

Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective

Achmad, C.I.

Citation

Achmad, C. I. (2018, June 26). Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective. Retrieved from https://hdl.handle.net/1887/63088

Version: Not Applicable (or Unknown)

License: License agreement concerning inclusion of doctoral thesis in the

Institutional Repository of the University of Leiden

Downloaded from: https://hdl.handle.net/1887/63088

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The following handle holds various files of this Leiden University dissertation: http://hdl.handle.net/1887/63088

Author: Achmad, C.I.

Title: Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective

Issue Date: 2018-06-26

Children's Rights in International Commercial Surrogacy

Children's Rights in International Commercial Surrogacy

Exploring the challenges from a child rights, public international human rights law perspective

PROEFSCHRIFT

ter verkrijging van de graad van Doctor aan de Universiteit Leiden, op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker, volgens besluit van het College voor Promoties te verdedigen op dinsdag 26 juni 2018 klokke 11.15 uur

door

Claire Indrawati Achmad

geboren te Auckland, Nieuw Zeeland

in 1983

Promotor: prof. dr. mr. M.R. Bruning

Co-promotor: dr. M.J. Vonk

Promotiecommissie: prof. dr. R.A. Lawson

prof. dr. M.L.P. Loenen

prof. dr. K. Sandberg (University of Oslo, Norway) prof. dr. W.M. Schrama (Universiteit Utrecht)

prof. dr. J.J. Sloth-Nielsen

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

ISBN 978 94 0281 061 5

© 2018 C. Achmad

Behoudens de in of krachtens de Auteurswet gestelde uitzonderingen mag niets uit deze uitgave worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Voor zover het maken van reprografische verveelvoudigingen uit deze uitgave is toegestaan op grond van artikel 16h Auteurswet dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3051, 2130 KB Hoofddorp, www.reprorecht.nl). Voor het overnemen van (een) gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken (art. 16 Auteurswet) kan men zich wenden tot de Stichting PRO (Stichting Publicatie- en Reproductierechten Organisatie, Postbus 3060, 2130 KB Hoofddorp, www.stichting-pro.nl).

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.

Acknowledgements

It has been a privilege undertaking this doctoral study in international children's rights law as a student of Universiteit Leiden, an institution with which I share many values, and which has inspired me through world-leading scholars and legal practitioners.

I am indebted to my principal supervisor Professor Mariëlle Bruning, for the opportunity of doctoral study. Thank you for supporting me to develop as a child rights expert, and for your flexibility and open-mindedness. Thank you for the time you have invested in me over the years to help me pursue this work. It has been a pleasure and privilege working with and being inspired by you.

I am grateful to my second supervisor, Assistant Professor Machteld Vonk. Your constructive feedback and encouragement has been unwavering; your enthusiasm for my topic and work has lifted me throughout. Thank you for your generous assistance translating the study summary into Dutch, and all you have contributed to help me complete this study.

I would not have undertaken doctoral studies if not for my husband Peter Dolan's encouragement. Peter, you said I should 'go for it'; I am grateful for your kindness, love and understanding during 'PhD life'. Thank you for proof-reading my work and testing my thinking so my ideas evolve in new directions.

My family is the bedrock of my commitment to lifelong learning. The wisdom my beloved grandparents Alieen and Tom Ross shared with me, and the life example they provided, has been a guiding force for me completing this doctorate.

I am grateful for the support, generosity and love of my parents, Robin and Bambang Achmad. You have both boosted me during my studies, always providing encouragement and practical help both in-person and virtually whenever necessary. Thank you and terima kasih banyak; you are both a driving force in my life that I cherish.

My brother, Andrew Achmad, has been a pillar of support to me during this work and always. Your thoughtfulness, accountability and good humour means so much.

I am grateful for the support of my wider family members internationally, including the wonderful Dolan family. The support and encouragement of close and dear friends has been grounding and motivating, including col-

Acknowledgements VII

leagues in Leiden's Child Law Department and others undertaking doctoral studies.

I have been privileged to work with many outstanding individuals, institutions and organisations during my studies. Thanks to the organisers of the workshops I have contributed to at Aberdeen, Columbia, ITM and La Trobe universities, and conferences in Auckland, Stockholm, The Hague, and Wellington.

My gratitude extends to the esteemed scholars and legal practitioners who have provided feedback and opportunities, discussed ideas and inspired me through their work. Particularly, Maud de Boer-Buqicchio, Adjunct Professor Yasmine Ergas, Assistant Professor Laura van Waas, Professor Ton Liefaard, Professor Eric Blyth, Professor Sanoj Rajan, Professor Mark Henaghan, Margaret Casey Q.C. and Simon Jefferson Q.C.

I am thankful for my supportive colleagues in the organisations I have worked with as a full-time employee while studying. I acknowledge the Leids Universiteit Fonds and the New Zealand Netherlands Foundation for financial support by way of grants, enabling my travel to conferences in The Hague and Stockholm. The opportunities I have had to teach at Leiden University and the University of Auckland while studying have fuelled my desire to continue teaching in future.

I hope this thesis will be of practical help and application for those around the world grappling with the challenges arising from International Commercial Surrogacy. Most of all, I hope it helps to ensure the rights of children born through International Commercial Surrogacy are promoted, protected and upheld.

Claire Achmad Te Whanganui-a-Tara, 2018

Table of contents

1	INTRODUCTION	1
1	International Commercial Surrogacy as a 21st century phenomenon	1
2	Aims of the study and research questions	5
3	Rationale for a focus on the rights of the child	6
4	Methodological approach and scope	8
5	The place and contribution of this study in the existing legal body of	1.1
_	knowledge concerning International Commercial Surrogacy	14 17
6 7	Structure of the study	22
/	Outline of the study	22
2	Contextualising a 21 st Century Challenge Part One	
	Understanding International Commercial Surrogacy and the Parties whose	
	Rights and Interests are at Stake in the Public International Law Context	29
1	Introduction	30
2	Understanding International Commercial Surrogacy and its parties	32
3	Tracking the emergence and development of a market: a global 'trade' in	
	babies through International Commercial Surrogacy	35
4	The parties to International Commercial Surrogacy arrangements	37
	4.1 The commissioning parents	37
	4.2 The surrogate mother	40
	4.3 The child	41
	4.4 The medical staff and surrogacy broker	41
5	Brave new world: the bioethical and moral conundrums of International	
	Commercial Surrogacy and the interface with health law issues	42
6	Human rights protection: when is a child a child?	44
3	CONTEXTUALISING A 21 ST CENTURY CHALLENGE PART TWO	
3	Public International Law Human Rights Issues: Why Are the Rights and	
	Interests of Women and Children at Stake in International Commercial	
	Surrogacy	49
	Surrogacy	ユノ
1	Introduction	50
2	Children's rights	51
_	2.1 The immediate practical problems for children born from	
	International Commercial Surrogacy arrangements	52

Table of contents IX

	2.2	The potential for statelessness	55
	2.3	The commissioned child as a contested or unwanted child	58
	2.4	The child's right to identity	58
		2.4.1 The importance of identity to knowing one's personal	
		narrative	60
		2.4.2 The importance of identity to knowing one's cultural and	
		ethnic background	61
		2.4.3 The importance of identity to knowing one's genetic origins	
		 the medical and health rationale 	62
	2.5	Potential for selective creation of children – designer babies	63
	2.6	The impact of the creation of international surrogate children on	
		potential adopted children	64
3	Wo	men's rights	65
	3.1	The potential for exploitation of the socio-economic position of	
		poor women and for ICS to contribute to perpetuated	
		marginalisation	65
	3.2	The potential for the exploitation of women's bodies and	
		reproductive rights and autonomy	68
4	Huı	man rights issues common to both women and children in	
	Inte	rnational Surrogacy arrangements	70
	4.1	Commodification of women and children	70
	4.2	The risk of human trafficking	71
4	Mu	LTIPLE 'MOTHERS', MANY REQUIREMENTS FOR PROTECTION	
		ldren's Rights and the Status of Mothers in the Context of	
		rnational Commercial Surrogacy	73
1	Intr	oduction	74
2	Uno	derstanding International Commercial Surrogacy as a distinguishable	
		nomenon	76
3		central feature of 'mother': child	78
4		Itiple mothers: the many faces of 'mother' in International	
		nmercial Surrogacy	79
		Surrogate	79
		Genetic	81
		Commissioning	82
5		sence of 'mother' in International Commercial Surrogacy	84
		Human	84
		Legal	85
6		contestable notion of 'mother' in International Commercial	
		rogacy and implications for the rights of the child	86
7		nclusion	90

X Table of contents

5	INTERNATIONAL COMMERCIAL SURROGACY AND CHILDREN'S RIGHTS	
	Babies, Borders, Responsibilities and Rights	91
1	Introduction	92
2	Conception cross-border	93
3	The ethics and economics of commercialising conception	97
4	Clash of rights: 'parents', children and other parties	102
5	The rights of the child at stake	104
	5.1 The rights of the child to identity and nationality	105
	5.1.1 The child's right to the preservation of their identity	105
	5.1.2 Nationality	108
	5.2 The right of the child to grow up in a family environment	109
	5.3 The rights of the child to health, education and social security	111
6	International approaches to the rights of the child in International	
	Commercial Surrogacy situations	111
	6.1 The rise of 'national guidelines' or government guidance as a	
	response to International Surrogacy: aspects relating to the rights of the child	110
		112
	6.1.1 New Zealand: International Surrogacy Information sheets and non-binding ministerial guidelines	113
	6.1.2 Australia: 'Fact Sheet 36a on International Surrogacy	113
	Arrangements'	115
	6.1.3 United Kingdom: 'Guidance: surrogacy overseas'	117
7	Judicial decision-making on the rights of the child in selected reported	
	International Commercial Surrogacy case law	119
8	Conclusion: placing the child's rights and best interests at the heart of	
	International Commercial Surrogacy	123
6	UNCONCEIVED, UNBORN, UNCERTAIN	
	Is Pre-Birth Protection Necessary in International Commercial Surrogacy	
	for Children to Exercise and Enjoy Their Rights Post-Birth?	131
1	Introduction	132
2	The impact of actions and decisions in the prenatal and preconception	
	stages of International Commercial Surrogacy on the rights of children	
	once born	135
	2.1 Key child rights impacts triggered during the preconception stage	
	of International Commercial Surrogacy	135
	2.2 Key child rights impacts triggered during the prenatal stage of	400
2	International Commercial Surrogacy	137
3	Does international human rights law provide a basis for protecting the	120
	unborn child?	138 138
	3.1 United Nations Convention on the Rights of the Child	138
	3.1.1 Convention the Rights of the Child – Travaux Préparatoires 3.1.2 Other international human rights law instruments	143
	5.1.2 Onici international numan rights law instruments	143

Table of contents XI

	3.2	Treatment of the unborn child in regional human rights	
		instruments and national constitutions	145
		3.2.1 Regional human rights instruments	145
			146
4	Juris	sprudential approaches to pre-birth issues	148
	4.1	Leading regional human rights jurisprudence	148
		0 0 / 1	148
		4.1.2 European Court of Human Rights	149
	4.2	Selected domestic and regional jurisprudence concerning specific	
		9 / 1	152
		4.2.1 Wrongful life legal actions, including those based on failures	
		o o	152
		4.2.2 Actions of a pregnant woman detrimentally impacting on	
			155
			157
5	Imp	lications for the future child's rights of the intentional, planned	
		are of International Commercial Surrogacy and the involvement of	
		ě,	158
6		roposed approach to preconception and prenatal protection of the	
		its of the future child most at risk in International Commercial	
	_		160
	6.1	Framing the future child in International Commercial Surrogacy	
			161
	6.2	Basic safeguards for protecting the future child in International	
		Commercial Surrogacy from rights impacts triggered preconception	
			161
		1 ,	162
		6.2.2 Professional codes of practice/best practice guidance	163
		6.2.3 Inserting the child's voice and perspective into International	
		Commercial Surrogacy decision-making and actions at the	
		• •	164
7	Con		167
7		URING CHILDREN'S RIGHT TO A NATIONALITY IN A CHANGING WORLD	
		context of International Commercial Surrogacy and twenty-first	
	cent	tury reproductive technology	171
1	Intr	oduction	172
2			174
	2.1	International Commercial Surrogacy as a new method of family	_
		· · · · · · · · · · · · · · · · · · ·	174
	2.2		174
		2.2.1 Scenario one: Lack of recognition of the child's parentage	_
			176
		× *	

XII Table of contents

		2.2.2 Scenario two: Application of conflicting nationality and	
		parentage laws by child's birth State and 'commissioning	
		parents" State of nationality	177
		2.2.3 Scenario three: Children abandoned by commissioning	
		parents	181
	2.3	Key findings distilled from the three International Commercial	400
		Surrogacy child statelessness scenarios and associated cases	182
		2.3.1 Examining the wider child rights impacts of child	100
2	T., C.	statelessness in International Commercial Surrogacy	183
3		rnational law governing the child's right to acquire a nationality	185
	3.1	General nationality provisions and nationality provisions	185
	3.2	pertaining specifically to children Key provisions in the statelessness conventions	186
4		uring the child's right to nationality in International Commercial	100
4		ogacy	188
	4.1	The limitations of the solutions applied in the cases discussed	188
	4.2	Possible solutions to child statelessness in International	100
	1.2	Commercial Surrogacy	192
		4.2.1 Jus soli based solutions	192
		4.2.2 Jus sanguinis based solutions	194
		4.2.3 A practical and effective solution and residual secondary	
		safeguards to secure the child's right to nationality in	
		International Commercial Surrogacy	197
5	Con	clusion: the future of the child's right to acquire a nationality in	
		rnational Commercial Surrogacy	199
8	Ans	WERING THE 'WHO AM I?' QUESTION	
	Prot	ecting the Right of Children Born Through International Commercial	
	Surr	ogacy to Preserve Their Identity Under Article 8 of the United	
	Nati	ons Convention on the Rights of the Child	201
1		oduction	202
2		elements of child identity at particular risk in International	
		nmercial Surrogacy	204
		Genetic and biological	205
		Personal narrative	207
2		Cultural	207
3		child's perspective: why the right to identity preservation is	200
		ortant in International Commercial Surrogacy	209
	3.1	Potential impact of conception and birth circumstances through	209
	3.2	International Commercial Surrogacy on children The implications for the child of being removed from their state of	209
	٥.۷	birth	211
4	The	child's right to preserve their identity: Article 8 of the United	411
•		ons Convention on the Rights of the Child and beyond	213
	4.1	The development of the child's right to preserve identity	214

Table of contents XIII

	4.2	The concept of 'preserving' identity under Article 8(1) of the	217
	4.3	Convention on the Rights of the Child The content of the right to preserve identity under Article 8(1) of	217
	1.0	the convention on the rights of the child	218
		4.3.1 The child's identity from a biological and genetic	210
		perspective	220
	4.4	The right to identity in regional human rights jurisprudence	224
	1.1	4.4.1 Inter-American Court of Human Rights	224
		4.4.2 European Court of Human Rights	225
5	Нол	v the child's Article 8 right has been breached in International	
		nmercial Surrogacy situations	229
		Volden twins	229
		D and L (Surrogacy)	230
		Paradiso and Campanelli v. Italy	231
		In the Matter of an Application by DMW and KW to adopt a male child	232
6		rning lessons from donor-conception, adoption and domestic	
		rogacy for the child's right to preserve identity in International	
		nmercial Surrogacy situations	236
	6.1	Domestic systems of donor-conceived children and lessons for the	
		child's right to preserve identity in International Commercial	
		Surrogacy	236
	6.2	Adoption systems and lessons for the child's right to preserve	
		identity in International Commercial Surrogacy	239
	6.3	Domestic surrogacy and lessons for the child's right to preserve	
		identity in International Commercial Surrogacy	242
7	Pro	posing practical measures of implementation of article 8 for children	
	in I	nternational Commercial Surrogacy	244
	7.1	Commissioning parents and medical professionals: a first line of	
		defence in preserving child identity in International Commercial	
		Surrogacy	244
	7.2	The state's role in protecting the child's right to preserve their	
		identity in International Commercial Surrogacy	248
		7.2.1 Facilitating an identity dossier for every child born through	
		International Commercial Surrogacy as an interim measure	
		of protection	249
		7.2.2 Facilitating a long-term, inter-state system of protection of	
		identity information in the context of International	0==
0	0	Commercial Surrogacy	251
8		clusion: Answering the 'Who am I?' question in International	252
	Con	nmercial Surrogacy situations	252

XIV Table of contents

9	Chil	E ANALYSIS Idren's Rights to the Fore in the European Court of Human Rights' t International Surrogacy Judgments	255
1 2 3 4 5 6 7	Chil Arg Judg Mul Chil Frer and	oduction deren in limbo for over ten years suments in the European Court of Human Rights gements in the European Court of Human Rights stiffaceted concept of identity central to private life deren's rights to the fore such Government reaction and future implications of the Mennesson Labassee judgments for human rights in the context of International memercial Surrogacy	256 257 258 260 261 262
		lum to Chapter 9: Brief case commentary $-$ Paradiso and Campanelli v . and Chamber of the European Court of Human Rights	269
10	Bala	LTIPLE POTENTIAL PARENTS BUT A CHILD ALWAYS AT THE CENTRE uncing the Rights and Interests of the Parties to International numercial Surrogacy Arrangements	279
1	1.1	oduction Focus and scope of this paper	280 281
2	surr	Incing the rights and interests of the unborn child with those of the rogate mother Leading decisions of the European Court of Human Rights and United Nations Human Rights Committee concerning abortion relevant by analogy to rights balancing in International Commercial Surrogacy Striking a balance between the rights and interests of the unborn	283 284
	2.2	child and the surrogate mother in International Commercial Surrogacy	286
3		ancing the rights and interests of the child with those of genetic or parents	289 289
	3.2	• •	291
4		uncing the rights and interests of the child with those of the unissioning parents	292
	4.1	The rights and best interests of the child in conflict with the rights and interests of the commissioning parents in International	<i>∠</i> 3∠
		Commercial Surrogacy	292
	4.2	8	294 294
		4.2.1 Is there a right to a genetic child?	794

Table of contents XV

		4.2.2 Is there a right to adopt?	299
	4.3	The concept of 'involuntary childlessness'	301
	4.4	Inserting the child's rights into the picture	303
	4.5	Striking a balance between the rights and interests of the child and	
		the commissioning parents in the specific situation of International	
		Commercial Surrogacy	304
		4.5.1 Selected jurisprudence relevant to the balancing of	
		commissioning parents' and children's rights and best	
		interests in International Commercial Surrogacy	305
		4.5.2 Selected International Commercial Surrogacy jurisprudence	000
		balancing commissioning parents' and children's rights	309
5	Rala	uncing the rights of the surrogate with the rights and interests of the	307
3			212
		imissioning parents	312
	5.1	A power imbalance in favour of commissioning parents in	040
		International Commercial Surrogacy	312
	5.2	A power imbalance in favour of the surrogate in International	
		Commercial Surrogacy	314
	5.3	, 1	
		parents' and surrogates' rights and interests in International	
		Commercial Surrogacy	316
	5.4	The surrogates' right not to be exploited through International	
		Commercial Surrogacy	317
6	Con	clusion: Overall balancing of rights in International Commercial	
		ogacy	318
	6.1	A general approach to rights balancing in International Commercial	
		Surrogacy according priority to the child's rights and best interests	318
	6.2	Striking an overall balance in the four situations of competing	
		rights and interests in International Commercial Surrogacy	
		discussed in this paper	321
		anocaobea in ano paper	021
11	CON	ICLUSION	325
1	Foci	using on child rights in International Commercial Surrogacy	325
2		rnational Commercial Surrogacy: A complex method of family	
		ding in a changing landscape	326
3		hild always at the centre, but often unprotected	331
4		ocus on the child, the most vulnerable person in International	001
1		<u> •</u>	332
_		nmercial Surrogacy arrangements	
5		nultifaceted child rights challenge	333
6		Convention on the Rights of the Child as the framework for	
	_	moting and protecting the child's rights in International Commercial	222
		ogacy	338
	6.1	The role of the convention on the rights of the child in protecting	
		and reinforcing the rights of children in International Commercial	
		Surrogacy	338

XVI Table of contents

	6.2	Understanding and approaching the rights of children in	
		International Commercial Surrogacy from a public international	
		human rights law, child rights perspective, and balancing	
		competing rights in International Commercial Surrogacy	
		Including a Framework of Recommendations for promoting and protecting	
		the rights of children in International Commercial Surrogacy	339
	6.3	Arguments for the Committee on the Rights of the Child to issue a	
		General Comment on the rights of children in International	
		Commercial Surrogacy	349
7	Env	isaging International Commercial Surrogacy arrangements that	
	prot	ect the children at their centre	351
8	Pros	spects for a long-term approach to protecting the child's rights in	
	Inte	rnational Commercial Surrogacy	352
9	Con	cluding remarks	355
Sui	MMAI	RY	361
SAI	MENV	ATTING (DUTCH SUMMARY)	369
Вів	LIOGI	RAPHY	377
Cu	RRICU	JLUM VITAE	399