From Baby M to Baby M(anj): Regulating International Surrogacy Agreements

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Abstract
In 1985, when Kim Cotton became Britain’s first commercial surrogate mother, Europe was exposed to the issue of surrogacy for the first time on a large scale. Three years later, in 1988, the famous case of Baby M drew the attention of the American public to surrogacy as well. These two cases implicated fundamental ethical and legal issues regarding domestic surrogacy and triggered a fierce debate about motherhood, child-bearing, and the relationship between procreation, science and commerce. These two cases exemplified the debate regarding domestic surrogacy – a debate that has now been raging for decades. Contrary to the well-known and longstanding debate concerning domestic surrogacy, a new ethical and legal debate has emerged concerning international surrogacy agreements. One aspect of this debate, which I will explore in this paper, is that international surrogacy requires a more robust regulatory regime. I will articulate a variety of solutions to effectuate this regulatory regime and will enumerate the advantages and disadvantages of these solutions. Against this background, I propose a Hague international convention to regulate international surrogacy agreements, similar to the existing Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption. Notwithstanding my support of a Hague convention, this alone will be insufficient to address some of the issues raised by international surrogacy. Therefore, in addition to a Hague convention to regulate international surrogacy, I propose the implementation of domestic regulation similar to the proposed 2010 Indian Assisted Reproductive Technology (Regulation) Bill and Rules or Israel’s 2012 expert committee recommendations and 2014 proposed regulation.

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Introduction

One of the most steadily evolving, growing, and ethically/legally challenging issues in family law is the question of the desirability and feasibility of surrogacy arrangements. Notwithstanding the fact that surrogacy arrangements have existed for centuries, and even have roots in the biblical period, the debate surrounding surrogacy continues to rage and attract enormous attention both within and outside academia. This debate was reinvigorated in the modern era approximately thirty years ago with the heart-wrenching case of Baby M in the United States and the case of Baby Cotton in England. Since then the judiciary and academic circles have debated the issue of surrogacy at length. These debates largely concerned the issue of domestic surrogacy. Even a brief glance at academic publications over the past decade, however, suggests that the focus of this debate has changed from domestic surrogacy to international surrogacy. The focus of this article will be on the desirability of a long term Hague convention on international surrogacy. This article also advocates for the adoption of supplemental domestic regulation to counteract some of the limitations of an international Hague convention.

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1 See, e.g., Charles P. Kindregan & Danielle White, International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements, 36 SUFFOLK TRANSNAT'L L. REV. 527, 529 (2013) (author’s preamble - “We recognize that this area of law is quickly emerging and changing, and particular statements made in this article may need revision or qualification after publication”).

2 For a survey of various biblical sources and the statement that surrogacy has been a common phenomenon for centuries, see Joseph Schenker, Legitimising Surrogacy In Israel: Religious Perspective, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 243, 243 (Rachel Cook et al. eds., 2003). For a survey of different surrogacy contracts signed during the first half of the last century and for divided opinions regarding whether those contracts were adoption agreements or child custody agreements, see Hutton Brown et al., Legal Rights and Issues Surrounding Conception, Pregnancy and Birth, 39 VAND. L. REV. 597, 645-50 (1986). For more recent but still less known cases, see Leslie Bender, Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law, 12 COLUM. J. GENDER & L. 1, 10 n. 26 (2003). The most important of these cases are Stiver v. Parker, 975 F.2d 261 (C.A.6 (Mich.1992); Huddleston v. Infertility Center of America, Inc., 700 A.2d 453 (Pa.Super. 1997); R.R. v. M.H., 426 Mass. 501, 689 N.E.2d 790 (Mass.1998).

In a previous article, I observed that in the past the debate was whether surrogacy was an ethically and socially acceptable practice, and therefore warranted legal protection. Now, however, the practice of domestic surrogacy has gained increased social and legal acceptance; particularly when surrogacy agreements are entered into by parties with altruistic motives. The current dilemma concerning American domestic surrogacy centers on the question of how to execute surrogacy contracts in the best possible way in order to maximize the feasibility and durability of the contracts at the state level. Some even endorse the notion of regulating these agreements at the federal level, but doubt remains as to whether federal regulation is appropriate or forthcoming. These, however, are questions of implementation, not threshold questions relating to surrogacy as a larger idea.

Much has been written concerning surrogacy arrangements in various European nations where the general approach toward surrogacy is much more restrictive and regulated than in the United States and other countries around the globe. These writings discuss the complications that arise in the context of international surrogacy agreements in which


6 See, e.g., Austin Caster, *Don’t Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477 (2011); Emily Gelmann, "I'm Just the Oven, it's Totally Their Bun": The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents, 32 WOMEN'S RTS. L. REP. 159 (2011); Patton, supra note 3.


8 See, e.g., FRANCE WINDDANCE TWINE, *OUTSOURCING THE WOMB :RACE, CLASS, AND GESTATIONAL SURROGACY IN A GLOBAL MARKET* (2011) and specifically in Argentina, Australia, Brazil, China, Guatemala, India, Israel, Japan, Mexico, New Zealand, South Africa, Venezuela at Trimmings & Beaumont, ibid.
intending parents contract transnationally with foreign surrogate mothers. These writings demonstrate that the stringent approach of certain nations toward surrogacy has yielded tragic results that cause significant harm to the various parties to those agreements, including the child. One endemic issue in the area of international surrogacy, for instance, is the economic, religious, social, racial, and gender disparity between surrogates in developing countries and intending parents from wealthier nations. This disparity leads to questions concerning the commodification and exploitation of women and the poor.

It is worth noting that while these concerns also arise in domestic surrogacy arrangements, they are exacerbated in the international context. These complex issues have prompted a vivid academic debate regarding various aspects of surrogacy outside the Euro-American context. These issues of inequality and exploitation demand a robust domestic and international regulatory framework. Such regulation is imperative to enable the continuation of these agreements while thoroughly preserving the best interests and the human rights of the contracting parties, particularly the conceived child. Only comprehensive domestic and/or international regulation will minimize the ethical and legal fears that have emerged concerning these cross-border agreements.

This Article proceeds in four parts. Part one explores the various medical, ethical and legal pitfalls of cross-border surrogacy agreements. Specifically, part one traces the medical and ethical drawbacks of surrogacy tourism, a subcategory of reproductive and worldwide medical tourism, both for the intending parents and for the surrogate. This part then explores the problem of the parentless and stateless child, and the criminal aspects of the international

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1. The Current Medical, Ethical and Legal Challenges Posed by International Surrogacy Agreements

1.1. Medical and Ethical Problems Arising from Surrogacy Tourism

In the past two decades there has been a dramatic increase in the number of couples and individuals traveling abroad in order to privately obtain medical care. While there is no accurate count of the number of people engaged in this new tourism,\(^\text{15}\) there is no doubt that it is a worldwide phenomenon spanning patients in many countries.\(^\text{16}\) Moreover, this phenomenon has grown with the expanded use of the internet and the simplicity of international transportation into a rapidly growing multibillion-dollar industry involving thousands of patients from the United States alone.\(^\text{17}\) For instance, it is estimated that about 6 million people traveled abroad for medical reasons in 2008, and in 2012 the global market for this industry exceeded 100 billion dollars.\(^\text{18}\) Further, scholars predict that given the global availability and movement of reproductive technologies, medical tourism will continue to grow at a fast pace.\(^\text{19}\)

There are many reasons why patients choose to leave their home country and seek medical care oversees including dramatic reductions in price and, in some cases, prompting by self-
insured firms and insurers. This is particularly true in the United States, which is undergoing a health insurance overhaul, as well as in other countries with unpredictable insurance landscapes. Other reasons include the availability of specific care service, the lack of certain medical technologies in a patient’s home country, better or safer medical conditions in a foreign county, or finding a country with more amenable social or religious norms. Individuals also seek medical treatment in foreign countries to protect their privacy, or to fulfill personal preferences such as dictating the race, ethnicity or gender of a child born to a surrogacy arrangement. Another main reason individuals engage in medical tourism is, in the words of Prof. Glenn Cohen, “Circumvention Tourism” which involves patients who travel abroad for services that are legal in the patient’s destination country but illegal in the patient’s home country. In this context, Prof. Cohen sheds light upon the following four issues – female genital cutting (FGC), abortion, assisted suicide, and reproductive technology.

The proliferation of international surrogacy agreements and the use of reproductive circumvention tourism is particularly relevant in the case of single individuals and same-sex couples since these categories of people are often excluded from utilizing surrogacy services in their home countries. If in the past the notorious “wild west” of reproductive medicine referred to the proliferation of fertility treatments in America, today, some scholars claim that the wild west of reproductive medicine is visible primarily in the field of cross border fertility treatment – referred to in academic literature as “procreative tourism,” a branch of medical tourism. In reproductive tourism, individuals, due to their social or medical

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20 See Cohen, supra note 17, at 1486-88.
25 For the notion of “procreative tourism”, see e.g., Lisa Hird Chung, Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet, 15 MINN. J. INT’L L. 263 (2006); Emily Stehr, International Surrogacy Contract Regulation: National Governments’ and International Bodies’ Misguided Quests to Prevent Exploitation, 35 HASTINGS INT’L & COMP. L. REV. 253 (2012) passim; Debra Spar,
infertility, seek to utilize reproductive technology in foreign countries in order to conceive a child with whom they may or may not share a genetic connection. In the context of international surrogacy, the resulting child may have genetic ties to one or both of the intending parents, but will have no physiological ties to the intending mother because the surrogate and not the intending mother will carry the child to term.

While the ethical, social and legal dilemmas of domestic surrogacy have been the main focus of scholars and the public, international surrogacy significantly exacerbates these dilemmas. The creation of a family by relying on the procreative ability of women in developing countries raises many acute fears. For instance:

(1) The home country of the intending parents often finds it easier to outsource the ethical, medical and legal concerns that surround international surrogacy to the destination country of the surrogate. This causes the acute problems of surrogacy to fall on the destination country which is often part of the developing world and cannot easily cope with these problems. Further, these destination countries often lack the basic legal and medical infrastructure to address the medical legal and ethical concerns of the surrogates.26

Practically speaking, there is a risk that the surrogate, often living in a developing nation, will be exploited and dehumanized. This risk is exacerbated by endemic global issues of gender, class, race and ethnic hierarchies. In some respects, this problem has become so acute that the inequality between the parties, in and of itself, has become a driver of reproductive tourism.27 Indeed, in the case of domestic surrogacy, the intending parents often have three times the income of the surrogate.28 On the international level, where common cross-border surrogacy arrangements involve parties from vastly different socio-economic classes, with the surrogate generally living in a developing nation, this disparity can be far greater. Thus, while surrogacy arrangements can yield an income for the surrogate that is equivalent to several

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27 See, e.g., supra note 9; Ikemoto supra note 17, at 309.

years of an average salary, the arrangements raise concerns of exploitation and coercion. These concerns have prompted calls for regulation. 29

(2) International surrogacy arrangements raise the risk that the intending parents, as well as the surrogate, will receive poorer medical care than they would have in the wealthier home country of the intending parents. This fact can put the intending mother (in a case where she uses her own ova), the native surrogate mother, and the conceived child at risk. 30 In addition, the intending parents may return to their home country with their child, but without adequate information on the child’s medical needs and how to administer proper follow up care to the child. 31 A rare empirical study that was conducted regarding this issue concluded that one of five dominant health and safety risks that confront reproductive travelers is discontinuity of medical documentation, and achieving uninformed decision-making on the part of the intending parents. 32 Moreover, this study sheds light upon another unexplored concern - surrogacy travelers may return to their home countries with unknown infections. Therefore, procreative tourism might have unintended and undesired side-effects upon a surrogacy consumer’s home healthcare system. 33

Besides the aforementioned medical problems there are also additional ethical-legal concerns that are exacerbated in the cross-borders context. Intending parents, in some cases, have suffered for years from infertility and may have undergone unsuccessful fertility treatments, miscarriages and the delivery of a deceased baby. These parents may be so eager to bring a child into the world that they rely on misinformation disseminated by fertility treatment clinics and the internet. 34 These misrepresentations are very common in the international realm where the internet plays a significant role in bridging the distance, language and culture of the parties to the agreement. The blind reliance by these intending parents...


30 See Leigh Turner, ‘First World Health Care at Third World Prices’: Globalization, Bioethics and Medical Tourism, 2 BIOSOCEITIES 303, 319 (2007); Ikemoto, supra note 17, at 293.


32 See Cohen, supra note 17.

33 See in length Crooks et al., supra note 15.

parents, coupled with their desperation to have a child, reduces their capacity for informed consent, and can lead them to agree to contracts with unfavorable terms. These ethical, legal and medical risks exemplify the fact that cross-border reproductive tourism endangers not only the surrogate mother but can have negative effects on the intending parents as well, notwithstanding the fact that the intending parents are often in a stronger bargaining position and are more financially stable.

(3) Surrogacy tourism may reduce access to health care for the destination countries’ poor. Some argue that foreign consumption will crowd out domestic consumption, resulting in an internal “brain drain” and a resource drain. Put differently, the large amount of money involved in surrogacy tourism may attract physicians to private clinics in a well-paying field of practice and away from public hospitals. This could create a shortage where health care is most needed and decrease access to healthcare in developing countries, particularly in poorer public hospitals. Accordingly, a focus on fertility treatments in developing countries could reset a country’s healthcare priorities and deprive poorer patients of much-needed medical services. Additionally, surrogacy tourism could prompt poorer countries to divert resources from public to private institutions to attract foreign patients, which would allow affluent private hospitals to capture a larger share of medical revenue.

1.2. The Legal Problem of the Parentless and Stateless Child

Issues regarding the validation and enforceability of agreements regarding reproductive technologies are not new. Historically, the vast majority of fertility treatments suffered from “labor pains,” and the first children born from these technologies suffered unjustly from the

35 Marcia C. Inhorn & Daphna Birenbaum-Carmeli, Assisted Reproductive Technology and Culture Change, 37 ANN. REV. ANTHROPOL. 177, 179 (2008); See also, Margalit, supra note 4.

36 See, e.g., Ikemoto, supra note 17, at 302-03; Nathan Cortez, Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care, 83 IND. L.J. 71, 109-11 (2008); Atul D. Garud, Medical Tourism and Its Impact on Our Healthcare, 18 NAT’L MED. J. INDIA 318, 319 (2005). For a possible refutation of this concern with respect to its empirical and normative components, see I. Glenn Cohen, Medical Tourism, Access to Health Care, and Global Justice, 52 VA. J. INT’L L. 1 (2011) (currently there is no evidence for diminutions in health care access by the destination country poor; the claim for Global Justice obligations stemming from medical tourism is quite weak when we deal with those paying out of pocket for essential services).

37 See, e.g., Yehezkel Margalit, To Be or Not to Be (A Parent)? - Not Precisely the Question; the Frozen Embryo Dispute, 18 CARDOZO J. L. & GENDER 355 (2012) (the legality and enforceability of disposition agreements regarding frozen embryos).
stigma of illegitimacy.\textsuperscript{38} However, over time, many countries gradually began to understand and appreciate the benefits of reproductive technologies. In turn, the legal systems of these countries have slowly begun to legitimize these technologies, and children born to these technologies face far less stigma than in the past.\textsuperscript{39} In a previous article, however, I explored the continued “labor pains” of domestic surrogacy contracts in the majority of states in the United States. I claimed that these labor pains cause harm to the contracting parties, and specifically the resulting children who are the subject of such contracts.\textsuperscript{40}

In this subpart I proceed one step further and explore the new “labor pains” of international surrogacy agreements felt by parents and children, particularly with respect to the notion of illegitimacy. Professor Richard Storrow precisely defined this phenomenon as “The New ‘Illegitimacy’ in International Surrogacy.”\textsuperscript{41} In the ancient era illegitimacy was defined as a distinct legal category and was largely promoted by the church and society at large in order to channel a conceived child into a legally recognized marriage.\textsuperscript{42} While this notion is now largely socially and legally defunct in many jurisdictions, a remnant of this notion remains in the context of international surrogacy. Thus, if an individual or couple try to evade the scrutiny of a home country with strict familial norms by crossing the border to another destination country, when the individual or couple return, the conceived child may not be legally deemed “legitimate” within the definition of the home country, even if the child is genetically related to the intending parents.\textsuperscript{43}

If in the traditional case of illegitimacy a child might suffer from poverty, abandonment, banishment or even infant mortality,\textsuperscript{44} in the modern era the child might suffer from not being legally recognized as the legal child of his intending parent. As a result, the child can be left

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\textsuperscript{39} Dominique Ladomato, Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation, 23 HASTINGS WOMEN’S L.J. 245, 247 (2012).

\textsuperscript{40} See Margalit, supra note 4.


\textsuperscript{42} See Storrow, supra note 38, at 568-71.

\textsuperscript{43} See ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 48, 93, 170 (1999); E. WAYNE CARP, FAMILY MATTERS: Secrecy and Disclosure in the History of Adoption xiii, 4 (1998).

\textsuperscript{44} See, e.g., HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 69 (1971); JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY (1982); Storrow, supra note 38, at 562-63 n. 5-13.
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with no parents and no nationality. This problem of the stateless child has grown steadily. In France it was recently estimated that each year at least 400 couples suffer from this new illegitimacy – a situation defined, with respect to the children, as “a new category of pariahs.” This tragic result of non-recognition of the parent-child relationship causes a number of serious consequences for the rights and welfare of the child, particularly regarding the child’s right to acquire a nationality. This problem stands in stark contrast to a nation’s general obligation to ensure that children do not end up stateless. Furthermore, even if the conceived child is eventually permitted to travel home, there is a risk that, due to the lack of the legal recognition of the child as the legitimate child of his intending parents, and the lack of a bright-line parentage determination, the child will suffer for his or her entire life from “limping” legal parentage, with all the ramifications of this vague designation.

Even a quick glimpse at several cases in this field demonstrates that the problems of the parentless and stateless child are inherent in cross-border surrogacy arrangements. One well known case, Baby Manji, has prompted a significant debate with respect to international surrogacy, much like the Baby M case did in the case of domestic surrogacy. In the Baby Manji case, a Japanese couple used a gestational surrogate with a donor egg in India, but divorced before the baby was born. The wife did not want the baby, but the father did. However, at the time, Japanese law did not recognize surrogacy and Indian law would not allow a single man to adopt a baby. In order to be recognized as the legal parent the father had to conduct an uphill legal battle both in Japan, which did not recognize the legality and enforceability of the surrogacy agreement, and in India, due to India’s strict prohibition on a single intending father adopting a female baby, especially when the parent is not Hindu. As a

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45 A stateless person is one who is “not considered as a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117.

46 See Storrow, supra note 38, at 566 n. 39-40.


48 See HCCH 2011, supra note 11, at Section VI(a); See also HCCH 2012, supra note 11, at 4; European Parliament, supra note 7, at 10 and passim; study of legal parentage, supra note 122, at 68 - 79
result, the baby was stuck in India for almost six months waiting for her Japanese passport following her recognition as the legal daughter of the Japanese father.\footnote{Yamada v. Union of India, 2008 IND LAW SC 1554 (Sept. 29, 2008). For a fuller description of this case, see Mohapatra, supra note 19, at 417-20; Anika Keys Boyce, \textit{Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Agreements}, 36 \textit{SUFFOLK TRANSNAT'L L. REV.} 649, 663-66 (2013). For similar cases and for the accompanying legal discussion of those cases, see respectively \textit{Re G (Surrogacy: Foreign Domicile)} [2008] 1 FLR 1047; Erin Nelson, \textit{Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy}, 41(1) \textit{JOURNAL OF LAW, MEDICINE \\

In another well known case a British couple made a surrogacy arrangement with a Ukrainian woman who gave birth to twins. In the U.K a priory a foreign commercial international surrogacy arrangement is not validated and recognized. Due to the difficulty of obtaining English citizenship for a child born to English intending parents and a Ukrainian surrogate, a British court was concerned that the child was at risk of being “marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home.”\footnote{See \textit{Re: X \\
& Y (Foreign Surrogacy)} [2008] EWHC 3030 (Fam); In X \\
& Y (Foreign Surrogacy) [2009] 1 FLR 71. For a legal analysis of this case, see Margaret Ryznar, \textit{International Commercial Surrogacy and Its Parties}, 43 \textit{J. MARSHALL L. REV.} 1009 (2010) passim; Ergas, ibid, passim. For similar international problems see the additional cases enumerated at Storrow, supra note 38, at 598 n. 268; In re L, [2010] EWHC (Fam.) 3146 (Eng.) (even careful and conscientious parents still receive incorrect information), discussed at Storrow, supra note 38, at 607-08;} Ultimately, the court relied on the best interests of the child (hereinafter: BIC) standard to recognize the child as a legitimate child of the intending parents, and therefore a citizen of the U.K. The court also approved payments to the Ukrainian surrogate mother of €27,000.

Similarly, the constitutional court of Austria dealt with a child born pursuant to an international surrogacy agreement between Austrian intending parents and a Ukrainian surrogate. The child was genetically related to the intending parents, but there was doubt concerning the identity of the surrogate mother since the only proof available was a foreign and unreliable Ukrainian birth certificate. Therefore, the Austrian government would not validate the birth certificate and would not designate the intending parents as the legal parents of the child. The Austrian court concluded that by refusing to recognize this foreign birth
certificate, the conceived child would be left without Ukrainian nationality or Austrian nationality, leaving the child stateless. Therefore, the court recognized the parental claim of the intending parents and awarded the child citizenship. The court based its decision on Austrian legislation which states that a child has the right to Austrian nationality from birth, even when born outside of Austria, since Austrian nationality is determined exclusively on the ground that a child’s parents are Austrians. In addition, the court based its conclusion on the scope of protection of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), which protects family life, including the right of a child to a nationality.51

Finally, in a German case an Indian surrogate was inseminated in India with the sperm of a German intended father. He requested the acknowledgement of his paternity in order to take the resulting twin children into German territory without a visa. Germany, however, considers the surrogate mother to be the legal mother, and the children, as a result, were deemed Indian, without the possibility of entering Germany. Moreover, the intended father could not establish parentage in either Germany or India. While German judges suggested that the intending father attempt an adoption procedure, an alternative solution was found, and in May of 2010 the German Embassy gave them a visa, probably on a humanitarian basis, so that the children could enter Germany.52

1.3. The Criminal Aspects of International Surrogacy Agreements

Various states in the United States, as well as several European and Asian nations, do not validate surrogacy agreements. For instance, Italy,53 Norway, Spain, France, and Germany

52 Verwaltungsgericht (VG) Berlin, 26th of November 2009 - VG 11 L 396.09; European Parliament, supra note 7, at 113-14. See also just recently the following French cases which recognize the right of transnational surrogacy’s children to enter France: Mennesson v France and Labassee v France cases (n°65192/11 & n°65941/11); Gregor Puppinck, & Claire de La Hougue, ECHR: Towards the Liberalisation of Surrogacy: Regarding the Mennesson v. France and Labassee v. France Cases (N°65192/11 & N°65941/11) (September 1, 2014), REVUE LAMY DROIT CIVIL, n° 118, September 2014. p. 78, http://ssrn.com/abstract=2500075 (“These judgments will have serious consequences on national law as well as European and International law.”).
53 So far the Italian regime of surrogacy restrictions, providing an absolute ban with penal consequences, has not been applied; no criminal case has emerged; no intended parents or surrogate mothers have ever been criminally convicted, see European Parliament, supra note 7, at 108, 297.
have entirely prohibited surrogacy.\textsuperscript{54} Similarly, China (mainland), Switzerland,\textsuperscript{55} Canada, the Czech Republic, Ireland, the Netherlands,\textsuperscript{56} Greece, South Africa, Israel,\textsuperscript{57} Australia,\textsuperscript{58} New Zealand, United Kingdom,\textsuperscript{59} France,\textsuperscript{60} and Bulgaria,\textsuperscript{61} have all, to varying degrees, limited or prohibited surrogacy agreements. Residents of these countries, who cannot utilize surrogates in their home countries due to the fear of prosecution, may resort to surrogacy arrangements in countries more amenable to surrogacy. Increasing globalization, along with internet resources including dozens of websites advertising surrogacy services, make these cross-border arrangements increasingly possible.

While criminal conduct is possible in the context of domestic surrogacy arrangements, it is more common and problematic in the cross-border scenario. This is due, in part, to the

\textsuperscript{54} For a survey of the negative legal attitudes toward surrogacy inside and outside the U.S., see, e.g., Carla Spivack, \textit{The Law of Surrogate Motherhood in the United States}, 58 AM. J. COMP. L. 97, 514-5, 523 (2010). For this list of states, see, respectively, Storrow, \textit{supra} note 38, at 595-604; Sarah Mortazavi, \textit{It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy}, 100 Geo. L.J. 2249, 2273 (2012).

\textsuperscript{55} In China or Switzerland, entering into a surrogacy arrangement can subject the parties involved or any intermediaries or medical institutions facilitating the agreement to criminal sanctions. See HCCH 2012, \textit{supra} note 11, at 9 n. 44.

\textsuperscript{56} In Canada, the Czech Republic, Ireland, and the Netherlands commercial surrogacy is prohibited through either express criminal law provisions or general criminal law provisions such as those relating to child trafficking, see HCCH 2012, \textit{supra} note 11, at 10-11 n. 52. In the Netherlands, although there is no specific legal regulation of non-commercial surrogacy, commercial surrogacy is prohibited by certain provisions of the Criminal Code that criminalize the commission of certain acts committed as part of a commercial surrogacy arrangement. The Netherlands objective to fight against commercial surrogacy resulted in the introduction in 1993 of article 151(b) to the Dutch Criminal Code, see European Parliament, \textit{supra} note 7, at 302.

\textsuperscript{57} In Greece and Israel entering into any arrangement which is not compliant with certain legislation constitutes a criminal offense. Practically speaking, while the penalties for engaging surrogacy in South Africa and Greece are harsh, including imprisonment for two years at least, and a payment of damages of at least 1,500 Euros, no criminal sanctions have ever been ordered in a surrogacy case. See, respectively, article 26 paragraph 8 of Law 3305/2005 in Greece; European Parliament, \textit{supra} note 7, at 350.

\textsuperscript{58} The Australian Surrogate Parenthood Act 1988 and the Infertility Treatment Act 1995 prohibit various forms of surrogacy agreements and include penalties for intermediaries and third-parties. Further, this legislation specifically provides for extraterritorial effect.

\textsuperscript{59} In these three countries criminal provisions are limited to entering into, or brokering, a commercial arrangement. In the U.K the Surrogacy Arrangements Act of 1985 criminalizes certain activities relating to commercial surrogacy.

\textsuperscript{60} Since 1994, French law prohibits all forms of surrogacy. See European Parliament, \textit{supra} note 7, at 105.

\textsuperscript{61} Current Bulgarian legislation contains a series of restrictive and prohibitive provisions relating to surrogacy. See article 182 of the Bulgarian Penal Code and Part IV, article 5(14) of the Ordinance Number 28 on Assisted Reproduction from 20 June 2007; \textit{See also} European Parliament, \textit{supra} note 7, at 234-35.
disparity in regulation between the regulation of this practice in the country of the intending parents and that of the surrogate mother. This disparity is often not taken into consideration ex-ante, when signing the surrogacy contract. Thus, once these intending parents achieve the goal of producing a child overseas, the intending parents often find that the road home can be fraught with difficulty. Desperate intending parents may even resort to criminal measures to attempt to bring a child home. One prevalent method utilized by intending parents in the European Union is to present a foreign birth certificate to a local civil registrar and ask for “transcription” into civil status records, while failing to mention the fact that the child was born to a surrogate. These births are recorded as ordinary overseas births and the intending parents acquire legal parentage in their home state. This omission, however, amounts to a criminal offence in most of these States. Indeed, Italian prosecutors have started to take a more robust approach against intending parents who are found to have fraudulently registered themselves as the legal parents of a child born abroad following a surrogacy arrangement, a violation of Art. 567(2) of the Italian Penal Code.

In addition to omitting the source of the child, intending parents have resorted to other criminal acts such as smuggling a child across a border. In one such case a French intending father was prosecuted for attempting to smuggle twin girls born to a surrogate mother in Ukraine into Hungary. In another case, a Belgian same-sex couple was prosecuted for trying to smuggle their child from Ukraine into Poland.

Moreover, the unregulated nature of international surrogacy is a breeding ground for opportunistic fraud. In one case the Dutch court dealt with a surrogacy agreement that was carried out in Belgium between a Belgian surrogate mother and Belgian intending parents. The surrogate mother was inseminated with sperm from the intending father. As a result of the deterioration of the relationship between the surrogate mother and the couple, the

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62 See HCCH 2012, supra note 11, at 20 n. 123.
63 HCCH 2012, supra note 11, at 25 n. 152.
surrogate mother pretended that she had a miscarriage. After the birth, the surrogate mother entrusted the baby, who was called baby Donna, to a Dutch couple, in return for payment. The Dutch couple informed the Dutch authorities that they would like to adopt the newborn without specifying that the child was coming from abroad. Finally, after the fraud was revealed, the Dutch couple was prosecuted by the public prosecutor and was sentenced to an eight-month prison sentence, 240-hours of community service and a fine of 1,000 EUR with a two-year suspended sentence for forgery and illegal adoption. Similarly, on October 12, 2012, the Criminal Court of Oudenaarde sentenced a surrogate mother and her husband to term of deferred imprisonment of one year and a fine of 1,650 EUR for inhumane and degrading treatment. It also sentenced the Dutch couple to a fine of 1,650 EUR.

Another example of the fraud possible in unregulated international surrogacy markets is the case of the “baby-selling ring.” In this case three women recruited American and Canadian women between the years 2005 and 2011 to serve as surrogates. The three women arranged for the surrogates to fly to Ukraine to be implanted with embryos from donor eggs and donor sperm. For months, until the women were in their second trimester of pregnancy, these “surrogates” carried fetuses for which there were no intended parents. Thereafter, the three advertised to potential adoptive parents that a “Caucasian” infant was available, with “high expenses” due to a surrogacy arrangement that “fell through.”

1.4 The Inadequacy of International Human Rights Conventions

Preexisting regimes such as article 8 of the ECHR, and international United Nations (hereinafter: U.N.) conventions, such as articles 7-10 of the U.N. CRC are insufficient to address the challenges of international surrogacy. The ECHR’s article protects the right to privacy and family life from government intrusion. For our purposes, this might include the right to produce a child via surrogacy either domestically or internationally. Furthermore, and

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66 See, e.g., Mohapatra, supra note 19, at 415-17; Mortazavi, supra note 54, at 2282-83. For less known additional “rings” in India near Mumbai and in Thailand, see, respectively, Cut-Price Babies (from the press) IX(2) INDIAN JOURNAL OF MEDICAL ETHICS 86 (2012); Thai Police Free Women From Surrogate Baby Ring, AFP (Feb. 24, 2011), http://www.google.com/hostednews/afp/article/ALeqM5gXBt7gEuqdnii4KYH2zcvjZvsFpQ?docId=CNG.e4206a773b164839c18a6b3802794fe5.6d1.

67 The full text of this article is as the following – “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right…”, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, www.echr.coe.int/Documents/Convention_ENG.pdf.
more important for our discussion, the CRC’s articles maintain a child’s right to be registered immediately after birth and that the child shall have the right from birth to be cared for by his parents, to be respected, and to have a nationality. The parties to this convention are obligated to avoid the possibility of stateless children and make sure that children are not being separated from parents against their will. If from some reason a child is separated from one of his parents, the parties to the treaty should respect the child’s right to maintain personal relations and direct contact with both parents on a regular basis. In addition, if the separated child or his parents applies to enter or leave a state for the purpose of family reunification, the state shall handle the request in a positive, humane and expeditious manner.  

The problem with reliance on these broad treaties and conventions is that most states in the E.U. have a very stringent approach toward surrogacy. Given this hostility, even a broad and lenient interpretation of these treaties and conventions may be of little utility in bolstering the rights of the surrogate and the conceived child. Indeed, the treaties themselves subordinate a broader view of children’s rights to local jurisdictions and their interpretation of the BIC.  

What this means is that the rights of children may be undermined in a given locality based on a local interpretation of the BIC, thereby undermining cross-border arrangements. Indeed, this was the justification for a uniform prohibition in Australia (except in Tasmania) on commercial surrogacy and an acceptance of gestational surrogacy in only limited circumstances. This legal process was deemed to be in accordance with the “best interests of the child” because it ensured that the child would not be left stateless or parentless. This example also demonstrates that reliance on idiosyncratic and regional notions of the BIC can be problematic and that a broader solution is needed.

The main implication of relying on local, stringent approaches to surrogacy is that it undermines cross-border surrogacy arrangements and can undermine the plain meaning of the

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68 Articles 9-10 of the CRC, supra note 47.
69 See article 9 of the CRC maintains a child’s right not to be separated from his parents “except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”. Similarly, article 8 of the ECHR dictates that the right of preventing interference by a public authority is maintained “except such as is in accordance with the law and is necessary in a democratic society…”.
70 Ergas, supra note 49, at 181 (“As the Mennesson and Quebec cases so vividly demonstrate, at least some judicial authorities will find it possible to reconcile the best interests principle with a prohibitionist stance toward surrogacy”).
71 See also European Parliament, supra note 7, at 63.
treaties and conventions previously discussed, as well as common sense. Moreover, even when courts apply these treaties they do so only in an ad hoc, post factum manner, and only as a last resort and in sporadic cases to assist a child to return to his parents’ home residence. These cases emphasize time after time that the decisions rendered are not binding precedent. Finally, in the American context, it should be noted that the U.S. has not ratified the C.R.C. Therefore, given the role of America in the international context, the C.R.C. is simply not a valid solution to the problems implicated by international surrogacy.

Similarly, general human rights treaties are also insufficient for regulating cross-border surrogacy arrangements. The League of Nations and later the U. N. has delineated and bolstered various human rights, including certain basic rights for children, in various declarations, treaties and conventions. The Geneva Declaration of the Rights of the Child (“DRC”) generally recognizes that “mankind owes to the Child the best that it has to give.” The Universal Declaration of Human Rights (“UDHR”), articulates a child’s right to enjoy social protection. The International Covenant on Civil and Political Rights (“ICCPR”) explicitly bolsters the right of every child to acquire a nationality and be registered immediately after birth. The International Covenant on Economic, Social and Cultural


74 Bruce Hale, Regulation of International Surrogacy Arrangements: Do We Regulate the Market, or Fix the Real Problems?, 36 SUFFOLK TRANSNAT’L L. REV. 501, 525-26 (2013).


76 Universal Declaration of Human Rights, supra note 73 – “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.” (article 25(2)); Bill Piatt, Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents, 63 NOTRE DAME L. REV. 35, 51 n. 130 (1988); Mary Ann Glendon, Knowing the Universal Declaration of Human Rights, 73 NOTRE DAME L. REV. 1153, 1180-81 (1998).

77 Int’l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 – “Every child shall be registered immediately after birth and shall have a name; Every child has the right to acquire a nationality” (article 24(2)-(3)) .http://www.hrcr.org/docs/Civil&Political/intlcivpol.html; Carol A. Batchelor, Statelessness and the Problem of Resolving Nationality Status, 10 INT’L J. REFUGEE L. 156, 166, n. 28 (1998); Shani M. King,
Rights (‘‘ICESCR’’), emphasizes that every child is deserving of a special measure of protection and assistance.78

The common denominator of these treaties and declarations is recognizing and bolstering the basic rights of children conceived by traditional or nontraditional measures, and recognizing their status as deserving special treatment and care. More specifically and importantly for our discussion, is the general right of these children to be recognized as the legal child of their parents and to a nationality.79 Nonetheless, these generalized statements of rights are insufficient for the sensitive and complex scenario of cross-border surrogacy and can be easily undermined in that context. This is particularly true given the negative view of surrogacy held by many countries. Indeed, given the generality of the statements, it is possible to argue that the statements do not apply to surrogacy arrangements and that preserving the rights of certain parties actually requires a rejection of surrogacy arrangements. Further, as cross-border arrangements and the technology of reproduction become more complex and prevalent, the sociological, ethical, and legal challenges posed by these arrangements will only increase.


79 See the following statements taken, respectively, from the CRC’s preamble and principle 3 – “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”; “The child shall be entitled from his birth to a name and a nationality”; “He (the child) shall, wherever possible, grow up in the care and under the responsibility of his parents”. For the full picture and discussion of those human and children rights in light of the broader international human rights law’s discourse, see Boyce, supra note 49, at 659-61; Barbara Stark, Transnational Surrogacy and International Human Rights Law, 18 ILSA J INT’L L. & COMP L 369 (2012). For a survey of the recent European Court of Human Rights’ verdicts recognizing the resulted child’s rights even via international surrogacy arrangements, see PERMANENT BUREAU, THE PARENTAGE/SURROGACY PROJECT: AN UPDATING NOTE, Prel. Doc. No 3A of February 4 - 7 (2015) (hereinafter: an updating note), http://www.hcch.net/upload/wop/gap2015pd03a_en.pdf.
2. Methodologies for Addressing the Problems Posed by International Surrogacy

2.1. Fully Permit or Ban International Surrogacy

In the face of the myriad problems posed by international surrogacy, many have called for prohibiting or criminalizing this practice. On a fundamental level, these calls embody the view that surrogacy agreements turn children and the procreative capacity of women into a commodity. Some view these agreements as violating the child’s and mother’s human dignity and some even equate them to baby selling per se. These criticisms are informed by the notion that it is unethical to conceive a child with the intention of relinquishing him immediately after birth; especially when the main incentive for the mother is money. Moreover, these concerns are exacerbated by the fact that, often, a surrogate mother is racially, socially and economically vulnerable, raising the ethical concern that she is being coerced and the legal concern that the surrogate may change her mind due to a change of heart or a change of circumstances. Additionally, the intending parents may be found to be unfit parents, thereby harming the child.

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80 The discussion of how private international law can be used for regulating cross-borders surrogacy arrangements is beyond the scope of this research. An initial discussion of this issue can be found in the following seminal articles: Sonia Bychkov Green, How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law, 24 WIS. J.L. GENDER & SOC’Y 25, 34-35, 47-51, 58-72 (2009); Ergas, supra note 49 and more lengthily SHARON SHAKARGY, DETERMINING PARENTHOOD IN SURROGACY CASES INVOLVING A FOREIGN ELEMENT (M.A. Thesis, Hebrew University, 2007) (Heb.).


82 As it is still embedded in the current German’ legislation, see Susanne L. Gossl, Germany, INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 131, 131 n. 3-5 (Katarina Trimmings & Paul Beaumont eds., 2013).


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While the above-mentioned concerns have been raised in the context of domestic surrogacy they are particularly acute in the context of international surrogacy.\textsuperscript{84} For instance, while disparities in race and socioeconomic status between the intending parents and the surrogate can be implicated in the domestic context, opponents of international surrogacy claim that in the international context, issues of race, class, and gender advance a new colonial structure that harms mankind more generally.\textsuperscript{85} Further, in the international context, fears of human trafficking, coercion and exploitation are much more prevalent. This is particularly true in the context of international surrogacy arrangements between intending parents in the developed world, and surrogate mothers in developing countries.\textsuperscript{86}

For instance, there is troubling evidence that the overwhelming majority of Indian surrogates are induced to enter into surrogacy arrangements by poverty and pressure from a husband, family, or surrogacy broker etc. There is also a concern that the surrogate does not even receive the financial benefit of the surrogacy.\textsuperscript{87} Indeed, new research discusses the compulsion surrogates in developing states feels to provide for family, a husband and other children by engaging in surrogacy.\textsuperscript{88} As a result of these concerns, one option might be to ban the practice of international surrogacy through bilateral or multilateral agreements or even through criminalizing the practice in a manner similar to the Palermo protocols against human trafficking.\textsuperscript{89}

\textsuperscript{84} Smerdon, \textit{supra} note 10, at 81 (“international surrogacy arrangements with Indian surrogates should be banned”); Luckey, \textit{supra} note 111, at 240 (“The incongruences of laws regulating surrogacy among countries as well as among the states of the U. S. raise the risk of exploitation as a concern for policy makers.”); Kristine Schanbacher, \textit{India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women}, 25 \textit{HASTINGS WOMEN'S L.J.} 201, 220 (2014) (“However, until these policies or other similar policies are enacted, an ever-increasing number of Indian women-- with no other opportunities to improve their standard of living--will be exploited.”);

\textsuperscript{85} See Stehr, \textit{supra} note 25, at 282.

\textsuperscript{86} Allan, \textit{supra} note 83.


\textsuperscript{88} \textit{GLOBALISATION AND TRANSNATIONAL SURROGACY IN INDIA: OUTSOURCING LIFE} (SAYANTANI DASGUPTA & SHAMITA DAS DASGUPTA EDS., 2014).

Another international regulation against child trafficking that may be viewed as a possible infrastructure for banning surrogacy is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. One of the main targets of this optional CRC’s protocols is to eliminate the sale of children, to raise public awareness in order to reduce consumer demand for the sale of children and to extend the measures that state parties should undertake in order to guarantee the protection of children.\(^90\) Indeed, in Australia surrogacy is disallowed by law due to this optional protocol.\(^91\)

There are, however, numerous problems with calls to ban international surrogacy. Preliminarily, achieving a transnational consensus on this issue is not a realistic option and its effectiveness is questionable.\(^92\) In this area, only rare prohibitions, such as international bans on reproductive cloning typically gain enough support to be broadly effective. Further, it is likely that a complete ban would simply exacerbate the black market for the sale of children, where the conditions and the stipulations of surrogacy agreements will be much more problematic for surrogate mothers.\(^93\) Moreover, such a preventative approach may simply raise the transaction costs and negative externalities of international surrogacy without actually preventing the practice.\(^94\)

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\(^{92}\) See Smerdon, supra note 10, at 82.


\(^{94}\) For a similar insights, see respectively Kimberly D. Krawiec, Price and Pretense in the Baby Market, in BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 41 (Michelle Bratcher Goodwin ed., 2010); Ergas, supra note 49, at 140. Recently, one scholar maintained that it is questionable whether even a cautious liberalisation would really bring an end to surrogacy tourism, see Martin Engel, Cross-Border Surrogacy: Time for a Convention?, FAMILY LAW AND CULTURE IN EUROPE: DEVELOPMENTS, CHALLENGES AND OPPORTUNITIES 199, 205 (Katharina Boele-Woelki and Nina Dethloff eds., 2014).
To the contrary, there are numerous justifications for permitting international surrogacy and various nations around the globe permit (or don’t explicitly prohibit) the practice. To effectuate international surrogacy while addressing the concerns posed by critics of this practice, a coalition of states could enter a bilateral or multilateral agreement or convention. Similarly, it could be internationally recognized that a woman is sovereign with respect to her body and capable of contracting with intending parent who are interested in hiring her procreative ability. Such agreements could determine and recognize the reciprocal fundamental rights possessed by the parties to surrogacy agreements. In that regard, one scholar even aspires to achieve a U.N. substantive human rights proclamation recognizing the contractual, procreative rights of women and the use of procreative capacity for economic benefit.95

Therefore, a tailored regulatory regime is the only appropriate response to the challenges of international surrogacy.96 Further, since cross-border surrogacy is an international phenomenon, there is an international collective responsibility to regulate this industry, and prevent harmful, exploitive or coercive arrangements.97 Prior to turning to the specifics of what such a regulatory regime might look like, it is helpful to first briefly discuss the beneficial role of domestic surrogacy regulation in preventing the ills of international surrogacy.

### 2.2. Domestic Surrogacy as a Tool to Address the Challenges of International Surrogacy

As noted, in the international context, the problems associated with surrogacy are exacerbated. Therefore, there are significant benefits to channeling surrogacy arrangements into the domestic context. Allowing a wider circle of couples and individuals to use the service of domestic surrogates, even for-profit, in an easier and friendlier process will dramatically reduce the need to look oversees to jurisdictions that are more lenient with respect to surrogacy.98 Moreover, encouraging a more conducive environment for domestic surrogates will likely raise the number of potential domestic surrogates and lower the average

97 Stehr, *supra* note 25, at 259-60.
payment for this local service. Similarly, the local jurisdiction and health system of the intending parents may be more effective in providing comprehensive health services to the surrogate, child and the intending parents. Finally, clear, uniform and accessible domestic surrogacy laws will protect surrogates from potential exploitative and coercive stipulations and even, in certain cases, from their own uninformed choices.  

One benefit to utilizing domestic surrogacy to address the challenges of international surrogacy is that there are compelling normative justifications for permitting domestic surrogacy. For instance, in the domestic context, particularly in countries with strong social welfare policies, it is easier to view a surrogate as providing the ultimate gift a woman can give another person. Further, endorsing surrogacy has the benefit of endorsing a woman’s right to make choices concerning her own body and reproductive potential. Permitting and regulating this practice also helps keep pace with technology and shifting societal norms while providing clarity and predictability to the parties. 

Moreover, in addition to these normative justifications, domestic surrogacy is also a good option because it has gained traction in recent years. Even a superficial reading of the recent scientific literature establishes that there is a shift towards a modest and conditioned liberalization of domestic surrogacy. A similar shift can be seen in legislative developments all over the world, such as Greece and the U.K, which have liberalized their surrogacy laws.

99 See Caster, supra note 6, at 484-85, 496, 509, 514.
Argentina is about to pass a bill which permits for altruistic gestational surrogacy and will be the first Latin America country that allows the practice. Reducing demand for international surrogacy, however, will only take us so far. The next sections will discuss suggested models for regulating international surrogacy.


3.1. The Acute Need for a Tailored Convention

The increased globalization of surrogacy along with increased transnational mobility has caused many families, to live in legal limbo concerning substantial aspects of their family status. International law has struggled to define whether individuals in a cross-border surrogacy arrangement are the legal parents of their children and whether these individuals owe the children various parental child obligations. Thus, the dilemmas in determining the legal parents of these children and the far reaching implications of this legal determination have become much more prevalent and complicated. Further, as international surrogacy becomes more common, traditional surrogacy concerns, such as placing the parties to such an agreement in a highly vulnerable position, are similarly exacerbated.

Only significant cooperation between different states, on a multilateral treaty basis, will adequately cope with the mushrooming of these international issues. International cooperation is particularly necessary in this area because unilateral domestic regulations and

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104 See respectively article 8 of the Greek Law No. 3089/2002; section 54(4)(b) of the British Human Fertilisation and Embryology Act 2008; Ian Curty-Sumner and Machteld Vonk, The Netherlands, In INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 259, 273 n. 3 (Katarina Trimmings & Paul Beaumont eds., 2013); Marcela Valente, Argentina to Legalise Surrogate Motherhood (03.08.13), http://www.ipsnews.net/2013/03/argentina-to-legalise-surrogate-motherhood; Engel, supra note 94, at 202.

105 It is worth noting that the option of proposing a new Hague convention for regulating transnational surrogacy has already been discussed in academic circles. See, e.g., Hannah Baker, A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to be Learnt from the 1993 Hague Intercountry, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 411 (Katarina Trimmings & Paul Beaumont eds., 2013); Katarina Trimmings & Paul Beaumont, International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level, 7 J. PRIVATE INT'L L. 627 (2011); Engel, supra note 94; Allan, supra note 83; Lin, supra note 49, at 565-69; Mohapatra, supra note 19, at 417. Nonetheless, the essence of this article is to not only address the needs of an international convention, but to articulate the need for parallel domestic regulation. For a similar suggestion, but one that is not supportive of broadening surrogacy practices but rather of protecting women and children, see Allan, supra note 83.

106 See Mortazavi, supra note 54, at 2252-58.
even bilateral agreements can be easily circumvented by simply crossing the border to another state and contracting with a surrogate mother who is a resident of a non-contracting state. A Hague Convention, with its unique global capacity to regulate international familial arrangements, will achieve the strength and the wide acceptance required to successfully address the pitfalls of international surrogacy. Indeed, the history of existing Hague conventions demonstrates how much time, money, thought and effort is invested in implementing these conventions.107

Notably, however, while these existing Hague conventions offer guidance, there is no existing convention that adequately addresses the issue of international surrogacy. Indeed, a special commission concluded in June 2010 that it was inappropriate to use the Hague adoption convention in cases of international surrogacy.108 This conclusion was logical due to the critical differences between these two similar, but distinct contexts. The main goal of international adoption is finding transnational parents for an already existing child. The purpose of a surrogacy arrangement, by contrast, is to bring a planned and desired child into the world. In the vast majority of these cases at least one of the intending parents is a genetic parent of the child. Thus, in the surrogacy process, the intent to become a parent is readily perceivable at the outset, and strongly signals that the intending parents will likely be the best parents for the conceived child.109


109 For this contention and for a survey of research that supports it, see Margalit, supra note 5, at 59 n. 51; Yehezkel Margalit, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage* 17 n.
Accordingly, international regulation concerning adoption is focused on different concerns than those implicated in international surrogacy. Namely, in the context of adoption, the main target of the convention is to make sure that the process of adopting a child is being conducted properly and ethically through a system that structures cooperation between the origin country and the receiving country. These countries will not approve the removal of a child unless they are confident that the adoption is the best option for the child. In the transnational surrogacy context, besides making sure that the BIC is strictly preserved and is appropriately being balanced with notions of freedom of contract, there are other parties to this arrangement that need to be protected. Indeed, there are many temptations and opportunities to exploit surrogate mothers; especially if those surrogates are in developing countries, due to the imbalance of power, lack of acknowledge, and biases relating to race, gender, nationality and religion. Furthermore, incongruent laws, discrepancies in health care and language barriers can harm the intending parents as well.

Therefore, independent, comprehensive, international regulation is urgently required in order to preserve the rights and welfare of the different parties to international surrogacy agreements, as well as the public as a whole. Notwithstanding the abovementioned differences between the focus of international adoption and international surrogacy, there is still much in common between these two areas. These similarities, coupled with the lack of

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60 (under evaluation). For some other differences between those two practices, see Baker, supra note 105, at 417-19

110 For the BIC as the main factor in determining the proper contours of any international surrogacy agreement, see Trimmings & Beaumont, supra note 105, at 640-41; Ergas, supra note 49, at 173-81; Engel, supra note 94, at 208, 215; Boyce, supra note 49, at 665-70. For the general argument that the easiest thing to forget in the cross-currents of conflicting surrogacy laws is the welfare of the intended children and for a proposal of enacting a federal Children’s Surrogacy Bill of Rights, which bolsters the basic right a child to be raised by his intending parents, see Robert Zimmer, The Surrogacy Minefield: Legal Challenges and Opportunities for Prospective LGBT Parents and Their Attorneys, 35 WHITTIER L. REV. 311, 336-38 (2014). For a practical implementation of the BIC doctrine in some British courts as the main justification for enabling a conceived child to be brought home with his parents, see Re: X & Y, supra note 50; Re S (Parental Order), [2009] EWHC (Jud) 2977 (Eng.); Re IJ (a child), [2011] EWHC (Fam) 921 (Eng.). For a survey of some additional European cases, see HCC H 2012, supra note 11, at 21.


112 For an additional discussion of the similarities and dissimilarities between those two children-parent relationships, see Trimmings & Beaumont, supra note 105, at 638.
a convention in the international surrogacy context, establish that a convention regarding international surrogacy is both feasible and necessary.\textsuperscript{113}

\textbf{3.2. Historical Background}

Over the past decade, The Hague Conference on Private International Law (hereinafter: Hague Conference) has articulated various treaties to cope with the inadequacy of domestic and/or international family law in the context of parents and children who span multiple jurisdictions. As relevant to the instant discussion, The Hague Conference has articulated four children’s conventions concerning, respectively, child abduction, inter-country adoption, child protection and family maintenance. The general purpose of these conventions is to increase and foster cooperation between different countries and to ease the life of children in transnational agreements.\textsuperscript{114} By and large these conventions have been successful; nearly 100 countries have participated in at least one of them and various scholars have observed that these conventions have achieved their intended results.\textsuperscript{115}

The Hague Conference has also invested enormous efforts in researching and discussing the worthwhileness and efficacy of a convention on international surrogacy. The idea of a unique Hague convention regulating cross-borders surrogacy was first discussed in April 2010, at the meeting of the Council on General Affairs and the Policy of the Hague Conference, composed of all Members (hereinafter: the Council). The Council acknowledged the complex issues in this field and agreed that the area should be kept under review by the

\textsuperscript{113} For a discussion of avoiding any ethical inconsistencies between these two treaties, see, respectively, Baker, supra note 105; Carolyn McLeod & Andrew Botterell, A Hague Convention on Contract Pregnancy (Or ‘Surrogacy’): Avoiding Ethical Inconsistencies With the Convention on Adoption, 7(2) INTERNATIONAL JOURNAL OF FEMINIST APPROACHES TO BIOETHICS 219 (2014).

\textsuperscript{114} For a fuller description of the different Hague Conference’s treaties concerning international legal cooperation and litigation, international commercial and finance law, as well as international protection of children, family and property relations, see http://www.hcch.net/index_en.php. For a more detailed discussion of the four children’s convention, see Estin, supra note 90.

\textsuperscript{115} See the following academic research concerning respectively the abduction convention and the adoption convention: RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 438 (2013); Elizabeth Bartholet, The Hague Convention: Pros, Cons and Potential (September 9, 2013), http://ssrn.com/abstract=2279583 (acknowledging the potential viability of such a treaty).
Permanent Bureau.  In 2010, during a special commission meeting, dated 17-25 June, it was agreed that the increasing number of these arrangements raised a concern over the uncertainty surrounding the status of the children who were born as a result of such arrangements. Therefore, the special commission recommended that the Hague conference should carry out further study of the legal issues surrounding international surrogacy.

In April 2011, the council received a report prepared by the Permanent Bureau on this issue, which identified various international problems associated with surrogacy practices, including the uncertain legal parentage and nationality of children conceived as a result of surrogacy arrangements. In March 2012, the Permanent Bureau published a preliminary report on these issues and concluded that this global phenomenon requires a global solution. During the April 2013 annual meeting, the council received an oral update provided by the Permanent Bureau and decided to circulate a number of questionnaires to various recipients – one was directed to members of the Hague conference and other interested states and three online questionnaires were sent to legal practitioners, health professionals and surrogacy agencies. Recently, in March 2014, the Permanent Bureau published two additional studies concerning parentage and surrogacy and, more specifically, about the issues arising from international surrogacy arrangements. In April 2014, the Hague Conference agreed to continue to explore the feasibility of an international convention on surrogacy. A final determination was deferred to the upcoming 2015 annual meeting.


117 Hague Conference, supra note 108.

118 HCCH 2011, supra note 11, at Section IV(a).

119 See respectively HCCH 2012, supra note 11, at 6, 30.

120 Conclusions and Recommendations, supra note 116, at 2.

121 All questionnaires are available at http://www.hcch.net/index_en.php?act=text.display&tid=183.


123 See the Conclusions and Recommendations of the 2014 Council (para. 3); Prel. Doc. No 3B and its accompanying study, http://www.hcch.net/index_en.php?act=text.display&tid=183. For a fuller description of the various developments and measures that has been taken place from 2011 till today, see ibid.
3.3. The Main Contours of The Proposed Convention

One critical lesson gleaned from the history of international Hague treaties, is that it is a fool’s errand to attempt to unify or harmonize the differing points of view of various nations in the arena of family law. Rather, a convention targeting international surrogacy should attempt to find the widest common denominator between these countries.\(^{124}\) This methodology is particularly acute in the context of international surrogacy where there is such a wide range of opinion.\(^{125}\) Indeed, this convention should be silent and remain neutral regarding whether international surrogacy is a normatively good phenomenon. Rather, recognizing that surrogacy arrangements occur with or without state approval, the convention should aim to foster cooperation between states and regulate these agreements. Such regulation is not, in and of itself, an endorsement of surrogacy.\(^{126}\) Rather, it is an attempt to alleviate the abuses and uncertainty attendant to unregulated cross-border surrogacy agreements.

Such a convention should rest on three pillars that relate to the three main parties to these arrangements – the conceived child, the surrogate mother and the intending parents. The first pillar embodies the need to clearly determine at the outset the legal parents of the child and to preserve the child’s best interests and legal rights. The second is to ensure the suitability of the surrogate mother and to preserve her welfare, bodily autonomy, and mental autonomy. The third is to devise a mechanism to ensure the suitability of the intending parents and to preserve their rights and interests. In addition, the convention should facilitate an efficient method to collect accurate information about the various parties to the agreement.\(^{127}\) Once this

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\(^{124}\) Trimmings & Beaumont, *supra* note 105, at 635 (“...a Convention on surrogacy should not aim at the unification of the conflict rules”); surrogacy project, *supra* note 122, at 16 (“The challenges...make clear the importance of remaining focused in international work on building bridges between (differing) legal systems, rather than seeking to harmonise laws in this area”); ibid, at 23 (“due to the apparent (at this stage) variation in the connecting factors currently applied by States, unification of these rules poses challenges”).

\(^{125}\) For a close insight see Trimmings & Beaumont, *supra* note 105, at 635, 637.

\(^{126}\) For such arguments, see Allan, *supra* note 83, at 24; Vanessa S. Browne-Barbour, *Bartering For Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHTTIER L. REV. 429, 467 (2004). For the claim that a surrogacy treaty should be neutral towards the dilemma of whether to support or deny this practice, see McLeod & Botterell, *supra* note 113.

\(^{127}\) In Israel and in the U.K., where there is very restrictive domestic regulation, there are few if any disputes around conducting surrogacy arrangements. This stands in stark contrast to the prevailing deregulation in the U.S., which manifests itself in bitter legal disputes. Indeed, perhaps the most well-known American surrogacy case of baby M involved a clinic which knew that the surrogate mother, Miss. Whitehead, was a troublemaker.
information is gathered, administrative agencies from the respective countries could collaborate to determine whether the surrogacy agreement should be recognized. Notably, the previous Hague conventions, especially the adoption convention have already established methods for the smooth operation of these administrative agencies, known as “Central/Competent Authority”. These pre-existing conventions can serve as a model for creating the infrastructure of a convention on surrogacy agreements.

Moreover, an international surrogacy convention could prospectively address many of the issues currently involved in surrogacy arrangements. For instance, legal diversity can often leave children in legal limbo regarding their parentage. A transnational tailored regulatory regime would only permit a surrogacy arrangement where both of the involved countries would validate the agreement. Administrative agencies in these countries could inspect the agreement and ensure that the terms do not harm the child and that the child is recognized as the legal child of the intending parents. Practically speaking, the convention would dictate that, upon birth, the child would receive a nationality and the required visa to be transferred to the intending parents. Indeed, given the prevalence of this problem, a main focus of the convention would be ensuring that both contracting states will cooperate to recognize the nationally of the child in an expedited way.

In furtherance of these goals, the convention should include these additional safeguards: (a) the appointment a local guardian who would be legally responsible for caring for the baby

but preferred not to reveal this crucial fact to the intending parents, who eventually sued the clinic, see Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (N.J.1988).


For the description of those authorities in the four children convention, see Estin, supra note 90.

For such close insight, see, e.g., Trimmings & Beaumont, supra note 105, at 635-46; Lin, supra note 49, at 565-69; McLeod & Botterell, supra note 113.

For a similar goal of protecting children from the downsides of legal diversity, see Engel, supra note 94, at 211.

See Trimmings & Beaumont, supra note 105, at 646.
until he/she is surrendered, (b) the issuing of emergency travel certificates by the receiving country so that the child may remain with the intending parents in the event the matter pends in a foreign court, (c) the issuing of entry visas on a humanitarian basis or by court decision. Similarly, the receiving state should enable the intending parents to immediately bring home their putative child. If a dispute arises that requires adjudication, the intending parents could be required to supply a security for removing the child to a foreign jurisdiction.

In addition, the convention should ensure that the surrogate mother is not abandoned, coerced, or required to accept draconian terms. To achieve this goal, the convention should impose guidelines defining what actions constitute human trafficking for the purposes of rendering an international surrogacy agreement unenforceable and illegal under international law. For example, any agreement in which the surrogate mother is brought outside of her home country for the purpose of acting as a surrogate mother could constitutes an act of human trafficking. Similarly, the convention could dictate what stipulations are unconscionable, coercive and exploitive and the appropriate terms for a surrogacy agreement. In doing so, the convention could endeavor to create a uniform set of ethical and legal norms.

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132 For an additional requirement for appointing a local guardian who will be legally responsible for taking care of the child during and after the pregnancy until the child/children is delivered to the foreigner or foreign couple or the local guardian, see Article 19 of the Assisted Reproductive Technology (Regulation) Bill, 2008. See also Smerdon, supra note 10, at 42-43; Ryznar, supra note 50, at 1021; Caroline Vincent & Alene D. Aftandilian, Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate, 36 SUFFOLK TRANSNAT'L L. REV. 671, 679 (2013); Jennifer Rimm, Booming Baby Business: Regulating Commercial Surrogacy in India, 30 U. PA. J. INT'L L. 1429, 1440-41 (2009).

133 For describing the current inadequacy of such measures as a post factum last resort, see Jyothi Kanics, Preventing and Addressing Statelessness In the Context of International Surrogacy Arrangements, 19 TILBURG LAW REVIEW 117, 124-25 (2014).

134 For the practical implementation of this suggestion, see Mark Henaghan, International Surrogacy Trends Trends: How Family Law is Coping, 7(3) AUSTRALIAN JOURNAL OF ADOPTION 1, 6, 10 (2013); Usha Rengachary Smerdon, Birth Registration and Citizenship Rights of Surrogate Babies Born in India, 20(3) CONTEMPORARY SOUTH ASIA 341 (2012). For similar suggestions, see Lin, supra note 49, at 550; Kindregan & White, supra note 1, at 623.

135 It should be noted that one of the substantial goals of the adoption convention is avoiding child trafficking in the context of transnational adoption, see outline Hague intercountry adoption convention, supra note 128. For the ultimate importance of the proposed surrogacy convention in avoiding any improper sale of children, see McLeod & Botterell, supra note 113.

136 For a close insight, see Trimmings & Beaumont, supra note 105, at 636, 639.
regarding issues of exploitation, particularly given the wide range of opinions regarding this issue.\textsuperscript{137}

Further, the convention would require that the surrogate be screened for financial, mental and medical suitability. It would also require that the surrogate receive independent legal consultation, as well as psychological assistance before, during, and after the pregnancy. This would ensure that the surrogate understands the agreement and that her consent to the agreement is of her own free will.\textsuperscript{138} The convention would also dictate that it should be clear to all parties to the agreement the monetary compensation that the surrogate will receive and that she should be paid even if there is a miscarriage or the child is stillborn. In furtherance of this goal, the clinic facilitating the pregnancy and birth should open an independent bank account on behalf of the surrogate that belongs solely to her and in which these funds could be deposited. Additionally, the surrogate should be free to decide to terminate the pregnancy. Lastly, the convention should set minimum standards for the medical treatment received by the surrogate.

Finally, the convention should set forth a transparent process for inspecting and screening the medical, financial and psycho-social suitability of the intending parents.\textsuperscript{139} This process could set limitations that are similar to the adoption convention such as an upper age limitation, the mental condition of the parties, and, in some cases, the motivation of the intending parents.\textsuperscript{140} In addition, the convention would require that the criminal record and any child services records of the parents be scrutinized.\textsuperscript{141} Further, the proposed convention

\textsuperscript{137} See Hale, supra note 74, at 526.

\textsuperscript{138} For the appropriate process of accepting and inspecting the informed consent of the surrogates in order to prevent the current problematic nature of this process, see respectively Centre for Social Research, supra note 87; study of legal parentage, supra note 122, at 87-88; McLeod & Botterell, supra note 113; Allan, supra note 83, at 12-15; Vida Panitch, Global Surrogacy: Exploitation to Empowerment, 9(3) JOURNAL OF GLOBAL ETHICS 329 (2013). For the general importance of judicial and administrative cooperation to help ensure compliance with new standards and safeguards, see Baker, supra note 105, at 421.

\textsuperscript{139} For this demand, see Trimmings & Beaumont, supra note 105, at 641-43.

\textsuperscript{140} In order to avoid exploitive cases such as a case in which a foreign couple undertook a surrogacy arrangement in India in order to obtain an organ for their sick child, see Centre for Social Research, supra note 87, at 5.

\textsuperscript{141} See Allan, supra note 83, at 20; study of legal parentage, supra note 122, at 18, 91-93; surrogacy project, supra note 122, at 18, 26. Such problematic misuse for criminal purposes, such as pedophilia, have been reported on several occasions over the last two years, see, e.g., “Australia investigates ‘pedophile’ father in Thai surrogate baby scandal”, 08.06.14, http://www.japantoday.com/category/world/view/australia-investigates-pedophile-father-in-thai-surrogate-baby-scare; “Convicted pedophile raises surrogate daughter”, 06.02.13, http://www.ynetnews.com/articles/0,7340,L-4387303,00.html.
should make sure that the intending parents receive accurate information regarding the prevailing legal practices in both countries involved in the agreement and an accurate picture of the ramifications and consequences of the agreement.

As a practical matter, this process could be facilitated like other regulatory regimes. The convention would require all the putative intending parents to apply to their country’s central authority to receive approval to enter into an inter-country surrogacy agreement. That central authority would then be required to prepare a report affirming the couple’s eligibility to enter into the agreement.\textsuperscript{142} The central authority in the receiving state would then be required to provide the central authority in the state of origin with a report approving the agreement. The implementation of such a system of cooperation would ensure that those who are precluded from entering into surrogacy agreements are unable to circumvent their countries’ laws and do so outside of this regulatory system.\textsuperscript{143}

In sum, the fundamental aims of such a convention would be as follows: to establish internationally centralized bodies that will have the duty to approve surrogacy agreements prior to their inception and to ensure, \textit{ex-ante}, that a child is given a nationality upon birth; to obtain consent from the foreign intended parents’ central authority before proceeding with reproductive procedures; to establish a process by which parental rights and responsibility, recognized amongst contracting states, are imposed upon the intending parents at the birth of the child; to establish a system of cooperation amongst contracting countries to ensure that the respective authorities work together to uphold the objectives of the convention; to establish a system by which the agreements approved in accordance with the convention receive recognition and parenthood rights are honored in member states;\textsuperscript{144} to oversee the

\textsuperscript{142} Trimmings & Beaumont, \textit{supra} note 105, at 636; McLeod & Botterell, \textit{supra} note 113. For a detailed description of the operation of the central authorities and accredited bodies in the adoption convention, see articles 6-13 of that convention.

\textsuperscript{143} The infrastructure of this suggested mechanism should be found in article 17 of the adoption convention which states as follows – “Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if – a. the Central Authority of that State has ensured that the prospective adoptive parents agree; b. the Central Authority of the receiving State has approved such decision…c. the Central Authorities of both States have agreed that the adoption may proceed… d. the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorized to enter and reside permanently in the receiving State”. \textit{See also} articles 4-5, 14-22 of the adoption convention.

\textsuperscript{144} \textit{See} surrogacy project, \textit{supra} note 122, at 26 (“there also seems to be considerable agreement between many States and other stakeholders that…the child’s legal status is secure prior to the commencement of any medical procedures”); ibid at 28.
organizations and clinics involved in arranging and conducting reproductive procedures and ensure against the improper payment of money in excess of reasonable expenses.\textsuperscript{145}

### 3.4. The Advantages

Given the increasing prevalence of international surrogacy agreements and all of the risks associated with these agreements, the international community should engage in regulation of these agreements. Much like inter-country adoption there are many issues that should be regulated through an international treaty. Since current regulations regarding inter-country adoption have worked quite well,\textsuperscript{146} we should attempt to imitate this success in the context of international surrogacy. Only international cooperation will be able to meaningfully address the far reaching implications of these arrangements while setting forth some minimum safeguards and standards.\textsuperscript{147} Regulating this issue on an ad hoc, patchwork basis will be ineffective.\textsuperscript{148}

An international treaty or convention will enable all the parties involved, first and foremost the conceived child, to have predictability and certainty that the agreement will be effectuated properly. Likewise, such a convention is the best method to ensure that, as a legal matter, the resulting child will be entrusted to the intending parents and recognized as the legal child of the intending parents. This will enable the intending parents to take responsibility over the child and fulfill the child's basic needs from birth. It will also supply the child with a nationality and visa for the purpose of returning home with the intending parents.

\textsuperscript{145} This is the same method of achieving legal certainty regarding the ultimate result of the adoption convention as dictated in articles 1c) and 23, see respectively: “To secure the recognition in Contracting States of adoptions made in accordance with the Convention.”; “An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States...”\textsuperscript{. }\textit{See also} articles 23-27 to the adoption convention.


\textsuperscript{147} See, e.g., study of legal parentage, supra note 122, at 92; Trimmings & Beaumont, supra note 105, at 635; Mohapatra, supra note 19, at 448-50; Baker, supra note 105, at 418; Allan, supra note 83, at 15, 21-24.

\textsuperscript{148} See, e.g., Keyes, supra note 96, at 49-50; Stehr, supra note 25, at 287 ("individual nations' attempts to protect vulnerable populations have both failed to incorporate diverse points of view and failed to confront the cross-border aspect of surrogacy arrangements"); Kristiana Brugger, \textit{International Law in the Gestational Surrogacy Debate}, 35 FORDHAM INT'L L.J. 665, 679-81 (2012); Allan, supra note 83, at 21.
parents.\textsuperscript{149} Similarly, such a convention will likely reduce the chances that the surrogate mother will have a change of heart and seek custody of the child.

A convention would also incentivize individuals seeking to engage in international surrogacy to partake in safe and transparent procedures. Once such a convention is ratified, it will be clear to all the parties that conducting a surrogacy agreement outside the outlines of the convention will subject the parties to uncertainty and risk. For instance, without the protection of the convention, there is no assurance that the child will be recognized as the legal child of the intending parents.\textsuperscript{150} In addition, a regulated and thoroughly scrutinized mechanism of approving such agreements could eliminate the misrepresentation made by many surrogacy clinics concerning matters such as fees.\textsuperscript{151} Since only accredited clinics will be able to conduct these arrangements, they will be required to accurately itemize and disclose the fees and estimated expenses associated with the surrogacy process or risk losing accreditation. The convention will also help reduce current racial and socioeconomic disparities in the surrogacy process.\textsuperscript{152}

Finally, even narrow regulation with only minimum restrictions and safeguards would be beneficial as a first step. While conventions are often imperfect measures, reflecting agreed upon compromises, they are often the best option available to develop a baseline for the ethical operation of an international system.\textsuperscript{153} Creating such a baseline in the context of international surrogacy would be a crucial first step on the road to alleviating some of the risks and problems associated with this practice.

\textbf{3.5. The Disadvantages}

The proposal of a new Hague convention to regulate international surrogacy agreements is not without its drawbacks and, indeed, there has been some doubt regarding the desirability and feasibility of such a convention. Some critics believe that the Hague children conventions, especially the adoption convention, does not sufficiently guard against abuse,

\begin{itemize}
\item \textsuperscript{149} For such inspiration, see Mohapatra, supra note 19, at 449.
\item \textsuperscript{150} See Trimmings & Beaumont, supra note 105, at 643 (“This will send a clear message to potential intended parents and encourage surrogacy arrangements only through authorized agencies”).
\item \textsuperscript{151} study of legal parentage, supra note 122, at 90-91.
\item \textsuperscript{152} For a similar hope, see Mohapatra, supra note 19, at 449.
\item \textsuperscript{153} See respectively Trimmings & Beaumont, supra note 105, at 635; Baker, supra note 105, at 426; Allan, supra note 83, at 24; surrogacy project, supra note 122, at 21 (“particularly in the ISA context, soft law measures, such as non-binding principles or guidelines, might be contemplated as a useful first step”); ibid, at 26.
\end{itemize}
and, therefore, it would be misguided to attempt to replicate this treaty in the context of international surrogacy. Put differently, to these critics, if the adoption convention, which is widely accepted around the world, is not achieving its goals, there is no point to try implementing any Hague convention in the much more sensitive and complicated scenario of international surrogacy.154

Moreover, as a practical matter, unlike adoption, which is universally recognized, it is unlikely that international surrogacy will be regulated by convention in the near future given the enormous legal diversity, and even hostility, regarding commercial surrogacy in various countries around the globe.155 It seems unlikely that countries will relinquish their basic desire to regulate the meaning of child-parent relationships, filiation, nationality and citizenship and, instead, adopt a compromise view of these fundamental issues.156 Moreover, there is an even present fear that the desire to reach a broad agreement will result in a race to the lowest common denominator, rendering the final agreed upon convention so thin that it will be pointless.157

In addition, surrogacy requires regulation in so many areas of law that any convention may not achieve the necessary political support for ratification.158 A new regulatory regime will require a long-term renegotiation of the meaning of various notions involving the family and international contract law.159 Further, regulation on the international scale is often slow and would not provide immediate solutions to the current problems facing both intending parents and surrogates.160 More specifically, further delays may be caused by the time it takes for a contracting state to implement the convention and stateless surrogate children may still

154 For such fear, see Lin, supra note 49, at 566-69. For an example illustrating the difference between regulation and reality, see Smerdon, supra note 10, at 84-85. For a more general critique of the existing adoption regulation, see McKinney, supra note 146, at 366.
155 See Kindregan & White, supra note 1, at 528-29. See also surrogacy project, supra note 122, at 15 (“the underlying problem in international surrogacy cases, insofar as status issues are concerned, is this very conflict in States’ approaches to legal parentage and nationality”).
156 For such a fear, see, e.g., Engel, supra note 94, at 211; surrogacy project, supra note 122, at 17 (“States’ laws on these issues do not seem to be quickly converging”).
157 See, e.g., Kal Raustiala, Form and Substance in International Agreements, 99 AM. J. INT’L L. 581, 610 (2005); Brugger, supra note 148, at 681-86; Nelson, supra note 49, at 248 (“it is difficult to imagine that the resulting rules would provide “meaningful protections””).
158 For a similar argument, see Brugger, supra note 148, at 680; Nelson, supra note 49, at 248.
159 See, e.g., Ergas, supra note 49, at 118.
be born in states that are not parties to the proposed convention. Additionally, even a well-crafted treaty will be useless if many countries refuse to ratify it.\textsuperscript{161} Therefore, many scholars maintain the fear that in the foreseeable future the possibility of the widespread ratification of such a convention is unlikely.\textsuperscript{162}

4. Additional Necessary Domestic and Unilateral Regulation

4.1. General

Having explored the advantages and disadvantages of a Hague convention on international surrogacy, it is readily apparent that while there are many justifications for advancing such a convention, in the short run, there are significant challenges to utilizing such regulation to address the needs of international surrogacy. As a result, supplemental domestic regulation is necessary to help address some of these needs. Furthermore, this domestic regulation will likely continue to be effective even after the implementation of an international surrogacy convention since it can be reasonably assumed that there will be certain countries that refuse to ratify the convention.

In this part, I will explore two central pending regulatory proposals, Indian and Israeli, which may serve as an appropriate framework for more widespread domestic regulation around the world.\textsuperscript{163} It should be noted that the common denominator of these domestic and unilateral regulations is the need for administrative preauthorization for surrogacy agreements. Notably, in the U.S., some states, including Virginia, Utah and New Hampshire, require preauthorization, while in Texas and Illinois this preauthorization is a voluntary option.\textsuperscript{164} This preauthorization, however, is judicial, and not administrative.

\begin{itemize}
\item \textsuperscript{161} See respectively Lin, \textit{supra} note 49, at 568; Baker, \textit{supra} note 105, at 420
\item Lin, \textit{supra} note 49, at 548; Allan, \textit{supra} note 83, at 2122.
\item For a similar contention, see Allan, \textit{supra} note 83, at 22 (“…ultimately domestic laws will also be required”); an updating note, \textit{supra} note 79, at 8 (“developments at the national level also continue to demonstrate starkly the significant issues which remain in the absence of international regulation”). These two states are perceived as “fertility superpowers” but in very different ways: while Israel is engaged with producing children for (Jewish) Israelis, India is preoccupied with producing children for citizens of other countries, see DAPHNA HACKER, LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION Ch. 4 (work in progress).
\end{itemize}
Administrative preauthorization can also be found in prominent domestic legislative proposals and Uniform Acts, such as the 1988 Uniform Status of Children of Assisted Conception Act (hereinafter: “USCACA”), the 2002 Uniform Parentage Act (hereinafter: “UPA”) and the 2008 Model Act Governing Assisted Reproduction Technology (hereinafter: “Model Act”).¹⁶⁵ Similarly, countries around the globe, such as Australia (VIC, QLD, WA, SA), Mexico (in draft legislation) and New Zealand (ethical approval from ECART is required), demand prior approval of domestic surrogacy agreements.¹⁶⁶ Since this administrative mechanism works well in the domestic context,¹⁶⁷ it can be extended to the international context as well. The next subsections describe the Indian and Israeli proposals as a foundation for building an infrastructure for domestic, unilateral regulation of international surrogacy.

4.2. The 2010 Proposed Indian Assisted Reproductive Technology (Regulation) Bill and Rules.

The history of Indian surrogacy is well rooted both in the ancient and the modern era. Mythological surrogate mothers are a well-known part of Indian history and the world’s second, and India’s first IVF baby is Kanupriya Alias Durga, who was born in 1978. Given this history, it is unsurprising that, in 2002, India became the first country to explicitly legalize commercial surrogacy.¹⁶⁸ Over the past decade, India has become the “surrogacy


¹⁶⁶ See Quinlan, supra note 102, at 820-21 (“In looking for guidance we can turn to states such as our neighbor, New Hampshire…had it been available to the parties before the birth of baby Desmond, it would have undoubtedly solved this parentage problem swiftly and equitably”).

¹⁶⁸ See respectively Anil Malhotra & Ranjit Malhotra, All Aboard for the Fertility Express, 38(1) COMMONWEALTH LAW BULLETIN 31, 31 (2012); Mula. Sneha Goud & Abhiram Sunkara, Is Legalising
capital of the world.” It is estimated that the surrogacy business in India involves approximately $500 million annually as a subpart of broader Indian fertility tourism which yields approximately $2-2.5 billion each year.\textsuperscript{169} As discussed in the first part of this article, despite the enormous income producing benefit of surrogacy to individuals in India, unregulated aspects of surrogacy involving international egg donation and fertility tourism have raised various risks and concerns for the surrogate mother and intending parents. This unregulated industry is populated by hundreds of fertility clinics all over India and fueled by foreign money. Other than a few fertility doctors who have voluntarily tried to self-regulate, since 2005, efforts to regulate this industry have been unsuccessful.

In 2005, the Ministry of Health and Family Welfare with the Indian Council of Medical Research (hereinafter: ICMR) and the National Academy of Medical Sciences (NAMS) drafted the National Guidelines for Accreditation, Supervision and Regulation of Assisted Reproductive Technology (ART) Clinics in India in order to examine and guide the practices of Indian fertility clinics.\textsuperscript{170} These guidelines set forth medical criteria for fertility treatments and procedures for the government to regulate ART clinics. \textit{Inter alia}, it demands that the intending parents provide for the surrogate’s medical expenses during the pregnancy; the surrogate must give informed consent, witnessed by a non-member of the clinic; the birth certificate must be in the names of the intending parents; and the surrogate must provide information about her role as a surrogate and/or as a genetic donor. In August 2009, the Law Commission of India delivered Report No. 228 entitled “Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy.”\textsuperscript{171}

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\item \textsuperscript{169} For those facts and figures see respectively Malhotra & Malhotra, \textit{supra} note 19, at 432-33.
\item \textsuperscript{169} For those facts and figures see respectively Malhotra & Malhotra, ibid, at 32 and the other references brought by Laufer-Ukeles, \textit{supra} note 26, at 1266 n. 254 and Cohen, \textit{supra} note 17, at 1472 n. 9. For a broader discussion how the surrogacy in India got transformed from a marginalized and socially unacceptable procedure to a multimillion-dollar industry, see \textsc{Gita Aravamudan, Baby Makers – The Story of Indian Surrogacy} (2014).
\item \textsuperscript{170} \textsc{Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India} (2005), http://icmr.nic.in/art/art_clinics.htm.
\item \textsuperscript{171} \textsc{Government of India Law Commission of India, Need for Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy} (2009), http://lawcommissionofindia.nic.in/reports/report228.pdf.
\end{itemize}
\end{footnotesize}
Critics argued that these guidelines were too vague and, due to their voluntary nature, lacked any clear legal guidance, were not binding, and were often violated. The guidelines were also silent on major issues. They failed to protect the human rights of either the surrogate or the child and informed consent was not a compulsory prerequisite and was dealt with in a vague and cursory manner. Additionally, there was a lack of guidance given to the authorities charged with approving new technologies and accrediting ART clinics.\textsuperscript{172} Notwithstanding these criticisms, at a basic level, these non-binding guidelines recognized the legality and enforceability of surrogacy agreements in India under both domestic and international law and included the notion of the rights of surrogates and intending parents.

In 2008, The ICMR released a draft Assisted Reproductive Technology Bill and Rules which, after several revisions, was published in 2010. While this proposed regulation is still pending, there has been some information from the media that it may be enacted in 2015.\textsuperscript{173} This proposed bill recognizes the legality of surrogacy and the enforceability of surrogacy agreements. It also includes various safeguards that are similar to the international convention proposed in this article. Namely, no Indian ART clinic would be permitted to proceed with IVF treatments unless the intending parents furnished documentation from a regulatory body of the intending parent’s home country, establishing that (a) the country permits surrogacy, and (b) the child born through surrogacy in India, will be permitted entry in the receiving state as a legal child of the intending parents.\textsuperscript{174} In addition, a local guardian would be appointed in order to ensure that the child’s welfare is not neglected and to be responsible for the child in the event the transfer of the child to the intending parents is delayed. Moreover, the guardian

\textsuperscript{172} Malhotra & Malhotra, supra note 168, at 34; Laxmi Murthy & Vani Subramanian, ICMR Guidelines on Assisted Reproductive Technology: Lacking in Vision, Wrapped in Red Tape, 3 INDIAN J. MED. ETHICS 123, 172 (2007). For a fuller description, discussion and criticism of these guidelines, see Smerdon, supra note 10, at 33-43; Rimm, supra note 132, at 1438-43; Boyce, supra note 49, at 656-57.


\textsuperscript{174} The draft bill also establishes in chapter two a national advisory board which would be responsible for regulating permissible ART practices, see Indian 2010 bill, supra note 13, at 5-11. For a similar call to establish a national fertility advisory authority in Israel, see Mor-Yossef Commission, supra note 14, at 7 and Yehezkel Margalit, Scarce Medical Resources – Parenthood at Every Age, In Every Case and Subsidized By the State?, 9 NETANYA ACADEMIC COLLEGE LAW REVIEW 191, 305-09 (2014) (Heb.), http://www.netanya.ac.il/Schools/LawSchool/Journal/Documents/Yehezkel-Margalit.pdf. For an English summary of this article, see ibid, Scarce Medical Resources? - Procreation Rights in a Jewish and Democratic State (April 12, 2011), http://ssrn.com/abstract=1807908.
will assist in the transfer of the child to an adoption agency in the event the intending parents fail to claim the child within one month of birth. In this scenario, the child would be given Indian citizenship (see article 34(19)).

Similarly, under the proposal, the surrogate mother would relinquish her parental rights (see article 34(4)); the conceived child would be the legitimate child of the intending parents (see article 35(1)-(5)); and, since the proposal automatically renders the child a legal child of the intending parents, the child’s birth certificate would reflect this fact (see article 34(10)). Finally, the draft bill demands that ART clinics screen the health of the surrogate as well as the intending parents and ensure that the most comprehensive and accurate information is given in order to obtain informed consent (see articles 32(2) and 22(2)(4)(9)).

Some scholars, in whole or in part, support this proposed legislation on the ground that it protects surrogates from the dangers inherent in all commissioned pregnancies. These proponents also approve of the progressive posture of the bill, which recognizes the rights of both the intending parents to have children and the right of the surrogate to be paid for her reproductive labor and related expenses during the pregnancy. The proposal also protects the intending parents, surrogate mother and the child in various respects.

To the contrary, other scholars have strongly criticized the proposal on the ground that it has been significantly influenced by the local surrogacy industry and does not address the heterogeneity of Indian fertility clinics, which numbered approximately 350 in 2009 and yielded approximately 1500 births in that year alone (1/3 of which were foreign commissioned births). The proposed regulation also increases the number of returned fertilized ova for a surrogate from three to five, which could be harmful to a surrogate’s health. Additionally, the proposal is structured principally to regulate the contractual relationship between the intending parents and the clinic and has a limited focus on the rights

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175 Indian 2010 bill, supra note 13. For discussion of this proposed law, see Malhotra & Malhotra, supra note 168, at 35-41. For the history of different Indian efforts at domestic legislative reform, see Ryznar, supra note 50, at 1016-22; Lin, supra note 49, at 554-55, 561-65; Stehr, supra note 25, at 267-68; Smerdon, supra note 10, at 44-5; Patton, supra note 3, at 525-26; Boyce, supra note 49, at 655-59; Ergas, supra note 49, at 132-33, 136.

176 See Vincent & Aftandilian, supra note 132, at 682 (“the Assisted Reproductive Technologies Bill must be adopted with a few adjustments.”); Unnithan, supra note 10, at 288; Malhotra & Malhotra, supra note 168, at 31.
of both the surrogate mother and the child, thereby rendering the surrogate and child more vulnerable.\textsuperscript{177}

In light of the delay in passing the proposed bill, on July 9, 2012, the Indian Ministry of Home Affairs issued new visa regulations for those foreigners who travel to India seeking an Indian surrogate mother. The regulations were publicized in January 2013. According to those new regulations, intending parents should apply for a medical visa instead of a tourist visa. These regulations warn that if any one of the following conditions are not met, the visa application will be denied:

(1) The surrogate mother cannot be cheated; (2) the intending parents must be married for at least two years; (3) regulatory documentation must be provided from the home country of the intending parents; (4) the intending parents must furnish an undertaking that the intending parents will take care of the child; (5) the fertility treatment may only take place at an accredited ART clinic recognized by the ICMR; (6) there must be a duly notarized surrogacy agreement; and (7) the intending parents must obtain permission to exit the country prior to leaving India.\textsuperscript{178} While these additional mandates are helpful, they fall short of the type of comprehensive regulation needed to truly regulate this industry. Indeed, given the pressure of various business interests and interest groups, the implementation of more comprehensive regulation will likely continue to be delayed. As a result, there should be a dual emphasis on promoting both domestic regulation and an international convention in order to achieve progress in this area.\textsuperscript{179}

\textsuperscript{177} See respectively Mohapatra, supra note 19, at 433-34; Goud & Sunkara, supra note 168, at 7; Liz Bishop & Bebe Loff, The Rights of the Gestational Mother and Child in Surrogacy: A Bill to Regulate Surrogacy in India, 7(3) AUSTRALIAN JOURNAL OF ADOPTION 1 (2013). See also Unnithan, supra note 10 (“the way the Bill attempts to introduce ‘universal’ notions of informed consent…resulting in the failure to safeguard the welfare of Indian surrogates. The second limitation is that the proposed law entitles only some poor women in India to realize access to quality medical healthcare services…”). For the Indian feminist criticism of the bill, see the references brought by Unnithan, ibid and by Sheela Saravanan, An Ethnomethodological Approach to Examine Exploitation in the Context of Capacity, Trust and Experience of Commercial Surrogacy in India, 8:10 PHILOSOPHY, ETHICS, AND HUMANITIES IN MEDICINE n. 6-8 (2013).

\textsuperscript{178} http://icmr.nic.in/icmrnews/art/MHA_circular_July%209.pdf. For a fuller discussion of it, see Lin, supra note 49, at 563; study of legal parentage, supra note 122, at 61 n. 527.

\textsuperscript{179} See Engel, supra note 94, at 206 (“issued a warning that this might diminish the surrogacy business by 90% and cause significant economic damage to a whole commercial sector”); Ergas, supra note 49, at 133 (“…favoring India’s economic use of the reproductive capacities of women in an extension of the health tourism that has been actively fostered”); See also New, moralistic regulations have not only raised questions over the
4.3. The 2012 Proposed Israeli’s Expert Committee’s Recommendations and 2014 Regulation

Israel became the first state to regulate and permit domestic surrogacy, including commercial surrogacy, when it enacted the 1996 Embryo Carrying Agreement Act (Agreement Authorization & Status of the Newborn Child).\(^{180}\) Since then, after almost twenty years, there is little doubt that this regulation has been a successful mechanism for regulating domestic surrogacy and creating uniform medical, psychological, legal and ethical standards. During these two decades there is no evidence of even a single dispute between intending parents and a surrogate mother. Moreover, the very few reported Supreme Court verdicts concerning surrogacy dealt only with individuals, mostly single mothers and homosexual couples,\(^{181}\) who requested the right to utilize the service of an Israeli surrogate mother. Therefore, this proactive, comprehensive method should be adopted by other countries both as a model for domestic surrogacy and as the basis for an international convention.

According to Israeli regulations, an approval committee (hereinafter: the committee) must be petitioned in advance to approve each domestic surrogacy agreement. The Committee makes sure that the agreement is obtained through informed consent and free will, that there is no foreseeable harm to the parties, and that the agreement does not infringe on any of the parties’ rights. The committee may demand information and/or documentation from the parties and the agreement will only be approved after the committee comprehensively and thoroughly inspects it. Additionally, the existence of an independent and neutral third party, governmental committee ensures adherence to basic legal and ethical standards.\(^{182}\) Practically

\(^{180}\) Often the act is also known in his following unofficial name - Surrogate Motherhood Agreements (Approval of Agreement and Status of the Newborn) Law. For an unofficial translation of it, see D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL App. B, 219–28 (2005).

speaking, the Israeli regulations focus on preserving the welfare and rights of the three main parties to the agreements – the conceived child, the surrogate mother and the intending parents.\textsuperscript{183} For instance, the committee ensures that there is an explicit stipulation that both parties will undertake to preserve the resulting child’s privacy and avoid any detrimental publication of private information which may harm the child. Further, the intending parents are required to take custody of the child after the delivery, even if the child is not a “perfect” baby due to a physical abnormality or mental disability.\textsuperscript{184}

In addition, the agreement must clearly delineate what should be done with the baby in the case of the divorce of the intending parents or if one or both intending parents pass away. Once the agreement is approved by court order, the child has all the rights of a natural child such as maintenance and inheritance. Finally, in order to document and obtain the child’s biological and medical information, the 1998 Embryo Carrying Agreement Ordinances (Agreement Authorization & Status of the Newborn) (Registry), created a registry in which all successful surrogacy procedures are registered. The registry must contain the names and details of the child, surrogate and intended parents and all changes and updates must also be submitted to the registrar.


\textsuperscript{184} This was the unfortunate outcome of abandoning baby gammy, who suffered from down syndrome, by his Western Australian intending parents in Thailand. Recently, Thailand outlawed surrogacy and, fortunately, the surrogate mother and baby were given Australian citizenship. See, e.g., Leslie R. Schover, \textit{Cross-Border Surrogacy: The Case of Baby Gammy Highlights The Need for Global Agreement on Protections for All Parties, 102(5) FERTILITY AND STERILITY 1258 (2014); David Bell et al., Transnational Healthcare, Cross-Border Perspectives, 124 SOCIAL SCIENCE & MEDICINE 284 (2015); Julianna Photopoulos, Baby Gammy Granted Australian Citizenship (01.26.15), BIO NEWS 787, http://www.bionews.org.uk/page.asp?obj_id=488186&PPID=488554&sid=986. For an updated survey of the surrogacy business in Thailand, see Andrea Whittaker, \textit{Merit and Money: The Situated Ethics of Transnational Commercial Surrogacy in Thailand, 7(2) INTERNATIONAL JOURNAL OF FEMINIST APPROACHES TO BIOETHICS 100 (2014).}
Moreover, the committee inspects the agreement and ensures that both parties are screened and found mentally and physically suitable for the surrogacy process. Additionally, the parties receive independent legal counsel and are provided with accurate information regarding the risks and hazards of the surrogacy process. The parties are required to declare that they are healthy and mentally fit and their advocates must reaffirm these prerequisites, before the agreement is signed, in front of the committee. The parties are also expected to set forth a comprehensive mechanism for resolving possible disagreements and to notify the other parties of any change in circumstances such as illness, divorce, or death.

Finally, as far as the surrogate’s rights are concerned, the agreement must emphasize the independence and autonomy of the surrogate mother. Additionally, the surrogate is entitled to independent consultation and treatment from a neutral physician who is being paid by the intending parents. The surrogate is also entitled to psychosocial treatment from a psychologist from the commencement of fertility treatments until six months after delivery. The intending parents are required to cover the surrogate’s expenses for life insurance, loss of income, firing due to pregnancy, or the loss of governmental benefits due to pregnancy. The number of IVF cycles, the duration of IVF cycles, as well as the number of returned fertilized ova are also limited by the regulations. Further, any medical treatment will only be provided upon the informed consent of the surrogate, and the surrogate is entitled to a second opinion from a doctor. Lastly, abortions must be medically justified and, in the case of abortion, the surrogate will be fully financially compensated.185

In May 2012, an expert committee, the Mor-Yossef Commission, discussed various possible revisions to the Israeli regulation of fertility and childbearing. Among other issues, it discussed gay parents and suggested allowing male couples to engage in altruistic surrogacy due to the shortage of surrogates in Israel. The commission also discussed the fact that the

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Israeli international surrogacy market has significantly increased, raising problematic legal and ethical concerns. The commission observed that there is no point in regulating domestic surrogacy without considering the parallel overseas market, since the use of international surrogates can easily undermine the protections of domestic regulation. The commission recommended that the Israeli government identify and enact a method to regulate Israeli cross-borders surrogacy.\textsuperscript{186}

In its conclusion, the expert committee recommended a proposed domestic and international regulation.\textsuperscript{187} In part, the committee recommended regulation whereby any Israeli physician and/or intending parent who engaged in an international surrogacy arrangement through an unapproved intermediary and/or with an uncertified clinic would be charged with a felony. The committee was cognizant of the fact that criminal penalties would not prevent all Israeli citizens from being involved in such unregulated arrangements, but observed that implementation of criminal penalties, and only recognizing the legal claim of intending parents who utilized approved procedures, would significantly reduce this phenomenon.\textsuperscript{188}

Following the publication of the committee’s conclusions, the Israeli health minister appointed an inter-ministerial committee, which dealt with the practical aspects of implementing the recommendations. The resulting legislation was opened for public comment in January 2014 and, after revisions, was passed by the Israeli Knesset the first stage in the regulating process on July 23, 2014. This legislation, known as the Memorandum of Surrogacy Agreements Law, contained various innovations concerning the proactive

\textsuperscript{186} See respectively Mor-Yossef Commission, supra note 14 at 51, 53, 68.

\textsuperscript{187} Mor-Yossef Commission, supra note 14, at 68-69 – “Therefore the committee hopes that international surrogacy will be regulated in the future by an international convention, such as exists for inter-country adoption...In the domestic sphere of Israel - the committee recommends that Israel regulates the manner in which surrogacy carried out outside of Israel is recognized. A track should be established which guarantees, even if not fully, preservation of the rights of women who are surrogates a. An inter-ministerial committee will recognize clinics abroad, based on an examination of documents relating to its medical facilities, and on consideration of…conditions provided to surrogates under the agreements. b. Recognition will be given after ascertaining that the law of the country permits and recognizes surrogacy. c. Surrogacy under the conditions laid forth in this track will ease the requirements for recognition of the parenthood thereof and entry into Israel.”

\textsuperscript{188} For evaluating its recommendations, see Shakargy, supra note 183 passim; Shahar Lifshitz, Neither Nature Nor Contract: Toward An Institutional Perspective on Parenthood Essay, 8 LAW & ETHICS HUM. RTS. 297, 309, 325-26, 329 (2014) (“I welcome the conclusions of the Mor Yosef Committee that wish to create a supervised track of overseas surrogacy and create incentives to use this track.”).
regulation of international surrogacy. In essence, it requires that every international surrogacy agreement be inspected in advance by an approval committee in order to ensure that the welfare and the rights of all involved parties are preserved.

The approval committee will validate such agreements only after concluding that the surrogacy process will take place in a clinic certified by an official Israeli intermediary. The agreement will also be reviewed to ensure that surrogacy is permitted in the foreign state and that the child will be considered the child of the intended parents and not the child of the surrogate mother, and that the child can be taken out of the surrogate’s home country. Additionally, the Israeli intermediary, which is supervised by an inter-ministerial committee, is required to act with high ethical and medical standards in facilitating such agreements. By operating within this regulatory regime, intending parents can ensure that they will be recognized as the legal parents of the child, and thereby obtain an Israeli passport for the child to be transported to Israel.

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189 See article 17IV of the Memorandum of Surrogacy Agreements Law, supra note 14, which states as follows – “No person shall implant a fertilized egg into a surrogate mother, outside of Israel, unless in a certified clinic and in the framework of a surrogacy agreement outside of Israel made through an approved intermediary or by an independent agreement approved by the advisory committee…and under the terms of the agreement”. For the latter prerequisites, see article 17X, ibid.

190 For a vivid criticism of the commercial character of these for profit intermediaries, see HEDVA EYAL, WORKING PAPER REGARDING AGENCIES FOR OVERSEAS SURROGACY PROCESS - ISRAELI REALITY 2 (2014) (Heb.) – “While overseas surrogacy agencies are active in the private economic arena that functions as a “free market”, they brand their ethical status using marketing techniques that rely on language and social messages drawn from birth and parenting values…Recommendations…local and international commercial intermediaries should be banned, and instead of the current situation non-profit organizations should be established and be active, similar to adoption agencies and their regulations…the procedure will be managed and regulated by a mechanism in the spirit of Hague Inter-Country adoption convention ….” For more on the findings and concerns about intermediaries in the global surrogacy industry, see MARCY DARNOVSKY & DIANE BEESON, GLOBAL SURROGACY PRACTICES, ISS WORKING PAPER SERIES/GENERAL SERIES 18-19, 52-53 (Vol. 601) (2014), http://repub.eur.nl/pub/77402.

191 See article 17XV(B) of the Memorandum of Surrogacy Agreements Law, supra note 14 – “An approved intermediary will carry out its activities under this chapter in good faith, integrity and under the full provisions of the law, while ensuring the best interests of the parties to the external surrogacy agreement and the welfare of the child to be born as a result of the agreement and respecting the basic rights of all parties involved, including those recognized in international law”.
Conclusion

Nearly thirty years have passed since the heart-wrenching cases of Baby M in the United States and the case of Baby Cotton in England. Since then, the discourse surrounding surrogacy has changed significantly as countries around the world begin to accept the legitimacy of surrogacy agreements.\(^{192}\) Moreover, due to the disparity between different states regarding the legality and enforceability of surrogacy agreements, and due to bureaucratic, fiscal, psychological, religious and cultural reasons, the phenomenon of cross-borders surrogacy has become increasingly prevalent. The legal and ethical dilemmas involved in such international agreements are far more complicated than domestic surrogacy agreements, as was reflected in the cases of baby Manji and baby Gammy. Since this is a transnational phenomenon and problem, it requires an international regulatory solution and the cooperation of the international community. Indeed, given the various pitfalls of international surrogacy, the Hague conference, at its March 2015 meeting, should move expeditiously to facilitate a Hague convention on international surrogacy in a manner consistent with the proposals contained in this article.

In the short run, however, due to the complexity of such regulation coupled with the time it will take for any such regulation to become effective, there is a parallel need for domestic unilateral regulation in various countries. Such regulation can be modeled after Israeli legislation and proposed Indian regulations. This dual process of achieving a long term international convention while simultaneously advancing domestic regulation will help address the risks and pitfalls of international surrogacy, and thereby protect the thousands of parents and surrogates who will utilize international surrogacy in the future, as well as the resulting children.

\(^{192}\) For a recent American trend to validate traditional, and not only gestational surrogacy agreements, see A.L.S. ex rel. J.P. v. E.A.G., Not Reported in N.W.2d, 2010 WL 4181449 (Minn.App., 2010); In re F.T.R., 349 Wis.2d 84 (Wis., 2013); In re Baby, Slip Copy, 2013 WL 245039 (Tenn.Ct.App., 2013); Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 J. Health Care L. & Pol'y 85 (2015).