Chapter 10
International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law

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Abstract For both private international law (PIL) and human rights lawyers alike, cross-border surrogacy raises numerous legal problems given the current lack of international legal standards and disparate regulation by states. This contribution aims to provide insight into the interconnectedness between PIL and human rights in this area. As cross-border surrogacy arrangements affect the human rights of all parties involved, in particular the child, states should ensure that an international PIL instrument is consistent with ethical and human rights standards. At the same time, PIL issues in cross-border surrogacy including the determination of applicable law with regard to the contract as well as the recognition of the child's legal parentage abroad, require practical legal solutions. On the basis of an analysis of recent case law of the European Court of Human Rights, the authors contend that a feasible PIL regime could be devised. Yet its aims should be modest, considering the great divergence in regulatory and ethical approaches taken by states at present. For the time being, a PIL instrument should probably not go beyond providing mutual aid between states, while incorporating 'classical' PIL concepts such as *ordre public* and public policy. Ultimately, human rights law restricts regulatory ambitions of any PIL instrument with regard to cross-border surrogacy.

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10.1 Renewed Interest in International Commercial Surrogacy

Cross-border surrogacy arrangements have been exposed to increased public and media attention since the mid-1980s.[1] Although surrogate motherhood itself is not a new phenomenon, biomedical developments have led to new forms of

[1]In 2014 the case of *Baby Gammy* caused a considerable outcry in the international media, when it emerged that the commissioning Australian parents, who after having negotiated a surrogacy arrangement with a Thai surrogate mother, who subsequently gave birth to twins, left Gammy, a baby with Down's syndrome and a heart disease, in Thailand while taking the 'healthy' twin sister back to Australia. The facts and circumstances of the case have not yet been fully established and the parties involved dispute each other's claims. The case has nonetheless prompted the Thai legislature to amend legislation with regard to cross-border surrogacy arrangements, in particular as regards the prohibition of commercial surrogacy; the Thailand Draft Surrogacy Law was approved by Office of the Council of State Subject No. 167/2553. www.thailawforum.com/thailand-draft-surrogacy-law/. Accessed 15 July 2015. On 20 February 2015, the Thai Parliament passed legislation banning commercial surrogacy. The legislation is awaiting royal approval at the time of writing.

surrogacy.[2] Moreover, the limited global market for adoption has meant that surrogacy has contributed to its significant cross-border expansion of the phenomenon in recent years. Another key factor that has enabled the current surge of media and scientific interest in the cross-border surrogacy market is the ease of access to information via the Internet.[3] Accordingly, the contemporary global geographical scope coupled with greater access to artificial reproductive technologies help account for the current interest in the phenomenon. This interest is attestable in legal scholarship, amongst private international law (PIL) and human rights lawyers alike. For both fields of law, surrogacy represents a challenge for international regulation because, in contrast to adoption, broad consensus over legal standards at both the national[4] and global levels[5] is still lacking with regard to surrogacy, especially with regard to international commercial surrogacy (ICS). A need for international regulation has been recognized broadly and has been advocated in several academic publications.[6]

Yet, regulation of ICS arrangements at the international level remains largely absent. In 2013, the European Parliament published a study on the regime of surrogacy in EU Member States which dealt with some important PIL aspects of a putative EU regime. Whatever the nature of a putative EU regime, the study suggested that one of the principal aims, which it should seek to deliver, is certainty as to the legal parenthood of the child, and the child's entitlement to leave the state of origin, and to enter and reside permanently in the receiving state.[7] Telling of the renewed human rights and global interest is also that the UN Committee on the

[2]'Traditional surrogacy' is mentioned, for example, in the Bible (Genesis 16: 1–16), while Genesis, Chap. 30, describes the story of Rachel, who gave her slave to her husband Jacob to bear children. Furthermore, under the Code of Hammurabi, a wife could permit a slave to bear a son with her husband in her place. See also Fenton-Glynn 2014, p. 157 under 1. As for traditional surrogacy, see, e.g. Zuckerman 2007–2008, pp. 662–665.

[3]Trimmings and Beaumont 2013, p. 441.

[4]Adoption, in its different forms (plenary or simple adoption), is subject to different legal conditions (for example, as regards the consent of the child's biological parents, the age criteria of the adoptive parents, the legal procedure) is known in virtually all legal systems of the world, with the notable and important exception of Islamic countries.

[5]A key international instrument is the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, which has entered into force in over ninety states. www.hcch.net/index_en.php?act=conventions.status&cid=69. Accessed 15 July 2015.

[6]See for example Boele-Woelki 2013a; Frohn 2014, p 327; Keating 2014, pp. 64–93; Trimmings and Beaumont 2011, pp. 627–647.

[7]A comparative study on the regime of surrogacy in EU Member States, p. 191. www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET%282013%29474403_EN.pdf. Accessed 15 July 2015.

Rights of the Child has, for example, focused its queries on the legal status of children born through international surrogacy arrangements with regard to India.[8]

At present, the Hague Conference for Private International Law is in the initial stages of preparing regulation. Bearing in mind the inevitable geographical constraints of a purely intra-EU or regional response, such a global approach may indeed be considered to be preferable, as the aforementioned study of the European Parliament also suggests.[9]

Our main aim in this contribution will be to gain a better understanding of the question of whether ICS arrangements require private international law (PIL) regulation at the international level and to establish which issues such an international legal instrument should regulate, considering the complex ethical and human rights implications of ICS. In this regard, the restrictions that should be considered in drafting such a PIL instrument will be explored. The basic structure of this contribution shall be as follows.

Following a brief introduction the main regulatory problems presented by ICS arrangements will be discussed. These problems will be approached from both a PIL and a human rights perspective. The fact that human rights norms should not only inform but indeed permeate PIL regulation on ICS arrangements may be appreciated to some extent by looking into the facts and circumstances of two remarkable recent cases before the European Court of Human Rights (ECtHR). Indeed, it is ventured, the 'interests of the child' against the backdrop of an ICS arrangement may often be better understood by considering concrete facts and circumstances of a case rather than on the basis of abstract rules, whether these derive from PIL (such as *ordre public*) or human rights law which might be ambiguous when it comes to parentage in surrogacy cases (for example, 'the right to a name, nationality and to know and be cared for by one's parents' in the sense of Article 7-1 United Nations Convention on the Rights of the Child (UN CRC). This is not to say, however, that there is no need for further international regulation.

At the same time, it should be acknowledged that human rights law does not and cannot provide unequivocal answers in addressing PIL problems in the context of ICS arrangements. With regard to this position, an analysis of the case law of the European Court of Human Rights, namely the recent cases of *Mennesson v. France* and *Labassee v. France*[10] and *Paradiso Campanelli v. Italy*, is proposed.[11]

The ramifications of the human rights dimension of ICS will then be discussed in greater depth in the Sect. 10.4. In that respect, it has been observed that on a fundamental question—whether 'the best interests of the child' principle requires a

[8]List of issues in relation to the combined third and fourth periodic reports of India, CRC/C/IND/Q/3/-4/.

[9]A comparative study on the regime of surrogacy in EU Member States, p. 191.

[10]ECtHR *Mennesson v. France*, 26 June 2014, No. 65192/11; *Labassee v. France*, 26 June 2014, No. 65941/11.

[11]ECtHR *Paradiso and Campanelli v. Italy*, 27 January 2015, No. 25358/12.

permissive or *prohibitionist* stance regarding the regulation of international surrogacy, international human rights law does not provide a univocal answer.[12] Thus, it is submitted that an approach which recognizes that states may to some extent assume both permissive and prohibitionist positions while still respecting and ensuring human rights, may still be considered compliant with the doctrine of the margin of appreciation in ECtHR case law. To the extent that states choose to recognize family law relationships between the intended parents and the child who is born as the result of an ICS arrangement and recognized in the home state of the surrogate, they should, however, also put in place clear PIL rules.

Section 10.5 focuses on the PIL aspects of a future legal instrument concerning cross-border surrogacy. Three recurrent themes in PIL will accordingly be addressed: international jurisdiction, the determination of the applicable law (conflict of laws) and the issue of recognition and enforcement. It is submitted that the determination of the applicable law does not only involve the question of which law should govern the surrogacy contract itself, but also which law should apply to the determination of the family law relationship.

The last section, Sect. 10.6 a few concluding remarks, inevitably tentative given the sensitivity, complexity and legal uncertainty surrounding the subject matter, will be made regarding the nature of the relationship between PIL and human rights in addressing the multifaceted regulatory challenges presented by ICS.

10.2 Cross-Border Surrogacy

10.2.1 ICS: Terminology and Background

For a better understanding of our study, we shall first explain some terms used by us and provide some general background information with regard to surrogacy.

A surrogate mother may be defined as a woman who carries a child pursuant to an arrangement made before she became pregnant, with the sole intention of the resulting child being handed over to another person or other persons while the surrogate mother relinquishes all rights to the child. A further categorisation is usually also made.[13]

Thus, in ‘traditional’ surrogacy (‘low-technology’), the surrogate mother becomes pregnant with the sperm of the intended father (usually by insemination, and exceptionally through sexual intercourse) or is inseminated with donor sperm. The surrogate mother is genetically related to the child in such forms of surrogacy. In the technically advanced forms of what is known as gestational surrogacy (‘high-technology’), an embryo is created by *in vitro* fertilization using the egg of the intended mother (or a donor egg) and the sperm of the intended father

[12]Ergas 2013, pp. 430–441.

[13]Trimmings and Beaumont 2013, p. 440.

(or donor sperm). As a consequence, in gestational surrogacy the surrogate mother usually bears no genetic relationship with the child.[14]

A further, legally relevant distinction usually drawn is that between commercial and non-commercial forms of surrogacy, and international surrogacy and surrogacy within one jurisdiction. Most surrogacy contracts nowadays occur in both a cross-border and a commercial setting, where some form of remuneration is paid by the intended parents during pregnancy for the gestation and birth of the baby by the surrogate who usually has her habitual residence outside the jurisdiction where the commissioning parents live. For the purposes of this article, we will exclusively focus on ICS, as it is this form of surrogacy that raises most regulatory concerns, both from a PIL and human rights perspective.

10.2.2 ICS: The Main Legal Problems

Surrogacy as such is an inherently complex phenomenon with multifaceted emotional, ethical, social and legal issues. Matters are complicated further in the international context as a result of divergent international regulation, as some states may be labelled as 'prohibitionist' to varying degrees while in a minority of 'surrogacy-friendly' states (such as India, Russia, Ukraine) the establishment of legal parentage in favour of the intended parents may be perfectly lawful. Various studies[15] have confirmed that there exist great differences in regulation. Some states may be regarded as 'staunchly prohibitionist' such as France, Italy or Sweden, whereas other states expressly permit ICS arrangements such as California, Ukraine or India. In addition, there are countries which allow some (non-commercial) forms of surrogacy (such as England, Greece) and others where the phenomenon quite simply still lacks clear regulation (such as Thailand before the *Baby Gammy* case). Currently, in Dutch law, for example, regulation is scant. The *Staatscommissie herijking ouderschap*[16] is expected to deliver a report on developments in parentage law in Spring 2016 which will also address the ethical and legal issues surrounding surrogacy, in particular as regards the basic question of whether new legislation is warranted.

It is questionable whether a prohibitionist national policy such as that of France may be enforced in a cross-border context. This is not only the expected outcome of the increased access to surrogacy, but could also be the outcome of a restricted discretion for states to rely on *ordre public* in the aftermath of the two recent ECtHR decisions with regard to international surrogacy, which will be discussed below. Once the child is born and has 'settled' in the state of the intended parents, which is likely to be a 'prohibitionist' state, and birth certificates stating

[14]Boele-Woelki 2013b.

[15]See, for example, Boele-Woelki et al. 2011, p. 304.

[16]St.cr. 2014, 12556.

the commissioning parents as the legal parents have issued made in accordance with the laws of the 'permissive' state of the habitual residence of the surrogate mother, the child's interests in concrete legal proceedings, as protected by Article 3 UN CRC and the child's right to private life under Article 8 ECHR, could compel more and more states to become more permissive. This could be the case even if the margin of appreciation doctrine espoused by the ECtHR may not require 'prohibitionist' states directly to amend their national parentage law, PIL and the conditions for recognition of foreign birth certificates accordingly.

Travel from prohibitionist to permissive states is likely to continue. Indeed, the majority of intended parents in ICS are Western couples who are childless or have fertility problems, and who are lured by the low costs and permissive position or lack of regulation of some developing countries with regard to ICS. Nonetheless, disparities in wealth are only part of the explanation, as some 'wealthy' jurisdictions such as California and Ontario, also permit forms of ICS and may similarly appeal to couples with a child wish.

Analogies may, to some extent, be drawn with adoption. ICS often provides a viable and attractive alternative to adoption for many, as it may (though not necessarily so) lead to the birth of a child that is genetically related to one of the commissioning parents, typically the father. Yet the (glaring) absence of international regulation regarding ICS arrangements may also be a reason why it is perceived by some as being more attractive than adoption.

So much seems clear that divergent approaches taken at the national level with regard to surrogacy cause considerable legal uncertainty as international regulation is absent. Such legal uncertainty may afflict all those involved: the child (which notably include nationality and statelessness issues, migration issues and legal parentage issues), the intended parents (regarding their status as parents, since it may be far from certain that they will be treated as the legal parents in their country of origin) and the surrogate mother (can she, for example, change her mind and 'keep the child' after the child is born? What sort of financial compensation or remuneration would be appropriate and how can this sum be claimed within and beyond her own jurisdiction if disputed by the commissioning parents?).

As such, some of these problems may be considered to be 'classic' PIL problems in the sense that they may include the *determination of the competent court* to decide upon a surrogacy case, the *applicable law* regarding the *establishment of legal parentage* and the determination of the law which governs the *contract* itself.

10.2.3 Human Rights and Private International Law

It appears indisputable that any foreseeable international PIL instrument with regard to surrogacy would have to be compliant with ethical and human rights standards. In that respect, the desirability of the creation of (any) international PIL instrument has indeed been questioned, as any form of (PIL) regulation would legitimize a phenomenon of which the ethical and human rights underpinning are

questioned at a more fundamental level. Following this rationale, the creation of such an instrument would have the unwelcome consequence of not only condoning, but also encouraging more international surrogacy arrangements.[17] Others contend that the usefulness of private international law to resolve disputes arising out of surrogacy is similarly problematic, as fundamental considerations of judicial comity, in which the courts of one state defer to the judgment of another, may be trumped by public policy arguments in this context.[18]

Even so, in 2010, such considerations did not prevent the Special Commission of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption from expressing its concern over the uncertainty surrounding the status of many of the children who are born as a result of surrogacy arrangements. The Hague Conference on Private International law is currently in the early stages of gathering country information and drafting preliminary reports with a view to the creation of a PIL instrument regarding surrogacy. This study is known as the 'Parentage/Surrogacy Project'.[19] The Council of General Affairs and Policy of the Conference decided in March 2015 that an Experts' Group should be convened to explore the feasibility of advancing work in this project, starting with the private international law rules regarding the legal status of children in cross-border situations, including those born of international surrogacy arrangements.

It is clear, however, that the Permanent Bureau might risk seeing human rights purely in terms of 'standards to be met' in focusing on PIL problems. As such, the approach of the Permanent Bureau could conceive of human rights as 'ends to be protected' while devising its PIL response to international surrogacy.[20] In that connection, a substantive (human) *rights-based* approach to PIL regulation with regard to ICS has been advocated and would have to display three distinct features: (a) the relevant issues would have to be conceptualized in terms of the rights engaged; (b) the content of these rights and their concomitant obligations would have to be examined carefully and (c) an accepted rights-based methodology should be adopted and used to resolve competing rights claims.[21]

As a further fundamental critique of a more practical nature, it has been ventured that the current absence of *an enforcement mechanism* administered by a centralized body could significantly reduce the benefits of having any PIL instrument compared with a human rights standard.[22]

Although such critiques of PIL regulation are quite understandable from a human rights perspective, it is submitted even though the creation of a PIL

[17]Browne-Barbour 2004, p. 429.

[18]Stark 2012, pp. 369–386.

[19]See for the relevant documentation the website of the Hague Conference on Private International law, www.hcch.net. Accessed 15 July 2015.

[20]Tobin 2014, p. 320.

[21]Tobin 2014, p. 323.

[22]Keating 2014, p. 91.

instrument with a limited geographical scope may never represent a global solution for the human rights concerns caused by ICS arrangements. However, such a PIL instrument could still help develop and delineate the scope of more clear fundamental rights standards whenever a State Party is confronted with an ICS case. There are also practical areas of concern in support of PIL regulation. The market for ICS is unlikely to disappear if regulatory choices are not made within the coming years while the current *fait accompli* approach taken by states, as will be discussed in some more detail below, leaves much to be desired in terms of clear standard-setting and steady cooperation between states. As has already been stated, this erodes what potential there is for a coherent and consistent implementation of the human rights for all parties involved.

10.3 At the Intersection of Private International Law and Human Rights: Recent ECtHR Case Law with Regard to International Commercial Surrogacy Arrangements

The nexus between both human rights and private international law concerns in the ICS context is illustrated to some extent by the recent cases of *Mennesson v. France, Labassee v. France* and *Paradiso & Campanelli v. Italy* before the ECtHR.

We will look into the main facts and circumstances of these cases and their PIL and human rights implications, which should be carefully distinguished in spite of some common features.

10.3.1 Mennesson and Labassee: The Child's Interests and Its Impact on Ordre Public in PIL Vis-à-Vis the Margin of Appreciation in European Human Rights Law

Both the *Mennesson* and *Labassee* cases involved children born in the United States and involved married, heterosexual French couples who had commissioned ICS arrangements with American surrogates. In the *Mennesson* case the surrogacy arrangement with the Californian surrogate resulted in the birth of twin girls, while in *Labassee* a surrogate from Minnesota gave birth to a baby girl. In both cases the children were genetically related to the commissioning father, but *not* to the commissioning mother as the conception of the children had been enabled through the use of the oocytes of a third party, an (anonymous) egg donor. In both cases a birth certificate was issued in which the commissioning parents were registered as the legal parents under the laws of California and Minnesota. Upon their return to France with the children, the commissioning parents in both cases failed

to persuade the French authorities to recognize the birth certificates of the children that had been issued in the United States.

The applicants in the subsequent human rights proceedings were the children themselves, together with their commissioning parents from France. In France both altruistic and commercial forms of surrogacy are unlawful pursuant to Article 16-7 of the Code Civil and irreconcilable with requirements pertaining to the public order (*ordre public*), which are held to preserve and protect the fundamental values and public morals of the French state. Accordingly, the French state persistently refused to register the children's births in the French civil register, thereby preventing them from acquiring French nationality and withholding recognition of the family law relationship between the children and the commissioning parents.

Although the children were allowed to live in France with the commissioning parents, who as the children's 'social parents' brought them up, no legal relationship could be recognized in France. On account of this refusal to register the children's births in the civil register, the applicants claimed that their human rights under Article 8 ECHR had been breached, which establishes the right to private life and the right to family life. In that connection, they underlined the duty of the French state to make decisions concerning children in accordance with its obligations under the United Nations Convention on the Rights of the Child (CRC).

The claimants advanced the argument that the children lacked recognition of their status within the family, which had a 'domino effect' in the sense that, as a result, they also had been given an inferior status in French inheritance law while their personal situation was hampered by practical difficulties on account of their inability to claim French nationality and a French passport. The latter problems in turn raised social security and schooling issues. More generally, the claimants took the view that the 'blanket' refusal by the French authorities to recognize the legal parentage of the commissioning parents undermined 'the interests of the children.'

For its part, the French state defended its legislative choice to prohibit all forms of surrogacy on account of its concern to prevent the 'commodification' of the human body and in view of the protection of (the state's own perception of) 'the child's best interests'. The French government claimed that its approach to ICS was consistent with human rights law. In making this assertion, the French position could be sustained by a particularly wide 'margin of appreciation', given the apparent lack of consensus amongst states party to the Convention ('High Contracting Parties') with regard to the regulation of surrogacy. Moreover, the French government argued that a recognition within France of the legal status of surrogacy in other states would effectively boil down to France having to face a de facto acceptance of the circumvention of its own national law. And, it would seem, not without good reason given the factual nature of 'reproductive tourism'.

Thus, in order to prevent criminal offences against the French public order, the rights enshrined in the Code Civil would have to be safeguarded. In that connection, the French government deemed it necessary to withhold recognition of the

legal paternity of the (intended) fathers, on the ground that this would erode the rights and duties protected under the Code Civil.[23]

So what did the European Court of Human Rights decide? It found that, although there had been an 'interference' with, there had been no 'breach' of the *right to family life* for all claimants within the scope of Article 8 ECHR. The practical difficulties the applicants experienced were not deemed insurmountable and, furthermore, the Court confirmed that the French state enjoyed a wide margin of appreciation in this respect. As such, the children had been able to live with the commissioning parents soon after their birth and the fact that they were unable under French nationality law to hold French nationality did not mean that their family life with the commissioning parents was (unjustifiably) undermined. In the eyes of the ECtHR the French courts had, accordingly, made a reasonable assessment of the various interests involved, something which was reconcilable with its obligations under Article 8 ECHR protecting the *right to family life*.

Nonetheless, with regard to *the right to respect for private life* of the children under the (same) Article 8 ECHR, the ECtHR decided that there *had* been a violation. In that respect, the emphasis the Court placed on the importance of the rights of children who are born through ICS and surrogacy in general is striking.[24]

As such, the ECtHR commented that nationality is an aspect of one's identity, meaning children's identity as well, and took note of the fact that the children faced considerable uncertainty in their (daily) lives because of their inability to acquire French nationality. This was found likely to negatively impact upon the formation of their own identity. In practice, moreover, the Court objected to the position of the French state with regard to inheritance law because the children would only be able to inherit from the commissioning parents as third parties, unlike other children.

In focusing on aspects of individual identity, the ECtHR referred to children's rights under the UN CRC. Thus, the lack of a 'filial connection' established under French law and the bearing this would have on the formation of the children's identity and their right to preserve their identity (Article 8 CRC) meant that they were left in a situation that was deemed incompatible with their 'best interests'. Given these consequences, France had therefore transgressed its margin of appreciation in the eyes of the ECtHR with regard to the right to respect for private life.

A PIL line of argumentation is discernible here. Thus, at No. 83 the ECtHR observed that the French position with regard to surrogacy manifests itself in withholding recognition of the family law relationship. The ECtHR considered it its task to verify whether, in applying that (PIL) mechanism to the case the French courts had duly taken account of the need to strike a 'fair balance' between the interest of the community (at large) in 'ensuring that its members conform to

[23]The position of French law with regard to surrogacy and the establishment of paternity of the commissioning father has received sharp criticism, especially for not distinguishing between the unlawful character of the surrogacy contract and the child's filiation resulting from that contract. See Fulchiron and Martín Calero 2014, pp. 540–541.

[24]See in particular Achmad 2014, pp. 638–646.

the choice made democratically within that community' and the interest of the (individual) applicants—the children's best interests being a paramount consideration—in fully enjoying their rights to respect for their private and family life. Accordingly, it submitted that national, French PIL should be consistent with an international human rights norm (to be found notably in Article 3 UN CRC).

The ECtHR went on to affirm that the French Court of Cassation had held that the inability to record the particulars of the birth certificates of the children in the French register of births, marriages and deaths did not infringe their right to respect for their private and family life or their best interests as children, insofar as it neither deprived them of the legal parent–child relationship recognized under *Californian* law nor prevented them from living in France with the commissioning parents either.

Whereas the Court accepted that a state may wish to deter or discourage its own nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory, it found that the effects of non-recognition in French law of the legal parent–child relationship between children 'thus conceived' (No. 99) and the 'intended' (commissioning) parents are not limited to the parents alone. Rather, as the Court saw it, they also affect the resultant children themselves, as their right to respect for their private life is substantially affected. As the ECtHR suggests, this right to private life of the children in this (ICS) context implies that 'everyone' must be able to establish the 'substance' of his or her identity and that this identity encompasses (*de minimis*) the *legal* parent–child relationship and *nationality*.

As the Court saw it, by 'blocking' both the recognition and establishment under domestic law of the children's legal relationship with their biological father, France had overstepped the permissible limits of its 'margin of appreciation'.

By taking this position, the Court has raised questions about where the limits of the state's 'margin of appreciation' may lie. Clearly, this question goes beyond the protection of human rights but also affects the sphere of PIL legislation, since it incorporates the question of to which extent the state may rely on the protection of *ordre public* in assuming a 'prohibitionist' stance towards ICS arrangements.

10.3.2 Paradiso and Campanelli: The State's Margin of Appreciation Once a Child Born Through an ICS with no Genetic Link to the Commissioning Parents Has Entered Their National Territory

Receiving states may find themselves in a predicament to take effective and proportionate measures in defence of human rights concerns in the ICS context once the child has entered the territory of the receiving state. This is attested by the recent *Paradiso and Campanelli* case.[25] In contrast to the *Mennesson/Labassee*

[25]ECtHR *Paradiso and Campanelli v. Italy*, appl. no. 25358/12, 27 January 2015.

decisions, in *Paradiso* there was no genetic link between the child and the commissioning parents, a heterosexual married couple from Italy, Ms. Donatina Paradiso and Mr. Giovanni Campanelli, who had contracted a Russian surrogate following no fewer than eight failed attempts at in vitro fertilization. The child, Teodoro Campanelli, was born on 27 February 2011. The commissioning parents (claimants) were represented by Mr. Svitnev, a lawyer working for the Russian company Rosjurconsulting specialized in ICS services.

The Russian surrogate mother had made a declaration at the Russian hospital where Teodoro was born that she consented to the registration of the Italian couple as parents on the child's birth certificate. On 10 March 2011 the couple was registered by the Russian authorities as the child's parents. In April 2011 Ms. Paradiso successfully obtained permission from the Italian consulate to travel with baby Teodoro to Italy. On 2 May 2011 the Italian consulate notified the juvenile court of Campobasso that the birth certificate contained false data. The couple was subsequently accused by the Italian authorities of the crime of alteration of civil status and of infringing restrictions to their authorisation from 2006 to adopt a newborn baby.

On 5 May 2011, the Public Ministry instituted proceedings with regard to the adoptability of the child, who was considered to have been left in a state of abandonment. A guardian was appointed by the court as a provisional child protection measure. On 25 May 2011, Ms. Paradiso was questioned by the Italian police and she declared that she had travelled to Russia alone to deliver the seminal liquid of her husband to Rosjurconsulting, the Russian company which had committed itself to finding a suitable surrogate mother in whose womb (uterus) the embryo would be placed. This was perfectly lawful, at least according to Russian law. By July 2011 the Campobasso court had, however, ordered DNA testing and by August 2011 the court had refused to recognize the Russian birth certificate stating the commissioning parents as the child's legal parents. In October 2011 the (domestic) Italian court decided that the child should be taken away from the couple and placed in a childcare institution unknown to the couple, after the DNA tests had revealed that there was no genetic link whatsoever between the couple and the child. Only the identity of the surrogate and the commissioning parents had been certain, not that of the child's genetic parents. As a result, the couple was found not only to have infringed international adoption law requirements but also Italian assisted conception law which prohibited heterological insemination, by unknown donors. On 20 November 2012, the couple lost the appeal proceedings. On 3 April 2013, the Court of Appeal of Campobasso decided that the child's birth certificate was 'false'; in the absence of evidence that the child had Russian nationality because of the uncertainty surrounding the child's parentage, the Italian rule of conflict was also considered to have been 'infringed', as it requires the child's legal parentage to be determined by the law of the child's nationality at birth. In addition, it was considered a violation of the Italian *ordre public* to transcribe the disputed birth certificate in Italy because it was found to be 'false'. The couple insisted, however, that it had acted in 'good faith' and also did not know the reason why the husband's semen had not been used by the Russian company for the child's conception.

The ECtHR decided as follows. It first explored the relevance of a number of international instruments, notably the principles of CAHBI dating from 1989[26] regarding the role of intermediaries in surrogacy. In its preliminary analysis, contesting the Italian government's claim that the couple was incapable of representing the minor in the proceedings, the Court stated that it was better not to assume an overtly restrictive approach as regards the representation of the minor, while acknowledging that no genetic link existed between them and that they lacked the legal quality to represent the minor in the proceedings.

The ECtHR then went on to consider the merits of the claim that the Italian authorities had violated the right to family life under Article 8 ECHR. Unfortunately, the Court did not give a substantive answer to this important question. Thus, the claim that the Italian authorities should have transcribed the Russian birth certificate under this provision of the convention, was discarded. This had a procedural reason, because domestic procedural remedies had not been exhausted as the claimants had not instituted proceedings at the Italian *Corte di Cassazione*.

Nonetheless, the (other) claim under Article 8 ECHR with regard to the allegedly unlawful removal of the child from the couple *was* admitted. The claimants wished to stress that their case was not about the lawfulness of surrogate motherhood per se, assisted conception or the genetic ties between them and the child (per se), and (much less) was it about adoption. Rather, as they saw it, their case revolved around the recognition of a foreign birth certificate. In addition, it was about the removal of the child from his family environment. The couple also underlined in this respect that they had never been convicted of any crime and that they had not faced any travel restrictions to fulfil their reproductive wish in Russia. Accordingly, they had been 'free to do as they wished'.

For its part, the Italian government observed that it had acted in accordance with its own interest in verifying whether a foreign birth certificate is contrary to the *ordre public* of the state and that it had applied its PIL legislation with regard to filiation (parentage). Given the absence of any (genetic) link between the couple and the child as mentioned in the Russian birth certificate, the birth certificate could according to the Italian government justifiably be regarded as 'false'.

[26]Principle 15 of the principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), 1989:

1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother.
2. Any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable.
3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited.
4. However, states may, in exceptional cases fixed by their national law, provide, while duly respecting para 2 of this principle, that a physician or an establishment may proceed to the fertilization of a surrogate mother by artificial procreation techniques, provided that:
   a. the surrogate mother obtains no material benefit from the operation;
   b. the surrogate mother has the choice at birth of keeping the child.

Furthermore, the Italian government claimed that the couple had previously been authorized to adopt a child lawfully and could instead have chosen to proceed accordingly.

With regard to this claim under Article 8 ECHR, the ECtHR discerned (at No. 68) certain analogies with its earlier decision in *Wagner et J.M.W.L. v. Luxembourg*.[27] In the *Wagner* case the Luxembourg authorities had withheld the recognition of a Peruvian judicial decision regarding the plenary adoption of a child because national adoption rules had been circumvented by the claimant. In *Wagner*, in its reasoning concerning Article 8 ECHR, the ECtHR had mentioned several factors which contributed to its finding that the decision of the Luxembourg courts to deny recognition was not proportionate. The Court took note of the fact that full adoption had been recognized in most European states, restricting the state's margin of appreciation. Moreover, the ECtHR made mention of the *legitimate expectations* of the applicants that the relationship *would* be recognized in that case.

In *Paradiso*, the ECtHR observed that the claimants were *not* the child's legal parents in accordance with Italian parentage law, even though they had previously enjoyed parental authority with regard to the child before their parental authority had been suspended. In addition, the ECtHR reconfirmed its earlier, consistent case law that the existence of family life within the meaning of Article 8 ECHR depends foremost on the existence of de facto ties. So even though the child had only lived with the couple for a short time, 'family life' protected by Article 8 ECHR was considered to exist between them. As such, Article 8 ECHR applied.

The ECtHR went on to add that—even though DNA testing had conclusively shown that no genetic link existed between the commissioning parents and the child after birth—Article 8 of the Convention does not only protect the right to family life but also a person's right to private life. This right to private life, to some degree incorporates the protection of an individual right to establish relationship with 'fellow human beings' ('*avec ses semblables*').

Furthermore, the ECtHR reconfirmed its earlier case law to the effect that individuals have a right to establish details about their 'basic identity' and that the right to be able to access such information is essential for the formation of their own identity.[28] The Court did not explore this issue with regard to information about (genetic) parentage in the ICS context further.

As regards the test of whether the authorities had acted in a proportionate manner in assessing both the private and public interests involved, the ECtHR took the view that it was not necessary to establish whether an advanced state

[27]ECtHR *Wagner et J.M.W.L. v. Luxembourg,* No. 76240/01, 28 June 2007.

[28]ECtHR *Gaskin v. United Kingdom*, 10454/83, 7 July 1989. This case law was developed further after this decision in a number of other judicial decisions, such as notably ECtHR *Mikulić v. Croatia*, No. 53176/99, 7 February 2002; ECtHR *Odièvre v. France*, No. 42326/98, 13 February 2003; ECtHR *Jäggi v. Switzerland*, No. 58757/00, 13 July 2006; ECtHR *Phinikaridou v. Cyprus*, No. 23890/02, 20 December 2007; ECtHR *Godelli v. Italy*, No. 33783/09, 25 September 2012. See further Blauwhoff 2009, pp. 59–100.

of harmonization of laws is attestable, something that would restrict a country's margin of appreciation in this area. In that respect, it took into account the fact that Russian law does not require the commissioning parents to also be the child's genetic parents, although the claimants had not made use of this argument in the surrogacy context.

Second, the ECtHR found (lamented) that it had been 'confronted' with a case in which a Russian company, which employed the lawyer representing the claimants, had been paid a considerable amount of money for 'buying' the gametes of unknown donors and had helped them obtain a birth certificate. Yet, the reassurances by the Russian company that Mr. Campanelli would be the genetic father ended in despair when he found out that he in fact was not. The court expressed 'sympathy' for this as well as for the couple's disillusionment at their earlier failed attempts to resort to IVF treatment and adoption. Furthermore, the Russian lawyer had reassured the commissioning parents that she could make amends by allowing the company to 'buy' the embryos, insisting that there was no reason to believe at the time of contract that the father had not in good faith believed that he would become the child's genetic father.

In the eyes of the ECtHR (at No. 79), the Italian authorities had attached excessive weight to the unlawfulness of the situation. True, the parents had taken the child with them from Russia to Italy while leaving the Italian authorities in the dark, thereby violating Italian law, in particular adoption legislation and the laws on assisted reproduction. Furthermore, the intended parents had been accused in Italy by the authorities, including childcare professionals, of circumventing adoption law requirements while satisfying their own 'narcissistic' wish to have a child, to deflect the attention from the problems of the couple, whose affective and pedagogical qualities were accordingly questioned, if only at that stage (i.e. when the child was already in Italy).

Even so, the ECtHR commented that the reliance by the Italian authorities on the protection of *ordre public* could not serve as sufficient justification for the position the Italian authorities had taken with regard to the recognition of the child's birth certificate. Thus, the 'paramount interest of the child' should in any event have been weighed into its reasoning, regardless of the existence or inexistence of a genetic link between the couple and the child, so the ECtHR considered. The decision to remove the child from its family environment was accordingly considered to have been an (overtly) extreme measure which Italy should only have used as a last resort. In that respect, the ECtHR commented that the couple *had* been considered suitable to become adoptive parents in December 2006, but that they had only come to be considered 'unloving and unfit for raising a child' after it had emerged that they had short-circuited the Italian adoption legislation (No. 84) by travelling to Russia to contract a surrogate.

In conclusion, the ECtHR recognized the 'sensitive' nature of the case but ultimately found that the Italian authorities had failed to respond proportionately by removing the child from its family environment with the commissioning parents. In that respect, the Court took note *inter alia* of the fact (at No. 85) that the child had only acquired a new identity in April 2013, which meant that such a (legal)

identity had not existed for over two years. In that connection, the ECtHR affirmed that a child born through a surrogate arrangement should not be disadvantaged *because of the way he or she was born*, thereby referring directly to the right of 'every child' to hold a nationality and to an identity (as inferred from Article 7 UN CRC in this respect). As such, in this regard this was sufficient for the ECtHR to conclude that Italy had violated rights under Article 8 ECHR.[29]

10.4 Human Rights Dimension

What may be gathered about the relationship between PIL and human rights in the context of ICS arrangements from these recent cases coming from Strasbourg? Even though one should be cautious to deduce general principles from individual judicial decisions, the argument can be sustained on the basis of the *Mennesson* and *Labassee* cases that it may not be consistent with regional human rights law for prohibitionist states, such as France, to invoke *orde public* as a (blanket) refusal to recognize a family law relationship whenever a state finds itself confronted with issues pertaining to the recognition of a family law relationship of a child born through ICS and recognized lawfully in the state of the surrogate. In these cases no violation of the right to family life was discerned as a result of the non-recognition of a family law relationship between the children and the intended parents within France, while the ECtHR did find a violation of the right to private life. Thus, prohibitive legislation with regard to the recognition of such a family law relationship might accordingly still be considered to fall in line with a state's margin of appreciation, taking into account the absence of consensus among states party to the ECHR in this field. Yet 'once the child is there' in the sense that (de facto) family life has developed with the commissioning parents and the child has moved to their home state, an appraisal of the child's interests in the concrete facts and circumstances of the case may require a prohibitionist state to reconsider a 'blanket' reliance on *ordre public*.

Considering the ECtHR's decision in the *Paradiso and Campanelli* case the argument could be advanced that states should be careful if they decide to remove a child born through an ICS arrangement from the family environment because de facto family life exists between them and the child. At the same time, the refusal of a 'prohibitionist' country such as Italy to recognize a birth certificate lawfully drawn up in a permissive and 'surrogacy friendly' country such as Russia, is a PIL issue. As such, it is distinguishable from the recognition of the right of the child born through surrogacy to enjoy the right to family life with the commissioning

[29]The partially dissenting opinion of judges Raimondi and Spano, however, puts forward some persuasive arguments as to why the Italian authorities duly acted in a proportionate manner and acted in accordance with its own (private international) law provisions with regard to filiation. This dissenting opinion is also noteworthy for its criticism of the majority opinion's alleged disregard for the principle of subsidiarity in delivering its judgment.

parents within their home state, whatever the legal or genetic link between them and the child.

A 'prohibitionist 'state may have legitimate reasons, reconcilable with the margin of appreciation doctrine of regional human rights law, to prevent or deter its own citizens (a priori) from entering into an ICS arrangement. Therefore, it could be argued that there is no need on the basis of *Mennesson* and *Labassee* to prescribe 'prohibitionist' states to alter their PIL legislation, as long as the right to family life between the commissioning parents and the child, as well as the children's right to private life can somehow be guaranteed in practice without unjustifiable, substantive differences in treatment vis-à-vis other families and children. Thus, it has been commented by one author that the decision sends the unfortunate message that 'surrogacy is fine—just "not in our backyard"'.[30]

To the extent that prohibitionist national legislation may easily be circumvented by commissioning parents who enter into an ICS arrangement in a permissive state, such a policy would arguably run the risk of becoming 'emblematic' in 'tolerating' ICS families on its territory, while at the same time formally withholding their recognition, burdening national authorities time and again with a 'fait accompli' with regard to the legal consequences of surrogacy. Moreover, such a policy may fall short of affording equal protection to children and families created through ICS. Finally, such an approach would inevitably have an ad hoc nature and lead to an exceptionalism with regard to ICS arrangements.

10.4.1 Rights of the Surrogate

It is accepted that the surrogate mother under no circumstances should be forced by the commissioning parents or by anyone else to enter into a surrogate contract, or be subjected to restrictive conditions during and after the pregnancy. Concerns related to ICS arrangements in India especially have been found not to be merely theoretical but substantiated by empirical findings.[31] In addition, there may be concerns over the physical well-being of surrogate mothers.[32] The imposition on the surrogate, as the gestational carrier of the child, of a duty to surrender the child to the commissioning parents arguably could be considered irreconcilable with prohibitions against cruel punishment and servitude. In addition, the sale of reproductive services could be regarded as contravening prohibitions against using the body and its parts for financial gain.[33] Ideally, the surrogate should be 'empowered' in the sense that she should only enter into such a contract on the basis of an

[30]Bala 2014, p. 15. www.yjil.org/docs/pub/o-40-bala.pdf. Accessed 15 July 2015.

[31]Trimmings and Beaumont 2013, p. 530, with references.

[32]Trimmings and Beaumont 2013, p. 529.

[33]Oviedo Convention, Article 21. See also Charter of Fundamental Rights of the EU [2010] OJ C83/389 and Ergas 2013, p. 435.

informed right to autonomy and right to self-determination. Nonetheless, in many if not most cases it will be questionable whether this goal can be achieved at the level of international regulation, let alone implementation.

Thus, it must be acknowledged that the issue of free and informed consent to a surrogate contract may be illusory for disparate reasons. Some question whether it is possible to give full informed consent before the child's birth as regards the transfer of a child, whether through adoption or surrogacy.[34] In addition, impoverished, surrogate mothers may be lured by the promise of comparatively high remunerations for the 'due' performance of the contract, especially in countries such as India.

It is conceivable that the commissioning parents could insist on certain unethical conditions with regard to the health and other qualities of the child, or express them after the birth of the child, as the recent *Baby Gammy* case blatantly shows. However, few would disagree that it may be exploitative if the costs related to the pregnancy (notably, the provision of adequate food, medical and hospital costs) would not be able to be recovered *at all* by the surrogate mother. Trimmings and Beaumont suggest, for example, that surrogate mothers should be provided with income for a year, i.e. during pregnancy and in the three months after birth.[35]

The income would be set at the wages lost if the mother was employed, or if unemployed, at a fixed sum, e.g. three times the minimum wage in that country.[36] Still, the intended parents and the surrogate will often not specify what falls under reasonable remuneration of the surrogate in a prior contract. Accordingly, the boundaries between adequate compensation, remuneration, commercial exploitation and commodification of the surrogate may sometimes be indefinite and become blurred. Furthermore, particularly in cases where there is a large divide in a country between the very rich and the very poor, the prospect of earning three times the minimum wage may represent a sum that would never otherwise be hoped for in the normal course of life.[37]

In our opinion, the need for international regulation outweighs the debatable advantage that due to the current lack of regulation, the exploitative sides to ICS arrangements are not being condoned. Nonetheless, it is questionable whether a PIL instrument should contain a standard clause regarding the compensation of the surrogate, because this may have the unwelcome effect of legitimizing the reduction of a woman's reproductive ability to a mere economic resource and be inconsistent with human rights concerns.[38]

Even so, the creation of a PIL instrument could lay down minimum health rules with regard to the performance of the contract that would be monitored by a central national authority. This could go some way in protecting the rights of

[34]Fenton-Glynn 2014, p. 166.

[35]Trimmings and Beaumont 2013, pp. 554–555.

[36]Trimmings and Beaumont 2013, pp. 554–555; Fenton-Glynn 2014, pp. 163–164.

[37]Fenton-Glynn 2014, p. 164.

[38]As also appears to be the view taken by Fenton-Glynn 2014, p 164.

surrogate from a human rights perspective while having the welcome side effect of protecting the welfare of the *nasciturus* and the rights of the (future) child born through an ICS arrangement. Thus, once the surrogate has entered into the ICS arrangement with the commissioning parents, it is vital to set limits in the interests of the future child to her right to self-determination, which may be considered to be an aspect of the surrogate's right to privacy.[39] These could, for example, require an all-out ban on smoking and drinking alcohol during pregnancy.

10.4.2 The Rights of the Commissioning Parents

At present, European human rights law does not recognize an enforceable right to find a family or a right to adoption, nor do adults indeed have any 'right' to conceive a genetically related children.[40] Nonetheless, the ECtHR has recognized 'the right to respect for the decisions both to have and not to have a child' and 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose' in the context of assisted pregnancy rather than surrogacy.[41] In the *Evans* case the ECtHR effectively denied the existence of a right to a genetically related child in the IVF context pursuant to Article 8 ECHR and considered the British 'bright line' legislation with regard to the right of the husband to withdraw his consent to IVF treatment after fertilization of the gametes to fall within the margin of appreciation of the UK.[42] Nonetheless, it appears that a state may sometimes also have to undertake positive obligations under Article 8 ECHR with regard to access to artificial insemination facilities, and it is undisputed that a refusal to access artificial insemination facilities affects the right to private and family life.[43]

However, if a child is born through an ICS arrangement, the commissioning parents probably do not have a right to compel the authorities to recognize a family law relationship with the child per se, even if this relationship is perfectly lawful under the laws of the state of the surrogate, as this falls within a state's margin of appreciation. This general conclusion may tentatively be drawn from the recent ECtHR decisions referred above. At the same time, even if 'only' de facto family

[39]Compare Tobin 2014, p. 319, who postulates the idea that the surrogate mother has a right to privacy as an entitlement to enter a surrogacy arrangement which may be subject to limitation where necessary.

[40]As follows, e.g. from ECtHR *E.B. v. France*, 22 January 2008, No. 43546/02.

[41]ECtHR *SH and Austria*, 3 November 2011, No. 57813/09, para 80. Still, according to some authors, this decision sends a strong signal that European countries are free to impose whatever restrictions on assisted reproduction they may desire and that they might even be permitted to outlaw assisted reproduction altogether. www.bionews.org.uk/page_117832.asp. Accessed 15 July 2015.

[42]ECtHR *Evans v. United Kingdom*, 10 April 2007, No. 6339/05, at No. 79 and 90.

[43]ECtHR *Dickson v. the United Kingdom*, 4 December 2007, No. 44362/04, No. 58.

life exists between the commissioning parents and the child, this will require human rights protection under Article 8 ECHR.

10.5 The Rights of the Child Born Through ICS

10.5.1 Identity Rights (Legal Parentage, Right to Know One's Parents and Nationality)

A salient, recurrent feature in the reasoning in all three ECtHR cases, is the focus on children's rights and in particular a 'broad' right to an identity. In respect of the right to an identity, both the child's right to hold a nationality and to have a family law relationship were considered to fall within the notion of the right to private life under Article 8 ECHR. This is congruent with the protection of such rights under Article 7(1) and Article 8 CRC.

As for the child's rights, the court has accepted in numerous instances that a child has a 'vital interest' to establish details about their identity. As such, this (underlying) right to 'identity', though not an absolute right, is firmly enshrined in human rights law and incorporates aspects of parentage, also within the ICS context.[44] It follows that the effectuation of this identity right will be contingent upon the availability and the access to information regarding this aspect of their identity. Regrettably, however, the ECtHR did not mention identity as incorporating a right to access to *both* genetic *and* gestational origins in the *Mennesson* and *Labassee* cases. Nonetheless, it is reasonable and consistent with its earlier case law to argue on the basis of this 'right to an identity' that the child born through an ICS arrangement would have a right to establish details about the identity not only of the commissioning parents but also the surrogate and the genetic parents, whatever their legal relationship to the child. It is submitted that such a right could reasonably be derived from Article 7(1) and Article 8 CRC as well. The *Paradiso* decision certainly suggests that this right to establish details about the identity of one's parentage potentially extends to the identity of the surrogate (whose identity incidentally was verifiable and accessible for the child in that case). Especially, in cases where the identity of the genetic parents is unknown because of anonymous donation or heterological insemination, this would go some way in helping the child's formation of a narrative identity. However, a guarantee of anonymity for the gamete donor sits uneasily with this right of the child because it precludes access to information deemed of 'vital interest' with respect to individual identity.

Such an interpretation of Articles 7(1) and 8 CRC would not, however, necessarily require states to prohibit all forms of ICS arrangements altogether nor does it require states to recognize the existence of a legal relationship between the commissioning parents and the child. Rather, states should be encouraged and, indeed,

[44]See, for example, in ECtHR *Mikulić v. Croatia*, No. 53176/99, 7 February 2002, No. 64.

may to a considerable extent even be expected to put in place adequate regulatory structures which ensure appropriate record-keeping and mechanisms to enable children to access information regarding those individuals who played a genetic or gestational role in their creation.[45]

In connection with Article 7 CRC, for the child, pervasive problems involving nationality law and statelessness could also arise as a result of an ICS arrangement. Thus, if a law provides that the legal mother is the person giving birth, the child's status may be unclear. If that law provides that a child cannot accordingly acquire the nationality of her intending parents, the child may be left in a legal predicament if the nationality and parentage law of the state of the surrogate regards the commissioning parents as the child's legal parents.

As has been pointed out, however, in *Mennesson* and *Labassee* this right under Article 7 CRC had been met, as the children did have a nationality (American) and they did have legal parents, at least in one jurisdiction, i.e. that of the surrogate (in California and Minnesota). The problem of establishing nationality was much more acute in the *Paradiso and Campanelli* case. Here the content of the Italian PIL rule of conflict was deficient as no parentage could be established with regard to the child's anonymous donors and resort was made to domestic Italian law. However, it is clear that the insistence on a violation of *ordre public,* and the blanket refusal both to accept the existence of any sort of family law relationship and to confer French nationality on the children accordingly, meant that the children's legal position in the *Mennesson* and *Labassee* cases was, for all intents and purposes, jeopardized.[46]

10.5.1.1 Right to Dignity and the Prohibition of Sale of Children (Article 35 CRC)

It has been suggested that the purpose of the *Optional Protocol to the UN Children's Rights Convention* includes the exploitative transfer of children and that this interpretation would exclude commercial surrogacy arrangements.[47] The sale of reproductive services per se could be seen as contravening prohibitions against utilizing 'the human body and its parts…as such…[for] financial gain'.[48]

The concept of a 'sale of a child' in the ICS context does not imply a *proprietary* transfer, but merely a physical one that is facilitated by remuneration.[49] Furthermore, as has been suggested above, to equate the role of a gestational surrogate mother to that of a factory worker could be considered demeaning not only

[45]Tobin 2014, p. 330.

[46]Fulchiron and Martín Calero 2014, p. 351.

[47]Tobin 2014, p. 340.

[48]Oviedo Convention, Article 21. See also Charter of Fundamental Rights of the European Union [2010] OJ C 83/389, as cited by Ergas 2013, p. 435.

[49]Tobin 2014, p. 340.

to women but also to children. Therefore, in this respect under human rights law a viable case could justifiably be made for prohibitionist states to ban all forms of ICS altogether. At the same time, in our view, reliance on these human rights concerns would not seem to be an adequate response to the manifold legal problems surrounding ICS arrangements.

10.5.1.2 Public Interest

It is to be expected that the incentives for corruption, or at least something less than best practice, will remain significant.[50] This assertion becomes all the more relevant when considerable sums of money are involved in ICS arrangements. Thus, even though ICS may not be inherently exploitative, a state may have reasonable grounds to withhold recognition of legal consequences deriving from ICS arrangements. Yet, this proposition does not, however, demand a (global) prohibition of commercial surrogacy, but only a concerted commitment to effective regulation, with individual States reserving their right to refuse to recognize surrogacy arrangements in States where there are reasonable grounds to suggest that the surrogate mothers' consent might not be free and fully informed.

As with children's rights, the moral objections to this practice are sufficiently defensible to fall within a State's margin of appreciation to justify a prohibition of commercial surrogacy on the basis of public morality.[51] Accordingly, our reading of the recent Strasbourg decisions is not that a prohibitionist or negative normative stance in PIL is no longer reconcilable with human rights norms, but that such a position falls short of addressing legal concerns, both of a PIL and human rights nature.

From the perspective of international human rights law (which also reflects a particular moral framework), the case for a prohibition of ICS may be made on three potential grounds: it arguably amounts to the *sale of a child*, it risks the *exploitation of (vulnerable) women*, especially in developing countries, and/or maintains *gender inequality*, for example because the husbands of surrogates in developing countries may benefit most financially. Although each of these propositions remains disputable, a prohibitionist State or one contemplating prohibition would be well within its margin of appreciation to prohibit such arrangements.

Yet we would dispute the assertion that a prohibitionist treaty would be a far more realistic option and that in the meantime accordingly no efforts should be made with a view to creating an international PIL instrument.[52] A pragmatic PIL instrument with a modest regulatory aim could be developed without this entailing a risk of legitimization of the practice and the pre-emption of an examination of

[50]Tobin 2014, p. 346.

[51]Tobin 2014, p. 347.

[52]Tobin 2014, p. 352.

the ethical considerations at the international level.[53] What would such an instrument look like?

10.6 Private International Law Dimension of International Commercial Surrogacy

10.6.1 Lack of International Regulation

At the national level, regulation of ICS varies considerably, as has been noted already. At the international level, regulation is at present almost absent, even though practise shows that surrogacy cases very often contain an international element. This situation causes problems and exacerbates legal uncertainty as regards legal parentage for all parties involved. Even though we recognize that regulation at the international level is fraught with difficulties (notably, regarding consensus, political will, the diversity of national regulation), we believe that some form of international regulation in PIL is warranted. The market for ICS is unlikely to disappear and the creation of a PIL instrument could help define fundamental rights standards whenever a state is confronted with an ICS case. Nowadays, in the absence of regulation, states all too often find themselves struggling with the 'fait accompli' nature of ICS arrangements. Further, at present, states have no or very limited ability to a priori control the circumstances which have led to the conception and birth of children born through international surrogacy arrangements.

An important element in the earlier ECtHR decision of *Wagner* cited in the *Paradiso* case, is the question of whether a status created in a foreign country, perhaps even lawfully in that country, may eventually become a 'social reality', which may stand in the way of—any?—denial to recognize a foreign judgment supporting the existence of a family law relationship of an adoptee.

Accordingly, the question may be raised of whether the shift towards a test based on Article 8 ECHR with regard to a 'social reality' may lead to more occasions—we daresay, also in case of international surrogacy,where a validly acquired status abroad may mean that traditional PIL rules regarding recognition of foreign acts and decisions become irreconcilable with human rights obligations once the family law relationship in question can be said to have become such a 'social reality.' Interpreted this way, the *Wagner* decision could be seen as introducing a new method of recognition for foreign family law judgments based on the 'broad' scope of Article 8 ECHR replacing more 'narrow' traditional private international law methods.[54] On the other hand, it is also true that the ECtHR has so far not decided a single case in which the application of foreign law as such actually

[53]Compare: Fenton-Glynn 2014, p. 169.

[54]Kiestra 2014, pp. 224–228.

resulted in a violation of one of the rights guaranteed in the ECHR.[55] In view of the cross-border aspects and the current lack of regulation, however, a continued adherence to an ad hoc approach in decision-making would not appear to be an adequate response or solution, neither from a human rights nor from a PIL perspective.

On the assumption that such a PIL instrument is desirable, the question arises as to how this instrument should be created. Since the Permanent Bureau of the Hague Conference on Private International Law has started a research regarding the private international law issues on the legal parentage, more specifically in relation to international surrogacy arrangements, and bearing in mind the expertise of the Hague Conference, their continued efforts regarding the issue of recognition of family law relationships deriving from ICS arrangements are to be welcomed.

Before delving into the modalities of a global instrument regarding ICS, it is interesting from a practical viewpoint to examine the question of whether it is possible to accommodate such an international regulation of ICS in an existing PIL instrument.[56] It would seem worth considering the Brussels II a Regulation,[57] but it should be noted from the outset that this instrument has a limited geographical scope, especially taking into account the global reach of a phenomenon such as ICS. Furthermore, the 1996 Hague Convention on the Protection of Children[58] and the 1993 Hague Adoption Convention could be considered as viable instruments.[59] As far as the first two instruments, we can be brief: both the Brussels II a Regulation[60] and the 1996 Convention[61] indicate that the determination of the legal parent–child relationship as such is beyond the scope of the instrument. And this is precisely the focus of any foreseeable PIL instrument with regard to ICS.

It has been suggested that the 1993 Hague Adoption Convention could provide an important backdrop in drafting a future PIL instrument concerning international surrogacy. Inclusion of ICS in the Adoption Convention would therefore seem a

[55]Kiestra 2014, Sect. 6.31 et seq. The cases of *Ammdjadi v. Germany*, 9 March 2010, No. 51625/08 and *Zvoristeau v. France*, 7 November 2000, No. 47128/99, both resulted in the Court not finding a violation with regard to the foreign law applicable.

[56]Keating 2014, pp. 77–78.

[57]Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, Official Journal of the European Union, 23.12.2003.

[58]Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (www.hcch.net).

[59]Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (www.hcch.net).

[60]Consideration 10: In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons.

[61]Article 4: the Convention does not apply to—a) the establishment or contesting of a parent–child relationship.

logical step, as in this convention the parent–child relationship is also covered. It should be noted, though, that the focus in adoption is the placement, if possible, of children with a suitable family in the best interests of the child. Moreover, in intercountry adoption the subsidiarity principle may require the child to remain in the care of his or her family of origin. Intercountry adoption may also offer the advantage of a permanent family for a child for whom a suitable family cannot be found in his or her State of origin. By contrast, in ICS the focus is on the fulfilment of the wish of the commissioning parents to have a child, thereby separating the child from the birth mother and her environment. Further, if we look at the 1993 Hague Adoption Convention from the perspective of ICS, it can be said that some treaty provisions are irreconcilable with ICS[62] and would, in any case, require modification if ICS is to become part of the Convention. In this respect, for example Article 4(c) states that the consent of the mother, where required, has been given only after the birth of the child, while the first part of Article 29 states that there shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child. Even though incorporation of ICS in the Hague 1993 Adoption Convention would therefore not be the solution and, in our view, ICS requires a separate instrument, the system could at least serve as an inspiration in drafting a separate Hague convention regarding ICS.[63] The 1993 Hague Adoption Convention is a very successful convention, with 93 Contracting States.[64] The Permanent Bureau meanwhile has gained a lot of experience with making the system familiar in the Contracting States and providing advice regarding its implementation at the national level, in addition to monitoring the convention in Contracting States.[65] Taking these activities into consideration, the Permanent Bureau already has a framework for a future PIL instrument regarding ICS.

10.6.2 What Would a Future PIL Instrument Look like?

Private international law addresses three kinds of problems: direct jurisdiction, applicable law and recognition and enforcement of foreign decisions. The most ambitious project would entail a comprehensive instrument dealing with all these aspects of PIL in matters of ICS (resolving jurisdictional questions, determination of applicable law, recognition and enforcement of birth registration and /or decisions on legal parentage), as well as dealing with judicial cooperation. In drafting a PIL instrument the following principles should be paramount: the child's welfare, the legal status of child and intended parents, and the position of the surrogate mother. Several elements may be distinguished which characterize ICS

[62]See Keating 2014, p. 78.

[63]Trimmings and Beaumont 2013, p. 535 et seq.

[64]Status 6 March 2015.

[65]See for documents as Practice Guides the Intercountry Adoption Section on www.hcch.net.

arrangements: these generally concern contractual issues, like, for instance, issues arising from the contract of the surrogate and the intended parents as well as issues of legal parentage.[66] This implies a distinct approach from a PIL perspective.

Breach of contract should, of course, be distinguished from the issue of determination of parentage. Jurisdiction regarding contractual issues could be based on choice of forum. Still, the question could remain whether the surrogate as the "weaker party" (but can she always be considered to be the 'weaker party'?) should be protected. If so, does that mean that the surrogate should have a *forum actoris* when she wants to start proceedings against the intended parents? Resolving jurisdictional issues with respect to legal parentage on the other hand should be based on the best interests of the child. That may lead to a jurisdiction based on the habitual residence (undefined?) of the child, or when the child's habitual residence cannot be established, the physical presence of the child (for example in urgent matters). Turning to the choice of law rules, again contractual issues should be distinguished from issues regarding legal parentage. With regard to contractual issues, party autonomy should in principle be a possibility. In the absence of a choice of law it is arguable to use the habitual residence of the surrogate as the connecting factor, which will in most cases also be the place of the 'characteristic performance' of the contract, assuming that the surrogate is the person who can be said to make the 'characteristic performance' (which may be becoming pregnant, producing a healthy baby and/or abiding with certain health prescriptions during the pregnancy, giving birth and/or handing over the baby to the intended parents after the birth).[67]

Some PIL problems will remain, however, if that regulatory choice is made. Thus, the qualification of the 'characteristic performance' might in some cases lead to different results, for example if the pregnancy and the birth occur in different jurisdictions. Moreover, if the rules of that state, for example a developing country lacking regulation on ICS, offer too little protection to the surrogate, choosing the habitual residence of the surrogate may seem an unfortunate choice. Conceivably, however, such states would be precluded from acceding to the convention and/or a certificate of conformity would be withheld, thereby discouraging the intended parents from looking for a surrogate in such a jurisdiction as the place of performance of the ICS arrangement.

As for the applicable law regarding legal parentage, party autonomy should not be admitted, considering that issues regarding parental status affect a state's *ordre public*. A connecting factor should prioritize the legal position of the child and, to a lesser extent, of the intended parents. The general PIL principle of protection[68] should serve as a guiding principle, taking into account the rules of the applicable law. A choice for the habitual residence of the child as the connecting factor is justifiable, as this often coincides with the habitual residence of the surrogate and the

[66]There are also the immigration problems for the child when entering the home state of the intended parents.

[67]See also for this classification: Struycken 2012, pp. 250–251.

[68]Strikwerda 2015, p. 39.

place of birth. These are just some of the possibilities that may be considered to indicate that the creation of a PIL instrument involves different perspectives.

Given this background and given the sensitive nature of ICS, it would appear unlikely that a comprehensive PIL instrument with such an extensive scope will, at least in the foreseeable future, be created. For starters, ideas about regulating ICS arrangements at the national level at present are still often ill defined. Thus, some states permit and facilitate ICS arrangements, while other states either prohibit ICS categorically or may not have regulated the issue, but may to varying degrees be permissive when confronted with an ICS case. If ideas at the national level are so disparate, the creation of a PIL instrument with ambitions at the global level is likely to prove extremely cumbersome. However, such considerations do not mean that a PIL instrument should not be drafted at all. In our view efforts should for the time being be directed towards the creation of a workable instrument at an international level, that does not aim at covering all issues regarding surrogacy. It is always possible for the instrument to be complemented with regulation of other issues at a later stage.[69]

In view of the current case law, a PIL instrument should address the recognition and enforcement of birth registration and/or decisions regarding legal parentage. Furthermore, the instrument should create a system of cooperation between the Member States. In short, a PIL instrument should, for the time being, therefore have a character of an international mutual legal aid treaty. As Trimmings and Beaumont suggests, the Hague Intercountry Adoption Convention could serve as a model for such an instrument.[70]

An international surrogacy convention should guarantee the best interests of the child and uphold human rights like the Hague Adoption Convention does.[71] A future convention should introduce international cooperation between states, notably to aim at preventing child trafficking and the exploitation of the surrogate mother.

The Convention should accordingly prescribe certain procedural standards, which respect the wishes of the surrogate, those of the intended parents and, above all, take into account the interests of the (future) child. The procedural standards should, in our view, contain minimum rules regarding the identity of the intended parents; if possible, the genetic parents; the surrogate and remuneration of the surrogate, as well as specific rules regarding, for example, the diet and health of the surrogate during pregnancy. The standards should be reviewed by the central authority that issues the certificate of conformity.

If the procedural standards set out by the Convention have been complied with, the central authority of the state of the habitual residence of the surrogate mother and/or

[69]It would not be the first time in its history that the Hague Conference in preparing an instrument would start with a partial response and address a specific issue. See the so called Judgment Project (www.hcch.net).

[70]Trimmings and Beaumont 2013, pp. 533–549 for an analysis of a convention regarding international surrogacy based on the principles of the Hague Intercountry Adoption Convention.

[71]Brochure www.hcch.net.

the state where the child is born, assuming that these coincide, could provide a certificate of conformity.[72] The certificate of conformity could on the other hand be withheld if these rules are not implemented. The Convention would also require the recognition of the effects of Convention surrogacy arrangements that have been certified, by operation of law, unless recognition would be manifestly contrary to the country's public policy, taking into account the best interests of the child. This also entails the recognition of the birth certificate in which the legal parents are mentioned.

The Central Authority would also be the authoritative source of information and point of contact in the state, cooperating where necessary with other Central Authorities, and ensuring the effective implementation of the Convention within its territory.

If a state invokes the public policy exception, it should have regard in particular to developments in the recent case law of the ECtHR, as discussed above.[73]

The *Mennesson* and *Labassee* cases suggest that the prohibition of surrogacy in a state's own internal law may be an insufficient ground to rely on *ordre public* with regard to the recognition of a family law relationship established in another state. By looking into the facts and merits of these two recent ECtHR cases on surrogacy it becomes perceptible that a prohibitionist position with regard to ICS arrangements, which insists on the protection of the *ordre public* (as a 'classic' notion of PIL), currently still falls within the state's margin of appreciation. States may therefore, under regional human rights law, presumably still aim at preventing or deterring their own citizens from entering into such arrangements by invoking the protection of *ordre public*.

10.7 Concluding Remarks

In this contribution, on the proud occasion of the T.M.C. Asser Institute's 50th anniversary, the question has been raised of whether a PIL instrument for ICS is desirable and which areas of concern such an instrument should address, in particular from a human rights perspective. As for a future PIL instrument as such, it has been submitted that such a convention should, for the time being, be limited to an international mutual legal aid convention. The convention should provide international standards and practices for ICS and result in the recognition by operation of law of the legal parentage between the intended parents and the child if these standards have been met.

[72]It is, of course, quite conceivable that the state of the habitual residence of the surrogate mother and the state where the child is born, do not coincide, but we will disregard this situation for the purposes of this contribution.

[73]Even though the scope of this case law is confined geographically, it is submitted that the implications thereof for the enforcement of human rights in the context of ICS arrangements may also be highly relevant beyond the territory of the parties to the European Convention of Human Rights.

The procedural standards in the PIL instrument should in our view contain rules regarding the access to the identity of the intended parents, the genetic parents, and the surrogate, since the right of the child to have information on his or her origins is recognized on the basis of the UN CRC and in ECtHR case law. Another important aspect is the free and informed consent of the surrogate before the birth of the child to hand over the child. This may also be required from a PIL perspective on the basis of *ordre public* considerations. Furthermore, the remuneration of the surrogate, as well as specific rules regarding the diet and health of the surrogate during pregnancy should be reviewed by the central authority when issuing a 'certificate of conformity.' It is more doubtful, however, that these latter aspects pertaining to the health and remuneration of the surrogate would fall under a state's *ordre public*.

States should be able to withhold recognition of an ICS arrangement if such recognition is manifestly contrary to the country's public policy, taking into account the best interests of the child. It is to be expected that the public policy exception will turn out to be decisive in many cases. Public policy is acknowledged as a classic principle in private international law. A further limitation is found in international human rights law which, in view of the complex and delicate legal issues raised by ICS arrangements, requires particular attention in drafting a PIL convention in this field.

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