

Adapting International Standards and Ethical Principles to New Reproductive Technologies (NRTs) and Scientific Advances

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Abstract

The advancement of new technology raises questions about ethical issues. Among them, human health, especially birth, is more frequently at the center of the discussions. Indeed, new technology have the potential to radically alter human nature, such as modifying human reproduction. In recent years, it has been demonstrated that new technology can provide maternity surrogacy, as well as gene editing and the possible development of an artificial uterus. The legislative response to these issues is still fragmented and poorly regulated, inhibited by moral arguments as well as legal systems' inability to adapt to decades-old issues like abortion. A lack of permissiveness on the side of some governments is frequently the source of disadvantages. In the case of maternal surrogacy, for example, there are frequently documented cases of abuse and corruption as a result of legislative differences across jurisdictions. Indeed, the potential of surrogacy in certain nations encourages individuals to travel overseas and use artificial insemination treatments that are not authorized under their domestic laws. In addition, it should be noted that the women who participate in these procedures are frequently poor and forced to accept. In this regard, it would be ideal if states could adapt their laws to scientific advancement on reproduction. Looking ahead, similar harmful trends might be seen in the development of artificial reproductive systems, which has recently received research funding. As a response, the article proposes to look at how the law should adapt to latest innovative advancements in terms of new reproductive technologies, examining what is now achievable and what could happen in the near future from an ethical perspective.

Keywords: *New Reproductive Technologies; Government Scientific Adaptation; Bioethics; Women Health; International Health Law.*

Résumé

Le progrès technologique soulève des questions d'ordre éthique. Les nouvelles technologies ayant le pouvoir de modifier radicalement la nature humaine, par exemple, en modifiant la reproduction humaine ; la santé humaine, et notamment la naissance, sont fréquemment au centre de discussions éthiques. Ces dernières années, il a été démontré que les nouvelles technologies peuvent permettre la maternité de substitution, ainsi que l'édition de gènes et le développement d'utérus artificiels. La réponse législative à ces questions est encore fragmentée. Somme toute, le cadre légal est mal réglementé, inhibé par des arguments moraux ainsi que par l'incapacité des systèmes juridiques à s'adapter à des questions vieilles de plusieurs décennies (comme l'avortement). Un manque de

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permissivité de la part de certains gouvernements est souvent à l'origine des inconvénients. Dans le cas de la maternité de substitution, par exemple, des cas d'abus et de corruption sont fréquemment documentés en raison des différences législatives entre les juridictions. En effet, la légalité de la maternité de substitution dans certaines nations encourage les individus à se rendre à l'étranger et à utiliser des traitements d'insémination artificielle qui ne sont pas autorisés par leurs lois nationales. En outre, il convient de noter que les femmes qui participent à ces procédures sont souvent pauvres et contraintes d'accepter. À cet égard, l'idéal serait que les États puissent adapter leurs lois aux progrès scientifiques en matière de reproduction. À l'avenir, des tendances similaires pourraient être observées dans le développement de systèmes de reproduction artificielle. Cet enjeu a d'ailleurs récemment reçu des fonds de recherche. En guise de réponse à ces problèmes, l'article propose d'examiner comment la loi devrait s'adapter aux dernières avancées innovantes en termes de nouvelles technologies de reproduction, en examinant ce qui est réalisable à l'heure actuelle et ce qui pourrait se produire dans un avenir proche.

Mots-clés : *Nouvelles technologies de reproduction, adaptation juridique aux avancées scientifiques, gestation pour autrui/ maternité de substitution, droits des femmes, droit international de la santé.*

Introduction

The development of new reproductive technologies (NRTs) must be addressed by international law since NRTs concern the international protection of human rights. Without pretending to be exhaustive, the right to health (both physical and mental), as well as the right to dignity, autonomy, and personal development are connected to NRTs. The rights of women who choose to undergo these practices, as well as the children born as their result, are particularly worthy of protection. In fact, NRTs can lead to forms of slavery, child trafficking, as well as medical and mental struggles for both women and children.

Currently, international law does not regulate NRTs uniformly. Indeed, legislation varies greatly among countries, resulting in conflict situations that frequently necessitate judicial intervention. Courts, along with certain guidelines provided by organizations – such as the World Health Organization (WHO) or bioethical research institutes – are one of the most important regulatory instruments in this regard. For example, the European Court of Human Rights (ECHR) has intervened on several occasions to protect the right to citizenship of children born through surrogacy.¹ Similarly, the WHO has established both practical standards – which unify the use of NRTs among governments – and ethical guidelines, which increase awareness about the value of

¹ ECHR, *Gestational Surrogacy – Judgments and decisions of the Court* (April 2022) <https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf> [accessed 4 July 2022].

adopting new technology to address concerns like as the rising infertility rate. Indeed, the WHO has suggested that fertility treatments and access to artificial reproductive methods be made more widely available across the world.²

In recent years, the increased use of reproductive technologies, due both to increased sterility and homosexual couples' desire to have children, has posed various ethical and legal dilemmas. Indeed, the use of reproductive technologies is causing a multitude of circumstances that are unexpected and must be addressed. For example, consider the current situation in Ukraine, where babies born via surrogate mothers are being held in subterranean nurseries waiting for their intended parents.³ In this case, what should governments do? Should they forcibly remove women from their homes to protect children? Should they reassure women that if they have children in neighbouring states, they will not be considered biological mothers? Furthermore, given this situation, is it realistic to presume that the hazards of employing NRTs exceed the benefits?

Concerns regarding the risks of NRTs included the possibility that they may significantly modify human reproduction and nature through gene editing and the development of artificial wombs. The purpose of this essay, however, is not to evaluate whether the use of NRTs is right or wrong, or to highlight the risks and benefits, but to emphasize how critical it is nowadays to establish international standards able to equally protect the rights of all those involved in these practices. Because the widespread adoption of these technologies cannot be stopped, I would like to highlight that the debate over whether to prohibit or allow their use must now be postponed in favour of research into strategies to protect the women and children involved. Increasing use on a global scale hence necessitates intergovernmental cooperation.

The essay will begin by analysing the current issues with NRTs. The discussion will next move to evaluate the existing international legal framework. Then it will go through the situation of Ukraine's surrogate mothers during the conflict, to demonstrate how critical it is for international law to create shared standards among states. Finally, the paper will examine potential solutions for ensuring human rights protection in light of the existing situation and future developments.

² "Infertility" (*World Health Organization*, September 14, 2020) <<https://www.who.int/news-room/fact-sheets/detail/infertility>> [accessed 4 July 2022].

³ Andrea Rosa, "Surrogate babies born in Ukraine wait out war in basement", *Apnews* (20 March 2022) <<https://apnews.com/article/russia-ukraine-kyiv-europe-6dce6502a0301638020e313b09cf6137>> [accessed 9 July 2022].

Part 1. NRTs and Current Issues

In recent decades, there has been significant technological progress in human reproduction. One of the variables that have contributed to increased research is the rise in cases of infertility. Indeed, there has been a one percent decrease in the global rate of fertility, raising awareness for future generations.⁴ This alarming number demonstrates how, despite the fact that their use is still widely contested today, both morally and legally, NRTs may be a lifeline for many couples who desire to have a child.

The use of reproductive technology began in 1978 in England with the Louise Joy Brown case – the first child born using the in vitro fertilization procedure (IVF) – and has since grown significantly.⁵ The IVF program, for example, now allows certain future parents' expectations to be fulfilled, such as the possibility to choose the sex of future children, secure their health, or even reach the frontier of gene editing by selecting the baby's future somatic traits. Furthermore, significant progress has been made in the development of additional models of assisted reproduction, such as gestational surrogacy and the creation of artificial uteri, which has intensified the debate around these subjects. Among the most contentious issues is whether IVF should be authorized just as a therapy for infertile couples or in other cases. For instance, it is currently being debated whether homosexual couples can have children using NRTs. In addition, the possibility of employing only the couple's gametes or even those of donors complicates the issue, since it could appear to be more ethical that the child born genetically belongs to the couple. Other difficulties include the definition of the embryo as well as the limits of modification and genetic editing. These possibilities pose questions regarding the ethics of selection and how diseases, deformities, or particular disabilities like Down syndrome will be considered in the future.

⁴ Shanna H. Swan and Stacey Colino, "Reproductive Problems In Both Men And Women Are Rising At An Alarming Rate" (2021) *Scientific American* <<https://www.scientificamerican.com/article/reproductive-problems-in-both-men-and-women-are-rising-at-an-alarming-rate/>> [accessed 14 May 2022]; Marcia Inhorn and Frank van Balen, *Infertility Around The Globe: New Thinking On Childlessness, Gender, And Reproductive Technologies* (1st ed., University of California Press, 2002); "Fertility Rate, Total (Births Per Woman)", (*Data.worldbank.org*, 2022) <<https://data.worldbank.org/indicator/SP.DYN.TFRT.IN>>.

⁵ Today the most used techniques are in vitro fertilization (IVF); Embryo transfer; Gamete intrafallopian transfer; Zygote intrafallopian transfer; Tubal embryo transfer; Gamete and embryo cryopreservation; Embryo donation and gestational surrogacy: Maureen McNeil, Ian Varcoe and Steven Yearley, *The New Reproductive Technologies* (Macmillan, 1990); Gaylene Becker, *The Elusive Embryo: How Women and Men Approach New Reproductive Technologies* (University of California Press, 2000).

In recent years, the NRTs have also raised questions involving private international law – such as the recognition of a child’s legal status and the citizenship of a child born through surrogacy –, and international human rights law. There are several concerns in this latest field since numerous rights are implicated. The use of the techniques, for instance, is frequently associated with the problem of contributing to the increase of socioeconomic disparities, racism, and gender gaps.⁶

All of these hazards pertain to NRTs in general, but in this article, I will focus on gestational surrogacy in particular since I believe it best represents the current ethical-legal debate on the issue. In fact, through this example, most of the concerns related with the use of NRT may be addressed: the possibility of exploitation of women, the hypothetical right to have a child, the morality of reproduction, and the tangible consequences that these practices can have on all those involved.

Part 2. Gestational Surrogacy

Surrogacy is described as the procedure of giving birth as a surrogate mother or organizing a surrogate mother’s delivery. Surrogacy is a well-known practice, at least in its classic version, in which pregnancy occurs with the surrogate mother’s egg and the purported father’s sperm.⁷ The first mention of the process in fact can already be found in the Bible in the “Book of Genesis” in the story of Abraham and Sarah, who, unable to have children, turned to their servant Hagar in order to conceive a child for the couple.

Active research in this field has led to development of a new type of surrogacy, known as gestational, in which the surrogate mother is not the child’s genetic mother. Indeed, the gametes may belong to the asking couple or have been provided by third people. Surrogacy can occur for free – known as altruistic – or for economic remuneration in favor of the surrogate – known as commercial. The first form is more widely approved by governments since it is seen to be safer for women. In altruistic surrogacy, gestation is typically carried out by someone close to the individual who wants to have a child. The lack of economic remuneration for gestation is often seen as a factor capable of decreasing global socioeconomic inequities among women and promoting a more ethical and moral approach to human existence and the role of women. According to those who support this idea, commercial surrogacy instead is a commercialization of

⁶ Joseph G Schenker, *Ethical Dilemmas in Assisted Reproductive Technologies* (De Gruyter, 2011); Annette Burfoot and Derya Güngör, *Women and Reproductive Technologies: The Socio-Economic Development of Technologies Changing The World* (1st ed, Routledge, 2021).

⁷ Hrafn Ásgeirsson and Salvör Nordal, “Reproductive Technology and Surrogacy: a Global Perspective” (2015) TemaNord <<https://doi.org/10.6027/TN2015-561>> [accessed 14 May 2022].

the female body and a patriarchal weapon that violates women's rights. On the other hand, feminist groups urge for better regulation because they see it as an opportunity for women's empowerment and autonomy. For example, with this type of income, they may start their own businesses or studies, something they would be probably unable to do with other jobs.⁸

From my perspective, rather than being entangled in ethical considerations, I believe that the traditional debate about surrogacy should be replaced with discussions about possible solutions and laws to protect women and children from breaches of their human rights. This practice has advanced much too far to be stopped. Limiting the possibilities of finding legal remedies will only enhance clandestinity, leading to more human rights breaches and less control by authorities.

The central problem with surrogacy is that not all states prohibit it. It is, for instance, legal in Ukraine, Russia, the United Kingdom, several states in the United States, and Southeast Asia.⁹ The disparity in national restrictions inevitably leads to an increasing phenomenon known as procreative tourism, in which couples or individuals go to countries where surrogacy is legal in order to have a child.¹⁰ Whether it is free or commercial, the danger of the technique is clear. In the first situation, women may be forced to comply with the practice by family members, whereas in the second case, the choice may be motivated by an extreme need for money to survive. In this sense, surrogates (re)produce children for upper classes and privileged nations, implicating such phenomena as neoliberal globalization, stratification, exploitation, racism, and nationalism.¹¹

⁸ Alessandra Di Martino, *Pensiero femminista e tecnologie riproduttive* (Mimesis, 2020); Mariangela Barletta, "Recensione a A. DI MARTINO, *Pensiero femminista e tecnologie riproduttive*. Autodeterminazione, Salute, Dignità, Milano, Mimesis, 2020, pp. 212 (2020) *Nomos – Le attualità nel diritto* <<https://www.nomos-leattualitaneldiritto.it/nomos/mariangela-barletta-recensione-a-a-di-martino-pensiero-femminista-e-tecnologie-riproduttive-autodeterminazione-salute-dignita-milano-mimesis-2020-pp-212/>> [accessed 9 July 2022]; Shulamith Firestone, *The Dialectic Of Sex: The Case For Feminist Revolution* (Verso, 2015).

⁹ "The United States Surrogacy Law Map" (*Creative Family Connections*, 2022) <<https://www.creativefamilyconnections.com/us-surrogacy-law-map/>> [accessed 14 May 2022]. "INTENDED PARENTS: International Surrogacy Laws By Country" (*Surrogate.com/Information About Surrogacy*, 2022) <<https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/what-are-the-international-surrogacy-laws-by-country/>> [accessed 14 May 2022]; "Surrogacy: Where In The World?" (*ORM Fertility*, 2022) <<https://ormfertility.com/surrogacy/surrogacy-where-in-the-world/>> [accessed 9 July 2022].

¹⁰ "What's Wrong With Surrogacy?" (*Center for Bioethics and Culture Network*, 2022) <<https://cbc-network.org/wp-content/uploads/2022/02/What-is-Wrong-with-Surrogacy-Center-for-Bioethics-and-Culture.pdf>> [accessed 14 May 2022]; Marcia C Inhorn and Pasquale Patrizio, "Procreative Tourism: Debating The Meaning Of Cross-Border Reproductive Care In The 21St Century" (2012) 7 *Expert Review of Obstetrics & Gynecology* 509-11 <<https://doi.org/10.1586/eog.12.56>> [accessed 14 May 2022]; Rachel Cook, Shelley Day Sclater, and Felicity Kaganas, *Surrogate Motherhood: International Perspectives* (Hart Publishing, 2003).

¹¹ Michal Rachel Nahman, "Reproductive Tourism: Through the Anthropological 'Reproscope'" (2016) 45 *Annual Review of Anthropology* 417-32 <<https://doi.org/10.1146/annurev-anthro-102313-030459>> [accessed 14 May 2022].

Furthermore, the problems are not limited to the rights and protection of women's rights but extend to those of children. Indeed, the lack of standard regulation among states leads to difficulties in recognizing the child born in another state using techniques that are not allowed in the territory where citizenship is requested. This problem is related to the fact that the concept of family is evolving, but most states have not yet adapted to these societal changes. National private laws and their interpretations generally refer to the concept of a heterosexual and married couple which, however, clashes with contemporary culture.¹²

As a result, the lack of supra national regulation of surrogacy will continue to produce additional challenges as situations change and new ones emerge. This is an evident fact that we can already observe in the current conflict in Ukraine, where surrogate mothers and children are facing unprecedented difficulties. NRTs are generating new realities that raise a variety of challenges that the law must address. The following section will look at how international law is responding to NRTs now.

Part 3. International Framework

NRTs are not regulated by a global convention that establishes uniform standards. However, as previously noted, the advancement of NRTs would necessitate this type of international law adaptation because it would aid in the resolution of some concerns, such as benefits for the mental health of persons who desire to have a child; prevention of fetal diseases, when possible; easier recognition of children's citizenship; and protection of women from exploitation.

Reflecting on these issues may lead to the question of whether it is possible to establish a right to have a child in international law. Given that this right is inextricably linked with the right to health, and given that the inability to have a child may undermine some people's mental health, a solution may be to include this within existing conventions such as the *WHO Constitution*, the *Universal Declaration of Human Rights*, and the *International Covenant on Economic, Social, and Cultural Rights*.¹³ In this regard, the WHO has recently indirectly addressed this idea, in light of the growing

¹² For example, although Italian law no. 76/2016 allows marriages between people of the same gender, it does not authorize them to adopt children.

¹³ The right to health is an integral part of internationally recognized fundamental human rights: the right of every person to enjoy the best conditions of physical and mental health that he is able to achieve was first mentioned in 1946 in the *Constitution of the WHO*, whose Preamble defines the concept of health as "a state of complete physical, mental and social well-being and not merely absence of disease or infirmity". The Preamble also states that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being, without

cases of infertility risking to undermine the recognition of the right to live according to the best mental and physical health possible, as well as to have a family. Indeed, WHO has emphasized the need of employing NRTs as well as the need for equitable resource allocation to manage infertility. Although assisted reproductive technologies have been available for some time, with over five million kids born using procedures such as in vitro fertilization, they are still mostly unavailable and inaccessible in many nations, particularly in low and middle-income countries (LMIC).¹⁴ Currently the WHO has not published specific recommendations in this direction, but since this is a public health issue, it is feasible that it may do so in the near future, namely by outlining how to make access NRTs equal between nations.

However, there is no total lack of regulatory tools at the national or regional levels: the problem is that they are frequently insufficient and inconsistent. As a result, the regulation of these practices is fragmented, potentially leading to inequalities among individuals, and jeopardizing the most vulnerable subjects. Fortunately, by releasing studies, ideas, and statistics, national or regional professional organizations make significant contributions to the definition of common standard practices. For example, the *Agence la Biomédecine* in France; the Fertility Society of Australia and New Zealand (FSA); the Human Fertilization and Embryology Authority (HFEA) in the United Kingdom; and the *Red Latinoamericana de Reproducción Asistida* (RLRA) in Latin America.¹⁵

A significant contribution is also made by the courts, which have often intervened to resolve issues such as those relating to the minor's citizenship. Indeed, they attempt to establish broad guidelines to settle disputes between parents and governments. In Europe, for example, the ECHR, which is the guarantee of the *Convention on Human Rights*, plays an important role.¹⁶ The Court has spoken out multiple times on matters involving gestational surrogacy agreements, which

distinction of race, religion, political belief, economic or social condition". The *International Covenant on Economic, Social and Cultural Rights* define the right to health as a human right, respectively in arts. 25 and 12. Subsequently, other international treaties have recognized or referred to the right to health or some of its components, such as the right to medical care.

¹⁴ "Infertility" (*World Health Organization*, September 14, 2020) <<https://www.who.int/news-room/factsheets/detail/infertility>> [accessed 14 May 2022].

¹⁵ For example, the International Federation of Fertility Societies, a non-governmental organization that works with the WHO, publishes reports every three years. See International Federation of Fertility Society, "International Federation of Fertility Societies" Surveillance (IFFS) 2019: Global Trends in Reproductive Policy and Practice, 8th Edition" (2019) 4 Global Reproductive Health <https://journals.lww.com/grh/Fulltext/2019/03000/International_Federation_of_Fertility_Societies_3.aspx> [accessed 14 May 2022].

¹⁶ ECHR, *Gestational Surrogacy - Judgments and decisions of the Court* (April 2022) <https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf> [accessed 14 May 2022].

raise issues primarily under art. 8 of the *European Convention on Human Rights* (Right to respect for private and family life), which states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁷

The ECHR pursued to determine whether the interference by the authorities with the applicants' private and family life was necessary in a democratic society and a fair balance was struck between the different interests involved. In a few significant cases, the ECHR has recognized affinity for children born through surrogacy whose commissioning parents were citizens of states that prohibited the practice. For instance, in the cases *Mennesson v. France* and *Lebassee v. France*,¹⁸ the Court stated that the absolute denial of acknowledgment of a parent-child connection (particularly where one of the parents was genetically related to the child) violated children's rights under art. 8 of the *Convention*. The twins born through surrogacy in the United States were regarded the legal offspring of the patrons in that area but not in France, which does not recognize children born through surrogacy. The Court noted that, even if states have a broad margin of appreciation because there is no European agreement on enabling or recognizing connection in surrogacy arrangements, they recognize the child's identification as a basic right, reducing the margin of appreciation for states.¹⁹ In other judgments, the Court determined that states may not be required to allow children born to surrogate mothers to enter their territory unless the national authorities had a previous chance to complete specific legal checks. In the *Campelli v. Italy* case, for example, the Court found no breach of art. 8 since the Italian authorities operated in conformity with the legal system, establishing that there was no violation of the child's rights.²⁰

Courts have also made important contributions in connection to other issues that come from the use of NRTs that may jeopardize children's rights. For example, in the Baby Gammy case in Australia, where a child with Down syndrome born to a Thai surrogate mother was claimed

¹⁷ Art. 8 of the *European Convention on Human Rights*.

¹⁸ *Mennesson v. France* app. n. 65192/11 and *Lebassee v. France* app. n. 65941/11.

¹⁹ For similar cases see *Foulon and Bouvet v. France* (ECHR, 21 July 2016), *Laborie v. France* (ECHR, 19 January 2017).

²⁰ *D. v. France* app. no 11288/18 (ECHR, 16 July 2020), *Paradiso and Campanelli v. Italy*, app. no. 25358/12, (ECHR, 24 January 2017).

to have been abandoned by the intended Australian parents, or Baby M. case in India, where a child born to an Indian surrogate remained stateless for a long time when her parents separated shortly after the surrogacy and the intended mother refused to acknowledge him.²¹

UN agencies, human rights committees, and other relevant international law bodies also make significant contributions to the use of NRTs. In two reports, the UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography, and other child sexual abuse material, had given significant attention to the topic of surrogacy.²² In 2019, the Special Rapporteur presented a thematic report to the General Assembly on safeguards for the protection of the rights of children born from surrogacy arrangements.²³ This report was written as a follow-up to the 2018 thematic report on surrogacy and sale of children presented at the 37th session of the Human Rights Council.²⁴ The Special Rapporteur's report to the Human Rights Council underlined the existence of abusive practices in both unregulated and regulated contexts, and gave analysis and suggestions on how to enforce the prohibition on the sale of children as it applies to surrogacy.²⁵ The Special Rapporteur noted that “[t]he international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children”.²⁶ Among her primary suggestions is the adoption of clear and comprehensive laws prohibiting the sale of children in the context of surrogacy, as specified by the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography*. Furthermore, the Special Rapporteur suggested that states should guarantee that a court or competent authority makes a post-birth best interests of the child determination in all paternity and parental responsibility determinations involving a surrogacy agreement. She advocates for the protection of all surrogate-born children, regardless of the legal status of the

²¹ Cyra Akila Choudhury, *Transnational Commercial Surrogacy: Contracts, Conflicts, and the Prospects of International Legal Regulation* (2016) Oxford Handbook Online <10.1093/oxfordhb/9780199935352.013.38> [accessed 10 May 2022]; Leslie R. Schover, “Cross-Border Surrogacy: The Case of Baby Gammy Highlights the Need for Global Agreement on Protections for All Parties” (2014) 102 *Fertility and Sterility* 1258 <<https://doi.org/10.1016/j.fertnstert.2014.08.017>> [accessed 14 May 2022].

²² The mandate of the Special Rapporteur was created in 1990 and is the only mandate of the UN Special procedures system with an exclusive focus on children.

²³ UN General Assembly, *Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (A/74/162, 2019).

²⁴ UN General Assembly, *Report of the 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, 2018)

²⁵ “Surrogacy” (*Special Rapporteur on the sale and sexual exploitation of children, OHCHR*) <<https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>> [accessed May 14, 2022].

²⁶ UN General Assembly, *Report of the 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, 2018).

surrogacy arrangement under national or international law. Finally, the Special Rapporteur encourages other human rights mechanisms, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women (CEDAW), as well as UN entities, to contribute to surrogacy discussions by conducting additional research in order to develop human rights-based norms and standards to prevent abuses and violations.

Human rights organizations have frequently equated gestational surrogacy to child trafficking or sale, and hence as a technique that violates human rights.²⁷ In this sense, the Committee on the Rights of the Child, which has consistently expressed that surrogacy and NRTs activities can lead or amount to the sale of children. It has also provided recommendations on how to deal with child protection in accordance with art. 35 of the *Convention on the Rights of the Child* which states that “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.”²⁸

In addition, recently the Aja Conference on International Law (HCCH) is providing an important contribution to NRTs and surrogacy in particular. In 2015, the HCCH’s Council on General Affairs and Policy (CGAP) created a special group to work about this issue.²⁹ The group in some occasion proposed that the *Hague Convention on Child Protection or the Cooperation in Intercountry Adoption (Adoption Convention)* could serve as a useful model for a surrogacy convention.³⁰ The *Adoption Convention*, without a doubt, arose from comparable conditions, such as an increase in transnational adoptions, the expansion of private adoption agencies and intermediaries, and the uncertain position of kinship and citizenship. The relationship, though, is not so evident. In reality,

²⁷ Nishat Hyder-Rahman, “Commercial Gestational Surrogacy: Unravelling the Threads between Reproductive Tourism and Child Trafficking” (2021) *Anti-Trafficking Review* 123-43 <<https://doi.org/10.14197/atr.201221168>> [accessed 14 May 2022].

UN General Assembly, Resolution 55/25, *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) [accessed 9 July 2022].

²⁸ The *United Nations Convention on the Rights of the Child*, 20 November 1989 (UNCRC): e.g., arts 2, 3, 7, 8 and 9. The committee recently expressed some considerations regarding the situation in Cambodia, appreciating the government’s efforts to manage the situation in the state.

²⁹ In March 2021, CGAP extended the mandate of the Experts’ Group by one year, to allow submission of its final report to CGAP at its 2023 meeting. “The Parentage / Surrogacy Project” (HCCH) <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>> [accessed May 14 2022].

³⁰ Hague Conference on Private International Law (HCCH), Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising From International Surrogacy Agreements* (2012) 58 -63 <<https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>> [accessed 14 May 2002].

unlike adoptions, surrogacy frequently involves a genetic relationship between the surrogate and the future child's parents. Furthermore, most surrogacy arrangements need establishing of relationships with agencies and surrogates. Because the baby does not have legal residency, there are no guaranties as there are in adoption cases. Instead, it would be useful to issue particular measures to protect women, children and intended parents. These measures could take the form of providing international standards that agencies should follow.³¹

The relevance of these arguments must also be read in relation to the conflict between Russia and Ukraine, given how the problems associated with the employment of NRTs in general have been intensified in this context. Ukraine, as is well known, allows surrogacy and is a popular destination for couples looking to have a child. One of the conflict's unexpected consequences is that many babies born through surrogacy procedures are placed in 'nurseries' in subways, waiting for their parents to pick them up. This is accompanied by the fact that many documents have been lost, making reconciling the family problematic.³² The difficulties of transporting children had already occurred during the Covid-19 pandemic, when international travel restrictions made travel difficult. In the case of this conflict, however, the problem has been aggravated by the inclusion of ethical considerations. For example, we could wonder whether the contract between agencies, parents, and surrogates requires surrogates to leave their territory during the conflict to save their own and the baby's life.

The extent of the surrogacy agreement is a tricky matter even in ordinary times, but it becomes even more challenging during emergencies. For this reason, providing international standards would be necessary. Generally, the contract has been widely criticized as a modern type of slavery in which the woman is forced to eat and behave in a certain way for the sake of the baby's health. Indeed, they will face financial penalties if they fail to meet their contractual obligations.³³

Aside from the extent of the agreements, the current situation in Ukraine underlines the problem of disparities in surrogacy laws between nations and how to deal with them. What would

³¹ *Ibidem*, 19 (Cyra Akila Choudhury).

³² Susan Dominus, "It's a Terrible Thing When a Grown Person Does Not Belong to Herself" *The New York Times* (3 May 2022) <<https://www.nytimes.com/2022/05/03/magazine/surrogates-ukraine.html>> [accessed May 14, 2022]; Goswami Lopamudra et al., "The Impacts of the COVID-19 Pandemic on Surrogacy in India: The Role of Social Work" (2021) 20 *Qualitative Social Work* 472-78 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8261337/>> [accessed May 14, 2022].

³³ Michael Wells-Greco, *The Status of Children Arising from Inter-Country Surrogacy Arrangements* (The Hague, The Netherlands: Eleven International Publishing, 2015).

happen if a refugee mother gave birth in a nation where surrogacy is prohibited, such as Poland, since she would automatically become the child's mother? Is adoption an option? Who should be in charge of resolving such a disagreement?

The conflict's influence might potentially have an impact on the surrogacy industry in other states. Ukraine may end up joining the European Union, as expected. Since surrogacy is not legal in Europe, how would this situation be handled? Prohibiting the use of surrogacy in Ukraine could have repercussions in other countries where it would be still permitted or uncontrolled. Southeast Asian countries, for example, which are popular for cross-border tourism, might be at the core of human rights violations. To avoid this butterfly effect, it is essential to anticipate these hypotheses and set international standards.

Conclusion

The aim of this article was to demonstrate the meaningful implications of adopting international rules and protocols to regulate the use of NRTs in general, and gestational surrogacy in particular. The first section discussed how these practices potentially jeopardize human rights, especially those of women and children. NRTs, in fact, have the potential to undermine a number of fundamental international principles expressed in human rights declarations and conventions, such as the right to health and dignity. Due to the fact that international law does not recognize the right to have a child or the right to receive services such as surrogacy, each state enacts its own legislation, leading to inequalities. As is well known, this results in a number of human rights issues, including the possibility of women being exploited and children being stateless. Because Ukraine is a popular location for 'procreative tourism,' these concerns have lately been highlighted in the conflict between Russia and Ukraine. The weakness of surrogacy agreements is demonstrated in this scenario. Given that these agreements are not universally recognized, it is unclear what their scope is. Indeed, they risk limiting the rights of women by compelling them to adopt specific behaviors in accordance with the contract, as well as children, who are not completely safeguarded. It is unclear, for example, what happens if the couple no longer intends to 'receive' the baby born through a surrogate mother. In dealing with particular issues, it has been demonstrated that court decisions and recommendations given by institutions and organizations provide a vital contribution to the resolution of various issues (such as those of the United Nations Special Rapporteur on the sale and sexual exploitation of children). However, in light of technological advances, this is insufficient to secure human rights protection. In fact, most of the issues associated with the use of NRTs are expected to increase in the future as new reproductive

technologies emerge, creating new situations and debates. The University of Eindhoven, for example, is developing an incubator capable of making the fetus independent before six months (the period after which the embryo is considered capable of surviving outside the mother's womb). This circumstance would undoubtedly result in a (re)evaluation of the concept of fetal viability and, as a result, a (re)definition of some terms, such as the one during which it would be legal in some jurisdictions to abort.³⁴ Furthermore, significant progress has been made in the field of embryonic culture, where technological advancements are permitting embryos to live, in certain laboratories, for more than 20 days (while up to now, it is possible until 14 days). As a result, what constitutes an ethically acceptable standard would be widely redefined.

So, what could the international order do right now to protect human rights? Should it acknowledge the right to have children? Should there be an international treaty that makes it mandatory to have a national law that defines the use of NRTs in a cohesive way? I feel that both questions should have negative answers at the moment. Indeed, recognizing a right to have a child sounds premature, exacerbated by aspects of multiculturalism related to the restrictions of rights granted to homosexual couples in some jurisdictions. Similarly, it appears doubtful that national rules of some countries may regulate the use of NRTs without forbidding them. However, international law could benefit from the establishment of programs capable of providing more public information about NRTs to enable both governments and future parents to understand the dangers and benefits of the techniques. Furthermore, in the case of surrogacy, it is critical to establish a consistent extent of the agreements in order to settle the legal concerns in advance.³⁵ Finally, international organizations may be crucial in improving inter-state cooperation. Given that NRTs are also linked to the worldwide public health problem of increasing infertility, WHO, for example, might play an essential role in this process. What is evident for now is that the ethical and moral debate between those who want to completely ban the use of certain reproductive technologies and others who support them, must give space to the necessity to address the current and future challenges that they present. Indeed, it is no longer possible or useful to impede scientific advance.

³⁴ “Artificial Womb” (*Eindhoven University of Technology*) <<https://www.tue.nl/en/research/research-groups/cardiovascular-biomechanics/artificial-womb/>> [accessed May 12 2022].

The project received a Future and Emerging Technologies grant of the European program Horizon 2020 of almost 3 million euros. In this project the researchers plan to finish a proof-of-principle in 5 years.

³⁵ Daniela Bandelli et al., *Raising Awareness on Gestational Surrogacy Among Vulnerable Women in Developing Countries* (2021) <<https://c-fam.org/wp-content/uploads/Raising-Awareness-on-Gestational-Surrogacy-3.16.21.pdf>>; Noelia Igarada González, “Legal and Ethical Issues in Cross-Border Gestational Surrogacy” (2020), 113(5) *Fertility and Sterility* 916-19 <<https://doi.org/10.1016/j.fertnstert.2020.03.003>> [accessed 15 May 2022].