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

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‘We may at the outset point out that a lot of legal, moral and ethical issues arise for our consideration in this case, which have no precedents in this country. We are primarily concerned with the rights of two new born innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova.’

– *Jan Balaz vs Anand Municipality and 6 ors*, 2009<sup>1</sup>

## 1 INTERNATIONAL COMMERCIAL SURROGACY AS A 21<sup>ST</sup> CENTURY PHENOMENON

International Commercial Surrogacy (ICS) has developed over the past decade as a distinct method by which to have a child. Prior to this, it would have been hard to fathom the possibility – let alone the practical reality – of a child being born using an embryo created from the sperm of an anonymous Scandinavian donor and the egg of an anonymous Ukrainian donor, implanted into an Indian surrogate mother, intended for the care of ‘commissioning parents’ living in New Zealand. Now however, families are being built in new ways, and those wishing to become parents may turn to ICS to do so. For some commissioning parents, (such as those who have been unable to conceive via other assisted reproductive technology (ART) methods), ICS is an option of last resort. For others though (such as same-sex couples and persons without a partner), it is sometimes viewed as an attractive first option. The observation of the Gujarat High Court quoted above in its judgment in *Jan Balaz v. Anand Municipality and 6 ors* highlights the unprecedented nature of the scenarios arising through ICS, and emphasises the people who are at the heart of all ICS situations: the children conceived and born this way. Children conceived and born through ICS are rights holders,<sup>2</sup> like all other children. They are entitled to the full range of rights guaranteed under the United Nations Convention on the Rights of the Child, and as such are owed special protection by states

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1 *Jan Balaz v. Anand Municipality and 6 ors*, AIR 2010 Guj 21, Gujarat High Court, 11 November 2009, at [9].

2 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para 1), CRC/C/GC/14, 2013, at [16(b)].

and other duty-bearers, such as parents.<sup>3</sup> However, conception and birth through ICS can lead to this group of children facing particular challenges to their rights. This study therefore focuses on this subject and how to address these challenges, to protect and uphold child rights in ICS.

ICS can be defined as the practice of a person or persons ('commissioning parents') living in one state paying to have a child who is intended for them upon birth, and who is conceived (usually in-vitro) and born in another state<sup>4</sup> to a woman acting as a surrogate. It is distinctive in its cross-border nature and the reality that commissioning parents are highly likely to intend to bring up the child in their own home state,<sup>5</sup> commissioning parents often wanting to remove the child from his or her state of birth shortly following birth. As Bromfield and Robati note, ICS arrangements are "almost always gestational surrogacy arrangements",<sup>6</sup> meaning that it is unlikely the surrogate mother is genetically related to the child she bears. The Permanent Bureau of the Hague Conference on Private International Law (Permanent Bureau) provides a simplified description of international surrogacy arrangements as being "any surrogacy arrangement involving more than one State, either as a result of the differing residences (and usually, nationalities) of the intending/commissioning parents and surrogate mother, or otherwise."<sup>7</sup>

The Permanent Bureau's definition of international surrogacy arrangements does not refer to the presence of a commercial element. In practice however, many international surrogacy arrangements have a commercial element beyond what might be seen to be 'reasonable costs' associated with a surrogacy in a traditional, altruistic sense.<sup>8</sup> It is for this reason that this study focuses on ICS,<sup>9</sup> with altruistic surrogacy falling out of scope. ICS leverages off globalisa-

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3 R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, (3<sup>rd</sup> ed.), UNICEF, 2007, at 1.

4 The 'supply-side state'.

5 The 'demand-side state'.

6 N.F. Bromfield and K.S. Rotabi, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations', (2014) 1(3) *Global Social Welfare*, at 124.

7 Permanent Bureau of the Hague Conference on Private International Law, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements* (Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference), (2011), at 3 fn 1.

8 In some states in which commercial surrogacy is illegal but which allow altruistic surrogacy, intending parents are permitted to compensate altruistic surrogates for reasonable costs associated with the surrogate's pregnancy. E.g. Section 7, Surrogacy Act 2010, New South Wales (Australia); Section 14(4), Human Assisted Reproductive Technology Act 2004, New Zealand; Section 11, Surrogacy Act 2010, Queensland (Australia); Section 54(8) Human Fertilisation and Embryology Act 2008, United Kingdom.

9 Indeed, e.g. in the UK, despite the standard of 'reasonable expenses' for altruistic surrogacy under UK legislation, the Family Division of the High Court has retrospectively authorised payments in ICS cases which go far beyond the traditional conception of reasonable

tion, technological advances, and cheaper ART and surrogacy services offered by 'supply states' which have predominantly grown in less-developed states in the past decade (existing alongside the availability of ICS in some states of the United States of America,<sup>10</sup> the cost of which is markedly greater<sup>11</sup>). ICS has also developed as a reaction to the reality that even in states where altruistic, non-commercial surrogacy is legal, it is still difficult to find women who are willing to act as surrogates purely on a gift-relationship basis.<sup>12</sup> These various factors have combined with attitude shifts about how we build and form families and what 'family' means in the 21<sup>st</sup> century. Indeed, creating a family through alternative methods such as ICS has become increasingly acceptable in some societies. It is in the context of 21<sup>st</sup> century connectivity and globalisation that the broader growth of medical tourism and the outsourcing of labour have also occurred and are broadly accepted; more people than ever before cross international borders for medical procedures far from home<sup>13</sup> and labour is increasingly outsourced to locations and people geo-

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- expenses, and where there was a clear commercial element involved: in *J v. G* [2013] EWHC 1432, a payment of USD \$56,750 was authorised (at [14]). Mrs Justice Theis held that the payments "were not so disproportionate to expenses reasonably incurred that the granting of an order would be an affront to public policy." (at [22(1)]); in *Re X (Foreign Surrogacy – Child's Name)* [2016] EWHC 108 (Fam), a payment of USD \$48,332.49 was authorised, with Mrs Justice Theis holding that "In the circumstances of this case the payments made other than for expenses reasonably incurred should be authorised by the court." (at [28])
- 10 For discussion of the approaches of different states in the United States, see J.L. Watson, 'Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?', (2007) 6(2) *Whittier Journal of Child and Family Advocacy*, 532-539.
- 11 For discussion of the comparative costs between surrogacy in the United States and other countries such as India, see: N. Grether and A. May, 'Going global for a family: Why international surrogacy is booming', *Al Jazeera America*, 12 May 2014, available at: <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/12/going-global-fora-familywhyinternational-surrogacyisbooming.html> (accessed 16 July 2016); D. Cunha, 'The Hidden Costs of International Surrogacy', *The Atlantic*, 22 December 2014, available at: <https://www.theatlantic.com/business/archive/2014/12/the-hidden-costs-of-international-surrogacy/382757/> (accessed 16 July 2016). For discussion of the comparative payments received by surrogates in the United States and India, see R. Deonandan, 'Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy', *Risk Management and Healthcare Policy* (2015), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4544809/> (accessed 16 July 2016).
- 12 E.g. in New Zealand, as discussed in: M. Duff, 'Who is my egg mother?', *The Dominion Post*, 12 October 2014, available at: <http://www.stuff.co.nz/dominion-post/culture/10607436/Who-is-my-egg-mother> Tombleson also argues that "The prohibition of commercial surrogacy is largely responsible for reproductive travel as it reduces the number of women within the domestic sphere willing to partake in the practice." A. Tombleson, *Contracting the New Delhi Belly: Responding to the Practice of International Surrogacy*, dissertation submitted in partial fulfilment of a Bachelor of Laws (Honours) degree, Faculty of Law, University of Otago, October 2012, 5.
- 13 For comprehensive discussion regarding the growth of medical tourism, see J. Connell, *Medical Tourism* (2011), at 42-60.

graphically distant from the customer or end user.<sup>14</sup> The nature of this supply and demand relationship, with demand flowing predominantly from the more developed world to the supply-side located in the less developed world can create underlying power imbalances and issues around relative ability to access services.<sup>15</sup> A number of factors motivate people to engage the services offered through medical tourism, including but not restricted to competitive pricing, on-demand availability, and to circumvent restrictive laws and policies of the state in which they reside and access procedures not available there.

The last of these factors is particularly significant regarding ICS, as commissioning parents often turn to ICS when they have exhausted all options for family building in their home state and when that state does not allow commercial surrogacy. Moreover, in instances where one or both commissioning parents are able to provide gametes for use in the ICS arrangement, the opportunity of creating a child with whom they will share a genetic link is a strong motivator towards ICS. Therefore, ICS can be viewed as a very specific subset of the wider growth in medical tourism, markedly different from other procedures accessed through medical tourism, because ultimately, it leads to a child.

It is the child – who is at the centre of all ICS arrangements – with whom this study is concerned, from a human rights perspective. Over the course of this study (between 1 January 2012 and 31 July 2016), ICS has continued emerging as a dynamic and multifaceted 21<sup>st</sup> Century human rights challenge. This is despite some significant changes having occurred in the ICS landscape since work on this doctoral study commenced. For example, some states – such as Thailand – have come full-circle with ICS during this time, having emerged as a primary ICS supply state and then legislated to outlaw and criminalise ICS within its jurisdiction.<sup>16</sup> Other major ICS states – such as India – have banned ICS in practice through issuing policy directives,<sup>17</sup> while draft legislation to effect such a ban in law awaits final legislative approval and assent.<sup>18</sup> Many other states – on both the supply and demand sides of ICS – are continuing to grapple with the challenges arising from ICS, including the situation of children born through ICS arrangements. Therefore, this study is highly relevant to the present-day context around the world. As has been

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14 I. Bantekas and L. Oette, *International Human Rights Law and Practice* (2013), at 703-705.

15 *Ibid.*, at 703.

16 See Protection for Children Born From Assisted Reproductive Technologies Act, B.E. 2558 (2015), available at [http://www.senate.go.th/bill/bk\\_data/73-3.pdf](http://www.senate.go.th/bill/bk_data/73-3.pdf); unofficial translation available at <https://tinyurl.com/yc2pgrra>

17 The Indian Ministry of Home Affairs issued a directive on surrogacy in November 2015 stating that foreign nationals are not allowed to commission surrogacy in India. See <http://boi.gov.in/content/surrogacy> (accessed 29 July 2016).

18 See The Surrogacy (Regulation) Bill, 2016 (India, Bill No. 257 of 2016), available at [http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20\(Regulation\)%20Bill,%202016.pdf](http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf); and for information on progress of the Bill through the legislative process: <http://www.prsindia.org/billtrack/the-surrogacy-regulation-bill-2016-4470/>

demonstrated through ICS situations which have come to light through domestic courts, regional human rights courts and the media, children conceived and born through ICS remain particularly vulnerable. Such cases have involved children being left stateless, discriminated against, trafficked and sold, abandoned without a family environment, without legal parentage, and unable to preserve their identity. This study explores the child's rights impacted by these realities and the associated implications for the child's best interests, whilst acknowledging the "indivisible, interdependent and inter-related nature of children's rights."<sup>19</sup>

## 2 AIMS OF THE STUDY AND RESEARCH QUESTIONS

This study proceeds from the hypothesis that children are particularly vulnerable to having their rights endangered as a result of being conceived and born through ICS. Despite the fact that all ICS arrangements are centred on producing a child, when work on this study commenced, no academic scholarship existed focusing on the child in ICS from a predominantly child rights perspective. Now, at the time of writing this Introduction to the study in 2016, ICS has received increased academic attention drawing on the international human rights and child rights framework, albeit often through a different legal lens, for example comparative law,<sup>20</sup> private international law,<sup>21</sup> and European law.<sup>22</sup> The work presented in this study has therefore been at the forefront of considering the situation of children in ICS from a child rights perspective under public international human rights law, and is a fresh and novel body of work in this respect.

The aims of this study are four-fold: first, to place focus on the child and their rights in ICS, and thereby contribute to filling the gap identified in scholarship; second, to explore and better understand the ways in which the child is vulnerable and how child rights are at risk and endangered in ICS; third, to provide insight into how the public international human rights law frame-

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19 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, CRC/C/GC/14, 2013, at [16(a)].

20 E.g., see M. Wells-Greco, *The Status of Children Arising from Inter-Country Surrogacy Arrangements* (2015).

21 Y. Margalit, 'From Baby M to Baby M(Anji): Regulating International Surrogacy Agreements' (2015), available at: <http://portal.idc.ac.il/he/lawreview/conferences/documents/2015-margalit.pdf> (accessed 13 July 2016); and S. Mohapatra, 'Adopting an International Convention on Surrogacy – A Lesson from Intercountry Adoption', (2016) 13(1) *Loyola University Chicago International Law Review*, 25.

22 N. Koffeman, *Morally sensitive issues and cross-border movement in the EU: The cases of reproductive matters and legal recognition of same-sex relationships* (2015); and K. Trimmings and P. Beaumont, 'Parentage and Surrogacy in a European Perspective', in J.M. Scherpe (ed.), *European Family Law: Family Law in a European Perspective* (2016), Vol. 3, at 232-283.

work, especially the United Nations Convention on the Rights of the Child (CRC)<sup>23</sup> provides a protective framework for children conceived and born through ICS, and how this can be harnessed to ensure children can exercise and enjoy their CRC rights, regardless of their conception and birth through ICS; and fourth, to provide practical suggestions for how the child and their rights can be better protected in ICS. The research questions addressed in this study are as follows:

*Main research question*

What is the role of international human rights law (especially the norms and standards established by the CRC) in protecting and reinforcing the rights of children in ICS, and how should the rights of children involved be understood and approached from a public international human rights law, child rights perspective in relation to other ICS parties and rights-holders?

*Subsequent research questions*

- a) How does ICS present a challenge to children's rights?
- b) What rights of the child are most at risk in ICS?
- c) How can international human rights law norms and standards (especially those established by the CRC) be utilised to protect the rights of children in ICS situations?
- d) How should the various competing rights and interests of children and others in ICS situations be balanced using an approach consistent with, and drawing on, public international law human rights norms and standards?

### 3 RATIONALE FOR A FOCUS ON THE RIGHTS OF THE CHILD

As already noted, this thesis seeks to fill a gap in scholarship on ICS by placing a clear focus on the child in ICS, from a child rights perspective. The hypothesis that the child is particularly vulnerable in ICS deserves in-depth exploration and analysis – as provided in this thesis – in order to understand why the child is vulnerable and the nature of that vulnerability from a rights perspective. As Biggs and Jones observe, “Vulnerability may stem from particular types of social disadvantage, based on factors such as young or old age, illness, disability and poverty. [Vulnerability is] experienced differently according to each individuals’ personal circumstances. Vulnerability is therefore defined

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23 1989, United Nations Convention on the Rights of the Child, 1577 UNTS 3.



in a variety of ways depending on the context.”<sup>24</sup> The contextual nature of vulnerability is certainly apparent in ICS, with each and every ICS arrangement presenting different circumstances depending on factors such as which states are involved on the supply and demand sides (and therefore, what domestic laws and policies apply), the genetic make-up of the child, and the actions of the commissioning parents and surrogate. However, the very fact of a child’s deliberate conception and birth through ICS does raise a number of potential risks to their rights, thereby heightening their vulnerability regardless of the nuances of the specific contextual factors at play in any one ICS arrangement. Children conceived and born through ICS appear to fit within Diver’s concept of being potentially “uniquely disadvantaged”<sup>25</sup> by virtue of their conception and birth via this method of family building (Diver uses the concept of unique disadvantage to describe genetically kinless persons). Therefore, a specific focus on the child and their rights situation is necessary and warranted, especially as children are continuing to be born through ICS and therefore born into situations of heightened vulnerability. This underscores the continuing relevance of this study and its findings and recommendations.

Although placing its central focus on the child and their rights in ICS, this study acknowledges the potential vulnerability of other parties involved in ICS, such as the women who act as surrogates and the commissioning parents. In the less-developed states where ICS supply has emerged over the past decade (for example, India), it is often economic impoverishment that drives their involvement in ICS due to a lack of economic alternatives.<sup>26</sup> This also opens them to the possibility of being taken advantage of by political and market forces and the associated demands of commissioning parents.<sup>27</sup> Surrogates’ vulnerability to having their rights and interests endangered is touched on at various points throughout this thesis, within the context of and in relation to the child’s rights situation. Therefore, this study is intended to be complementary to pre-existing research and literature concerning the rights of other parties to ICS arrangements. The primary focus rests on the child and their rights given the child’s absolute lack of personal agency in comparison to other parties to ICS arrangements, owing to their stage of life. This is especially the case for children in their infancy in the months and years immediately following their birth through ICS, when many actions and decisions concerning their

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24 H. Biggs and C. Jones, ‘Legally Vulnerable: What is Vulnerability and Who is Vulnerable?’, in M. Freeman, S. Hawkes and B. Bennett (eds.), *Law and Global Health: Current Legal Issues* (2014), Vol. 16, at 133-134.

25 A. Diver, *A Law of Blood-ties: The “Right” to Access Genetic Ancestry* (2014), at 83.

26 E.g. see A. Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*, (2014), at 9; and N. Witzleb and A. Chawla, “Surrogacy in India: Strong Demand, Weak Lives”, in P. Gerber and K. O’Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 189.

27 For discussion, see S. Allan, “The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations”, in P. Gerber and K. O’Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 125-126.

rights are taken which have a potential life-long impact for them as they grow up and reach adulthood. By placing central focus on the child's rights at stake in ICS, this study serves to highlight the situation of the child in ICS.

#### 4 METHODOLOGICAL APPROACH AND SCOPE

This study has been conducted between 01 January 2012 and 31 July 2016. This study focuses on the child's situation in ICS through a public international law framework, taking a child rights, legal theory based approach. This approach has been selected to ensure attention is adequately placed on the child's rights in ICS, in relation to the international human rights standards and norms established under the CRC and other relevant international human rights law instruments. Although private international law issues are briefly touched on throughout the thesis (out of necessity, given the conflict of domestic laws arising in ICS), this study does not take a private international law, family law or contract law lens to the child's situation in the ICS context. Doing so would detract from the aims of the study and the core focus on the child's human rights situation and the focus on public international human rights law norms and standards as the foundational, underpinning protection framework for approaching the child's situation in ICS. It is for this reason that this study does not focus on legal parentage as a central issue and this thesis does not have a chapter focussing solely on legal parentage in ICS, given that legal parentage is predominantly a private international law matter in this context. However, legal parentage is dealt with from a child rights perspective where relevant throughout the thesis, given its interface with the child's rights situation in ICS.

The CRC is the most widely ratified international treaty, with near universal coverage.<sup>28</sup> Like other public international human rights law treaties, realisation of the rights of rights-holders (in the case of the CRC, children's rights) is reliant on CRC duty-bearers fulfilling their associated duties and obligations.<sup>29</sup> Although States Parties are the principal CRC duty-bearers, the responsibilities and obligations for exercising duties under the CRC are not limited to States. Making the CRC real in practice for children also relies on other non-state actors, such as parents, families, communities, civil society and private actors fulfilling their responsibilities and obligations under the

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28 At the time of writing, the United States of America is the only state that has not ratified the CRC. See [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) (13 July 2016).

29 For discussion, see J. Tasioulas, 'Protecting Human Rights: On the Role and Duties of Duty-Bearers', *ABC*, 28 June 2017.

CRC, as secondary duty-bearers.<sup>30</sup> The CRC is, however, as Detrick explains, “unique, because it protects the broadest scope of fundamental human rights ever brought together within one treaty – economic, social and cultural, and civil and political”.<sup>31</sup> The CRC is the public international law instrument forming the backbone of the legal framework that this study utilises as its main point of departure, as well as referring to other public international sources of law (both hard and soft) where relevant. The study draws on the work of the CRC Committee and other human rights treaty bodies, existing legal academic scholarship generally relating to children’s rights, as well as scholarship specifically dealing with international surrogacy (an emerging body of scholarship over the period of time this study has been undertaken), and relevant reports and media publications regarding ICS. Although classical legal research forms the primary methodology of this study, multidisciplinary sources have been consulted where relevant, including from the disciplines of anthropology, social work and psychology. The legal, jurisprudential and other sources on which this study is based have been accessed via extensive research through digital platforms and databases, and by working with a range of texts in research libraries primarily in the Netherlands and New Zealand (with some research also conducted in research libraries in wider Europe, Australia and the United States). The study is also generally informed by the author’s own professional experience as a lawyer working on cases of ICS in New Zealand<sup>32</sup> and through engaging in and presenting papers at expert dialogues, conferences and workshops on international surrogacy around the world throughout the course of this study.<sup>33</sup> Undertaking this study as a thesis by articles (explained further in Section 6 of this introductory chapter) has enabled the chapters which are now presented in this doctoral thesis to be relevant and

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30 For a useful overview, see European Commission, *EU Commitments in the Field of Child Rights: Rights Holders and Duty Bearers*, <https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.8.html>.

31 S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (1992), at ix.

32 Including for the New Zealand Government as in-house legal counsel for the Ministry of Social Development.

33 International Workshop: National Approaches to Surrogacy, University of Aberdeen, Scotland, August-September 2011; Reconstructing and Deconstructing ‘Mother’ Workshop, Columbia University, United States of America, April 2012; World Social Work and Social Development Conference, Sweden, July 2012; International Adoption and Surrogacy Conference, New Zealand Law Society, New Zealand, April 2014; Global Forum on Statelessness, UNHCR and Tilburg University, The Netherlands, September 2014; International Conference on Surrogacy and Human Rights, School of Law, ITM University, India, November 2014; 25 Years of the UN Convention on the Rights of the Child Conference, The Netherlands, November 2014; Crossing Boundaries: Reproductive Travel in Asia, La Trobe University & La Trobe Asia, Australia, December 2014; Redefining Family Conference: Growing Families Through Adoption, Donor Conception and Surrogacy, Auckland University of Technology, New Zealand, January 2016.

have a practical application and influence in 'real-time', over the course of time that the study has occurred.

As ICS is a phenomenon with a global dimension, a global perspective is important when examining it from a child rights, legal perspective. Therefore, this study takes a wide-ranging, international approach to the cases of ICS it highlights, while choosing to focus particularly on a) ICS cases occurring in jurisdictions where ICS supply has developed rapidly over the past decade in the context of little or no domestic legislation or policy governing ICS; and b) ICS case law that has emerged in response over the past decade in domestic courts in ICS demand jurisdictions. The selection of case law focused on throughout the thesis is restricted, for practical reasons, to cases where English judgments or case reports in English have been available. It should also be noted that given the dynamic and emerging nature of ICS as a phenomenon, over the course of the study, the pace at which ICS case law has developed in different jurisdictions has varied. Recognising this reality, in order to remain responsive, relevant and engaged with the limited number of leading ICS cases which have emerged over the course of this study, some leading cases outside of the primary selection criteria are dealt with in the thesis. Case law analysis throughout the thesis elucidates particular child rights issues and challenges in ICS, intended to provide a sense of the issues both domestic and regional courts are contending with in practice when dealing with ICS, and the jurisprudential approaches adopted.

In the absence of being able to directly incorporate the voices of children born through ICS given their current young age, this study aims to bring a strong child-centred perspective to the study of ICS by maintaining a clear focus on the rights of the child most at risk in ICS, to highlight them so that they can be addressed through future approaches to ICS at the legislative and policy levels, both internationally and domestically.

From a methodological and scope perspective, this study does not explore in-depth whether ICS amounts to the sale of children. The definition of the sale of children is broad under international human rights law, established under Article 2(a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.<sup>34</sup> Therefore, it is important to acknowledge at the outset of this study that strong arguments exist that in some instances, ICS amounts to the sale of children under this definition. Indeed, some scholars argue that the only valid approach to ICS under public international human rights law is to ban the practice, given its incompatibility with human rights law standards and

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34 2001, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, A/RES/54/263.

norms.<sup>35</sup> While acknowledging these arguments and the arguable *jus cogens* status of the sale of children,<sup>36</sup> to date however, no international consensus has been reached as to whether ICS amounts to the sale of children.<sup>37</sup> Indeed, given the complex moral and philosophical aspects to this issue, it is likely to be a long time until states reach a broad consensus on this matter, and it is one of the reasons why reaching international agreement on how to regulate ICS is so fraught. Moreover, given the various fact scenarios and constructions of ICS in any individual ICS arrangement, it cannot be said with certainty that all instances of ICS amount to the sale of children.

As already noted, the question of whether and in what circumstances ICS does amount to the sale of children is largely outside the scope of this doctoral study. The decision to delimit the scope of the present study in this way has been taken for a number of reasons, namely:

- out of recognition that children are being born through ICS and following birth, are, in some instances, experiencing challenges to their exercise and enjoyment of their rights;
- to maintain a central focus on the rights of children born through ICS, given that these children are entitled to exercise and enjoy their rights regardless of whether or not they have been sold through ICS;
- to explore how the rights of children born through ICS can be better protected, even if they were sold through ICS;
- the question of whether or not ICS amounts to the sale of children (and in what instances ICS can be said to be tantamount to the sale of children)

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35 E.g. see J. Tobin, 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?', (2014) 63(2) *International and Comparative Law Quarterly*, 317; A. Gallagher, 'International surrogacy is dangerous and unfair', *Sydney Morning Herald*, 5 August 2014; and D. Smolin, 'Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children', (2015-2016) 43 *Pepperdine Law Review*, 265.

36 *Jus cogens* are defined as "a peremptory norm of general international law", meaning "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted": Article 53, 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. Bassiouni cites the international crimes of aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture as having the status of *jus cogens*: M.C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', (1996) 59(4) *Law and Contemporary Problems*, at 68. Arguably, Articles 35 and 3 CRC and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography indicate that the sale of children has reached *jus cogens* status. For further discussion in the context of international surrogacy, see Y. Ergas, 'Thinking 'Through' Human Rights: The Need for a Human Rights Perspective With Respect to the Regulation of Cross-border Reproductive Surrogacy,' Chapter 27 in Trimmings and Beaumont (eds.), *International Surrogacy Arrangements* (2013), 432-435.

37 For a discussion refuting the characterisation of compensated surrogacy as sale of children, see P. Gerber and K. O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy', in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 95-99.

- merits separate legal research, solely focused on that question (for example, it could be the subject of a separate doctoral study); and
- to fully answer the question of whether ICS amounts to the sale of children and in what instances, ideally field research and investigation is needed, in order to satisfactorily explore the nuances of the different ways in which the sale of children might occur in ICS. Such research and investigation may be suited to being undertaken through the expert mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography, for example through country visits.

The fact remains that children continue being born through ICS. As long as this continues to be the case, children's rights will be placed at risk. Therefore, rather than exploring whether ICS amounts to sale of children, this study is concerned with the practice of ICS as it is currently occurring, and its implications for the rights of children conceived and born through ICS. This study takes a pragmatic approach to the practical reality of ICS, placing focus on ICS as a contemporary method of family building that is creating children who are placed at a heightened vulnerability to rights violations. Given this reality, this study focuses on exploring what those children's rights violations are and how they can be guarded against.

This study therefore takes the view that as long as the practice of ICS continues, attention must be given to protecting the rights of children conceived and born this way. Of course, this does not exclude the possibility of work taking place concurrently to attempt to reach international consensus as to the broader approach to be taken regarding ICS, in order to protect those who it makes vulnerable – not least children. Such work should necessarily consider the question of whether ICS amounts to the sale of children. Indeed, such discussions are already underway and continue under the leadership of the Permanent Bureau of the Hague Conference on Private International Law<sup>38</sup> and the International Social Service,<sup>39</sup> and there is scope for the UN Special Rapporteur on the sale of children, child prostitution and child pornography to continue deepening her leadership role on exploring the particular issue of sale of children in the ICS context.<sup>40</sup>

Significantly too, despite having some commonalities with intercountry adoption (such as both being cross-border in nature and both being an alternative method of family formation), ICS is distinct from and different to intercountry adoption, and this study treats it as such. The most crucial differ-

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38 See <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 13 July 2016).

39 See <http://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy> (accessed 13 July 2016).

40 Indeed, N.B. the Special Rapporteur's *Study on surrogacy and sale of children*, A/HRC/37/60, p.3ff.

ences to acknowledge are firstly that intercountry adoption is a measure primarily aimed at providing a family environment for an existing child who is in need of care and protection,<sup>41</sup> while ICS is not a care and protection measure. Whereas adoption concerns existing children, ICS is a way of creating new children, responding to the desires of commissioning parents to become parents or add children to their families. Secondly, whereas intercountry adoption is premised on safeguarding against the illegal movement of children across borders and is in no way intended to be commercial in nature,<sup>42</sup> ICS arrangements always involve a financial transaction of some nature occurring before commissioning parents receive a child. However, it is also important to note that both intercountry and domestic adoption orders have been used (and in some instances are continuing to be used) as a method of regularising and creating legal relationships between commissioning parents and children born through ICS.

Finally from a methodological and scope perspective, it is important to note that this doctoral study takes as its point of departure that:

- ICS is a method of family formation that is occurring despite questions regarding its legality/illegality and whether or not the practice is in the public interest;
- children are continuing to be born through ICS; and
- in some instances, children's rights are being infringed as a result of their birth through ICS.

Therefore, the scope of this study is confined to focusing on this contemporary reality, in order to:

- analyse how children's rights in ICS can be protected, promoted and upheld by implementing in practice the relevant standards and norms established under international human rights law (especially those established by the CRC); and
- explore how children's rights can be appropriately balanced with the rights and interests of the other core parties in ICS when they directly compete.

This means that the question of whether or not ICS is a method of family formation which is generally in the public interest is a question falling largely out of scope of the present study.

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41 The preamble to the 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption includes the following statements: "Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding", and "Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin".

42 See Articles 1(b), 4(c)(3) and 4(d)(4) 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption.



Limiting the scope of this doctoral study in this way is not to say that public interests arguments which exist for and against the practice of ICS are not important. On the contrary, the author acknowledges that in reaching future policy and legal positions and agreements on ICS at both the domestic and international levels, public interest considerations will be important for legislators and policy-makers to contend with. Indeed, the choice of whether to outlaw or permit ICS at the domestic and international levels will, to an extent, turn on the positions states choose to adopt regarding the challenges pertaining to public morals and ethics in ICS, and what is seen to be in the general interests of the public.

However, the practical reality remains that ICS as a method of family formation has developed despite the existence of public interests questions, and that even where ICS markets have been shut down (for example in states such as India and Thailand), new ICS markets have developed in other states (such as Cambodia<sup>43</sup>) to service the ongoing demand for ICS. In light of this practical reality, it is necessary and timely to explore the role that existing international human rights law standards and norms can play to protect the rights of those whose rights are made vulnerable in ICS (especially the rights of children born through ICS), and to guide the balancing of competing interests in ICS. This is what this study addresses.

## 5 THE PLACE AND CONTRIBUTION OF THIS STUDY IN THE EXISTING LEGAL BODY OF KNOWLEDGE CONCERNING INTERNATIONAL COMMERCIAL SURROGACY

This thesis is made up of a collection of articles, which have been written over a course of time through which ICS has been emerging and rapidly developing as a phenomenon. Over this time, a small body of legal scholars and institutions have been engaging with ICS from differing legal perspectives (and this body has increased over time). Work led by Beaumont and Trimmings commencing in 2010<sup>44</sup> was a forerunner to legal research which has taken place since focusing on ICS. The aim of Beaumont and Trimmings' project was "to examine private international law problems that arise in cases of cross-border surrogacy arrangements and to propose a global model of regulation of such arrangements."<sup>45</sup> As part of this project, a workshop was convened at the University of Aberdeen (which the author of this doctoral thesis participated in) bringing together legal specialists from 22 jurisdictions to discuss the

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43 See V. Muong and W. Jackson, 'The Billion Dollar Babies', *The Phnom Penh Post*, 02 January 2016, <http://www.phnompenhpost.com/post-weekend/billion-dollar-babies> (accessed 13 July 2016).

44 See <http://www.nuffieldfoundation.org/regulation-international-surrogacy-arrangements> (accessed 13 July 2016).

45 As stated in the Series Editor's Preface to K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements* (2013).



current (at the time) snapshot of the domestic and private law approaches to surrogacy in their jurisdictions. Beaumont and Trimmings's project culminated in the publication of an edited book,<sup>46</sup> drawing together their findings, including from the Aberdeen workshop.<sup>47</sup>

The Hague Conference on Private International Law has been the international legal institution directly engaging with ICS matters consistently since 2010, since the Council on General Affairs and Policy of the Hague Conference acknowledged "the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements".<sup>48</sup> Following this, the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (17-25 June 2010) noted that "the number of international surrogacy arrangements is increasing rapidly. [It expressed] concern over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements. [It viewed] as inappropriate the use of the Convention in cases of international surrogacy."<sup>49</sup> Since, the Hague Conference has published a number of preliminary documents, notes and reports on international surrogacy arrangements as part of its "Parentage/Surrogacy Project",<sup>50</sup> which studies "the private international law issues being encountered in relation to the legal parentage of children, as well as in relation to international surrogacy arrangements more specifically."<sup>51</sup> In 2015, the Council on General Affairs and Policy of the Hague Conference decided to convene an Expert's Group to explore the feasibility of advancing work concerning the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements.<sup>52</sup> The work of the Expert's Group on Parentage/Surrogacy is continuing and to date has largely focused on legal parentage matters.<sup>53</sup>

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46 K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements* (2013).

47 This includes a chapter focussing on surrogacy law and practice in New Zealand, written by the author of this doctoral thesis. See C. Achmad, 'New Zealand', Chapter 18 in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Arrangements* (2013), 295-310.

48 Council on General Affairs and Policy of the Hague Conference on Private International Law, *Conclusions and Recommendations adopted by the Council* (7-9 April 2010), at 3.

49 Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (17-25 June 2010), at [25].

50 A full listing is available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>

51 Ibid. A full chronology of the Parentage/Surrogacy Project is available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2011-2015> and <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior>

52 Council on General Affairs and Policy of the Hague Conference on Private International Law, *Conclusions and Recommendations adopted by the Council* (24-26 March 2015), at [5].

53 Reports of the Expert's Group on Parentage/Surrogacy are available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2011-2015>

Over the course of the present doctoral study, a number of other significant legal studies have also been undertaken which engage with ICS. These include a doctoral study by Koffeman examining reproductive matters and same-sex legal recognition in European jurisdictions,<sup>54</sup> and a doctoral study by Wells-Greco examining the status of children arising from inter-country surrogacy arrangements through a comparative legal perspective.<sup>55</sup> A collection edited by Gerber and O'Byrne brought together for the first time a series of articles on domestic and international surrogacy in its contemporary context from a human rights law perspective.<sup>56</sup>

At the wider international level too, two other developments are important to acknowledge. The first is to note that the United Nations Committee on the Rights of the Child has, over the course of this doctoral study being undertaken, made its first comments relating to surrogacy in Concluding Observations issued under the CRC reporting cycle.<sup>57</sup> Although its comments to date concerning surrogacy in its Concluding Observations remain limited and do not directly address ICS, given that surrogacy has remained a topic which the Committee has largely steered clear of engaging with previously, this signals a shift and indicates the Committee is viewing surrogacy as an issue of concern from a child rights perspective.

The second development worth noting at the international level is the work convened by International Social Service (ISS) concerning international surrogacy and the protection of children. In 2013, ISS issued an international call for action on international surrogacy,<sup>58</sup> followed by a second call for action in 2016.<sup>59</sup> Both calls for action focused on the need to protect the child's rights and best interests in all cases of international surrogacy. To support the advancement of this work, in 2015 ISS convened an International Experts Group to develop 'Principles for better protection of children's rights in cross-border reproductive arrangements, in particular international surrogacy'.<sup>60</sup> The drafting of these principles is on-going, and the author of this doctoral

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54 N. Koffeman, *Morally sensitive issues and cross-border movement in the EU: The cases of reproductive matters and legal recognition of same-sex relationships* (2015).

55 M. Wells-Greco, *The Status of Children Arising from Inter-Country Surrogacy Arrangements* (2015).

56 P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015).

57 See Committee on the Rights of the Child, Concluding observations regarding Israel, 04 July 2013, CRC/C/ISR/CO/2-4, at [33] and Committee on the Rights of the Child, Concluding observations regarding India, 07 July 2014, CRC/C/IND/CO/3-4, at [57](d) and [58](d).

58 International Social Service, *International Surrogacy and Donor Conceived Persons – Preserving the Best Interest of Children: Call for action by the International Social Service Network*, July 2013, available at [http://www.iss-ssi.org/images/Surrogacy/Call\\_for\\_Action2013\\_ANG.pdf](http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2013_ANG.pdf) (accessed 13 July 2016).

59 International Social Service, *Call for Action 2016: Urgent need for regulation of international surrogacy and artificial reproductive technologies*, January 2016, available at [http://www.iss-ssi.org/images/Surrogacy/Call\\_for\\_Action2016.pdf](http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf) (accessed 13 July 2016).

60 Ibid.

study is a member of the Core Expert Group responsible for drafting the principles. The work of the ISS International Expert's Group is complementary to, but distinct from the work of the Hague Expert's Group on Parentage/Surrogacy, given that the ISS work takes a human rights perspective, first and foremost grounded in the standards and norms established by the CRC, and recognition of the need to protect and uphold the rights of children who are born through international surrogacy.

The study presented in this doctoral thesis adds to the existing legal body of knowledge on ICS by intentionally focusing in on the rights of children born through ICS, to explore how the CRC can be harnessed to protect their rights in practice. In doing so, this doctoral thesis is distinct from many of the other existing legal studies and initiatives concerning the phenomenon of ICS, because it makes practical recommendations for ways in which the CRC can be implemented in ICS to protect children's rights. It is the first comprehensive scientific legal research focusing on the child in ICS from a child rights perspective under international human rights law, placing attention on the rights of the child most at risk in ICS. As such, it raises new ways of thinking about the situation of children conceived and born through ICS, and offers practical and relevant insights and guidance for those making decisions affecting children in ICS situations, such as policy-makers, government decision makers at the executive level, and judicial decision-makers. The study presented in this doctoral thesis is also distinct as it proceeds from the recognition that despite the live nature of questions of whether or not the practice of ICS is in the public interest and the overall legality or illegality of ICS, children are continuing to be born through ICS, and as a result in some instances are facing infringements of their rights. Therefore, by proceeding from this reality, this thesis presents recommendations as to how infringements on and violations of the child rights shown to be most at risk in ICS situations may be avoided, by implementing the CRC in practice.

## 6 STRUCTURE OF THE STUDY

This study has been undertaken as a thesis by articles, which are largely already published elsewhere. This is reflected in the structure of the thesis. The decision to choose to undertake this doctoral study as a thesis by articles is premised on the following reasons:

- The substantive topic of the study is, by nature, dynamic and emerging;
- Given the nature of the substantive topic of the study, a thesis by articles provides flexibility, enabling contributions to be made to contemporary debate and discourse, and for the work undertaken throughout the study to be published closer to the time of the developments in ICS occurring; and

- A desire on the part of the author to contribute to the growing body of scholarship on ICS as it emerges over time, in order to make a scientific contribution highlighting the child rights problems in ICS and to pose potential solutions, grounded in international human rights law standards and norms (in particular, the CRC).

Undertaking this doctoral study as a thesis by articles has meant that:

- Chapters of the thesis which have been published to date have been relevant to contemporary developments and have raised novel issues at the time of writing and publication;
- Aspects of the study have been cited in other scholarly works,<sup>61</sup> and as such have had an influence on the legal discourse concerning ICS as it has developed over time; and
- Bringing the various articles which comprise the doctoral study together in the body of work presented in this thesis highlights the journey the study has taken over time, from a point in time at which ICS was a topic which was largely 'under the radar', to a point in time where ICS is more widely recognised as a contemporary method of family formation, raising human rights and legal challenges.

All of the substantive chapters appearing in this thesis have a central thread running through them – namely a focus on children's rights in ICS and the role of international human rights law in protecting and upholding children's rights. All the chapters have either been published or submitted for publication as articles in academic journals or edited legal or multidisciplinary collections (except for Chapter Ten which has not been submitted for publication). The title of each chapter, its principal focus, as well as its publication status is summarised in the following schematic outline of the structure of the thesis.

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61 E.g. J. Pascoe, 'State of the Nation – Federal Circuit Court of Australia', (FMCA) [2014] FedJSchol 21; J. McCrossin, 'Babies Without Borders', *Law Society of NSW Journal*, No. 9, Mar 2015: 40-43; S. Bassan, 'Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions', 37 *Mich. J. Int'l L.* 299 (2015-2016); R. Scherman, G. Miska, K. Rotabi and P. Selman, 'Global commercial surrogacy and international adoption: parallels and differences', *Adoption and Fostering*, Vol 40 (2016) Issue 1, 20 – 35; Ilaria Anro, *Surrogacy from the Luxembourg and Strasbourg Perspectives: divergence, convergence and the chance for future dialogue*, Geneva Jean Monnet Working Paper 09/2016.

Ch.	Title	Key focus	Publication status
1	Introduction	Provides an overarching introduction to the doctoral thesis.	Published as part of the doctoral thesis.
2	Contextualising a 21 <sup>st</sup> Century Challenge: Part One – Understanding International Commercial Surrogacy and the Parties whose Rights and Interests are at Stake in the Public International Law Context	Introduces ICS as a twenty-first century human rights challenge and examines the parties whose rights and interests are at stake in the public international law human rights context. These parties are focused on throughout the following chapters of the thesis.	Published in <i>New Zealand Family Law Journal</i> , Vol. 7, Part 7, August 2012, 190-198.
3	Contextualising a 21 <sup>st</sup> Century Challenge: Part Two – Public International Law Human Rights Issues: Why Are the Rights and Interests of Women and Children at Stake in International Commercial Surrogacy	Introduces the rights and interests most at stake in ICS for the two most vulnerable parties from an international human rights law perspective: the women acting as surrogate mothers and the children conceived and born through ICS. Provides a foundational basis for closely examining children's rights in ICS in later chapters of the thesis.	Published in <i>New Zealand Family Law Journal</i> , Vol. 7, Part 8, December 2012, 206-216.
4	Multiple 'Mothers', Many Requirements for Protection: Children's Rights and the Status of Mothers in the Context of International Commercial Surrogacy	Analyses the complexities of the relationship between the child in ICS and their multiple 'mothers' (genetic, biological, legal, social). Presents discussion of the child's rights in relation to the rights and interests of these women, and examines how the rights and interests of the child can be balanced with those of their multiple 'mothers'.	Published in Y. Ergas, J. Jensen and S. Michel (eds), <i>Reassembling Motherhood: Procreation and Care in a Globalised World</i> , Columbia University Press, 2017.
5	International Commercial Surrogacy and Children's Rights: Babies, Borders, Responsibilities and Rights	Building on earlier chapters, argues that the child is the locus of vulnerability in ICS. Presents discussion of the ethics and economics of ICS in relation to children; assesses jurisprudential trends and non-judicial responses to ICS in selected demand-states, in relation to relevant international child rights legal norms and standards. Presents arguments regarding the need to harness and implement the CRC, so that children born through ICS can exercise and enjoy their rights.	Published in New Zealand Law Society, <i>International Adoption and Surrogacy – Family Formation in the 21<sup>st</sup> Century</i> , (2014).

Ch.	Title	Key focus	Publication status
6	Unconceived, Unborn, Uncertain: Is Pre-Birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-Birth?	Identifies and examines how preconception and prenatal decisions and actions in ICS can result in challenges to the child's rights once born. Makes recommendations for safeguards to be implemented before the child's conception, during the child's gestation and following the child's birth, to better protect and promote the child's rights in ICS in a holistic manner.	Accepted for publication in <i>The International Journal of Children's Rights</i> , Issue 1, 2018.
7	Securing children's right to a nationality in a changing world: the context of International Commercial Surrogacy	Focuses on the child's Art. 7 CRC right to a nationality as a child right most significantly at risk in ICS. Examines the ways in which children can end up stateless in ICS and recommends practical measures to implement the CRC and other relevant international human rights law standards, so that children born through ICS can secure their nationality right.	Published in in L. Van Waas and M. Khanna (eds) <i>Solving Statelessness</i> (2016) Wolf Legal Publishing, at 191-224.
8	Answering the "Who am I?" Question: Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child	Focuses on the child's Art. 8 CRC right to identity preservation as a child right most significantly at risk in ICS. Argues that protecting this right is of central importance for children born through ICS, given the lifetime impact of not being able to exercise and enjoy their Art. 8 right. Makes recommendations for how Art. 8 can be upheld for children in ICS.	Submitted for publication in <i>Human Rights Law Review</i> .
9	Case Analysis: Children's Rights to the Fore in the European Court of Human Rights' First International Surrogacy Judgments	Presents a child rights, legal analysis of <i>Mennesson v. France</i> and <i>Labassee v. France</i> , landmark judgments in the European Court of Human Rights concerning ICS. Draws out linkages with the child rights discussed in Chapters 7 and 8 of the thesis, and the importance of the CRC in judicial decision-making in ICS previously discussed in Chapter 5 of the thesis.	Published in <i>European Human Rights Law Review</i> (2014), Issue 6, 638-646.

<i>Ch.</i>	<i>Title</i>	<i>Key focus</i>	<i>Publication status</i>
10	Multiple Potential Parents But a Child Always at the Centre: Balancing the Rights and Interests of the Parties to International Commercial Surrogacy Arrangements	Drawing on earlier chapters findings, presents a rights balancing analysis of the balancing of children's rights and interests with those of surrogates, genetic donor parents and commissioning parents in ICS. These are the practical rights balancing exercises necessary between the parties throughout ICS arrangements. Argues that in balancing competing rights and interests in ICS, once a child is born, his or her rights and best interests should be accorded priority.	Published as part of the doctoral thesis (not submitted for publication elsewhere).
11	Conclusion	Provides an overarching conclusion to the doctoral thesis, drawing on the main findings of previous chapters. Presents a framework of recommendations for protecting children's rights in ICS applicable to the contemporary context, proposed as the basis of a UN Committee on the Rights of the Child General Comment on children's rights in ICS.	Published as part of the doctoral thesis.

Some explanatory text as to the nature of ICS as a phenomenon and how it impacts on children's rights has been necessary to include in a number of the articles which are now presented as chapters in this thesis. This means that some repetition appears throughout the thesis, as a by-product of the fact that at the time which the individual articles which make up the chapters of the thesis were written (especially in the early part of the study), ICS was a topic which had received limited scholarly attention from an international human rights legal and child rights perspective.

At the time each chapter in this thesis was written, it was relevant to the real-time, contemporary developments in ICS. It is also noted that in some instances, the information concerning ICS which appears in some of the chapters of the thesis is now out-of-date, given the fast-paced development of ICS as a phenomenon. However, the combination of newer and older chapters presented in this thesis is illustrative of how the phenomenon of ICS has developed over time, and how this doctoral study has sought to engage with these developments as they have occurred, from a child rights perspective under international human rights law. The contextual commentary included as part of the overviews appearing before each chapter of the thesis highlight the relevance of the chapter's contents at the time it was written; key developments

in ICS since that time; and the continued relevance of the arguments and main findings presented in the chapter.

From a structural perspective, the doctoral thesis is tied together by the central focus on children's rights in ICS, and this introductory chapter to the thesis; the brief chapter overviews appearing at the start of each chapter; and the conclusion to the overall study (Chapter Eleven). The conclusion to the study (Chapter Eleven) further draws the strands of the study together by presenting a comprehensive framework of recommendations proposed to form the basis of a Committee on the Rights of the Child General Comment on the rights of the child in ICS. The Conclusion to this study underscores the relevance and application of this doctoral study to the contemporary children's rights context up to the present day.

## 7 OUTLINE OF THE STUDY

This thesis is presented through nine chapters, along with this Introduction to the study (Chapter One) and a Conclusion to the study (Chapter Eleven). Chapters Two<sup>62</sup> and Three<sup>63</sup> introduce ICS as a 21<sup>st</sup> century human rights and child rights challenge. These initial chapters provide an overview of the phenomenon of ICS through a public international law, human rights lens. These chapters are important to set the scene for understanding the complex, multifaceted nature of ICS, and serve to contextualise the discussion in later chapters which hones in more closely on the particular situation of the child and their rights in ICS, including their rights most at risk.

Chapter Two discusses the emergence and development of the ICS market and predominantly focuses on introducing the parties whose rights and interests are at stake in ICS, the 'core parties' to ICS arrangements, namely the child, the surrogate and the commissioning parents. The core bioethical and moral challenges raised by ICS are briefly touched upon and provide important background context to the legal, child rights focus of this thesis. This Chapter also foreshadows some of the issues triggered in ICS by the existence of competing rights and interests of the core parties to ICS arrangements.

Chapter Three then extends the discussion begun in Chapter Two, by focussing in on the main human rights law challenges arising through ICS under public international law. The main question explored is 'why and how are the rights and interests of women and children at stake in ICS?'. Primary emphasis is placed on the rights of the child at stake, with a secondary focus on the rights of surrogate women in ICS. When this Chapter was written (2012), no academic scholarship existed which comprehensively examined how ICS

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62 Originally published in *New Zealand Family Law Journal*, Vol. 7, Part 7, August 2012, 190-198.

63 Originally published in *New Zealand Family Law Journal*, Vol. 7, Part 8, December 2012, 206-216.



impacts on the child's rights. Therefore, this Chapter filled an existing gap in scholarship at the time, and argues that ICS should be recognised as an international human rights challenge to the rights of the child. Central challenges to the child's rights in ICS are identified and discussed, in the context of and with reference to the relevant provisions of the CRC. This begins building a picture of the potential negative impacts of conception and birth through ICS on the rights of children. This Chapter then acknowledges that at the time of writing, much of the existing scholarship regarding ICS focused on the situation of women acting as surrogates (often from the perspectives of anthropology, documentary-making and sociology). In order to draw on this pre-existing body of literature and to place it within the context of the current study, Chapter Three provides an overview of some of the key human rights issues pertaining to women in the ICS context, and discusses some of the human rights challenges common to both surrogate women and children in ICS, namely the risks of commodification and human trafficking. In doing so, this highlights the broader human rights picture at play, again emphasising the intersecting nature of many of the rights and interests at stake in ICS.

Chapter Four<sup>64</sup> builds on the close links between children and women in ICS, through an examination of child rights in relation to the status of the multiple potential 'mothers' in ICS. This Chapter brings a unique focus from a rights perspective to one of the central relationships in all ICS arrangements, between the child and their potential multiple 'mothers'. It discusses the construct of 'mother' as inherently related to 'child', and analyses the different 'mothers' involved in ICS: surrogate (the only person with a foetal-maternal link through the biological act of carrying to term and giving birth to the child); genetic (the only woman with a DNA link with the resulting child); and commissioning (where a woman is involved, the woman or women who want(s) to parent the child). This discussion illustrates that establishing the status of the various potential mothers in ICS is both socially and legally complex. In doing so, this Chapter draws attention to the contestable nature of the notion of 'mother' in ICS and traverses the corresponding implications for the rights of children.

Chapter Five<sup>65</sup> deepens the focus on the child's rights in ICS and develops the idea of the child as the locus of vulnerability in ICS arrangements. As part of this analysis, this Chapter presents an extended discussion of the ethics and economics of the commercialisation of the conception of children. Specific CRC rights which are at the most significant risk in ICS are highlighted: to nationality and to preserve identity, to grow up in a family environment, and to

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64 Originally published in Y. Ergas, J. Jensen and S. Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalised World*, Columbia University Press, 2017.

65 Originally published in New Zealand Law Society, *International Adoption and Surrogacy – Family Formation in the 21<sup>st</sup> Century*, (2014).

education, health and social security. This Chapter also highlights jurisprudential trends (through case law analysis) and non-judicial responses (especially national guidelines/government guidance as quasi-policy approaches to ICS) in three ICS 'demand' states (Australia, New Zealand and the United Kingdom). These are examined in relation to the child rights framework, in order to assess the extent to which child rights are being promoted, protected and upheld through these responses to ICS. This Chapter illustrates that the clash of rights involved in ICS between the child and the other core parties is difficult to avoid, but that increased efforts and measures to place the child's rights and best interests at the heart of the practice of ICS is both necessary and possible.

Chapter Six<sup>66</sup> deals with an issue that must be contended with in order to present a holistic consideration of the child's rights in ICS. This is the question of whether any protection of the future child's rights is necessary prior to the child being conceived and before the child's birth, in order to ensure the child is able to exercise and enjoy their CRC rights once born. This Chapter explores the hypothesis that due to the intentional, planned nature of ICS and the involvement of multiple parties, protection of particularly at-risk child rights is required pre-conception and pre-birth in the specific context of ICS. It does so by analysing the legal context of the future child's rights both pre-conception and pre-birth; identifying the child's rights which are placed at risk through actions and decisions occurring pre-conception and pre-birth in ICS; and analysing the potential impacts of these actions and decisions on the child's rights once born. This Chapter is, therefore, an important backdrop to the chapters of the thesis that follow after it, which focus on the child's specific rights most at risk in ICS. As part of the discussion presented in Chapter Six, the CRC is closely examined to establish whether it provides a basis for pre-conception and prenatal protection of the child's rights, and relevant domestic and regional jurisprudential approaches to the unborn child are analysed to extract lessons for ICS. In dealing with this subject, this Chapter also contributes to the wider body of child rights legal scholarship concerning pre-natal rights and the situation of the unborn child. Practical measures are suggested, aimed at protecting the future child's rights pre-conception and pre-birth in ICS in order to preserve the child's opportunity to exercise and enjoy their rights in the event that they are born.

Chapters Seven<sup>67</sup> and Eight<sup>68</sup> hone in on two of the child rights most significantly at risk in ICS and in doing so provide in-depth analysis of how these rights are at risk and how they can be better protected. Chapter Seven is a close analysis of the challenge of securing the child's right to a nationality

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66 Accepted for publication in *The International Journal of Children's Rights*, Issue 1, 2018.

67 Originally published in L. Van Waas and M. Khanna (eds) *Solving Statelessness* (2016) Wolf Legal Publishing, at 191-224.

68 Submitted for publication in *Human Rights Law Review*.

under Article 7 CRC in ICS. Children born through ICS are sometimes born stateless and stranded in their birth state. This Chapter provides an overview of the child's Article 7 right and discusses why and how child statelessness arises in ICS, and highlights the wider child rights implications of statelessness in ICS. Here, the intersecting nature of the child's right to a nationality with other CRC rights is made clear. As well as drawing attention to state responses to the issue of child statelessness in ICS, jurisprudence dealing with child nationality and ICS is discussed. This Chapter proposes practical solutions to the problem of child statelessness in ICS, to prevent further children from being precluded from enjoying their right to a nationality.

Intersecting with the discussion in Chapter Seven, Chapter Eight closely analyses the child's right to preserve their identity under Article 8 CRC in the ICS context. As well as providing an overview of the child's Article 8 right and related key regional human rights jurisprudence, this Chapter examines the three elements of identity most at risk in ICS: genetic and biological (including the health rights implications for the child); personal narrative; and cultural. It makes clear that the child's Article 8 CRC right is precarious in ICS and argues that the child's Article 8 right is the central child rights challenge in ICS. It makes the case that in instances where this right is not protected and upheld, it will have a lifetime impact on the child. This is illustrated with reference to case examples in which children conceived and born through ICS have had their Article 8 right endangered, and in some cases, violated. Along with the public international law human rights framework, key lessons from donor-conception, adoption and domestic surrogacy are drawn on to propose practical measures of implementation of Article 8 CRC in the ICS context, to make this right real for children conceived and born through ICS. This Chapter makes clear that safeguarding the right to identity preservation must be treated as a matter of central importance for all children conceived and born through ICS.

Chapter Nine<sup>69</sup> presents a case analysis of the landmark European Court of Human Rights cases of *Mennesson v. France*<sup>70</sup> and *Labassee v. France*.<sup>71</sup> These cases are significant in the context of this study given they were the first judgments concerning ICS issued by a regional human rights court; furthermore, they warrant analysis as they indicate an approach to ICS emphasising the rights of the children involved. Despite dating from 2014 and the fact that the European Court of Human Rights has dealt with other applications concerning ICS since,<sup>72</sup> the Court's reasoning in *Mennesson* and *Labassee* continues

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69 Originally published in *European Human Rights Law Review* (2014), Issue 6, 638-646.

70 *Mennesson v. France*, Application No 65192/11, Merits and Just Satisfaction, 26 June 2014.

71 *Labassee v. France*, Application No 65941/11, Merits and Just Satisfaction, 26 June 2014.

72 The most significant being the judgment of the Grand Chamber in *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment, 24 January 2017, overturning the earlier judgment of the Court (Second Section), Merits and Just Satisfaction, 27 January 2015.

to provide insight and context from a child rights perspective. This Chapter analyses the rights situation of the children concerned in the two cases, outlines the main arguments in the European Court of Human Rights and analyses the judgments. This Chapter serves to further place the preceding two Chapters concerning the child's rights to nationality and preservation of identity in context, given that the *Mennesson* and *Labassee* judgments emphasise the importance of protecting these child rights in ICS arrangements, and impacts experienced by children when this does not occur. This Chapter also comments on the broader future implications of the *Mennesson* and *Labassee* judgments for the rights of children in ICS. An Addendum to Chapter Nine is included, providing a brief analysis from a child rights perspective of the first ICS judgment of the Grand Chamber of the European Court of Human Rights, given the landmark nature of the judgment.

With the previous chapters having covered the rights of the child most significantly at risk in ICS and presenting concrete recommendations for the promotion and protection of these rights, Chapter Ten deals with balancing the rights of the child with the rights and interests of the other core parties to ICS (surrogates, genetic donor parents and commissioning parents). This is important because ICS arrangements often raise a clash of competing rights and interests.<sup>73</sup> However, this Chapter argues that the child's rights and best interests must always be central to any rights balancing exercise in ICS. The child's rights must be protected and prioritised wherever possible, consistent with their best interests, unless this would result in a violation of the rights of another party to the ICS arrangement which outweighs the protection of the child's rights. Furthermore, in some instances where the rights of an adult party would be negated by protecting the child's rights in ICS, it is argued that on balance, this may be necessary.

Chapter Eleven presents the conclusion to this study. It unites the overall picture of child rights in ICS provided by the preceding chapters and comments on the steps to be taken to better protect the rights of children conceived and born through ICS. As well as commenting on the future of ICS and associated developments in family formation, the Conclusion comprehensively outlines the recommendations made throughout this thesis by presenting a framework for a Committee on the Rights of the Child General Comment on the rights of children in International Commercial Surrogacy. This framework is grounded in the standards and norms established by the public international human rights law framework, in particular the CRC, and tailored towards protecting the child's most at-risk rights in ICS. The proposed framework is

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73 As Gerber and O'Byrne observe, "Viewed from a human rights perspective, the interests of the child born via surrogacy may compete with the interests of other participants in the surrogacy arrangement." P. Gerber and K. O'Byrne, "Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights* (2015), at 82.

intended as practical guidance for a broad range of actors in ICS, able to be implemented regardless of the persistent lack of international agreement on the practice of ICS generally, and regardless of the lack of cohesive and comprehensive legislative and policy measures governing ICS at the domestic level in some states.

Therefore, the framework proposed in the Conclusion to this study is aimed at responding to the need in practice (demonstrated throughout the main chapters of this study) to ensure that the rights of children who are being born through ICS are prioritised and actively protected and safeguarded in ICS. As such, the Conclusion makes clear that the findings and recommendations of this study are of immediate relevance and practical application for the range of actors contending with the child and human rights challenges arising from ICS, including states and their governments around the world. If the Committee on the Rights of the Child issues guidance based on this framework and it is implemented by a range of actors involved in ICS, it will mean that children conceived and born through ICS are not prevented from exercising and enjoying the rights to which they are entitled, despite their heightened vulnerability in ICS.

