association (ABA). The ABA acknowledges that the commissioning of children through surrogacy in exchange for money does represent a market and advocates for a market-based approach, rather than a regulatory approach, because “market-based mechanisms have allowed international surrogacy to operate efficiently.” Such a market-based approach allows prospective parents with sufficient financial resources to select their ideal means of family-building. However, an unregulated, free-market system allows prospective parents to put their rights above those of the prospective surrogate and future child. This market-based approach was criticized by the Special Rapporteur (on the sale and sexual exploitation of children, including child prostitution, child pornography, and other child sexual abuse material) in a 2018 report for the UN General Assembly for its potential to erode improvements made in child rights norms in relation to adoption, as well as its potential to herald a new generation of human rights violations.

The ABA argues for a market-based approach without intercountry adoption-like suitability reviews by pointing out that, while naturally-born children may also be exploited by parents, there are no suitability reviews for such births or pregnancies. This argument ignores the inherent differences in natural births and surrogacy arrangements while also suggesting that “one method of engaging in a crime should go unregulated simply because another method exists that would still be unregulated.” Additionally, the ABA bases its opposition to regulation in part on prospective parents’ freestanding rights to procreate and determine when and how many children to have. This stance conflicts with the fact that in international law there is no “right to a child.” The regulations in consideration at the international level should be governed by international law, which prioritizes the interests and rights of children without exceptions for market efficiency.

The general similarities in objectives and best practice approaches between intercountry adoption and ICS arrangements allow for the appropriate importation of elements from the 1993 Hague Convention

143. See Report of the Special Rapporteur, supra note 139, at 8.
146. See Report of the Special Rapporteur, supra note 139, at 8–9.
147. See Sidwell, supra note 145, at 135.
148. Id.
149. See id. at 135, 143 (quoting the AM. BAR ASS’N REPORT, supra note 144).
151. See id. at 7–8.
on Intercountry Adoption into a prospective international surrogacy regulatory framework.

B. Ad Hoc Determinations of Parentage and Citizenship

The previously mentioned independent expert appointed by the UN Human Rights Council recommended international cooperation to protect the rights of children born through surrogacy, regardless of the legal status of the arrangement in international or domestic law. This last part essentially (though not directly) recommends the use of ad hoc determinations of citizenship for surrogate-born children brought to countries that do not immediately recognize the prospective parents in an ICS case as the legal parents. Many countries, such as France, that prohibit surrogacy (or specifically ICS) already engage in ad hoc determinations of citizenship to promote the child’s best interests while maintaining public policy-backed restrictions or prohibitions. While ad hoc determinations are important for balancing state sovereignty in the controversial public policy area of ICS with a child’s internationally recognized right to nationality, such case-by-case approaches come with negative consequences that still affect the child.

The ad hoc solutions that judges or other government authorities of receiving prohibitionist states may implement include emergency border entry orders, issuance of emergency or temporary passports, and birth certificate orders. These solutions are often discretionary in nature, leading to uncertainty in an area of the law that is already lacking stability. Such determinations may also take time—leaving the child in limbo for longer—and are often temporary measures that fail to resolve the issue of nationality.

Relying on ad hoc determinations rather than international regulations and cooperation does not afford enough consideration to cases in which surrogate children are abandoned by prospective parents in an ICS arrangement. Often it is the prospective parents that petition a prohibiting government under which they reside for ad

152. See id. at 20.
153. See Rajan, supra note 6 ("[M]ost of these countries with prohibitive or restrictive surrogacy laws have provided parentage certificates or nationality to surrogate children on an ad hoc basis on the principle that it is in the child’s best interest.").
156. See Ergas, supra note 154.
157. See Ghráinne & McMahon, supra note 155, at 331.
158. See id.
159. See id.
hoc emergency solutions. However, if the prospective parents sought out an ICS arrangement with a surrogate residing in a country that recognizes the prospective parents as the legal parents, such abandonment could leave the surrogate child without citizenship and in a position where the individuals most likely to fight for the child’s right to nationality (the prospective parents) are no longer willing to do so. The state in which the child is born may not be required to issue an order of nationality because the child is not a citizen. And if the surrogate is willing to seek an order of nationality, she may be unable to do so because of a lack of financial resources.

1. Spain as an Example of the Reasoning behind Ad Hoc Determinations

Certain countries, such as Spain, do not allow commercial surrogacy and instead use ad hoc determinations to transfer legal parentage and confirm citizenship. In 2017, the Spanish Bioethics Committee produced a report that illustrates the legal issues and reasoning surrounding the use of ad hoc determinations in a country that has determined commercial surrogacy to be unlawful. This committee is an independent, professional body that operates as part of Spain’s Ministry of Health, Social Services and Equality to issue reports and recommendations to public authorities relating to matters of biomedicine and health sciences. The committee’s responsibilities specifically include suggesting and establishing best practice approaches in bioethics issues to better represent Spain in international forums. This expressed mission indicates that the report generated by the committee was created through a lens of ethical considerations for best practice approaches in the international community.

Because the Spanish government has already decided that surrogacy arrangements such as ICS arrangements are unlawful on public policy grounds, allowing citizens to seek out surrogacy elsewhere and bring children into the country with automatic citizenship would frustrate the policy considerations that led to the prohibition of such practices. The committee’s report lays out an important conflict of public policy considerations by stating that “[t]he unlawful action of

160. See id.
161. See id.
162. See id.; see, e.g., Pronek, supra note 58 (noting that “[i]nternational surrogacy is not a level playing field” in terms of the relative economic positions between parties).
163. See generally Spanish Bioethics Committee Report, supra note 92.
165. See id.
166. See Spanish Bioethics Committee Report, supra note 92, at 47.
[the prospective parent(s)] who have brought about [the child's] existence may not cause harm of any kind to the child, but may equally not, in itself, constitute a legitimate right to anything." Ethical concerns associated with commercial surrogacy combined with the difficulty of international regulation in a period of growing globalization demonstrate why a country may reasonably choose to deem surrogacy unlawful as a public policy matter. However, as the Spanish Bioethics Committee reports, it is also in the best interest of a child to ensure the right to an identity, parents, and a nationality. Ad hoc determinations may strike a balance between these conflicting ethical approaches of prohibiting potentially exploitative or harmful practices and ensuring basic human rights after such practices have been completed in foreign jurisdictions.

Spain's international surrogacy laws have been interpreted by both the country's Supreme Court and the European Court of Human Rights, which delivers decisions that bind Spain as a member of the Council of Europe. A 2014 Supreme Court decision involved husbands, both of whom were Spanish citizens, that had two children together through gestational surrogacy. While they were in California, the couple sought to have the births of their children registered at the Spanish Consular Registry in Los Angeles. After registration was denied and subsequently issued through an appeal, the Spanish Supreme Court ruled to withhold recognition of parentage. Parentage was withheld under the Civil Registry Act, which lays out the requirements for the recognition of foreign registry certificates (such as the California certificates issued for the birth of the children in this case).

To be recognized, the Civil Registry Act requires that a foreign registry certificate reflect facts that are in accordance with Spanish law. This requirement is intended to uphold public policy decisions guided by individual rights and freedoms that embody human rights values that Spain has adopted through its own Constitution and its ratification of international human rights conventions. The Spanish Supreme Court acknowledged that while the Spanish Constitution includes the rights to family privacy and autonomy to choose from "diverse life options . . . in accordance with [one's] preferences," it also protects children in accordance with international agreements that

167. Id.
168. See id.
169. See id. at 48.
170. See id.
171. See id.
172. See id. at 48–50 (explaining the Spanish Supreme Court's February 2014 Ruling, T.S., Feb. 6, 2014 (R.J., No. 835/2013)).
173. See id.
174. See id. at 49.
175. See id. at 49–50.
safeguard children's rights. This view acknowledges the legitimate rights of family building that are referenced by the ABA, while prioritizing the protection of children's rights as determined by international agreements, such as the UNCRC. The adoption of international norms is more apparent when considering that the Spanish Supreme Court also justified its decision on the grounds that Spanish public policy condemns the commercialization of gestation and parentage—echoing concerns of commodification expressed by the UNCRC.

Spain has ratified the UNCRC, along with nearly two hundred other countries. In fact, the only country mentioned in this Note that has not ratified or accepted the convention is the United States. The Spanish Supreme Court also decided the case under precedent established by the ECtHR at the time. The application of this precedent reflects the ability of an international body to create agreements driven by best practice determinations and public policy norms that hold authority.

This decision upheld the use of ad hoc citizenship and parentage determinations, rather than creating a concrete protection for children born through surrogacy. The court acknowledged that when balancing the public interest of prohibiting surrogacy and granting immediate citizenship, it considered other protections in place for the children that did not include effectively allowing the banned practice. The court stated that the children in such arrangements would still be protected under Spanish law and would not be sent to an orphanage or the surrogate's country of citizenship. Justification for continuing this ad hoc method includes the importance of evaluating facts and

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176. See id. at 50, 52 (highlighting the Supreme Court's concern with the inherent risk of exploiting women in need/poverty in commercial surrogacy).

177. See id. at 50, 52 (stating that the Supreme Court views gestational surrogacy arrangements such as the one in this case as an attack on the child's dignity, by way of "converting him/her into an item of trade"); Sidwell, supra note 145, at 135, 143-44 (quoting the AM. BAR ASS'N REPORT, supra note 144).

178. See Spanish Bioethics Committee Report, supra note 92, at 50; supra text accompanying note 88.


182. See Spanish Bioethics Committee Report, supra note 92, at 52-53.

183. See id. at 53.

184. See id.
situations to determine whether a “family relationship” exists between the child and parents in conjunction with Spanish law and ECtHR precedent.\(^{185}\) Alternatively, the court pointed to foster care and adoption as means of legally bringing a child into a family.\(^{186}\)

2. Precedent for Ad Hoc Determinations in Europe

The ECtHR precedent that guided the Spanish Supreme Court’s decision was its decision in 2014 on a pair of similar cases: Mennesson \textit{v.} France and Labassee \textit{v.} France.\(^{187}\) Each case involved a French married couple that entered into an ICS arrangement with a surrogate in the United States, in which an embryo was created using the husband’s gametes and the surrogate’s egg.\(^{188}\) California and Minnesota, the jurisdictions under which the children were born, officially recognized the prospective parents as the parents of the children, but France refused to recognize the parentage and would not register the children because ICS arrangements are void as a matter of public policy in France.\(^{189}\) After exhausting possible ad hoc court remedies in France with no success, the couples filed a claim with the ECtHR seeking registration of their children as citizens through legal parentage.\(^{190}\)

The ECtHR clarified that there were distinct rights to (1) respect for family life and (2) respect for the child’s private life.\(^{191}\) The ECtHR held that the French government did not violate the right to respect for the family life of the couples because it struck an appropriate balance between the state’s interest and the interests of the parents by allowing the children to live in France with the parents.\(^{192}\) The state’s interest in this case was to carry out its public policy objectives regarding surrogacy. However, the ECtHR held that the French government did violate the rights of the children to respect for their private lives.\(^{193}\) By not recognizing the familial relationship between the French parents and the children, the French government substantially affected the rights of the children to their private lives, particularly with regards to their inheritance rights.\(^{194}\) Mennesson and Labassee established the ECtHR’s view on the proper balance of interests in ICS cases. While it is acceptable for states to allow for ad

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186. See id.
187. See id. at 57–60.
188. See Ghráinne & McMahon, supra note 155, at 336.
189. See Spanish Bioethics Committee Report, supra note 92, at 57.
190. See id. at 58.
192. See id. at 337.
193. See id.
194. See id.
\end{flushright}
hoc determinations of citizenship and parentage as a deterrent to surrogacy (when a sovereign nation deems it as a public policy concern), states cannot refuse recognition of citizenship and parentage to the extent that it substantially affects the rights of children born through surrogacy.\textsuperscript{195}

While the ECtHR does not create international law, it does interpret codified law, and its decisions are binding on Council of Europe member states, which include many countries that prohibit surrogacy, as well as Ukraine and Russia—two of the largest destinations for ICS arrangements.\textsuperscript{196} Additionally, Georgia and Poland are member states with increasing popularity for reproductive tourism, and Mexico and the United States are observer states with significant roles in ICS.\textsuperscript{197} While observer states are not bound by decisions made by the ECtHR, they do still have the ability to cooperate with the Council of Europe, send observers to meetings of the Council, and send representatives to meetings in some circumstances.\textsuperscript{198} Because many of the largest hotspots for ICS are bound by ECtHR decisions or cooperate with the Council of Europe, Mennesson and Labassee carry weight in the international discourse of ICS regulation and best practice approaches.

IV. SOLUTION

Comprehensive documentation of cases in which ICS arrangements have left children stateless is not plentiful, but that does not mean those cases do not exist. Well-reported situations such as Baby Gammy’s create quick attention to the harms that can be caused by a lack of regulation and international cooperation. Many members of the international community have started addressing these issues within the past few decades, and the COVID-19 pandemic has shined a new spotlight on the importance of continuing discussions on an international level. With babies being stranded in “baby hotels” without family members and surrogate mothers being asked to care for babies that are not legally related to them, recent news coverage shows that parentage and citizenship issues tied to ICS still exist, even after

\textsuperscript{195} See id.


previous hotspot states and others banned the practice or started regulating it.\footnote{The unregulated and uncooperative international approach to ICS that currently exists allows individuals seeking ICS arrangements to easily contact potential surrogates around the world. Without an international regulatory approach, it is likely that the globalized market will continue to create situations in which rulemakers of reproductive tourism hotspots ban ICS arrangements on policy grounds only to see the market switch to a new state.}

This is not to say that an international approach should prohibit ICS arrangements fully. Such an approach would not be effective without impeding on state sovereignty. The issue of prospective parents seeking out surrogates in states that did not agree to a full prohibition would still exist because a state cannot be forced into an international agreement. Instead, the work already being done by international organizations and experts in this area should be used to develop a best practice approach driven by ethical considerations and introduced in a Hague or UN convention.

The proposed convention would be similar to the 1993 Hague Convention on Intercountry Adoption and would ask for states’ ratification because of the positive effect that uniformity and cooperation would have on the children involved. The proposed solution would be to import the following aspects of the 1993 Hague Convention on Intercountry Adoption to the ICS context: (1) before entering into the arrangement, ensure compliance with state laws that are binding on the states themselves and convention protocols that are binding upon consent of the states; (2) ensure that the child is afforded at least the same level of safeguards and protections as a child born through altruistic surrogacy domestically; and (3) take all appropriate measures to ensure that an ICS arrangement does not result in improper financial gain to the parties involved.

Additionally, the convention should require screening of prospective parents and surrogates before they can enter into ICS arrangements, with surrogates being screened to ensure that they are not being coerced. Prospective parents should be screened with the child’s best interests in mind, and care must be taken not to screen prospective parents in an over-exclusionary manner that improperly discriminates. Background screening should be done on a case-by-case basis until there is more concrete international precedent establishing specific factors for the screening to consider. However, there should be guidelines for screenings presented at the convention, including a warning that a criminal conviction alone is not enough to disqualify a prospective parent but violent offenses and those that relate to children should weigh heavily in favor of disqualification. Here it is important

\footnote{See Perasso, supra note 1; Sirin Kale, Surrogates Left Holding the Baby as Coronavirus Rules Strand Parents, GUARDIAN (May 14, 2020, 4:00 PM), https://www.theguardian.com/lifeandstyle/2020/may/14/surrogates-baby-coronavirus-lockdown-parents-surrogacy [https://perma.cc/L8R6-VX2P] (archived Feb. 17, 2022).}
to note that while the adoption context is concerned with finding a family for a child, ICS screenings will occur before the arrangement begins and no actual child or embryo exists. While thorough screenings could delay a child's placement in a family environment in the adoption context, such evaluations prior to ICS arrangements would not hinder the best interest of the child temporally, resulting in less need for quick determinations.

The convention should adopt a similar rule regarding ad hoc determinations as the ECtHR did in *Mennesson* and *Labassee*. The convention should not bar the prohibition of ICS or other surrogacy arrangements so as not to dissuade states that are opposed to such practices on public policy grounds from ratification. However, the rights of the child and associated protections should be the utmost priority. While deterrence methods can be implemented, the receiving state cannot ultimately engage in a practice that harms children for the unlawful acts of their parents. The convention should highlight that children have a right to citizenship, identity, and nationality, and that when a prospective parent's interests are weighed against the interests of protecting these rights, the fundamental rights of the child must outweigh the desires of the prospective parent.

The convention may also recommend contractual provisions that states can choose to adopt as requirements for commercial surrogacy arrangements both within and outside of their borders. One recommended ICS provision may be similar to Florida's requirement that prospective parents assume full parental rights and responsibilities upon birth, regardless of any possible impairment of the child. However, the convention should warn against requiring prospective parents to be married because such requirements may discriminate against LGBTQ couples (in jurisdictions that restrict same sex marriage) and single individuals that possess sufficient parenting capabilities. Instead, the convention can recommend contractual arrangements such as the inclusion of provisions reflecting the intent of the parties to recognize the unmarried prospective parents as having joint custody in the same manner as a married couple, so that a jurisdiction's existing custody laws can be used to promote stability in the event of a separation.

V. CONCLUSION

The sovereign nature of states does make international law a less authoritative legal body than domestic law. However, allowing for the continuance of an unregulated and unmonitored market that has the potential to harm children because cooperative regulation is difficult ignores the possibility of international regulation entirely. Inter-

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200. *See supra text accompanying notes 75–78.*
national cooperation does not mean that each state must give up its authority, but it instead asks that states discuss the various complexities and arrive at a framework that protects common interests while allowing for areas of disagreement.201

The concept of protecting children is not controversial, but the means of doing so certainly can be. When a principle as fundamental as a child's right to citizenship—and the minimum protections afforded by that citizenship—is at risk, it is likely that members of the international community will be able to find areas of agreement toward a common goal. If that goal is to secure the best interests of children born through ICS arrangements, a regulatory framework must be negotiated at an international level.

Rachael Curtin

201. See Ergas, supra note 154, at 164 (referencing Robert Keohan: "cooperation is necessary where harmony does not exist.").