BREAKING FERTILE GROUND IN THE EUROPEAN UNION

A Trial for the Regulation of Womb and Child Trade in Surrogacy

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Abstract: The thesis provides an overview of the challenges that arise in the European Union with an increasing number of incoming children born as a result of a commercial international surrogacy arrangement.
The principal objective of the analysis is to provide a human rights regulative approach to surrogacy, which has mostly been apprehended to date under private law.
In the first part of the analysis, the filiation systems of a sample of EU member states and their adaptability to surrogacy cases are assessed. The thesis then proceeds to examine the existing legal protections available under international human rights instruments, such as the CEDAW, the CRC and the ECHR, for all the parties to surrogacy arrangements.
The inadequacy of family law on the national level or international private law to address issues raised by commercial surrogacy has impacts *per se* in terms of the human rights of the intended parents, the commissioned children and surrogates.
The results of this thesis plead for the design of a multilateral regulation of surrogacy that would take into account human rights and democratic values along with matters of private international law. In order to achieve this, more interdisciplinary endeavors in research, the legal arena and on the level of international bodies is necessary.

Keywords: European Union, Reproductive Technology, Surrogacy, Women's Human Rights, Children's Rights, Reproductive Rights, Filiation.

I. PART I : INTRODUCTION AND LEGAL FRAMEWORK

«The feminist project in international human rights law has barely begun»
—- van den Brink et Wijers (2012)

A. INTRODUCTION –

Assisted reproductive technology (ART) has become more common these last decades and nowadays challenges the definition of family life. Simultaneously, the traditional family structure is acknowledging a revolution with the legalization of same-sex marriage and the normalization of divorce.[1] The challenges brought about by ART in terms of legal regulation are at least threefold. Firstly, ART challenges our definition of family as it raises questions like "who are the parents of this child?". In surrogacy involving in vitro fertilization with a third party ova donor, for example: is the woman whose genetic material is used the mother?[2] What about the woman who carries the child in her womb? Or is the "real" mother the intended mother who commissioned the child? Perhaps all three of them, donor, surrogate and social mother, should be considered as such? Legislators and courts are called upon to participate in the search for new norms of what family is, who is included and who is

[1] Consequently, family law in many EU countries has undergone change. For example, a reform authorizing same-sex marriage and adoption by same-sex couples was voted in France in 2013. However, French same-sex couples did not gain legal access to ART. In the EU, access to ART varies from one country to another. Some have very restrictive eligibility criterion excluding single persons and same-sex couples (e.g. France). Even when countries are very flexible in their legal regulation: for example in a State that (a) authorizes the use of ART in surrogacy and (b) authorizes or tolerates surrogacy arrangements made by same-sex couples, economic inequalities of accessing ART in general and surrogacy in particular still prevail.
[2] Because in the major cases of surrogacy the surrogates do not use their eggs, the use of « surrogacy » in this study will refer to gestational surrogacy.

excluded from the family and related rights. These dilemmas concern the domain of private law, particularly family law and national legislations on filiation.[3]

In surrogacy a woman gives birth to a child for someone else. Nowadays, this practice typically includes a specific type of use of ART, and is one of the most controversial social practices brought about by the revolution in reproductive technology. EU countries have adopted different attitudes and different legal responses (in legislation and/or in courts) towards this practice on their national territory. However, all EU states are currently facing problems arising from an increase of de facto international commercial surrogacy arrangements (referred to hereafter as ISAs) contracted outside of the EU and legislation and regulation have not kept pace. Commissioned children being brought back into member states confront the judiciary with the consequences of a lack of regulation or prohibition (Brunet et al., 2013) and parentage is a key issue in cases currently coming to different European courts. Hence, conflicting national legislations in the domain of international private law is the second legal challenge legislators and courts are confronted with. Part I (chapter 1) of this thesis introduces the subject of surrogacy and ISA, clarifying some of the notions and some of the complex stakes involved in surrogacy and ISAs. The research question(s) and method are also presented in this part. Then, Part I (chapters 2-3) proceeds to focus on the major national and international private law issues that ISAs raise in EU countries and the problems that they raise in private law and in terms of international human rights.

International surrogacy arrangements generally involve the commercialization of the womb and children. Indeed, commercial surrogacy *per se*, as well as the manner in which judicial institutions solve ISA cases in private law practice in sometimes confused legal frameworks, raises a third type of ethical and legal question, that has been debated as bioethical and/or human rights issues. These issues concern the rights of children, the rights of women/surrogates, the rights of infertile couples and sexual minorities demanding an access to « family » and « parenthood » through ART and will be examined in Part II of this thesis. Governments are increasingly attentive to the protection and well being of children. Hence, the status of children has also changed in law. Rights of the child and over the child are provided for in law (although the rights of step-parents may still be in need of definition in national legislations). No « right to » a child has yet been translated into law. However jurisprudence in cases of commissioned children conceived through ISAs, tends to legitimize such a claim, expressed by gay male single men or couples (Stark 2012) or infertile heterosexuals. Commissioned children's rights are also in balance in parentage disputes and claims of regularization; there is a threat that children stay stateless and/or parentless. Questions of the right to information about one's origins, identity and child welfare also arise. The surrogates' rights are also examined through a human rights instrument: the CEDAW. Therefore, after having adopted a private law approach in Part I (chapter 2 to 3), Part II adopts a human rights approach and Part III will gather the human rights features that could be included in a regulative approach to surrogacy.

Amrita Pande has mapped a typology of existing research literature on surrogacy. She lists three types of works: (a) legal and other works which debate on the morality of this practice, (b) feminist literature that apprehends surrogacy as « *the ultimate form of medicalization, commodification and technological colonization of the female body* », (c) and more recently, literature on the impact of surrogacy on the cultural meanings of motherhood and kinship (Amrita *Pande, Transnational commercial surrogacy in India: gifts for global sisters? (Reproductive Biomedecine Online, vol. 23, 2011) pp. 618-625).*

Methodologically, this thesis draws on existing legal human rights instruments, cases and stories of legal procedures. I have also analyzed legal preparatory documents commissioned by the Hague Conference on International Private Law (HccH). However, the approach is not only legal, but also multidisciplinary, as it includes sociological, philosophical and anthropological arguments, which are necessary for understanding the complexity of the issues surrounding surrogacy (drawing on authors such as Zelizer 1994, Carsten 2004, Fine 2001 and

[3] The terms "descent", "filiation" and "parentage" are used here as synonyms.

Godelier 2004). Theoretically, I have often found feminist critic of prostitution, trafficking, surrogacy and reproductive health inspiring (e.g. van den Brink 2012, Wijers 2012, Badinter 2013). Hence, this study contributes to what is already known on surrogacy and human rights by replacing the debate in Europe with an exploration under new angles of the CEDAW, the CRC and the European Convention on Human Rights (ECHR), to examine how these specific human rights instruments could enhance the protection of fundamental rights of all parties to surrogacy arrangements.

In practice, surrogacy comes up as an issue dealt under private law and less under public international law: human rights. As a matter of fact, human rights issues come up implicitly or explicitly, especially if and when legislators reflect upon surrogacy *per se*. However, most of the legal energy is spent on cases coming up in courts, and then it is private law or international private law that become the framework in which surrogacy related issues are solved. Barbara Stark looks into the adequacy of legal norms addressing surrogacy (Stark, 2012). Her findings are that domestic family laws are inadequate for framing surrogacy issues. Useful guidelines could be drawn from human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). However, Stark mostly examines arguments on the health and reproductive rights of the surrogates and the reproductive rights of gay men (Stark, 2012). This thesis examines further the rights of the commissioned child and of the surrogate's women's human rights through fundamental rights instruments in order to draw complementary insights for a regulative approach to surrogacy. It should also be noted that this study builds upon the comparative research on surrogacy regimes in the European Union lead by Brunet (Brunet et al., 2013) by complementing it through an analysis of the questionnaires addressed by the Hague Conference on Private International Law to its state parties regarding the issues arising in their national legal order related to transnational surrogacy cases.[4]

1. Altruistic v. Commercial Surrogacy

People generally resort to surrogacy because they feel a strong desire to become a parent that they cannot fulfil naturally: this is the case for heterosexual couples, when the woman is not physically able to carry the child (however, in some cases, her ova may be used) - and for same-sex male couples.[5] Surrogacy may be preferred to adoption because, on the one hand, the child is handed to the intended parents right after birth and the waiting time is shorter than the adoption procedure, and on the other hand, because the child (in the great majority of surrogacies) is biologically linked to at least one of the intended parents who appear on the birth certificate.

The sociologist Zelizer examines the change in attitude toward children and stresses that a market for children has existed for a long time: children were (and still may be) sources of income for their labour and services. Indeed, until the nineteenth century, adoptive parents interested by skilled children, and their capacity to work was major criterion that families took into account when adopting (*Viviana A.* Zelizer, *Princing the Priceless*

[4] Laurence *Brunet, King, Derek, Davaki, Konstantina, McCandless, Julie, Marzo, Claire & Carruthers, Janeen, A Comparative Study on The Regime of Surrogacy in European Union Member States. Brussels, European Parliament, Policy Department C: Citizen's Rights and Constitutional Affairs, 2013*A. This is a research commissioned by the European Union in the prospect of legislating on surrogacy. It provides an overview of legislations and positions of (mainly) EU member states on surrogacy. It also undertakes an extensive examination of national legal approaches to surrogacy. Indeed, this study analyses existing European Union law and the law of the ECHR to determine what obligations and possibilities surround national and international surrogacy arrangements. The legal research of this study was conducted on:

i. National legislative models for surrogacy.
ii. National case law approaches to a range of issues raised by surrogacy.
iii. Possible EU legal approaches to surrogacy.
iv. Possible private international law approaches to surrogacy.

[5] Surrogacy for convenience, sometimes called «social surrogacy» also exists. In a minority practice, but has attracted a lot of media attention. See for example Sharon Greenthal, *"Social Surrogacy, a Scary Trend in Pregnancy"* Huffington Post (21 April 2014) <http://www.huffingtonpost.com/sharon-greenthal/social-surrogacy-a-scary-_b_5179121.html> accessed 10 may 2014

Child - The Changing Social Value of Children (Princeton, Princeton University Press 1994) *57).* As birth-rates declined in Western countries, new sentimental criteria emerged. During the twentieth century, the social value of children inflated. For couples, the child came to symbolize an accomplishment of their love and the social imaginaries of adoption also acquired romantic features. For « baby hungry » parents, adoption even became a « fairy tale » (Zelizer 1994). The development of ART has brought about a new chapter in the relationship between children and the market as commercial forms of surrogacy have become commonplace, and because the market for surrogacy arrangements has become globalized.

The commercial form of surrogacy is at the core of social debates, addressing the acceptability of the commercialization/commodification of children and women's body and or its parts. However, it is important to note that not all surrogacies are commercial: they can also take an altruistic form, where the surrogate is animated by a desire to help others to become parents and volunteers to put her womb at their disposal without seeking for making profit out of it. Sometimes, these pregnancies are conceived between family members (e.g. the surrogate mother is a sister, cousin or even the mother of the intended parents) or very close friends. On the other hand, the scarcity of women with the willingness to enter an altruistic surrogacy arrangement is such that the demand exceeds the offer, opening the door to the monetization of pregnancy. The question of where to draw the line when it comes to the retribution or compensation — in order not to fall into the field of human trafficking — is contentious.

The frontier between compensation and remuneration, i.e. between altruistic and commercial surrogacies, is not always clear. According to this research, the major difference between altruistic and commercial surrogacies lies in the importance of the remuneration given to the surrogate by the intended parents. Compensation acts as a reparation for the gestation period and for relinquishing parental rights on the child. In this case, the payment shall not provide the surrogate with any financial benefit but rather aims at restoring the financial state she was in, before the pregnancy took place. Retribution, on the other hand, places the surrogate mother in a better financial state after pregnancy, and therefore constitutes recompense and an incentive to volunteer for such a procedure.

The frontier between the two forms of surrogacy is also murky, because actors in a commercial arrangement involving intimacy may often mask the commercial character of the transaction behind arguments of altruism, for example in adoption procedures (Zelizer, 1994). Surrogates may also literally hide themselves from the eyes of their community to escape from the social stigma that goes with the recourse of this practice in some societies (for example, surrogate motherhood is considered akin to adultery in India) (Mohapatra, 2012: 412). Studies of surrogate mothers in the USA have found that, to counter the anxiety of giving an image of themselves as animated by economic motives, the women may insist on the sharing and the «sisterhood» aspect of the experience, emphasizing the «gift» they give, rather than on the remuneration they get (for example, see Pande, 2011). These findings suggest that even in a liberal climate (or unregulated) environments, commercial surrogacy is problematic, because of the mix of intimacy and the market.[6]

According to the research conducted by Brunet (Brunet et al., 2013), in the European Union amongst the states that have legalized altruistic surrogacy, there is not yet a consensus regarding how to clearly differentiate the retribution from the compensation. The sums accepted for retribution can vary from €11 780 in the

[6] India is one of the most popular outgoing country for transnational surrogacy cases, thanks to very low costs and a lose legislative framework. India legalized commercial surrogacy in 2001 and introduced in 2010 The Assisted Reproductive Technologies Bill. This regulation requires that intended parents should provide documentation to the clinics assuring that they will be able to bring back to their home country the commissioned child. The documentation consists in "a letter from either the embassy of the Country in India or from the foreign ministry of the Country, clearly 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." (Prel. Doc. No 11 of March 2011, see paras 43). The Assisted Reproductive Technology (Regulation) Bill, passed in 2013 stipulating that gay couples, single persons and non-married couples were prohibited to hire surrogates in India. See Anil *Malhotra, Ending discrimination in Surrogacy,* (The Hindu, 3 May 2014).

United Kingdom (UK) (covering the costs of the meetings between the intended parents and the surrogate, holidays after the delivery of the baby, and the expenses related to the pregnancy) to €50 000 in Greece (the surrogate is also compensated for her lost earnings)(ibid.). Commercial surrogacies have not been explicitly legalized in any EU country (Brunet et al., 2013). This does not mean that such practices do not exist if there is a legal vacuum on surrogacy in a given nation state. Intended parents, intermediaries, clinics and surrogates may also subvert legislations when altruistic surrogacy is allowed (and commercial surrogacy banned). Indeed, the legalization of altruistic surrogacy demands specific control procedures (for example, on the Greek and South-African cases, see Brunet et al., 2013).

More importantly still, whatever the state regulation is (or non-regulation) in a country, EU-countries are, in practice, confronted to commercial transnational surrogacy arrangements. The Hague report (Prel. Doc. No 11 of March 2011, see paragraph 2) maintains that the loose legal frameworks of India, United States of America and Ukraine, the three main exporting countries in the market of international surrogacy arrangements, have contributed to reproductive tourism spreading all over the world.[7]

2. Traditional v. Gestational Surrogacy

Surrogacy is not a new phenomenon, but now that the access to donors and in vitro fertilization (IVF) has been facilitated, a switch happened from traditional surrogacy to a more sophisticated procedure called gestational surrogacy. Although it is of the utmost difficulty to obtain accurate data, the latter is going through a severe increase these last two decades. In the traditional procedure, a woman (the surrogate mother) is inseminated with the sperm of a man (in general the intended father) with the intention and the willingness to hand over the child after birth to an individual or a couple. The child is biologically linked to the surrogate mother and to either a sperm donor, either the intended father.

The advancement in assisted reproductive technologies (ART) led to an increase in tolerance toward surrogacy arrangements in the public opinion. Indeed, gestational surrogacy involves a new type of medical intervention: the IVF (in vitro fertilization) procedure. The biological father, as for the traditional surrogacy procedure, is a sperm donor, or the intended father. The IVF, prior to the transplantation of embryos into the womb, consists in extracting newly ovulated eggs after a hormonal stimulation and fertilizing them *in vitro* with sperm. The child carried by the surrogate mother is no longer biologically linked to her *per se,* because the ovum comes from a donor or from the intended mother herself (if only this is medically possible). In this way, the IVF strips the gestational carrier from any possibility to claim rights over the child she carried, or at least diminishes her legitimacy to claim the child.8 The biological father, as in the traditional surrogacy procedure, is a sperm donor or the intended father.

In the USA, future parents have more options opened to them than in Europe for choosing their donors. Europeans cannot select a donor from a catalogue and purchase gamete out of a selection of profiles. Indeed, the identity of both receivers and donors is, in general, kept secret. Thompson has observed how important it is for intended parents in the USA to choose someone from their community who shares « genetic similarity », a culture and an ethnicity (Thompson 2001, quoted by Janet Carsten*, After Kinship, (Cambridge University Press,*

[7] One indicator of this increase can be found in Brunet (n 4) 22 referring to judicial authorities to Crawshaw (2013): « The UK General Register Offices for England and Wales reported that approximately 26% of POs granted in the year to October 2011 involved births outside the UK (up from 2% in 2008, 4% in 2009, and 13% in 2010. ». See Marilyn Crawshaw, *The changing profile of surrogacy in the UK – Implications for national and international policy and practice (Journal of Social Welfare and Family Law, vol. 34, no. 3, 2013) 267-277.*

[8] In Greece, where the surrogacy legislation confers contractual enforceability to the arrangement, the surrogate mother who can only bear a child that is not biologically related to her, has no possibility to refuse to relinquish her parental rights. On the other hand, the South African surrogacy legislation, which is very similar to the Greek one, foresees the possibility for the surrogate to claim back the child under certain conditions, provided he/she was born from a traditional surrogacy. Therefore, gestational surrogacy makes impossible for the surrogate to breach the arrangement. Brunet (n 4) 348 - 350.

2004) 173). Therefore, another advantage of IVF performed in the framework of an international surrogacy arrangement outside of the EU, is to enlarge the possibilities for donor selection for Europeans.

From the above mentioned reasons, gestational surrogacy is today preferred to traditional surrogacy, the principal reason being that IVF in surrogacy reduces complications regarding the legal establishment of filiation, although it does not solve at all the problems involved in cross-border surrogacy.

3. Parentage and Parenthood in Surrogacy: Cultural and Legal Issues

Anthropologists have explored other societies than Western ones, and in which children are linked to only one of the parents: matrilineal or patrilineal descent systems.9 However, the mother, father or other relatives (for example the mother's brother in matrilineal descent systems) can exercise parental functions, of which one is authority (see Godelier, 2004 below). Traditionally our Euro-American societies have a bilateral descent system that is exclusive: (only) one woman (the mother) and one man (the father) embody all parental functions: that of genitors and of social parents (Fine, 2001). Nevertheless, the twentieth century changed the shape of this traditional model, or at least challenged it. The growing number of divorces and an increased tolerance for same sex couples have given rise to one-parent families, same-sex families and complex post-divorce family configurations that may include step parents. Assisted reproductive technology (ART) also created complex configurations of parent that are often incompatible with the traditional Western cultural and legal framework of parentage.

Indeed, in ART the genitors and the carers of the child may be different people. Therefore, the question of who is a parent is being asked. It is in gestational surrogacy that the configuration of possible parents is the most complex. Is the provider of the gamete a parent? And the woman who gives birth? Or are the parents those who take care of the child? The issue is highly contentious because it touches upon concepts such as the definition of paternity and maternity. Maternity in particular has traditionally been linked to childbirth in many legislations (and no genes).[10] Surrogacy also touches upon questions of identity itself (i.e. the question of "who is the child?" arises).[11] The anthropologist Maurice Godelier, defines parenthood through seven different functions: the conception of the child, the care, education, transmission to the child (e.g. name, inheritance), the exercise of rights over the child, parental authority and the respect of the prohibition of incest.[12]

In the equation posed by surrogacy arrangements, up to six persons can be at the origin of the child's birth and hence occupy the first function enumerated by Godelier. There is a surrogate (1) who bears the child and who is being considered in many legal orders as the mother. If the surrogate is married, then her husband (2) may become the father of the child by presumption.13 The intended parents (3,4) have commissioned the baby, and at least one of them is the provider of genetical material. In the case where donors (5,6) are implicated in the conception, the child can have a genetical mother, a surrogate mother (gestational mother) and an intended mother; on the paternal side, the child may have a biological father, an intended father and the presumed

[9] For more details, see Agnès Fine, *Pluriparentalité et system de filiation dans les sociétés occidentales, pp. 69-93 in Didier le Gall et Yamina Bettahar, (eds.) La Pluriparentalité, Paris (PUF 2001)* 71.
[10] *Mater sempre certa est* : the mother is always certain. This principle is embodied in the Article 2 of the European Convention on the Legal Status of Children Born out of Wedlock, 1975, «*Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child*».
[11] The European Court of Human Rights delivered in the cases Mennesson v. France, App no. 65192/11 and Labassee v. France App no. 65941/11, (ECtHR 26 June 2014) a judgement emphasizing the right to identity as being included in the article 8 "Right to private and family life" of the European Convention on Human Rights. See also for more details on the question of identity for adopted children or children born from ART: Fine (n 9) 85.
[12] Maurice *Godelier, Métamorphoses de la parenté, (Fayard 2004) 242.*
[13] The presumption of paternity (or legitimacy) is a legal presumption that the husband of the woman who gives birth is the father of the child and therefore he does not need to administratively recognize his parentage tot he child. This presumption can be contested in a certain time frame depending of national legislation when the child is illegitimate. The European Court of Human Rights recognizes both this presumption, and the possibility to contest it. See Mizzi v Malta (Application no 26111/02), 12 January 2006, 1 FLR 1048.

father at birth. Another complication of gestational surrogacy procedures is to involve to the agreement more parties than the traditional ones. Therefore, gestational surrogacy bears a potential for more legal complications in case of dispute.[14]

Maternity and paternity are concepts which we tend to think as defined by « nature », when in fact their social construction and legal transcription are, at least to some degree, malleable (Ergas, 2012). The procedure of gestational surrogacy consists in a very advanced technologized procreation. Carsten writes: *« the « technolozigation » of nature has the potential to shake our most fundamental assumptions about kinship as a domain in which relations are given rather than produced through technological interventions. »* (Janet Carsten*, After Kinship, Cambridge University Press, 2004,* 163). For this anthropologist, reproductive technologies are challenging the traditional definitions of parentage that Western societies consider « natural » (see also Stark 2012). Nature and culture (or here technology) are problematic notions, since our perception of them (at least in Western culture) constantly changes and builds culture (or technology) on what used to be nature.[15]

The importance often accorded by children to genetical truth encounters many obstacles in surrogacy. For instance, an adopted child may consider the woman who gave birth to her/him as the « real » mother. And a child born out of wedlock may recourse to genetical tests to identify his/her « real » father (Fine, 2001: 82). Nevertheless, even if the child is an addition of genetical materials, the conception of parenthood in the long term runs further than providing for sperm, ova or giving birth. When we try to delineate who is the « real »16 mother of the child, rather according to Carsten, we may rely on socioeconomic factors (Janet Carsten*, After Kinship, (Cambridge University Press, 2004)*). People do not only focus on genes, but may be prone to ask questions such as « who is paying for the IVF or the gamete? » and « who is raising the child in practice? ». The anthropologist argues: *« we do not necessarily find evidence of a highly geneticized view of kinship where we might most exert to find it »* (Janet Carsten*, After Kinship, (Cambridge University Press, 2004)* 167). Hence, the importance and the need (if any) of genetical truth and its the legal acknowledgment, seems to be an inevitable question to be asked when legal parenthood is being discussed. For example, research interviews of ova donors in London's infertility clinics suggest that these women feel as they are donating body parts *« without inherent biogenic properties »* in a very detached emotional state (Konrad 1998, referred to by Carsten 2004: 181). This contrasts with the boiling debates in assemblies on the bioethical issues and trafficking.

It appears that the answer to the question: « to whom should the law attribute parenthood status ? », is difficult to provide. Legal answers provided so far point at the genitors of the child.[17] This question would deserve to be studied more in depth by incorporating answers and questions from other sciences such as anthropology, before apprehending the multiple legal solutions in order to adapt legislation on filiation to changing familial structures. In surrogacy, the fact that up to 6 individuals could claim filiation to the child partially explains the recourse to a contract by intended parents. The aim of a contract is to secure their legal parenthood. Nevertheless, the contract alone does not erase the role held by the surrogate in this process.[18] Further, the meaning of genetical truth itself might vary from the point of view of the person (child, intended parents, surrogate, gamete donors) and depend on factors such as (e.g. culture, age, social background). All these uncertainties have

[14] In the documentary directed by Zippi Brand Frank *"Google Baby"*, (2009) *<https://www.youtube.com/watch?v=pQGlAM0iWFM. > (last consulted 13 July 2014)*
The surrogacy procedure involves a surrogacy agency and intended parents from Israel buying ovas from an egg donors in the USA and shipping them to the Akanksha Clinic in Anand, Gujarat, India so that an Indian surrogate will carry the pregnancy in India at low costs.
[15] See for example Philippe Descola*, Leçon Inaugurale, (*Collège de France *29 March 2001)*.
[16] Article 332 French Code civil - if the legal father is not the « real » father of the child, the one who provided the gamete, he is entitled to an action in contestation of his paternity.
[17] See the aforementioned principles of *mater sempre certa est*, presumption of paternity and DNA testing.
[18] Fine (n 9) 87. Fine finds for example that it is impossible to erase the gestational carrier.

led to a contractualisation of filiation in surrogacy considering solely private law, to the detriment of human rights.

4. Research Questions, Scope and Structure

We have seen in the section above, how traditional conceptions of biological, social and legal parenthood are put to trial in ART and in gestational surrogacy in particular. Anthropology opens new doors to the legislator for apprehending new configurations of family. Nevertheless, in many countries, the principle of *mater sempre certa est* still prevails and becomes problematic, especially in cases of international surrogacy arrangements. Then two different legal orders and conception of public policy may confront each other without matching. Indeed, EU countries are now confronted to children conceived in international surrogacy arrangements. Parental order cases are falling into European courts, demanding an approach in terms of international private law.

Legal parentage is established between the parents and the children after birth: either through the usual administrative procedures, presumptions, or adoption. The latter consists in transferring parental rights over the child to persons who are not the biological parents of the child. International surrogacy arrangements (ISAs) raise the question of how and when to establish the parentage between the intended parents and the commissioned child, but also, what nationality to attribute to the latter. Permissive countries may have two different systems of filiation to commissioned children: an ex-ante facto and an ex-post facto filiation (see Part I, Chapter 3, 3.1.1 and 3.2.2). However, even in permissive countries, different legal orders and public policies can oppose each other, and there is no given answer. Hence, commissioned children from ISAs may be left stateless and parentless, creating a disadvantage based on their procreative origin.

At a moment where the position of member states in the EU is fragmented on the issue of the legalization of surrogacy, and thoughts are given by the European Parliament to find a way to solve this lack of consensus, the subject of the research is an important one. The legal uncertainties faced by all the actors involved in this practice and the problematic responses of many member states when faced with ISAs results namely in creating a difference of treatment by discriminating individuals on grounds of their procreative origin, which calls for a regional, if not global answer. The legalization of surrogacy is a thorny debate where, amongst others, arguments on human dignity (e.g. often linked to the leitmotiv of the commodification of bodies, trafficking, exploitation) and the rights of the child (to family, to information on one's procreative origin, to welfare) may oppose those of the right to a family life (of children and/or parents) and to the principle of self-determination (of women surrogates). The purpose of this study is not principally to provide a bioethical focus on the rights and wrong of surrogacy itself. Rather, it aims to address a legal and pragmatic response to situations that have developed from the importation of commissioned children from international surrogacy arrangements (ISAs) in the EU and the treatment they receive from the member state of residence of the intended parents. Therefore, a worldwide overview of human rights violations related to the practice of surrogacy is not provided.[19] This work is above all an Eurocentric approach of the derivative challenges of international surrogacy arrangements on children, women, parenthood and the state's « ordre public ». There is an undeniable demand for resorting to new procreative methods of which surrogacy, and now that clinics and agencies have mushroomed outside the Union's borders, there is a call for regulation. The answers given to the derivative issues attached to ISAs need to be put to trial. What issues arise when European filiation systems are confronted with transnational surrogacy, and what human rights oriented features could be adopted in a future legal framework?

Hence, in a first analytical part, the level of acceptance of surrogacy (permissive attitude, prohibitive legislation or legal vacuum) and the means employed by the member states for dealing with surrogacy and ISAs are

[19] Another delimitation of the study being that disputes arising between both parties to the ISAs (between surrogates and commissioning parents) are not covered.

mapped. The repercussions of surrogacy and of the lack of regulation on the individuals involved will also be apprehended. The actual consequences of the lack of consensus between EU Member States giving rise to different scenarios creating discriminations on grounds of procreative origin leads to two emerging problems: the establishment of a legal parenthood and of citizenship. These two issues will be particularly focused upon. Sub-questions that are dealt with in Part I are: How is surrogacy dealt within the EU, and what are the hindrances for integrating it into legal systems? How does the present situation impact on commissioned children of ISAs ?

Secondly, in order to consider the future of ISAs in the EU, the question of the features that a EU response to ISAs should contain in order to guarantee the respect of human rights for all will be addressed. Therefore, Part II of the study weighs the pros and cons of the practice of ISAs in the light of human rights for all parties involved in the arrangement. I particularly ask: To what extent can the CEDAW, CRC and ECHR grant sufficient protection to the parties involved in a surrogacy arrangement? To what extent can the CEDAW offer protection to the surrogate mothers? To what extent can the CRC and the ECHR offer protection to the commissioned children? Is the ECHR evolving toward the recognition to a right to a child? Finally, in the Conclusions of the thesis, human rights oriented features that could be adopted in a future regulatory framework are specified.

5. Methods and Materials

In order to respond to these questions, the thesis makes use of various legal sources and research literature. The European Parliament Committee on Legal Affairs commissioned a study in 2013 led by Laurence Brunet that drafts an inventory of the legislation (or the absence of legislation) on surrogacy and the legal problems raised by this practice in the EU.[20] The authors suggest guidelines for a harmonization of legislations. The report has been an important and absolutely necessary source for the comparison of the positions adopted by different countries.

Main primary legal sources are drawn from the domains of domestic family law (e.g. Civil codes, national case law, acts and government recommendations), private international law (jurisprudence of the European court of justice [ECJ]) and international human rights law (conventions and jurisprudence of the European Court of Human Rights [ECtHR]).[21] It shall be noted that accurate data on surrogacy (for example the number of cases coming before courts is not always documented) — and especially on ISAs — is very poor and difficult to obtain. This is a limitation to all study of the surrogacy phenomenon (on the reasons for the lack of data, see for e.g. Brunet et al. 2013: 6).

A legal comparative method is employed by using primary sources to map the legal frameworks and positions of the relevant countries to this study on ISAs. As no common position on surrogacy has been issued by the European Union, it is not possible to draw conclusions on its conformity with international human rights instruments. Surrogacy is an undealt issue at any regional level. European courts are only starting to issue rulings regarding surrogacy arrangements, and have not provided yet any position on many of the human rights issues involved in ISAs. Therefore, the elaboration of the arguments advanced rely on cases falling into national courts or even « stories » involving ISAs.[22] The approach I have adopted is interdisciplinary in the sense that research literature used combines legal analysis, anthropology, sociology and philosophy. Considering

[20] Brunet (n 4).
[21] The judgement Paradiso and Campanelli v. Italy, App no. 25358/12, (ECtHR 27 January 2015) was released after this research was conducted. Hence, it will not be analysed if the present work.
[22] Often, ISA disputes benefit from a significant media coverage that triggers diplomatic cooperation between the incoming and outgoing country. Therefore, many cases may be solved by diplomatic or administrative means and do not end up before courts. In such case, the only material available are the « stories » related by the medias (see also Mohapatra Seema, *« Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy », Berkeley Journal of International Law, Vol. 30, no. 22, 2012*). Therefore, another type of material used in the thesis is media accounts of problems encountered by intended parents and their child.

various perspectives and positions on parenthood and surrogacy related issues is necessary in order to apprehend the complexity of the issues arising from the development of the recourse to surrogacy.

B. International Surrogacy in the European Union: A Rainbow of Arrangements

This chapter will address the issue of the impact, on families created by surrogacy, of the great diversity in law providing for parentage and of the legal and judicial responses to surrogacy across the EU. The distinction between surrogacy arrangements in their national or transnational dimension will be clarified, before exploring the variety of positions of member states on the legalization of this procreative method. A comparison of a chosen sample of more or less permissive EU states is drawn under the lens of private law, in order to highlight the issues that arise when existing law of parentage in confronted to surrogacy practices. The adaptability of filiation systems to surrogacy is explored through two existing models: filiation ex-ante et ex-post.

1. National v. Transnational Surrogacy Arrangements

a. Differentiation

Few countries in the European Union authorize surrogacy. Moreover, the states that have provided for surrogacy processes by law only allow its altruistic form to be performed on their territory. This type of surrogacy can be called national surrogacy. However, European couples also seek to enter surrogacy arrangements outside the borders of the EU. This practice is sometimes called a transnational surrogacy arrangement, or more commonly, an international surrogacy arrangement (ISA). Intended parents residing in countries where surrogacy is inaccessible to them — because it is illegal, financially out of reach, or because they do not fit in the requirements criteria (that are often tight in terms of age or sexual orientation, for example) —, are faced with the temptation of going abroad. The destinations of reproductive travelers are permissive countries, where the costs are lower, the procedure faster and more privacy is offered. Hence, the international surrogacy arrangement is a configuration that involves an importing/incoming country (the country of the intended parents) and an exporting/outgoing country (the country of the surrogate mother). The loose legislative framework of exporting countries, where no, or hardly any, laws regulate the medical procedures, visas issues and the monitoring/control of these arrangements, constitutes an incentive for « baby hungry » parents (Zelizer, 1994). Importantly, the surrogacy offer available outside the frontiers of the EU is of a commercial nature, which is in contradiction with the position and the public policy of EU member states.23

b. Challenges Set by International Surrogacy Arrangements

The market of commercial surrogacy is developing rapidly in permissive countries. This development raises two major problems. The first being the probability of the presence of conflicting legislations in the exporting and the importing country (on filiation, nationality, immigration and public policy) with all its adverse effects. The second one being an ethical concern. In the configuration where surrogacy is legal in both countries (at least in some form), the probability that complications arise after the surrogacy agreement has been enforced, is relatively low. Whereas when the importing county prohibits surrogacy and has a legislation conflicting with the exporting country, the complexity of situation may result in disputes on filiation, citizenship and/or residence, as children conceived in ISAs may be unable to leave their country of birth. Such situations are more and more frequently arising in EU courts.[24] The case of « Baby M »[25] and the « story » of the Balaz twins[26] em-

[23] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, 1997, Chapter VII – Prohibition of financial gain and disposal of a part of the human body, Article 21 – Prohibition of financial gain: *« The human body and its parts shall not, as such, give rise to financial gain. »*

[24] Brunet (n 4) found that cases in EU countries that are characterized by a prohibitive legal climate or a legal vacuum on surrogacy are falling into courts.

body the inextricable legal problems that arise in international surrogacy arrangements (ISAs) between outgoing states (here India in both cases) and incoming countries (respectively Germany and Japan). In these two ISAs, embassies refused to deliver travel documents to the children and to establish nationality or filiation. Intended parents were confronted with a language barrier, the lack of assistance and with limited effective legal recourse possibilities in case of tort. In addition, cross-border custody disputes may arise in situations of ISA when the couple of intended parents separates prior to the birth of the child or if they refuse a child born disabled.

As the new global market of ISA develops, feminists and bioethics specialists such as Mohapatra raise ethical concerns regarding the creation of a « breeder class » in the South (Mohapatra, 2012: 412). Medical tourism nowadays includes reproductive traveling. This practice contributes to the medicalization of procreation: individuals are now conceived *and* born in clinics. The situation of surrogate mothers in national (for example in the USA and the UK) and international surrogacy arrangements (for example India or Ukraine) is typically different (Stark, 2012, and Brunet et al., 2013). In transnational surrogacy, surrogates generally come from a country that is economically disadvantaged compared to the importing. Surrogates may suffer from multiple disadvantages: social stigma coupled with a loose legal protection. Women giving birth in ISAs also put themselves at risk with exposure to physical health complications due to the IVF treatment (e.g. such as multiple births, potential selective abortions, caesarean, or the accrued risk of cancer, sterility and psychological suffering) and psychological distress related to the separation with the child, to post partum depression.

c. The Three Degrees of Positions Taken by Member States

Western society has created new space for individuals' will in the creation of parentage and family. People now have more possibilities to choose the number of children they have, the moment to have them. The social acceptability of becoming a parent without a partner, of becoming a parent through recourse to ART or adoption or of founding a same-sex family has increased.[27] Some countries of the EU are reputed for their natalist tradition (e.g. France) and allow extensive recourse to assisted medical procreation (ART).[28] Positions on altruistic surrogacy vary inside the EU. Nevertheless, the European Union has not yet produced one piece of legislation on surrogacy, neither has the European Court of Justice (ECJ), nor the European Court of Human Rights (ECtHR), delivered a judgement that would put to trial surrogacy in all its possible forms.[29]

The member states of the European Union have reacted in different ways towards claims for the authorization of surrogacy from infertile couples (Brunet et al., 2013). Some states (The Netherlands and Belgium for instance) have legalized it *de facto*, that is, without issuing any laws allowing or prohibiting it as such. The practice of surrogacy in its altruistic form (traditional or gestational) is accepted on the national level in these two countries. Other states, such as the United Kingdom and Greece, have chosen to build a legal framework around national altruistic surrogacy arrangement. However, the UK and Greece have adopted quite opposite

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[25] On the notion of story, see the section on Methods. Mohapatra *Dhananjay, "Baby Manji's case throws up nee for law on surrogacy", The Times of India (Delhi 25 August 2008) <http://timesofindia.indiatimes.com/india/Baby-Manjis-case-throws-up-need-for-law-on-surrogacy/articleshow/3400842.cms.>(accessed on 10 July 2014). July 2014).*

[26] Mohapatra Dhananjay*, "German surrogate twins to go home", The Times of India (Dehli 27 May 2010) <http://timesofindia.indiatimes.com/india/German-surrogate-twins-to-go-home/articleshow/5978925.cms.> (accessed 10 july 2014)*

[27] Fine (n 9).

[28] *Anne* Chemin, "*Dans les cuisines de la politique*" *, Le Monde* (Paris 7 June 2013) *<http://www.lemonde.fr/idees/article/2013/06/07/dans-les-cuisines-de-la-politique-familiale_3425566_3232.html (last consulted on 10 July 2014)*> (Accessed on 10 July 2014).
Since the end of the Second World War, France has deployed number of natalist policies and the money spent to date represents 4% of the French GDP.

[29] C- 167/12 C.D. v S.T., ECJ.
Mennesson v. France, App no. 65192/11 and Labassee v. France App no. 65941/11, (ECtHR 26 June 2014)
Paradiso et Campanelli v. Italy, App no. 25358/12, (ECtHR 27 January 2015).

ways to rule on the legalization of such contracts and on the filiation of children born from surrogacies (specified in following sections). Finally, a few states (e.g. France and Italy) have opted for clearly stating in both their jurisprudences and their laws that they consider surrogacy in all its forms (altruistic and commercial) as a practice going against the fundamental principle of human dignity and of the respect of public order. Thus, three different approaches and positions have been adopted within the European Union. In addition, many states (e.g. Finland, Bulgaria, Estonia) are still in a legislative vacuum as they have neither frankly legislated for nor against surrogacy (Brunet et, al. 2013). [30] Be they permissive or prohibiting, none of the EU countries facilitate the recognition of transnational surrogacies. Conceptions differ on the concepts of public order, best interest of the child and human dignity. Nevertheless, with the recent the boom of the reproductive industry, a growing number of Europeans practice reproductive travel outside the borders of the EU. When they return, national Courts are faced with an increasing number of cases related to immigration or filiation disputes.

In what follows, the position of three member states, each embodying one of the three positions mentioned above, will be compared. The analysis starts off from filiation laws; in order to understand the extent of the problems rose by an absence of international law and/or international cooperation regarding incoming children conceived from ISAs an brought back into the EU.[31]

2. The Diversity of Private Law Responses to ISA

The three degrees of the EU member states' positions are embodied respectively by: the UK[32] (formal legal permissive position on the legislation of surrogacy); France[33] (formal legal prohibition) and by the Netherlands (de facto acceptance of altruistic surrogacy arrangements).[34] We examine the answers given by these three EU countries — that also happen to be state parties to the Hague Conference on Private International Law (HccH) — to a questionnaire, addressed to them in 2013 by the Permanent bureau of the Hague Conference on International Private Law (HccH) on the issues arising from their national legal order in the enforcement of ISAs.[35] A comparison of their filiation system is drawn from the information recorded in the questionnaire regarding birth registration and the settlement of disputes on parentage. The questionnaires also provide us with information on the attribution of nationality (regarding private international law); on the state of the availability of ART services (including its uses in surrogacy) and on the situation of international surrogacy agreement enforcements. The comparison of ISA related issues in private international laws leads to an in depth analysis of the adaptability of surrogacy into the different filiation systems of the compared nation states — their assets and liabilities.

a. Birth Registration

Birth registration is mandatory in the Netherlands, as well as in the UK.[36] It has to take place at the municipality or an embassy within a certain time frame after the delivery (three days for the Netherlands and fourteen days for UK), and has to be done by either parents or the health care facility of birth. In France, children should be registered within three days after birth (fifteen days if the birth occurs abroad). The particularity of the

[30] Cour. Cass. 1ère civ, 6 avril 2011 n°. 72.
[31] Can it be said that children born from surrogacy are therefore discriminated on their procreative origin regarding the disparity of treatment they receive from one EU state to another? Such claim has not yet constituted the core issue of a legal problem brought before any European courts, but seems relevant regarding the present situation of children issued from ISAs in the EU.
[32] *Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements - The United Kingdom -*, Permanent Bureau of the Hague Conference on Private International Law, 2014.
[33] *Ibid. - France*.
[34] *Ibid. - The Netherlands.*
The Netherlands have no laws on surrogacy, but regulate the recourse to ART for purposes of surrogacy relying on a soft-law « code of practice »: NVOG-Guideline no 09. Indication for IVF, 1998.
[35] Information and legal references are drawn from the national questionnaires. It is important to note that the authorities of each country responded more or less precisely to questions of the Bureau: some citing the legal references, while others did others not.
[36] Article 1:19e Dutch Civil Code.

French legislation lies in the fact that it gives the woman who gives birth the right to choose whether she desires or not to take the status and the responsibility of becoming the mother of a child she has given birth to. Indeed, acknowledging the child is not mandatory in France. In such cases, the birth occurs « Sous X ».[37] A French mother may give birth anonymously in a clinic and not declare the born child at municipal civil register. If she desires to remain totally anonymous, no traces of her will be left to the child. Even if the child was to discover later the identity of the woman who gave birth to her/him « sous x », the child cannot claim any parentage by any means in French courts to his birth mother (on anonymous or secret birth, see Ensellem 2001).

When children are born abroad, the validity of the transcription of the birth certificate and the legal recognition of the child can depend on the commissioning parent's nationality or on the law of the country of birth. As in many legal orders, the presumption of *mater sempre certa est* prevails in the Netherlands, UK and France. Therefore, the legal mother of the child is the woman who gives birth[38], irrespective of any use of assisted reproductive technology.[39] However, after birth, a woman can decide to relinquish her rights over the child and give him/her up to adoption. Except in France, when this happens, the woman who gives birth will be considered as the/a mother of the child, in the sense that there are administrative traces of the childbirth at the registry.[40] In such cases, the only possible motive of contestation of maternity is to prove that one is not the woman who gave birth.

Just as for the presumption of maternity, there is also a presumption of paternity that applies to the husband of the woman who gave birth in all three countries of comparison. The husband becomes, by operation of the law, the legal father of the child.[41] The presumed father has the possibility to contest the attribution of paternity.[42] When there is no presumption of paternity, (for example in civil unions in France), fathers are in the obligation to declare their paternity, either prior to birth, or at the birth of the child43 in order to be recognized as such.44 Legal paternity can be denied by judicial means, proven the man is not the biological father. However, if the man knew of the pregnancy before the marriage, or if he consented to a medical procreation, then his legal paternity cannot be challenged upon birth. [45]

In addition, the acknowledgment can be nullified under certain conditions in the Netherlands, particularly if the man is married to another woman, or if the child already has two parents.[46] These last two obstacles limit the possibilities of an intended father to acknowledge a commissioned child born of a surrogate mother. Indeed, an intended father of a child born from an ISA cannot acknowledge the child if he is married to another woman (here the intended mother) than the birth mother (here the surrogate). The second obstacle stems from the marital status of the surrogate mother: if she is married, her husband, by presumption, becomes the legal father of the child. Indeed, a husband who consents to the ART treatment of his wife becomes the legal father of the child born from this procedure whether or not he is the actual genetic father. Another Dutch particularity consists in the possibility for the mother to give the permission to the gamete donor (one has access to the identity of donors in The Netherlands) to acknowledge his paternity over the child.

Once the father and the mother are legally recognized as the parents of the child, they are endowed with all the rights and obligations inherent to this responsibility (e.g. inheritance rules, naming rules, parental authori-

[37] Article 328 Code civil.
[38] Giving birth anonymously is not in the Netherlands, public policy is being infringed when the woman mentioned on the birth certificate is not the woman who gave birth to the child. The child will not be granted the Dutch nationality and be allowed to access to The Netherlands. The child should have access to information about his descent: Court The Hague, 23 November 2009.
[39] For example, Article 1:198 Dutch Civil Code.
[40] Cecile Ensellem*, Naître sans mère. Accouchement sous X et filiation*, (PU de Rennes, 2004).
[41] Article 1:199 Dutch Civil Code.
[42] Article 332 Code civil applies if the father is not the one who provided the gamete at the time of conception.
[43] Article 316 Code civil.
[44] Even when the presumption of paternity exists, in practice, fathers declare their paternity to the authorities.
[45] Article 1:200 paragraph 3 Dutch Civil Code.
[46] Article 1:204 Dutch Civil Code.

ty). The three countries chosen as samples here have in common the impossibility to establish an agreement between the putative parents. In France, fraud to the civil registry is punishable under criminal law and no legal parentage can be established on the basis of an arrangement or contract.[47] Misrepresenting the legal parents of the child to the authorities of the Netherlands is sanctioned under criminal law by a maximum of five years of prison.48 In a same-sex family, one parent can be recognized on the civil registry, while the other parent has to adopt the child in France. Until recently, this was also the case in the Netherlands. Now two women can be the legal parents of a child through a normal adoption procedure.[49]

Legal fatherhood that has been already established can be challenged within a certain time period varying slightly from one country to another. In case of doubts over biological paternity, DNA testing is conducted. The child is also entitled to challenge the legal fatherhood of his parent, in case she/he discovers that his present father is not his biological father. However, legal motherhood can only be contested provided the mother did not give birth to the child.[50]

b. Nationality

Nationality is acquired according to two different modes of attribution: jus solis and jus sanginis. The first depends on the soil of birth, whilst the second is derived from the nationality of one or both parents. The attribution of the nationality in the three countries in our comparison obeys to the principle of jus sanginis — also called by « descent » — when one of the legal parents is a national.[51] Children born abroad can have their birth certificate and parentage transcribed into the French, Dutch or UK civil registry, if the foreign birth certificate is lawful according to the law of the country from where it originates, if it has not been falsified and if the facts declared are true. [52] Nevertheless, there is an exception to this principle: the child acquires the nationality of the state of birth when her/his parents originate from a country that does not provide the child with their nationality. EU member states cannot leave a child born on their territory stateless. This obligation derives from community law but also from the dispositions included in various Treaties that are parties to (e.g. Convention on the Rights of the Child, Convention on Stateless Persons).[53]

Moreover, in some cases the state of residence or origin of the intended parents can stop the transcription of the birth certificate. This has the consequence of impeding the establishment of the nationality of the child. French jurisprudence (Civ 1ère, 13 septembre 2013) does not acknowledge certificates when it appears that the child was born through surrogacy, on the grounds that there has been fraud to French law. On the other hand, a contradicting decision of the Conseil d'Etat, issued in May 2011, allows French embassies to deliver a « con-uullat » (travel document) instead of a passport when a surrogacy arrangement is suspected.54 In The Nether-

[47] Articles 131-13, R645-4 and 441-6 Code penal.
[48] Article 236 Dutch Penal Code.
[49] *« As from 1 April, the female partner of the mother, the so-called 'co-mother' ('duomoeder'), will be able to legally become a parent without court involvement. The co-mother will automatically become a legal parent if she is married and if the semen donor is unknown within the meaning of the Artificial Fertilisation (Donor Information) Act (Wet donorgegevens kunstmatige bevruchting). In all other cases, she has the option to acknowledge the child. The acknowledgement is a straightforward act that can already be completed before the registrar of births, deaths, and marriages preceding the birth. At the birth of the child, the co-mother will then legally become a parent. Municipalities will register the changes in the municipal personal records database (basisregistratie personen). »* <http://www.government.nl/issues/family-law/news/2014/04/01/laws-taking-effect.html.> (accessed on 10 July 2014)
[50] Article 1:205 Dutch Civil Code.
[51] Article 3 Rijkswet op het Nederlanderschap Statue Law on Dutch citizenship ; Article 18 Code civil.
[52] Also see Brunet (n 4). The principles mentioned in the text have been lately translated in France into the Circulaire 25 January 2014, amidst hot debates on same-sex mariages, adoption and rights to ART.
[53] Article 19 and 19-1 Code civil.
[54] Mohapatra (n 20). Le Roch "story.For further details, see also, *Family held after trying to smuggle surrogate babies out of Ukraine: French couple say they hid twin girls in chest under bed out of despair at not being able to obtain passports*, *The Guardian* (London 24 March 2011) *<http://www.theguardian.com/world/2011/mar/24/family-smuggle-surrogate-babies-ukraine.> (last consulted 10 July 2014)*

lands, the absence of the mother on the birth certificate is contrary to the Dutch public order. This makes the birth certificate impossible to transcribe, and therefore, deprives the child from the nationality of his father (Court ruling, The Hague, 23 November 2009).

The growing number of incoming commissioned children from ISAs is putting to trial the legislations on the modality of attribution of nationality at birth. Non-recognition of the birth certificate of commissioned children may lead to statelessness. States prohibiting surrogacy have a firm position on this point: it is not possible to acquire nationality via an arrangement or a contract. In this, their position is akin to the position they have adopted on parentage.

c. Assisted Reproductive Technology

Assisted reproductive technologies (ART) consist in medical care for treating infertility. The access to ART is heterogenous in the EU, as member states have different requirement levels (e.g. access may depend on age; be open to single persons or couples only; depend on the matrimonial situation and sexual orientation of the couple).[55] Moreover, countries do not share the same understanding regarding which treatments are included in their definition of ART. Indeed, if gestational surrogacy implies an IVF treatment (which is broadly recognized as an assisted reproductive technology), surrogacy is not necessarily considered across all legislations in Europe as an ART. One major point of divergence across the EU in ART services is the anonymity/identification of gamete donors. In the Netherlands, gametes must not be donated anonymously since 2004[56], while medically assisted procreation in France gives only access to gametes from anonymous donors.[57]

In the UK and France, the establishment of legal parentage for « naturally » or « ART-conceived » children, when a donor is involved is identical. Irrespective of whether an ART service has been performed, the woman who gives birth to the child will always be considered as the legal mother (in UK Human Fertilization and Embryology Act 1990, in France article 319 Code civil). Equally, her husband or male partner, who formally consented to the ART treatment, will be considered as the legal father of the child. In the Netherlands, a sperm donor can also be regarded as the child's legal father, and the female partner of the woman who gives birth also becomes a legal parent to the child.

d. Contractual Enforceability of Surrogacy

France is the only country expressly prohibiting surrogacy under criminal law within this sample of states.[58] Surrogacy arrangements or contracts have no legal contractual enforceability in France. Although surrogacy in its altruistic national form is allowed in the two other countries, it appears that neither the Netherlands, nor the United Kingdom have legalized surrogacy *contracts*. The reasoning in the Netherlands is that these arrangements cannot be legally enforceable since the practice is unregulated under the law. The only mention of surrogacy arrangements in the Dutch Penal Code is made in Article 151b. The latter criminalizes the mediation of arrangements and the publication of supply or demand requests related to surrogacy. In the UK, the Surrogacy Arrangements Act (1985) allows surrogacy arrangements when they are altruistic, but prohibits advertising and

[55] Human Fertilisation and Embryology Act 1990 as amended 2008.
ART is permitted in the UK, but access is limited: restrictions concern forms of authorized ART, regulations on the medical institutions that perform ART services, the conditions of donation of gamete (anonymity withdrawn in revised Act 2008), the right of the child to know his/her birth origins, and the legal parentage of a child born through ART.
[56] Wet donorgegevens kunstmatige bevruchting (Act on donor data artificial insemination) and Embryowet (Embryo Act) : In HccH questionnaire - The Netherlands. From the age of 16, one may access his origins.
[57] HccH questionnaire – France, « *articles 16-8 Code civil and L1211-5 Code de santé publique: the donors and receivers of gamete are kept anonymous and cannot access to each others identity or informations; and article L2141-1 Code de santé publique: presents no residence or nationally requirements and is open for couples of same sex living together or married who are infertile or risking to transmit a serious disease to the partner or the child.* ».
[58] Article 16-7 Code Civil - Any surrogacy contract or agreement is not enforceable on grounds of maintenance of public order and consists in a criminal offense punishable by the article 227-12 Code Pénal.

« matching » services for profit (i.e. the renumeration of commercial intermediaries). Altruistic surrogacies are not contractually enforceable.

There is no contractual enforceability conferred to surrogacy arrangements in European legal systems, even when they are accepted *de facto* or monitored by a *post-facto* judicial assessment (see Chapter 3). The absence of a pre-approval by the State strips national (and international) arrangements of any contractual enforceability in these three states. In France the principle of non-recognition of surrogacy arrangements is even stricter. For instance, the latest jurisprudence of the Cour de Cassation on surrogacy (13 September 2013) ruled that authorities cannot proceed to the establishment of parentage in national civil registries, since all surrogacy arrangements are struck with nullity. The decision was justified by the necessity of maintaining public order.[59]

e. Incoming and Outgoing Surrogacy Arrangements Within the EU

No data is available regarding the number of incoming ISA cases in the EU.[60] The answers from the HccH's questionnaires indicate that the major outgoing (or exporting) countries in transnational surrogacy are: India, Ukraine and the USA, and, less commonly, Belgium, Spain, Filipines and South Africa. No outgoing cases of surrogacy have been reported to any of the three governments. No national or international laws or authorities regulate or coordinate the issues that arise between the legal orders and the family laws of incoming and outgoing countries. As permissive countries, The Netherlands and the UK allow the establishment of nationality and immigration status of commissioned children born from ISAs in the paramount of the child, but cannot be said to facilitate, them: lengthy judicial procedures are the norm in these two countries that remain concerned about the commodification of bodies (Brunet et al. 2013).

In its answers to the HccH's questionnaire, the Netherlands indicates that it is endeavouring to clarify the legal grey area that exists around the birth of a commissioned child. The Dutch authorities (embassies and immigration authorities) have also engaged in operations of cooperation with Ukraine and India regarding ISA. To date, the parents of all children born abroad need to undertake a procedure before the Dutch authorities (or Dutch embassy) to apply for a passport for the child with the birth certificate. When both intended parents of a child conceived in a surrogacy arrangement appear on the birth certificate, it is refused by the authorities on the grounds of the respect of the principle of *mater sempre certa est* (i.e. an issue of maintaining public policy). Therefore, the intended parents need to ask to the Court a travel document to be issued without the transcription of the birth-act. Such a procedure takes, in average, 12 to 18 months. Without a passport, the child becomes an alien. This triggers the application of the Alien Act (2000) and the delivery of a temporary residence permit. After the delivery of such a permit, the intended parents can apply for an authorization to adopt the child, a procedure lasting in average two years in the Netherlands. Once adopted, the child will acquire the Dutch nationality and legal parentage is established between him and his parents of intention. The procedure takes a minimum of four years (HccH Questionnaire, The Netherlands, 2013).

If no data is available regarding the number of ISAs concerning the UK each year, the number of Parental Orders delivered by UK courts indicates that the number of arrangements made abroad by British nationals is rising (Questionnaire UK, 2013). Just as for other incoming states (including France), the problems encountered by children born from ISAs are: the ability of the child to leave the state of birth, the attribution of a nationality and the establishment of legal parenthood.

[59] Civ 1ère, 13 septembre 2013 pourvoi H12-30.138 et F12-18.315. This decision strikes down the arguments of both the paramount of the child under article 3(1) of the UNCRC, and the respect of private and family life under article 8 of the ECHR.
[60] The Dutch authorities in the Questionnaire of the HccH, indicate that the Dutch Care and Protection Agency declares being confronted to an average of ten cases of incoming ISAs per year.

Issues surrounding the enforcement of ISAs between an exporting country and an importing EU member state do not only happen between permissive and prohibitive states (e.g. India and France) but also arise between two permissive states (e.g. India and the Netherlands). Legislations on the establishment of filiation and nationality differ enough between countries to lead to a situation, in which most children born from an ISA are left without nationality, filiation and travel documents, unless the intended parents engage in a judicial procedure of which the outcome is lengthy and uncertain.

3. Conclusions

Based on a comparative approach within a sample of states representing the gradation of positions on surrogacy in the EU, it emerged that: their legislations are heterogenous in some fields (e.g. systems of birth registration, filiation to the mother and access to ART services) and homogenous in others (establishment of nationality, filiation to the father, absence of judicial pre-approval and of conferred legal enforceability). All in all, the establishment of filiation for children born from ISAs seems problematic.

However, countries explicitly permitting surrogacy have adapted their filiation systems to children born from surrogacy arrangements on their territory. Therefore, the next chapter examines how they have adapted their traditional filiation systems to national surrogacy practices.

C. The Adaptability of Surrogacy to Filiation Systems

1. The Three European Models of Establishment of Legal Parenthood in Surrogacy

Based on the aforementioned findings, it appears that establishment of parenthood between commissioned children and intended parents is often a complex and challenging procedure. However, in permissive countries, where national surrogacy has been apprehended and regulated by the law, such matters are not of a serious concern when the surrogacy arrangement is being performed in its national modality. The research conducted by Brunet and the answers of The Netherlands and UK to the questionnaires of the Hague Conference on Private International Law (HccH) were essential materials for building the typology presented in this chapter.[61] Two other countries are examined, Greece and South Africa. They have established an *ex ante facto* filiation system for surrogacies that is different from the one The Netherlands and the UK have adopted: *ex post facto* filiation. Moreover, and this time not by operation of the law, jurisprudence has, in some cases, put into place *de facto* solutions. All three options will be analyzed. Their strengths and weakness are compared in order to map features that might be useful for the international regulation of surrogacy.

a. Post Facto Filiation in Surrogacy

In 1927, *The New York Times* reported that the main issue in adoption was to: *« find enough children for childless homes rather than that of finding enough homes for homeless children »* (Zelizer, 1994: 190). The rarefaction of children given up for national or international adoption, coupled with the possibility to be genetically linked to the child by the use of ART in surrogacy arrangements, are two of the factors that explain the development of the new market of surrogacy. Traditionally, in adoption, a stranger is given the status of a legitimate child. When infertile couples have recourse to adoption, they have a tendency to « eliminate » the genitors for improving the establishment of their social parenthood.[62] However, surrogacy takes away the possibility — in some legislations (e.g. California) — to erase the gestational carrier from the picture.

[61] Brunet (n 4) 60-63.
[62] Fine (n 9). Hence adoptive parents often prefer *full adoption* even if *simple adoption* is possible. In full adoption, genitors are erased from the parentage of the child, and new descent is fictively established, solely on the behalf of the adoptive parents. This type of behavior is often induced by the state as, for instance, in France, the law on bioethics of the 29 July 1994 does not provide (on grounds of public order) the donor with a legal existence: helping the non-genetically linked parents to better establish their « legitimity » of appearing as descents to the child.

The United Kingdom has clearly answered the issue of the establishment of parentage between the intended parents and the commissioned child in 1992 (Brunet et al., 2013: 60). Indeed, the Surrogacy Arrangements Acts of 1985 only aimed at prohibiting commercial surrogacies, and did not deal in depth into matters of legal parenthood. Hence, the Parental Order section of the Human Fertilisation and Embryology Act (1990) was improved in 1992, with provisions ruling on an *ex post facto* procedure consisting in a speedy adoption between the consenting birthmother and adopting parents.[63] The ex post facto system refers to an acknowledgment of the surrogacy agreement by the public authorities only after the birth has occurred. All matters of establishment of the legal parentage, as well as the control of the legality of the surrogacy agreement, are dealt with once the child is born. The parental Order is then delivered, provided the judge's approval, ensuring that the intended parents fulfill the requirement criteria. In the case where the surrogate is married, the intended father contests the paternity of the surrogate's husband. On the other hand, if she is not married, the intended father can recognize the child straightforwardly at birth, so that only the intended mother applies for the Order. If a dispute was to arise, the judges take their decision in the paramount of the child. It is important to note that this may lead to other interests being neglected, even if they are protected by both (a) the interdiction of commercial surrogacy (e.g. dignity) and (b) the legal framework of the Surrogacy Arrangement Act — or more directly, this procedure neglects the question of the legality of international surrogacy agreements.

In this system, the surrogate appears on the birth certificate and is considered as the legal mother of the child until she relinquishes her parental rights. It is conform to Fine's recommendations in regard to the relation between adoptive parents and genitors (Fine, 2001). The anthropologist argues in favor of « pluriparentage » and the symbolical recognition of the existence of successive parents to the child in adoption.64 This would, in addition to improving the welfare of the chid, potentially confer him/her with new rights: such as the one of being raised by good parents and the right to know one's origins (Geneviève Delaisi & Pierre Verdier, *L'enfant de Personne,* Odile Jacob, 1994).

b. Ex Ante Facto Filiation in Surrogacy

Greece and South-Africa both have a legislation on surrogacy that provides for an *ex ante* control of the agreement and which secures legal parenthood between the intended parents and the commissioned child *prior* to birth (Brunet et al., 2013: 137-148). In this way, the surrogate mother has no possibility (Greece) or barely any chance (South Africa) to claim the child. At birth, the intended parents become the legal parents of the child, just as if the intended mother had given birth to him/her, and no adoption procedure is needed. This system has been designed in order to ensure that no parentage or custody issues arise after birth, as the consent and motives of all parties to the agreement are controlled. This system — and more generally the strategy of using gestational surrogacy instead of the traditional one (involving the eggs of the surrogate) — raises the question of how valuable the biological bond is for parenthood.[65]

If an international treaty or a EU legislation was to see the light of day, and the *ex ante* procedure was to be chosen against the *ex-post facto* one, a few private law questions would be raised regarding the recognition of

[63] Brunet (n 4) 60. The Parental Order requirements are the following: Single persons are not entitled to apply for Parental Order; Intended parents must be over 18, there is no upper age; The surrogate's pregnancy has been brought by other means than intercourse, meaning from licensed fertility treatment or artificial insemination; The woman giving birth is considered the mother, irrespective of genetics; The intended parents must have at least a partial genetic connection to the child; The application of the Parental order has to be done within six months after birth; At least one of the intended parents must be domiciled in UK; The surrogate consents to the transfer of legal parenthood;No benefit other than reasonable expenses should be exchanged.
[64] Fine (n 9) 71.
[65] By depriving the surrogate mother of any rights over the child she carried for 9 months and gave birth to, there is a social and legal *de facto* lack of appreciation of the bond between the gestational carrier and the child.

ISAs: would the establishment of parentage prior to birth be also given contractual enforcement? From which state would the judicial approval be needed (Ergas, 2012)?

c. De Facto Filiation in Surrogacy

In transnational surrogacy cases, where the establishment of parentage has been partially transcribed or not transcribed at all between the intended parents and the commissioned children, the establishment of filiation between the intended parents and the child can be sought by judicial recourse. Hence, legal parenthood can be established in court. In this case, the existence of a *de facto* social parenthood is recognized by the judge.[66] These decisions are taken in the best interest of the child (article 3.1 of the UNCRC) for correcting a situation resulting from the absence of legislation or coordination between two legal orders. The establishment of filiation through a *de facto system* is not viable and safe for the stability of the family. In addition, the judges are obligated to decide under the pressure of the child's best interest, at the risk of ignoring the reasons behind the prohibition of commercial surrogacy (Brunet et al., 2013: 62).

2. Strengths and Weaknesses of Permissive Surrogacy Legislations

In the research *A Comparative Study on The Regime of Surrogacy in European Union Member States* it appears that both Greece and South-Africa have a permissive legal system regarding altruistic gestational surrogacy (Brunet et al., 2013: 40-48). However, unlike the Netherlands or the United Kingdom, the two countries have a quite elaborated legislation that pushes the framing and the monitoring of the surrogacy arrangement by the state way further. The research led by Brunet found it interesting to study the South African legislation on surrogacy as it presents similitudes to the Greek one. It is also relevant for the thesis. Therefore, this section will point out the strengths and weaknesses of the two systems.

a. The Greek and South African Systems

The Greek law aims at providing « *a comprehensive and facilitative framework for altruistic gestational surrogacy* », with tight eligibility criterion and the involvement of a judicial approval prior to the implantation of embryos in the surrogate mother (Brunet, 2013: 38). The South African system of filiation in surrogacy (established by the South African Children's Act 2005) also involves a court approval of the agreement. However, it offers more scrutiny than Greece to ensure that the motives behind the arrangement are not of a commercial nature, and that the intended parents will be suitable for the child. Surrogacy is also open to single persons and same-sex couples in South Africa. Both laws set three types of eligibility requirements to the arrangement for: the surrogate mother, the intended parents and the provisions of the contract. The intended parents are understood as persons who have a medical inability to have children by their own natural means or fertility treatments. Greek law does not understand male same-sex couples as being infertile under the law. Further, there is also a residency requirement for the intended parents in both countries, and Greece requires the intended mother to be under fifty years of age (Brunet, 2013: 277-293; 339-350).

In both countries, to enter the surrogacy arrangement, the surrogate mother has to comply with certain physical and psychological health conditions. Experienced doctors evaluate her, and if necessary, ensure that she has had at least one healthy pregnancy and a child of her own (the last criterion applies only to South African law). Regarding the psychological assessment: the emotional state of the surrogate mother, as well as her intentions to comply with the terms of the arrangement, is examined. No requirement concerning her marital status is set, and in the case she has a spouse, the spouse shall be part to the agreement. In South Africa, if the gestational mother is found to also be the genetical mother (traditional surrogacy) of the child, she can claim the termination of the contract up to sixty days after birth, if she pays back all the expenditures that have

[66] For example: Rechtbank Almelo, 24 October 2000, FJR, 2001 (3) 91:, *« Acknowledgment of paternity of a child born to a surrogate mother by a married father of intent. The tribunal granted demand as soon as it appears that there was a close personal relationship between the father of intent and the child established by the fact that the child was living in the home of the parents of intent since birth. ».* Brunet (n 4) 80 quoting M.J. Vonk, *Netherlands: Maternity for another : a double Dutch approach, (F. Monéger 2011).*

been involved in the arrangement to the intended parents. The Greek law does not provide for a possibility to the surrogate to claim back the child (ibid.).

Greek and South African legislations prohibit commercial surrogacy, hence the agreement shall provide for no more than « reasonable expenses » under penalty of civil and criminal sanctions. The only retributions allowed by the intended parents are those necessary to the conduct of the surrogacy procedure and of the pregnancy (e.g. the costs of the medical care of the surrogate (costs during the pregnancy, of childbirth and the costs related to the care after childbirth); costs for the medical assessment for the court; the loss of wages due to the maternity leave of the surrogate; an insurance covering the surrogate and finally, the legal costs of issuing of the contract).67 The arrangement has to be approved by the Court that releases a pre-conception authorization, once the judge has verified the altruistic nature of the contract and the informed consent of all parties. The legal parenthood of the intended parents is therefore established prior to the child's birth, so that there is no adoption procedure to undertake at any point. In South Africa, the surrogate mother has to become pregnant before 18 months after the Court's authorization; otherwise the parties have to undergo the same procedure again for renewing their consent to the terms of the arrangement (s. 296 (1) (b) of the Children's Act of 2005) (Brunet et al., 2013: 349). Regarding the medical procedures performed, the IVF has to be performed in an accredited clinic, although no requirements are stated on the place of birth.

These two legislations on an *ex ante facto* surrogacy model contain slight differences in their content. The strength of this system is to contain both a judicial approval, and an investigation on the parties' motivations and the arrangement. However, the latter is more meticulous in South Africa. Another difference is that Greece leaves more space for the recognition of social parenthood than in South Africa, since the law does not require that one of the intended parents be biologically linked to the child. Greek law confers legal parenthood prior to birth independently of whether there is a genetical link with the child or not.

Nevertheless, liabilities are to be found in these two legal orders: the residency requirement is not precise and applies only to the intended parents and not to the surrogate mother. Even if the law provides only for altruistic surrogacy, this can be an incentive for incoming immigrant surrogates (on the Greek case, see Brunet et al., 2013: 284-285). Concerns have also been raised by Brunet et al. regarding discriminations performed on grounds of sexual orientation in Greece (South Africa having a more tolerant approach). Thirdly, the only age requirement existing in these two systems is quite gender discriminative, since it applies only to women. The age limit is only set for the intended mother, while an age limit would be more relevant for the surrogate.

Surrogacy regimes in Greece and South Africa appear to not only regulate the resort to surrogacy, but also to facilitate it. This type of ruling may become an incentive for performing ISAs. According to the interpretation of Brunet et al., their legislation leads, de facto, to a recognition of a « right to a child » *de jure,* since in both Constitutions, respectively Article 5 (1) of the Greek Constitution and s.12 (2) (a) of the South African Constitution, these provisions can be read as conferring such a right.[68]

b. The UK and Dutch Systems

The position of the United Kingdom is one of the most permissive within the European Union with a legalization of surrogacy in its altruistic form. Three pieces of legislation frame these arrangements. The UK has taken steps early toward the legalization of surrogacy: in 1985, The Surrogacy Arrangement Act criminalizes commer-

[67] Brunet (n 4) South African surrogacy law requires the contract to be dealt with by specialized lawyers.
[68] Constitution of Greece Article 5 (1): « *All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages.* ». Constitution of the Republic of South Africa1996, Section 12 (2) a: « *Everyone has the right to bodily and psychology integrity which includes the right to make decisions concerning reproduction;* »

cial surrogacy agreements (Article 4) and ensures that surrogacy contracts are not enforceable (Article 2). In 2008, the revised Embryology Act of 1990 rules in its second part on « *parenthood in cases involving assisted reproduction* ». The Act provides in the « Parental Order » section that a surrogate mother can transfer her parental rights to the intended parents (provided they fulfill the legal requirements: e.g. married or registered in civil partnership). Rights must be transferred within six weeks after birth and before the 6 months of the child. Surrogacy in its commercial form is prohibited under the law, nonetheless, non-profit agencies putting the parties to the agreement in contact have mushroomed and these intermediaries are allowed by the 2008 Act to advertise their services.

Nevertheless, one consequence of the legalization of one form of surrogacy (altruistic surrogacy) has become an incentive for reproductive tourism and transnational surrogacy — in general in its commercial form — outside the European Union. Faced with a growing number of children born from transnational surrogacies. [69] They have resulted in diverse administrative and legal cases arriving before the courts due to filiation or immigration issues. Therefore, the government of the UK and of Ireland published state guidelines for transnational surrogacy arrangements in 2012. This document elaborates on the difficulties for the authorities to accept the transcription of foreign birth certificates for children born of ISA and how the impact of these difficulties on the immigration status of children conceived through international surrogacy agreements.[70] The document does not provide any certainty concerning legal filiation between intended parent and commissioned child even if they are genetically linked to the intended parents: « *It is important to be aware that the fact that a genetic relationship exists between a commissioning adult and the child does not mean that he or she is automatically the legal parent of the child under Irish law.* » (UK State Guidelines for Transnational Surrogacy Arrangements, 2012: 2).

According to the research conducted for the European Parliament led by Brunet the Netherlands have no « *general prohibition on surrogacy* » except in its commercial form since 1994 (Brunet et al., 2013). *It « expressly facilitates »* altruistic surrogacy, since it only requires that the clinics performing the IVF procedure in the context of surrogacy shall abide to the professional guidelines issues by the Dutch Society for Obstetrics and Gynaecology (1998).

The state of the law — or its absence — leads the intended parents to adopt the child born through (altruistic) surrogacy a year after the birth took place. Hence, the argument of unnecessary psychological distress for the intended parents resulting on this delay has been raised and suggestions for abandoning this obligatory period have been made *(*Sylvia Dermout, *Non-commercial surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy, from 1997 to 2004 (Human Reproduction, Vol. 25, no. 2. 2010) 443-449)*. From 1997 to 2004, the first Dutch Centre for non-Commercial IVF Surrogacy was run in the Netherlands. A research conducted by Dermout proceeded to a psychological, medical and legal assessment of the consequences of undergoing an altruistic gestational surrogacy for the intended parents and the surrogate, including her partner if there were any (Dermout, 2010). The conclusions of this research are that the procedure of non-commercial surrogacy arrangement offered by the Centre are: (a) feasible; (b) produced successful results in matters of pregnancy and psychological outcome; (c) and did not present complications for the adoption procedure. To achieve such results, the Centre had a structured protocol regarding the eligibility criterion for the selection of intended parents and surrogates, and favored an « ideologic » motive to conduct the surrogacy (the surrogate being a sister, sister-in-law or a good friend of the intended parents). Yet, nationals from the Nether-

[69] In the Questionnaire HccH 2013, the government of the UK underlines a significant increase in the delivery of Parental Orders for children born abroad.
[70]The Departments of Justice and Equality, Health, Children and Youth Affairs, Foreign Affairs and Trade, Social Protection and the Office of the Attorney General, Republic of ireland,*Citizenship, Parentage, Guardianship and travel Document issues in Relation to Children Born as a Result of Surrogacy Arrangements entered into Outside the State* (2012).

lands have also started to resort to surrogacy abroad, raising the same issues as in the UK (Brunet et al., 2013).

In permissive countries such as the Netherlands or the UK, no consistent legislation has yet been enacted in order to legalize foreign surrogacy arrangements and to transcript foreign birth certificates in order to avoid administrative and legal disputes arising on grounds of denial or recognition of legal parenthood, attribution of the citizenship or the delivery of travel documents to the children issued from a transnational surrogacy arrangement. A common feature of the systems in the Netherlands and the UK is that legal parenthood between the intended parents and the child is only established after a certain time after the child is born and is not effective prior to birth. There are two liabilities pertaining to this model. A a judicial recourse is necessary for transferring parental rights. So far, judicial authorities have always ruled in the paramount of the child's welfare, even when the surrogacy arrangement was suspected of being contrary to public order, i.e., of being of a commercial nature (Brunet et al., 2013). In the UK, no refusal of a Parental order has ever been grounded on the resort to a commercial surrogacy arrangement. In 2008, the High Court has even delivered a judgement approving the payment of the sum of €27,000 to a foreign surrogate, in order to confer legal filiation to the child as well as a citizenship, while the average compensation is €11,800 (Brunet et al., 2013: 60).

D. Conclusions Part I

In order to map the issues that arise when European filiation systems are confronted to surrogacy, this chapter carried out a comparison of private law on filiation and in terms of tolerance towards surrogacy within a sample of EU member states. The findings highlight a great legal diversity in the establishment of parentage between states and legal frameworks of surrogacy. The procedures of birth registration, establishment of legal motherhood, and access to ART services are heterogeneous across the Union. However, the compared states also possess common features regarding the establishment of nationality, legal fatherhood and the impossibility of contractual enforcement of surrogacy arrangements in absence of judicial pre-approval.

Part I demonstrates that the integration of commissioned children from ISA into European filiation systems is arduous, although it also appeared that, in permissive countries, mechanisms of adaptation regarding the establishment of filiation between intended parents and commissioned children have been legislated and put into practice: there exists an ex ante facto and a ex post facto model of parentage establishment in altruistic surrogacy. However, the commissioned children born in international surrogacy arrangements suffer from the lack of coordination, or legislation and from the incompatibility of the outgoing and incoming states' legal orders. The issues arising at birth concern the delivery of travel documents by the state of the intended parents, the establishment of filiation to the intended parents and the attribution of a nationality.

The major asset of the ex ante filiation system is to ensure, providing a wide range of requirements are fulfilled, the eligibility of all parties to enter the arrangement prior to the fertilization of the surrogate. In addition, laws provide medical standards regarding the treatments and procedures performed on the surrogate. However, the ex ante system could be charged with two major drawbacks. On the one hand, it rather encourages the recourse to surrogacy than it allows it; on the other hand, the contractual enforceability of the arrangement makes it impossible for the surrogate to choose to keep the child.[71] The two assets of the ex post facto system, are, firstly, that it only facilitates surrogacy (and is not an incentive to resort to it). Secondly, the surrogate has the possibility to wait 6 months after the child is born to relinquish (or not to relinquish) her parental rights. The liability of this system lies in the absence of judicial approval prior to the pregnancy. This inhibits the possi-

[71] In South Africa, in cases of traditional surrogacy, the surrogate can claim the termination of the contract up to 60 days after birth if she pays back all the expenditures that have been involved in the arrangement to the intended parents. The Greek law does not provide for this possibility.

bility to make sure that the consent of all parties is enlightened, and that they all are in a suitable physical, mental and economical state to perform a surrogacy arrangement.

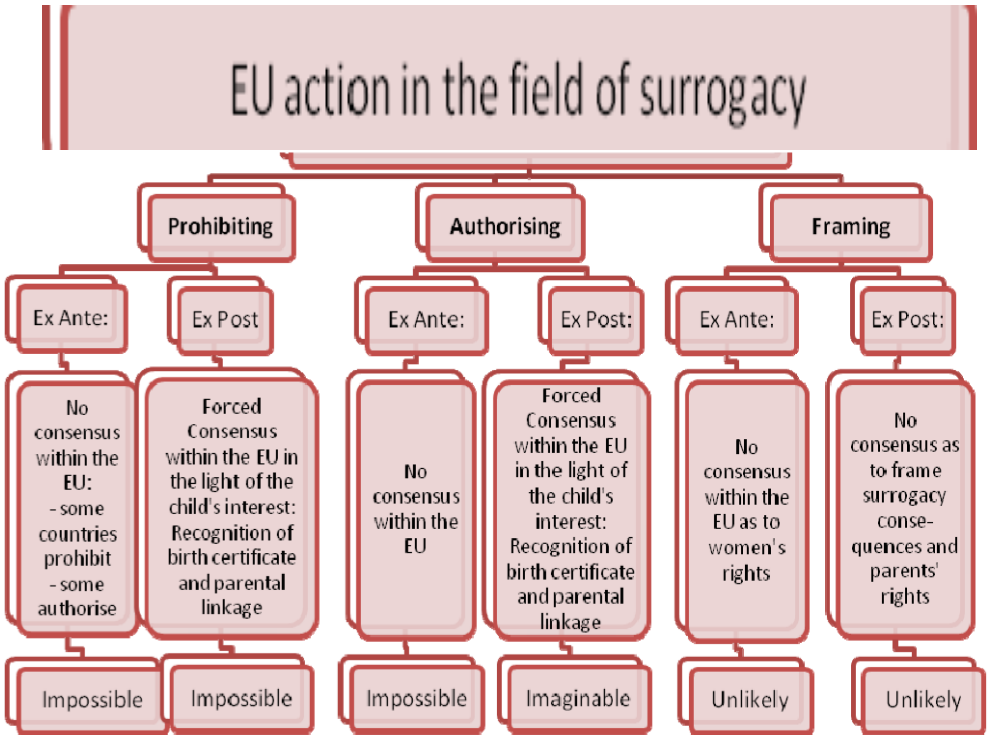

Figure 1 - EU Action in the Field of Surrogacy[72]

Finally, surrogacy arrangements have always been legislated under family or criminal laws. Yet, it appears that this field has been providing unequal or weak protection to the individuals involved. Consequently, a human rights approach to surrogacy arrangements appears to be the key to improve the way current legislations take into account the fundamental rights of all parties.

II. PART II : HUMAN RIGHTS AND SURROGACY

This study has alluded to the adverse effects of surrogacy on commissioned children from a private law perspective. Nevertheless, there are three main parties directly involved in the surrogacy process: the surrogate, the intended parents and the child. The drawbacks often invoked against the legalization of surrogacy concern the violation of fundamental rights of both the surrogate and the child.73 All parties to the agreement have different human rights to defend or to claim in the performance of a surrogacy arrangement, which can sometimes be conflicting. Each of them can rely on existing conventions, although none of them mentions surrogacy. For this reason, the second part of this thesis explores the adaptability of human rights instruments to improve the rights of all parties to surrogacy arrangements.

From a human rights point of view, to what extent can the Convention on Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the European Court of Human Rights (ECHR) grant sufficient protection to the parties involved in a surrogacy arrangement ? Each chapter will propose to apply respectively: the CEDAW to the rights of surrogates, the CRC and the ECHR to commissioned children, and also the ECHR to the rights of the intended parents.

[72] Brunet (n 4) 195.
[73] Some claim that the recourse to surrogacy should be encouraged foe enabling infertile individuals to fulfill their right to a family life.

A. Examining the Rights of the Surrogate with a Women's Human Rights Lens

International human rights instruments have progressively been dedicated to the protection of women. It is a positive development that, nonetheless, had the tendency to emphasize women's vulnerability, with a focus on gender violence (particularly amongst Southern countries) and on the experience of motherhood. The United Nations' efforts to secure women's human rights started in 1952 with the short Convention on the Political Rights of Women (1952), followed by the Convention on the Nationality of Married Women (1957), the Convention on the Consent to Marriage (1962), the Declaration on the Elimination of Discrimination against Women (1967) and finally with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979).

The CEDAW values affirmative action and includes provisions on violence against women. It was a stepping-stone for the Declaration on the Elimination of Violence against Women (1993). The objectives of this instrument consist in: the elimination of discrimination against women (Article 1, 2 and 24), the promotion of substantive equality between men and women (articles 3 and 4) as well as the modification of gender stereotypes (Article 5). The analysis also establishes a parallel between prostitution and surrogacy, as both put women's bodies temporarily at the disposition of others. However, prostitution has only has been apprehended by human rights instruments in a protective and victimizing manner.[74] To what extent can the CEDAW offer protection to the surrogate mothers? The two last mentioned objectives of the convention will be analyzed in depth before apprehending the bioethics challenge posed by surrogacy for investigating the suitability of the CEDAW to surrogacy arrangements.

1. Substantive Equality

a. Definition

Equality is at the core of the CEDAW. However, substantive equality is a complex notion. It designates the aim of achieving equality in laws and in practice (e.g. equal treatment, access to opportunity and to equal results). The formulation of the convention is explicit: all appropriate measures shall be put into practice (Article 3). The CEDAW contains different types of measures. Actions that entail affirmative action are provided for in Article (4) « Special measures ». There are two types of special measures: « temporary » measures (Article 4(1)) and measures of « protection » (Article 4(2)). The first one refers to special temporary support services or budget allocations for women that should exist only until the targeted results are achieved. « Protection » refers to maternity protection (leave, social benefits, health care, labour laws). These special measures are mandatory for the implementation of the Convention, and even if they only concern women, they are not considered as an exception to the principle of non-discrimination. However, protective measures[75] often receive criticism: they have been considered as too far reaching and as potentially impeding the participation of women in public life.

b. Challenges

This study will rather focus on the notion of substantive equality than on non-discrimination. The CEDAW consists in a tremendous legal and political instrument for women's empowerment. However, the human rights discourse on non-discrimination and equality of the CEDAW often lacks precision on the issue of taking

[74] Seminar taught by Katarina Frostell on « Women's Human Rights » (07/02/2013) in Åbo Akademi University.
[75] *Ibid.* For example: Article 7 of the ILO Night Work Convention (1990) provides for special protection to women night workers and has received criticism for excluding women from social/working life. However, the CEDAW states in its article 4 (2) that "Adoption by states parties of special measures, including those measures contained in the present convention, aimed at protecting maternity shall not be considered discriminatory". All in all, maternity is a contentious issue: criticisms of public exclusion (from too much protection) and discrimination (because of a lack of protection) confront each other in the public sphere.

measures to change behaviors (Article 5).[76] Indeed, the difficulty with such a global instrument as the CEDAW is that Third World feminists criticize it for not letting their voices being expressed (Frostell, 2013). Further, two other major criticisms concerning this instrument have been expressed. The first concerns Article 6 dealing with prostitution, treating all sex-workers as exploited. The second criticism is addressed to Article 14 on rural women, as it takes a globalized market economy model that women have not been able to influence.

c. Equality in Surrogacy

The CEDAW protects women's human right to equality in a way that raises criticism on its inadequacy toward some groups of women in particular (sex workers, rural women, third country women in particular) (Frostell 2013). Similar criticism could be formulated on its scope of protection regarding surrogate mothers entering ISAs. Surrogates are also stereotypically depicted by the medias in the EU as vulnerable women from the South renting their wombs to wealthier western couples.[77] This type of discourse resembles the terms in which the debate on the legalization of prostitution takes place.[78] Therefore, it should be asked if commercial surrogacy has a negative impact on gender equality, calling for its prohibition under human rights law?

d. The Cliché of Exploitation

The CEDAW is promoting women's empowerment and condemning their exploitation, especially in trafficking. For Michel Foucault, the notion of « power » is, firstly, defined as getting someone else to do what you want them to do, and, secondly, as a notion of « pouvoir-savoir », which means that no power can be exercised without the constitution of a knowledge (Foucault 1975: 36).[79] In the context of a surrogacy arrangement, the intended parents are then in « power » if they get the surrogate to do what they want her to do: carry a child for them and relinquish all her maternal rights at birth when handing them the child. Moreover, in the configuration where the surrogate contracts an agreement on the content of which she has less knowledge and comprehension than the intended parents, the latter also occupy a position of power over her. Another possible way of envisaging « power » is a shared one: each party gets the expected or desired result from the performance of the contract without exploiting one another. The intended parents get a child, and the surrogate a financial gain. Entering a surrogacy arrangement could consist in an empowering experience: the embodiment of the expression of the power of will and freedom of women, and therefore would not be contrary to the objective of the CEDAW. The World Bank defines empowerment as « *the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control and hold accountable institution that affect their lives* ».80 Surrogates in poor economic situations, through the negotiation and the performance of their surrogacy contract, expand their financial assets and better their life situation by exercising a similar economic autonomy as men in countries and contexts where they are less likely to be able to exercise it (e.g. rural India). In this sense, surrogacy is a personal participatory experience to public and economic life, and could possibly empower poor women in a CEDAW perspective.

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[76] One may ask: to whose customs, in which circumstances, from which definition? *Article 5: States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women*;.

[77] Frédérique Joignot, *"Mères porteuses libres ou exploitées?", Le Monde Magazine* (Paris 19 June 2009) <*http://www.lemonde.fr/societe/article/2009/06/19/meres-porteuses-libres-ou-exploitees_1209099_3224.html*> (accessed on 9 July 2014)

[78] For a discussion on the transformation of prostitution into a synonym of slavery, see e.g. Marjolein van den Brink & Marjan Wijers, Because to me, a Woman Who Speaks in Public is a Public Woman: 30 Years Women's Convention and the Struggle to Eliminate Discrimination of Women in the Field of Trafficking and Prostitution , in Ingrid Westendrop (Intersentia, 2012)135-159.

[79] Michel Foucault, *Penal Theories and Institutions,* (Rabinow Paul (eds.) Michel Foucault Ethics, Subjectivity and Truth 1954-1984, vol.1, 1985) *36.*

[80] World Bank, see at :http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTEMPOWERMENT/0,,contentMDK:20245753~pagePK:210058~piPK:210062~theSitePK:486411,00.html.

Further, the *capability approach*, developed by the economist Sen, could as well be applied to surrogacy as well: where individual advantages are judged according to his/her capability to do things he/she has reason to value (Sen, 2008.). The economist understands poverty as the depravation of living a good life, and development as the possibility to better one's conditions of living. Therefore, if surrogacy consists in a positive development enabling poor women to better their lives and promoting their welfare, then it should have no reason to be prohibited.

The aforementioned explorations of who detains power in the surrogacy arrangement suggests that even if the surrogate could also be considered as being in power, or as being on the same foot as the other contracting parties, her position requires attention regarding a specific issue: the higher risk for her to suffer physical, non-physical and psychological harm. Indeed, commercial surrogacy is an industry that could fit into the Palermo Protocols's definition of trafficking as the scope of the latters is defined broadly: any industry can be concerned, wether exercised within or across borders. This puts surrogacy in the same basket as prostitution, women are considered as providing a service to others by renting their bodies in certain conditions. Hence, a parallel can be traced between the two practices. The French feminist and philosopher Elisabeth Badinter, is known for her position against the prohibition of prostitution.[81] According to Badinter, a prohibitive legislation is absolutely inefficient and deprives women of their sexual freedom. Moreover, she stresses the fact that most arguments against prostitution seduce a large public because they position women as exploited victims that « *need to be defended* » and emphases their « purity ». Indeed, she further mentions that the freedom to control their own bodies was the first claim of the feminist movements, and that if women wish to, they should be free to rent their bodies in conditions that they find suitable. Finally, she argues that prohibition has the opposite effect than the one wished for by legislators.
The philosophical issues aforementioned raised by surrogacy will not be further developed in this particular study. However, they should be considered, before enacting any regulatory or prohibitive regulations on the topic of surrogacy, so that all ethical dimensions of this practice be sufficiently covered (see Part III).

e. The Risk of Exploitation

However, just as in prostitution, the exploitation and trafficking of women for surrogacy purposes is a risk that has to be taken into account when giving thoughts for designing international regulation. The Palermo Protocol's (2000) definition of trafficking includes three criteria: the means (use of threat, force, abduction, abuse of vulnerable position), the act (recruitment, transportation, transfer, receipt) and the purpose of the traffic (sexual exploitation, forced labour or service, slavery, removal of organs).

As for the care chain, trafficking flows move from South to North. There are two kinds of factors in the background of trafficking: push factors (e.g. such as an economic inequality, a feminization of poverty, gender discrimination, unemployment) and pull factors (e.g. a demand for cheap labour forces, a demand for workers in the international sex industry, globalization). International human rights instruments have been dedicated to the fight against trafficking. This occurred for the first time in 1949, in the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others. The issue is taken up in the CEDAW (1979), which seeks to suppress all form of trafficking in women and considers it as a form of gender-based violence. This point of view was later confirmed by the Vienna World Conference on Human Rights (1993). It must be noted that, in trafficking, the consent of the victim is irrelevant when any of the means mentioned by the protocol have been used against her. If the victim consented to conditions that turn out to be different from the ones he/she had agreed to, or when he/she ends up in a situation of exploitation, his/her consent ceases to be relevant. In this regard, the self-determination of the surrogate is an extremely relevant question when contracting for surrogacy, since a pregnancy is an experience that may involve unforeseen situations (e.g. risks

[81] Interview of Elisabeth Badinter, *TV5 Monde* (Paris, 27 November 2013) <http://www.tv5.org/cms/chaine-francophone/Revoir-nos-emissions/L-invite/Episodes/p-26884-Elisabeth-Badinter.html.>

related to multiple births, severe bleeding, caesarean sections, womb removal, etc.). Such health problems potentially cause irreversible consequences for the physical and mental health of the surrogate mother. [82]

f. The Exploitation of Surrogate Mothers

The number of international surrogacy arrangements (ISAs) is said to have exponentially increased these last decades, although no accurate data is available.[83] Therefore, this booming business has also opened a door for criminal activity. Trafficking cases are not unknown in the surrogacy field. The following examples illustrate three different situations in different countries that share common features with human trafficking.

In the USA, the condemnation of the mediator and expert on surrogacy arrangements, attorney Erickson, revealed a complex but flourishing baby trade established between San Diego and Ukraine.[84] Intended parents in California were lured by the prospect of being able to legally adopt a child, paying the sum of $150 000. Respectively, surrogates thought that the child they carried was commissioned from an arrangement. In reality, American surrogates where sent to Ukraine at low cost to be inseminated by anonymous donors. Once a surrogate was pregnant, the attorney recruited intended parents for adoption. In this case, both intended parents and surrogates were deceived. Surrogate mothers could even have claimed having been exploited for renting their womb in conditions they did not agree upon (e.g. the price). Moreover, in 2011 the BBC reported that in Thailand, the Bangkok police discovered a criminal Taiwanese-run surrogacy business: in some cases, women had been forced to become surrogate mothers after having suffered rape and having had their passports confiscated.[85] This case clearly illustrates how surrogacy can produce gender-based violence and inequalities between men and women. The conditions in which ISAs are contracted in India have also been criticised. Surrogacy agencies in India are settled within the clinic performing the IVF treatments and that acts as the health care facility for the surrogate. Sometimes these units even consist in boarding houses where the surrogate lives, from the moment they enter the contract, to their recovery after the delivery. Agencies may have a complete monopoly of influence on the surrogates and lead them to accept contractual provisions that they do not understand. Smerdon has highlighted the ambiguity of the consent of surrogates in these terms: « When the 'choices' can be so dire, it is possible that Indian women may be pressured by their families, brokers, and personal circumstances to lend their bodies for cash » (Smerdon 2008)[86].

In the debate concerning prostitution as voluntary versus exploitative (pimps to prostitutes or also from men to women), there are two approaches: abolitionist and regulatory. The regulatory approach has been accused of having increased trafficking flows.[87] On the other hand, the abolitionist approach stresses a victimizing oriented approach, emphasizing the unbalanced relationship between buyer/seller and questioning the voluntariness of sex workers: the lack of alternative to find another occupation is played against their consent. Akin to the debate on prostitution, the debate on surrogacy is torn between abolitionist and regulatory approaches. Abolitionist approache also have critics. Wijers asserts that « anti-trafficking policies can do and do significant

[82] The World Health Organization reports that every year more than half a million women die during their pregnancy or childbirth. For more details, see World health organization, *Au delà des nombres. Examiner les morts maternelles et les complications pour réduire les risques liés à la grossesse*, (Département OMS de la santé génésique, 2004).
[83] HccH, Prel. Doc. No 11 of March 2011, see paras 2.
"The surrogacy business in India is estimated to worth $2 billions a year." Dhawan Himanshi, *Unregulated surrogacy industry worth over $2bn thrives without legal framework, (The Times of India 18 July 2013)*.
[84] Michael McLaughlin, "Theresa Erickson, *To Be Sentenced For Baby Trafficking Ring*", Huffington Post (24 February 2012) <*http://www.huffingtonpost.com/2012/02/24/theresa-erickson-sentneced_n_1299434.html*> *(last consulted on 9 July 2014)*
[85] BBC, "Thailand police investigate baby sales ring", (2011).
[86] Usha *Rengachary Smerdon, Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India,* (Cumberland Law Review, Vol. 29, 2008) pp.15-54 :26.
[87] Erika Schultze, *Sexual Exploitation and Prostitution and its impact on Gender* Equality (Policy Department C: Citizens' Rights and Constitutional Affairs, 2014).

harm » (Wijers 2013).[88] Also, prohibitionist legislations consist in providing means for the state to control how women dispose of their own bodies: (their sexuality for sex workers, and perhaps, their reproductive rights for « breeder » workers).[89] If a prohibitive criminalizing approach of surrogacy was to be adopted in conformity with the provisions of the CEDAW, it should not be done: (a) in the name of the preservation of women's human rights to substantive equality and (b) solely grounded on avoiding risks of trafficking. This decision should be enacted for protecting other interests (e.g. ethics, child's best interest, public order). On the other hand, if a regulatory approach was to be chosen, then the responsibility to monitor trafficking flows in surrogacy should not be the construed as the duty of the exporting state only. It should also rely on solidarity between importing and exporting countries. Furthermore, according to Wijers, the trafficking framework has not yet been helpful in practice for sex workers's human rights (Wijers 2013). This casts a doubt on the efficiency of such an approach for the human rights protection of surrogate mothers. Therefore, when envisioning a regulatory approach for framing surrogacy arrangements, other types of approaches appear more relevant, namely, the issues of the commodification of bodies, children's rights and public order. They are dealt with in the second and third chapters of Part II.

The trafficking approach to sex work, or eventually surrogacy, aims at protecting women from the exploitation of their bodies in exchange of sums of money. Surrogacy in the European Union is legalized only in its altruistic form, in order to not contradict the prohibition of the commodification of the body and its parts. Such legislations also prohibit the commercial form of surrogacy in order to counter the risks of exploitation. This leads to the following question: does an exchange involving fees necessarily induce the exploitation of women? Cattapan examines the legitimacy of prohibiting paymentin the framework of a permissive regulatory approach in surrogacy in Canada (Cattapan 2014). According to this author, the relationship between payments and exploitation is «tenuous» in the arguments put forward by Canadian parliamentarians put forward. Indeed, in Canada exploitation is a policy rationale for prohibiting payments to surrogates and gamete donors. The three assumptions commonly used to demonstrate that payments encourage exploitation are: (a) that marginalized women are exploited; (b) that there is an inextricable link between payment and exploitation; (c) that the prohibition of payments is the best means to prevent women's exploitation in reproduction (Cattapan, 2014). Nevertheless, Cattapan casts a doubt on the legitimacy of prohibiting payments highlighting the difference between a perceived exploitation of women versus factual exploitation.

2. Gender Stereotypes

The Article 5 of the CEDAW aims at modifying fixed gender stereotypes based beliefs on the inferiority / superiority of one sex. They are discriminatory, but also that are rooted in habits and customs. The wording of article 5 refers to: « *the common responsibility of men and women* ». There are many gender stereotypes which call for diversity in the responses brought about to change them. In this section, I ask: can surrogacy reinforce gender stereotypes? This part will also examine the issue of the commodification of women's body in surrogacy, before addressing the question of contractual autonomy and finally the public character of pregnancy.

[88] Marjan Wijers, From repression to empowerment: is there a way back?, key note speech Conference « From Prosecution to Empowerment, Fighting Trafficking and Promoting the Rights of the Migrants », University of Southern California (2 February, 2013).
[89] For further details on parliamentary propositions in Canada for prohibiting payments in surrogacy, see Alana Cattapan, *Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation (Canadian Journal of Law and Society / Revue Canadienne Droit et Société, published online 20 June 2014*) 1-19.

a. Commodification of Surrogates' Bodies in Surrogacy

French philosopher Elisabeth Badinter challenges stereotypes on mothers and pregnancy. She claims that all women are different because of the diversity of human nature, and therefore, there are women who « love » being pregnant, but do not wish to take care of a new child.[90] She also challenges the assumption that a woman inevitably loves the child she is pregnant of (i.e. a stereotype), adding, conversely, that there are women who would like to raise children, but who refuse to, or cannot, become pregnant.[91] For Badinter there is no reason to deny couples the possibility to become good and legitimate parents of a desired child. Further, the philosopher considers that the argument of commodification of bodies is advanced on « anything and everything » in debates on surrogacy. Badinter urges the French Sénat to take a look at the model of surrogacy of the UK, where a voluntary woman has the right, provided she has altruistic motives, to decide to carry a child for a couple. Finally, the philosopher stresses, that the risks surrounding the practice of surrogacy in a suitable European framework are comparable with those to which Ukrainian or Indian surrogates are exposed.

The stereotype that a pregnant woman loves the child she carries is also reflected by the law (*mater sempre certa est*). However, further research on what importance we socially and legally give to pregnancy is necessary. Sociologists have recently stressed the fact that more efforts should be put into exploring the creation of bonds between individuals, stressing the need for more research to be conducted in the field of understanding processes of construction of social bonds.[92] This type of knowledge might provide the legislators with adequate tools to legally frame and secure bonds between adults and children.

b. Contractual Autonomy of the Surrogate

The State performs a constant production of norms on the right of women to dispose freely of their own bodies, sometimes at the expense of their contractual autonomy and economic autonomy.

For instance, abortion has always been a subject of debate on grounds of moral, ethics, philosophy and religion. It is regulated by the public policy of national governments. Notably, it is illegal in the Republic of Ireland, unless the mother's life is in danger (*in fine*, the availability of medical care for abortion, even when needed, is however quite narrow).[93] Sex-work is also restricted by states and normatively based on grounds of public policy and human dignity. This is generally linked to the belief that women are not autonomous and rational in decision making (another stereotype).[94] Surrogate mothers willing to dispose freely of their bodies in order to enter a surrogacy arrangement, whether altruistic or commercial, are faced with prohibition or a lack of regulations in the EU.

It could be argued that freedom to provide cross border services in the EU, (article 56, ex-Article 49 TEC), one of the fundamental freedoms of the Union, could secure a right to provide cross border services of surrogacy *within* the EU (provided it is legalized).

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[90] Extract of Elisabeth Badinter's intervention during the auditions conducted for the discussion of the same-sex marriage law (« mariage pour tous ») in the French Senate (Paris 2012) <https://www.youtube.com/watch?v=lpPjxHkXTzM.> (last consulted 9 July 2014)
See also: Michelle MEUNIER, "Avis No 435 « Projet de loi ouvrant le mariage aux couples de personnes de même sexe », fait au nom de la commission des affaires sociales »" (2013) <http://www.senat.fr/rap/a12-435/a12-4357.html.> (last consulted 10 July 2014)

[91] See also Barbara Stark*, Transnational Surrogacy and International Human Rights, p. 369 (ILSA Journal of International & Comparative Law, Vol. 18, No. 2, 2012)* 7 footnote 55.

[92] Jaana *Maksimainen Jaana & Kaisa Ketokivi, Sidoksen ongelmasta [On the question of the social bond], pp. 101-105 (Sosiologia, Vol. 51, no. 2, 2014) 103.*

[93] Article 40.3.3°, Irish Constitution (right to life equally applicable to unborn children).

[94] Van den Brink & Wijers (n 75) 139.

c. Criminal Law and Reproduction

In recent decades, some reproductive health rights have been secured as women's Human Rights: access to services (contraception, voluntary sterilization, information) and protection of women from involuntary sterilization.[95] Nevertheless, the interest of the mother and the child are often played against each other, and the human rights framework does not provide any clear supremacy between women's human rights or that of the child (in some states the rights of the unborn). Therefore, it is relevant to ask: to what extent is the surrogate's pregnancy relevant as a public matter?

One example is court-ordered recourse to caesarean sections in the USA and England. They demonstrate an interest for foetal protection that may be emphasized at the expense of maternal autonomy, although the New York Convention on the Rights of the Child states (indirectly) in its Articles 6 and 7 that foetus and embryos are *not* considered as children and that they become children by getting through childbirth.[96] Likewise, law can be used to restrict women's options treating them « protectively » (van den Brink & Wijers, 2012), and there is an undeniable state interest in motherhood that may also be expressed in criminal law.[97] The CEDAW provides for a right to decide the number and spacing of their children (Article 16(1)) and ensures the right of pregnant women (Article 1). However, the situation in Ireland is contradictory with a pregnant woman's right to respect for her private life.[98] In Finland, where only 0,4% of women present risks of being addicted to drugs or alcohol, the Working group on the National Drug Situation suggested, in its 2011 report, a legal amendment enabling an involuntary treatment of the mother based on the health risk posed to the unborn child (Tanhua & Others, 2011). The Working Group recommends that this period be extended to 30 days or until the end of the pregnancy. Currently, in Finnish law, Act 41/1986 allows involuntary treatment for five days in case of health risks.

This raises the following question: to what extent is Article 8 of the ECHR providing protection to women in their private life and reproduction, against state intervention? Article 8 states that interferences to this right can only happen: *« in accordance with the law (…) in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others* » (Article 8, ECHR). This leads to the following conclusion: pregnancy is considered as an aspect of women's private life, but States are still willing to keep their grip on women's bodies. Further, since states still have such an interest in motherhood and pregnancy, it is very likely that similar interests will influence any future regulation on surrogacy arrangements.

3. Bioethics and Surrogacy

Medical progress has produced remarkable developments that, nevertheless, raise important ethical issues. Bioethics considers these new challenges, aiming at the protection of individual's dignity and rights. Therefore, human rights instruments have started to be elaborated for securing human interests against the advances of

[95] For a rigorous study of the development of reproductive rights in international law, see Stark (n 88) 8.
[96] See article 7(1) of the CRC: « *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents*. ».
[97] In most European countries, the incrimination of manslaughter is not applicable to the fetus except in Italy, Spain, Turkey and Ireland.
[98] Article 40.3.3° of the Irish Constitution deals with the Right to life and therefor it includes in its section §3 the right to life of the unborn. Throughout the Constitution there is no less than 6 references to the "unborn" present in the following sections:

- Article 40.3.3°
- Eighth Amendment of the Constitution 7 October, 1983
- Eleventh Amendment of the Constitution 16 July 1992
- Twice in the Thirteenth Amendment of the Constitution Act 23 December 1992
- In the Index with the reference : « unborn:see right to life »

On the other hand, one cannot find a single reference to the unborn under another term such as « foetus », «embryo » or « product of conception » which are the most common synonyms in legal or medical practice.

technology.[99] However, surrogacy is a procedure that has not been included in the normative framework of bioethics or human rights. The dignity and the rights of the surrogate mother are at stake in the performance of the surrogacy arrangement. Therefore, two theoretical assumptions will be discussed in order to outline the strengths and weaknesses of surrogacy in a bioethical perspective.

In his work *On Liberty* (1859), the English philosopher and utilitarian John Stuart Mill developed the idea of the ethical system of a utilitarian society and reflects on the extent to which society can exercise its power over individuals.[100] More precisely, he developed the « harm principle », suggesting that individuals can act as it pleases, as long as their actions do not cause harm to the others. He acknowledges that individuals are not separated from the others, and that their actions can have adverse consequences on each other. Therefore, society has no claim to intervene in a situation where an individual is acting in a way that can cause harm only to him/herself. A utilitarian application of the « harm principle » to surrogacy raises the question of whether the procedure can harm anyone else than the surrogate herself? Following Mill's interpretation, if she is willing to cause self-harm, without impacting on the rest of the society, this decision belongs to her. However, the exponential growth of the surrogacy business weakens the validity of an argument based on the « harm principle » . For example, in India « baby factories » are built up, and a « breeder class » (Lahl et al. 2014) is being created as an international reproductive market emerges[101]. This « class » or category is mostly composed of economically disadvantaged women. Legislative frameworks for preventing abuses in surrogacy arrangements are inexistent or poor. Hence, one can doubt on the relevance of applying the « harm principle » to the growing number of surrogates performing ISAs in such life conditions. Would it be still accepted by the society ? Moreover, women are not the only party involved in ISAs and the « harm principle » would have to be applied to all parties. Tom Beauchamp's and James F. Children's (in Mohapatra, 2012) established principles of biomedical ethics (more commonly employed for making clinical decisions) that Mohapatra applies to surrogacy. Beauchamp and Children list four principles: beneficence, non-maleficience, justice and autonomy. The beneficence principle poses the question of the promotion of well-being. This would mean in surrogacy that we ask the following question: does surrogacy promote the well-being of the intended parents, the surrogate and the commissioned child? Surrogacy most probably elevates the well-being of infertile couples who are not eligible to adoption and have surrogacy as the only option left for satisfying their desire of becoming parents. Commercial surrogacy raises surrogates' well-being in the sense that it is a source of income. Mohapatra further argues that surrogacy increases the social value of pregnancy, as only women can become surrogates (idem). This author does not mention the potentially degrading character of this practice; neither does she consider the welfare of the child. [102] Beauchamp's and Children's non-maleficence principle applied to surrogacy raises the question: does surrogacy cause harm? Intended parents may suffer emotionally when caught in trafficking cases or in administrative turmoils created from insufficient legislative frameworks. Surrogates may suffer form surrogacy physically, ethically (because of the commodification of their bodies). They may also risk health problems inherent to pregnancy and IVF treatments, as well as mental harm.[103] Finally, children born from surrogacy arrangements also a risk both physical and « non-physical » harm. There are health risks involved in an IVF treatment for the child, e.g. in case of multiple or premature birth. Children may also suffer from the inconsistency between legislations giving rise to filiation and citizenship issues (Mohapatra, 2012). The third bioethical principle elaborated by Beauchamp and Children, the autonomy principle questions: (a) the free will of all parties, (b) the enlightened consent to all the terms and their (c) their voluntariness to enter the arrangement. Intended parents

[99] The Convention on Human Rights and Biomedicine.
[100]John Stuart Mill, *De la liberté*, (Gallimard, 1990).
[101]Documentary: Jennifer Lahl, "*Breeders: A subclass of women?* Trailer of a documentary of the Center for Bioethics and Culture Work", (2014) *<https://www.youtube.com/watch?v=GNNCqs52jFU.>(last consulted 10 July 2014)*
[102] The question of the wellbeing of commissioned children from surrogacy arrangement will be discussed in the second part of this chapter: Surrogacy and Children's Rights.
[103] Also, enduring numerous pregnancies have long lasting effects on women's health. This raises the following question: if being a surrogate mother become a career, who will pay for the health problems occurring to the surrogate years after she undergone the pregnancy?

initiate the procedure of surrogacy and can be considered as exercising their autonomy. When it comes to the surrogate, the remuneration in the case of a commercial arrangement empowers her with new economical means of subsistence, and in some ways may provide the surrogate with increased autonomy. Reversibly, one could also argue that the economic situation which led women to enter the arrangement is not consistent with autonomy. The situation is different in altruistic surrogacy, as the surrogate is not expecting benefits from the arrangement other than offering a gift to the intended couple. Therefore, her autonomy in decision-making is not such a matter of concern for ethics (Mohapatra, 2012). Concerning the final principle enumerated by Beauchamp and Children justice, Mohapatra formulates the following question: does international surrogacy promote justice? She considers that the existing cases of trafficking and the creation of a « breeder class » give us reasons to believe that international commercial surrogacy can reinforce racial and social hierarchy (Mohapatra 2012).

4. Conclusions

This chapter aimed at investigating the applicability of two major objectives of the CEDAW (substantive equality and the fight against gender stereotypes) to surrogacy arrangements and at exploring the bioethical issues related to them.

The application of Mills' « harm principle » and of the bioethical medical principles of Beauchamp and Children by Mohapatra (2012) to surrogacy, demonstrate that there are possibilities for all parties to the arrangement to suffer from physical, mental and non-physical harm. This strengthens the assumption that an international regulatory approach to international surrogacy arrangement with a human rights perspective is of the utmost necessity for protecting all individuals taking part to these arrangements. It appears that regarding the protection of the surrogate mothers the CEDAW contains some objectives (non-discrimination, substantive equality, fight against gender stereotypes) that could be relevant for future regulations on surrogacy and ISA. It should be noted that the CEDAW provisions on pregnant women in general, are not inapplicable to pregnancies occurring in a surrogacy arrangement. To sum up the findings in this chapter: they demonstrate that an approach focused on trafficking promotes a victimization of women, which is neither empowering, neither promoting women's rights to have control over their own bodies as it does not take into account the possibility of autonomy and self-determination. Since surrogacy touches upon maternity and pregnancy, reproduction being an aspect of women's life which is not fully entitled to the protection of the right to private life, a future instrument framing surrogacy should take into account the risk that the state's interest in controlling human reproduction and women's bodies represents for some human rights. Finally, it appears that the best way to safeguard the surrogate's human rights would be to listen to their voice under a multidisciplinary angle, in parallel to considering the interests of children, intended families, the private sector and the state.

B. Surrogacy and the Rights of the Child

The interests of the child are also at stake once the surrogacy arrangement has been enforced. It has been demonstrated in the first part of this study, that in the EU (Part I, section 2.2.5), commissioned children from ISAs suffer from the lack of legislation and international cooperation between incoming and outgoing countries. As a consequence, some of them have neither filiation or nationality. The European Court of Human Rights released its very first decision related to these situations in 2014, condemning the position of France and entitling these children to protection under article 8. The applicability of the UNCRC and of the ECHR to commissioned children in the EU will be explored in the following chapter.

Children's rights started to be given attention only in the late 19th century, in parallel with the development of labour rights. Indeed, until then, they were granted no special protections and were considered as « small adults » (Zelizer, 1994: 138). At the international level, the first progress in this field of human rights came in 1919, when the League of Nations created a committee for child protection. It was followed by the Declaration

of the Rights of the Child in 1924. The World War II and its human consequences triggered an acceleration in the development of children's rights: a special fund was created in 1947 (which later became the UNICEF in 1953). Other human rights instruments started to include provisions applicable to children (the Universal Declaration of Human Rights, the International Charter for Economical, Social and Cultural Rights). Finally, in 1979, declared International Year of the Child by the UN, the Convention on the Rights of the Child (CRC) was adopted and inspired further child protection provisions in human rights instruments in Africa[104]. The CRC is the first binding human right treaty aiming at the protection of every aspect of children's rights (civil and political, economic, social and cultural) and that is applicable to children around the world (to minorities, to disabled children and, refugees). This convention sets four principles: non-discrimination, best interest of the child (article 3[1]), right to life and respect for the views of the child. In Europe, at the regional level, the ECHR grants children some protection under article 8 on private and family life. Interestingly, it can be coupled with article 3(1) of the CRC to constitute an argument in favor of equal treatment for children born from ISAs before courts. Surrogacy is a new form of business for both the market and legislations. In the absence of international instruments regulating this practice, especially in its transnational form, the question of wether the CRC's scope of protection would be sufficient to guarantee commissioned children's rights is raised.

In the debate and disputes surrounding surrogacy, the principle of the best interest of the child is the most often evoked argument. The CRC is then evoked to supplement national laws. However, a French judgement recently states that the principle of making the best interest of the child paramount was a less imperative issue than the maintenance of national and international public order. France thus created a difference of treatment for children born from ISAs.[105] Also, the ECtHT recently condemned France for infringing the right to private life of children conceived through ISAs, referring to Article 8 of the Convention. Therefore, a definition of the « best interest » will be introduced hereunder. A special attention is given to the risk of commodification of children in surrogacy. Further, the rights to nationality and to private life of children born from ISAs in Europe will be examined under the loop of the first decision of the ECtHR on surrogacy arrangement.

1. The Best Interest of the Child

The concept of the « child's best interest » existed prior to the Convention on the Rights of the Child. It was already included in the 1959 Declaration of the Rights of the Child (para. 2) and the CEDAW (arts. 5 (b) and 16, para. 1 (d)). All children's rights elaborated since 1959 comply with the best interest principle. Indeed, several articles of the CRC refer to it: article 9 (separation from parents), article 10 (family reunification), article 18 (parental responsibilities), article 20 (deprivation of family environment and alternative care), and article 21 (adoption). The Committee on the Rights of the Children in its General Comment number 14 (2013) on Article 3 paragraph 1 (the right of the child to have his or her best interest taken as a primary consideration) defines this complex, and yet flexible, principle as a threefold concept.106 It is a substantive right, a fundamental, interpretative legal principle and a rule of procedure. This means that the child has the right to have her/his own interests assessed and taken in consideration when different interests are being weighted for reaching a decision (as when the interest of the child conflicts with those of women). Also, when a legal provision has to be interpreted, the interpretation that best serves the child's interest shall be the one that is chosen. And finally, in decision-making processes, there should be justification that an evaluation of the potential impacts on the concerned children has been conducted.

[104] Humanium is an international NGO dedicated to the protection of children's rights throughout the world. Their advocacy aims to better the knowledge on the rights of the child.
[105] Civ 1ère, 13 septembre 2013 pourvoi H12-30.138 et F12-18.315.
[106] *« In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. »* Convention on the Rights of the Child, art. 3, para. 1.

The Convention is cautious with adoption and prefers that the child grow up with her/his (biological) parents. In surrogacy the biological parents can be the donors and/or the surrogate, and, consequently, the principle of a preference given to the biological parent(s) cannot be applied in surrogacy. What choice would be in the best interest of the child? To be in the care of the woman who carried him/her for 9 months: or in that of the couple/individual who commissioned him/her, via a contract including a sum of money through ISA ? A principle liable to provide a strong answer to this question could the right to identity and the right to family life. Indeed, the latter is one of the common points between the CRC and the ECHR.

The ECtHR (Genovese v. Malte, App n° 53124/09, ECtHR11 Octobre 2011, § 33) has already interpreted a decision in the light of article 8 of the ECHR (right to privacy and family life), considering nationality as an element of an individual's identity. Thus, the Convention protects the right to nationality and the right to an identity (and information on one's origins), opening the door to interpretations of further components of identity (see below). Indeed, in its recent judgments, the Court recognized that the refusal of French authorities to transcribe foreign birth certificates of children born from ISAs constituted a violation of article 8 for these children, in that the refusal was liable to have repercussions on their definition of identity.[107] The Committee of the CRC stresses in its General Comment n°14 the importance to acknowledge the diversity of children in the assessment of their best interest. The Convention's article 8 calls for the respect of the right of the child to preserve his/her identity. The latter included: his/her sex, sexual orientation, national origin, religion and beliefs, cultural identity and personality.[108] Regarding one's origins, children should have access to information about their biological family, in accordance with the national laws (article 9(4)). Also, the question of rightful and possible access to information on identity and origins gives rise to multiple complications, especially when a surrogate and/or donors involved in the conception eventually reside overseas. The human rights of the child also provide that he/she shall not suffer from discrimination from the birth or parental status. If the Convention grants children with a right to family life (article 16), it's interpretation of « family » is quite broad. It can include the biological, adoptive or foster parents. However, neither the Convention nor the Committee alludes to the gestational family, or gestational origins of the child. This omission puts to trial the importance that is given to pregnancy. Indeed, its value is ambivalent in law: the principle of *mater sempre certa est* is still deeply rooted in European private law. At the same time, the whole process of surrogacy aims at desacralizing pregnancy. The role of the pregnant surrogate mother in ISA is minimized. So are the bonds that may exist or arise between her and a child during gestation and birth. Commercial contracts presume a detached emotional relation to the child. Therefore, it appears that, although the CRC and the ECHR (both in their wording and interpretation) provide for a right to identity, they still lack precision. This is namely true for the importance that the identity of the gestational carrier may have for children and their definition of their own identity. Indeed, neither the Committee, nor the judges of the ECtHR, have yet adopted a position stating whether surrogacy is a practice going for — or against — the best interest of the child.

2. The Commodification of Children in Surrogacy

a. Pricing the Child

In a commercial surrogacy arrangement, an agreement, a contract, a medical procedure and most certainly money are associated to the conception of the child. From a human rights perspective, one may ask: is it in the best interest of the child to be marketed? Surrogacy risks to emphasize the commodification of women's body and to treat children as goods on a market of human beings. The sociologist Zelizer has highlighted that, as the sentimental « uniqueness » of children grew in the twentieth century, the assessment of their value became

[107] Mennesson v. France, App no. 65192/11 and Labassee v. France App no. 65941/11, (ECtHR 26 June 2014).
[108] Article 8 ECHR
« *1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. ».

« morally offensive ». She writes: « *the black market is unacceptable because it treats children in the same impersonal, economizing manner used for less sacred commercial products* » (Zelizer, 1994: 203). She further claims that adoption is commonly confined to the «acceptable», contrarily to commercial surrogacy, because, in adoption, one is perceived as a gift, whereas surrogacy puts a price on a human being. However, for the intended parents, the sum of money going to the surrogate does not represent a price, but rather, a symbol of gratitude. Zelizer describes this phenomenon in the following manner: *« priceless values were being priced, but the pricing process itself was transformed by its association to value »* (Zelizer, 1994: 211).

b. Child Protection and Surrogacy

The risk of commodification is linked to the undeniable risk of children becoming goods in an illicit trade. Indeed, ISAs raise concerns of trafficking and abuse and against commissioned children. The absence of legislation, or loose legislations on surrogacy in exporting/outgoing states regarding the suitability and eligibility of the commissioned parent(s) to become guardians and legal parents of the child, leave an open door for abuse and neglect.

In the USA, The Huddleston case embodies the consequences of loose legislation and its potentially maleficient consequences on commissioned children.[109] The case involved a 26-year old single man, who commissioned a child through a traditional commercial surrogacy arrangement, and was condemned for the physical abuse of his 6-week-old infant. A case from Thailand illustrates the trafficking risk.[110] It concerned a baby factory where children were conceived, with gametes that were not the ones of the intended parents. Children were even conceived prior to any arrangement and before potential parents had been found, and then sold.[111] In in its latest report on surrogacy, the NGO Center for Social Research in India, also denounces a case of surrogacy in India, in which a foreign couple commissioned a child for proceeding to an organ transplant on their own biological child who was sick in their country. This case is another call for legislation to be enacted for preventing ill-intentioned people from entering surrogacy arrangements.[112] Another serious concern is what happens to a child in an ISA, if the intended parents change their mind prior to birth or at birth, and if the surrogate mother is not willing to raise the child (or the children) either. This kind of situations arise when the intended parents are divorcing, the child presents disabilities, or the birth is multiple one and the surrogate refused to reduce some of the embryos.[113] In countries where surrogacy contracts are enforceable by operation of law, there is an issue of including all possible situations that may arise so that all parties to the agreement consent to the various outcomes of the contract. Reversely, in countries where these arrangements are not conferred enforceability, there should be authorities responsible for settling the disputes and situations that arise in cases with an unforeseen outcome.

3. The Right to Nationality for Commissioned Children of ISAs

Nationality is one component of identity and a fundamental right. Everyone is entitled to a nationality and cannot be deprived of it arbitrarily. States shall grant their nationality to stateless persons born on their territory or born abroad from one national. Stateless persons face significant obstacles to the enjoyment of their fun-

[109] Huddleston v. Infertility Clinic of America Inc., 20 August 1997, Superior Court of Pennsylvania, USA.
[110] Mentioned in the 3.c Exploitation of Women and Surrogacy.
[111] This case, which encompasses all the criteria to qualify for the crime of trafficking, leads us to wonder how many Indian baby factories fall under this category, surrogates are not always contracting in conditions they understand or control. They are being potentially lured by intermediaries who abuse of their position and make profit from selling the child to a far higher price than the sum paid to the surrogates.
[112] The Center for Social Research is an NGO based in New Delhi, India, with the mission to empower the women through means of research, communication and teaching. The CSR's research department conducted a report led by Dr. Ranjana Kumari , Surrogate Motherhood: Ethical or Commercial?, *(Center of Social Research 2014).*
[113] *MailOnline, "Surrogate sues couple who turned down twins", (The Daily Mail, 2014) <http://www.dailymail.co.uk/news/article-65930/Surrogate-sues-couple-turned-twins.html> (last consulted 10 July 2014)*

damental rights. No article in the ECHR provides directly for a right to nationality, however it can be claimed under the article 14 and 8 of the Convention (Genovese v. Malte, no 53124/09, § 33, 2011, ECHR).[114]

In the French Mennesson and Labassee cases, the children born from the ISAs were not deprived from any nationality, as they were American. However, the applicants sought to establish simultaneously (a) their parentage to the commissioned children and (b) a French nationality for the latter. Article 18 of the French Civil Code establishes nationality according to the principle of *jus sanginis* and states that: « *is French the child that has at least one French parent* ». Therefore, *ipso facto*, the French authorities, by refusing to transcribe the parentage, also deprived these children from the access to French nationality. These cases are not of the worst kind, since the children were not stateless and possessed an American nationality. However, there are cases of ISAs where the children brought back to Europe were stateless in addition to having no parentage legally secured.[115] Besides, if children do not acquire the nationality of their intended parents, and are third country nationals in the EU, serious concerns regarding the immigration status at the majority of the child and the stability of the family may arise. Further, by not granting the children conceived in ISAs the nationality of the member state of their intended parents, children are not entitled to benefit from the protection and the rights that go with the European Citizenship.[116] Even if there is a human right to nationality and it is reinforced (amongst others interests) for the protection of the identity and in the name of the child's best interest, the weight of the CRC is still too weak to grant commissioned children with sufficient protection against states' interest to protect their standards of morality.

4. Public Order v. Human Rights

The Article 8 of the ECHR provides for a right to private and family life, home and correspondence. However it is a non-absolute right, subject to limitations and also left to a broad interpretation for the judges and state parties. The scope of protection of this article is stretchable to many areas of life. Interferences to this right are accepted, provided they fit in the exceptions listed in the second paragraph. Any interference has to be in accordance with the law, necessary in a democratic society and serve the interests of national security, public safety or the economic well being of the country.

To some extent, the understanding of different states' conception of morality can affect the private and family life of individuals. The position of France on the prohibition of surrogacy is so strict that it has impeded the delivery of travel documents, the establishment of parentage and the granting of nationality to children born from ISAs. Even children who were biologically linked to their intended parents have been refused documents. The Cour de cassation (Cass. ass. plén. 31 mai 1991: Bulletin 1991 A.P., no 4, p. 5) considers that the arrangement in which a woman enters (even without compensation) aiming to conceive a child and to abandon it at birth is contrary to the principle of the non availability of human body. Another decision of the same court in September 2013 ruled that surrogacy arrangements consist in such a fraud, that neither the best interest of the child (under the article 3.1 of the CRC), nor the respect to private and family life (under article 8 of the ECHR), could be effectively invoked. Also, article 16-7 of the French Civil code civil states that all surrogacy arrangements are considered void under the law.117 As a matter of fact, there are contradictory State «moralities»

[114] There is a common confusion between the concepts of nationality and citizenship as citizenship, invented at the end of the 18th century, is a more politically active phenomenon of nationality (a national is only the subject of his/her state).
[115] Rottman calls commissioned children of international surrogacy arrangements the « Republic's ghosts » (« fantômes de la République »). Rotman, 2009.
[116] The Article 9 of the Treaty on European Union states that « (…) every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship ». Therefore, EU citizenship is an extra layer to the core national citizenship as it is additional, meaning no one can benefit only from the EU citizenship. Thus, there would be no possibility for those commissioned stateless children to claim to be entitled firstly of a Union citizenship before they would be granted the one of a member state.
[117] Cour de Cassation, Civ 1ère, 13 septembre 2013 pourvoi H12-30.138 et F12-18.315.

and public orders. Contradiction of « morality », or public order, can arise between a member state of the EU and a third country, but also between two member states. For instance, the French procedure of « accouchement sous X » is considered contrary to the Dutch public order.118 Nevertheless, in its recent decision in the Mennesson and Labassee cases, the ECtHR granted the commissioned children of ISAs the protection of their private and family life, under article 8 of the Convention, in order that their legal filiation and nationality be established in France.119 These two cases were similar and concerned the refusal of the French judicial authorities to grant the recognition of legal parentage that had been legally established in the USA between children born from ISAs and French intended parents. When the French authorities suspect that the child is born from a surrogacy arrangement, the refusal to transcribe the birth certificates in the French register of births, marriages and deaths is systematic. The aim of this practice is to reinforce the prohibition in the law for entering surrogacy arrangements, to protect the women's and children's interest, and hence, to discourage French nationals from entering ISAs. Since the ECtHR granted protection to the commissioned children under the article 8, it recognized them as being the children of the intended parents and not of the surrogate mother. The motives behind this decision, dissociate the children from the illicit character of the arrangement, and focus only on their best interest. The spirit of the law is akin to the position on the rights of children born out of wedlock (Press release ECHR 185 2014). The claim of the applicants was that the position of France was also violating article 8 of the Convention the right to respect of private and family life of the intended parents themselves. However, the court found no violation of Article 8 concerning the applicants' right. There had been no infringement in the decision of not transcribing the children's birth certificates into the civil registry, as it did not deprive the children from the parentage (the latter was recognized in the USA). Moreover, the decision did not prevent them from living with the applicants, meaning that parents and children did not face insurmountable obstacles even though the family life was affected. [120] These families' life was complicated by the absence of the transcription, constraining them to produce the American birth certificates with translations every time they had to undergo an administrative or legal procedure. [121] These two judgments of the ECtHR recognized that there had been a violation of Article 8 concerning the children's right to respect for their private life. The Article 8 provides for positive obligations toward the state, but this decision questions the negative obligations of the state, its role as a defender of these children's rights. These commissioned children suffered from a legal uncertainty as they were denied a status under French law, and which was liable to affect their own definition of identity regarding their filiation and nationality. The right to identity is an integral part of private life, and is deeply linked to parentage: « *a key aspect of individual's identity* ». Further, the non-establishment of parentage also impacts inheritance rights. Finally, the Court added that the respect to one's private life included the opportunity to access details about his/her filiation. The life situations of these children born from ISA were not compatible with the children's best interests, a principle which should guide all decisions in which they are concerned.

Contracting states to the ECHR have a broad margin of appreciation on what they judge necessary in a democratic society. Even if the interference of the State was in accordance with the law, the judges did not agree on the fact that it defended the maintenance of public order and prevented further breaches of the law. Thus, it was found that France had breached article 8 regarding the commissioned children. No violations of article 14, pertaining to the prohibition of discrimination was found in either of these French cases.

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[118] « *The mother is the woman who gives birth to a child (or who had adopted it). This principle is of public order. The birth cerficiate must therefore (initially) mention as the mother the woman who the child was born to. This principle is of public order. Surrogate motherhood in itself is not against the Dutch ordre public.* » (Questionnaire HccH - The Netherlands - 2013).

[119] Mennesson v. France, App no. 65192/11 and Labassee v. France App no. 65941/11, (ECtHR 26 June 2014) para. 66.

[120] The European Court of Human Rights issued a press release on the Mennesson and Labasse cases resuming the motives of the cour for « prohibiting the establishment of a relationship between a father and his biological children born following surrogacy arrangements abroad ». Registrar of the ECHR 185, 2014.

[121] Irène Théry, *Filiation, origines, parentalité– le droit face aux nouvelles valeurs de responsabilité générationnelle, (Ministère des affaires sociales et de la santé Ministère délégué chargé de la famille, 2014).*

5. Conclusions

In this second chapter, the efficiency of the scope of application of the UNCRC for protecting the commissioned children's human rights has been looked into. Although the CRC, the ECHR and its judges are providing commissioned children with a minimum protection, they do not address the underlying ethical issues of the compatibility of surrogacy with children's rights, their best interest or international public order. This study also pointed at the present lack of recognition of the importance that could represent for children the access to the identity of the gestational carrier, when building his/her own identity (as provided in the CRC and the ECHR). Moreover, the right to a private and family life and a nationality under the two aforementioned instruments, is challenged by states' interest to protect their standards of morality. Thus, the CRC and the ECHR do not consist in a sufficient framework for resorting to a « rights of the child friendly » surrogacy arrangements, if this would ever be possible.

If contracting with a surrogate for the rental of her womb could be accepted, would contracting for a child benefit from the same tolerance? The issue of the commodification of children is present in two aspects of surrogacy: the contractual enforceability of the arrangement and trafficking in children. If global regulation on surrogacy was to include a trafficking approach, this might harm to the surrogates. On the other hand, it would provide for more protection to commissioned children against traffic and abuses. Further, the issue of possibly conferring contractual enforceability for surrogacy arrangements raises questions on the commodification of children, the question of incorporating all cases of unforeseen outcomes of the pregnancy and the existence of authorities that would be responsible for settling the disputes. The present findings have indicated that a human right approach to regulate surrogacy was of the utmost importance to the protection children's rights. Furthermore, this calls for an international forum on the ethical and bioethical issues raised by surrogacy. Nevertheless, one could wonder if the designing of such instrument would not encourage the social demand for including a right to a child in the name of the right to family life.

C. Surrogacy and the Right to a Family Life : A Recognition of a Right to a Child?

As new possibilities and technologies are nowadays available, the desire for children may keep on growing until it is satisfied. This is why the number of couples who have recourse to surrogacy is expanding (whatever the reasons, infertility or for convenience), namely through ISAs. This exponential social demand for newborns that are biologically linked at least to one of the intended parents, puts to trial the concept of family life. The latter is, according to article 8 ECHR, an expandable one as regarding the right to a child. Is the European Court of Human Rights and the European Court of Justice promoting a right to a child in their recent jurisprudence? The four decisions delivered in 2014 by both courts will be analysed in an attempt to foresee the future of surrogacy in the European Union.

1. Absence of Parental Benefits for Intended Parents

In the UK, where altruistic surrogacy is legal, two cases (Cases C. D. v S.T. and Z. v A, 2014, ECJ) have been brought before the European Court of Justice in Luxembourg for ruling on the entitlement to a maternity leave for intended mothers.[122] The judicial authorities in the UK refused to grant them maternity leaves, on the grounds that they did not either carry the child or have had recourse to an adoption (the Parental Order does not constitute in an adoption *per se*). Three questions were examined by the Court: the first one being if the refusal to be granted the paid maternity leave constituted in a violation of the Recast Sex Equality Directive of the right to sex equality. The second was if there had also been a violation of the Framework Equality Directive 2000/78/EC (prohibition to discriminate on disablement), and if the latter Directive was valid in the light of the

[122] C. D. v S.T., C-167/12, 2014, ECJ and Z. v A, C-363/12, 2014, ECJ.

UN Convention on the Rights to Persons with Disabilities (UNCRPD).[123] The Court answered that there had been no violations. Firstly, because intended fathers were in the same position as the intended mothers regarding the right to a paid leave. Secondly, because the absence of uterus does not constitute a disability in the sense of this Directive. And finally, the court ruled that the obligations of the UNCRPD are not directly applicable to the Directive.

In this case, the ECJ ruled on the entitlement to a maternity leave and grounded its decision on the physical condition of the mother. However, parental leaves do not only aim to facilitate physical recovery from pregnancy and childbirth, but also to enhance bonding with the newborn(s).[124] The judges only stressed the medical reasons (which are not applicable in surrogacy) for granting a leave, and did not allude to the psychological ones (bonding, avoiding stress). Moreover, in the C.D v. T.S case, the intended mother was even breastfeeding the child, which was not considered a medical reason for granting her the leave either.[125] Finally, the decision does not open the possibility for intended fathers to be granted a parental leave. The judgement seems principally constructed upon a "sacralization" of pregnancy It may impede the intended parents bonding with their children, by not entitling them with the same rights to maternity and paternity leave as natural or adoptive parents.

2. Equality in Access to Surrogacy

The recent decisions of the ECtHR in the French Mennesson and Labassee cases grant protection to the commissioned children of ISAs under the right to private life, including a right to identity. These two judgements strike down the position maintained to date by France, which was to stop any administrative or judicial procedures involving commissioned children. However, the ECtHR does not refer to the needs or reasons there might be to discourage or encourage surrogacy. This silence could, in fact, leave an open door to member states for legalizing surrogacy. Added to the fact that the court did not make a judgement of value on surrogacy *per se*, the silence of the judges cast a doubt on the equality of parents regardless sexual orientation when resorting to surrogacy. Indeed, these two cases concerned heterosexual couples.

Another dimension of the debate on surrogacy concerns the eligibility of same-sex couples to become legal parents of a child: they constitute a great share of the intended parents entering surrogacy arrangements. While I was writing up this thesis, same-sex couples have been included in the category « infertile couples », but would they be considered as such by the court of Strasbourg? When it comes to the eligibility for accessing ART, there are numerous countries in the EU where the criterion are very selective and exclude same-sex couples or single persons to recourse to these technologies.[126] Nevertheless, the article 14 of the ECHR provides for a right to non-discrimination, which has not yet been referred to in order to democratize the access to ART. It could potentially constitute a claim that same-sex couples or single persons could make for obtaining the right to access ART services.

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[123] ECJ, press release No 36/14, 2014.

[124] The associate Claire Wilson criticizes the decision of the ECJ alluding to the new position of the government on the necessity to provide these parents with parental leaves too : « *This is a perhaps a surprising decision as the ECJ has a bit of a track record of seeking to extend protection for parents. It does seem unfair that a mother who receives a baby under a surrogacy arrangement should not have the same opportunity to bond with her baby as an adoptive or birth parent. The Government has recognized that this is an issue and may be planning to provide leave to parents in England and Wales in such a situation* ».
Claire Wilson, 2014.

[125] Lactation can be induced by hormonal treatment that allows women who did not give birth to breastfeed their commissioned or adopted child <http://www.aboutkidshealth.ca/En/News/NewsAndFeatures/Pages/Breastfeeding-without-pregnancy.aspx. >

[126] France does not allow homosexual to recourse to ART, therefore, those who wish to have access to it are forced to travel to other countries where it is accessible to them (Spain for instance) and therefore participate to « reproductive tourism ». The individuals resorting to ART in France shall be in a heterosexual relationship, civil partnership or marriage, and be authorized after examination of their motivation and stability to have access to the treatments. LOI n° 2004-800 du 6 août 2004 relative à la bioéthique.

Because recourse to ART or surrogacy is becoming easier, and because of the aforementioned decision of the ECtHR, an evolution towards a legal recognition for a right to a child seems to be taking place. This right, if it were to be recognized, could entitle individuals to recourse to surrogacy whenever it would please them; eventually facilitate adoption procedures; and, thus contribute to the expansion of a market for children. A right to a child could mean, for example, that couples could justify a divorce by the infertility of their partner. Such a right might also increase the social pressure on women: a surrogate might replace a woman who was not able to procreate.

However, the principle of best interest of the child being deeply rooted in international and national legal provisions, the recognition to a right to a child seems out of reach at the international or regional level for the time being.[127] Although, even if it became a right in practice, *in lege*, its inclusion in either a convention or an international jurisprudence does not seem likely. On the other hand, the two decisions of the ECJ on the refusal of maternity leave for intended mothers could have been motivated by the will to avoid facilitating the recourse to surrogacy in a Union where it is still a contentious practice. Nevertheless, it seems that the future of surrogacy is evolving toward more tolerance from the courts and in thoughts given by legislators (Brunet et al., 2013). Hence, interrogations remain concerning its democratic character.

3. Conclusion

The two European courts, both in Luxembourg and Strasbourg, did not approach the underlying ethical issues of surrogacy in their decisions. Rather, they aimed at smoothing administrative and judicial procedures rising in cases involving incoming commissioned children in the member states. The ECJ's decision sanctions the intended parents for having had recourse to surrogacy by depriving them of paid parental leave. On the other hand, the decision of the ECtHR appears more tolerant regarding ISAs.

Since surrogacy is the only procreative method allowing gay men to become parents to genetically linked children, they constitute a great share of the intended parents entering surrogacy arrangements.[128] One may also note that, in this regard, both courts kept silent on the eligibility of same-sex couples to access ART regardless of their sexual orientation. However, the trend towards recognizing equality regarding family rights in Europe (i.e. regardless of one's sexual orientation) will probably lead to the support of the ECtHR in cases involving same-sex couples that have recourse to surrogacy.[129]

D. Conclusions of part II

This study has alluded in its first part to the adverse effects of surrogacy on commissioned children from a private law perspective. In this second part, it explored with a human rights lens the extent of protection provided by the existing human rights framework to the parties involved in surrogacy arrangements. The purpose of connecting human rights to surrogacy, which is usually apprehended under international private law, is to highlight which strengths and weaknesses contained by these human rights instruments should be adopted or, on the contrary, not developed when designing the features of a regulatory approach to surrogacy and ISAs.

The first chapter explored the women's human rights of surrogates in surrogacy and demonstrated that considering they can suffer physical, non-physical and psychological harms because of this procreative method, an international regulatory human rights approach to surrogacy - and especially the commercialization in ISAs - is of the utmost importance for guaranteeing the respect of the rights and the well being of surrogates. The objectives supported by the CEDAW (namely non-discrimination, substantive equality and the fight against gen-

[127] Brunet (n 4) 140.
[128] Stark (n 88) 11.
[129] Karner v. Austria, App. No. 40016/98, (ECtHR 24 July 2003.

der stereotypes) shall be transferred to this instrument. Although, the trafficking approach included in the CEDAW to sex work should not be shifted to surrogacy. Indeed, this would deny the voluntariness of surrogates and emphasize on victimization of women. Undoubtedly, since reproduction, and especially women's disposition of their bodies, is of significant interest for most states, a future regulation on surrogacy would reflect even more their concerns if approached with human rights, rather than with international private law. In conclusion, it appears that the best way to safeguard the surrogate's human rights in surrogacy would be to listen to their voices.

The second chapter proposed an examination of the impact of surrogacy on the rights of the child. The CRC and the ECHR were looked into for finding which one of their provisions offer sufficient protection to commissioned children from enduring human rights violations. The current findings lead to note that, to date, the commissioned children's right to nationality and family life is still endangered by the will of governments to protect their standards of morality. Moreover, even if both instruments recognize the importance of building one's identity to have access to origins, no provisions cover the meaning or the importance in « origins » or « identity » of the acknowledgment of the role held by the gestational carrier. In addition, the ECtHR did not address the issues of commodification or of the best interest of the child to be born form a surrogacy arrangement. Therefore, if a trafficking approach to surrogacy could be detrimental for surrogates, it would actually be beneficent for commissioned children in order to make sure they are not sold as goods. Further, the question of whether issuing a contract upon the conceiving of a child is ethical or not, has not yet been addressed by the courts of Luxembourg and Strasbourg. Thus, the CRC and the ECHR do not provide sufficient protection and provisions for ensuring that the commissioned children's rights are respected in surrogacy arrangements. The findings in this second chapter encourages the creation of an international forum that would discuss the human rights, as well as ethical and philosophical questions raised by surrogacy across different cultures, in order to regulate a safe practice that would not be prejudicial to commissioned children.

The third chapter proposes an analysis of the positions of the ECJ and ECthR on surrogacy and its future potential impact on the right to family life. The decisions delivered this year by the aforementioned courts aimed solely at facilitating or clarifying the integration of the recourse to surrogacy with national or European administrative and labour laws. Nevertheless, it seems that the ECJ is more reluctant to ease the recourse to surrogacy for intended parents, when the ECtHR appeared to have a rather tolerant position on surrogacy and transnational surrogacy. However, they both did not pronounce themselves regarding the access or the establishment of parenthood in surrogacy cases where the intended parents are composed of a same-sex couple. For this reason, it questions the legal democratic development of surrogacy across the EU under the article 14 of the ECHR.[130]

This « Human Rights lens » indicated that the targeted futures regulation shall protect vulnerable persons, but not focus exclusively on the trafficking aspects that can adopt surrogacy. There are also contractual issues that need to be foreseen by the laws and regulations on the private parties to the arrangements (namely, agencies and clinics). Also, legal advices and necessary informations shall be available for preventing the parties to be mislead on the terms and the consequences of entering such arrangements.

In fine, it seems that there are so many contradicting forces and interests in the surrogacy market and in the debate over the ethic dimension of this service, that if the international community is seeking for more cooperation and achieving a consensus on a global approach, an interdisciplinary committee of experts should be appointed for debating over the rights and wrongs of surrogacy (in all its possible forms: altruistic, commercial, gestational, commercial, transnational) and its consequence. The debate should bring different cultural

[130] Indeed, since the access to ART is still generally restricted to heterosexual couples, the democratization for couples or individuals to ART or surrogacy regardless their sexual orientation still falls under the competence of each state.

approaches and confront two fields of law instead of a single one: international private law and human rights law. In addition, a human rights based approach is also beneficent for the states as it touches upon their interests (e.g. migration, labour, security). Unfortunately, it could consist in a way for the governments to emphasize the control over women's body and diminish the private character of pregnancy. The results of these analyses will be further employed for suggesting what features should a EU response to ISAs contain for guaranteeing the respect of Human Rights for all.

III. PART III : A REGULATIVE APPROACH TO SURROGACY

Even if family or criminal law regulates issues relating to the establishment of filiation and nationality or the enforcement of a surrogacy arrangement, human rights related concerns arise. Just as for sex work (see Part II, Chapter 3), surrogacy can be apprehended under a regulative or a prohibitive regime. The lawyer and sociologist Ergas envisions the creation of two treaty zones for international surrogacy arrangements: a « permissive » and one a « prohibitive » one (Ergas 2013). These two trails of regulation are examined in Part III, before exploring the current attempts of designing a global regulatory approach by the Hague Conference on Private International Law (HccH). To conclude, a compilation of the needed features of a future regulative approach to surrogacy will be provided from three directions: from the findings of comparative research (Brunet et al. 2013), from the analysis of the Questionnaires addressed by the HccH to the sample of states studied in the first part of this thesis, and finally, from the findings of a human rights approach to surrogacy.

A. Regulating Surrogacy Under Two Treaty Zones

As a uniform set of rules in surrogacy is hard to picture, Ergas argues that, in the short term, it is very unlikely that states will succeed in reaching a unified set of rules for surrogacy, and that in order to establish a framework, negotiations should be held, on the long term, on the meaning of filiation and citizenship, and on their attribution (Ergas, 2013: 188). This author further argues that transnational surrogacy arrangements require a reinterpretation of human rights norms. Transnational coordination could well give rise to two treaty zones: a « permissive » one and a « prohibiting » one.[131]

The permissive zone could itself be dual: with states reaching a more or a less comprehensive (i.e. permissive) treaties on surrogacy. Some countries could reach a very comprehensive and permissive treaty under international law allowing surrogacy, ease the establishment of filiation between the commissioned children and the intended parents, and the state would take a share of this new market (Ergas, 2012: 170). This treaty would rule on parentage; allocate the decision making capacity over the termination of the pregnancy; on the scope, structure, timing and allowable compensation of the arrangement; as well as on the payments and insurance coverage. Also, the state obligations that would consist in monitoring the validity of the transaction, regulating the access to records (in order to ensure the health care and living conditions of the surrogate and a national and international coordination for dispute resolution), would be provided in this very permissive treaty. Other countries could reach a less comprehensive treaty, that would provide for state responsibility in the control of the legality of the transactions. This second type of treaty would provide a clear and legal definition of maternity and contractual requirements; establish a non-governmental body of authority in charge of monitoring the agreements, ensuring the recognition of the filiation in transnational cases, and guaranteeing the good treatment of the gestational carrier as well as the gamete donors.

[131] Yasmine Ergas*, Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy* », pp. 117-188 *(Emory International Law Review, Vol.27, 2013)* 170.

The prohibiting treaty zone would consist either in countries having signed a criminalizing convention or establishing an agreement with the permissive states under international law that would seek to prevent transactions between their nationals.[132]

Ergas also applied a human rights test with the lens of the best interest of the child to these two zones, but finds liabilities to both. A « permissive » treaty zone of cooperation bears the risk of encouraging the development of the sale of children (if its terminology includes too explicit references to the « price » and « payments » in surrogacy), while the prohibitionist treaty zone, which emphasizes the criminalization of surrogacy, bears the risk of leaving children stateless.[133]

B. Private International Law Projects

The development of international surrogacy arrangements (ISAs), and more generally, of technologies impacting on reproduction (ART, IVF, DNA testing) and familial structures, lead states to question the traditional manners of establishing filiation and the recognition of social parenthood. The permanent bureau of the Hague Conference on Private and International law (HccH) started working on the issues raised by transnational surrogacy arrangements in 2010, with a mandate to achieve a consensus with a global approach.[134] The HccH undertook its work by initiating a discussion on the issues of filiation in ISAs and on determining the status of commissioned children. The permanent bureau advocates for securing the recognition of surrogacy arrangements from one country to another, with transparency on their provisions and on the sums of money exchanged, as well as for the respect of a non-discrimination principle. [135]

The work of the HccH on this project started with the drafting of preliminary reports that gathered informations from private international law, health professionals and filiation regarding the issues surrounding surrogacy. In 2013, questionnaires were released to the attention of surrogacy agencies, health clinics, legal practitioners, and member states. More recently in 2014, the European Council adopted recommendations for further gathering of information (in particular from permissive states), in order to progress in the drafting of a multilateral regulatory convention.136 The task of the HccH also consists in foreseeing a way to regulate the private sector in surrogacy arrangement. Thoughts have been given to reuse the model of the Inter-country Adoption Convention (1993).137 Indeed, some surrogacy agencies could be granted an « accredidation » just as adoption agencies.138 However, the permanent bureau of the HccH found far too many liabilities to the application of this convention to surrogacy arrangements, as the same requirements cannot be fulfilled.139 As

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[132] Ibid.
[133] The sale of children is prohibited under international human rights law, including the Convention on the rights of the child, the Palermo Protocol, the Anti Slavery Convention and is a peremptory *jus covens* norm according to the article 53 of the Vienna Convention on the Law of Treaties.
[134] Permanent Bureau of the HccH, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from ISA, (2011).
[135] Mohapatra (n 20) 432.
[136] *Conclusions and Recommendations Adopted by the Council*, 2014.
[137] The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (29 May 1993).
[138] The accreditations delivered to agencies for providing services related surrogacy would seeks the same objectives as the Article 21 of the UNCRC: to prevent the abduction, the sale of, or traffic in children (Prel. Doc. No 11 of March 2011).
Permanent Bureau of the HccH, Private International Law Issues Surrounding the Status of Children, Including Issues Arising from ISA, (2011) 12.
[139] Ibid. (Prel. Doc. No 11 of March 2011), see paras 2.« *Some of the basic requirements of the 1993 Convention simply cannot be fulfilled in international surrogacy cases. For example: (1) Consents (…) (2) Subsidiarity (…) (3) Procedural safeguards (…) (4) Prohibition on contact – there is a general rule in Article 29 of the 1993 Convention that there should be no contact between the prospective adopters and the child's parents until a number of basic conditions have been satisfied (except in the case of an in-family adoption). A surrogacy arrangement is obviously inconsistent with this principle since contact will be established between the intending parents and the surrogate when the surrogacy agreement is entered into and possibly when any medically assisted reproduction treatment takes place.* »

a matter of fact, this convention had been designed for children in needy situation, and forbids any exchange of fees (article 32. 2).

In Europe, apart from the timid initiatives of the EU[140] and the project of the Hague Conference on International Private Law, a forum of expert working toward the establishment of an international harmonization for surrogacy arrangements has been launched by the International Surrogacy Forum.141 The specialized solicitor in surrogacy Anne-Marie Hutchinson (and founder of this forum) also stresses others problems arising from the idea of using the adoption convention to surrogacy arrangements.142 The consent of the mother is needed prior to birth and she is not supposed to have any contact with the prospective adoptive parents. She furthers points out the fact that at EU level, the Brussel II Revised Regulation (2003) cannot be used to solve surrogacy arrangements disputes as it has not adequate provisions on parentage for this use.

In parallel to the initiative taken by the HccH, the Council of Europe has drafted a document on the status of children and parental responsibilities, which has not been thought for applying to surrogacy cases (see the Council of Europe, « Committee of Experts on Family Law Tasked to Draft One or More Legal Instruments on the Rights and Legal Status of Children and Parental Responsibilities », 2011 as mentioned in Prel. Doc. No 11 of March 2011: 22).

C. Recommendations

Based on the above-mentioned human rights approach and findings, it is time to consider the recommendations that follow in order to address some issues that require further action to be taken. They will be drawn from the findings of Brunet (Brunet et al., 2013), but mostly from the analysis conducted in the first part of this thesis of the questionnaires addressed to the Netherlands, UK and France by the HccH. Finally, based on the Human Rights approach to surrogacy offered by this study (Part II), some recommended human rights features to surrogacy arrangements will be suggested.

1. Legislating on Surrogacy at the European Union Level

The conclusions drawn by Brunet point at the impossibility to identify a particular trend that might consist in a liability for the Union to propose a regulative approach to surrogacy (Brunet et al. 2013). Hence, cooperation between incoming and outgoing countries in ISAs could be the key to the establishment of filiation and nationality of commissioned children while a regulation is sought out. The HccH project seems more promising for securing the situations of commissioned children in the EU.[143]

2. Needed Features of a Regulative Approach: Netherlands, France and he United Kingdom

In the questionnaires addressed to the state parties of the HccH in the project of drafting a convention on the private international law issues arising from international surrogacy arrangements, the governments had the possibility to address their concerns regarding the enforcement of surrogacy arrangement of a national or transnational nature on their territory.

[140] The research of Brunet (n 4) had been commissioned by the European Parliament as thoughts are given to harmonize surrogacy regimes across the Union.
[141] <http://www.internationalsurrogacyforum.com> (last consulted 9 July 2014)
This forum aims more precisely at resolving «*the problems concerning the establishment or recognition of a child's legal parentage, to regulate the legal consequences of parentage and with particular reference to issues of citizenship, nationality, immigration, the right to support, inheritance and the right to family life* ».
[142] Anne-Marie Hutchinson*, The Hague Convention on Surrogacy: Should we agree to disagree?* (ABA Section of Family Law 2012 Fall CLE Conference Philadelphia, October 2012).
[143] The HccH counts 76 states parties including the European Union.

The Netherlands expressed concerns regarding the uncertain legal parentage of the child, nationality, right to know their origins, the (mis) information of the surrogate mother and finally on the eligibility of the intended parents to care for a child (e.g. age, criminal record, psycho-social sustainability).[144] Furthermore, although the Dutch government gives a low priority to the creation of an international instrument on the status of children (Questionnaire The Netherlands, 2013), it expressed the interest for the project to take into consideration three features in the drafting. Firstly, the convention should provide for the (a) establishment of securities for all filiation procedures (establishment, acknowledgment and contestation) of legal parentage that would respect the human rights of the parties to the arrangement, in particular the children. Secondly, it would ensure (b) the respect of the fundament rights of all parties: the intended parents, the commissioned children (access their origins) and the surrogate mother to have a free and enlightened consent. Finally, (c) cooperation, co-ordination systems between incoming and out coming states involved in ISA should be put into place with a division of their responsibilities. :

« (i) The State of residence of the intended parents will be responsible to ensure the intended parents are eligible and that the commissioned child will be able to enter and reside in their State ; (ii) the State of residence of the surrogate mother will ensure she is eligible to enter the arrangement and that the child will be able to leave the state. » (Questionnaire The Netherlands, 2014: 36).

The government of the UK addressed few concerns regarding issues surrounding ISAs. However, it appears in the questionnaire that the authorities are interested in improving the following issues: the quality of the medical care received by the surrogate mother, the mis(informations) provided to the parties, the eligibility of the intended parents to care for the child and the contractual character of the arrangement (e.g. financial aspect and enforceability). [145]

As for France, the answers to the questionnaire indicate that the government refuses perspectives of cooperating with foreign authorities to solve issues of parentage (surrogacy being contrary to the national public order, the government refuses to facilitate by any means the recourse to this procreative method).146 It expresses in details its concerns regarding surrogacy arrangement on: the uncertainty for establishing parentage and nationality to commissioned children, the right to acknowledge a child born from surrogacy, finally on the voluntariness and the psychological impacts of surrogacy on the surrogate.[147] Moreover, (contrarily to the UK but likewise The Netherlands), France replied to the questionnaire on the necessary features that the future work of the HccH, and expressed its interest for the legal (a) status of commission children to be provided by law, with the (b) possibility to establish, contest and acknowledge legal parenthood in the respect of all parties' fundamental rights.

Thus, comparing the answers from the questionnaires, it appears that The Netherlands and France are much interested in the designing of a future convention on the status of children and that would improve the possibilities of establishment of legal parentage in surrogacy, in respect of the human rights of all parties (in particular children). [148]

[144] *Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements - The Netherlands -*, 2014: 36.
[145] *Questionnaire on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements - The United Kingdom-*, Permanent Bureau of the Hague Conference on Private International Law, 2014.
[146] Cour de Cassation, Civ 1ère, 13 septembre 2013 pourvoi H12-30.138 et F12-18.315.
[147] These concerns were already partly alluded to in the ministerial intern document issued by the Minister of Justice Taubira. Circulaire du 25 janvier 2013.
[148] Brunet (n 4) As afore mentioned, France is not willing to cooperate with foreign authorities in matters that could influence its filiation system as the government considers this as a specific national prerogative.

3. Needed Features of a Regulative Approach to Surrogacy for the Surrogate

I draw the following conclusions concerning the most fruitful features that future regulation should envisage for the surrogate.

(a) An approach in terms of Health as a human right

Considering that surrogate mothers expose themselves through pregnancy to physical and psychological risks, the respect of their rights and well-being would be potentially more efficient if human rights provisions were made in addition to provisions in private law

(b) An approach in terms of women's human rights

The objectives of non-discrimination, substantive equality and the effort to dismantle gender stereotypes in the CEDAW are positive developments for securing women's human rights (and are applicable to surrogates as well). Hence, they should be included — or serve as guiding principles — to the future convention, or regulatory international piece of legislation, on surrogacy arrangements. However, the trafficking approach presented in the aforementioned convention relating to sex work should not be transferred to surrogacy. Indeed, such a transfer would cast a doubt on the self-determination of surrogates to enter arrangements, and victimize women.

4. Needed Features of a Regulative Approach to Surrogacy for the Child

(a) An approach in terms of the discrimination of children depending of their procreative origin.

The thesis demonstrates that commissioned children's right to nationality and family life are not secure; because they are faced with governments' will to protect their standards of public order.

(b) An approach in terms of the trafficking of children.

This study also alluded to the potential usefulness of applying a certain trafficking approach to surrogacy in order to foresee and prevent the excesses related to this procreative method. Indeed, if a trafficking approach is not relevant for women, it is for children as it would secure the prohibition of the trade of children.

(c) An approach in terms of the right to identity and knowledge of one's parentage.

This issue concerns the child and surrogate mothers. In ISAs, the right to access one's origins becomes difficult. Special provisions could foresee the rights of children to knowledge on the circumstances of their procreation. The private law provisions in some countries erase the surrogate on the birth certificate (e.g. on India, see Brunet et al., 2013), and in the current state of human rights law, there is no provision on the role of the gestational mother in the construction/establishment of the child's identity.[149]

An approach to surrogacy should be tailored with the lens of the child's best interest should also take into account the issue of the monitoring of intended parents by a non-state body in charge for protecting children from abuse.

D. Final Conclusions

A global regulative approach to surrogacy in general, and international surrogacy arrangements (ISAs) in particular, is called for. Its necessity derives from the existing legal diversity in filiation laws and models of legalization of surrogacy in member states. Commissioned children of ISAs suffer from this lack of coordination. As I was writing this thesis, the European Court of Human Rights found that France had violated the right of a

[149] Which calls for research on the social meaning of pregnancy and e-evaluating or revaluating its legal value.

child to private and family life, particularly his/her right to an identity.[150] Indeed, France in its prohibitive climate had refused the establishment of filiation and nationality to children born from an ISA.

National private law and the state of international private law have not kept pace with social practices of ISA. They are insufficient in resolving disputes surrounding surrogacy. Hence parties may find themselves in inextricable life situations.[151] Attitudes toward surrogacy may be influenced by the defence of national public order (e.g. in France which has adopted a particularly prohibitive position through legislation and jurisprudence). Legal vacuums also preclude legal harmonization across the EU.[152] Therefore, children risk discrimination based on procreative origin. For example, when they are refused the delivery of travel documents, nationality and legal filiation. We do not have enough knowledge on the effects of surrogacy on the welfare of the child. For example, what is the relevance of the bond between mother and child during pregnancy?

Other parties, generally the intended parents, may suffer from these administrative and judicial struggles. Moreover, particularly in global surrogacy arrangements, where parents from the North travel to the South, surrogates risk exposure to trafficking (see comments above), unsafe medical treatments, psychological damage resulting from pregnancy (IVF, caesarean sections, womb removal, post partum depression, etc.), and/or insufficient legal counselling. Surrogacy per se has been legislated to date solely under private law (family and criminal law). Yet, disputes concerning these arrangements, and even the way that the judicial system is handling them in Europe, raise questions regarding the respect of fundament rights of one or more parties to the arrangement. Combining human rights to international private law, as I suggest, in a future regulative instrument could enhance the protection of all. Nevertheless, as a result of the Human Rights test conducted by Ergas, liabilities regarding the welfare of the child are to be found in all regulative approaches of surrogacy (Ergas, 2012). A permissive treaty includes risks of encouraging the development of child trade; whilst a prohibitionist treaty increases the risk of children being left stateless.[153] Thus, it appears that a « human rights-safe » modality of recourse to surrogacy (and especially to transnational surrogacy) is almost impossible to achieve from the perspective of the child.

Further, it appears that we lack knowledge and data on international surrogacy arrangements. Before we can hope to complete a satisfactory regulative instrument in both private and human rights law. Still more international interdisciplinary research and collaboration is needed, namely comparisons of the social and legal bond between the potential mother(s) and child, data on the concrete life situations and welfare of surrogates and commissioned children, as well as research on the relationship between public orders and the respect of fundamental rights.

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Annexe

Figure 1 - EU Action in the Field of Surrogacy

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