

# Commercial Gestational Surrogacy: Unravelling the threads between reproductive tourism and child trafficking

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## Abstract

Narratives of commercial gestational surrogacy (CGS) as ‘baby-selling’ often conflate or interchange the transfer of children born via surrogacy with *trafficking* in children or the *sale* of children, two sometimes overlapping but nonetheless distinct offenses. Moreover, anti-trafficking laws have been used to police cross-border CGS. But when do CGS arrangements fall within the category of legitimate ‘reproductive tourism’ and when do they amount to child trafficking? In this paper I critically explore intersections between human trafficking laws and CGS, vis-à-vis the child, charting the relevant trafficking laws in the context of international surrogacy, and analysing whether trafficking laws are an appropriate mechanism through which to regulate CGS. I conclude that while child trafficking might occur via surrogacy, CGS in itself is not child trafficking under international law.

**Keywords:** cross-border commercial surrogacy, reproductive tourism, child trafficking

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## Introduction

The language and framework of human trafficking has often been used to describe and construct narratives of commercial gestational surrogacy (CGS<sup>1</sup>) both in the media,<sup>2</sup> in academic literature<sup>3</sup> and by institutions.<sup>4</sup> Narratives of CGS as ‘baby-selling’ often conflate or interchange the *transfer* of children born via surrogacy with *trafficking* in children or the *sale* of children. Yet, both *trafficking* and *sale* of children are distinct, albeit sometimes overlapping criminal offenses. Conflating or interchanging these terms serves to only further confuse an area of law and policy already wrought with complexity and ambiguity. Viewing CGS through the lens of human trafficking, and in particular *child* trafficking, immediately propels discussions on the use of assisted reproductive technologies (ART) into the realm of serious organised crime. This is both a provocative (re)framing of the complexities raised by CGS and a powerful method of policing reproductive care services. But is it apposite? In this paper, I critically explore intersections between human trafficking laws and CGS,

<sup>1</sup> See the following section on ‘practice and law’ for full definitions.

<sup>2</sup> S Jeffreys, ‘Reject Commercial Surrogacy as Another Form of Human Trafficking’, *The Conversation*, 11 August 2014, retrieved 14 July 2020, <https://theconversation.com/reject-commercial-surrogacy-as-another-form-of-human-trafficking-30314>; C White, ‘Surrogate Parenthood for Money Is a Form of Human Trafficking’, *Forbes*, 4 April 2014, <https://www.forbes.com/sites/realspin/2014/04/04/surrogate-parenthood-for-money-is-a-form-of-human-trafficking/#723abe421202>; C Parker, ‘Scottish Catholic Church Compared Surrogacy to Trafficking’, *The Times*, 19 October 2019, <https://www.thetimes.co.uk/article/scottish-catholic-church-compared-surrogacy-to-trafficking-bddflqfzl>.

<sup>3</sup> A Parker, ‘Reproductive Labor or Trafficking: The effect of disparate power on consent in transnational surrogacy agreements’, *J. Transnat’l L. & Pol’y*, vol. 25, 2015, pp. 155-172; F M Abdullah ‘Legal and Ethical Aspects Beyond Commercial Surrogacy: Modern form of human trafficking’, *Journal of Legal, Ethical and Regulatory Issues*, vol. 22, issue 1, 2019, pp. 1-7; J Yacoubian, S George and L Clements, ‘An Examination of Compliance With the Inter-Country Adoption Convention: Exploring surrogacy in Armenia as a form of human trafficking’, *Ariz. J. Int’l & Comp. L.*, vol. 31, no. 3, 2014, pp. 811-834; C Schurr and L Perler, ‘“Trafficked” Into a Better Future? Why Mexico needs to regulate its surrogacy industry (and not ban it)’, *Open Democracy*, 17 December 2015.

<sup>4</sup> European Parliament resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, para 20-21, [https://www.europarl.europa.eu/doceo/document/TA-7-2011-0127\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-7-2011-0127_EN.html); United Nations Human Rights Council, 37th Session, 6 March 2018, Statement by Special Rapporteur on the sale and sexual exploitation of children, M de Boer-Buquicchio, reads: ‘States, regardless of their perspectives on surrogacy, must create safeguards to prevent the sale of or traffic in children in the context of surrogacy.’ (See further the section on ‘human trafficking in the context of surrogacy’ below).

vis-à-vis the child. Before proceeding further, it is useful to see this intersection in practice through recent events in Cambodia.

In November 2016, Cambodia made international headlines when authorities issued a snap ban on all commercial surrogacy, via a directive from the Health Minister. At the time Cambodia was a popular destination for couples from around the world seeking to build a family through CGS, following the practices being shut down in neighbouring India, Thailand, and Nepal.<sup>5</sup> The directive had the immediate effect of altering the status of surrogacy services from legal—by virtue of there being no laws prohibiting the practice—to something that was suddenly on dubious legal ground.<sup>6</sup> The legal position of already pregnant surrogates, as well as couples and their child(ren) born through surrogacy and still in Cambodia awaiting birth and immigration paperwork to be processed, was catapulted into a state of confusion, and would remain so for quite some time. Within two weeks of the directive being issued, an Australian nurse running a surrogacy agency and two Cambodian associates were arrested, charged, and jailed for *inter alia* human trafficking offences.<sup>7</sup> By 2017, the Cambodian government passed formal laws prohibiting commercial surrogacy. Some countries, such as the United States and Australia, arranged amnesty for commissioning parents partway through their surrogacy journey to collect their children without fear of arrest.<sup>8</sup> Nonetheless, the Cambodian position was clear: new cases would be prosecuted.

Far from shutting down, the Cambodian surrogacy sector simply went underground. In July 2018 the Cambodian police arrested, charged, and detained 32 pregnant surrogates and five intermediaries,<sup>9</sup> and in November a further 11

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<sup>5</sup> KS Bhangra, 'India's Lower House Passes Bill Banning Commercial Surrogacy', *BioNews*, 14 January 2019, [https://www.bionews.org.uk/page\\_140769](https://www.bionews.org.uk/page_140769); J Photopoulos, 'Thailand Outlaws Commercial Surrogacy for Foreigners', *BioNews*, 23 February 2015, [https://www.bionews.org.uk/page\\_94929](https://www.bionews.org.uk/page_94929); A Ilic, 'Nepalese Court Suspends Commercial Surrogacy', *BioNews*, 1 September 2015, [https://www.bionews.org.uk/page\\_95169](https://www.bionews.org.uk/page_95169).

<sup>6</sup> At the time, the legal status of the directive was unclear as it was not backed by specific laws.

<sup>7</sup> J Willows, 'Australian Nurse Jailed for Illegal Cambodian Surrogacy', *Bionews*, 7 August 2017, [https://www.bionews.org.uk/page\\_96122](https://www.bionews.org.uk/page_96122).

<sup>8</sup> L Cochrane, 'Cambodia Offers Amnesty So Australians Can Collect Surrogate Babies', *ABC*, 25 November 2016, <https://www.abc.net.au/news/2016-11-26/cambodias-amnesty-for-surrogate-babies/8059714>; E Handley, 'Cambodian Surrogates Face an Impossible Choice – Forced motherhood, or years in prison', *ABC*, 12 May 2019, <https://www.abc.net.au/news/2019-05-12/cambodian-surrogates-forced-to-be-mothers-or-face-prison-time/11086640>.

<sup>9</sup> M Krause, 'Pregnant Cambodian Surrogates Charged With Human Trafficking', *BioNews*, 16 July 2018, [https://www.bionews.org.uk/page\\_137194](https://www.bionews.org.uk/page_137194).

pregnant surrogates and seven intermediaries, for human trafficking offences.<sup>10</sup> The women were carrying babies for mainly Chinese commissioning parents, and the intermediaries were of both Cambodian and Chinese nationality. The reasoning of the Cambodian authorities was elucidated by the deputy director of the National Committee for Counter Trafficking: ‘They [intended to] exchange their children for money. What we prioritise as the victim is the baby inside the mother. To bear a child and then sell it is very inhumane.’<sup>11</sup> The surrogates were eventually released from detention on the condition that they would keep the children until the age of 18 (the alternative being up to 15 years imprisonment), despite the fact that as gestational surrogates (defined in the following section) they are not genetically related to the children.<sup>12</sup> The commissioning parents faced no legal consequences.<sup>13</sup>

Cambodia is not the only country where human trafficking laws have been used to police commercial surrogacy. In Spain, where both commercial and altruistic forms of surrogacy (see the following section for definitions) are illegal, many couples travel to Ukraine where commercial surrogacy is legal and regulated. However, in September 2018, the Spanish government effectively stranded almost 30 families in Ukraine, when they ceased registering the births of babies born through surrogacy (a necessary, usually straightforward procedure, in order for parents to bring their child(ren) home), citing possible medical malpractice and trafficking of children.<sup>14</sup> Neither charge has been substantiated. More recently, Ukraine itself has announced intentions to shut down its commercial surrogacy sector: the closure of country borders and travel restrictions in an effort to control the ongoing COVID-19 pandemic left many commissioning parents unable to travel to Ukraine for the birth of their children (one clinic alone counted 50 ‘stranded’ babies) and others unable to travel home from Ukraine with their newborn(s), thus revealing the extent of the Ukrainian surrogacy market.<sup>15</sup> Ukraine’s Ombudsman for Children described the situation as a

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<sup>10</sup> M Krause, ‘Cambodia Arrests 11 More Surrogates, as Australian Nurse Released’, *BioNews*, 19 November 2018, [https://www.bionews.org.uk/page\\_139872](https://www.bionews.org.uk/page_139872).

<sup>11</sup> M Krause, ‘Pregnant Cambodian Surrogates’.

<sup>12</sup> E Lynam, ‘Cambodia Releases Detained Surrogates’, *BioNews*, 10 December 2018, [https://www.bionews.org.uk/page\\_140307](https://www.bionews.org.uk/page_140307).

<sup>13</sup> It is worth noting that this scenario is unusual: anti-trafficking discourses have typically focussed on the surrogate as the victim of exploitation, rather than the child, when considering trafficking in the context of surrogacy (see further the section on ‘human trafficking in the context of surrogacy’).

<sup>14</sup> S Pritchard, ‘Spanish Families Stranded in Ukraine in Surrogacy Limbo’, *BioNews*, 3 September 2018, [https://www.bionews.org.uk/page\\_138143](https://www.bionews.org.uk/page_138143).

<sup>15</sup> O Grytsenko, ‘The Stranded Babies of Kyiv and the Women Who Give Birth for Money’, *The Guardian*, 15 June 2020, <https://www.theguardian.com/world/2020/jun/15/the-stranded-babies-of-kyiv-and-the-women-who-give-birth-for-money>.

violation of children's rights—stopping just short of labelling it child trafficking—and is pushing to close the sector to foreign couples at least.<sup>16</sup> These are just a few examples of the confusion between surrogacy and child trafficking; the myriad issues these examples highlight will be discussed in the course of this paper.

When do CGS arrangements fall within the category of legitimate 'medical tourism' and when do they amount to human trafficking? This question has long perplexed lawyers, ethicists, and social scientists.<sup>17</sup> For, as the examples above demonstrate, the same set of actions and motivations can one day be viewed as cross-border access to ART services, and as possible human trafficking the next—a dichotomy that is not to be taken lightly.<sup>18</sup> Exponential growth in the worldwide surrogacy market—the result of a convergence between increasingly accessible ART, globalisation, demand for ART due to medical or social infertility,<sup>19</sup> and the legal and social recognition of new family structures—means that how we regulate surrogacy across borders is a pressing issue. All parties to a CGS arrangement (the commissioning parents, surrogate, healthcare professionals, and intermediaries) ought to have clarity under the law as to whether they are exercising their rights as private citizens, or engaging in a criminal activity. Nor is it in children's best interests for criminal proceedings or legal uncertainties to linger over the conditions of their birth.

The purpose of this paper is two-fold: first, to chart and place the relevant child trafficking laws in the context of international surrogacy, and second, to analyse whether trafficking laws are an appropriate mechanism through which to regulate CGS. In doing so I hope to contribute towards an understanding of what distinguishes CGS from child trafficking, and what can be done to better delineate this distinction in law and policy. This paper proceeds in four parts. In the following section I explain the phenomenon of CGS. I set out the terms and definitions used herein and briefly summarise the legal landscape and ethical debates surrounding international CGS. I then

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<sup>16</sup> *Ibid.*

<sup>17</sup> C Shalev *et al.*, 'Ethics and Regulation of Inter-Country Medically Assisted Reproduction: A call for action', *Israel Journal of Health Policy Research*, vol. 5, no. 1, 2016, pp. 1-12, <https://doi.org/10.1186/s13584-016-0117-0>; JA Gupta, 'Reproductive Labour or Reproductive Trafficking?: Indian women's reproductive bodies in the globalised bioeconomy', in RR Flood and JG Payne (eds.), *Transnationalising Reproduction*, Routledge, Abington and New York, 2018, pp. 95-116.

<sup>18</sup> Surrogacy arrangements might of course constitute some other illegitimate practice that is not human trafficking.

<sup>19</sup> W Lo and L Campo-Engelstein, 'Expanding the Clinical Definition of Infertility to Include Socially Infertile Individuals and Couples', in L Campo-Engelstein and P Burcher (eds.), *Reproductive Ethics II*, Springer, Cham, 2018, pp. 71-83.

set out the relevant international law on child trafficking; I discuss the applicability of these laws to the practice of CGS, demonstrating the inherent incongruence of classifying wholesale the practice as trafficking. Finally, I draw together my conclusions, returning to the question of what distinguishes CGS from child trafficking.

## Surrogacy: Practice and law

Surrogacy is an arrangement in which a woman (the ‘surrogate’) agrees to be impregnated and carry a child for another couple or individual (the ‘commissioning parent(s)’ or ‘intended parent(s)’). Surrogacy can be conducted directly between the surrogate and intending parents. Alternatively, the surrogacy can be arranged via an agency or surrogacy clinic which can match the surrogates to intending parents, liaise between them, and coordinate the surrogacy process. These ‘agents’ or ‘intermediaries’ charge a fee for their service. In some places they are also responsible for recruiting women to be surrogates.<sup>20</sup>

Surrogacy can take two forms: traditional or gestational. In traditional surrogacy, the surrogate provides her own egg, which is fertilised with the intending father’s or donor sperm, usually via an at-home insemination, and rarely via sexual intercourse. In these cases, the surrogate is genetically related to the child, as well as being the gestational carrier or birth mother. In gestational surrogacy, an embryo, created using either the intended parents’ gametes, donor gametes, or a combination of both, is implanted via in vitro fertilisation (IVF) in the surrogate. Here, the surrogate is not genetically related to the child; she gestates and births the child who might be genetically linked to one or both intended parents. Gestational surrogacy is increasingly preferred as it gives the commissioning parents the option of having a child that is genetically related through the maternal line, or using their preferred egg donor/provider. Removing the genetic relationship can also help limit bonding between the surrogate and child,<sup>21</sup> enabling a smoother transfer of parental rights. Given its prevalence, and in the interests of space, this paper focuses on gestational surrogacy.

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<sup>20</sup> A Pande, ‘Commercial Surrogacy in India: Manufacturing a perfect mother-worker’, *Journal of Women in Culture and Society*, vol. 35, no. 4, 2010, pp. 969-992, <https://doi.org/10.1086/651043>.

<sup>21</sup> Although see: A Pande, “‘It May Be Her Eggs But It’s My Blood’”: Surrogates and everyday forms of kinship in India’, *Qualitative Sociology*, vol. 32, no. 4, 2009, pp. 379–397, <https://doi.org/10.1007/s11133-009-9138-0>.

Surrogacy remains an ethically controversial issue. The use of IVF technology, which can necessitate the destruction of embryos, the potential use of donor gametes, and the fact that gestation occurs outside the traditional, heteronormative family setting all contribute to the continued disagreement over whether the practice should be allowed on moral grounds. Further complicating the ethics of surrogacy is the fact that it can be carried out either altruistically or for payment. In the former, the surrogate is not paid; expenses necessary to establishing and carrying through the pregnancy are compensated, but she does not profit from the surrogacy. Under this model surrogacy is characterised as a benevolent act. On the other hand, in 'commercial', 'for-profit', or 'compensated' surrogacy the surrogate does receive a fee in addition to her expenses.

Whilst altruism and commercial surrogacy are certainly not mutually exclusive,<sup>22</sup> the profit-making element highlights the issue of the potential exploitation of women in vulnerable positions, although it has been argued that curtailing or dismissing the ability of women to make their own choices is paternalistic and elitist,<sup>23</sup> that it need not be exploitative,<sup>24</sup> and that in fact *all* professionals accept money for the use of their body.<sup>25</sup> Moreover, it has been argued that surrogacy, indeed all ART, exploits women through controlling their reproductive power.<sup>26</sup> The arguable commodification of women for their wombs has been characterised as degrading,<sup>27</sup> rendering women a 'breeder class',<sup>28</sup>

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<sup>22</sup> LB Andrews, 'Beyond Doctrinal Boundaries: A legal framework for surrogate motherhood', *Virginia Law Review*, 1995, pp. 2343-2375.

<sup>23</sup> R Arneson, 'Commodification and Commercial Surrogacy', *Phil. & Pub. Aff.*, vol. 21, no. 2, 1992, pp. 132-164.

<sup>24</sup> S Wilkinson, 'The Exploitation Argument Against Commercial Surrogacy', *Bioethics*, vol. 17, no. 2, 2003, pp. 169-187, <https://doi.org/10.1111/1467-8519.00331>; V Panitch, 'Global Surrogacy: Exploitation to empowerment', *Journal of Global Ethics*, vol. 9, no. 3, 2013, pp. 329-343, <https://doi.org/10.1080/17449626.2013.818390>.

<sup>25</sup> MC Nussbaum, *Sex and Social Justice*, Oxford University Press, New York, 1999.

<sup>26</sup> G Corea, *The Mother Machine: Reproductive technologies from artificial insemination to artificial wombs*, Harper and Row, New York, 1985.

<sup>27</sup> R Macklin, 'Is There Anything Wrong With Surrogate Motherhood? An ethical analysis', *Law, Medicine and Health Care*, vol. 16, no. 1-2, 1988, pp. 57-64, <https://doi.org/10.1111/j.1748-720X.1988.tb01051.x>.

<sup>28</sup> JG Raymond, *Women as Wombs: Reproductive technologies and the battle over women's freedom*, Spinifex Press, Melbourne, 1995.

and in doing so reducing children to something that can be ‘bought’<sup>29</sup>—thus straddling the fine line between reproductive care and potential child trafficking, which is the focus of this paper. (The trafficking of women for exploitation as surrogates is an equally pressing issue, but it is not the focus here.) CGS has been compared to prostitution,<sup>30</sup> others have conceptualised surrogacy as work/labour.<sup>31</sup> These are deeply sensitive and complex ethical issues upon which there is no global consensus—a fact reflected in the considerable variation in the law and policy on surrogacy around the world. It is not the purpose of this paper to assess the ethics of surrogacy per se, however, it is helpful to bear in mind the ethical discourses underpinning law and policy.

The ethical complexities of cross-border CGS are augmented by narratives of race and class that underlie this phenomenon. Typically, this involves wealthy individuals from developed countries, travelling to developing world countries in order to seek the services of a poor woman, leading to the ‘stratification of reproduction’.<sup>32</sup> In 1988, sociologist Barbara Rothman queried, ‘Can we look forward to baby farms, with white embryos grown in young and Third world women?’<sup>33</sup>—a question that surely resonated uncomfortably at the height of Asia’s surrogacy sector through the 2000s and 2010s. Nearly two decades later, Amrita Pande reveals the complex and paradoxical nature of global surrogacy at the ‘intersections of reproduction, labour and globalization’ that ‘cross boundaries based on class, caste and religion and

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<sup>29</sup> ES Anderson, ‘Is Women’s Labor a Commodity?’, *Phil. & Pub. Aff.*, vol. 19, issue 1, 1990, pp. 71-92; A van Niekerk and L van Zyl, ‘Commercial Surrogacy and the Commodification of Children: An ethical perspective’, *Med. & L.*, vol. 14, 1995, pp. 163-170; D Satz, *Why Some Things Should Not Be for Sale: The moral limits of markets*, Oxford University Press, Oxford, 2010.

<sup>30</sup> A Dworkin, *Right-Wing Women*, Perigee Books, New York, 1978.

<sup>31</sup> L Van Zyl and R Walker, ‘Beyond Altruistic and Commercial Contract Motherhood: The professional model’, *Bioethics*, vol. 27, no. 7, 2013, pp. 373-381, <https://doi.org/10.1111/j.1467-8519.2012.01962.x>; A Pande, *Wombs in Labor: Transnational commercial surrogacy in India*, Columbia University Press, New York, 2014.

<sup>32</sup> D Deomampo, *Transnational Reproduction: Race, kinship, and commercial surrogacy in India. Vol. 1.*, NYU Press, New York, 2016; FW Twine, *Outsourcing the Womb: Race, class and gestational surrogacy in a global market*, Routledge, New York, 2015; A Pande, ‘This Birth and That: Surrogacy and stratified motherhood in India’, *Philosophia*, vol. 4, no. 1, 2014, pp. 50-64.

<sup>33</sup> BK Rothman, ‘Reproductive Technology and the Commodification of Life’, in EH Baruch *et al.* (eds.), *Embryos, Ethics, and Women’s Rights: Exploring the new reproductive technologies*, Haworth, New York, 1988, pp. 95-100; S Markens, ‘The Global Reproductive Health Market: US media framings and public discourses about transnational surrogacy’, *Social Science & Medicine*, vol. 74, no. 11, 2012, pp. 1745-1753, <https://doi.org/10.1016/j.socscimed.2011.09.013>.



sometimes even race and nation’ but ‘ultimately reify structures of inequality.’<sup>34</sup> These analyses remain relevant despite the surrogacy industry moving from Asia towards Eastern Europe: disparities of class and nationality persist between surrogates and intending parents. Furthermore, Seema Mohapatra points out the hypocrisy of countries that ban surrogacy on moral grounds, whilst ignoring the phenomenon of their own citizens engaging in reproductive tourism by seeking surrogacy services abroad.<sup>35</sup>

There are currently no international laws governing international surrogacy arrangements. Surrogacy is regulated solely through domestic law: some countries have banned the practice outright (France, Germany, Italy, Spain, Switzerland, China), some allow altruistic surrogacy, but not commercial surrogacy (UK, most states in Australia and Canada, Hong Kong, South Africa, Mexico), some allow commercial surrogacy (Ukraine, Georgia, some states in the USA), some allow commercial surrogacy under strict conditions for their own citizens (Israel, India), and others still have no regulation (certain states in Australia and USA). This variation in law and policy has encouraged people in countries with restrictive legal frameworks or expensive rates to seek surrogacy services abroad, in jurisdictions with a permissive or indeed no framework, and lower costs—a phenomenon known as ‘medical’ or, more specifically, ‘reproductive tourism’. Asia was once a popular destination for commercial surrogacy, with markets flourishing in Cambodia, Nepal, Thailand, India, and Laos. As these markets have shut down over the last decade (all except Laos), Eastern European nations such as Ukraine and Georgia, as well as Greece, have picked up much of the ‘lost trade’. These destinations are particularly popular as they offer CGS services at a considerably lower cost than the US, which is the only developed country where commercial surrogacy is legal and regulated. Given the prevalence of medical or reproductive tourism for surrogacy services—a trend that is still growing<sup>36</sup>—I focus here on cross-border CGS.

Despite there being no specific international laws targeting cross-border CGS, the existing network of international and European laws do play a role in

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<sup>34</sup> A Pande, ‘Global Reproductive Inequalities, Neo-Eugenics and Commercial Surrogacy in India’, *Current Sociology*, vol. 64, no. 2, 2016, pp. 244-258, <https://doi.org/10.1177/0011392115614786>.

<sup>35</sup> S Mohapatra, ‘Adopting an International Convention on Surrogacy—A lesson from intercountry adoption’, *Loy. U. Chi. Int’l L. Rev.*, vol. 13, issue 1, 2016, pp. 25-55.

<sup>36</sup> M Salama *et al.*, ‘Cross Border Reproductive Care (CBRC): A growing global phenomenon with multidimensional implications (a systematic and critical review)’, *Journal of Assisted Reproduction and Genetics*, vol. 35, no. 7, 2018, pp. 1277-1288, <https://doi.org/10.1007/s10815-018-1181-x>.

regulating the practice.<sup>37</sup> A number of human rights law instruments include provisions that are relevant to cross-border CGS, primarily, the UN Convention on the Rights of the Child (hereafter ‘CRC’)<sup>38</sup> and the Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography (hereafter the ‘Optional Protocol’).<sup>39</sup> Within Europe, it also includes the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights.<sup>40</sup> The Hague Conference on Private International Law (HCCH) began the Parentage/Surrogacy Project in 2011, and this is one of the few examples of international cooperation on the law and policy relating to surrogacy. In 2014, the HCCH published its ‘Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements’<sup>41</sup> and it is currently developing a private international law instrument and separate protocol on the recognition of foreign judicial decisions on legal parentage in international surrogacy arrangements. Significantly, for the purposes of this paper, any document produced by the HCCH would not encompass trafficking in surrogacy, as its mandate only extends to private law matters. The potential

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<sup>37</sup> R Blauwhoff and L Frohn, ‘International Commercial Surrogacy Arrangements: The interests of the child as a concern of both human rights and private international law’, in C Paulussen *et al.*, *Fundamental Rights in International and European Law*, TMC Asser Press, The Hague, 2016, pp. 211-241; B Stark, ‘Transnational Surrogacy and International Human Rights Law’, *ILSA J. Int’l & Comp. L.*, vol. 18, no. 2, 2011, pp. 369-386; Y Ergas, ‘Babies Without Borders: Human rights, human dignity, and the regulation of international commercial surrogacy’, *Emory Int’l L. Rev.*, vol. 27, issue 1, 2013, pp. 117-188; NF Bromfield and K Smith Rotabi, ‘Global Surrogacy, Exploitation, Human Rights and International Private Law: A pragmatic stance and policy recommendations’, *Global Social Welfare*, vol. 1, 2014, pp. 123-135, <https://doi.org/10.1007/s40609-014-0019-4>; S Allen, ‘Governing Transnational Surrogacy Practices: What role can national and international regulation play?’, in M Davies (ed.), *Babies for Sale: Transnational surrogacy and the new politics of reproduction*, Zed Books, London, 2017; K Trimmings and P Beaumont (eds.), *International Surrogacy Arrangements: Legal regulation at the international level*, Bloomsbury Publishing, London, 2013.

<sup>38</sup> UN Commission on Human Rights, *Convention on the Rights of the Child*, E/CN.4/RES/1990/74, 7 March 1990.

<sup>39</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, A/RES/54/263, 16 March 2001.

<sup>40</sup> C Fenton-Glynn, ‘International Surrogacy Before the European Court of Human Rights’, *Journal of Private International Law*, vol. 13, issue 3, 2017, pp. 546-567, <https://doi.org/10.1080/17441048.2017.1385901>; K Trimmings and P Beaumont, ‘Surrogacy Before the European Court of Human Rights’, in C Fenton-Glynn, JM Scherpe and T Kaan (eds.), *Eastern and Western Perspectives on Surrogacy*, Intersentia, 2019, p. 329

<sup>41</sup> H Baker, ‘Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements’ (Prel. Doc/ No 3 B), Hague Conference on Private International Law (HCCH), March 2014, <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>.

for human trafficking in surrogacy is mentioned in a number of the HCCH's reports (in the context of women being trafficked for exploitation as surrogates), but the distinction between a legitimate arrangement under private law and the potential breach of anti-trafficking laws is not explored at length.<sup>42</sup> Finally, the child protection and family unification NGO, International Social Service (ISS), is currently drafting a set of internationally agreed principles on the protection of the rights of the child in the context of surrogacy that can be used to guide policy and legislation.<sup>43</sup> Thus, we see that the absence of a comprehensive legal framework on cross-border CGS allows scope for countries to look to alternate legal tools, such as anti-trafficking laws, in order to police surrogacy.

Briefly, it is important to note that beyond domestic laws allowing or disallowing CGS as seen above, domestic family and citizenship law frameworks will determine critical issues of filiation and nationality. As nationality can be derived through one's parents, as well as place of birth, filiation is important, and the two matters are often related. Conflicts of national law on the attribution of these matters (e.g. legal parenthood is commonly attributed to the woman who gives birth and her partner; conversely, some countries—notably, Ukraine—attribute parenthood to the intended parents from birth) has led to instances where children have been rendered 'parentless' or 'stateless' or both, in contravention of Articles 7 and 8 of the CRC.<sup>44</sup> Furthermore, this exposes both the intended parents and surrogates, for either party might be in a position where they are caring for a child to whom they are legally unrelated, to investigation for child trafficking.<sup>45</sup> Thus, aligning the law on filiation and citizenship for cross-border CGS is important in the context of trafficking. In Israel, for instance, a genetic link between the child

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<sup>42</sup> *Ibid.*; H Baker, 'Preliminary Report on International Surrogacy Arrangements', (Prel. Doc. No 10), Hague Conference on Private International Law (HCCH), March 2012.

<sup>43</sup> ISS website, retrieved 14 July 2020, <https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy>; C Baglietto, N Cantwell and M Dambach (eds.), *Responding to Illegal Adoptions: A professional handbook*, International Social Service, Geneva, 2016, chapter 6.

<sup>44</sup> S Mohapatra, 'Stateless Babies & Adoption Scams: A bioethical analysis of international commercial surrogacy', *Berkeley J. Int'l L.*, vol. 30, issue 1, 2012, pp. 412-450, <https://doi.org/10.15779/z380q00>; CP Kindregan and D White, 'International Fertility Tourism: The potential for stateless children in cross-border commercial surrogacy arrangements', *Suffolk Transnat'l Rev.*, vol. 36, issue 3, 2013, pp. 527-628; M Yehezkel, 'From Baby M to Baby M (anji): Regulating international surrogacy agreements', *JL & Pol'y*, vol. 24, issue 1, 2015, pp. 41-93; A Margaria, 'Parenthood and Cross-Border Surrogacy: What is "new"? The ECtHR's First Advisory Opinion', *Medical Law Review*, vol. 28, no. 2, 2020, pp. 412-425, <https://doi.org/10.1093/medlaw/fwz042>; M Iliadou, 'Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v Italy*', *Medical Law Review*, vol. 27, issue 1, 2019, pp. 144-154, <https://doi.org/10.1093/medlaw/fwy002>; Ergas.

<sup>45</sup> Mohapatra, 'Stateless Babies'.

and at least one of the commissioning parents is required in order to rule out possible child trafficking.<sup>46</sup> Arguably, even in jurisdictions where this approach is not enshrined in law, demonstrating filiation can help mitigate suspicion of trafficking.<sup>47</sup>

## Human Trafficking in the Context of Surrogacy: International law and policy

Undoubtedly, human trafficking laws have a place within the network of laws governing international CGS to prevent and apprehend instances where surrogacy is used as means of trafficking in persons. Anti-trafficking laws have typically targeted ‘modern slavery’ and sexual exploitation.<sup>48</sup> As new medical technologies have advanced, trafficking laws have expanded to target new forms of trafficking, namely, trafficking people for organs and tissue, including human egg-cells.<sup>49</sup> CGS itself is not targeted in the international anti-trafficking law books, however human trafficking laws can nonetheless be used to police reproductive tourism in a number of ways. It is clear that women can be trafficked for the purpose of serving as surrogates or for the purpose of harvesting their egg-cells.<sup>50</sup> That is to say, the legal elements of the crime of human trafficking can be met vis-à-vis surrogates as victims (see below). I am not suggesting that compensated surrogates *are* by virtue of their participation in CGS victims of human trafficking (which is a discussion worthy of a separate paper); rather, the set of actions involved in CGS could potentially be both construed as trafficking, and evidenced to be so.<sup>51</sup> Indeed, the absence of any meaningful legal distinction between the constituent elements of trafficking and CGS is, in that context,

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<sup>46</sup> Shalev *et al.*

<sup>47</sup> See analyses of the La Roch case in: Mohapatra, ‘Stateless Babies’, p. 420 and the Shigeta case in Mohapatra, ‘Adopting an International Convention’, p. 6.

<sup>48</sup> T Truong, ‘Human Trafficking, Globalization, and Transnational Feminist Responses’, in R Baksh-Soodeen and W Harcourt (eds.), *The Oxford Handbook of Transnational Feminist Movements*, Oxford University Press, Oxford, 2015, p. 295.

<sup>49</sup> C Shalev, ‘Limiting Commodification: International law and its challenges’, in J Rainhorn and S El Boudamoussi (eds.), *New Cannibal Markets: Globalization and commodification of the human body*, MSH, Paris, 2015, pp. 363-382.

<sup>50</sup> *Ibid.*; Truong; J Kostenzer, ‘Human Trafficking and Exploitation for the Purpose of Reproduction’, in B Gebrewold, J Kostenzer and A Müller (eds.), *Human Trafficking and Exploitation: Lessons from Europe*, Taylor & Francis, London and New York, 2017, ch. 5; K Neorytu, ‘Assisted Reproduction Crime Network in Greece Highlights Need for Monitoring Surrogacy’, *BioNews*, 21 October 2019, retrieved 14 July 2020, [https://www.bionews.org.uk/page\\_145701](https://www.bionews.org.uk/page_145701).

<sup>51</sup> A Parker; Gupta.

profoundly problematic as it obfuscates the line between legitimate practices and criminal behaviour.<sup>52</sup>

Might children born via surrogacy and then transferred to the commissioning parents also be potential victims of human trafficking according to the law? The example of Cambodia elaborated on in the introduction demonstrates how a shift in policy can transfer the status of victim from the surrogate to the child, and of trafficker/wrong-doer from the intermediary/commissioner to the surrogate herself. I contend that this is not consistent with internationally agreed definitions and constructions of trafficking in persons. Trafficking can occur in the domestic or international context; given that the emphasis of this paper is cross-border CGS where the child born will be taken home from the surrogacy host country, I focus on the relevant international laws. Applying the law, I show that although child trafficking *might* occur in the context of CGS, this would be exceptional, and that CGS is not in itself child trafficking.

The UN Trafficking Protocol is the primary international law instrument governing human trafficking.<sup>53</sup> Following Article 3(a), in order for something to be considered trafficking in persons, three distinct elements must be met:

- i) the *act* (recruitment, transport, transfer, harbouring, receipt of persons)
- ii) the *means* (threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim)
- iii) the *purpose* (for the purpose of exploitation, which includes, at a minimum, exploitation of the prostitution of others, sexual exploitation, forced labour or services, slavery or similar practices, servitude, and the removal of organs).

Furthermore, Article 3(b) states that any consent derived via the means set out in subsection (a) 'shall be irrelevant', and that consent is in any event irrelevant if the person trafficked is a child (3(c)). Notably, surrogacy is not specifically mentioned in Article 3, nor elsewhere in the Protocol, nor the relevant *travaux préparatoires*. It is mentioned as a potential form of exploitation in the Model Law drafted by the UN Office on Drugs and Crime to assist countries in implementing the Convention and Protocols<sup>54</sup>—but no further guidance is offered on how and

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<sup>52</sup> Shalev *et al.*; Shalev.

<sup>53</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000.

<sup>54</sup> United Nations Office on Drugs and Crime, *Model Law Against Trafficking in Persons*, Vienna, 2009, [https://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf).

when CGS might meet the elements of trafficking.

Nonetheless, Article 3(a) is not a closed or exhaustive definition—the purpose element only sets out the minimum requirements. Certainly, some writers have argued that CGS itself meets all three elements when the surrogate is considered the victim of trafficking.<sup>55</sup> What of the child as a victim of trafficking in CGS arrangements? Applying the criteria set out in Article 3(a) yields the following:

- i) the *act*—transferring the child(ren) from the surrogate to the commissioning parents, intermediaries may be involved in the transport, harbouring, and receipt of the children
- ii) the *means*—following Article 3(b), this element is not required to be met. That said, payments/benefits to the surrogate as the ‘person in control’ of the child, physically and/or legally in her capacity as the automatic legal mother (bearing in mind the conflict of laws viz. parentage alluded to above in the section on ‘practice and law’), or to the intermediaries in cases where the child(ren) are in intermediary care before being collected by the commissioning parents, could nonetheless constitute means.
- iii) the *purpose*—no exploitative purpose.

Children brought about via commercial surrogacy overwhelmingly go to loving, caring homes.<sup>56</sup> These children are joyously welcomed by their intended parents and their arrival is celebrated with hope for a happy and fulfilling family life—just as any other parent welcomes their newborn. There is no expectation of subsequent exploitation, in the same way that there is no expectation of subsequent exploitation when parents whose genetic, gestational and intentional parenthood coincide (i.e. the prevailing hetero-normative family ‘ideal’) take their children home from a hospital maternity ward. Thus, unless there is evidence to the contrary, the purpose for which children born through surrogacy are transferred is not an exploitative one, and therefore trafficking is not established.

The CRC potentially offers a far wider definition of child trafficking. Article 35 states that: ‘State 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.*’ [my emphasis]

Taken at face value, under this approach exploitation need not be demonstrated as the purpose of trafficking, and nor is the method of trafficking limited, that is to say, it could encompass CGS arrangements. However, although the wording of Article 35 offers more flexibility to establish trafficking practices,

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<sup>55</sup> A Parker; Gupta. Although see for counter-arguments: Pande, ‘Wombs in Labour’; Panitch; B Parry, ‘Surrogate Labour: Exceptional for whom?’, *Economy and Society*, vol. 47, no. 2, 2018, pp. 214-233, <https://doi.org/10.1080/03085147.2018.1487180>.

<sup>56</sup> See intended parents’ accounts in: Grytsenko.

the implementation guide cuts back significantly on that flexibility. Readers are redirected to Article 3(a) of the Trafficking Protocol for a definition of human trafficking—which is at odds with Article 35. The former includes an unequivocal requirement for demonstrating the exploitative purpose; the latter does not. Neither the CRC nor the accompanying implementation guide mentions surrogacy, although intercountry adoption is specifically addressed. The guide does state that Article 35 serves as a safety net ‘to ensure that children are safe from being abducted or procured for these [CRC Articles 21, 32, 33, 34, 36] purposes or for any other purpose.’ (p. 531) It is far from clear that CGS in itself would fall foul of article 35 on trafficking grounds. CGS may, however, be construed as sale of children, a separate offence under Article 2(a) of the Optional Protocol.

The Optional Protocol does not specifically mention surrogacy, however, the sale of children under Article 2 was specifically considered by the UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio (hereafter the ‘Special Rapporteur’), in a thematic report presented to the UN Human Rights Council.<sup>57</sup> In fact, this report is directed at preventing the sale *and trafficking* of children in the context of surrogacy, with both ‘sale’ and ‘trafficking’ repeatedly emphasised together throughout the report (paragraphs 34, 36, 37). Given this, it is disappointing that the law on trafficking in children is not at all explored, or at least distinguished and set aside in the report, nor discussed during the interactive dialogue,<sup>58</sup> nor the follow-up report.<sup>59</sup> Trafficking is listed in the report as an abusive practice in surrogacy (paragraphs 29-33), but no evidence of child trafficking as per Article 3 of the Trafficking Protocol is put forward. The example of the Baby 101 surrogacy ring cited appears to have been a case of trafficking in women—not children—for the purposes of exploitative surrogacy practices.<sup>60</sup>

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<sup>57</sup> UN Human Rights Council, *Report of Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material A/HRC/37/60*, 15 January 2018 (‘SR Report 2018’), <https://undocs.org/en/A/HRC/37/60>.

<sup>58</sup> *Ibid.*; OHCHR, ‘Human Rights Council Discusses the Right to Privacy, and Commercial Surrogacy in the Context of the Sale of Children’, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22768&LangID=E>.

<sup>59</sup> UN Human Rights Council, *Report of Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and other Child Sexual Abuse Material A/74/162*, 15 July 2019, <https://undocs.org/en/A/74/162>.

<sup>60</sup> Anon, ‘Thai Police Free 14 Women From Illegal Baby-Breeding Farm in Bangkok’, *Huffington Post*, 24 February 2011, retrieved 14 July 2020, [https://www.huffpost.com/entry/vietnamese-women-freed-fr\\_n\\_827595](https://www.huffpost.com/entry/vietnamese-women-freed-fr_n_827595).

On the other hand, the law on the sale of children is considered in depth (paragraphs 41-51) and the report concludes that commercial, and in some cases altruistic, surrogacy usually does meet the elements of the sale of children under the Optional Protocol—and that most CGS arrangements are therefore in contravention of international law. Briefly, for the sale of children is not focus of this paper, the elements of sale under Article 2 are: i) remuneration or any other consideration (payment), ii) the transfer of the child, and iii) the exchange, i.e. payment *for* transfer. Article 3 (Optional Protocol) sets out the minimum acts and activities for which the sale of children is prohibited: sexual exploitation, transfer of organs for profit, and forced labour. On this analysis the child is viewed as a commodity.<sup>61</sup> However, whether the payment in gestational surrogacy is payment for the child itself, or the surrogate's gestational service, and whether intending parents can in fact buy a child that is or was always 'theirs' (through intention, genetics or both)<sup>62</sup> or indeed *at all* (for CGS arrangements do not presuppose that parents have ownership rights over children)<sup>63</sup> is a matter of contention. This ultimately depends on how surrogacy is conceptualised and organised—as work, commerce, or altruism.<sup>64</sup>

There is considerable scholarly debate over whether Article 35 (CRC) and Articles 2 and 3 (Optional Protocol) extend to CGS at all. Some scholars<sup>65</sup> maintain that interpreting these Articles according to the ordinary meaning of the terms used clearly results in CGS amounting to the sale of children—this appears to be the approach adopted by the Special Rapporteur.<sup>66</sup> However,

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<sup>61</sup> DM Smolin, 'Surrogacy as the Sale of Children: Applying lessons learned from adoption to the regulation of the surrogacy industry's global marketing of children', *Pepp. L. Rev.*, vol. 43, issue 2, 2015, pp. 265-341, <https://digitalcommons.pepperdine.edu/plr/vol43/iss2/2>.

<sup>62</sup> JKM Hanna, 'Revisiting Child- Based Objections to Commercial Surrogacy', *Bioethics*, vol. 24, no. 7, 2010, pp. 341-347, <https://doi.org/10.1111/j.1467-8519.2010.01829.x>.

<sup>63</sup> Arneson.

<sup>64</sup> M Cottier, 'Understanding the Impact of Different Concepts of Surrogate Mother for the Regulation of International Surrogacy Arrangements', *Voelkerrechtsblog*, 22 July 2016, <https://voelkerrechtsblog.org/understanding-the-impact-of-different-concepts-of-surrogate-mother-for-the-regulation-of-international-surrogacy-arrangements>.

<sup>65</sup> J Tobin, 'To Prohibit or Permit: What is the (human) rights response to the practice of international commercial surrogacy?', *Int'l & Comp. L.Q.*, vol. 63, issue 2, 2014, pp. 317-352, <https://doi.org/10.1017/S0020589314000049>.

<sup>66</sup> SR Report 2018, paragraphs 41-51.



others<sup>67</sup> argue that the treaties must be interpreted in light of their object and purpose—‘to prevent harm to children, to protect children’s rights and to promote their best interests’<sup>68</sup>—and that it is not obvious how CGS contravenes these aims, given the intention of all surrogacy arrangements is to bring much-wanted children into families that are ready to care for them as their own.<sup>69</sup> Furthermore, although it is not excluded, this intended outcome does not sit logically alongside the (minimum) prohibited purposes of sale listed in Article 3 (Optional Protocol), all of which are clearly degrading and exploitative.<sup>70</sup> Johnson goes further, arguing that following a complete and contextualised reading of both treaties, CGS in fact advances rather than contradicts the goals of the CRC set out in the Preamble—to allow children to ‘grow up in a family environment, in an atmosphere of happiness, love and understanding’<sup>71</sup>—and that there is no evidence to date that surrogacy detracts from this objective.<sup>72</sup> This argument applies equally to any attempt to bring CGS under the broad definition of trafficking in Article 35 (CRC).

CGS has been intuitively linked to trafficking in children. It is not difficult to see how: surrogacy as a transaction has been criticised as manifesting the commodification of children (and women), and commodification in turn is associated with exploitation—the very thing that anti-trafficking laws seek to prevent. However, the fact that commercial surrogacy can—*but not necessarily does*—involve exploitation, does not mean that it is therefore an act of child trafficking. Even if the process of surrogacy is deemed to commodify the child, it does not follow that such commodification was carried out for the purpose of exploitation under Article 3(c) (Trafficking Protocol). And, as demonstrated above, the CGS process itself does not meet the third element of trafficking in persons. This is not to undermine the very serious issues of both commodification of children (and women) and the exploitation of vulnerabilities of each party: the surrogate’s need to alleviate her economic position, the intending parents’ inability to form a family without ART, the child’s right to a family (i.e. parents) and citizenship, etc. These issues are of critical importance, but they are outside

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<sup>67</sup> L. Johnson, ‘Commercial Surrogacy Is the Sale of Children? An argument that commercial surrogacy does not violate international treaties’, *Wash. Int’l L. J.*, vol. 28, no. 3, 2019, pp. 701-726; P. Gerber and K. O’Byrne, ‘Souls in the House of Tomorrow: The rights of children born via surrogacy,’ in P. Gerber and K. O’Byrne (eds.), *Surrogacy, Law and Human Rights*, Routledge, Abington, 2016, pp. 81 -112

<sup>68</sup> Gerber and O’Byrne, p. 97.

<sup>69</sup> *Ibid.*

<sup>70</sup> Johnson; Gerber and O’Byrne.

<sup>71</sup> CRC Preamble.

<sup>72</sup> Johnson, p. 712.

the remit of anti-trafficking law, which refers to a specific set of actions and intentions. In an area that is emotionally sensitive, ethically controversial, and inconsistently regulated, accuracy and clarity is crucial when considering the applicability of human trafficking charges. Safeguarding against issues of commodification and exploitation in this wider sense requires the development of rigorous, comprehensive, and targeted international laws and legal bodies to effectively regulate cross-border surrogacy, and consider more closely the interaction between the private, public, and potential criminal law dimensions of assisted reproduction.

Finally, it is interesting to note that this exact confusion between ‘sale of children’ and ‘trafficking in children’ is an issue that also pervades intercountry adoption.<sup>73</sup> Indeed, intercountry adoption has often been compared to cross-border CGS as a field sharing some similar characteristics.<sup>74</sup> The HCCH’s Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>75</sup> is the main international law document regulating cross-border adoption, seeking to ensure that ‘adoptions take place in the best interests of the child’ (Article 1a) and ‘to prevent the abduction, the sale of, or traffic in children’ (Article 1b). It has often been held up as model for a future cross-border surrogacy convention.<sup>76</sup> As with CGS, it is difficult to establish the ‘purpose for exploitation’ element necessary to determine trafficking in the context of intercountry adoption—a fact conceded by those who would prefer to police the practice through anti-trafficking law.<sup>77</sup> The difficulty in establishing trafficking under Article 3(a) has led some to propose removing the ‘purpose of exploitation’ criteria, on the grounds that not all people who are trafficked are necessarily subsequently exploited, and vice versa.<sup>78</sup>

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<sup>73</sup> N Cantwell, ‘Editorial’, *ISS Monthly Review*, no. 11-12, 2005, p. 1; Mohapatra, ‘Adopting an International Convention’; DM Smolin, ‘Intercountry Adoption as Child Trafficking’, *Val. UL Rev.*, vol. 39, no. 2, 2004, pp. 281-325.

<sup>74</sup> Mohapatra, ‘Adopting an International Convention’; Smolin, ‘Intercountry Adoption’; R Scherman *et al.*, ‘Global Commercial Surrogacy and International Adoption: Parallels and differences’, *Adoption & Fostering*, vol. 40, no. 1, 2016, pp. 20-35, <https://doi.org/10.1177/0308575915626376>.

<sup>75</sup> Hague Conference on Private International Law (HCCH), *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

<sup>76</sup> Mohapatra, ‘Adopting an International Convention’; Trimmings and Beaumont, ‘International Surrogacy Arrangements’.

<sup>77</sup> DM Smolin, ‘Child Laundering as Exploitation: Applying anti-trafficking norms to intercountry adoption under the coming Hague regime’, *Vt. L. Rev.*, vol. 32, 2007, pp. 113-168; Smolin, ‘Intercountry Adoption’.

<sup>78</sup> T Obokata, *Trafficking of Human Beings From a Human Rights Perspective: Towards a more holistic approach*, vol. 89, Martinus Nijhoff Publishers, Leiden, 2006.

To date there are no proven cases of surrogacy for the purpose of subsequent exploitation. That is not to say it will not happen: There are two known cases of children being born through surrogacy to an intended parent (in both cases the father) who was subsequently found to be a convicted child sex offender.<sup>79</sup> In neither case were trafficking charges raised, and both home country authorities have concluded, following investigation, that it is in the best interests of the child to remain with the intended parent despite his convictions, that there is no evidence of harm, and that the risk of harm is low (monitoring is ongoing). In both cases, a background check would have revealed the intended father's criminal record and could have prevented the surrogacy from proceeding on grounds of suspected trafficking—for in both cases surrogacy for the purpose of subsequent exploitation was and remains a real danger. Two points emerge: firstly, that child trafficking in the context of surrogacy, albeit rare, is a real risk that must be taken seriously. Manipulating the language of child trafficking to lobby against CGS wholesale obfuscates these risks and frustrates the development of regulatory safeguards to actively prevent trafficking. Child trafficking is a devastating and serious criminal matter that must be properly understood and discussed with rigour and accuracy, rather than headline-grabbing rhetoric.<sup>80</sup> Secondly, these cases simultaneously highlight the alarming lack of oversight, and the corollary urgent need for international cooperation and robust regulation to prevent and detect harms, including human trafficking. A blanket ban cannot achieve this.<sup>81</sup> As seen in Cambodia, banning commercial surrogacy simply drove the practice underground, where there is no oversight to ensure legal, ethical, and medical care standards are being met, no dispute resolution procedures, and no mechanisms for accountability.

## Conclusion

In this paper I have sought to place anti-trafficking laws within the network of laws that impact international surrogacy. In doing so, I have shown that the language and lens of human trafficking has been used and misused to police CGS. 'Trafficking in children' has been conflated and confused with the 'sale of children' at the expense of properly considering the applicability of international

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<sup>79</sup> J Overdorf, 'Israeli Sex Offender Taps India's Booming Surrogacy Trade for Baby Girl', *The World*, 10 June 2013, <https://www.pri.org/stories/2013-06-10/israeli-sex-offender-taps-indias-booming-surrogacy-trade-baby-girl>; M Safi, 'Baby Gammy's Twin Can Stay With Australian Couple Despite Father's Child Sex Offences', *The Guardian*, 14 April 2016, <https://www.theguardian.com/lifeandstyle/2016/apr/14/baby-gammys-twin-sister-stays-with-western-australian-couple-court-orders>.

<sup>80</sup> J Millbank, 'Gammygate II: Surrogacy law must not be based on the latest tabloid story', *BioNews*, 27 April 2015, [https://www.bionews.org.uk/page\\_95013](https://www.bionews.org.uk/page_95013).

<sup>81</sup> Bromfield and Rotabi, p. 131.

anti-trafficking laws. Focussing on that, I have demonstrated that CGS itself does not meet the elements of the crime of trafficking in children in accordance with international law, and nor is it clear that CGS falls within the ambit of the sale of children offence. Yet, states and institutions have inaccurately and misleadingly used the weight and/or rhetoric of child trafficking laws to discourage cross-border CGS—i.e. reproductive tourism—wholesale. This is problematic for two reasons.

Firstly, it is a misuse of the law on child trafficking; in an area already fraught with ambiguity, manoeuvring anti-trafficking laws to achieve outcomes beyond those which they are designed to target adds significantly to the legal uncertainty faced by already vulnerable parties. When there is no evidence indicating or suggesting subsequent exploitation (of the child, in this case), anti-trafficking laws do not apply. The sweeping use of anti-trafficking laws to target CGS is rather an attempt to assert a particular ethical position vis-à-vis CGS—in short, to stop it. Sovereign states are of course free to legislate nationally as they wish; however, the reality is there is both a demand for ART, and people and places willing to provide these services. Reproductive tourism for CGS needs to be addressed with due care and thought, rather than ignored, outsourced, or indirectly banned through anti-trafficking laws. And even countries who specifically ban surrogacy practices must confront how to handle reproductive tourists returning home.<sup>82</sup>

Secondly, the consequences of employing anti-trafficking laws in the context of CGS must be examined. For the Spanish families trapped in Ukraine, it was the child—left legally stateless and parentless for weeks to months—who was most affected. Likewise, in Cambodia, children born via CGS have been separated from their intended, and perhaps genetic, parents and placed in the care of a surrogate who a) did not intend to expand her family, and b) far from alleviating her economic position, will now be under even more financial strain to provide for a larger family. In both instances the intended parents are indirectly punished (the threat of/actual loss of their child), and in the latter, surrogates were directly targeted. It is difficult to see how these outcomes are defensible or desirable for any of the stakeholders, including the states. And yet, commercial surrogacy continues; Spanish families are travelling to Ukraine<sup>83</sup> and CGS operates underground in Cambodia.<sup>84</sup>

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<sup>82</sup> Mohapatra, 'Adopting an International Convention'; S Bassan, 'Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions', *Mich. J. Int'l L.*, vol. 37, issue 2, 2015, pp. 299-349.

<sup>83</sup> Grytsenko.

<sup>84</sup> M Cook, 'More Surrogate Mothers Jailed in Cambodia', *Bioedge*, 28 July 2019, <https://www.bioedge.org/bioethics/more-surrogate-mothers-jailed-in-cambodia/13151>.

Surrogacy is about building families. To view CGS simply through the framework of trafficking or the sale of children is to miss the point that distinguishes this practice. A surrogate child is planned as a welcome addition to the intended parents' family. Here, the intention is to build a family; in trafficking, the intention is to exploit a child. Whilst existing laws on human rights and trafficking could provide a scaffold for the regulation of cross-border CGS, ultimately, the unique ethical and practical issues raised by this practice require targeted, detailed laws that respond on point to the vulnerabilities of each party to prevent exploitative practices manifesting and to promote safe practices that protect the interests of all parties. Such an undertaking, however, goes far beyond the purpose and function of human trafficking laws.

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