

Project



International Convention for the abolition of surrogacy

PART 1 : INTRODUCTION

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In the 21st century, while the situation of women around the world is improving in some respects, it is also experiencing many obstacles and even setbacks. Despite United Nations declarations and the commitment of some States to gender equality, inequalities remain persistent. Political and legislative measures have not succeeded in undermining these structural inequalities, which are still nourished by sexist norms and representations present in all societies, in all social categories, in all communities. Many harmful practices are still used against women and girls, aimed at controlling their bodies and their lives, in order to maintain women in social, economic and political positions of inferiority, and to exploit their reproductive capacity and work.

The instrumentalization of girls and women has made it possible to create markets in which they are the raw material. The practice of surrogacy, highlighted by the development of medically assisted procreation, is now a market based on the use of women, in the name of sexist and misogynistic clichés. This practice consists of a woman carrying out a pregnancy with the aim of separating herself from the child at birth, to hand it over to the people who asked her to give birth to it. It is based on (i) a patriarchal representation of women and their bodies as fragmented and fragmentable, and (ii) the exploitation of women's reproductive capacity in the name of gender bias against them, including their innate desire to give to others and their sense of sacrifice. In so doing, surrogacy reinforces and consolidates the gender norms and representations that underlie the structural and enduring inequalities between women and men.

Far from being just an individual act, this social practice is implemented by human reproduction companies, in an organised system of production, including laboratories, doctors, lawyers, agencies, brokers. This system needs women as means of production and even their bodies as a reservoir of raw materials, so that pregnancy and childbirth become a functional processes with use value and market value and are part of the globalisation of markets for the human body. In countries where no law protects them, women's bodies are turned into resources for the reproduction industry. Surrogacy turns the child into a product with an exchange value, so that the distinction between a person and a thing is cancelled out. Respect for the human body and equality between women and men must prevail over individual interests.

In order to overcome these unacceptable inequalities, and to promote equality between women and men, there is an urgent need to eradicate this practice. There is an urgent need to deconstruct the clichés and representations that promote patriarchal images of women, and prohibit their instrumentalization. Given the scale of the market generated by surrogacy, the only measures considered at the international level, assuming its inevitability, are aimed at regulating it in order to reduce its most disastrous consequences.

However, a practice that undermines human dignity, i.e. the fundamental principle of human rights, cannot be regulated, but must be abolished and eradicated.

PART 2: PREAMBLE

DIGNITY

Considering that the "Charter of the United Nations"¹ reaffirms faith in fundamental rights applicable to human beings, in the dignity and worth of the human person and in the equal rights of men and women,

Considering that the "Universal Declaration of Human Rights"² states that all human beings are born free and equal in dignity and rights, and that it emphasizes in its preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.

Surrogacy is contrary to the primacy of the human person, to the integrity and lack of patrimonial character of the human body as it is based on the instrumentalization and exploitation of women's bodies and their reproductive capacities for the benefit of third parties, with no other objective than the satisfaction of their individual desires.

By thus opening up the possibility of instrumentalizing and exploiting women for their reproductive capacity, surrogacy humiliates women, undermines the very notion of human dignity and weakens it for our societies as a whole.

EQUALITY BETWEEN MEN AND WOMEN

Considering that the "Convention on the Elimination of All Forms of Discrimination against Women"³ calls on States, in its Article 3, to "ensure the full development and advancement of women on a basis of equality with men",

Surrogacy, which leads to the specific appropriation of women's reproductive capacities, with physical and psychological endangerment, not only violates the principle of equality of human beings, and here of equality between women and men, but also reinforces and perpetuates this inequality.

TRAFFICKING

Considering that the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime"⁴ calls

¹ <https://www.un.org/en/sections/un-charter/chapter-i/index.html>

² <https://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>

³ <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

upon States to prevent and combat trafficking in persons, paying particular attention to women and children

Considering that the "Slavery Convention of 26 September 1926"⁵ defines slavery, in Article 1, as "the status or condition of an individual on whom any or all of the attributes of the right of ownership are exercised" and that in the course of gestation for another person, the limited partners acquire a real right over the surrogate mother, since they acquire a right of use and even enjoyment over her person and her body

In surrogacy, the clients acquire a real right of use over the person and body of the surrogate mother as soon as the contract is concluded or a court decision is taken in accordance with local practice or legislation, since they are led to renounce their most basic right to dispose of their body in accordance with the requirements formulated, on the one hand, by the intended parents and, on the other hand, by the medical-industrial system which organises surrogacy.

Commissioning parents also acquire the right to take the fruits (or rather the "products" and the woman does not come out of the operation physically unharmed), namely one or more children.

CHILD'S BEST INTERESTS

Taking into account the "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption"⁶ which, in order to prevent the abduction, sale or trafficking of children, requires in its Article 4 that the consent of the parents at birth, and in particular that of the mother, be obtained after the birth of the child,

Considering that the "Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography"⁷ provides in Article 2 that the sale of a child is defined as "any act or transaction whereby a child is delivered by any person or group of persons to another person or group for remuneration or any other consideration",

Considering that the "Convention on the Rights of the Child"⁸, in its articles 7 and 9, "guarantees the right of the child to know his or her parents as far as possible and to be cared for by them" and that "States Parties shall ensure that the child shall not be separated from his or her parents against their will".

Everywhere, the woman who bore and gave birth to the child is removed by contract, law or court order from the relationship with the child. The real and scientifically established epigenetic link between her and this child is abruptly

⁴ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-12-a&chapter=18&lang=en
https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-38%20AM/Ch_XVIII_12_ap.pdf

⁵ https://treaties.un.org/doc/Treaties/1926/09/19260925%2003-12%20AM/Ch_XVIII_3p.pdf

⁶ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>

⁷ https://treaties.un.org/doc/Treaties/2000/05/20000525%2003-16%20AM/Ch_IV_11_cp.pdf

⁸ https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf

severed to the detriment of her psychic well-being and erased from her genealogy, as is the genetic contribution of the egg donor.

Noting that the United Nations Special Rapporteur "on the sale and sexual exploitation of children, including child prostitution, child pornography and other content"⁹ acknowledged in her study on surrogacy in her 2018 progress report that "the bulk of the surrogacy conventions practised even in the so-called developed countries are nothing more than the sale of children, whatever legal tricks are used".

The existence of prior arrangements and/or financial compensation is the very principle of surrogacy. As a result, this is a violation of the above-mentioned international conventions. Getting the surrogate mother to give up the child she is going to bear, even before the child is conceived, is child trafficking within the meaning of the "Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption".

VIOLENCE AGAINST WOMEN

Considering the "Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence", known as the "Istanbul Convention"¹⁰, which defines in Article 3 the concept of violence against women as "all acts of gender-based violence which result, or are likely to result, in physical, sexual, psychological or economic harm or suffering to women".

Considering Article 3 of the Charter of Fundamental Rights of the European Union, which states that "everyone has the right to physical and mental integrity".

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EUGENISM

Considering that the "Convention on Human Rights and Biomedicine", known as the "Oviedo Convention"¹¹, provides in Article 2 that "the interests and welfare of the human being shall prevail over the sole interest of society or science" and in Article 14 that "the use of medically assisted procreation techniques is not permitted for the purpose of choosing the sex of the unborn child, except in order to avoid a serious hereditary disease related to sex. »

Surrogacy acts contrary to the principle of primacy of the human being defined by the Oviedo Convention, in the way that the use of a surrogate mother to obtain a child entails subjecting a woman to the desire of others with invasive medical acts and treatment unrelated to health care.

⁹ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement>

¹⁰ <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>

¹¹ <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf99>

Furthermore, the choice of sex of the commissioned child, as well as the genetic selection of embryos are among the "services" offered and openly displayed by companies implementing surrogacy.

INTERNATIONAL AND NATIONAL CONDEMNATIONS

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Recalling that the European Union has clearly condemned the use of surrogacy from 2015 in its annual report "on human rights and democracy in the world and the European Union's policy on the matter"¹², specifying that "the practice of surrogacy is contrary to the human dignity of women, whose bodies and reproductive functions are used as commodities; Believes that this practice, whereby the reproductive functions and bodies of women, especially vulnerable women in developing countries, are exploited for financial or other gain, must be prohibited and should be addressed as a matter of priority in the framework of human rights instruments".

Noting that the European Union recognised, in Article 48 of the same annual report for the year 2017, voted in 2018, that the use of surrogacy leads to a violation of human rights, calling for "the development of clear principles and legal instruments to combat [these] violations",

Recognizing that surrogacy, in the name of human rights and the protection of women and children, is condemned and prohibited in many countries,

Deploing the fact that countries that prohibit the use of surrogacy have not made provisions for cross-border surrogacy, introducing serious discrimination and a de facto hierarchy between women citizens protected on their national territory and women in countries that allow, permit or condone the practice, thus creating categories of women that are liable to be instrumentalized and exploited,

Pointing out that the development of surrogate motherhood is the result of a commercial and industrial system that has organised a very lucrative market bringing together a considerable number of stakeholders and brokers whose interest is driven above all by profit-making, operating under false humanitarian arguments and the banner of individual freedom and flouting the principles that safeguard our humanity.

PART 3: ARTICLES OF THE CONVENTION

CHAPTER I. AIMS, DEFINITIONS, GENERAL OBLIGATIONS

Article 1: Aims of the Convention

The purposes of this Convention are :

- to reaffirm the principle that the human body cannot be the subject of conventions or contracts and that the law can in no way violate the limits and respect of the human person,

¹²

https://www.europarl.europa.eu/doceo/document/TA-8-2015-0470_EN.html

- to recognise that the exploitation of women's reproductive capacity, including through surrogacy, whether commercial or described as altruistic, is intrinsically a form of violence against women, and as such an infringement of the fundamental rights of human beings,
- to recognise that the use of surrogacy is always contrary to the interests of the child, which are (1) not to be bought and sold or given away at the whim of adults and (2) as far as possible to have access to his or her origins, to know the mother who gave birth to him or her and to be brought up by her,
- to prevent and prohibit the use of surrogacy,
- to pursue and eliminate actions to implement, promote, encourage, enable, or facilitate this practice.

Article 2: Definition of surrogacy

For the purposes of this Convention, surrogacy is defined as the practice of recruiting a woman, whether for remuneration or not, to bear one or more children, whether or not conceived with her own oocytes, for the purpose of handing them over to a person or persons who wish to be assigned as parents of those children.

Article 3: Constitutional and legislative measures, effectiveness of these measures, principle of non-discrimination, State obligations

Parties to the Convention shall embody in their national constitutions or other appropriate legislation the principle of non-patrimony of the human body and its corollary, the principle of prohibition of surrogacy.

Parties shall take the necessary legislative or other measures to prohibit, prevent, deter and punish the use of surrogacy.

Parties shall take the necessary legislative or other measures to prohibit, prevent and discourage the use of artificial fertilisation practised on a woman who intends to bear a child for another woman and who has agreed before the pregnancy to abandon the child immediately after birth.

Parties shall ensure the effectiveness of these principles, in particular through the use of civil and criminal penalties.

Parties shall refrain from promoting, encouraging, permitting or facilitating the use of surrogacy and shall ensure that State authorities, officials, agents and institutions, as well as other actors acting on behalf of the State, act in accordance with this obligation.

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination of any kind, such as on the basis of sex, race, language, religion, opinion, national or social origin, membership of a minority, property, birth, sexual orientation, age, health status, disability, marital status, migrant or refugee status or any other status.

CHAPTER II. PREVENTION

Article 4: Awareness-raising and education

The Parties shall promote or conduct, on a regular basis at all levels, awareness-raising campaigns or programmes to increase the awareness and understanding of the general public of what surrogacy represents:

- a practice contrary to the principle of human dignity,
- a practice contrary to gender equality,
- a form of violence against women,
- a form of child abuse,

and that it is contrary to the interests and rights of the child.

Parties shall take the necessary steps to include in the official curricula and at all levels of education information on human rights, the principle of non-patrimony of the human body and the prohibition of the exploitation of the reproductive capacity of women.

Article 5: Digital Platforms

The Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order the blocking or de-blocking of Internet sites or their contents which have the purpose or effect of promoting, permitting, encouraging or facilitating the use of surrogacy in their territory.

CHAPTER III. CIVIL CONSEQUENCES OF SURROGACY

Article 6: Disposal of existing contracts

The Parties shall take the necessary legislative or other measures to ensure that any convention or contract which has as its object the exploitation of a woman's reproductive capacity is rendered null and void.

Article 7: Parentage

The Parties undertake to ensure that no woman may be forced or induced to renounce the establishment of a parent-child relationship with a child she has given birth to.

CHAPTER IV. CRIMINAL CONSEQUENCES OF SURROGATE MOTHERHOOD: MATERIAL LAW, INVESTIGATIONS AND PROSECUTIONS

Article 8: Criminal qualifications

Parties shall take the necessary legislative or other measures to establish as criminal offences:

- profiting from, sharing the proceeds of, or receiving subsidies from a person engaged in surrogacy.

- the hiring, enticing, training, diverting or coercing a person to engage in surrogacy or to exert pressure on a person to engage or continue to engage in the practice of surrogacy.
- aiding or assisting in the performance, promotion, encouragement, enabling or facilitating the use of surrogacy.
- the fact, by gift, promise, threat, order, abuse of authority or power, of promoting, encouraging, enabling or facilitating the use of surrogacy.
- instructing or mediating to promote, encourage, enable or facilitate the use of surrogacy.
- the provision of a service with the purpose or effect of achieving, promoting, encouraging, enabling, permitting or facilitating the use of surrogacy, even where the proposal is not followed up.
- resorting to surrogacy, in order to be designated as the parent of the child or children resulting from it.

Article 9: Jurisdiction of criminal law

Parties shall take such legislative or other measures as may be necessary to establish their jurisdiction over any criminal offence in accordance with this Convention when the offence is committed:

- in their territory; or
- on board a vessel flying their flag; or
- on board an aircraft registered under their domestic laws; or
- by one of their nationals; or
- by a person having his or her habitual residence in their territory.

Article 10: Prosecution

The Parties shall take the necessary legislative or other measures to:

- ensure the effective investigation and prosecution of the offences established in accordance with this Convention, and
- that investigations and judicial proceedings relating to offences established in accordance with this Convention are dealt with effectively.

Article 11: Sanctions and measures

Parties shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions commensurate with their gravity. These shall include, where appropriate, penalties involving deprivation of liberty which can give rise to extradition.

CHAPTER V. INTERNATIONAL COOPERATION

Article 12: General principles

The Parties shall co-operate, in accordance with the provisions of this Convention, and pursuant to the relevant international and regional instruments relating to civil and criminal co-operation, arrangements based on uniform or reciprocal legislation of their domestic laws, to the widest extent possible, for the purposes of :

- preventing, combating and prosecuting criminal offences established in accordance with this Convention.
- to conduct investigations or proceedings in respect of the offences established in accordance with this Convention.
- to enforce relevant civil and criminal judgments rendered by the judicial authorities of the Parties.

For the prosecution of the offences established in accordance with this Convention, Parties may consider this text as the legal basis for mutual legal assistance in criminal matters, extradition or enforcement of civil or criminal judgments of another Party.

This will be the case, in particular, if a Party makes mutual legal assistance in criminal matters, extradition or the enforcement of civil or criminal judgements of another Party conditional on the existence of a treaty.

The Parties shall endeavour to integrate, where appropriate, the prevention of and the fight against the use of surrogacy in development assistance programmes conducted for the benefit of third States, in particular through the conclusion of bilateral and multilateral agreements with third States.