

**RAPPORT PRÉLIMINAIRE SUR LES PROBLÈMES DÉCOULANT DES CONVENTIONS DE  
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

*établi par le Bureau Permanent*

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**A PRELIMINARY REPORT ON THE ISSUES ARISING  
FROM INTERNATIONAL SURROGACY ARRANGEMENTS**

*drawn up by the Permanent Bureau*

*Document préliminaire No 10 de mars 2012 à l'intention  
du Conseil d'avril 2012 sur les affaires générales et la politique de la Conférence*

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of the Council of April 2012 on General Affairs and Policy of the Conference*

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## A preliminary Report<sup>1</sup> on the issues arising from international surrogacy arrangements<sup>2</sup>

### I. INTRODUCTION

1. In April 2011, the Council on General Affairs and Policy welcomed the report prepared by the Permanent Bureau on the "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements".<sup>3</sup> This report identified the serious problems occurring internationally as a result of the increasing use of international surrogacy arrangements, the most prevalent issues being the often uncertain legal parentage and nationality of the children born.<sup>4</sup> Children may be "marooned, stateless and parentless"<sup>5</sup> in the State of their birth, with their families resorting to desperate, sometimes criminal, measures to attempt to take them "home".<sup>6</sup> Further, if they are able to travel "home", children may be left with "limping" legal parentage, with the consequent child protection concerns that this involves. These and other child protection issues arising as a result of such arrangements<sup>7</sup> implicate the fundamental rights and interests of children, including the right not to suffer adverse discrimination on the basis of birth or parental status, the right of the child to have his or her best interests regarded as a primary consideration in all actions concerning him or her, as well as the child's right to acquire a nationality and to preserve his or her identity.<sup>8</sup> Attention should also be given to the possible vulnerability of *all* parties to international surrogacy arrangements,<sup>9</sup> raising concerns regarding exploitation and the difficulties which may arise as a result of unregulated

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<sup>1</sup> The Permanent Bureau would like to thank Hannah Baker, Senior Legal Officer at the Permanent Bureau, for carrying out the principal research and drafting of this Note. The Permanent Bureau would also like to thank Carine Rosalia, Legal Officer at the Permanent Bureau, for her assistance with Part IV.

<sup>2</sup> See the annexed **Glossary** for the definition of "international surrogacy arrangements" as used in this Report.

<sup>3</sup> Prel. Doc. No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "General Affairs"). See pp. 3-4 of Prel. Doc. No 11 for a detailed background to work in this field.

<sup>4</sup> *Ibid.* at Section IV(a).

<sup>5</sup> Per J. Hedley, in the English case of *Re X & Y (Foreign Surrogacy)* [2009] Fam 71, at 76C.

<sup>6</sup> *E.g.*, the French intending father who attempted to smuggle twin girls born to a surrogate mother in Ukraine into Hungary:

< [http://www.rferl.org/content/womb\\_for\\_hire\\_ukraine\\_surrogacy\\_boom\\_is\\_not\\_risk\\_free/24215336.html](http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html) > (last consulted 16 March 2012) or the Belgian same-sex couple who tried to smuggle their child from Ukraine into Poland: < [http://www.msnbc.msn.com/id/41800437/ns/world\\_news-wonderful\\_world/t/boy-stuck-years-ukraine-arrives-belgium/](http://www.msnbc.msn.com/id/41800437/ns/world_news-wonderful_world/t/boy-stuck-years-ukraine-arrives-belgium/) > (last consulted 16 March 2012).

<sup>7</sup> Prel. Doc. No 11 of March 2011 (*op. cit.* note 3), at Section VI(a). Other child protection concerns include those relating to the possible breakdown of the surrogacy arrangement because the intending parents decide they no longer want the child, *e.g.*, as a result of the child's disability (*e.g.*, < [http://www.bionews.org.uk/page\\_71982.asp](http://www.bionews.org.uk/page_71982.asp) >, last consulted 16 March 2012) or because their relationship has broken down (*e.g.*, < <http://www.cbc.ca/news/canada/new-brunswick/story/2011/09/13/nb-bathurst-surrogate-parent-1245.html?cmp=rss> >, last consulted 16 March 2012), or because the surrogate mother decides she wishes to keep the child (*e.g.*, one recent domestic example, *CW v NT & Anor* [2011] EWHC 33 (Fam)). Of further concern are the dangers for the child inherent in the fact that there may be, in some States, no "checks" concerning the prospective intending parents: this has resulted in cases where children have been "commissioned" for abuse (Prel. Doc. No 11 of March 2011, *op. cit.* note 3, at para. 31) or, allegedly, in order to secure inheritance (*e.g.*, < <http://www.dailymail.co.uk/news/article-54972/Surrogacy-scandal-thats-shocked-world.html> >, last consulted 16 March 2012). Also, see note 11, *infra*, regarding trafficking concerns.

<sup>8</sup> The United Nations *Convention on the Rights of the Child*, 20 November 1989 ("UNCRC"): *e.g.*, Arts 2, 3, 7, 8 and 9.

<sup>9</sup> Prel. Doc. No 11 of March 2011 (*op. cit.* note 3), at Section VI(a). See also the recent study by the Centre for Social Research, India (< [www.csrindia.org](http://www.csrindia.org) >), "Surrogate Motherhood – Ethical or Commercial" (March 2012). Based on interviews with 100 surrogate mothers, 50 intending parents and clinics, many concerns were reported including: surrogates were often illiterate and relied on clinics to inform them of the terms of the contract, with no independent advice; contracts were often not signed until mid-way through the fourth month of a pregnancy; clinics often were not party to the contract, allegedly to avoid accountability; the overwhelming majority of surrogates indicated that they had decided to become a surrogate due to "poverty"; there were concerns about pressure from others (*e.g.*, agents, husbands) to become a surrogate; a lack of transparency regarding the fees paid to surrogates, with the report concluding: "The payments to surrogate mothers are arbitrarily decided by the infertility physician of the clinic / hospital in all cases." Similar concerns also come to light in the documentary "Made in India" (see < <http://www.madeinindiamovie.com/> >, last consulted 16 March 2012).

intermediaries,<sup>10</sup> including the trafficking of women and children,<sup>11</sup> as well as concerns regarding “independent” arrangements.<sup>12</sup>

2. International surrogacy arrangements are growing at a rapid pace and, unfortunately, so too appear to be the difficulties arising from them. In the past year alone, problems concerning the legal status of children born as a result of such arrangements have arisen in many States across the globe. In addition, more cases have come to light which demonstrate starkly the possibilities for exploitation and abuse.<sup>13</sup>

3. Council, in April 2011, requested that the Permanent Bureau intensify work, “with emphasis on the broad range of issues arising from international surrogacy arrangements”.<sup>14</sup> In accordance with this mandate, the Permanent Bureau has undertaken further research on comparative developments relating to international surrogacy in internal and private international law, as well as on the practical needs in the area. The Permanent Bureau has also been closely monitoring developments and work being undertaken by other organisations and institutions in the field and is continuing to work in co-operation with Aberdeen University.<sup>15</sup> The fruits of these efforts are combined in this Preliminary Report which, as requested, provides an “update on progress” to Council,<sup>16</sup> but does not purport to present a complete picture on this dynamic and complex subject. Subject to the Council’s view, the Permanent Bureau

<sup>10</sup> Prel. Doc. No 11 of March 2011 (*op. cit.* note 3), at Section VI(a). See further, in the last year: *e.g.*, the convictions of three individuals who sent “surrogate” mothers to Ukraine for implantation with embryos without any surrogacy arrangements in place and who subsequently “sold” the unborn children: see < <http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted> > (last consulted 16 March 2012).

<sup>11</sup> See, *e.g.*, the “Model Law against Trafficking in Persons”, developed by the United Nations Office on Drugs and Crime (“UNODC”) to assist States with the implementation of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (entry into force 25 December 2003, Protocol to the United Nations *Convention Against Transnational Organised Crime* of 29 September 2003) which specifically mentions “forced pregnancy” and the “use of women as surrogate mothers” as, in certain circumstances, possible examples of “exploitation” which States may wish to consider when legislating to criminalise “trafficking” (available at < [http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf) >, last consulted 16 March 2012). Other reported examples of trafficking relating to surrogacy include, *e.g.*, Polish women reportedly recruited to travel to Holland, Belgium and Germany (< [www.independent.co.uk/news/world/poles-hired-as-surrogate-mums-in-illegal-trade-1584960.html](http://www.independent.co.uk/news/world/poles-hired-as-surrogate-mums-in-illegal-trade-1584960.html) >, last consulted 16 March 2012); women from Burma sold to Chinese men to work as surrogates as part of a trafficking scheme (< [www.chinapost.com.tw/china/local-news/other/2009/03/26/201716/China-returns.htm](http://www.chinapost.com.tw/china/local-news/other/2009/03/26/201716/China-returns.htm) >, last consulted 16 March 2012); concerns regarding practices in Guatemala (see, *e.g.*, the European Parliament’s Joint Motion for a Resolution on Guatemala (6 July 2005) which stated that “the abuses occurring in Guatemala include forced or surrogate pregnancies [...]” (source: “Memorandum: Is there a need to regulate intercountry surrogate-pregnancy agreements in private international law?”, written under the instruction of Peretz Segal, Ministry of Justice Israel, by Jennifer Chernick, B.A. Stanford University, 2009 (on file with the Permanent Bureau)).

<sup>12</sup> The vulnerabilities of parties may also be exploited precisely because there are *no* qualified intermediaries involved in an arrangement and the parties have “met” independently, online (*e.g.*, the case where a Belgian surrogate, having entered into a surrogacy arrangement with a couple she met online, informed the intending parents she had miscarried before “auctioning” off the child online to a Dutch couple: see *Baby D*, Court of Appeal, Gent, 5 September 2005).

<sup>13</sup> See *supra* notes 7 to 12 (a small “snapshot” of the reports of such problems).

<sup>14</sup> The Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011) (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Work in Progress” then “General Affairs”), para. 18.

<sup>15</sup> *E.g.*, the Permanent Bureau has been in communication with the International Commission on Civil Status (ICCS), the Council of Europe (the Steering Committee on Bioethics), the International Social Service, the International Law Association and the American Bar Association, among others, all of whom have provided helpful information. In the context of its co-operation with the Aberdeen University research project on international surrogacy arrangements (< <http://www.abdn.ac.uk/law/surrogacy/> >, last consulted 16 March 2012), the Permanent Bureau is grateful for having the opportunity to review the draft national reports on surrogacy commissioned by the project (see note 35, *infra*) and the statistical information provided. References have been made by other organisations to the ongoing mandate of the Hague Conference in this field: *e.g.*, in the Report of the Secretary General of the ICCS dated 20 September 2011, at p. 10 (available at < [www.ciec1.org](http://www.ciec1.org) >).

<sup>16</sup> Conclusions and Recommendations of the 2011 Council (*op. cit.* note 14), at para. 20. See also “Work Programme of the Permanent Bureau for the next Financial Year (1 July 2012 – 30 June 2013)”, drawn up by the Permanent Bureau, Prel. Doc. No 2 of February 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Work in Progress” then “General Affairs”), at para. 11.

intends to produce a Final Report in April 2013 which will incorporate the views of Members expressed at the 2012 Council meeting and beyond.

## II. INTERNATIONAL SURROGACY ARRANGEMENTS: THE EVOLUTION OF A WORLDWIDE PHENOMENON

### (a) The reasons for the evolution of a worldwide phenomenon

4. Surrogacy is not a new concept: indeed, traditional surrogacy arrangements can be traced back to biblical times.<sup>17</sup> However, the booming global surrogacy “business” we see today appears to have evolved (rapidly) within the last decade or so.<sup>18</sup> This can be attributed to a convergence of scientific, demographic, legal and social developments. First, scientific developments such as artificial insemination and in-vitro fertilisation (“IVF”) have made surrogacy a far more attractive possibility today.<sup>19</sup> IVF, in particular, has enabled the genetic link between the surrogate mother and the child to be severed, in some cases allowing the creation of a genetic tie between the intending mother and child.<sup>20</sup> Secondly, with infertility affecting a growing number in certain States,<sup>21</sup> as well as there being an increasing acceptance in some States of parenting within alternative family forms,<sup>22</sup> “demand” for surrogacy services is strong.

5. In terms of the *cross-border* “phenomenon”, the prohibitive or restrictive legal approach of many States to surrogacy (in particular, *commercial* surrogacy<sup>23</sup>), combined with the liberal approach of a minority, means that prospective intending parents are often using surrogacy services abroad because they are prohibited or restricted at home.<sup>24</sup> Other motivating factors may be lower costs or fewer perceived risks abroad.<sup>25</sup> The growth in these *cross-border* arrangements has undoubtedly been facilitated by the Internet, other modern means of communication, and the ease of international travel. A

<sup>17</sup> *E.g.*, Genesis (Chapter 30), in which Rachel, who is infertile, gives her servant to Jacob as a concubine to serve as a surrogate in order to procreate a child who will be socially viewed as the offspring of Rachel and Jacob. See the annexed **Glossary** for the definition of a “traditional surrogacy arrangement”.

<sup>18</sup> See, *e.g.*, the figures regarding the reproductive segment of India’s medical tourism industry: Prel. Doc. No 11 of March 2011 (*op. cit.* note 3), at para. 11.

<sup>19</sup> The first birth of a child conceived by IVF and embryo transfer occurred on 25 July 1978 in the United Kingdom. The first gestational surrogacy in the world occurred in 1984 (*ibid.*, at para. 8). See the annexed **Glossary** for the definition of a “gestational surrogacy arrangement”.

<sup>20</sup> This has made surrogacy a solution to infertility which may result in a child that is genetically related to *both* intending parents. Anecdotally, the majority of international surrogacy arrangements use IVF procedures and are therefore “gestational surrogacy arrangements”. However, IVF procedures may also (often) involve gamete donors.

<sup>21</sup> See the definition of “infertility” given by the World Health Organisation (WHO): <http://www.who.int/topics/infertility/en/> (last consulted 16 March 2012). There appear to be no comprehensive global statistics but see, *e.g.*, < <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2127rank.html> > (last consulted 16 March 2012) which reports that: “Global fertility rates are in general decline and this trend is most pronounced in industrialised countries, especially Western Europe [...]”. In some of these States, this is due to the fact that women postpone childbearing due to career prospects and contraception. However, compare “Infecundity, infertility, and childlessness in developing countries. Demographic and Health Surveys (DHS). Comparative reports No. 9” by ORC Macro and WHO (2004), which used data from 47 surveys in developing countries to examine women’s inability to bear children and concluded that “infertility, whether primary or secondary, has declined in most [of these] countries” (available at < [http://www.who.int/reproductivehealth/publications/infertility/DHS\\_9/en/index.html](http://www.who.int/reproductivehealth/publications/infertility/DHS_9/en/index.html) >, last consulted 16 March 2012).

<sup>22</sup> *E.g.*, single persons and same-sex couples (usually male) also use surrogacy arrangements.

<sup>23</sup> Some research suggests a correlation between international travel for surrogacy and “commercial” payment: see J. Millbank, “The New Surrogacy Parentage Laws in Australia: Cautious regulation or ‘25 brick walls’”, (2010) M.U.L.R. at p. 28, which reports on the study by the parent support group, Australian Families Through Gestational Surrogacy (< [www.surrogacyaustralia.org](http://www.surrogacyaustralia.org) >) which surveyed overseas IVF clinics providing surrogacy services to Australian intending parents and found that of 35 international arrangements, 32 arrangements involved payment to the surrogate mother.

<sup>24</sup> See Section III(a) *infra*. This is not unique to surrogacy arrangements: cross-border travel to access reproductive care generally is a growing trend: see, *e.g.*, L. Culley *et al.*, “Transnational Reproduction: An exploratory study of UK residents who travel abroad for fertility treatment”, June 2011 (available at < <http://www.esrc.ac.uk/my-esrc/grants/RES-000-22-3390/read> >, last consulted 16 March 2012).

<sup>25</sup> *E.g.*, despite surrogacy arrangements being permitted in some US states, US residents are travelling to India to enter into surrogacy arrangements, where costs are significantly lower. It may also be felt that there is less risk of the surrogate reneging on the agreement. See further Prel. Doc. No 11 of March 2011 (*op. cit.* note 3), at para. 12.

further layer of complexity, however, is the fact that the growth of international surrogacy in some States also results from “the ready availability of poor surrogates”.<sup>26</sup> The unease expressed by some concerning the practice of engaging surrogates in States with emerging economies to bear children for more wealthy intending parents from other States has dimensions similar to those discussed in the preparatory reports on intercountry adoption.<sup>27</sup>

## **(b) What is the geographical scope and incidence of the phenomenon?**

6. International surrogacy is a phenomenon which is truly global in its reach. Recent data shows that intending parents entering into international arrangements come from *all* regions of the world, including Europe, North America, Australasia, South America, Asia and Africa.<sup>28</sup> The States to which intending parents are travelling are also geographically diverse and primarily include Eastern Europe, Asia and North America. The phenomenon is also global in that one arrangement may often involve more than two States.<sup>29</sup>

7. The number of international surrogacy arrangements entered into globally is impossible to determine. However, data from five agencies specialising in international surrogacy shows a tremendous growth in the “market”: when comparing 2010 to 2006, the figures demonstrate a percentage increase of nearly **1,000%** across the agencies.<sup>30</sup> Moreover, generally, the international “reach” of the agencies grew over the five years, with an increase in international intending parents, from an increasing number of States. This result is in line with the media reports of one leading agency which stated, in 2008, that, “almost forty percent of the agency’s new clients are from outside the [country] ... compared with less than a fifth in previous years.”<sup>31</sup> Further, “[i]n 12 years we have grown 6,000 percent with no borrowing whatsoever and profit made every month [...] We expect to double in the next two and half years.”<sup>32</sup>

<sup>26</sup> Per the Indian High Court in *Baby Manji Yamada v. Union of India & Anr.* (2008) INSC 1656 (29 September 2008). Some have likened the travel to less economically developed countries to engage surrogates to a form of “outsourcing” of pregnancy, e.g., *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market*, by France Winddance Twine (Routledge, 2011).

<sup>27</sup> See “International Co-operation and Protection of Children with regard to Intercountry Adoption”, by J.H.A. van Loon, *Recueil des cours*, volume 244 (1993-VII), at para. 31 (which was based on ‘Report on Intercountry Adoption’, drawn up by J.H.A. van Loon, Prel. Doc. No 1 of April 1990, in *Proceedings of the Seventeenth Session (1993)*, Tome II, *Adoption – co-operation*, pp. 11-119), where it was stated: “when, as a result of declining fertility, birth control and changed attitudes, the impetus and motivation for intercountry adoption arising from the industrialised countries [...] acquired a structural character [...] a structural ‘supply’ of children ‘available’ for adoption abroad in economically developing countries met with a structural ‘demand’ for such children in economically advanced countries. The language of economics made its appearance and intercountry adoption became a more complex and controversial social phenomenon.” Whilst there is no “supply” of children in international surrogacy, there is a “supply” of surrogates willing to carry children at the request of intending parents who are often from more economically advanced countries.

<sup>28</sup> E.g., whilst only a “snapshot”, the information obtained by the Aberdeen University research project (*supra* note 15) from five “agencies” that specialise in international surrogacy (based in the United States of America, India and the United Kingdom), evidences that international surrogacy arrangements have been entered into by intending parents resident in Europe, Australasia, North and South America, Asia and Africa.

<sup>29</sup> This is particularly the case where gamete donors are used: for example, intending parents resident in one State may use an egg donor in a different State and a surrogate mother in a third State (e.g., the documentary “Google Baby” illustrates such an example: < <http://www.hbo.com/documentaries/google-baby/index.html#/documentaries/google-baby/synopsis.html> >, last consulted 16 March 2012). The involvement of more than two States may also arise where a surrogate is asked (or forced) to move from one State to another for the purposes of being a surrogate and the intending parents then reside in a third State: see *supra* note 12 regarding the trafficking concerns this may raise. A different example of a case involving three States (which also highlights the vulnerabilities of surrogate mothers) is: < <http://reformtalk.blogspot.com/2011/10/international-surrogacy-debacle.html> > (last consulted 16 March 2012).

<sup>30</sup> See *supra* note 28.

<sup>31</sup> See the online article, dated 23 April 2008, available at < <http://www.prnewswire.co.uk/cgi/news/release?id=225503> > (last consulted 16 March 2012).

<sup>32</sup> See the online article, dated 6 May 2008, available at < [http://afp.google.com/article/ALeqM5jrd6qhHhLskehDUMRI\\_I-IhM4oJw](http://afp.google.com/article/ALeqM5jrd6qhHhLskehDUMRI_I-IhM4oJw) > (last consulted 16 March 2012). This surrogacy agency also states on its homepage that it works with “international intended parents in 6 continents and over 50 countries”. This information accords with the information obtained by Australian Families through Gestational Surrogacy (*supra* note 23) which showed a three-fold increase in births to Australian intending parents in overseas IVF clinics in the period from 2008 to 2011.

The growth in the number of clinics or agencies offering surrogacy-related services is also impossible to determine. However, the growth in countries offering assisted reproductive technology ("ART") generally was reported recently, based on the fact that the number of countries submitting data concerning ART to the IFFS Surveillance had risen from 59 in 2007, to 105 in 2010.<sup>33</sup> The survey also reported, "a substantial increase in the numbers of clinics in many parts of the world" with numbers in excess of 400 in some countries.<sup>34</sup>

### III. CURRENT PERSPECTIVES AND TRENDS IN POLICIES, LEGISLATION AND JUDICIAL APPROACHES IN RELATION TO SURROGACY<sup>35</sup>

8. There are currently a variety of approaches to surrogacy within States' internal laws and policies. Responses to surrogacy are, however, somewhat in a state of flux: several States have introduced legislation recently and several others have bills currently under consideration.<sup>36</sup> However, despite this, there are distinct identifiable policy approaches amongst States and, within these, many similarities in terms of legislation (or the absence of such) and judicial trends. Section III(a) presents, in brief, some of these approaches and identifies which are supporting the growth of surrogacy in key States, particularly for international intending parents. Lastly, it asks whether there is a "trend" in the recent legislative developments.

9. Section III(b) focuses on the approaches of "receiving States"<sup>37</sup> to the challenges posed by *international* surrogacy arrangements and identifies approaches to the question of the recognition or establishment of the legal parentage of the child and the nationality of the child. A principal question is whether there is an increased similarity in the approaches of States to these questions due to the fact that States are faced with a "*fait accompli*" and need to prioritise the interests of the child who has, at this stage, already been born.<sup>38</sup>

#### (a) Approaches to surrogacy in internal laws and policies

##### (i) States which prohibit surrogacy arrangements<sup>39</sup>

10. In some States, surrogacy arrangements are expressly prohibited by law.<sup>40</sup> This approach is generally based on a policy perspective which views such agreements as a "violation of the child's and the surrogate mother's human dignity"<sup>41</sup>, reducing both, it is said, to mere objects of contracts.<sup>42</sup> In many of these States, entering into a surrogacy arrangement will attract criminal sanctions either for the parties involved or, more

<sup>33</sup> The International Federation of Fertility Societies, "IFFS Surveillance 2010" (available at < [http://www.iffs-reproduction.org/documents/IFFS\\_Surveillance\\_2010.pdf](http://www.iffs-reproduction.org/documents/IFFS_Surveillance_2010.pdf) >, last consulted 16 March 2012). This survey concluded that "ART has spread to distant parts" (at p. 1) and noted that "[a]mong the 103 nations with reliable information on this point, 42 operated [ART] with legislative oversight, 26 with voluntary guidelines, and 35 operated with neither" (at p. 10).

<sup>34</sup> *Ibid* at p. 6. The number of centres reportedly offering ART services in India was approximately 500; in the United States of America it was between 450 and 480 and, in Japan, over 600 (pp. 7-9).

<sup>35</sup> References in this section to "A. Name, 'National Report on Surrogacy'" are references to the reports commissioned by the Aberdeen University research project (see *supra* note 15). The reports will be published in Trimmings & Beaumont (eds), "International Surrogacy Arrangements: Legal Regulation at the International Level", Hart Publishing 2012 (forthcoming).

<sup>36</sup> See *infra*.

<sup>37</sup> See the annexed **Glossary** for the definition of the term "receiving State" as used in this Report.

<sup>38</sup> *E.g.*, in accordance with Art. 3 of the UNCRC.

<sup>39</sup> States which appear to be in this category include: China (mainland), France, Germany, Italy, Mexico (Queretaro), Sweden, Switzerland, United States of America (*e.g.*, Arizona, District of Columbia).

<sup>40</sup> *I.e.*, whether the surrogacy arrangements are altruistic or commercial in nature, and whether they are gestational or traditional arrangements (see **Glossary**). (In some States, such as Austria and Norway, ovum (egg) donation is prohibited. This amounts to an effective prohibition of *gestational* surrogacy which always involves ovum donation, either from the intending mother or a third party.)

<sup>41</sup> See S. Gössl, "National Report on Surrogacy: Germany". *E.g.*, Germany and Switzerland.

<sup>42</sup> Other policy concerns are (a) the psychological damage which may occur when a child has to grow up with 'split motherhood', *i.e.*, one mother who gave birth to him or her and another 'genetic' mother (*e.g.*, in Germany, Austria and Italy: see *S.H. and Others v. Austria* (European Court of Human Rights, Application No 57813/00, 3 Nov 2011)); (b) a concern that the legal status of persons should not be the subject of private agreements (*e.g.*, in France); and, (c) a fear that if surrogacy is permitted, legal, social and ethical chaos will ensue (*e.g.*, China: information from Z. Huo, "National Report on Surrogacy: China").



commonly, for any intermediaries and / or medical institutions facilitating the arrangement.<sup>43</sup>

11. The obvious consequence of this approach is that surrogacy arrangements reached in contravention of the law are void and unenforceable in terms of their legal effects. This means that the general rules concerning legal parentage will apply to any child born as a result of such an arrangement. Generally, the gestational, surrogate mother will be considered the legal mother and often this is not contestable.<sup>44</sup> While adoption may be a route for an intending mother to acquire legal parentage in some States,<sup>45</sup> this can be far from straightforward since there may be rules which prohibit an adoption being granted where the prospective adoptive parents took part in a procurement which is unlawful or contrary to public policy.<sup>46</sup> The legal father will be presumed usually to be the surrogate mother's husband if she is married. However, depending upon the State, it may be possible to contest this presumption and for a putative father to acknowledge his paternity or to bring court proceedings to establish his legal paternity.<sup>47</sup>

12. The prohibition on surrogacy may be thought to have eliminated the practice of surrogacy within these States.<sup>48</sup> While this may be true for the majority, it is reported that in one State, surrogate business is thriving "underground". In addition, intending parents habitually resident in these States are travelling to more permissive States to enter into surrogacy arrangements there.<sup>49</sup>

### **(ii) States in which surrogacy is largely unregulated<sup>50</sup>**

13. A second group of States share the characteristics that: (1) there is no express prohibition in law concerning surrogacy arrangements in general; (2) however, such arrangements are either expressly, or under general law principles, void and unenforceable in terms of their main clause (the obligation of the surrogate mother to surrender the child(ren) to the intending parents following the birth); (3) in some of these States, *commercial* surrogacy is prohibited through either express criminal law provisions or due to the fact that such an arrangement would contravene other general

<sup>43</sup> *E.g.*, China (mainland), Germany, France, Italy and Switzerland.

<sup>44</sup> *E.g.*, Germany, Switzerland. This is based on Roman law (the principle of *mater semper certa est*). See also, Art. 2 of the European Convention on the Legal Status of Children Born out of Wedlock (Strasbourg, 15 October 1975). However, compare Arts 7(3) and 8(2) of the more recent Council of Europe "Draft Recommendation on the rights and legal status of children and parental responsibilities" which provides that States may derogate from this rule in legislation concerning surrogacy (currently before the Committee of Ministers of the Council of Europe with a view to its adoption – see < [http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20\\_2011\\_%2015%20E%20%20meeting%20-report%2019%2010%20\\_final\\_.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20_2011_%2015%20E%20%20meeting%20-report%2019%2010%20_final_.pdf) >, last consulted 16 March 2012).

<sup>45</sup> *E.g.*, Germany, Switzerland.

<sup>46</sup> *E.g.*, Germany (but adoption can be granted on the basis that it is necessary for the child's well-being, S. Gössl, *op. cit.* note 41).

<sup>47</sup> *E.g.*, Germany (where the presumption of legal paternity arises as a result of marriage, a contestation of paternity will always be necessary, even if the legal father is clearly not the genetic father).

<sup>48</sup> But note that whilst a prohibition on *gestational* surrogacy arrangements may be enforceable by controlling medical intermediaries, a prohibition concerning *traditional* surrogacy arrangements is more difficult to "police" since such arrangements may involve natural conception or "DIY" artificial insemination.

<sup>49</sup> See section III(b) *infra*.

<sup>50</sup> This approach can be seen, for example, in legal systems as geographically diverse as: Argentina (but no express prohibition of commercial arrangements and further research is needed to determine whether such arrangements would contravene other internal laws); Australia (the Northern Territory, which has no laws concerning surrogacy but has effective restrictions against clinic-based commercial surrogacy); Belgium (but seemingly no express prohibition of commercial arrangements); Brazil (while there is no legislation regulating surrogacy, there is a Federal Medical Board Resolution (1957/2010) which sets down rules for clinics providing ART, including surrogacy, and states that commercial arrangements are not permitted. There has not yet been a case concerning the enforceability of an *altruistic* arrangement in Brazil: N. de Araujo, D. Vargas, L. Martel, "National Reports on Surrogacy: Brazil"); Canada (the Assisted Human Reproduction Act 2004, federal legislation, prohibits commercial surrogacy arrangements. Parentage falls within provincial jurisdiction and there is considerable variation concerning such matters. However, the majority of the provinces do not have express regulation of legal parentage following a surrogacy arrangement; see the exceptions at note 64 *infra*); the Czech Republic, Ireland, Japan (the Japan Society of Obstetrics and Gynecology adopted guidelines in 2003 stating that doctors should not be involved in surrogacy arrangements; whilst there is no legislative prohibition, it is therefore strongly discouraged), Mexico (Mexico City), the Netherlands, the United States of America (*e.g.*, Michigan, New York) and Venezuela.

criminal law provisions, for example, relating to child trafficking;<sup>51</sup> (4) however, in many of these States (but not all) some medical institutions within the State will facilitate *altruistic* surrogacy arrangements but it is generally left to the individual institutions to determine the precise conditions for treatment.<sup>52</sup>

14. The unenforceability of the surrogacy arrangement in these States means that, as in the States where surrogacy is expressly prohibited, the legal status of the child born as a result of any arrangement will be determined by the general laws concerning legal parentage. These rules are often similar to those outlined in the first group, with the same inherent difficulties for intending parents.<sup>53</sup> However, it can tentatively be stated that there may be the beginnings of a “trend” in judicial approach in some of these States to try to facilitate establishment of the legal parentage of a genetically-related intending mother.<sup>54</sup> The unenforceability of the contract, however, also means that the intending parent(s) must often rely on the continuing consent of the legal, surrogate mother in order to secure their parental rights. In some of these States, legislation concerning surrogacy is currently being considered.<sup>55</sup>

15. In terms of the incidence of altruistic surrogacy arrangements in some of these States, the medical institutions which facilitate them have reported modest figures.<sup>56</sup> However, the eligibility criteria applied by the institutions are generally strict. It is most likely due to these strict criteria, as well as the inability to enter into *commercial* surrogacy arrangements, that these States have not reported instances of intending parents who are habitually resident in other States travelling to their jurisdictions to engage surrogates. However, there are reported instances of intending parents from many of these States travelling to more permissive jurisdictions to enter into surrogacy arrangements, usually commercial in nature.<sup>57</sup>

### **(iii) States which expressly permit and regulate surrogacy<sup>58</sup>**

16. The number of States which have legislation regulating surrogacy arrangements is growing.<sup>59</sup> These States generally expressly permit certain forms of surrogacy

<sup>51</sup> *E.g.*, Canada (Assisted Human Reproduction Act 2004); Czech Republic (if a surrogate mother takes payment for a surrogacy, she could be prosecuted for trafficking in children, s.168, the Criminal Code: M. Pauknerová, “National Report on Surrogacy: Czech Republic”); Ireland (no express provision but possible violation of trafficking or adoption laws: M. Harding, “National Report on Surrogacy: Ireland”); the Netherlands (the Dutch Criminal Code contains express provisions relating to commercial surrogacy but only targets intermediaries, not the parties themselves: I. Curry-Sumner, M. Vonk, “National Report on Surrogacy: the Netherlands”). This does not appear to be the case in Argentina and Belgium.

<sup>52</sup> *E.g.*, Ireland, Japan (only one doctor openly offers surrogacy services), the Netherlands. However, in some States, there are certain criteria which must be followed when medical institutions facilitate such arrangements (*e.g.*, Brazil (Federal Medical Board resolution on ART which includes surrogacy), the Czech Republic (legislation concerning ART which may be applied, by analogy, to surrogacy)).

<sup>53</sup> As before, in many of these States an intending mother, whether genetically related to the child or not, will often have to adopt the child and this can be a lengthy procedure involving State authorities (*e.g.*, Argentina, Czech Republic, Japan, Mexico (Mexico City), the Netherlands, Venezuela).

<sup>54</sup> *E.g.*, Argentina (C. Apel. Civ., Com. Y Lab. Gualeguaychú, 14 April 2010: stating if a putative mother is also a genetic mother she may contest maternity since the genetic link must prevail (the surrogacy arrangement was not mentioned in the decision) – E. Lamm, “National Report on Surrogacy: Argentina”); Brazil (some court decisions have allowed intending parents to register as the legal parents of a child born following a surrogacy arrangement, by consent with the surrogate mother, despite the general rules on legal parentage. Further, on 3 January 2011, a “pre-birth order” was made by a judge, something previously unknown by the legal system: N. de Araujo, D. Vargas, L. Martel, *op. cit.* note 50); Canada (judicial precedent in Ontario and British Columbia has enabled intending parents to register as legal parents: *AA. v. BB* 2007 ONCA 2; *Rypkema v. British Columbia* [2004] B.C.J. No 2721 (S.C.)); Ireland (a case is currently pending in which a surrogate mother and a genetic intending mother are challenging the fact that the intending mother cannot be registered as the legal mother on the birth certificate); United States of America (New York: *T.V. et al. v. New York State Dept. of Health* (9 August 2011), confirming that it was not necessary for a genetic intending mother to initiate adoption proceedings and a judicial declaration of maternity could be made).

<sup>55</sup> See note 106 *infra*.

<sup>56</sup> *E.g.*, Czech Republic, Ireland, Japan, the Netherlands.

<sup>57</sup> See Section III(b) *infra*.

<sup>58</sup> It is considered that this group includes, amongst others: Australia (the Australian Capital Territory (ACT), Queensland (QLD), New South Wales (NSW), South Australia (SA), Victoria (VIC), Western Australia (WA)), Canada (Alberta, British Columbia); China (Hong Kong SAR), Greece, Israel, South Africa, United Kingdom and, to a certain degree, New Zealand.

arrangements for defined, eligible persons and make specific provision for the legal parentage of a child born as a result of an agreement which falls within the scope of the legislation.<sup>60</sup> In some States, to enter into a surrogacy arrangement which is not compliant with this legislation will amount to a criminal offence.<sup>61</sup> This note only discusses a few key aspects of this statutory regulation:

### The type of "regulation"

17. The type of regulation enacted can be seen to fall into two groups: (1) the first group<sup>62</sup> applies a process of "pre-approval" of surrogacy arrangements, whereby the prospective intending parents and the surrogate mother must present their arrangement to a body<sup>63</sup> to be approved *before* the arrangement and any medical treatment may proceed. The bodies are required to verify that the conditions of the legislation have been met. (2) In the second group,<sup>64</sup> regulation relates only to putting in place a set procedure for the intending parents to obtain legal parentage for a child born as a result of a surrogacy arrangement *ex post facto*. Here the focus is on the transfer of legal parentage post-birth, and the process usually includes a *retrospective* consideration of the arrangement to determine whether the conditions of the legislation have been met such that a "parental order" (transferring legal parentage) may be made. The emphasis of these approaches is therefore different.<sup>65</sup>

### Which surrogacy arrangements are generally permitted by the legislation?

18. The overwhelming trend across the States which regulate surrogacy is to permit only *altruistic* surrogacy arrangements.<sup>66</sup> In many States this requirement is enforced with criminal provisions regarding commercial surrogacy.<sup>67</sup> That said, in most States intending parent(s) are permitted to pay "reasonable expenses" to the surrogate.<sup>68</sup> Israel stands as an exception because its legislation authorises the committee which pre-approves surrogacy arrangements to allow monthly "compensation payments" to the surrogate for "pain and suffering", as well as reimbursement for her expenses. The Act

<sup>59</sup> "Growing" because many of these States have enacted this legislation within the past ten years: *e.g.*, Australia (ACT (2004), QLD (2010), NSW (2010), WA (2008), VIC (2008)), Canada (Alberta (2010), British Columbia (2011, not yet in force)), China (Hong Kong SAR, Ordinance came into effect in 2007), Greece (2002 and 2005), Russia (2011), South Africa (law came into effect in 2010).

<sup>60</sup> Some States (*e.g.*, Mexico (Tabasco), Russia, Ukraine) have a limited number of legislative provisions which expressly permit surrogacy or provide for the legal parentage of a child born as a result of a surrogacy arrangement. However, these States are not dealt with in this section since there is no "regulation" as described in sub-section (a) *infra*. Where relevant, they are dealt with in the "permissive" section below.

<sup>61</sup> In some States, entering into *any* arrangement which is not compliant with the legislation will amount to a criminal offence: *e.g.*, Greece, Israel. In other States, criminal provisions are limited to entering into, or brokering, a *commercial* arrangement: *e.g.*, Australia (states at note 58), Canada (as a result of federal legislation), China (Hong Kong SAR), New Zealand, United Kingdom.

<sup>62</sup> *E.g.*, Australia (VIC, WA and, by practice rather than legislation, ACT), Greece, Israel, South Africa. New Zealand has legislation concerning ART which specifically regulates certain aspects of surrogacy arrangements and includes an ethics approval process for surrogacy arrangements involving IVF. However, there is no legislation regulating the legal parentage of children born as a result.

<sup>63</sup> Whether a court or a committee established specifically for the purpose.

<sup>64</sup> *E.g.*, Australia (QLD, NSW, SA), Canada (Alberta and British Columbia, both as a result of new legislation: in Alberta, the Family Law Statutes Amendment Act of Alberta 2010, c.16 and in British Columbia, the Family Law Act 2011), China (Hong Kong SAR), United Kingdom.

<sup>65</sup> In the first, the aim is to regulate the entire process of the surrogacy arrangement and to stop agreements progressing which are not in accordance with the legislative criteria; in the second, the focus is usually more limited and relates to regulating the status of the child after the event. These States may also have some 'limiting' criteria concerning the agreement and the process itself, *e.g.*, commercial arrangements and intermediary activities related thereto will usually be prohibited (see note 61).

<sup>66</sup> *E.g.*, Australia (this is a common feature across all states which regulate surrogacy: see note 58), Canada (as a result of federal legislation), China (Hong Kong SAR), Greece, New Zealand, South Africa, United Kingdom.

<sup>67</sup> *Supra* note 61.

<sup>68</sup> Depending upon the particular State, such expenses may be undefined (*e.g.*, the United Kingdom) or may be expressed to include, for example, medical, counselling and / or legal expenses (*e.g.*, Australia (SA, WA, VIC, NSW, QLD), Greece, New Zealand, South Africa) and, in a few States, "loss of income" (*e.g.*, Greece (and this may even be paid where the surrogate was previously unemployed), South Africa (the South African court has expressed concern about possible abuse of these provisions because of deep socio-economic disparities in the country: *Ex parte* matter between *WH, UVS, LG and BJS* (case No 29936/11, October 2011, not yet reported), at para. 64 and M. Slabbert, "National Report on Surrogacy: South Africa").

does not require such compensation and specifies no minimum or maximum payments, leaving it to the discretion of the parties and, ultimately, the committee.<sup>69</sup>

19. In addition, there is a strong trend amongst these States to permit only surrogacy arrangements where at least one of the intending parents is genetically related to the child.<sup>70</sup> Further, in some States it is specified that there must be *no* genetic link between the surrogate and the child.<sup>71</sup>

#### The eligibility criteria for intending parents and surrogate mothers

20. The specificity regarding the eligibility criteria for surrogate mothers and intending parents depends to a degree on the type and level of regulation in the State (see (a) above).<sup>72</sup> However, within systems which regulate the arrangement *per se*, a number of criteria for surrogate mothers must be satisfied. These vary across the States but include requirements as to: age,<sup>73</sup> satisfactory completion of medical and psychological screening,<sup>74</sup> having already had a viable pregnancy and / or a living child and / or having completed her family,<sup>75</sup> civil status<sup>76</sup> and having received independent legal advice.<sup>77</sup> In relation to the intending parents, many States require that there be a medical reason for the intending mother not undertaking the pregnancy herself.<sup>78</sup> Some States also have restrictions regarding the civil status, sexual orientation,<sup>79</sup> and age of intending parents.<sup>80</sup>

#### The legal parentage of the child born as a result of the surrogacy arrangement

21. In the States which regulate the entire surrogacy arrangement process, authorisation to proceed with the arrangement will often have the result that the intending parents are, for all purposes, automatically regarded (and registered) as the

<sup>69</sup> S. Shakargy, "National Report on Surrogacy: Israel".

<sup>70</sup> *E.g.*, China (Hong Kong SAR) (only the gametes of a married couple can be used which implies that *both* intending parents must be genetically related to the child), Israel (the intending father's gamete must be used, but a donor egg may be used), South Africa (gametes of both intending parents should be used unless this is impossible as a result of medical or other valid reasons, in which case at least one of the intending parents should be genetically related to the child), United Kingdom.

<sup>71</sup> *I.e.*, traditional surrogacy arrangements are not permitted under the legislation: *e.g.*, Australia (ACT) and Israel. In South Africa, different rules apply depending upon whether the arrangement is traditional or gestational.

<sup>72</sup> *E.g.*, in the United Kingdom since the "regulation" takes the form of requirements in order that intending parents can acquire legal parental status following the birth of the child, the only "requirement" concerning the surrogate mother specified in the legislation is that she has freely consented (once the child is six weeks old) to the transfer of parental rights in full knowledge of the consequences.

<sup>73</sup> *E.g.*, Australia (NSW, WA, VIC, QLD: all have minimum age requirements); Israel (surrogate must be between 22 and 38 years); South Africa (surrogate must be between 21 and 34 years for a traditional surrogacy; not over 50 years for a gestational surrogacy).

<sup>74</sup> *E.g.*, Australia (WA, SA: surrogate mother must have been assessed to be medically and psychologically suitable); Greece (subject to medical screening and psychological evaluation); Israel (medical and psychological evaluations of the surrogate mother are submitted to the committee).

<sup>75</sup> *E.g.*, Australia (some states have a requirement that the surrogate have a still living child); Israel (must have given birth at least once but no more than three times); New Zealand (has completed her family); South Africa (has a living child of her own).

<sup>76</sup> *E.g.*, Israel (surrogate has to be unwed, but this can be waived by committee if no other solution can be found).

<sup>77</sup> *E.g.*, Australia (NSW, WA, SA, VIC, QLD).

<sup>78</sup> *E.g.*, Australia (NSW, WA, SA, VIC, QLD), China (Hong Kong SAR), Greece, Israel, New Zealand, South Africa. Some States also define that there may be a "social" need for the surrogacy: this therefore enables same-sex male couples and / or single males to use surrogacy arrangements.

<sup>79</sup> *E.g.*, Australia (in SA and WA, surrogacy is not available to same-sex intending parents; in ACT, VIC, NSW and QLD, it is. Surrogacy is available to single men in QLD, NSW, and VIC but not in other states); United Kingdom (the intending parents must be a couple, though they can be heterosexual, same-sex, married, or not); China (Hong Kong SAR) (surrogacy is only available to a married couple); Greece (unmarried or married heterosexual couples may enter into an arrangement or single women but same-sex couples or single men are not permitted to. However, in two recent decisions, single men have been granted permission to enter into a surrogacy arrangement: K. Rokas, "National Report on Surrogacy: Greece"); Israel (intending parents must be a heterosexual couple, whether married or not); South Africa (intending parents can be heterosexual or same-sex couples, whether married or not, and single persons of both genders).

<sup>80</sup> *E.g.*, Israel (over 18 years, but generally not over 52 years), United Kingdom (over 18 years).

legal parents of the child from the moment of birth.<sup>81</sup> However, an exception to this is Israel where the intending parents are required to issue proceedings for a Parenthood Decree no later than seven days following the birth of the child: a decree will be granted unless the child's best interests demand otherwise.<sup>82</sup>

22. In the States which focus on the regulation of legal parentage *ex post facto*, the general approach is that, upon the birth of the child, the general law on parentage will apply.<sup>83</sup> Within a defined timeframe (often six months), an application may be made by the intending parents for a transfer of parentage.<sup>84</sup> Each State, while having slightly varying requirements for the transfer of parentage, places the paramount consideration on the best interests of the child. In some States a presumption will operate that it will be in the best interests of the child to transfer parentage.<sup>85</sup>

#### The regulation of intermediaries

23. The establishment and operation of "for-profit" intermediaries ("agencies"), which provide services including "matching" prospective intending parents with surrogates, is not possible in many of the States discussed in this section due to the fact that the brokering of arrangements on a "for-profit" basis is expressly illegal.<sup>86</sup> In many States it is also illegal to advertise for, or as, a surrogate.<sup>87</sup>

#### Is the surrogacy agreement enforceable?

24. In many of these States, the surrogacy agreement itself remains contractually unenforceable.<sup>88</sup> However, in all of the States which have established the "pre-approval" system, once approval to proceed has been given, generally the surrogate may not renege on the agreement.<sup>89</sup> This is said to derive not from contractual principles, but from the fact that approval has been given and thus the matter has been taken out of the parties' hands and is now a matter which has been determined by the State.

#### The incidence of international surrogacy arrangements in these States

25. It appears that, for the most part, intending parents habitually resident in other States are not travelling to these States to enter into surrogacy arrangements. This is because most of these States have strict requirements in their legislation in relation to the habitual residence (or domicile) of the intending parents and / or the surrogate which

<sup>81</sup> *E.g.*, Greece (if the intending mother is unmarried, her partner must have given his consent to the arrangement before a notary in order to become the legal father), South Africa.

<sup>82</sup> A similar system is used by Australia (VIC, WA) where, although the approval of a State regulator is required for the arrangement to proceed, a transfer of parentage will still need to be obtained by intending parents following the birth of the child.

<sup>83</sup> *I.e.*, usually the surrogate mother will be the legal mother and legal paternity will depend upon her marital status.

<sup>84</sup> *E.g.*, Australia (QLD, NSW, SA, ACT, VIC, WA), China (Hong Kong SAR), United Kingdom.

<sup>85</sup> *E.g.*, Australia (WA).

<sup>86</sup> See *supra* note 61. South Africa (the brokering of arrangements was targeted in a recent court decision where the court stated that such agreements would have to be presented to it for scrutiny prior to approval to go ahead with the arrangement being granted: *supra* note 68).

<sup>87</sup> *E.g.*, Australia (but commentators have noted that advertising on the Internet is occurring and seems very hard to police); China (Hong Kong SAR); Greece; New Zealand; South Africa (a woman may advertise her willingness to be a surrogate on an altruistic basis); United Kingdom (not-for-profit bodies may provide some services related to surrogacy on a non-commercial basis).

In Israel, however, private advertising is permitted and agencies are not regulated under the legislation. The Committee which approves surrogacy arrangements in Israel requires intending parents' agreements with any agency to be disclosed to them and the amounts paid must be reported. The agencies are thus subjected to scrutiny to a degree by this body (S. Shakargy, *op. cit.* note 69).

<sup>88</sup> *E.g.*, Australia (common across all states which regulate surrogacy, except in relation to the payment of reasonable expenses which it seems may be claimed in some states if they are not paid), China (Hong Kong SAR), New Zealand, United Kingdom. Any dispute in these States would be referred to the court to determine in accordance with the child's best interests.

<sup>89</sup> *E.g.*, Greece; Israel (if the surrogate mother wishes to keep the child *and* there has been a significant change in circumstances, the court may order that the surrogate should keep the child); South Africa (different rules apply for a traditional surrogacy arrangement and there is a cooling off period of 60 days following the birth during which the surrogate mother can change her mind).

are specifically designed to prevent “reproductive tourism”.<sup>90</sup> In addition, the fact that *commercial* surrogacy is not permitted by most of these States may also be a further disincentive to international prospective intending parents since an “altruistic” surrogate may be difficult to find. In contrast, there are many known cases where intending parents habitually resident in these States have travelled to a more permissive State to enter into a surrogacy arrangement.<sup>91</sup> This may be connected with the fact that particular intending parents do not meet the eligibility criteria of their “home” State. In some States, it may also be linked to the fact that commercial surrogacy arrangements are not permitted and it is difficult to find surrogates who will carry a child for no compensation.<sup>92</sup>

**(iv) States with a permissive approach to surrogacy, including commercial surrogacy<sup>93</sup>**

26. Lastly, there is a group of States which share the following characteristics: (1) *commercial* surrogacy is permitted and practiced; (2) following a surrogacy arrangement, there are usually procedures in the State<sup>94</sup> which enable legal parentage to be granted to one or both of the intending parent(s); and (3) there is no domicile or habitual residence requirement for intending parents. The policy perspectives which have resulted in this position vary across these States. In some, the economic policy of encouraging “medical tourism”, combined with an absence of regulation regarding surrogacy, has played a role.<sup>95</sup> In comparison, in others, constitutional or legal protections may have influenced the legal culture and form (or absence) of any regulation.<sup>96</sup> The common characteristics may result from legislation, judicial practice, an absence of any regulation or a combination of all of these.<sup>97</sup> In the States where there is

<sup>90</sup> *E.g.*, Australia (NSW, WA, SA, VIC, QLD, ACT), Greece (both the intending mother and the surrogate mother have to be “domiciled” in Greece. However, there is a possibility that the courts are not enforcing this condition with rigour: K. Rokas (*op. cit.* note 79)), South Africa, United Kingdom (at the time of the application for transfer of parentage, one or both of the intending parents must be domiciled in the United Kingdom: see *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814).

<sup>91</sup> See Section III(b) *infra*.

<sup>92</sup> *E.g.*, in Australia, lawyers have reported that one reason that clients turn to international surrogacy is due to a lack of available surrogate mothers or gamete donors at “home” (S. Page, “Bringing them home: the journey of children born through surrogacy back to Australia”, presented to the ABA Section of Family Law Conference, October 2011). There is also reporting of a shortage of donor gametes in the United Kingdom (see L. Culley *et al.*, *op. cit.* note 24).

<sup>93</sup> The States which appear to fall within this category include: Georgia, India, Russia, Thailand, Uganda, Ukraine and the United States of America (there is affirmative case law or legislation allowing commercial surrogacy in 18 states: case law – California, Maryland, Massachusetts, Ohio, Pennsylvania, South Carolina; statutes – Alabama, Arkansas, Connecticut, Illinois, Iowa, Nevada, North Dakota, Oregon, Tennessee, Texas, Utah, West Virginia). There have also been reports of foreign agencies using surrogate mothers in Armenia and Moldova (S. Shakargy, *op. cit.* note 69).

<sup>94</sup> Either as a result of specific legislation or under general law. However, this is not the case in Thailand: under the Thai Civil and Commercial Code, an unmarried surrogate mother is the sole legal parent of a child born to her and, for a married surrogate mother, she and her spouse will be the legal parents. There is a limited ability for a genetic intending father to acquire legal paternity under the Code but he must wait until the child is 7 years old.

<sup>95</sup> *E.g.*, India, Thailand. “India’s efforts to promote medical tourism took off in late 2002 when the Confederation of Indian Industry produced a study on the country’s medical tourism sector, in collaboration with international management consultants, McKinsey & Company, which outlined immense potential for the sector. The following year, the finance minister called for the country to become a ‘global health destination’”: see < <http://www.who.int/bulletin/volumes/85/3/07-010307/en/> > (last consulted 16 March 2012). The reproductive segment of the “market” in India is estimated to be worth approximately \$400 million (Prel. Doc. No 11 of March 2011 (*op. cit.* note 3), at para. 11).

<sup>96</sup> *E.g.*, United States of America (whether there is a constitutionally protected right to have children *through ART* is debated. However, the US Supreme Court in *Carey v. Population Svcs. Int’l* (1977) 431 U.S. 678 confirmed that one aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment is “a right of personal privacy”. This includes the interest in independence in making personal decisions relating to procreation. “The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy.”); Ukraine (Art. 281 of the Civil Code states, “an adult woman or man has the right to be cured by means of assisted reproductive technologies [...]”). This applies to all persons, regardless of their nationality: G. Druzenko, “National Report on Surrogacy: Ukraine”).

<sup>97</sup> *E.g.*, in Uganda there is no specific regulation of surrogacy and the only legal constraints are those imposed by the general law (B. Isoto, “National Report on Surrogacy: Uganda”). In Thailand, there is also no regulation of surrogacy (but see note 106 *infra* regarding draft legislation being considered). In India, there are non-binding guidelines concerning ART which also mention certain aspects relating to surrogacy (National Guidelines

some (limited) legislation regulating surrogacy, there are usually eligibility criteria which must be fulfilled by the intending parents or surrogate in order to be able to enter legally into a surrogacy arrangement.<sup>98</sup> There may also be requirements concerning the type of surrogacy arrangement which may be legally entered into *i.e.*, usually there must be a genetic link between the child and one of the intending parents and, in some States, traditional surrogacy arrangements are prohibited.<sup>99</sup> In States where there is no regulation, the only legal constraints concerning eligibility are those imposed by general law.<sup>100</sup> There is also, of course, no requirement for any genetic link between the intending parents and child born and traditional surrogacy arrangements are permitted.<sup>101</sup>

27. In terms of legal parentage, in some of these States, intending parents may be immediately placed on the birth certificate *following* the birth if certain conditions are fulfilled, one of which is that the surrogate mother consents.<sup>102</sup> In contrast, in some States, it is possible to acquire a *pre-birth* order such that the child will be automatically the legal child of the intending parents at birth.<sup>103</sup> The rules on the enforceability of the contract also vary across the States and, while it is clear that in some States the principle clause for the surrogate to hand the child to the intending parents and relinquish her rights would not be enforceable, in other States it appears the contract may be enforceable.<sup>104</sup>

28. These States have become “hubs” for international surrogacy arrangements. Intending parents from all over the world are engaging surrogates in these States<sup>105</sup> to carry children for them, often without understanding that the legal parentage they can acquire in these States in relation to the child(ren) born, will not be universally recognised.

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for Accreditation Supervision and Regulation of ART Clinics, promulgated by the Ministry of Health and Family Welfare, Government of India and the Indian Council of Medical Research and the National Academy of Medical Sciences in 2005); there is also limited judicial precedent on the issue (see, *e.g.*, *Baby Manji Yamada v. Union of India & Anr.* (2008) INSC 1656 (29 September 2008)). In Ukraine and Russia, there is legislation which specifies: (1) certain conditions in relation to the use of ART, including surrogacy; and (2) the procedure for intending parents to acquire legal parentage. However, the legislation is sparse and silent on central matters such as the payments which may be made to the surrogate. In the United States of America, of the 18 states which allow commercial surrogacy, 12 have specific statutory regulation and six rely on judicial precedent.

<sup>98</sup> *E.g.*, Ukraine (only heterosexual spouses may enter into a surrogacy arrangement, there must be a medical need for surrogacy and the child must be genetically related to one of the spouses. However, it is hard to assess how far these criteria are enforced in practice: *e.g.*, a case in 2007 demonstrated that a couple had been able to enter into a surrogacy arrangement using donor egg and sperm (the case of Jeanette Runyon: the intending parents were subsequently prosecuted and the child remains in Ukraine. See G. Druzenko, *op. cit.* note 96)); Russia (certain requirements are placed on a surrogate mother by the Federal Law on the Basis of Protection of Citizens’ Health, adopted in November 2011. However, requirements for intending parents are unclear: see O. Khazova, “National Report on Surrogacy: Russia”).

<sup>99</sup> *E.g.*, Ukraine (there must be a genetic link, *ibid.*, but there appears to be no explicit prohibition of traditional surrogacy); *cp.* Russia (where the 2011 Law expressly prohibits traditional surrogacy arrangements (s.55(10)) and appears to suggest that surrogacy involving donor gametes is only available to single women (*i.e.*, a couple must both use their own genetic material)).

<sup>100</sup> Such matters are therefore generally left to the individual clinics: *e.g.*, in Uganda it is illegal to engage in homosexual acts and hence homosexual couples are not able to enter into a surrogacy arrangement (B. Isoto, *op. cit.* note 97).

<sup>101</sup> *E.g.*, India, Thailand, Uganda. *Cp.* the 2010 Draft Indian Bill which defines a surrogacy arrangement in such a way as to specifically exclude traditional surrogacy arrangements (clause 34(12)). It does not, however, exclude situations where an intending couple commission a child which is genetically unrelated to either of them.

<sup>102</sup> *E.g.*, Russia, Ukraine (it is an administrative act). The requirement to obtain the surrogate mother’s consent has led to alleged cases of extortion (including the involvement of criminal gangs) in Ukraine: < <http://surrogacy.ru/eng/news/news14.php> > (last consulted 16 March 2012).

<sup>103</sup> *E.g.*, United States of America (California: pursuant to *Johnson v. Calvert*, 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776 (cert. denied 510 U.S. 874, 114 S.Ct. 206, 126 L.Ed.2d 163) (Cal. 1993) and *Buzzanca v. Buzzanca*, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (Cal. Ct. App. 1998), and Massachusetts, pursuant to *Culliton v. Beth Israel Deaconess Medical Center*, 435 Mass. 285 (2001), and *Hodas v. Morin*, 442 Mass. 544 (2004)).

<sup>104</sup> *E.g.*, in Russia the principle clause is not enforceable (O. Khazova, *op. cit.* note 98); compare, *e.g.*, Ukraine (where there is no case law on the issue but commentators have stated that the court would look favourably on the intending parents: see G. Druzenko, *op. cit.* note 96).

<sup>105</sup> The surrogate mothers will not always be nationals of, or resident in, these States. When there are no requirements concerning the surrogate mother’s nationality or residence, women may travel to the State to become surrogate mothers (freely, or under duress).

### **(v) Trends in legislative developments**

29. As has been noted, some of the States which have legislated to regulate surrogacy have done so recently. Further, a number of the States which currently have largely no regulation in respect of surrogacy (or, in a few cases, those with a currently prohibitive stance) are considering some form of regulation.<sup>106</sup> The legislation enacted and being considered generally contains rules which permit and regulate certain defined forms of surrogacy arrangements, most commonly *altruistic* arrangements.<sup>107</sup> At the same time, the legislation outlaws forms of arrangements which do not fit within the approved "model". In some States, the Greek / Israeli "model" of requiring pre-approval from a body before medical treatment commences is being followed. At the current time, no State is known to be currently legislating to prohibit all forms of surrogacy arrangements.

30. Moreover, three of the States with currently very permissive approaches to surrogacy, including commercial surrogacy, are also considering draft legislation.<sup>108</sup> The proposed draft legislation in all cases aims to (further) regulate surrogacy and put in place certain conditions on its use. However, the precise conditions differ between these States: for example, in one State commercial surrogacy would be specifically permitted by the proposed legislation,<sup>109</sup> and in another, it would be expressly outlawed with significant consequences for contravening the law.<sup>110</sup> Moreover, in one State, the draft law under consideration contains provisions concerning international surrogacy which aim to ameliorate some of the current difficulties encountered by international intending parents.<sup>111</sup> In another State, a draft Bill expressly limits the use of ART (including surrogacy) to nationals of the State, thus attempting to curb the practice of "reproductive tourism".<sup>112</sup>

### **(b) Approaches to international surrogacy arrangements**

31. As described in Preliminary Document No 11 of March 2011, international surrogacy arrangements usually come to the attention of the authorities in the State of the habitual residence of the intending parents in one of two ways: (1) at the consular authorities overseas when the intending parent(s) request a passport or other travel documentation for the child in order to return "home"; or (2) when the intending parent(s) and child are

<sup>106</sup> *E.g.*, Argentina (four bills on surrogacy are pending consideration: the three most recent (2011) seek to regulate surrogacy. Further, in February 2011 a project to update the Argentinean Civil Code was commenced and this included a proposal on surrogacy inspired by Greek law: see E. Lamm, *op. cit.* note 54); Belgium (there are currently a number of bills before parliament, all of which prohibit commercial surrogacy); Bulgaria (on 26 October 2011, the Bulgarian parliament reportedly adopted the first reading of an amending and supplementing bill to the Family Code, legalising surrogacy: see < <http://claradoc.gpa.free.fr/doc/398.pdf> >, last consulted 16 March 2012); Finland (on 23 September 2011 it was reported that a report from an advisory board was potentially opening up the way for surrogacy in very limited circumstances: < <http://claradoc.gpa.free.fr/doc/393.pdf> >, last consulted 16 March 2012); Iceland (on 18 January 2012, it was announced that the Icelandic parliament had voted to begin the process of legislating to permit certain forms of surrogacy arrangements, but not commercial surrogacy: see < <http://claradoc.gpa.free.fr/doc/407.pdf> >, last consulted 16 March 2012); Ireland (the Minister of Justice recently announced that he intends to legislate in this area); Mexico (Mexico City) (a law has been approved, but not yet entered into force, which expressly regulates surrogacy: E. Lamm, *ibid.*); Sweden (a new study is to commence re-examining the prohibition on surrogacy: < <http://www.thelocal.se/39650/20120313/> >, last consulted 16 March 2012).

<sup>107</sup> *E.g.*, Belgium, Iceland, Mexico (Mexico City).

<sup>108</sup> India (2010 Draft Indian Bill: with parliament), Thailand (Draft Surrogacy Act: passed by the Cabinet but awaiting parliamentary approval) and Ukraine (in the case of Ukraine, to *further* regulate matters: three Bills are pending consideration but none were introduced by the government).

<sup>109</sup> *E.g.*, the 2010 Draft Indian Bill specifically permits compensation for the surrogate beyond reasonable expenses (clause 34(3)).

<sup>110</sup> *E.g.*, Thailand: the Draft Surrogacy Act would prohibit commercial surrogacy (save for expenses for the health of the surrogate related to the pregnancy). The consequences of contravention of this law would be up to 10 years imprisonment or a fine.

<sup>111</sup> The 2010 Draft Indian Bill contains a clause specifically aimed at "foreign" (*i.e.*, non-resident) intending parents. This is discussed in Section IV *infra*.

<sup>112</sup> One pending Ukrainian Bill seeks to limit access to ART to legally capable Ukrainian citizens 21 years or over (Draft Law No 8282). However, this Bill was not proposed by the government and commentators have said there is little chance of it being passed (G. Druzenko, *op. cit.* note 96).



back “home”<sup>113</sup> and they wish to ensure that the child’s legal status is regularised in the “home” State.<sup>114</sup> There are usually two (inter-connected) issues for the “home” authorities (which may arise in any order, depending on the factual matrix of the case): (a) who are the *legal* parents of the child according to the law (including, in some cases, the private international law rules) of the “home” State? And, (b) can the child acquire the nationality of the “home” State? The first question may be a necessary, preliminary question to the second in most States (but not all).<sup>115</sup> An increasing number of “receiving States”<sup>116</sup> have now placed on the Internet stark warnings for prospective intending parents about the dangers and complications which may ensue if nationals or residents enter into an international surrogacy arrangement.<sup>117</sup>

32. It should be noted at the outset of this section that despite *some* partial “remedies” which are being employed by certain States (as described below), the current situation is highly undesirable for all involved and, most importantly, for the child(ren). First, in some States, such “remedies” (even partial) are simply not available.<sup>118</sup> Secondly, even those States which have crafted partial “remedies”, have not been able to do so for all the cases which come before them. The factual matrices of these cases vary significantly and the “remedies” are usually “ad hoc” and sometimes expressly limited to the particular case at hand.<sup>119</sup>

33. Thirdly, legal parentage is the gateway for children through which many legal rights and obligations flow.<sup>120</sup> Another reason as to why the status quo is unsatisfactory therefore is that, as will be seen below, these partial “remedies” will often still leave the child with “limping” legal parentage. This is because while the child may be able to acquire a passport and enter the State based on one intending parent, the second intending parent (often an intending mother) may be left without any legal status in respect of the child and, in some States, with no ability to acquire such a status. For example, information obtained recently evidences that there are numerous children born as a result of international surrogacy arrangements who are living in one particular State

<sup>113</sup> Usually with the child travelling on the passport of the State of birth. This is possible if the child is born in a State where acquisition of citizenship may be based on the *ius soli* principle (e.g., United States of America).

<sup>114</sup> Often through registering the child in the civil status records of that State and / or by applying for the child to acquire the nationality of the State at this time. In international surrogacy cases, intending parents may present the authorities with one of a number of documents from abroad evidencing their legal parentage: e.g., an original or amended birth certificate, a judicial decision, an administrative decree or an adoption order.

<sup>115</sup> See group 2 below: e.g., in Australia, Israel and the United States of America, guidance suggests that citizenship may be granted to a child born to an international surrogacy arrangement if a *genetic* link can be established between the child and one of the intending parents. However, this will not establish the intending parents’ legal parentage.

<sup>116</sup> See the annexed **Glossary** for the definition of this term as used in this document.

<sup>117</sup> E.g., including Australia, Canada, Ireland, New Zealand, Switzerland, United Kingdom.

<sup>118</sup> E.g., in Australia, in a series of recent cases, while “parental responsibility” orders have been granted to intending parents to grant them the ability to make day-to-day decisions concerning the child, their legal parentage has been refused recognition and has not been established under Australian law: see *Dudley and Chedi* (2011) FamCA 502, *Hubert and Juntasa* (2011) FamCA 504, *Findlay and Punyawong* (2011) FamCA 503, *Johnson and Anor & CHompunut* (2011) FamCA 505.

<sup>119</sup> See, J. Verhellen, “Intercountry Surrogacy: a comment on recent Belgian cases”, (2011) NIPR Afl. 4, at 1.2, where the “[f]ait accompli leading to a case-by-case approach by the Belgian authorities” is described. Concerning the variety of factual matrices which come before State authorities, see: “Documenting US Citizenship and getting a US passport for Children born abroad to US citizen parents through ART” by L. Vogel, US Department of State, presented to the ABA Family Law Section Conference, October 2011, where it was stated, “[t]he Department has seen examples of intending US parents who have used ART to conceive children using almost every combination of US eggs and sperm or foreign eggs and sperm and foreign or US surrogates. US intending parents have been single men, single women, married heterosexual couples, and same sex couples, both married and unmarried.” A case scenario which may cause difficulties, cited in this paper, is if a genetically related intending parent is *not* a national of the State where he / she resides and wishes to return with the child (*i.e.*, the national is the *non*-genetically related intending parent), it is unlikely that the child would be able to acquire citizenship of that State “by descent” and there may therefore be significant difficulties for the child to enter the jurisdiction (and ultimately to acquire citizenship). This is the same in other States which rely on the genetic link to establish citizenship “by descent” (e.g., Israel).

<sup>120</sup> Prel. Doc. No 11 of March 2011 (*op. cit.* note 3), at para. 4. It is not hard to envisage the difficulties which may result in the future for the child in this situation, e.g., if the intending parents separate and custody of the child is sought, if the recognised “legal” parent dies or, indeed, if a non-recognised parent dies in terms of inheritance, etc.

with at least one individual (possibly two) who is (or are) not recognised by that State as the children's legal parent(s).<sup>121</sup>

34. Lastly, where available, the procedures which are being used by intending parents to establish legal parentage are often cumbersome and lengthy, in part because they are being used for a purpose for which they were never intended.<sup>122</sup> Such procedures may also, of course, entail huge (additional) costs for intending parents.

**(i) States which apply a "conflicts of law" or "recognition" method to the question of legal parentage established in the child's State of birth**<sup>123</sup>

(i) Legal parentage

35. In many States of a civil law tradition, the question of the legal parentage of a child born in another State will be answered by an application of the relevant private international law rules of the State, most often those relating to "recognition". In some States, different rules may be applicable depending upon whether the intending parents seek recognition of a birth certificate (confirmation of a legal "fact"), an acknowledgement of paternity (a legal "act") or a judgment.<sup>124</sup> However, a number of cases illustrate that, no matter whether recognition is sought of a legal act, fact or judgment, a strict application of these private international law rules may often, in an international surrogacy context, lead to non-recognition of the legal parentage of the intending parent(s) (in particular, legal maternity) established under the foreign law on the basis of an application of the State's "public policy" exception. This can be seen in a number of cases which have arisen in the past few years, resulting in tremendous difficulties for intending parents and, ultimately, the child.<sup>125</sup>

<sup>121</sup> This information was obtained by the Aberdeen University research project, with the assistance of CLARA, *Comité de soutien pour la Légalisation de la Gestation Pour Autrui et l'Aide à la Reproduction Assistée*, in response to a questionnaire to which 12 sets of French intending parents (and one Belgian intending father) who had undertaken international surrogacy arrangements responded. In all cases, the responses indicated that one or both of the intending parents are not recognised in France (or Belgium) as the legal parents of the child(ren).

<sup>122</sup> *E.g.*, the process to establish legal parentage recommended to German intending parents who have entered into an international surrogacy arrangement ("How to choose a surrogate for German Intended parents: an overview of legal issues when trying to legalise a child for intended parents from Germany in Germany" by M. Pecher (attorney), presented at the ABA Family Law Section Conference, October 2011). Since the foreign birth certificate cannot be transcribed into the German vital records (note 123 *infra*) and recognition of any foreign judgment will be refused on public policy grounds, intending parents are advised that they will have to (1) establish the legal parentage of the intending father under German law. (This involves an acknowledgement of paternity process which requires the consent of the surrogate mother or, if the surrogate is married, a court hearing to contest the paternity of the surrogate's husband, followed by the acknowledgement process.) (2) There will then need to be proceedings to grant the intending father sole custody. (3) Finally, sometime later, the intending mother will have to apply to court for a step-parent adoption (even if she is the genetic mother of the child).

<sup>123</sup> *E.g.*, Belgium, France, Germany, Italy, the Netherlands and Spain. It should be noted that, previously, in many of these States, due to the problems intending parents knew would result from disclosing the fact of the surrogacy arrangement to the relevant authorities, once the child was in the State (usually having travelled on the passport of the State of birth), the intending parents simply presented the foreign birth certificate to the local civil registrar and asked for "transcription" into the civil status records, failing to mention the fact of surrogacy. The birth was therefore recorded as a "normal" overseas birth and the intending parents acquired legal parentage in their "home" State. This actually amounts to a criminal offence in most of these States. However, due to the increasing numbers of these arrangements, the civil status registrars are now aware of the possibility of surrogacy having been used and new procedures have been put in place to attempt to minimise these practices (*e.g.*, Germany: there are new practice guidelines for the German vital records offices (M. Pecher, *ibid.*); Italy: see, E. Menzione, "The Legal Situation in Italy: A general overview", presented at the ABA Family Law Section Conference, October 2011, where it is stated that, until last year, registration in this way was possible but recently the authorities have become more strict and prosecutions are now even being brought – see note 152 *infra*.)

<sup>124</sup> *E.g.*, this is the case in Belgium and the Netherlands. International surrogacy cases may involve any one of these documents (see note 114, *supra*).

<sup>125</sup> *E.g.*, France: decisions of the *Première chambre civile* of the *Cour de Cassation* (Arrêts Nos 369, 370, 371 du 6 avril 2011). The approach of the *Cour de Cassation* is being challenged before the European Court of Human Rights: see Application No 65941/11, *Labassee and others v. France*, introduced on 6 October 2011. Belgium: in two cases challenging the refusal of the Belgian authorities to issue travel documentation for the child, the courts refused to overturn the decision of the Belgian authorities: Court of First Instance Brussels 4 February 2009, AR 09/1694/C and Court of First Instance Brussels 9 July 2010, AR 10/830/C (both unpublished). Moreover, in the *twins H&E* case (Court of First Instance, Antwerp, 19 December 2008) and the case of the

36. However, in a number of States, judicial or administrative authorities have, more recently, attempted to create at least partial “remedies”, in particular to attempt to enable a child born from an international surrogacy arrangement to return “home”.<sup>126</sup> These solutions have often been explicitly based upon recognition that the pre-eminent consideration must be the best interests of the child. For example, in one State, in two recent decisions concerning the recognition of foreign birth certificates, the court recognised the foreign birth certificates as valid authentic acts insofar (only) as they established the legal paternity of the intending father.<sup>127</sup> The court held that the illicit nature of the surrogacy arrangements under internal law could not be given greater weight than the superior interests of the child.<sup>128</sup> A court in another State recently followed a similar approach, referring to Article 8 of the European Convention on Human Rights and the family life which existed between the intending father and the child born in India.<sup>129</sup> Such decisions may represent the beginnings of a trend in some States to focus on the status of the child and to disassociate this from the illegal nature of the contract under internal law. However, these decisions have all so far focused on the recognition of legal *paternity* of an intending father. In some States, the intending mother may be able to regularise her status as regards the child by initiating adoption proceedings once the child is “home”.

37. In line with the trend to focus on legal *paternity*, in two other States, a more lenient approach has been taken towards “acknowledgements of paternity” by intending fathers.<sup>130</sup> In one State, in at least one case, foreign law was applied to the question of whether an intending father had undertaken a valid acknowledgement which led to determination that it was valid.<sup>131</sup> In the other State, in two cases where the foreign birth certificate had been refused recognition at the consulate, the intending fathers successfully acknowledged the child instead. In one case, the intending father was not the genetic father of the child, but the acknowledgement was still held to establish validly

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*twins M&M* (Court of Appeal, Liege, 6 September 2010), despite the recognition of the legal parentage of the genetic intending father (see *infra*), the second intending parents (in one case an intending mother, and in the other a second intending father) were apparently left without legal status with respect to the children. In the Netherlands, the courts have refused to recognise legal parentage established in foreign birth certificates where no mother is mentioned in the birth certificate (see I. Curry-Sumner and M. Vonk, *op. cit.* note 51). In Japan, the courts have consistently upheld the government’s refusal to recognise the legal parentage of intending parents evidenced in a foreign birth certificate, following an international surrogacy arrangement (the *Aki Mukai* case (unpublished), the case of Yasunao and Yoko Kondo, Osaka High Court, 20 May 2005, 1919 Hanrei Jihō 107, affirmed by the Supreme Court (unpublished) and the *Baby Manji* case (*supra* note 26): M. de Alcantara “National Report on Surrogacy: Japan”). In Spain, see the decision of the Tribunal de Primera Instancia No 15 of Valencia (15 September 2010, *La Ley* 152885/2010) annulling the registration of two intending fathers, recognised as the legal parents in a Californian birth certificate (which prompted the Dirección General de los Registros y del Notariado to act: see note 126 *infra*).

<sup>126</sup> In Spain, developments have been instigated by the administrative authorities and an “Instrucción” has been issued by the Dirección General de los Registros y del Notariado (5 October 2010). Whilst the authorities in charge of the civil register usually give effect to a foreign judgment only if the relationship created by the judgment is consistent with the applicable law as determined by the Spanish internal private international law rules (so-called “conflictual recognition”), the Instruction orders civil registrars to instead follow the rules for “procedural recognition”. This means that the conditions for recognition are considerably more limited and the Instruction explicitly makes no mention of “public policy”. However, there is some concern by commentators that the Instruction may not withstand scrutiny by the courts (see P. Orejudo, “National Report on Surrogacy: Spain”).

<sup>127</sup> Belgium: the *twins H&E* case (Court of First Instance, Antwerp, 19 December 2008) and the case of the *twins M&M* (Court of Appeal, Liege, 6 September 2010) (note 125 *supra*). This is in contrast to the principled refusal of the *administrative* authorities to register the children, which has caused the cases to have to come before the courts. A similar finding, this time based on a consideration of Art. 8 of the European Convention on Human Rights (ECHR), was reached in the *child C* case (Court of First Instance, Brussels, 6 April 2010).

<sup>128</sup> *Ibid.*

<sup>129</sup> The Netherlands: ordering the Dutch authorities to deliver an emergency document to allow the child to enter the Netherlands (Judge in Interlocutory Proceedings of the District Court Haarlem 10 January 2011, LJN BPP0426, *NIPR* 211 185).

<sup>130</sup> Germany and Switzerland. In some States, known as “recognition of paternity”.

<sup>131</sup> AG Nürnberg 14 December 2009 – UR III 0264/09, UR III 264/09. S. Gössl (*op. cit.* note 41), where it is stated: “As the acknowledgement of paternity is more liberal under German law, the public policy exception seems to be handled less strictly than in questions of motherhood [...]”.

legal paternity.<sup>132</sup> In these States too, however, it seems that the position of the intending mother remains far more precarious.<sup>133</sup>

(ii) Nationality

38. States apply their own internal law to the question of whether the child is a national of the State. Generally, such laws provide for nationality “by descent” where one of the child’s *legal* parents is a national of the State.<sup>134</sup> This means that the authorities will need to determine the question of legal parentage in order to determine subsequently the question of whether the child can be granted a passport.<sup>135</sup> For this purpose, States in this grouping will usually apply the private international law rules of the State (as described above).<sup>136</sup> If the authorities refuse to issue a passport to the child (for example, as a result of a refusal to recognise the foreign birth certificate), in some States, such a decision may be challenged in court.<sup>137</sup>

**(ii) States which apply the *lex fori* to the question of legal parentage<sup>138</sup>**

(i) Legal parentage

39. In many States of the common law tradition, the approach to the question of the legal parentage of a child born in another State starts from a fundamentally different perspective. In these States, parentage is often viewed as a matter of fact, rather than a conclusion of law.<sup>139</sup> The foreign birth certificate may therefore carry no weight beyond providing factual evidence as to the conclusion regarding legal parentage reached under the foreign law.<sup>140</sup> Moreover, in some of these States, internal legislation concerning the

<sup>132</sup> Switzerland (information from State authorities). This also accords with the approach recommended by one German lawyer to German intending parents (M. Pecher, *op. cit.* note 122). It has also been stated that a French intending father could acknowledge paternity according to French law to establish his legal paternity, and thereby enable the child to acquire French nationality (L. Perreau-Saussine, N. Sauvage, “National Report on Surrogacy: France”). This is also in line with the approach suggested by the Conseil d’État in its report concerning the review of the 1994 Bioethics Act, where it concluded that the prohibition of the establishment of maternity between an intending mother and child should be maintained but legal alternatives should be found, such as the acknowledgement of paternity by a genetically related intending father (“La révision des lois de bioéthique”, *étude du Conseil d’État*).

<sup>133</sup> *E.g.*, in Switzerland and Germany, the intending mother may be able to adopt the child but certain requirements will have to be met (*supra* notes 45 and 46).

<sup>134</sup> *E.g.*, Belgium, Germany.

<sup>135</sup> This could be consular authorities abroad or, if the child has travelled into the country on a foreign passport, it may be the relevant authorities in the State. It may be that an initial travel document (or *laissez-passer*) is granted in the first instance.

<sup>136</sup> However, in one recent decision, the *Conseil d’État* (the highest court for administrative matters in France) took an arguably more liberal approach to the application of the French private international law rules in order to grant an intending father a *laissez-passer* to enable the child to enter the State. In the decision of 4 May 2011 (*Juge des référés*, 348778), it was held that if DNA testing demonstrates a biological link between the child and the person designated on the birth certificate as the father, the foreign birth certificate must be given effect (in accordance with Art. 47 of the French Civil Code) and it will be presumed that the intending father is the legal father for the purposes of issuing the travel documentation. Further, the circumstances in which the child is conceived did not alter the obligation of the administration to give primary consideration to the best interests of the child in accordance with Art. 3, UNCRC.

<sup>137</sup> *E.g.*, in Belgium (Art. 23 of the Private International Law Code, which has led, in some cases, to recognition of the birth certificate insofar as it establishes legal paternity (note 125 *supra*)); Italy (if the Registration Authority denies registration a claim can be put before the local civil court: in the Court of Naples recently (First Civil Section, 1 July 2011, unpublished), the judge overturned the refusal of the registrar to register twins born to a genetic intending father following an international surrogacy arrangement, stating that the registration did not offend public policy).

<sup>138</sup> *E.g.*, Australia, Ireland, New Zealand, United Kingdom. Israel, to date, could be said to fall within this grouping since no weight is placed on the foreign birth certificate and instead DNA testing of the intending parents is undertaken (and only if a genetic link is established with one of the intending parents to permit registration and acquisition of nationality). However, this position is currently being challenged in the High Court of Justice (H.C.J 566/11 *D.M.-M. et al. v. The Ministry of the Interior*) on the basis that legal parentage should be based on recognition of the foreign birth certificate.

<sup>139</sup> *E.g.*, this approach can be seen in the (now historic) English and Irish cases concerning the legitimacy of a child, where the parentage of the child was established first, as a matter of fact, before the question of whether the parents were married was examined as a question of law (and therefore the issue of which law should be applied to this question arose): see, *e.g.*, *AB v. AG* (1868) IR 4 Eq 56.

<sup>140</sup> *E.g.*, the Israel Ministry of Interior has confirmed that foreign birth certificates do not suffice for proving parenthood (S. Shakargy, *op. cit.* note 69). The case law of Australia, New Zealand and the United Kingdom, as

determination of parentage specifically states that it will apply no matter where the child is born (*i.e.*, the internal law is expressly stated to have extra-territorial effect).<sup>141</sup> The corollary of this approach is that the State authorities apply their internal law to the question of legal parentage. This may result in an answer which (wholly or partly) does not coincide with the legal parentage established under the foreign law.<sup>142</sup> However, where an application of this internal law does not result in the acquisition of legal parentage for one or both of the intending parents, there may be methods available for intending parents to establish or acquire legal parentage (often once “home” with the child).<sup>143</sup> The precise method available will vary: for example, if there are specific domestic legislative regimes in place in the State for the establishment of legal parentage where a surrogacy arrangement has been entered into, and if the requirements of the legislation have been met, it may be possible to use these regimes to obtain legal parentage.<sup>144</sup> In other States, domestic adoption procedures may be the only route for intending parent(s) to acquire legal parentage.<sup>145</sup> While judges in many States have adopted a sympathetic approach when hearing such applications, they have lamented the difficult position they are placed in when presented with these *fait accompli* and some have called for reform.<sup>146</sup>

## (ii) Nationality

40. As stated above, the question of the nationality of the child is resolved by an application of States’ own nationality laws and, again as above, many of the States in

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well as the guidance issued by the State authorities online, makes this plain (*e.g.*, *Re X and Y*, see *supra* note 5 and the guidance issued by the UK Border Agency, which states: “anyone considering entering into an inter-country surrogacy arrangement must remember that if they reside in the United Kingdom, they are subject to United Kingdom law and the definitions which underlie it” (at para. 10, available at < <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/Inter-country-surrogacy-leaflet> >, last consulted 16 March 2012), as does the new Irish Guidance issued by the Ministry of Justice, in co-operation with the Attorney General’s Department, where it states concerning the question of who are the legal parents of the child, “the Irish authorities are required to apply Irish law” (at p. 2: available at < <http://www.inis.gov.ie/en/JELR/Pages/PR12000035> >, last consulted 16 March 2012).

<sup>141</sup> *E.g.*, New Zealand (s.5(3) of the Status of Children Act 1969) and the United Kingdom (s.33(3) of the Human Fertilisation and Embryology Act 2008).

<sup>142</sup> This is particularly the case because the internal rules in these States will usually regard the gestational mother (*i.e.*, the surrogate) as the legal mother and, in some States, the husband of the surrogate as the legal father (*e.g.*, in the United Kingdom as a result of the application of ART rules in the Human Fertilisation and Embryology Act 2008, “HFEA 2008”).

<sup>143</sup> This, of course, depends upon the child being able to enter the “home” State: this may be on the passport of the State of birth (*e.g.*, if the child is born in the United States of America), or it may be as a result of an application of the “home” State’s immigration or nationality rules (see nationality section, *infra*). Further routes to establish legal parentage may be necessary in the latter case because the satisfaction of the immigration requirements does not, in these States, necessarily mean that the intending parent(s) will then be recognised (automatically) as the *legal* parent(s). Some commentators have described this as a “catch 22” situation for intending parents: “one must return from overseas in order to utilise the parentage transfer process, but may find it hard to bring a child into the country without first establishing legal parentage” (J. Millbank, *op. cit.* note 23, at p. 34).

<sup>144</sup> This will usually not be the case for States which employ a “pre-approval” system (see Section III(a), *supra*) as pre-approval will not have been given and also the requirements as to the domicile or residence of the surrogate will not be met: *e.g.*, Israel, South Africa. In the United Kingdom, in contrast, it may be possible to use procedures for the transfer of legal parentage if the intending parents are able to enter the jurisdiction with the child. However, the commercial nature of the agreement has caused judges some difficulty due to the requirements of the legislation (s.54, HFEA 2008). If a transfer of parentage is granted, however, the child will automatically acquire UK nationality (HFE (Parental Orders) Regulations 2010). In Australia, the requirements of the legislation will usually not be met (*e.g.*, in the ACT, the assisted conception must take place within the ACT).

<sup>145</sup> *E.g.*, New Zealand, where domestic adoption applications have to be made by intending parents in order to acquire legal parentage (and for the child to acquire New Zealand nationality by descent). See, *e.g.*, *Re an application by KR and DGR to adopt a female child* [2011] *New Zealand Family Law Reports* 429, and *Re an application by BWS to adopt a child* [2011] *New Zealand Family Law Reports* 621. The judicial approach to these applications has so far been sympathetic in that judges have found that the child is “habitually resident” in New Zealand (in accordance with his / her parents’ intentions) such that the Adoption (Intercountry) Act does not apply and the case can proceed as a domestic adoption.

<sup>146</sup> *E.g.*, *Re an application by KR and DGR to adopt a female child* [2011] *New Zealand Family Law Reports* 429, where J. Ryan stated, “it is essential that some control is exerted over the processes that may be used [...] It is for the Parliament in consultation with the appropriate government agencies both in New Zealand and overseas to put in place rules and protocols surrounding IVF procedures undertaken in foreign countries by New Zealanders.” See also, J. Hedley in *Re X & Y (Foreign Surrogacy)* (*supra* note 5) at 82E.

this group will consider first the question of *legal* parentage in order to determine whether the child can acquire nationality "by descent". The difference in approach, however, stems from the fact that most of these States will apply their own internal law to determine this preliminary question of *legal* parentage. In addition, in a minority of these States, it is not *legal* parentage but *genetics* which is determinative for the child acquiring nationality. If a genetic link can be established between an intending parent and the child, generally that intending parent will be considered the parent for nationality purposes (whether a *legal* parent under internal law, or not) and, if a national of the State, will be able to pass nationality "by descent".<sup>147</sup>

41. Where the child cannot acquire nationality "by descent", and the child is unable to enter into the State on, for example, a foreign passport, some States provide a degree of flexibility with their immigration rules to enable the child to enter the State in order that the position can be regularised once the child is "home" (this seems to apply where the immigration authorities are satisfied that there are methods available within the State to enable the intending parents to establish their legal parentage once "home"). In this regard, in some States, these intending parents are able to apply for a visa for the child or for "entry clearance" to enable the child to enter the State "outside the immigration rules".<sup>148</sup>

### **(iii) The possibility of criminal sanctions**

42. Another element relating to international surrogacy arrangements which is of increasing concern is the role of criminal law. As has been discussed above, in many States, entering into a commercial surrogacy arrangement may amount to a criminal offence. While in many States the legislation relates only to surrogacy arrangements entered into *within* the State, in some States, the legislation expressly has extra-territorial effect.<sup>149</sup> With increasing numbers of intending parents entering into these arrangements, it seems some States are beginning to take a more stringent approach to applying these criminal laws.<sup>150</sup>

43. In addition, in some States, intending parents are resorting to criminal acts out of desperation due to their inability to return "home" or their inability to register themselves as the legal parent of their child in their home State. The vivid pictures of the intending father who, in desperation, attempted to smuggle his twin girls out of Ukraine, to France, were broadcast across international news channels.<sup>151</sup> In one State, prosecutors have recently impeached numerous sets of intending parents for making false declarations to civil registrars concerning their status.<sup>152</sup> Some of these criminal offences carry possible sentences of imprisonment, which could have serious implications, including for the future of the child.

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<sup>147</sup> In some States, they may apply a combination of these criteria. Further, in most of these States, evidence of the surrogate mother's consent or relinquishment of parental rights will be required, either when considering immigration requirements or at the later stage of regularising the legal status of the intending parent(s).

<sup>148</sup> *E.g.*, New Zealand: see < [http://www.acart.health.govt.nz/moh.nsf/pagescm/22/\\$File/international-surrogacy-factsheet.pdf](http://www.acart.health.govt.nz/moh.nsf/pagescm/22/$File/international-surrogacy-factsheet.pdf) > (last consulted 16 March 2012); United Kingdom (*supra* note 140).

<sup>149</sup> *E.g.*, Australia (ACT, QLD, NSW): the criminal offences all relate to *commercial* surrogacy arrangements. Whilst it used to be the case that prosecution was rare, two recent cases involving commercial international surrogacy arrangements have been referred by the court to the Director of Public Prosecutions and charges may be brought (see *Dudley and Anor & Chedi* [2011] FamCA 502, *Findlay and Anor & Punyawong* [2011] FamCA 503).

<sup>150</sup> *Ibid.* See also note 152 *infra*.

<sup>151</sup> See *supra* note 6. This intending father (and his father who assisted in the smuggling attempt) were prosecuted by the Ukrainian authorities and fined.

<sup>152</sup> Prosecutors have reportedly started to take a more robust approach to intending parents who are discovered to have fraudulently registered themselves as the legal parents of a child born abroad following a surrogacy arrangement. This amounts to a violation of Art. 567(2) of the Italian Penal Code and one lawyer has reported that she is now defending "a dozen" couples all over Italy who face this charge (which carries a possible penalty of 5 to 15 years imprisonment: see E. Menzione (*op. cit.* note 123)).

#### IV. SOME INITIAL THOUGHTS ON POSSIBLE APPROACHES TO ANY NEW INSTRUMENT ON INTERNATIONAL SURROGACY

44. The transnational nature of the problems arising as a result of international surrogacy arrangements means that it is difficult, if not impossible, to envisage how such difficulties can be fully resolved by *individual* State action.<sup>153</sup> Indeed, the difficulties which remain following the unilateral attempts already made by States to remedy certain aspects of the problems have been outlined above.

45. An indication that *multilateral* co-operation may be required can be seen from some of the actions already undertaken by States. For example, in 2010, the Consul Generals of eight European States wrote a joint letter to a number of IVF clinics in India to request that they cease providing surrogacy options to nationals of their countries unless the intending parties had consulted with their embassy first.<sup>154</sup> In addition, some States, in their proposed internal reforms, are already considering introducing aspects of multilateral co-operation. For example, the 2010 Indian Draft Bill contains a specific provision for intending parent(s) who are resident outside India<sup>155</sup> and who wish to enter into a surrogacy arrangement in India with a surrogate. This provision effectively requires that authorisation to proceed with the arrangement be given by the State of the residence of the intending parent(s). The authorisation to proceed must be in the form of "proper documentation (a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clear and unambiguously stating that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the Country as a biological child of the commissioning couple / individual)".<sup>156</sup> While this is not the place for a detailed consideration of this draft legislation, it is an example of proposed inter-State co-operation regarding international surrogacy arrangements which adopts, at an international level, a form of "pre-approval" of surrogacy arrangements, similar to that which exists internally in some States. It recognises the differing legal approaches to surrogacy and takes into account the law of the State of the residence of the intending parent(s) *before* any child is conceived. It is an approach which arguably creates a "division of responsibilities" between States, placing the responsibility for determining the "eligibility" of prospective intending parents with the "receiving State".<sup>157</sup> Indeed, it seems that prospective intending parents from a State which prohibits surrogacy arrangements might no longer be permitted to access surrogacy services in India.<sup>158</sup>

46. Existing Hague Conventions may also provide sources of "inspiration" for any future instrument. In particular, the 1996 Hague Child Protection Convention<sup>159</sup> and the 1993 Hague Intercountry Adoption Convention<sup>160</sup> "inspire" some of the thoughts which follow concerning possible future approaches to multilateral regulation in this field.

47. If multilateral action is required, however, it is important to identify clearly the needs which this action would seek to meet.

<sup>153</sup> Something which came to be recognised in intercountry adoption and was one of the reasons for the Hague Conference preparing an instrument on the subject: see J.H.A. van Loon (*op. cit.* note 27) at para. 168.

<sup>154</sup> Belgium, France, Germany, Spain, Italy, the Netherlands, Poland and the Czech Republic: see "IVF Centres Direct Foreigners to Consulates over Surrogacy Issue", *Hindustantimes* (New Delhi, 15 July 2010) (< [www.hindustantimes.com/India-news/Mumbai/IVF-centres-direct-foreigners-to-consulates-over-surrogacy-issue/Article1-572534.aspx](http://www.hindustantimes.com/India-news/Mumbai/IVF-centres-direct-foreigners-to-consulates-over-surrogacy-issue/Article1-572534.aspx) >, last consulted 16 March 2012).

<sup>155</sup> Stated in the Bill to be "a foreigner or foreign couple not resident in India, or a non-resident Indian individual or couple, seeking surrogacy in India [...]" (clause 34(19)).

<sup>156</sup> The proposed legislation states that such intending parents must also appoint a local guardian to be legally responsible for looking after the surrogate mother, as well as to be legally obliged to take the child if the intending parents fail to, in order to hand the child to an adoption agency (clause 34(19)).

<sup>157</sup> Art. 5 of the 1993 Convention.

<sup>158</sup> Clause 34(19)(a).

<sup>159</sup> *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

<sup>160</sup> *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

### (a) The needs to be met

48. As was mentioned earlier, international surrogacy arrangements implicate the fundamental rights and interests of children, rights and interests which have already been widely recognised by the international community. The ultimate “need” is therefore for a multilateral instrument which would put in place structures and procedures to enable States to ensure that these obligations are being met in the context of this transnational phenomenon. This would include seeking to eliminate “limping” legal parentage, ensuring children are able to acquire a nationality, ensuring their right to know their identity is secured and putting in place procedures to ensure that they are protected from harm. There is a real danger that the current situation is failing children in all these ways.

49. The children born as a result of international surrogacy arrangements are not the only vulnerable parties.<sup>161</sup> The vulnerability of surrogate mothers, particularly those from economically disadvantaged backgrounds, as well as of intending parents, often desperate in their search for a way to have a child, suggests that there is also an imperative to prevent the exploitation of all parties to such arrangements.<sup>162</sup> This is connected with the unregulated nature of intermediaries in the area. In relation to these aspects too, a multilateral legal framework could put in place structures and procedures to ensure (1) that the international legal norms which already exist are enforced in a transnational context; and (2) that further safeguards are introduced, where necessary, to ensure the protection of those involved. One *consequence* of a multilateral approach could be to enhance mutual respect and trust between the different legal systems concerned. As with many Hague Conventions, a multilateral framework would create structures through which States work together to ensure the rights of all those involved.

50. Indeed, the combined nature of the 1993 Hague Intercountry Adoption Convention as a human rights instrument, an instrument for judicial and administrative co-operation and a private international law instrument<sup>163</sup> may provide an approach to consider in the context of international surrogacy arrangements.

51. Without providing an exhaustive review of already existing relevant international legal frameworks which would need to be borne in mind if multilateral action in this area were considered, it is clear that international principles need to be taken into account, including (but not limited to): the *UNCRC* and its *Optional Protocol on the sale of children, child prostitution and child pornography*,<sup>164</sup> the *International Covenant on Civil and Political Rights*,<sup>165</sup> the *International Covenant on Economic, Social and Cultural Rights*,<sup>166</sup> the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>167</sup> as well as the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.<sup>168</sup>

<sup>161</sup> See *supra* note 9.

<sup>162</sup> Including possibilities such as the trafficking of women and children (see *supra* note 11). See also, e.g., the European Parliament Resolution of 5 April 2011 on “Priorities and outline of a new EU policy framework to fight violence against women” (INI/2010/2209) which, at paras 20-21, “[a]sks Member States to acknowledge the serious problem of surrogacy [...] [and] emphasises that women and children are subject to the same forms of exploitation and both can be regarded as commodities on the international reproductive market, and that these new reproductive arrangements, such as surrogacy, augment the trafficking of women and children and illegal adoption across national borders [...]”.

<sup>163</sup> J.H.A. van Loon (*op. cit.* note 27), at pp. 336–337.

<sup>164</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 (entered into force on 18 January 2002).

<sup>165</sup> Of 16 December 1966 (entry into force 23 March 1976), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI): e.g., Arts 17(1), 23, 24.

<sup>166</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 3 January 1976): e.g., Arts 12(1), 15(1) b).

<sup>167</sup> Adopted by the United Nations General Assembly on 18 December 1979 (entry into force 3 September 1981). In relation to surrogate mothers and intending mothers: e.g., Arts 6, 11(1) f), 9(2), 16.

<sup>168</sup> Adopted by General Assembly resolution 55/25 of 15 November 2000, entry into force 25 December 2003, Protocol to the *Convention against Transnational Organised Crime* (adopted by the same UN General Assembly resolution, entry into force 29 September 2003); as well as regional approaches: see e.g., the decisions of the European Court of Human Rights, including *S.H v. Austria* (*supra* note 42) and the forthcoming decision in *Labassee* (*supra* note 125).



**(b) Some thoughts regarding possible approaches to multilateral regulation**

52. The following thoughts on some possible approaches to multilateral regulation in this field are tentative in nature and are based on the preliminary research carried out to date. Further research, as well as the information that could be obtained from a Questionnaire that the Permanent Bureau suggests sending to its Members in the course of the next year, if Council agrees that work on this subject should continue, would enable a more detailed consideration of the feasibility and desirability of these approaches. This further information might also bring to light other possible approaches to resolving these issues which are not considered here.

**(i) An approach focused on a harmonisation of private international law rules relating to the establishment and contestation of legal parentage, including provisions on co-operation**

53. One possible approach to resolving the difficulties regarding the legal parentage of children born as a result of international surrogacy arrangements may be to consider the issue within the broader context of a comprehensive future instrument concerning the private international law aspects of the establishment and contestation of legal parentage. As was stated in Preliminary Document No 11 of March 2011, such an instrument might contain, for example, uniform rules on the jurisdiction of courts or other authorities to make decisions on legal parentage which have general effect, uniform rules on the applicable law, corresponding rules providing for the recognition and enforcement of such decisions (or authentic acts, e.g. a birth certificate), uniform rules on the law applicable to the establishment of legal parentage by operation of law or by agreement and applicable law or recognition principles concerning the establishment of parentage by voluntary acknowledgement.<sup>169</sup>

54. There are a number of factors which warrant further consideration in relation to this approach. First, there is the question of desirability: whether such an approach is desirable depends ultimately upon the practical need for a broad set of principles. Research has focused this year on the acute problems arising as a result of international surrogacy arrangements. Further work in the next year would be needed to assess the nature and the scale of the practical problems that are generated by the lack of uniform global rules on jurisdiction, applicable law, recognition and enforcement concerning legal parentage *outside* the surrogacy context. Secondly, there is a question of feasibility: again, further work of a comparative law nature is needed to ascertain whether there is any prospect of achieving consensus on the unification of private international law rules in this field.

55. Further, if such an approach were being considered in order to resolve the particular problems relating to international surrogacy arrangements, consideration would need to be given as to whether this approach would meet the required "needs". For some States, recognition of the legal parentage of a child born as a result of a surrogacy arrangement is currently problematic because of the application of an *ordre public* clause (often in relation to legal maternity, in particular). Even if agreement were possible on private international law rules, such an agreement might include an *ordre public* clause to prevent the application of foreign law where it would be contrary to a State's "public policy". If this were the case, unified rules might not prevent the child from ending up "parentless and stateless".<sup>170</sup>

56. However, the role of public policy could be significantly narrower in connection with recognition than with applicable law and thus the scope of a private international law instrument limited to recognition might be more effective. For example, some States

<sup>169</sup> *Op. cit.* note 3: see Section VIII, "How can the Hague Conference Assist in this Field?"

<sup>170</sup> "International Surrogacy Agreements: Some Thoughts from a German Perspective", Dr. Rolf Wagner, in (2012) IFL (forthcoming), where he states that, in such circumstances, "[t]he unified rules would not actually be in a position to rule out limping legal relations".

might refuse the application of foreign law allowing or accepting surrogacy agreements but might nonetheless accept the effects of a foreign judgment or act granting a child legal status and attributing parentage to the intending parents.

57. Conceivably, such an approach might be confined in scope to international surrogacy arrangements, excluding other issues relating to legal parentage. This might provide a more specific focus to the approach, but would also give rise to new questions, for example, relating to the parameters of the limited scope.

**(ii) Setting a framework for co-operation**

58. A second possible approach to resolving the difficulties arising from international surrogacy arrangements would be to consider the matter as a discrete, "burning issue" which requires a methodology which is more specific in focus and yet broader in the techniques employed to resolve the issues. Such an approach might be to look to the 1993 Hague Intercountry Adoption Convention, although there are obvious and important differences between international surrogacy and intercountry adoption.<sup>171</sup> For example, there is at the moment no similar set of agreed international principles relating to international surrogacy and it might therefore be difficult to find common principles for an international system. However, the "needs" to be met are similar, it is appropriate to consider how far some of the techniques employed by the 1993 Hague Intercountry Adoption Convention may be of relevance to international surrogacy. This *Preliminary Report* considers only a few broad aspects for the purpose of initial discussions.<sup>172</sup>

59. Since some States currently prohibit the use of surrogacy arrangements, this could be seen as incompatible with a discussion concerning the regulation of international surrogacy arrangements. It is important to recognise, however, that creating safeguards around a system and finding solutions for the challenges it poses, does not necessarily entail facilitating and promoting such a system. This is indeed a common denominator between international surrogacy and intercountry adoption. Contracting States to the 1993 Hague Intercountry Adoption Convention are not bound to engage in any particular level of intercountry adoption.<sup>173</sup> Indeed, "[u]nder the [1993] Convention, Contracting States remain entirely free to regulate or restrict intercountry adoptions in whatever way they deem fit, as long as they respect its minimum safeguards."<sup>174</sup> In the same way, an instrument setting a framework for co-operation and the prevention of abuses, with the goal of protecting the rights and interests of children, must be distinguished from an effort to promote international surrogacy. All States may consider that they have an interest in effectively regulating international surrogacy in order to protect the rights and interests of those involved, as well as to ensure that situations which are effectively a "*fait accompli*", with all the consequent difficulties and concerns, are minimised.

60. The 1993 Hague Intercountry Adoption Convention has novel provisions concerning the "recognition and effects of the adoption".<sup>175</sup> It makes recognition of the adoption decision of a child upon whether the adoption has been made "in accordance with the

<sup>171</sup> One of the most often cited being that surrogacy is a form of procreation to satisfy the desire of childless adults, whereas adoption (theoretically) is a process to find a home for a child in need. However, note the challenges concerning intercountry adoption in this regard: see, "The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice No. 1" (available at < [www.hcch.net](http://www.hcch.net) >, under the "Intercountry Adoption Section").

<sup>172</sup> This section only includes key points concerning the broad approach which may be adopted. There are many aspects of future regulation in this form which are not considered here, including, e.g., the material scope of any such instrument, the approach to compensation, the question of nationality, the child's right to know his / her identity, as well as issues surrounding anonymity for gamete donors and surrogate mothers, etc. For a further consideration of significant differences between international surrogacy and intercountry adoption and challenges to the use of the 1993 Convention as a model for an international regulatory scheme for surrogacy, see H. Baker, "Are there 'lessons' that can be learnt from the 1993 Hague Intercountry Adoption Convention for any future instrument on international surrogacy arrangements?", based on a presentation at the University of Aberdeen in September 2011, forthcoming, Hart Publishing.

<sup>173</sup> The Guide to Good Practice No 1 (*op. cit.* note 171) clearly indicates that States which have imposed a moratorium on intercountry adoption are not in violation of the 1993 Convention (at Chapter 8).

<sup>174</sup> J.H.A. van Loon (*op. cit.* note 27), at para. 198.

<sup>175</sup> Chapter V, 1993 Convention.

Convention".<sup>176</sup> Instead of adopting a "traditional" private international law approach and attempting to harmonise the rules regarding jurisdiction, recognition and applicable law relating to adoption, the Convention instead relies upon a system of co-operation. Central to this system, for the purposes of recognition, is Article 17. According to this Article, the two States involved in the particular adoption must both agree before the adoption takes place that the adoption may proceed. Both States therefore have the power to prevent the adoption from taking place if it is felt to be contrary to their perceptions of proper jurisdiction or the law to be applied (or if there is any other concern).

61. In the surrogacy context, such a system of minimum safeguards, combined with the establishment of a system of co-operation and ultimately a "recognition principle" could be a way to ensure the prevention of abuses, while also banning the "limping" legal parentage of a child born as a result of an arrangement and ensuring predictability for the parties. At the same time, this would avoid having to harmonise possibly complex and varied private international law rules concerning legal parentage.

62. The 1993 Hague Intercountry Adoption Convention, following the earlier Hague Conventions in the field of legal co-operation, puts in place a structure whereby designated Central Authorities are placed as "gatekeepers" of the process of intercountry adoption. Responsibilities may be delegated to competent or "accredited" bodies, but only to a defined extent.<sup>177</sup> Such a centralised system, reinforced by the benefits of co-operation, may help to prevent some of the issues currently present in international surrogacy. It would enable proper verifications of any substantial safeguards to take place through this structural mechanism.

63. An instrument which focuses on co-operation in international surrogacy could ensure safeguards so it becomes a phenomenon *in respect of* the rights and interests of the children born. It would put in place procedures to enable States to *a priori* control the process to prevent abuses, as well as to ensure, in advance, that where an arrangement proceeds, there is certainty as to the resulting child's legal status.

## V. CONCLUSION

64. The number of international surrogacy arrangements appears to be growing at a rapid pace and while some States are attempting to resolve these problems, this *global* phenomenon may ultimately demand a *global* solution. There is no doubt that the current situation is far from satisfactory for the States and parties involved and, most importantly, for the children born as a result of these arrangements. There is a real concern that the current situation often fails to adequately ensure respect for children's fundamental rights and interests.

65. In the next year, if Council supports the continuation of work in this field, the Permanent Bureau would continue its work pursuant to the 2011 mandate, and more specifically: (1) circulate a Questionnaire directed to Members in order to obtain further, more detailed information regarding the incidence and nature of the problems being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage or "filiation" more broadly and also seek Members' views on the "needs" to be addressed and their thoughts on the approach to be taken; (2) undertake (further) consultations with health, legal professionals and others (including surrogacy agencies) engaged in the field; and (3) carry out further comparative law research concerning the private international law rules relating to legal parentage in order to assess further the desirability and feasibility of the approaches discussed in Section IV(b) above.

66. Subject to the view of the Council, the Permanent Bureau would expect to produce a Final Report on this matter for Council in April 2013 with recommendations as to the appropriate next steps.

<sup>176</sup> Cp. the 1965 Convention.

<sup>177</sup> Arts 9 *et seq.*, 1993 Convention.

**ANNEXE / ANNEX**

## GLOSSARY

<b>International surrogacy arrangement</b>	<p>A surrogacy arrangement entered into by intending parent(s) resident<sup>1</sup> in one State and a surrogate resident (or sometimes merely present) in a different State.</p> <p>Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State.</p> <p>Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or commercial in nature (see below).</p>
<b>Traditional surrogacy arrangement</b>	<p>A surrogacy arrangement where the surrogate provides her own genetic material (egg) and thus the child born is genetically related to the surrogate.</p> <p>Such an arrangement may involve natural conception or artificial insemination procedures.</p> <p>This may be an altruistic or commercial arrangement (see below).</p>
<b>Gestational surrogacy arrangement</b>	<p>A surrogacy arrangement in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate.</p> <p>Such an arrangement will usually occur following IVF treatment. The gametes may come from both intending parents, one, or neither.</p> <p>This may be an altruistic or commercial arrangement (see below).</p>
<b>Commercial surrogacy arrangement</b>	<p>A surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her "reasonable expenses". This may be termed "compensation" for "pain and suffering" or may be simply the fee which the surrogate mother charges for carrying the child.</p> <p>This may be a gestational or a traditional surrogacy arrangement.</p> <p>N.B. It is often difficult to draw the line between what is an altruistic surrogacy arrangement and what is a commercial arrangement. For example, if a surrogate is unemployed prior to conception but can claim "reasonable expenses", including loss of earnings, for the arrangement, is this arrangement still "altruistic"?</p>
<b>Altruistic surrogacy arrangement</b>	<p>A surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her "reasonable expenses" associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate.</p> <p>This may be a gestational or a traditional surrogacy arrangement.</p> <p>Such arrangements often (but not always) take place between intending parent(s) and someone they may already know (<i>e.g.</i>, a relative or a friend).</p>
<b>Receiving State</b>	<p>The State in which the intending parents are resident and to which they wish to return with the child, following the birth.</p>

<sup>1</sup> The term habitually resident is purposely not used here. It may usually be the case that both the intending parent(s) and the surrogate are "habitually resident" in these States. However, the definition has been drawn broadly (even including those cases where a surrogate is merely "present" in the other State) to include all possible cases where problems are occurring: *e.g.*, this would include situations where women have been 'trafficked' to a permissive State for the purposes of being surrogates.

<b>State of the child's birth</b>	The State in which the surrogate gives birth to the child and in which the question of the child's legal parentage usually first arises. This will usually be the State in which the surrogate is resident. However, in some cases the surrogate may move to a State specifically for the birth. <sup>2</sup>
<b>Surrogate (mother)</b>	The woman who agrees to carry a child (or children) for the intending parent(s) and relinquishes her parental rights following the birth. In this paper, this term is used to include a woman who has not provided her genetic material for the child. In some States, in these circumstances, surrogates are called "gestational carriers" or "gestational hosts".
<b>Intending parent(s)</b>	The person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement.
<b>Gamete (egg) donor</b>	The woman who provides her eggs to be used by other person(s) to conceive a child. In some States, such "donors" may receive compensation beyond their expenses. The question of the anonymity of "donors" also varies among States.
<b>Gamete (sperm) donor</b>	The man who provides his sperm to be used by other person(s) to conceive a child. In some States, such "donors" may receive compensation beyond their expenses. The question of anonymity of "donors" also varies among States.
<b>"Legal parentage" or the legal parent(s)</b>	The person(s) considered to have acquired the legal status of being the "parents" of the child under the relevant law, and who will acquire all the rights and obligations which flow from this status under that law. In surrogacy situations, this may not (indeed, often will not) coincide with the genetic parentage of the child ( <i>i.e.</i> , those who have provided their genetic material).
<b>"Genetic parentage" or the genetic parents</b>	The person(s) who have provided their genetic material for the conception of the child. In some languages, this is referred to as "biological parentage". In surrogacy situations, such person(s) may not be (and often will not be), the legal parent(s) of the child.

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<sup>2</sup> Or may have been "trafficked" there for this purpose.