Contribution of a grouping of Feminist and Human Rights Organizations
to the work of The Hague Conference on Private International Law
regarding legal issues concerning international surrogacy conventions
(“parentage/surrogacy project”)

Comments on Preliminary Document No 3 B of March 2014 and Preliminary Document No 3A of February 2015
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I  THE REASONS FOR PARTICIPATION IN THE DEBATES OF THE HAGUE CONFERENCE

A)  Introduction of the Signatory Organisations

-  *The Collectif pour le Respect de la personne (CoRP - FRANCE)*

[www.collectif-corp.com](http://www.collectif-corp.com)

CoRP is a French association to promoting human rights and the respect of human life, and to combatting the practice of so-called “surrogate motherhood.”

Among CoRP’s leading figures are the historian feminist Marie-Josèphe Bonnet, the philosopher Sylviane Agacinski, the writer Eliette Abécassis and the law professor Marie-Anne Frison-Roche.

Recently, CoRP sent a letter to the President of the French Republic containing over 8,000 signatures by members of the general public and the field of politics, including several former ministers from left-wing governments, a former prime minister, and a former president of the European Commission, as well as numerous association for the defense of human rights, especially women’s rights.

The letter was published on July 14, 2014 in the daily newspaper *Libération* and attracted a significant response from the media. The purpose of the letter was to request that the President of the Republic oppose legal recognition of surrogate maternity contracts in the wake of a decision by the European Court of Human Rights (ECHR) on June 26, 2014 that jeopardized the French prohibition against the practice known as “surrogacy.”

-  *The European Women’s Lobby (EWL – President: Viviane Teitelbaum - EUROPEAN UNION)*


The European Women’s Lobby (EWL) is the largest umbrella organisation of women’s associations in the European Union (EU), working to promote women’s rights and equality between women and men. EWL membership extends to organisations in all 28 EU member states and the three candidate countries, as well as to 20 European-wide bodies, representing a total of more than 2000 organisations.

-  *The Swedish Women’s Lobby (SWL - President: Gertrud Åström - SWEDEN)*


The SWL is the swedish umbrella organisation for women's organisations, gathering 45 member organizations. Their work is based on the CEDAW (Convention on the Elimination of Discrimination against Women) and Beijing Platform for action and european human rights standards. Their vision is Full human rights to all women in a gender equal society.
- Feminist No to Surrogacy (SWEDEN)

http://www.nejtillsurrogat.se

Feminist No to Surrogacy is a network formed by different organisations and individuals, like Kajsa Ekis Ekman, author of Being and Being Bought - Prostitution, Surrogacy and the Split Self, which is an investigation into surrogacy's legal, ethical and gender consequences.

- The Romanian Women’s Lobby (ROMANIA – President : Laura ALBU)

http://www.dearnetwork.ro

The Romanian Women’s Lobby (RoWL) is an umbrella association representing the national co-ordination for the European Women's Lobby (EWL) at Romanian national level, and includes Romanian NGO's dedicated to support women in all aspects of life.

RoWL’s mission is to promote real and effective equality between women and men in all spheres of public and private life, throughout Romania and Europe, and its main objective is to foster a friendly environment for gender equality in Romania.

- Coordination des Associations pour le Droit à l’Avortement et à la Contraception (CADAC – President: Maya Sourduts and Nora Tenenbaum - FRANCE)

www.collectifdroitsdesfemmes.org/

Cadac, Coordination of associations for the right to abortion and contraception, was created in 1990 against anti-abortion zealots. It was responsible for the law on obstruction to abortion. It works with the « Planning familial » and Ancic (national association of centers for abortion and contraception) for the right of women freely to live their body. With CLF (below), CADAC signed a manifesto against surrogacy.

- Coordination Lesbienne en France (CLF – President: Marie-Josèphe Devillers, Catherine Morin, Jocelyne Fildard - FRANCE)

http://www.coordinationlesbiennorganisation.org

CLF gathers around twenty french lesbian associations, to fight for lesbian rights and visibility on the society.

- La Lune, association of lesbian feminists (President: Irène Tabellion - FRANCE)

http://www.lalune67.fr
ECVF gathers politicians, cities, regions and departments in France to heighten awareness and train politicians and civil servants on the fight against violence against women.

Assemblée des Femmes (ADF– President: Danielle Bousquet– FRANCE)

Funded by Yvette Roudy, former french Minister, ADF is a feminist association born from the battle for parity in France.

Center for Bioethics and Culture (CBC – President: Jennifer Lahl - UNITED STATES)

The Center for Bioethics and Culture (CBC) addresses bioethical issues that most profoundly affect our humanity, especially issues that arise in the lives of the most vulnerable among us.

Leading International Figures

Gertrud Åström (SWEDEN), president of the SWL, rapporteur in 2004 for the Government of Sweden on gender equality policies.

Kajsa Ekis Ekman (SWEDEN), author of Being and Being Bought - Prostitution, Surrogacy and the Split Self, which is an investigation into surrogacy's legal, ethical and gender consequences.

Elfriede Hammerl (AUSTRIA), journalist and essayist.

Alice Schwarzer (GERMANY), founder and publisher of the german feminist journal EMMA.

B) The Need to Listen to Civil Society

We have followed the project launched in 2011 by the Permanent Bureau of the Hague Conference on Private International Law regarding the status of children, in particular the conventions pertaining to surrogacy at the international level.

A preliminary study and a preliminary document were published in March 2014.
The preliminary document described plans for an international instrument to facilitate mutual recognition and define “minimum standards” in the domain of surrogacy.

Given the impact of this kind of legal instrument on the growth and legitimation of the practice in question, it is clear that studies cited in these documents cannot be conducted without the broadest and most inclusive consultation possible.

Indeed, the development of surrogacy contracts and, more broadly, of numerous uses of surrogacy pose very serious questions in terms of biomedical ethics, human rights, and the dignity of human persons and their bodies.

To date, the Permanent Bureau has based its studies on its own preliminary documents and on responses to questionnaires that it addressed to the States and to the various participants in the transnational surrogacy process, including health professionals, lawyers faced with situations of “surrogacy of a transnational nature,” and surrogacy agencies.

In other words, the Permanent Bureau only included the perspectives of professionals who are actively involved in surrogacy, not only stakeholders but also promoters of the practice.

The opinion of these professionals has the potential to facilitate the mutual recognition of filiation through surrogacy, thereby supporting their activities in this domain.

The question of any potential ban against the practice was not even raised, despite the fact that it is strictly forbidden in a number of countries.

Beyond the respondents to the questionnaires, only sponsors or “intended parents” were in fact asked for “feedback” from those involved in a surrogacy convention of an international nature.

No questionnaire was directed towards the general public or NGOs committed to defending human and more specifically women’s rights.

No discussion of the soundness of the practice or its compatibility with human rights was initiated.

It is therefore unsurprising that the study’s conclusions are oriented towards defining “minimum standards” and the need to harmonize the regulations concerning recognition of foreign decisions concerning legal parentage.

Significantly, the preliminary document and the March 2014 study abundantly cite lawyers involved in the market to support the idea of working on a text on mutual recognition and regulation. The study never entertained the idea of abolishing surrogacy as was done with slavery.
It is indispensable that the abolitionist point of view be considered and that the defenders of human rights and human dignity be heard.

It is for this reason that we intend to submit the present contribution to the Permanent Bureau and the Member States of the Hague Conference on Private International Law. We are requesting that CoRP’s contribution be distributed to the members as an element of information and reflection and made public on the Internet site of the Conference, perhaps under a new category labeled “civil society.”

We also ask that we be heard by a working group if such a group were to be formed.

II MATERNITY THROUGH SURROGACY–A SOCIAL PRACTICE CONTRARY TO HUMAN DIGNITY

The basic principle of surrogate motherhood, euphemistically called “surrogacy,” constitutes an infringement on fundamental rights.

Unlike much of what has been said and written about the practice, it is a new phenomenon whose development has been made possible by new reproductive technologies.

Surrogacy is not in itself a reproductive technique, however, but a social practice that employs techniques that were created for other purposes and that have fostered the rise of a vast market in human reproduction.

Prior to its recent development, and disregarding Lebensborn programs, the only documented example of a practice centered on surrogacy was a Mesopotamian custom that authorized an infertile wife to appropriate the reproductive services of a servant woman in order to provide her husband with an heir.¹

In the intervening period, this kind of practice has been able to function only in marginal or clandestine ways, often involving fraudulent maternity documents (an “assigned offspring,” or declarations of maternity of the child of the woman who gave birth).

Even in its contemporary form, surrogacy is an exploitative practice that alienates both the surrogate mother and the child that she carried and brought into the world. It is at the center of a huge market whose development is particularly disquieting.

¹ An echo of this custom can be found in the Biblical story of Hagar and Ishmael. It should be noted that in the Biblical myth, the child is finally returned to his mother because Hagar, the slave of Sara, is pursued with her son Ishmael. It is therefore not possible to see this story as an illustration of approval of the practice in question.
A) A Lockdown on Women Unprecedented Since the Abolition of Slavery

1) Putting the entire physical and psychic life of the “surrogate” mother at the disposal of a third party

The term “carrier” is used by agencies and supporters of surrogacy. This term is openly reductionist in suggesting that pregnancy can be reduced to the functioning of an organ—the uterus—and therefore to the mere “carrying” of the child.

In reality, the surrogate mother not only places her uterus, but her entire body as well as her mind, at the disposal of the other party to “produce” a child intended to be relinquished at birth.

In addition,² it is well known that both biological and affective exchanges between the developing child and the mother occur throughout pregnancy. For example, studies have revealed a mother-child cellular exchange called fetomaternal microchimerism,³ but there is also the simple experience of the newborn baby climbing his mother’s body to seek her breast. None of this can be ignored or simply passed over in silence.⁴

In view of these bonds, relinquishing a child to third party commissioning couple or individual is merely programmed abandonment.

In this regard, it is vital not to be misled by the agencies, nor by certain surrogate mothers, who deploy rhetoric that describes the “wonderful gift of life.”

Surrogacy endangers the physical and psychological health of the woman who bears:

- Physical health: Pregnancy and delivery can be accompanied by complications that in some cases can lead to permanent handicaps or death. This is all the more true in that, in the name of better planning and/or reducing the risks to the child, delivery by cesarean section is customary in the context of surrogacy. Further, surrogate mothers undergo medical treatments associated with side effects and risks.⁵

² The development of medical knowledge confirms and provides details what experience had already provided evidence of on this point.
³ An exchange and blending of cells between the mother and developing child, traces of which are exchanged by both, creating a reciprocal belonging.
⁴ It is curious to witness on one hand, the growth of a significant literature full of encouragement of public authorities intended to validate the mother-child bond prior to delivery and, on the other hand—and in total contradiction—to the development of a discourse that, to legitimize surrogacy, argues that these bonds are insignificant and can be negated without causing damage.
• Psychological health: In the case of surrogacy, the woman carries her pregnancy knowing that she will have to abandon the infant that she is carrying, in a sort of dissociation that she must impose upon herself. How can this not leave any traces in her? American surrogacy agencies and their experts are fully aware of this risk and emphasize the need for psychological support of surrogate mothers.6

2) The rise to power of the commissioning couples or individuals and agencies over surrogate mothers’ health

The gestation process for third parties implies total control by contracting couples or individuals and/or agencies over the health of surrogate mothers.

In American contracts, this translates into numerous obligations for the surrogate mother that amount to assaults on her private life and self-determination. They include open access to her medical files, rules of behavior, the participation of sponsors in medical decisions such as amniocentesis and pregnancy termination. In other instances, such as in Indian clinics, the surrogate mother is not even consulted about decisions that affect her health.

The doctor can face conflicts of interest, with the risk in the event of complications of favoring the interest of the unborn child, as well as that of the sponsors who paid to have the newborn, over the interests of the surrogate mother.

Dramatic situations in human terms can occur that are legally insoluble, the most obvious of which involve terminating the pregnancy. In numerous countries where it is authorized, the right to decide to voluntarily interrupt a pregnancy belong fully to the pregnant woman. In surrogacy, the surrogate mother loses this right, whether it is a pregnancy that places her own health in danger or there is a malformation of the fetus. In the United States, for example, although abortion is a woman’s constitutional right, contracts include abortion clauses diving preponderant weight to the will of the sponsors. Although such clauses cannot be forcibly executed, the financial clauses of the contract render the freedom of the surrogate mother completely illusory. This is also the case of a request for embryonic reduction, which can result from the fact that the quest for effectiveness sometimes encourages the implantation of several embryos, with the intention of later only allowing one or embryos to come to term.

The sponsors thus acquire complete control over the entire body and person of the surrogate mother in order to appropriate the child that she carries and brings into the world, in total contempt of the risks confronted by the surrogate mother, under conditions that have no antecedent since the abolition of slavery.

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6 Studies have established that this kind of psychological “support” is very important for surrogate mothers and that their dissatisfaction is greater when they do not participate in psychic therapy (see in particular Ciccarelli, J. C. and Beckmann, Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy, Journal of Social Issues, Vol. 61, No. 1, 2005, pp. 21--43).
B) The Child and Maternity: Objects of a Contract and Potential Conflicts

1) The child as the object of a contract

Surrogacy finally results in a veritable reification of the child. It involves fabricating an embryo (or several) in order to implant it in the body of a woman (who has usually not supplied an egg in order that it develop there until birth, at which point he or she is handed over to the sponsors, who have generally furnished part of the genetic material and are described by the industry as “intended parents.”

This process is regulated by a contract. When from a strictly legal point of view this is not the case, the reality remains the same: There is an agreement between the sponsors and the surrogate mother, and intermediaries to obtain the objective described in the previous paragraph.

The child is thus disposed of like the object of a commercial exchange.

The surrogate mother is usually remunerated one way or another (see below), playing a role tantamount to that of a service provider.

Even if the extremely rare cases in which there is no financial compensation (for example surrogacy between close acquaintances), there is still an act of making the child available, since the child is “given.”

The child is thus submitted to a planned abandonment, since it was conceived for the purpose of being abandoned.

Furthermore, this kind of abandonment is not without effects on the psychology of the child who is the product of surrogacy. Recent studies, while biased in favor of the practice, have shown that surrogacy has real psychological repercussions for children.

Furthermore, the effects of surrogacy on the psychology of the other children of the surrogate mother should not be forgotten: How do they experience the fact of seeing their mother carry a pregnancy for nine months and bring an infant into the world only to be given to sponsors? Their case has not been well studied, a sign of the deep disinterest on the part of the actors in this market.

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In addition, one the child has been, in the true sense of the term, “produced,” there are elevated expectations in terms of quality. Not only do the sponsors not want a child with disabilities (see above regarding pregnancy termination), but also, when there is also recourse to an egg “donor” (the most frequent case), she is selected based on very strict criteria. The downward spiral towards eugenics is not far behind...

2) **Renunciation of maternity by contract**

The heart of the process of surrogacy is the advance renunciation of her maternal rights by the surrogate mother to the benefit of the sponsors.

The expression “intended parents” is deceptive: Since the dawn of time, the mother is the mother who delivers a baby. She is thus the one who carried the pregnancy and who brought the child into the world. Even in countries that authorize surrogacy, the surrogate mother only loses her status as mother if she renounces beforehand, explicitly or implicitly, the exercise of her rights. But once she has renounced these rights, no reversal is possible.

The renunciation is most often planned through a contract. For example, American contracts stipulate clearly that the surrogate mother renounces her parental rights over the child that she is carrying.

In the event that there is no contract, or when the definitive consent of the surrogate mother is given after the delivery, there is an arrangement stating that the surrogate mother carried the pregnancy to term for the benefit of a third party.

3) **Difficult situations, often decided to the disadvantage of the surrogate mother**

The practice of surrogacy leads to numerous situations of conflict requiring recourse to the legal system which, when it becomes involved, can yield impossible legal decisions like the judgment of Solomon.

Even in the absence of an appeal to the courts, circumstances can lead to situations that are humanly inextricable.

Several kinds of cases can be observed:

- The surrogate mother changes her mind and decides she wants to keep the child (for example, the well known “Baby M” et “Johnson v. Calvert” affairs). Whose

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8 See below regarding the case of adoption.
9 This is the case in the United Kingdom, for example.
perspective should receive the most consideration, that of the woman who brought the child into the world, or that of the people who placed the order for the child, often using some or all of their own genetic material?

- The case in which the surrogate mother decides that she wants to interrupt the pregnancy, occasionally for reasons tied to her own health.

- The case in which the sponsors no longer want the child, either because a couple is separating or because the child has a deformity (for example the recent highly mediatized Gammy case\textsuperscript{10}), or finally in the event of a multiple childbirth. The question could be asked well before the delivery if the event that the surrogate mother refuses a request from the sponsors to terminate the pregnancy.

- The sponsors and the surrogate mother enter into conflict over the material provisions of the contract.

No single solution can be completely satisfying to all parties. The surrogate mother is generally left in a very difficult situation. If she wishes to retain her status of mother, it is nearly impossible for her rights to be respected because the law systematically sides with the sponsors, and when the sponsors no longer want the child, it is the birth mother who finds herself responsible for the child unless she decides to give it to the social services.

**C) Surrogacy at the center of a vast market based on exploitation**

Surrogacy is a market, whether it takes place in the United States, India, Ukraine, or elsewhere.

There is no such thing as a neutral surrogacy.

Even in the United Kingdom, where surrogate mothers are supposedly “altruistic,” they receive compensation as high as 10,000 £. And even this is not sufficient, since British citizens travel to countries that openly practice commercialization to find volunteers.

In the United States and India, the practice of surrogacy is openly commercialized, and agencies recruit client couples by emphasizing the happiness of parenthood and of surrogate mothers, blending an altruistic discourse (to overcome resistance) with financial incentives.

\textsuperscript{10} The Gammy affair concerns Thailand, but the UK is not spared; see one case at \url{http://www.telegraph.co.uk/news/health/children/11055643/British-mother-rejected-disabled-twin-because-she-was-a-dribbling-cabbage-says-surrogate.html}. 
Even in cases of surrogacy among close acquaintances or family members, a form of exploitation of the generosity of the woman who agrees to carry the child exists. She is potentially the object of veritable emotional blackmail. It is an illusion to imagine that power relations and/or manipulation are not factors within families and between friends.

In every instance, surrogacy involves intermediaries and professionals who are far from disinterested.

The agencies, doctors, and lawyers involved are paid significant sums in a market estimated at several billion dollars per year.

The market is based on the exploitation of under-privileged women, the reservoir of surrogate mothers.

In certain countries, surrogate mothers are recruited among the poorest populations: In India, they are recruited in the villages before being concentrated in clinics until birth, hoping to leave misery behind them thanks to remuneration that is greater than the average annual income (which represents nevertheless a small sum for the Westerners who are using their services).

Surrogate mothers in the United States, for reasons largely related to minimizing risk, are not recruited among the poorer segments of the population but among lower middle class women--stay-at-home mothers, wives of soldiers or farmers--who need the money to finance expenses such as housing or children’s schooling.

Although agencies attempt to persuade clients of the contrary by emphasizing rare exceptions, there is always inequality between the incomes of the sponsors and the surrogate mother.

Legitimizing this kind of human marketplace would be a defeat for international law.

III ANY INSTRUMENT TENDING TO ORGANIZE OR REGULATE THE PRACTICE OF SURROGATE MOTHERHOOD IS INCONSISTENT WITH THE INTERNATIONAL TEXTS CURRENTLY IN FORCE

A) The practice of surrogacy is contrary to the objectives of THE Convention on inter-country adoption

Studies such as that proposed by the preliminary document of March 2014 risk placing the Hague Conference in an untenable internal contradiction.
Every international instrument, binding or not, whose purpose or outcome is to endorse, organize, or supervise the practice of surrogacy will be in open contradiction with the founding principles of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, playing havoc with its objectives.

Of course, adoption and surrogacy are not identical in every way, because within the framework of surrogacy, the genetic material of one or more of the sponsors is utilized, at least in theory.11 Nevertheless, in both cases, it is a question of abandoning parental rights, at least by the birth mother, and the breaking of legal parentage. Parental rights are transferred to other persons, and a legal parentage is established between these other persons and the child.

Under some laws, the implementation of surrogacy also entails the abandonment of parental rights by the partner of the surrogate mother, the child’s presumptive father.

Furthermore, in a certain number of laws, the legal mechanism chosen to implement surrogacy is rigorously inspired, from a formal perspective, by the mechanisms of adoption. For example, in the United Kingdom (although there are other examples), the surrogate mother is the legal mother of the child at birth, and the sponsors acquire “parental” status only through judicial issuance of a “parental order,” for which an application must be filed with the court within six months of the birth.

Moreover, the entire mechanism of surrogacy is in complete contradiction with the expressed goal of protecting the weak that underlies the Convention on International Adoption.

Indeed, the Convention on Intercountry Adoption is not intended solely to protect the legal security of transnational adoptions.

The Convention also seeks to ensure in a deeper sense international adoptions, with the objective of giving a family to a child who cannot be raised by his or her birth parents nor be adopted in his or her country of origin; these regulations are not meant to cover practices of purchasing and selling children or exploiting the reproductive services of third parties.

To this end, Article 4 of the Convention specifies that “An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin: (...) c) Have ensured that (...) (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and (4) the consent of the mother, where required, has been given only after the birth of the child (...).”

11 There is no difference, however, when no genetic material from either of the commissioning couple is utilized.
The Convention thus simultaneously forbids any arrangement prior to the birth of a child and all remuneration, whether monetary or in compensation for the remittal of the child by its genitors, and in particular by his or her birth mother.

This is not simply a question of legal terminology.

This regulation has meaning.

Its purpose is to ensure that transnational adoption does not cover a practice consisting, for residents of wealthy countries, in appropriating the reproductive capacities of poorer countries, based on financial exchanges.

Surrogacy is founded on a strictly contrary logic: It explicitly assumes in every case a prior arrangement and also always includes, whether explicitly or de facto, quasi-systematic monetary compensation.

1) The prior arrangement is the very basis of surrogacy:

   • The child is conceived to be remanded to the contracting couple;

   • The surrogate mother carries out the pregnancy, with all of the associated risks and psychological and affective implications, to satisfy the request of a third party;

   • In many cases, the mother cannot legally question her consent after the child is born or employ any other effective legal means of preserving her maternal status (see in particular on this point American jurisprudence relating to conflicts of parental rights in the context of surrogacy).

When legislation preserves in theory the surrogate mother’s right to change her mind, it does not fundamentally change the situation: There is a prior agreement. It is to execute this prior agreement that the surrogate mother carries the pregnancy. Ultimate consent can be given legally after the birth, but that does not remove the fact that the surrogate mother committed herself beforehand to carry the pregnancy and to remit the child to the commissioning couple or individual whose “genetic material” (or that of at least one of them) has generally been utilized. The freedom that the surrogate mother disposes of to renego on this commitment is purely theoretical. Not only is the situation psychologically inextricable (keeping a child conceived for a third party), it is legally impossible to rule on. In fact, it is the contracting couple who, by emphasizing the eminently manipulable notion of the best interest of the child or the parties’ intentions, usually obtain satisfaction.  

12 When the law systematically sides with the

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12 See, for example, the decision of the UK Appeals Court in *In the matter of N (a Child)* [2007] EWCA Civ. 1053.
commissioning couple or individual, the surrogate mother’s chances of asserting her rights are non-existent.  

2) There is always compensation, usually monetary:

- Openly commercial surrogacy does not conceal the existence of the remuneration, although the precise terms used do vary ("fees," "compensation," etc.).

- Even when the law authorizes only supposedly non-commercial surrogacy (also called “altruistic”), the “reasonable expenses” paid to the surrogate mother, which are added to medical expenses, in reality mask a form of remuneration, albeit modest.

- The use of the term “payment of compensation” or “reasonable expenses” is often intended to mask remunerative practices. The practical difference between remuneration and compensation for expenses is very often a highly delicate question of bio-ethics. The amounts, duration of the period covered, and the basis for the compensation can transform it into true remuneration. As a consequence, compensation for lost wages, when it covers an extended period of time, as is the case for surrogacy, plays precisely the same role as that of a salary. The case is similar with the question of clothing or other expenses. The flat-rate nature of such “compensation” approaches the idea of remuneration. For example, in the United Kingdom, “reasonable expenses” pre-established by the parties and validated by the judicial system, which cover clothing and transportation and loss of wages, can be higher than 10,000 £. The COTS announces expenses that must be paid to the surrogate mother of between 12,000 and 15,000 £.

The Permanent Bureau furthermore recognizes itself that it is extremely delicate to distinguish between commercial and non-commercial surrogacy (see the “glossary” of the preliminary document of March 2014).

Therefore, without creating profound incoherence in its legal system, the Hague Conference cannot legitimate within the framework of surrogacy practices that it seeks at the same time to suppress in the framework of adoption. It cannot simultaneously

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13 Regarding the United States, see for example the legal consequences of the decision by the California Supreme Court on May 20, 1993 in the celebrated Johnson v. Calvert case, which allowed the legal parents of a child to be those who had the intention of being parents beginning with conception. In certain cases, it is the law itself that decides this question.


15 A sum of 12,000 £ was accepted for example in the matter of Re C (Application by Mr and Mrs X) ([2002] Fam. Law 351). In 2009, in a case of transnational surrogacy, the High Court ruling Re X and Y (Foreign Surrogacy) 2009 1 FLR 733, approved a remuneration of 23,000 pounds paid to a foreign surrogate mother by a British couple.

16 Childlessness Overcome Through Surrogacy.

combat the marketing of children and the exploitation of the reproductive capacities of others in the context of international adoption and, on the other hand, organize the same practices in the context of surrogacy provided that safeguards (weak ones, moreover) are created.

B) The practice of surrogacy is incompatible with numerous other international legal instruments

1) The United Nations Slavery Convention

Article 1 of the convention of September 26, 1926 concerning slavery defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

According to this definition, there can be a situation of slavery even in the absence of appropriation, as was the case in older forms of slavery, of the entire person. It is enough to appropriate the usage or products of a person.

Surrogacy closely resembles a modern form of slavery according to this definition.18

Commissioning couples or individuals acquire a real right over the body of a woman because they acquire the right to use her person and her body (because pregnancy implicates considerably more than her uterus).

They also acquire the right to take the fruit of the woman’s body (or rather the products), i.e., one or several children.

Because the surrogate mother cannot in reality withdraw from the arrangement, and is not always authorized under the law to do so once the pregnancy has begun, she loses control of her body and finds herself in a situation that is comparable to slavery.

3) The International Convention on the Rights of the Child

Article 7 § 1 of this convention stipulates “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

The International Convention on the Rights of the Child does not define what is meant by “parent.” It is nevertheless unarguable that the first individuals who should be

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considered as “parents” are a child’s so-called “biological” parents, and in particular the mother who carried him or her.

Children thus have the right, to the extent possible, of knowing the mothers who brought them into the world and carried them for nine months, and to be raised by her.

There are circumstances under which this is not possible. In addition to cases of death or certain particular situations of separated parents, the abandonment of children, regardless of the reasons, creates a situation in which the child does not have the possibility of being raised by his or her birth mother, or even of knowing her.

In the case of the parents’ death or abandonment, the parental role is assumed, whenever possible, by adoptive parents. But in no case should the abandonment of the child or of his or her separation from the mother who brought them into the world be brought about to benefit the interests of the contracting couple or individual, regardless of who they are and their ability to raise a child.

It is not sufficient to modify the legal definition of what is a “parent” and to deny the status of the woman who brought the child into the world to evacuate the meaning of the provisions of the International Convention on the Rights of the Child.

Surrogacy thus violates Article 7 § 1 of the Convention on the Rights of the Child.

Article 9 § 1 of The International Convention on the Rights of the Child furthermore stipulates that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.”

The practice of surrogacy in many cases leads to a violation of this stipulation. For example, in general, the surrogate mother who changes her mind after the birth can preserve her status as mother and her parental rights sees these rights refused by the law, either in the name of the prior commitment or of a supposed best interest of the child interpreted in favor of the contacting couple (see again American jurisprudence, as well as British law, as referred to above). The result is in effect the separation of the child from his or her mother, against the mother’s wishes and despite the fact that she cannot be accused of mistreating or neglecting the child nor any other omission.

Finally, Article 35 of The International Convention on the Rights of the Child stipulates “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”
The practice of surrogacy consists of entrusting a woman in exchange for remuneration (sometimes called “compensation”) the task of carrying and birthing a child destined to be remitted to the contracting couple or individual after the birth.

This thus represents the sale of a child in the sense of Article 35 of the International Convention on the Rights of the Child.

4) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

The terms of Article 2 a) of this Protocol stipulate:

“Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration (…)“

As indicated earlier with regard to Article 35 of the International Convention on the Rights of the Child, the practice of surrogacy, to the extent that it organizes the conception, gestation, and relinquishment of the child in exchange for remuneration or other compensation, constitutes the sale of a child in the sense of the Protocol.

Furthermore, Article 3 of the Protocol stipulates:

“1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: (a) In the context of sale of children as defined in article 2: (...) (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.”

It is recalled that the practice of surrogacy is contrary to the convention on international adoption.

It thus cannot be authorized by government legislative action, or a fortiori by an international legal instrument, but should instead be suppressed by criminal law.

4) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Article 3 of this convention stipulates that “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, 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 a basis of equality with men.”

The practice of surrogacy involves appropriating in a specific manner the reproductive capacities of women. It leads to the implementation of an extremely firm control over every aspect of women’s lives during pregnancy and endangers their physical and psychological health in order to satisfy the desires of sponsoring third parties.

In this sense, the practice is profoundly discriminatory and is contrary to the objective of the full development of women and of progress towards women’s full enjoyment of their fundamental human rights.

Further, Article 6 of the CEDAW convention stipulates that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

Surrogacy involves exploiting the economic and/or social vulnerability of certain women in order to encourage them, in exchange for remuneration, to place their reproductive capacities at the service of richer individuals. This practice therefore can be seen as similar to the trafficking of women.


According to the terms of Article 3 of this Protocol: ““Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The exploitation of the reproductive capacities of women by making her body and mind available for many months in order to implant an embryo in her and have her carry a pregnancy to term for the purpose of giving up the child to the contracting couple or individual resembles a form of sexual exploitation.

Further, while there is clearly no removal of organs, there is organ rental, i.e., the rental of the woman’s uterus (without even considering all of the other organs that are impacted), for the purpose of fabricating a child intended to be handed over.

This therefore counts as exploitation in the sense of Article 3 of the Protocol.
In addition, there is often trickery concerning the reality of the physical and psychological risks involved as well as systematic abuse of the economically or socially—or even psychologically and emotionally—vulnerable situation of the woman used as an incubator by third parties.

This can therefore be considered trafficking.

6) **Regional Instruments**

For the same reasons indicated involve the Convention on International Adoption, surrogacy is contrary to the objectives of the European Convention on the Adoption of Children, which stipulates in Article 5 that “A mother’s consent to the adoption of her child shall be valid when it is given at such time after the birth of the child, not being less than six weeks, as may be prescribed by law, or, if no such time has been prescribed, at such time as, in the opinion of the competent authority, will have enabled her to recover sufficiently from the effects of giving birth to the child.”

The explanatory report on this convention clearly demonstrates that the goal of this disposition is “to avoid premature adoptions to which mothers give their consent as a result of pressure exerted before the birth of the child or before their physical health and psychological balance have been restored after the child’s birth.”

Even when legislation contains provisions for final consent by the surrogate mother following the birth and beyond the terms contained in this convention, the objective of this stipulation is disregarded: Everything is set up in the framework surrounding surrogacy to encourage the surrogate mother to agree to hand over the child at the specified time. Furthermore, it was for this sole purpose that she was recruited and the embryo was implanted in her body. The entire system is a collection of pressures intended to encourage abandonment and submission of the child by the mother who bore him or her. Surrogacy is also, for the same reasons as those discussed earlier for the Protocol on human trafficking, contrary to the Council of Europe Convention on Action against Trafficking in Human Beings, the so-called Warsaw Convention.

Similarly, it is contrary to Article 21 of the Council of Europe Convention on Human Rights and Biomedicine, the so-called Oviedo Convention, which stipulates, “The human body and its parts shall not, as such, give rise to financial gain.”

The professionals and intermediaries who are involved in the surrogacy process earn profits that are in fact significant on a pregnancy brought to term by a surrogate mother whom they have engaged for the purpose. Moreover, in carrying a pregnancy to terms, in the best of cases, the surrogate mother does not supply labor, but purely and simply places her body and biological processes linked to the state of pregnancy at the disposal of the agencies and contracting couples and individuals.
Exploiting the biological processes of a woman’s body in this way, surrogacy uses the human body as a source of profit, contrary to the stipulations cited earlier.

C) The legal instrument as proposed in the preliminary document of March 2014 must be rejected

The Hague Conference should therefore not develop an international instrument that, under cover of mechanisms for mutual recognition associated with “minimum standards” would legitimize and oversee surrogacy and the gigantic market that derives from it. This kind of practice has no place in a civilized world.

Further, any system of mutual recognition would make the situation even more delicate for the States which, for ethical reasons recalled in part II, forbid surrogacy, because it would incite the resident of those countries to go abroad in order to evade the domestic legal ban on the practice.

Let us consider Spain. Although the practice of surrogate motherhood is forbidden and criminalized in Spain, the resulting birth certificates and other civil documents are recognized, even though this recognition is limited to biological paternity since a ruling by the Constitutional Tribunal. As a result, Spanish clients are actively targeted by surrogacy agencies, particularly Ukrainian and Mexican, and their numbers exploded to over 800 in 2013).

CoRP therefore requests that the Hague Conference firmly recall that transnational surrogacy is contrary to the principles underlying the Convention on Intercountry Adoption as well as to the instruments for the protection of human rights referred to earlier.

It is imperative to go further by working at the international level towards the abolition of surrogacy. The proper institutional framework for developing one or several legal instruments to promote this goal globally is the United Nations.

IV FOR THE ADOPTION OF AN INTERNATIONAL CONVENTION TO ABOLISH SURROGACY

In spite of the numerous texts cited earlier that enable surrogacy to be considered contrary to international legal framework established to protect human rights, a specific instrument is needed to effectively promote the abolition of this practice as firmly as possible.
It is therefore urgent that an international convention abolishing surrogacy be developed within the framework of the UN based on the working model achieved against slavery and analogous practices for the 1926 Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956.

In order to render a ban on surrogacy and the struggle against this practice fully effective, provisions also need to be established stipulating legal punishments that criminalize surrogacy, or at least the intermediary activities surrounding surrogacy.

These stipulations could either constitute part of the abolition convention or be included in an additional protocol thereto. This second option could enable the abolition convention to generate broader support concentrated on banning the principle and measures to be taken to cause the practice to decrease. This would permit the most willing States to establish criminal cooperation to more effectively combat the practice.

This protocol could be inspired by texts related to criminal cooperation that already exist relative to the field of trafficking in its broader sense, including:

- The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;