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

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2 Contextualising a 21st Century Challenge: Part One

Understanding International Commercial Surrogacy and the Parties whose Rights and Interests are at Stake in the Public International Law Context

Abstract

International commercial surrogacy (ICS) has developed over the past decade as an alternative method of family formation at the intersection of science and technology, globalisation and changing social patterns, raising profound human rights, legal and ethical questions. This Chapter introduces ICS as a twenty-first century human rights challenge and provides a comprehensive examination of the parties whose rights and interests are at stake in the public international law context. In doing so, it provides a solid contextual foundation to frame the analysis and arguments presented in the later chapters of this study concerning the person at the centre of all ICS arrangements: the child.

Main Findings

- ICS arrangements are often factually complex, owing to the involvement of multiple parties and the fact that the ICS market has grown in an unregulated manner.
- ICS is controversial due to the legal, human rights, moral and bioethical questions it raises.
- From a public international law, human rights perspective, the rights of surrogate women and children are those most at risk in ICS.
- A child is at the centre of all ICS arrangements; children born through ICS – like all other children – are entitled to all the rights provided by the CRC.
- The child's rights and interests may clash with those of other parties to ICS arrangements, necessitating rights balancing exercises.

Contextual notes

- This Chapter was written when ICS was still very much an emerging phenomenon, and not yet widely recognised as raising international human rights challenges.

- At the time it was written, this Chapter was one of a small number of scholarly works engaging with the phenomenon of ICS from a public international law, human rights perspective.
- Since the time this Chapter was written, the human rights challenges raised by ICS are much better understood; today a growing body of scholarly works exists concerning the human rights challenges raised by ICS, from a legal perspective.
- As a reaction to the legal and human rights problems raised by ICS, some States have since taken steps to outlaw ICS while others have addressed ICS through policy guidance; however, ICS remains unregulated at the international level.

This Chapter was originally published in the *New Zealand Family Law Journal*, Volume 7, Part 7, August 2012, pp. 190-198.

1 Introduction

It is well-documented that children and women remain two of the most vulnerable groups of human beings in our societies today. However, relatively little legal discussion occurs in relation to a specific group of vulnerable children and women whose human rights are at stake due to the rapidly emerging practice of international commercial surrogacy (ICS). The current unregulated growth of this practice is quietly causing a concurrent growth in potential human rights violations of the children and women whom it involves, and on whose lives it has an enduring impact and effect. This development is unsettling in a number of areas – not least due to the ethical issues it raises. One important question which has received relatively little attention or analysis to date however, is the question of what role could, or should the law play in this rapidly growing trans-boundary issue born of our 21st century globalised world? Already, national judiciaries are being confronted with complex ICS cases, with judges struggling to grapple with the legal, ethical and moral minefield that ICS cases present.

This article is presented in two parts, and explores the phenomenon of ICS from a predominantly public international law perspective, placing a focus on the human rights and legal challenges raised. In this, the first part of the article, attention rests on identifying and discussing the parties to ICS arrangements in the public international context. The second (forthcoming) article focusses on the public international law human rights issues and challenges raised by ICS. Particular regard is given to those whom this phenomenon has the potential to leave most vulnerable: the children born and the women who act as surrogate mothers. Those who commission ICS arrangements often give minimal thought to the human rights of the children and women involved, and the fact that these require protection. There has also been little considera-

tion given to the role that the law could or should potentially play in ICS, or indeed the potential value of the law in such situations, and for whose benefit. The lack of legal regulation, in many cases at the domestic level, and the absence of any overarching international framework to regulate ICS, is a point of weakness and a factor potentially leading to serious human rights violations.

Issues of immigration, parentage, guardianship, adoption and citizenship are often the issues raised by ICS given most attention. However, a more holistic assessment seems appropriate, in particular one which incorporates consideration of the human rights issues at stake, in parallel – and with a respect for – analysis of the relevant private law issues, as well as being infused with a multidisciplinary outlook. Additional to legal concerns, public policy issues are writ large in any discussion of ICS. On this note, the Hague Conference accurately observes that this is

> 'an area in which there will be differences of opinion about the proper balances to be struck, for example, between regulating the conduct of adults and ensuring protection for the rights or welfare of the born child, or between party autonomy and the pursuit of other public policy objectives such as the suppression of commercialism in human reproduction.'[1]

Given the recent advent of ICS, it is perhaps not that surprising that no coordinated international law approach or attempt to regulate and protect (either in the public or private international law spheres) has been taken or even considered extensively with regard to the challenges it poses. However, time and the obstacles faced should not be allowed to hinder any further the protection of the rights of the children and women involved. Therefore the exploration of ICS from an overarching international law perspective should not be further delayed. As Lee notes, international problems require international solutions:

> 'Governments should recognize their duty to protect children, women and families from opportunistic and reckless practitioners who primarily seek to profit from the existing climate of disparate regulation of commercial surrogacy. Many public policy issues can no longer be resolved within the isolation of national borders. […] success requires either global coordination or cooperation. Inaction could harm the health and safety of women and children.'[2]

1 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* (Prel. Doc. No. 11, March 2011).

2 Ruby Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 Hastings Women's Law Journal 299 (2009).

Lee further posits that "In an integrated global society, inaction can have direct consequences to all."[3]

2 Understanding International Commercial Surrogacy and its parties

Whilst the practice of surrogacy is not new[4] and the use of surrogates underwent a modern resurgence in the 1980s (predominantly in the United States),[5] international commercial surrogacy (ICS) is very much a phenomenon of recent times. In fact, it is best understood as a 21st century challenge given that it has rapidly emerged in the past ten years and raises, among others, intersecting issues of bioethics, reproductive technologies and science, changing familial structures, the use of the human body, modern communication media, globalisation and law.

Under an ICS arrangement (as distinct from compassionate or altruistic surrogacy which is non-commercial in nature), "commissioning parents" (heterosexual or homosexual couples or individuals) are motivated by different reasons (discussed further below) to arrange for a surrogate mother located in a different country than that in which they live, to carry a child to term. After birth, the surrogate is expected to hand the child over to the commissioning parents, who will raise the child, in many instances without on-going contact with the surrogate. Depending on the particular arrangement, the surrogate may in fact act anonymously throughout the entire process from impregnation to provision of the child to the commissioning parents. In terms of the biological make-up of the child born from an ICS arrangement, there are many possibilities (for ease of reference the six core possibilities, which may have variants dependent on whether donors or surrogates act anonymously or are known, are also set out in diagrammatic form at Figure 1). The child may or may not be genetically linked to one or both of the commissioning parents. The child may or may not be genetically linked to the surrogate mother. Where there is a genetic link to the surrogate, this may be understood as a "traditional surrogacy"[6] or "complete surrogacy"[7] given that the surro-

3 *Id.* at 299.

4 Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues – Expanded Edition*, 5 (1990).

5 *E.g. id.* At 2-4, Field discusses two of the most well-known cases from this period in the US, *Stiver v Parker*, 975 F.2d 261 (6th cir. 1992), and *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

6 Margaret Ryznar uses the term "traditional surrogacy" meaning one which "results in a surrogate's genetic child following her artificial insemination with the intended father's sperm." *See* Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43(4) John Marshall Law Review 1010 (2010). The "traditional" aspect can therefore be understood as drawn from the fact that the surrogate gives birth to her "own" child in the sense that it is genetically related to her, and not genetically related to the commissioning mother or to a third-party egg donor.

gate both provides her own genetic material to create the child, and therefore has a genetic link to the child as well as being its carrier during gestation. Where there is no genetic link to the surrogate, the term 'gestational surrogate' is often used.[8] Eggs and sperm are sometimes separately paid for and implanted (provided by donors), or an embryo is purchased and implanted. Any of these variants may either involve known or anonymous donors. In some ICS cases, the advent of cryo-shipping is utilised, to ship embryos or sperm or eggs via international courier from their origin to the place in the world where they will be used in an ICS arrangement. An exchange of money adds the 'commercial' element to ICS; fees are often paid to surrogacy clinics carrying out the associated medical procedures, and/or to the third party who arranges the surrogacy, and/or to the surrogate herself. Contractual documents sometimes govern the transactions, but not always.[9] Of course, the exact nature of each commercial surrogacy arrangement differs in all these aspects, and it is in many cases difficult to map all the various persons, places and transactions involved; this sets ICS apart from domestic surrogacy arrangements, or purely altruistic compassionate surrogacy, squarely locating it in the context of the 21st century globalised world.

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7 Mary Lyndon Shanley prefers this term to the use of "traditional surrogacy". *See* Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption and Same-Sex and Unwed Parents*, 103 (2001).

8 *E.g.* this is the term used by Amrita Pande throughout her work focussing on non-genetic surrogate mothers in India. *See* Amrita Pande, *It May Be Her Eggs But It's My Blood: Surrogates and Everyday Forms of Kinship in India*, 32 Qualitative Sociology 379-397 (2009). Sangeeta Udgaonkar states that "Gestational surrogacy arises when the embryo is transferred into the uterus of the surrogate mother and is then carried by her. The surrogate mother only contributes her womb but not her occyte. […] Genetic surrogacy arises when the surrogate donates the oocyte as well as carries the child. In a genetic surrogacy, therefore, the surrogate mother is an oocyte donor as well." *See* Sangeeta Udgaonkar, *The Regulation of Oocyte Donation and Surrogate Motherhood in India*, in *Making Babies: Birth Markets and Assisted Reproductive Technologies in India* 82 (Sandhya Srinivasan ed., 2010). Ryznar surmises that in the process of gestational surrogacy, "the surrogate mother bears a non-genetic child following in-vitro fertilisation with a couple's embryo". *See* Ryznar, *supra* note 6, 1010. However, what Ryznar fails to note is that the "couple's embryo" may not always constitute the genetic material of the commissioning parents themselves; while it is true that in many cases the sperm of the commissioning father is used, the egg used in the embryo may have come from the commissioning mother, or it may have come from a third party (possibly anonymous) egg donor.

9 *See* for a comprehensive discussion of the various types of surrogacy arrangements the Indian Supreme Court's observations in Baby Manji Yamada Vs. Union of India & ANR [2008] INSC 1656 (29 September 2008), paras. [5]-[12].

Figure 1: the main models of international commercial surrogacy

Given the above, an ICS arrangement could lead to a scenario, for example, whereby a heterosexual couple in New Zealand pays a clinic in Thailand for the implantation of the male's sperm, combined with an ovum purchased from the United States, into a Thai surrogate mother who gives birth in Thailand. Alternatively, consider the scenario described in a recent article: "In a hospital room on the Greek island of Crete with views of a sapphire sea lapping at ancient fortress walls, a Bulgarian woman plans to deliver a baby whose biological mother is an anonymous European egg donor, whose father is Italian, and whose birth is being orchestrated from Los Angeles. She won't be keeping the child."[10] Superficially, the complexities of such factual scenarios are immediately apparent, but a further tangle of difficult issues underlies these scenarios, raising numerous potential human rights challenges for the children born and the surrogate mothers involved. These issues will be dealt

10 Tamara Audi and Arlene Chang, Assembling the Global Baby, 10 December 2010, Wall Street Journal Online, available at http://online.wsj.com/article/SB10001424052748703493504576007774155273928.html (last visited June 1, 2011).

with in the second article in this series, however, should ideally be considered within the context presented in this (the first) article.

3 Tracking the emergence and development of a market: a global 'trade' in babies through international commercial surrogacy

The emergence of ICS really started to become prominent in the early 2000s,[11] but it has only been in the last 5 years where there has been a clearly identifiable increasing trend of greater use of these arrangements.[12] As the Hague Conference on Private International Law recently stated in a discussion paper on international surrogacy, "A brief internet search of "international surrogacy" and, in today's world, one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilisation techniques ("IVF") and surrogacy: for a price. It is now a simple fact that surrogacy is a booming, global business."[13] Domestically, surrogacy is the subject of legal regulation in many jurisdictions. Some states – in fact the majority of states which regulate surrogacy – take a very strict approach to commercial surrogacy, banning it outright, whilst altruistic surrogacy is generally permitted in those jurisdictions.[14] Commercial surrogacy is however, legal in some other jurisdictions and in those places there is a dedicated domestic legal regime which governs the practice of surrogacy.[15] Celebrity cases in the media (for

11 *See* for one of the first legal assessments of ICS, Angie Goodwin McEwen, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 Vanderbilt Journal of Transnational Law 271-304 (1999).

12 This is evident in the increased numbers of cases coming before domestic courts in jurisdictions such as the United Kingdom, India and France on the issue, whereas previously they were virtually non-existent. *E.g. see* the recent cases of *RE: L (A minor)*, [2010] EWHC 3146 (Fam) (UK); *Balaz v Anand Municipality*, High Court of Ahmedabad (11 November 2009) (India); and the Mennesson case involving French commissioning parents who had twins in California via ICS, Arrêt n° 370 du 6 Avril 2011 (10-19.053), Cour de Cassation – Première Chambre Civile (France).

13 Permanent Bureau of the Hague Conference on Private International Law, *supra* note 1, 6.

14 *E.g.* New Zealand, Canada, Australia, The Netherlands, Belgium, the United Kingdom. In France and Italy however, all forms of surrogacy are illegal. For a helpful survey on domestic legislative responses to surrogacy see Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 20-49 (2007).

15 *E.g.* in Israel and Ukraine. In India, the controversial Draft Assisted Reproductive Technologies (Regulation) Bill 2010, available at http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf (last visited June 1, 2011), has been finalised and is awaiting approval. It will bring into effect a comprehensive domestic regime governing clinics providing international surrogacy in India and addresses related rights and duties. *See* for commentary on the Bill, A. Malhotra, *Legalising Surrogacy – Boon or Bane?*, 2010, The Tribune India, available at http://www.tribuneindia.com/2010/20100714/edit.htm#6 (last visited June 1 2011); Jagran News Network, *Bill on Surrogate Mother Awaits Approval of Law Ministry*, January 27, 2011, available at http://post.jagran.com/bill-on-surrogate-mother-awaits-approval-of-law-ministry-1296102040 (last visited June 1, 2011).

example Cristiano Ronaldo, Elton John) have drawn attention to ICS, but everyday people are driving demand for the service of ICS, fuelling recent growth in what some are now calling a baby production 'industry'.[16] Demand for ICS appears to be growing, and as the very possibility to undertake such arrangements is becoming more widely known (and is easily available via the internet), the supply end of the market is trying to keep pace and expand to meet this demand. In particular, growth is apparent in developing states such as Thailand and India, seeking to cater to the growing number of prospective commissioning parents from the developed world. ICS has the potential to be a very big, global business (arguably it already evinces the hallmarks of this), which in turn has the potential to generate substantial profits for the many different actors involved, such as medical clinics, surrogacy brokers, and surrogate mothers.[17] In discussing the role that contractual arrangements – which exist in and govern some ICS arrangements – take on in this market, McEwan notes that "The modern contracts between surrogate mothers and commissioning parents have become a market-driven event that is much more complicated than simply bringing a new life into the world."[18]

The development of this market is reliant on the on-going demand of commissioning parents as the party in ICS arrangements driven by a desire for a child, and thus for the surrogacy arrangement. The various motivations of such commissioning parents are discussed below, but it is interesting at this point to raise the question of whether the growth in the ICS market should be understood as having grown out of being a market of 'last resort' – that is, commissioning parents tend to only resort to such arrangements after exhausting all other alternative options, or, should it be better understood as being a market of 'easy resort' – that is, one which is convenient to commissioning parents as they can have a baby created for them offshore without the usual stresses and hassles of a regular pregnancy (granted though, an ICS arrangement comes with many other unique stresses and hassles of its own).[19] In practice, a combination of both elements is probably likely to be present.

One of the most problematic aspects of the ICS market as it currently operates, from a legal perspective, is the unregulated international nature of the market which characterises it. The "global baby economy", described by

16 *E.g.* Zippi Brand Frank, *Google Baby* (film, 2009).

17 In India, the ICS market as a whole is currently estimated to be worth US$445 million annually. *See* Neha Wadekar, *Wombs for Rent: A Bioethical Analysis of Commercial Surrogacy in India*, 10:3 TuftScope: The Journal of Health, Ethics and Policy (2011) available at http://www.tuftscopejournal.org/issues/S11 (last visited June 1, 2011).

18 McEwen, *supra* note 11, at 273.

19 Rachel Cook, Shelley Day Sclater, and F. Kaganas (eds.), Surrogate Motherhood: International Perspectives, 3 (2003); P.S. Hoe, More Seek International Surrogate Mothers, November 8, 2010, The New York World, available at http://thenewyorkworld.com/2010/11/08/more-seek-international-surrogate-mothers/ (last visited June 1, 2011).

one commentator as the "baby production industry in age of globalisation"[20] has been allowed to establish itself and to grow with very few legal barriers, besides domestic laws which may or may not regulate the practice in part, dependent on the various jurisdictions in which the parties to the surrogacy arrangement are located. Lee frames the practice using the term "global outsourcing of commercial surrogacy".[21] Essentially, having enough money to pay for ICS is the only gatekeeper directly regulating the market at the international level, other than where individual states have enacted domestic legislation which addresses ICS.[22] However, to date such states are few, and therefore the effect is piecemeal and far from providing any sort of overarching legal regime, let alone a protective legal regime focussed on the children born and the women who act as surrogates. To have such a market functioning across borders – essentially trading in human life – without any coordinated legal regulation[23] or consideration of how to provide a protective framework, is highly problematic.

4 THE PARTIES TO INTERNATIONAL COMMERCIAL SURROGACY ARRANGEMENTS

Having discussed the emergence of the phenomenon of ICS, focus of this article now turns to highlight the various parties involved in an ICS arrangement. An understanding of the different, often very personal, motivations driving the various parties' actions or underlying their specific situations is essential at this point. This will help serve as a background against which to consider wider human rights legal issues associated with ICS.

4.1 The commissioning parents

The commissioning parents are those who commission the ICS arrangement, and thereby the engagement of a surrogate, possibly an arrangement through a medical clinic and/or surrogacy broker, and crucially, the creation of a child.

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20 Zippi Brand Frank, *Google Baby: Synopsis*, 2010, available at http://www.zippibrandfrank.com/ (last visited June 1, 2011.

21 Lee, *supra* note 2, at 275-300.

22 *E.g.* in Australia the New South Wales Surrogacy Act 2010 bans ICS; in India, the Draft Assisted Reproductive Technologies (Regulation) Bill 2010, when it comes into effect, will allow ICS within a regulatory framework.

23 Consideration of the prospects for a private international law regulatory framework currently forms part of a research project being undertaken at the University of Aberdeen, with support from the Hague Conference on Private International Law. The project is called "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level", and is led by Professor Paul Beaumont and Dr. Katarina Trimmings. Background to the research is available at http://www.abdn.ac.uk/law/surrogacy/index.shtml (last visited June 1, 2011).

Sometimes an individual will commission an ICS arrangement, but in the majority of instances it is a couple that commissions an international surrogate child, therefore the term "commissioning parents" will be used throughout this article; it is worth noting that sometimes the term "intending parents" is used.[24]

A range of factors may underlie the actions of commissioning parents. For example, in many ICS cases, the commissioning parents are themselves unable to conceive (for varying reasons) and may have already been through a number of rounds of in vitro fertilisation treatment (IVF, also sometimes known as artificial reproduction treatment or ART) without success; in some cases they have exhausted the surrogacy options in their home country, again without success (either due to there being a lack of women willing to act as surrogates, or due to legal barriers). Alternatively, some commissioning parents will have explored the adoption options which may be available either locally or via intercountry adoption. However, the declining number of children available for adoption worldwide,[25] coupled with the difficulties in adopting a child internationally (such as time delays, strict eligibility requirements, the nature of the children available) arguably make adoption an option trending downwards in its uptake around the world.[26]

Having often explored other options as discussed above, ICS then might become an attractive and viable option for commissioning parents who have the financial means to access it, for a number of reasons. Firstly, many commissioning parents have a strong preference for a child who has a genetic link to both or at least one of the commissioning parents; this may in fact be ICS' strongest selling point. As McEwan notes, "parents' desires for a genetic link with their children makes surrogacy attractive in its own right".[27] It may be possible for commissioning parents to achieve this via an ICS arrangement, either through means of embryo implantation (using the commissioning parents' genetic sperm and egg) in the surrogate, or by using the commissioning father's sperm. Going to extreme cases, the possibility of a so-called "saviour-sibling child" – a child who is conceived in order to enable access to genetic material such as bone marrow for a sick sibling – could be the motivation underlying some ICS arrangements.[28] Related to the desire for a

24 *E.g.* Ryznar, *supra* note 6; the Permanent Bureau of the Hague Conference on Private International Law, *supra* note 1.

25 *See generally* Robin Hilborn, *Global Adoptions Fall One-Third in Six Years*, *Adoption News Central,* March 15, 2011, available at http://www.familyhelper.net/news/110315global.html (last visited June 20, 2011); and Peter F. Selman, *Intercountry Adoption in Europe 1998-2008: Patterns, Trends and Issues*, 34:1 Adoption and Fostering 8, 15 (2010).

26 Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1:1 Global Policy 92 (2010).

27 McEwen, *supra* note 11, at 273.

28 Eric Blyth, *To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived Through New Reproductive Technologies*, 16:4 International Journal of Children's Rights 501-510 (2008).

genetically related child, the "erosion of traditional notions about the structure of the family and the strides in reproductive techniques"[29] also arguably contribute to the popularity of surrogacy, including ICS.

Furthermore, the financial viability of ICS may also motivate commissioning parents to undertake such an arrangement. Undertaking an ICS arrangement in a developing state such as India or Thailand is in most cases significantly cheaper that undertaking a commercial surrogacy arrangement in the developed world in places where it is legally possible and regulated, such as some states in the United States.[30] Illustratively, the difference in cost margin has been reported as being up to as much as $78,000 (US).[31] Therefore undertaking surrogacy in a developing country where it is available to foreign commissioning parents is much more financially viable, and indeed attractive, for the majority of commissioning parents than commercial surrogacy options in the developed world.

Finally, the perceived legal flexibility of ICS may also be a motivating factor for commissioning parents to favour the option of undertaking surrogacy internationally rather than domestically. For example, Ryznar discusses the strict legal regulation in some states in the United States regarding surrogacy, and some of the legal outcomes, such as the *Baby M* case in which the surrogate mother's decision to not hand over the baby after its birth was upheld by the Supreme Court of New Jersey.[32] Ryznar argues that there is no doubt that "domestic cases like this one have increased the appeal of international commercial surrogacy."[33] However, despite the possible attraction of ICS due to what may be a prohibitively restrictive legal regime governing surrogacy in the home-state of the commissioning parents, the very existence of this domestic regulation of commercial surrogacy may still be problematic in terms of its ultimate impact on an ICS arrangement. The effect may be that in the home-state, such an arrangement is essentially held to be illegal, which can raise problems when commissioning parents attempt to return with a surrogate to a state such as France after undertaking an ICS arrangement in an offshore commercial surrogacy-friendly jurisdiction.[34] The commissioning parents,

29 McEwen, *supra* note 11, at 273.

30 *E.g.* Arkansas, Illinois, Florida, Nevada, New Hampshire, Texas, Utah, Virginia. Californian courts have consistently allowed commercial surrogacy under precedential case-law, there is no Californian legislation governing commercial surrogacy.

31 Amana Fontanella-Kahn, *India, the Rent-a-Womb Capital of the World: The Country's Booming Market for Surrogacy*, August 23, 2010, Slate, available at http://www.slate.com/id/2263136/ (last visited June 1, 2011).

32 Ryznar, *supra* note 6, at 1014.

33 *Id.*

34 Essentially, such cases raise conflict of laws issues. *See* for discussion of the Mennesson case (France/US), Gilles Cuniberti, *Flying to California to Bypass the French Ban on Surrogacy*, November 5, 2007, Conflict of Laws.net, available at http://conflictoflaws.net/2007/flying-to-california-to-bypass-the-french-ban-on-surrogacy/ (last visited June 1, 2011). Another interesting example worth noting is the introduction of the New South Wales Surrogacy

and therefore the child, may end up caught in a conflict of laws quagmire with no simple way out. To the extent to which this may raise human rights challenges, this possibility will be further discussed in the forthcoming second part of this article.

4.2 The surrogate mother

The role of the surrogate mother in an ICS arrangement is primarily to be the host to the surrogate child for the gestation period. In cases where she only hosts the child in this way, she is best understood as the biological carrier of the child. In some ICS arrangements, the surrogate's genetic material is also used. In such instances, she is both biologically and genetically linked to the child (and therefore this might be referred to as a full surrogacy). The other key role of the surrogate mother in ICS is that she is expected to, and sometimes is contractually bound (if there is a contract governing the ICS arrangement, this will be the expectation of the commissioning parents) to hand the baby over to the commissioning parents directly following its birth. This is done on the understanding that it is the commissioning parents who will assume responsibility for the child and raise the child, not the surrogate mother.

The surrogate is, like the commissioning parents, potentially motivated by various reasons to participate in an ICS arrangement. Some surrogates are motivated on purely compassionate grounds of wanting to help those unable to become pregnant themselves to have a child, whereas other surrogates are motivated by financial gain. This is understandable in the context of the developing world, where ICS arrangements have been recently characterised as a new type of "labour": ironic in that the very act of labouring to carry the child for 9 months, and the act of labour itself, are combined, in a form of work which is in many cases providing economically marginalised, poverty-stricken women an income they would have never otherwise have dreamed of.[35] In some cases however, surrogates might not participate in ICS by choice, but under external pressure. These issues will be further elaborated on in the discussion of women's rights in part two of this article.

Act 2010 (which came into effect on 1 March 2011), which makes it illegal to engage in commercial surrogacy arrangements within the territory of NSW or outside NSW, including undertaking ICS overseas.

35 Pande first explicitly characterised ICS as a new and particular type of "labour". *See* Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35:4 Signs: Journal of Women in Culture and Society 989-992 (2010). ICS can be viewed as a literal nine months of "labour" ending in the "labour" of child-birth.

4.3 The child

The child who is born from an ICS arrangement is of central importance: essentially the child is the product which the commissioning parents commission, the surrogate nourishes and produces, and the commissioning parents then take 'ownership' of. The child is therefore vulnerable as a potential cite of contestation; the rights and interests of the child are one of the central concerns of the author's research, and will be discussed more extensively part two of this article.

4.4 The medical staff and surrogacy broker

Some ICS cases are private arrangements not carried out with the assistance of a medical clinic specialising in surrogacy, whereas others utilise such services. Whilst such clinics have existed in some states of the United States of America for many years, more pertinent to the current ICS market is the emergence of such clinics in developing states. The business of many of these clinics in the ICS field shows no sign of slowing in growth.[36] Such clinics may also orchestrate the financial transactions for the arrangement, receiving money from the commissioning parents, and in cases where the surrogate is being paid, the payment to the surrogate may be funnelled through the clinic as part of a larger transaction. Such clinics' medical staff deal with ICS arrangements on a daily basis, and in many instances rely on ICS brokers employed not only to recruit surrogates, sometimes using undue pressure,[37] but who are also tasked with matching surrogates to commissioning parents.

The notion of the surrogacy broker should also be understood more widely as encompassing the many ICS brokerage businesses functioning widely through the internet, promoting the various international surrogacy options to prospective commissioning parents. This highlights the role played by modern communication technologies (and their centrality to many ICS arrangements), which enable prospective commissioning parents to access information about potential surrogacy arrangements available on the other side of the world via simple mouse-clicks; in extreme instances, such arrangements may be conducted entirely remotely, with the commissioning parents often erroneously believing it is as simple as flying in to collect the child once it is born. Such instances emphasise the often made-to-order nature of ICS.

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36 *E.g.* the Ankanksha Infertility Clinic run by Dr. Nayna Patel which is one of the subjects of *Google Baby*, *supra* note 16, and the Hope Maternity Clinic run by Dr. Usha Khanderia, discussed by Pande, *supra* note 35. Both clinics are located in Anand in the state of Gujarat in India.

37 Pande, *supra* note 35, at 975ff.

5 Brave new world: the bioethical and moral conundrums of international commercial surrogacy and the interface with health law issues

The scope of this article does not extend to engaging in a full discussion of the ethics of ICS. However, brief discussion of the core bioethical and moral conundrums provides an essential contextual prism through which to frame and view any legal and human rights focused analysis of ICS. As Wendy Chavkin states,

> 'The biology of reproduction has clearly become fragmentable, with gestation and organs and gametes and intracellular ingredients and genetic components now separable. The meanings accorded to these bits and processes is both highly varied and contested.'[38]

Already, the terms "world babies" and "designer babies" are being applied to the children born from ICS arrangements. Surrogates have been referred to as "rentable wombs" and part of "baby-farming" schemes or "baby factories".[39] Brief discussion of some of the core bioethical and moral issues thus provides a primer for later discussion of the human rights challenges posed by ICS for surrogate women and children (contained in part two of this article).

The first bioethical issue raised by ICS relates to the commercialisation of human reproduction. Discussing the increasing numbers of American couples seeking to engage Indian surrogates to carry a child for them in India, Lee notes that "this practice raises ethical concerns, indicating that U.S. outsourcing is no longer limited to manufacturing and service jobs, but has expanded to include women's biological and reproductive bodily functions."[40] The ethically problematic aspect of international surrogacy in this respect is expanded upon by McEwan who observes "While placing a monetary value on a product or service seems natural in many areas of society, it presents new challenges when introduced into the reproductive arena. [… gestational surrogacy has] brought into question the ethics of paying women to bear children and the potential for exploiting surrogates through those payments."[41] Essentially, what this aspect of the discussion around ICS boils down to are the problematic bioethical issues caused by the creation of human life through biotechnological advances, and the commodification of the body, where babies are part of a human trade

38 Wendy Chavkin and Jane Maher (eds.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care*, 12 (2010).

39 *E.g. see* SBS Australia, *India's Baby Factory, Dateline Transcript*, available at http://www.sbs.com.au/dateline/story/transcript/id/600008/n/India-s-Baby-Factory (last visited June 1, 2011).

40 Lee, *supra* note 2, at 278.

41 McEwen, *supra* note 11, at 272.

and where women are, some would say, reduced to a means of production to be utilised to this end.[42]

A second bioethical and moral challenge raised by ICS is the issue of technological intervention in and on the body, and the extent to which this is permissible from an ethical viewpoint. As Gupta and Richards state, "By facilitating greater degrees of intervention on the body, technology unsettles our knowledge of what bodies are and puts to test our ability to make moral judgments about how far science should be allowed to reconstruct the body."[43] At its extremes, this bioethical issue ventures into the area of issues of the post-human body, and where technological intervention may eventually lead in the future.[44]

Thirdly, and interrelated to the abovementioned issue, the extent to which ICS may sometimes be seen (in part) to be an exercise in eugenics raises pressing ethical and moral questions. For example, to what extent should commissioning parents be able to select aspects such as the race and sex of the child they commission through ICS? Further, to what extent should commissioning parents be able to make decisions such as whether to abort a child being carried by a surrogate who is found during gestation to have a genetic disability or disease, or simply doesn't carry the specific characteristics or sex desired by the commissioning parents? Whilst these may seem like extreme cases, there exists very real potential for such practices to eventuate within the paradigm of ICS. Indeed, the already existing sex-selective abortion practices in natural childbirth in India and China highlight that this is not a theoretical possibility. Such potential in ICS will touched on further at the end of this article in a brief discussion of rights balancing in ICS. Furthermore, the ethical aspects of whether the practice of ICS can be seen to be exploitative of women is a large issue at a more general level, but will be discussed further in part two of this article from a public international law human rights perspective.

Finally, it is worth noting that governments are often unwilling to discuss issues such as ICS due to the fraught nature of the bioethical and moral issues raised, which are often viewed as alienating and highly controversial within public debate. This is perhaps one of the main reasons why the majority of democratic governments to date have assumed a hands-off approach when it comes to taking a position on ICS (effectively therefore not taking a position). However, the on-going uptake of ICS by citizens from various jurisdictions

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42 *See generally* Jyotsna Agnihotri Gupta and Annemiek Richters, *Embodied Subjects and Fragmented Objects: Women's Bodies, Assisted Reproduction Technologies and the Right to Self Determination*, 5 Bioethical Inquiry 240-241 (2008).

43 *Id.* at 248.

44 *See* for a comprehensive exploration of the potential posthuman future, F. Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (2003). *See* for insight into the impact of the notion of posthuman humanity on the law and on judging, Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in a Post-Human Era*, 78:5 New York University Law Review 1581 (2003).

throughout the world is likely to continue to come into conflict with this legislative and policy-development and political reticence, and the bioethical and moral issues are likely to increasingly come to the fore as topics on the agenda for public debate. Lee expands, "When most surrogacy agencies are focused solely on the economic gain, the significant social, political and ethical considerations surrounding commercial surrogacy become more urgent."[45] However, it should also be noted at this point that it is unlikely that the many challenges of ICS can be adequately addressed through treating it as an issue which can be addressed by national legislative and policy measures in the first instance, as Lee predominantly argues.[46] Rather, without international impetus, national legislatures are likely to be reticent to holistically addressing ICS. Indeed, given that ICS functions through what are primarily private businesses providing the services of ICS, there may be little motivation in some states with lower levels of transparency and good governance to pass laws or establish policies which might impact on the profitability of the ICS market. This said, if a private international law framework is to work in this area to provide global regulation of ICS, as is envisaged as a possibility,[47] two key things can be said at this stage regarding what it will need to work.

Firstly, it will require willingness from national governments to submit to such regulation, and in turn will require national legislatures to enact implementing legislation or policies to give effect to such a regulatory framework. Secondly, it will require the wider support of complementary implementation of public international law human rights standards, to ensure a holistic protective regime for those most impacted by ICS, being the women and children involved.

6 Human rights protection: when is a child a child?

One of the central concerns of part two of this article is an examination of the rights and interests of the child who is produced by ICS arrangements. In order to be able to progress to discussion and analysis of children's rights in this context, it is first necessary to briefly consider the legal question of "when is a child a child?" Granted, this question could be treated as a stand-alone research topic in itself, and will be explored in the context of ICS in more depth in future research. At this juncture, this article intends only to provide a brief introduction to this question in the ICS context; more research and work on this aspect of ICS will form part of the author's future work on the wider topic.

The question of when is a child a child presents a highly fraught area; indeed, there exist "great differences in opinion about the legal protectability

45 Lee, *supra* note 2, at 281.
46 *Id.* at 300.
47 *See* the current project at the University of Aberdeen, *supra* note 23.

of [the unborn] child."[48] However, consideration of this question is necessary to be able to assess when legal protection of a child begins, and therefore when a child's rights can be the subject to the protection of public international law and the body of children's rights law. Cornock and Montgomery provide a helpful starting point in this assessment, noting that "When considering the legal rights of the unborn child, the questions that the law has to address are: what is the legal status of the unborn child and when does the child's legal personality begin?"[49] At the domestic level, this issue is a matter for national legislatures. Bainham writes that "The beginning of childhood raises directly the status of the foetus or unborn child. English law generally takes the position that personhood is established at birth and not before."[50] He also notes that in the US, a similar view is taken to the English position, and as confirmed in the landmark case of *Roe v Wade*,[51] the unborn child is not a person under the US Constitution.[52] However, the effect of this is not to say that no legal protection is extended to the unborn child, but that if it is, that protection is not provided on the basis of a status of personhood or childhood.[53]

At the international level, the United Nations Convention on the Rights of the Child (CRC) defines a child as meaning "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[54] The use of the ambiguous term "human being" leaves it open to individual States Parties to determine whether or not an unborn child can be brought within the scope of the Convention, and as to what level of legal protection would be afforded to children in the embryonic or foetal stage during gestation.[55] However, what adds a further level of complication to the position taken by the Convention regarding the rights protection of the unborn child, is the following statement found in the preamble (citing a preambular paragraph of the Declaration on the Rights of the Child[56]) which reads: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[57] This seems to indicate that the unborn child falls under the protection of the Convention, yet this is ambiguous in light of Article 1, which appears to rule this out, with its use of the term "human being". How-

48 J.H.H.M Dorscheidt, *The Unborn Child and the UN Convention on Children's Rights: the Dutch Perspective as a Guideline*, 7 International Journal of Children's Rights 303 (1999).
49 Marc Cornock and Heather Montgomery, *Children's Rights In and Out of the Womb*, 19 International Journal of Children's Rights 4 (2011).
50 Andrew Bainham, *Children: The Modern Law* (3rd ed.), 86 (2005).
51 *Roe v Wade,* 410 US 113 (1973).
52 Bainham, *supra* note 50, at 86.
53 *Id.*
54 United Nations Convention on the Rights of the Child, art, 1, Nov. 20, 1989, 1577 U.N.T.S. 3.
55 Dorscheidt, *supra* note 48, at 303.
56 Declaration on the Rights of the Child (adopted by UN General Assembly Resolution 1386 XIV), Dec.10, 1959).
57 United Nations Convention on the Rights of the Child, preamble, supra note 54.

ever, as posited by Joseph, arguably the fact that this sentence appears in the preamble is crucial, as "what is stated in a preamble is by way of foundation and motivation for the substantive content of the relevant document."[58] Extending this view to its logical end, it is arguable that the CRC does not necessarily exclude the unborn child from its scope of protection. Joseph takes a more absolutist position: "The inescapable conclusion here is that the child before as well as after birth is to be protected by the CRC, if that Convention is interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[59]

However, leading jurisprudence in this area does not appear to accept such an absolutist position. Under the European Convention on Human Rights (ECHR), it has been established in the cases of *Vo v France*[60] and *Evans v United Kingdom*[61] that the unborn child does not have a right to life (safeguarded for "everyone" in Article 2 of the ECHR), and therefore is not afforded the human rights protection of the Convention. As Katherine Freeman wrote insightfully prior to these judgments, "If the European Court of Human Rights were to find that "everyone" includes unborn human beings, and therefore "[e]veryone's right to life" protects the unborn child, the abortion laws of many member states would then be held in contravention of the European Convention."[62]

A final aspect of the issue of when is a child a child is the fact that tensions also exist between the protection of the unborn child and the protection and rights of the mother who carries the child, and at a further extension, the rights of the father. In characterising this issue, Cornock and Montgomery observe it can be asked which rights have priority should a conflict arise between the two.[63] In English law, the position is held that the rights of the mother override the unborn child should the two come into conflict (for example in the case of medical treatment). This is "based upon the concept that the foetus is part of the woman's bodily integrity until such a time as it has been born and is independent of the woman. Until that point the woman's consent is sufficient for treatment to her and also the foetus. The father has no rights regarding treatment that is necessary for the benefit of the unborn child if the mother will not consent to the medical treatment."[64] The English case of *Paton v United Kingdom* saw the then European Commission of Human Rights earlier holding this position regarding the legal inability of a prospective father

58 Rita Joseph, *Human Rights and the Unborn Child,* 4-5 (2009).
59 *Id.* at 6.
60 *Vo v France,* (2005) 40 EHRR 12.
61 *Evans v United Kingdom,* Application no. 6339/05, Grand Chamber judgement (2007).
62 Katherine Freeman, *The Unborn Child and the European Convention on Human Rights: To Whom Does "Everyone's Right to Life" Belong?,* 8:2 Emory International Law Review 616 (1994).
63 Cornock et al, *supra note* 49, at 8.
64 *Id.* This position was made clear in *St George's Healthcare NHS Trust v S,* [1998] 2 FLR 728.

preventing the unborn child's mother from having an abortion. The effect of this was that the unborn child's rights will be outweighed by the mother's rights.[65] Discussion of this aspect will become further relevant in discussions of rights balancing in ICS, a topic that the author will engage with in future writing on this topic.

Therefore what appears apparent in answer to the question under law as to "when is a child a child?" is that this is an area open to interpretation, however one which the courts, both at the national and international level, have taken the position that it is usually the case that the unborn child is not afforded rights protection; rather, that protection begins at birth, and until that point in time, the balance, should rights conflict, tips in favour of the mother. Yet, ambiguity exists, with some arguments able to be made that a child should also be understood as including an unborn child for the purposes of the CRC; indeed the Committee on the Rights of the Child appeared to – intentionally or not – assume this position with its issuance of General Comment no. 7, which cited the act of sex selective abortion as one which may violate the right to non-discrimination under Article 2,[66] sex-selective abortion being an act which occurs in respect of the unborn child. As previously mentioned, it is not the within the scope of this article to focus in-depth on this question. However, the core point to be made here is that in the area of ICS, it is worth keeping in mind the notion of the child as possibly encompassing both the unborn and born child in the subsequent consideration of rights protection in the context of commodification and the vulnerability of women's and children's rights. Moreover, it is paramount to remember that in all the possible models illustrated in Figure 1 (above), a child is the ultimate outcome, and no matter what model of ICS that child is the product of, that child has certain rights, as does the surrogate mother who carries him or her. In part two of this article, the rights provided under public international law to these groups are identified, in order to subsequently be able to assess how ICS may pose specific challenges to these rights and interests.

65 *Paton v United Kingdom*, (1980) 3 EHRR 408. The Commission said at para. [19] that "The 'life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman."

66 Committee on the Rights of the Child, *General Comment No. 7 Implementing Child Rights in Early Childhood*, para. 11(b) (2005).