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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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## 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

#### *Abstract*

Public international law provides an important lens through which to deal with ICS as a twenty-first century human rights challenge, given the range of human rights issues arising through this method of family formation, and the framework for protection provided by international human rights law. Indeed, one of the main tenets of this study is the value of the CRC to ensuring children's rights are protected and upheld in ICS. This Chapter therefore introduces the rights and interests most at stake in ICS for the two most vulnerable parties from a human rights perspective: surrogate mothers and children who are conceived and born through ICS. It demonstrates that some of the human rights challenges faced by children in ICS are interrelated to those sometimes experienced by surrogates. This Chapter develops understanding of why the rights of women and children are at stake in ICS; the child's rights situation in particular will be examined more deeply in later chapters of this study.

#### *Main Findings*

- Children born through ICS can face practical problems following birth which pose risks to their human rights. At particular risk are children's rights to nationality; identity preservation; and to not be discriminated against.
- Surrogate mothers in ICS can also face risks to their human rights, including their reproductive autonomy and rights, and their rights not to be exploited and/or trafficked.
- The risks of human commodification and human trafficking are challenges common to both children and surrogate women in the context of ICS.
- Judicial decision-making in ICS cases should, based on the individual facts of a case, be child-centred to ensure the rights and best interests of children are protected and upheld, while balancing these with other parties' rights.

*Contextual notes*

- This Chapter was written at a time when very limited scholarly works had considered the situation of children in ICS, but a multidisciplinary body of work existed concerning the situation of surrogate mothers in ICS.
- At the time it was written, this Chapter was one of the first analyses of children's rights in ICS from an international human rights law perspective.
- It was also one of the first scholarly works presenting analysis in one place of the children's rights and women's rights challenges raised by ICS.
- Since the time this Chapter was written, although legal scholars and international bodies have increasingly engaged with ICS from a child rights perspective, a close focus on the child's rights in ICS remains limited; ICS jurisprudence at domestic and regional levels has developed; and the situation of children born through ICS has come under greater scrutiny from international media. The rights of surrogate women in ICS have continued to receive attention from multidisciplinary scholars, domestic courts and international media.
- However, children's and women's rights continue to be at risk and infringed in ICS, and a lack of international regulation persists, as does a lack of international consensus about ICS as a practice.

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## 1 INTRODUCTION

Building from the first article in this series, the present article discusses some of the core challenges posed by international commercial surrogacy (ICS) arrangements to the rights of children and women. Given the lack of comprehensive consideration of children's rights and how they are impacted and affected by ICS to date, primary emphasis is placed on discussion of why ICS should be recognised as an international human rights problem affecting children. As part of this discussion, relevant case law from various international jurisdictions are touched upon. The challenges to women are the secondary focus of the article, and issues cutting across both groups are dealt with together in a discrete subsection. All of the issues raised in this article have significant public policy dimensions in addition to legal facets, and elaborate on the issues raised in the discussion of bioethical challenges posed by ICS in part one of this article. As Ryznar notes, "it would be very difficult, and perhaps unwise, to consider only the legal framework of international commercial surrogacy while ignoring public policy goals. Should surrogacy remain legal, these public policy considerations center on protecting the three primary groups of people involved in international commercial surrogacies:

the surrogates, the commissioning parents, and the resulting children. It is therefore vital to analyze the rights, interests and obligations of these parties. Naturally, they vary, but each has implications for the potential regulatory framework".<sup>1</sup>

## 2 CHILDREN'S RIGHTS

One of the most striking aspects of research undertaken to date on ICS is the lack of in-depth attention given to the position of the children involved and who ICS ultimately produces. Instead, attention largely falls on the situations of the commissioning parents or the surrogate mother. This is not to say that there are not some notable exceptions of scholarship focussed on ICS or directly related issues – there are,<sup>2</sup> but more comprehensive thought needs to be given to how ICS affects children. This article seeks to make a preliminary contribution to this on-going work, and to what is hoped is further work in this area by a range of legal scholars and practitioners. This will add to and complement the body of work already further established in other disciplines (such as social work and sociology) on ICS. As Michael Freeman observed in 1996, "Assisted reproduction has hitherto neglected a children's rights perspective – and it shows. There has been no systematic exploration of the questions it raises which has put children, their interests and rights to the forefront."<sup>3</sup> In 2011, this equally applies to the ICS context. Indeed, assessment of the situation of the commissioning parents and surrogate mothers is essential to understand the overall picture. However, the importance of inserting the children born from ICS into the centre of discussion of these arrangements is crucial, to highlight the pressure points where their rights may be particularly vulnerable to violation. It must always be remembered that all the scenarios depicted in Figure 1 (see part one of this article) result in the creation of a child. As Fuku-

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1 Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43(4) *John Marshall Law Review* 1024 (2010).

2 E.g. see generally 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); Michael Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 *International Journal of Children's Rights* 273-298 (1996); George Palattiyil, Eric Blyth, Dina Sidhva and Gita Balakrishnan, *Globalization and Cross-border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work*, 53 *International Social Work* 686-670 (2010); Ryznar, *supra* note 1; and Mary Lyndon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption and Same-Sex and Unwed Parents* (2001). Shanley states at 104 "While contract pregnancy clearly can be viewed from the perspective of those who commission a pregnancy, I put the woman who bears the foetus, and the child who will be born, at the centre of my analysis."

3 M. Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 *International Journal of Children's Rights* 297 (1996).

yama and Furger write regarding bioethics and human reproduction, “Since reproduction aims at the creation of children, their welfare ought to be placed first and foremost as an objective of regulation.”<sup>4</sup> Therefore an assessment of the most significant ways in which children’s rights may be breached through ICS follows.

## 2.1 The immediate practical problems for children born from international commercial surrogacy arrangements

In many ICS cases, commissioning parents do not adequately foresee the practical implications and consequences that their actions will have for the child they have commissioned. Things many commissioning parents assume will be taken for granted after the child’s birth (for example, who the legal parents of the child will be, and what eligibility for citizenship the child will have) can become highly problematic. Thus, unforeseen complications can dominate immediately following an ICS birth. As Hedley J. (the United Kingdom judge who has been most active in the international surrogacy area) recently said, “I have been extremely anxious about the difficulties people have got themselves into [...] without appreciating the legal implications of doing so. [...] a number of people have found themselves getting into a mess unnecessarily and their children into a mess unnecessarily”.<sup>5</sup>

These complexities arise because of the international nature of the surrogacy arrangement; the involvement of parties from two different – or sometimes more – jurisdictions brings cross-border issues into play, along with a raft of potential conflict of laws issues. Problematic situations often occur when the home state of the commissioning parents bans commercial surrogacy, and they undertake an ICS arrangement in a foreign jurisdiction. In these cases the law of the home state may take a different view of issues which affect the child (such as who the legal parents are) than the position taken by the law of the state where the child is born. Storrow captures the practical issues likely to arise in many ICS cases, given the legal lacuna in this area: “The children born of international surrogacy tend to be born in the host country. The intending parents must obtain travel documents to return with their new children to their countries of origin. [...] A government intent on curtailing cross-border surrogacy may refuse to issue a passport or visa to the child, may not bestow citizenship upon the child and may refuse to recognize the intended parents

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4 Francis Fukuyama and Franco Furger, *Beyond Bioethics: A Proposal for Modernizing the Regulation of Human Biotechnologies*, 4 (2006).

5 BBC Radio 4, *Interview with Mr Justice Hedley of the High Court of the UK*, May 19, 2011, The World at One. An unofficial transcript of the interview is available at <http://www.nataliegambleassociates.com/assets/assets/interview.pdf> (last visited June 1, 2011); a report on the interview is available at <http://www.bbc.co.uk/news/uk-13452330> (last visited June 1, 2011).

as the legal parents of the child. Problems can also arise in host countries where the law does not automatically entitle the intending parents to recognition as the legal parents of the child.”<sup>6</sup> Therefore these immediate challenges after birth are essentially issues of legal status, which can create “legal limbo”<sup>7</sup> for the child (and by extension the commissioning parents). Given the nature of these issues it may seem most appropriate to resolve such issues through domestic legislation and from a private international law perspective.<sup>8</sup> However, they are also important to consider from a public international law standpoint, as these practical problems very much raise the question of what is in the best interests of a child born from an ICS arrangement. As Article 3(1) of the Convention on the Rights of the Child states:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’

Therefore, in any actions of the kind described in Article 3(1) which are taken to resolve the situation of an ICS child regarding their relationship to their commissioning parents, their citizenship, ability to travel internationally or their welfare, the best interests of the child should be treated as a primary consideration.

Some recent judicial decisions where these issues have been at stake illustrate how the child’s best interests might be assessed and practically applied. The UK High Court handed down a landmark international surrogacy decision in 2010, *RE: L (A minor)*.<sup>9</sup> In this case, British commissioning parents had commissioned a surrogate in Illinois, who had provided them with a baby, L. At issue was whether the commissioning parents could be recognised as L’s legal parents, and whether the Court would recognise the ICS agreement, given payments to a surrogate other than ‘reasonable expenses’ are illegal under UK law.<sup>10</sup> In this instance a parental order was made in favour of the commissioning parents being L’s legal parents. Hedley J. highlighted other practical difficulties, noting:

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6 Richard Storrow, *Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-border Reproductive Travel*, 23 *Reproductive BioMedicine Online* 543 (2011).

7 Louisa Ghevaert, *International Surrogacy: Progress or Media Hype?*, 590 *BioNews* (2011) available at [http://www.bionews.org.uk/page\\_85684.asp](http://www.bionews.org.uk/page_85684.asp) (last visited June 1, 2011).

8 Indeed, these are the types of issues being considered by a current research project at the University of Aberdeen, led by Professor Paul Beaumont and Dr. Katarina Trimmings. The project is called “International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level” and is supported by the Hague Conference on Private International Law. Background to the research is available at <http://www.abdn.ac.uk/law/surrogacy/index.shtml> (last visited June 1, 2011).

9 *RE: L (A minor)*, [2010] EWHC 3146 (Fam).

10 UK Human Fertilisation and Embryology Act 2008, section 59(4) amending s42(2) of the Surrogacy Arrangements Act 1985.

'[...] there still remain real issues about re-entry to the UK although in this case it was effected through temporary leave granted to the child who had a USA passport. It remains essential for each commissioning couple to acquaint themselves with their immigration position before committing themselves to a surrogacy agreement.'<sup>11</sup>

Standing as one of a small handful of legal decisions on ICS internationally (at the time of writing in 2011 only two others have been decided in UK courts),<sup>12</sup> the decision in *RE: L* is important in a number of respects. Firstly, it highlights the range of legal issues requiring resolution in ICS cases regarding the status of both the child and the commissioning parents, in relation to each other (and for the child in general).

The second important aspect of the *RE: L* decision (arguably the most important given potential wider impact on other cases) is that the judgment explicitly considered the welfare of the child to be the paramount consideration, and in this case the welfare of the child was found to outweigh public policy considerations regarding payments in surrogacy arrangements:

'It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an [parental] order if otherwise welfare considerations supports its making. It underlines the Court's earlier observation that, if it is desired to control commercial surrogacy arrangements, those controls need to operate before the court process is initiated i.e. at the border or even before.'<sup>13</sup>

By holding that the welfare of the child is the paramount concern, the UK courts have thus to date taken a child-centred approach to ICS cases. However, the Court also made the important observation regarding the commercial aspect of international surrogacy arrangements that each case must be scrutinised on its own facts, given the impossibility of pinning down a conventional quantum of payment.<sup>14</sup> Indeed, the case-by-case consideration of ICS cases in national courts (regarding matters such as these practical issues which ensue immediately after birth of an ICS child) means there will remain an element of unpredictability in judicial decision-making in this area.

A second case illustrating the comprehensive practical problems for a child immediately following their birth from an ICS arrangement is the case of *Baby Manji*.<sup>15</sup> The commissioning parents, the Yamadas, were from Japan and

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11 *RE: L (A minor)*, [2010] EWHC 3146 (Fam) para. [8].

12 See the earlier cases *RE: X and Y (Foreign Surrogacy)*, [2008] EWHC 3030 (Fam), and *RE: S (Parental Order)*, [2009] EWHC 2977 (Fam).

13 *RE: L (A minor)*, *supra* note 11, para. [10].

14 *Id.*, para. [7].

15 *Baby Manji Yamada vs. Union of India & ANR*, [2008] INSC 1656 (29 September 2008).



entered into a surrogacy contract through a prominent Indian surrogacy clinic.<sup>16</sup> An embryo was created using Mr Yamada's sperm and the egg of an anonymous Indian donor, and implanted into an Indian gestational surrogate. Manji was born in July 2008 however the Yamadas divorced a month earlier. Mr Yamada wanted to care for Manji; Mrs Yamada did not.<sup>17</sup> As Kari Points describes,

'The way she saw it, she was unrelated to the baby biologically, genetically and legally. Under the terms of the agreement with the clinic, the egg donor's responsibility had ended once she provided the egg, and the surrogate's job was finished as soon as she gave birth. Suddenly, Baby Manji had three mothers – the intended mother who had contracted for the surrogacy, the egg donor, and the gestational surrogate – yet legally she had none. Was she Indian? Was she Japanese? Could she have an identity and a nationality without having a mother? The surrogacy contract did not cover a situation such as this. Nor did any existing laws help to clarify the matter.'<sup>18</sup>

Following diplomatic wrangles, the matter was heard by the Supreme Court of India.<sup>19</sup> It directed the relevant Indian government departments to deal with the case expeditiously however, the Supreme Court did not enter into any discussion of the best interests of the child. Eventually, identity documents enabling travel to Japan were issued by the Indian government as an ad-hoc solution, and a temporary one year visa was issued by the Japanese government on humanitarian grounds, allowing entry to Japan.<sup>20</sup> Thus, the difference in focus between the approach taken by the Indian Supreme Court and the UK High Court in the two cases discussed can be contrasted; the UK Court demonstrating a proactive, child-centred approach, whilst the best interests of the child were seemingly a peripheral concern for the Indian Supreme Court, leaving Manji in a vulnerable position.

## 2.2 The potential for statelessness

Related to the practical matters which may affect the child immediately after birth, the very real potential of an ICS child ending up as being stateless requires consideration. The implications of statelessness are large for anyone, but for a child they may be further magnified. A child in an ICS arrangement

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16 The Ankanksha Infertility Clinic in Gujarat.

17 See for a full factual outline of the case and a discussion of the case from an ethical point of view, Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, available at <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf> (last visited June 1, 2011).

18 Points, *supra* note 17, at 2.

19 *Baby Manji Yamada vs. Union of India & ANR*, *supra* note 15.

20 Points, *supra* note 17, at 6-7.

may end up stateless if the country of its birth and the commissioning parents' country (or countries) of citizenship refuse recognition. Essentially baby Manji (discussed above) was left stateless given the refusals of both the Indian government to issue a passport, and the Japanese government to recognise citizenship.

Further instances of statelessness have arisen in the Indian ICS context. One case, *Balaz v Anand Municipality*, involved German commissioning parents who contracted an Indian surrogate mother to carry a child for them.<sup>21</sup> Twins Nikolas and Leonard were born in 2008 in India however they remained stateless for two years.<sup>22</sup> The twins were confined to India, whilst their commissioning parents engaged in lengthy endeavours to regularise the twins' situation to enable them to go to Germany. Eventually the case was resolved by requiring the commissioning parents to adopt the twins through intercountry adoption (by exception to usual intercountry adoption policy), in order for them to be able to leave India and enter Germany.<sup>23</sup> Travel visas were then issued by the German government;<sup>24</sup> therefore the issue of statelessness of children born from ICS was not explicitly confronted.

A similar situation has arisen in another Indian ICS arrangement, involving a Norwegian commissioning mother who contracted a surrogate mother in Mumbai. After implantation of an embryo created using sperm from an anonymous Scandinavian donor and an egg from an anonymous Indian donor, twins were born in January 2010. However, Norway refused travel documents for the children given DNA tests showed no genetic link between the commissioning mother and the twins (therefore Norway recognises the surrogate mother as the legal mother).<sup>25</sup> The Indian government takes the opposite position (that the commissioning mother is the legal mother), and refuses recognition of the twins as Indian nationals.<sup>26</sup> In contrast to the *Balaz* case, the Norwegian government says adoption is not an option open to the commis-

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21 *Balaz v Anand Municipality*, High Court of Ahmedabad (November 11, 2009).

22 See Dahananjay Mahapatra, *German Surrogate Twins to Go Home*, May 27, 2010, Times of India, available at [http://articles.timesofindia.indiatimes.com/2010-05-27/india/28279835\\_1\\_stateless-citizens-balaz-surrogate-mother](http://articles.timesofindia.indiatimes.com/2010-05-27/india/28279835_1_stateless-citizens-balaz-surrogate-mother) (last visited June 1, 2011).

23 Rakesh Bhatnagar, *Adopt Surrogate Twins, SC Tells German Couple*, January 18, 2010, Daily News and Analysis, available at [http://www.dnaindia.com/india/report\\_adopt-surrogate-twins-sc-tells-german-couple\\_1336403](http://www.dnaindia.com/india/report_adopt-surrogate-twins-sc-tells-german-couple_1336403) (last visited June 1, 2011).

24 Hillary Brenhouse, *India's Rent-a-Womb Industry Faces New Restrictions*, June 5, 2010, Time Magazine, available at <http://www.time.com/time/world/article/0,8599,1993665,00.html> (last visited June 1, 2011); Times Now, *German Twins Leonard, Nikolas Granted Visa*, May 16, 2010, Times of India, available at <http://www.timesnow.tv/articleshow/4346013.cms> (last visited June 1, 2011).

25 Sumitra Deb Roy, *Divergent Laws Leave Twins Stateless*, February 2, 2011, Times of India, available at [http://articles.timesofindia.indiatimes.com/2011-02-02/india/28380051\\_1\\_fertil-ity-clinic-twins-crime-branch](http://articles.timesofindia.indiatimes.com/2011-02-02/india/28380051_1_fertil-ity-clinic-twins-crime-branch) (last visited June 1, 2011).

26 *Id.*

sioning mother.<sup>27</sup> At the time of writing of this article, the case remains unresolved, the twins remaining stateless in India.<sup>28</sup>

The UK High Court has also been confronted with cases involving stateless children born from ICS arrangements. A good example is the case of *RE: IJ (A Child)*.<sup>29</sup> The case involved UK commissioning parents who had a child born in Ukraine to a Ukrainian surrogate mother in 2010 through an ICS arrangement (an embryo created using the sperm of the commissioning father and the egg of an anonymous donor was implanted). Again, difficulties arose in the areas of legal parentage and citizenship; the child was left stateless for a period of time, as a result of the different positions of the respective Ukrainian and UK laws pertaining to surrogacy. A similar situation arose earlier in the UK case of *RE: X & Y (Foreign Surrogacy)*.<sup>30</sup> In that matter, a UK commissioning couple entered into a contractual arrangement with a surrogate in Ukraine; again an anonymous egg was fertilised with the commissioning father's sperm and implanted, and twins were born. Similar problems ensued as in *RE: IJ*. Hedley J. importantly stated in the *RE: X&Y* decision that "As this case vividly demonstrates, not only may (and probably will) those laws be different but they may be incompatible to the point of mutual contradiction."<sup>31</sup> Effectively this left the twins without clear parents or nationality, the ultimate impact being they were, for a time, stateless.

These cases of child statelessness resulting from ICS are particularly problematic when viewed in light of Articles 7(1) and 7(2) of the United Nations Convention on the Rights of the Child (CRC).<sup>32</sup> What the cases illustrate is that States Parties to the CRC have displayed a large degree of reticence regarding recognition of the child's rights in ICS cases, as required by Article 7(1). In particular, the right to acquire a nationality from birth and to ensure implementation of these rights where the child would otherwise be stateless have been neglected. Arguably in some of the cases discussed above, states have breached their obligations under Article 7, given that children have not had their right to nationality from birth fulfilled (in some cases waiting for over

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27 R. Kumari, Complications of Surrogate Motherhood in India, *Gender Matters India* (28 January 2011), (<http://csrindia.org/blog/2011/01/>) (last visited 1 June 2011).

28 However, the case has apparently not had the effect of dissuading Norwegian commissioning parents from seeking ICS in India, with a reported marked increase during 2011, see *Views and News from Norway, Indian Surrogates for Norwegian Women Increase*, (23 March 2011) (<http://www.newsinenGLISH.no/2011/03/23/indian-surrogates-for-norwegian-women-increase/>) last visited 1 June 2011.

29 *RE: IJ (A Child)*, [2011] EWHC 921 (Fam).

30 *RE: X and Y (Foreign Surrogacy)*, [2008] EWHC 3030 (Fam).

31 *Id.* at para. [3].

32 Article 7(1) states that the child shall be registered immediately after birth, and have the right to a name and nationality from birth, and to know and be cared for as far as possible by his/her parents; Article 7(2) requires States Parties to ensure implementation of these rights, emphasising this should be done in particular where the child would otherwise be stateless.

two years). Moreover, Article 7(2) emphasises that Article 7(1) rights are particularly important in cases where, if those rights are not fulfilled, the child would otherwise be stateless. This has been the outcome in many cases like those discussed above; states should therefore be doing much more to ensure these rights are fulfilled.

### 2.3 The commissioned child as a contested or unwanted child

Given the situations a child born from an ICS arrangement may face following birth (as discussed above), it can be posited that in extreme cases, these children end up falling into one of two categories. Firstly, the child may best be understood as a 'contested child': where more than one party claims the child, for example estranged commissioning parents who may both lay claim to the child, or a surrogate mother changes her mind refusing to provide the baby to the commissioning parents, acting against any contractual agreement. A second alternative is that the child may be an 'unwanted child': when born, neither the commissioning parents nor the surrogate are willing to take responsibility for the care of the child. Such a situation may arise for a number of reasons, for example in instances where the commissioning parents have lost interest in parenting a child, or perhaps if the child is born with a birth defect or disability. Both contested children and unwanted children who are products of ICS arrangements will likely face social and legal uncertainty in the early phase of their life, and will continue to experience the impact of these situations as they grow older and potentially throughout their lives. Their status as a contested or unwanted child may well have an impact on their sense of personal identity, a separate but related issue which will now be examined.

### 2.4 The child's right to identity

The right to identity is likely to be highly relevant in almost all cases of ICS, given the unique circumstances surrounding birth, and the child's particular situation post-birth (as mentioned above, the position of the child immediately following birth can be highly variable, sometimes precarious). Indeed, this issue merits further research and discussion in the future given its importance in the context of ICS, and the author intends to engage in such a project. For the purpose of the current article, it can be said that two factors based on the nature of ICS mean that such arrangements will likely have a distinct impact on the child's right to identity.

Firstly, in many ICS arrangements, the child will either have only a half genetic link to the commissioning parents, or no genetic link to the commissioning parents. Often genetic material is anonymously donated; in some cases

the surrogate mother may also be acting anonymously. Secondly, the international nature of the surrogacy arrangement means the child is likely to grow up in a place and culture that may be geographically distant from the place they were born, and culturally dislocated from their ethnic and cultural origins. This will be especially marked where commissioning parents from developed states use surrogate mothers in developing states.

Identity is a contested notion; as Blauwhoff notes, its multidimensional nature means “it comes as no surprise that identity has so far not been given a legal definition.”<sup>33</sup> However, it is widely agreed that identity is an important concept in relation to a person’s sense of self; it is through the concept of narrative identity – based on understandings of the past, and memory – that we construct our own notions of personal identity. Michael Freeman therefore describes identity as

[...] what we know and what we feel is an organising framework for holding together our past and our present and it provides some anticipated shape to future life. It is an inner personal landscape.<sup>34</sup>

Van Bueren identifies further dimensions:

‘An identity transforms the biological entity into a legal being and confirms the existence of a specific legal personality capably of bearing rights and duties.’<sup>35</sup>

Freeman’s description of identity is particularly apt in considering the importance of the right to identity for children born out of ICS arrangements. Many such children will not have access to this organising framework, given that they may have been created using genetic material from anonymous donors, may not know who their birth mother was, and may be culturally and geographically dislocated from their cultural origins and birth place, given the intention that they have been made in order to travel to and live in another part of the world.

Given these factors, ICS threatens to perpetuate the status quo in relation to the right to identity as “an interest long neglected and constantly denied”.<sup>36</sup> However, the right to identity is a right too important to neglect in ICS situations; after all, “There can be few more basic rights than a right to one’s identity.”<sup>37</sup> The CRC was the first international human rights treaty to explicitly recognise the right to identity; although the right to identity enshrined in

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33 Richard J. Blauwhoff, *Foundational Facts, Relative Truths: A Comparative Law Study on Children’s Right to Know Their Genetic Origins*, 20 (2010).

34 M. Freeman, *The New Birth Right? Identity and the Child of the Reproduction Revolution*, 4 *International Journal of Children’s Rights* 290 (1996).

35 Geraldine van Bueren, *The International Law on the Rights of the Child*, 117 (2006).

36 M. Freeman, *supra* note 34, at 274.

37 *Id.* at 283.

the CRC does not envisage the specific situation of artificially created children, it holds particular significance for that group of children,<sup>38</sup> and by extension to children born from ICS arrangements. Article 8(1) and 8(2) provide that:

'(1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

(2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'

In the context of ICS, regarding the right to identity there are definite overlaps with issues discussed in previous sections. However here, three dimensions of the right to identity are arguably of heightened significance and deserve particular attention. Each of these is briefly considered below.

#### 2.4.1 *The importance of identity to knowing one's personal narrative*

In ICS, unless specific steps are taken to ensure the child knows where they came from (including the identity of their genetic parents, as well as the identity of their birth mother), such children may be effectively left in an identity vacuum, lacking knowledge of their personal narrative. This could have a significant psychological impact on such children. In the context of adoption, discussion of a state of 'genetic bewilderment' has been a term applied to describe the effects of not being able to fully establish one's identity through a personal narrative.<sup>39</sup> This is equally applicable to the situation of children born from ICS arrangements; Sants states that

'a genealogically bewildered child is one who either has no knowledge of his natural parents or only uncertain knowledge of them. The ensuing state of confusion and uncertainty fundamentally undermines his security and this affects his mental health.'<sup>40</sup>

Leighton argues that children have a right to "the development of a sense of self as a lived narrative blending action and memory [and] to participate in their own histories and their own future."<sup>41</sup> Furthermore "children who have no identifiable origin, no identifiable human beginning to their personal

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38 *Id.*

39 See generally H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37:2 *British Journal of Medical Psychology*, 133-141 (1964).

40 *Id.* at 133.

41 N. Leighton, *The Family: Whose Construct is it Anyway?*, in *The Family in the Age of Biotechnology*, 103 (Carole Ulanowsky ed., 1995).

narrative may have a sense of alienation in the world in which they find themselves.”<sup>42</sup> Van Bueren also posits that

‘the only method to preserve an identity is to have full knowledge of all the components of that identity, including that of the biological parents, and that unlawful interference includes not only actions which are unlawful in domestic law, but also actions which are unlawful in international law.’<sup>43</sup>

It is crucial that ICS children have knowledge of their genetic and cultural origins, in order to be able to piece together their identity which will have had its earliest beginnings in a cross-border context. Ryznar captures the crucial essence of what lies at the root of the issue, asserting that “Although such issues unavoidably arise in the adoption context, they are being intentionally created in international commercial surrogacy.”<sup>44</sup> Therefore, it is crucial that intentional and proactive steps are taken by those involved in ICS – the commissioning parents, surrogacy clinics, medical professionals and national and state governments – to uphold the child’s right to identity.

#### 2.4.2 *The importance of identity to knowing one’s cultural and ethnic background*

Knowing one’s cultural and ethnic origins is another important aspect of identity. However, children born from ICS arrangements may not be provided with a sense of this, given that they are removed from the culture and ethnicity they are born in and with (apart from those situations where the commissioning parents are of the same ethnic or cultural background as the surrogate and/or genetic parents). The importance of knowing this aspect of one’s identity has been identified as important in intercountry adoption; the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption explicitly requires that due consideration is given to the child’s ethnic and cultural background for children who are adopted intercountry.<sup>45</sup> Unless the commissioning parents in ICS arrangements consciously ensure that the child knows their ethnic and cultural background and take active steps to ensure these links and knowledge are maintained, the child may end up ethnically and culturally dislocated and isolated. Therefore the importance of knowing this aspect of one’s identity should be extended by analogy to the ICS context.

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42 *Id.*

43 Van Bueren, *supra* note 35, at 122.

44 Ryznar, *supra* note 1, at 1036.

45 Hague Convention of 29 May 1993 on Protection of Children and Co-operation In Respect of Intercountry Adoption, art. 16(c).

### 2.4.3 *The importance of identity to knowing one's genetic origins – the medical and health rationale*

Van Bueren asserts that

'Denying access to genetic records goes to the very heart of child-to-child equality, child autonomy and participation. Autonomy requires not only the skills to use knowledge but also, as a necessary precondition, access to the knowledge.'<sup>46</sup>

Indeed, this knowledge aspect of identity and knowing one's genetic origins is particularly important; as Blyth further notes, genetic origins are important especially given that

'[...] we are aware anecdotally of concerns expressed by some parents who sought donor services in another country who are seeing in their growing children unanticipated physical characteristics, suggesting, at the very least, that the ethnic origins of their child's donor might not be what they originally thought. As these children grow up, whatever their parents initial intentions, it will be impossible to avoid talking to their children about their origins.'<sup>47</sup>

However, perhaps the strongest reason why it is important that children born from ICS arrangements have the opportunity to know their genetic origins is due to the importance of knowing this information for health reasons. Knowing one's personal health history – for example a heightened risk of developing a particular hereditary medical condition can be critically important. Again, in the context of intercountry adoption under the Hague Convention, the child's medical information is safeguarded, with contracting states obliged under Article 30(1) to preserve this for the child and under Article 30(2) to make this available to the child. The UN Committee on the Rights of the Child is yet to take a concrete position on the importance of knowing one's genetic origins as part of the right to identity in the context of donor assisted conception, but it has in some cases been critical of states that endorse donor anonymity (and as yet has not ventured into any consideration of ICS).<sup>48</sup> Unless commissioning parents and states play an active role in ensuring the child is privy to such information, the child may not have the opportunity to know their genetic origins. Given the cross-border location of their genetic origins, they may prove extremely difficult or impossible to trace, especially

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46 Van Bueren, *supra* note 35, 121.

47 Eric Blyth, *Tackling Issues in Cross-Border Reproductive Care*, 2009, 508 BioNews, available at [http://www.bionews.org.uk/page\\_38069.asp](http://www.bionews.org.uk/page_38069.asp) (last visited June 1, 2011).

48 Eric Blyth, *Donor anonymity and secrecy versus openness concerning the genetic origins of the offspring: international perspectives*, 2006, 2 Jewish Medical Ethics, available at <http://www.medethics.org.il/articles/JME/JMEM10/JMEM.10.1.asp> (last visited June 1, 2011).



in cases where anonymity has played a part, either in terms of donor(s) or the surrogate.

## 2.5 Potential for the selective creation of children – designer babies

Another way in which children may be left vulnerable given their creation through ICS is that their commissioning parents might select the characteristics of the child, essentially creating a ‘designer baby’. Numerous motivations may underlie this, and various methods may be employed. For example, Shanley notes a common goal is to “create a family in which the children appeared to be the biological offspring of the husband and wife.”<sup>49</sup> Sometimes, commissioning parents may want to ensure the child is a specific sex, and that it does not carry a genetic disease or disability. Pre-implantation genetic diagnosis (PIGD) allows this via analysis of embryonic cells. Utilisation of such screening methods may lead to sex-selective abortion or abortion on the grounds that the child carries a genetic disease or disability. Regarding the use of PIGD, Blyth notes its use “to exclude “undesirable” characteristics is criticized for legitimating sex discrimination, eugenic practices, and undermining the dignity of *existing* sick and disabled individuals as having a life that is “not worth living”.”<sup>50</sup> Rao further asserts we are thus now in “the brave new world of neo eugenics”.<sup>51</sup>

In his discussion of this issue Blyth highlights two further possibilities given rise through pre-selection of characteristics, which may be brought to fruition via ICS and therefore applied to the current discussion. Rarely, some commissioning parents may seek to create a child with a specific disability or physical condition. Blyth says that “Given the ostensible purpose of technology to avoid disabilities and adverse health conditions, its use deliberately to conceive a disabled child would strike many as perverse”,<sup>52</sup> however goes on to note that “Nevertheless, recent research has shown that some clinics in the United States would be willing to “select in” a disability.”<sup>53</sup> Clearly this raises a question in terms of whether such actions would be in a child’s best interests; arguably in most cases, it would be difficult to see that the child’s best interests would be served by such actions. Another possibility is a child who is conceived as a saviour sibling: a child whose tissue or cord blood could be used

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49 Shanley, *supra* note 2, at 82.

50 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* 510 (2008).

51 Mohan Rao, *The Brave New World of Neo Eugenics*, 94-110 *Making Babies: Birth Markets and Assisted Reproductive Technologies in India* 82 (Sandhya Srinivasan ed., 2010).

52 Blyth, *supra* note 50, at 510.

53 *Id.*

to treat a pre-existing sibling who is sick with a life-threatening illness,<sup>54</sup> as previously noted in part one of this article.

These situations of potential selective creation of children through ICS are problematic given the tension between the child's existence in and of itself, and the purpose for which it was created. Again, the question of what is in the best interests of the child, and how the reason for their existence would impact them later in life, arises. Here the relevance of Blyth's question as to whether bringing children into the world can ever be regarded as contrary to their interests comes into sharp focus.<sup>55</sup> Essentially, what these practices amount to is "instrumentalisation of children conceived with "made-to-order" characteristics or to perform a particular role, rather than for their own intrinsic worth".<sup>56</sup> These methods also veer into the territory of the commodification of the child, in this sense, for a specific purpose. The wider issue of commodification of children through ICS will be considered separately in this article, together with the issue of the commodification of women through ICS.

## 2.6 The impact of the creation of international surrogate children on potential adopted children

The rights of existing children awaiting adoption worldwide may be adversely affected by ICS, and more specifically, by the creation of children through ICS. Ryznar characterises the impact of ICS on adoption candidates as an "opportunity cost",<sup>57</sup> because by choosing the alternative of ICS over adoption, commissioning parents are displacing resources that may otherwise go towards adoption (thereby having a potentially negative effect on children awaiting adoption).<sup>58</sup> The motivation of commissioning parents to choose ICS over international adoption may be easily explained; as already discussed part one of this article, ICS offers the chance of a child with a genetic link to one or both of its commissioning parents, which many desire. As Pande notes, "The high demand for gestational surrogacy is precisely because the genetic tie remains a powerful and enduring basis of human attachment."<sup>59</sup> Moreover, the stringent regime of comprehensive checks and assessments to be undertaken in international adoption (under the Hague Convention on Protection of Children and Co-operation in Intercountry Adoption) – whilst all focussed on the best interests and welfare of the child – along with the time involved, may be perceived by prospective adoptive parents as presenting too many

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54 *Id.*, at 509.

55 *Id.*, at 506.

56 *Id.*, at 510.

57 Ryznar, *supra* note 1, at 1028.

58 *Id.*, at 1037.

59 Amrita Pande, *It May Be Her Eggs But It's My Blood: Surrogates and Everyday Forms of Kinship in India*, 32 *Qualitative Sociology* 393 (2009).

hurdles, when ICS provides an alternative posing fewer barriers to having a child expeditiously. Although this may be a mistaken belief (as already noted, ICS brings with it a whole host of unique issues that are likely to be difficult to resolve), it does provide an alternative to adoption which is, at least superficially, in many aspects likely to be more attractive to many commissioning parents.

The current unregulated nature of the ICS market thus raises major questions as to who can access children via this new market. In stark contrast to intercountry adoption which is governed by a robust international regulatory framework (and indeed, one which has the protection of children at its heart), nothing of this kind exists to govern ICS, making children freely available to all people with the financial means to access the market. This makes children born from such arrangements potentially vulnerable to situations in which their welfare is not safeguarded, leaving them open to abuse and neglect in extreme cases, and as will be discussed shortly, to the risk of human trafficking.

### 3 WOMEN'S RIGHTS

As previously mentioned, to date, the majority of analysis of ICS remains centred on the position of the women who act as surrogates and their possible exploitation in the "brave new world of globalized motherhood".<sup>60</sup> This section provides an overview of some of the key human rights issues associated with women who act as surrogates in ICS, and highlights some of the key ways in which women's rights are potentially made vulnerable.

#### 3.1 The potential for exploitation of the socio-economic position of poor women and for ICS to contribute to perpetuated marginalisation

Recent work of sociologists, journalists and filmmakers has revealed a picture of the situation of some of the women acting as surrogates in the burgeoning ICS market, especially in developing states.<sup>61</sup> Whilst the US continues to main-

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60 Wendy Chavkin and Jane Maher (eds.), *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care*, 11 (2010). See generally for discussion of the potential for exploitation of women through ICS: Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 20-49 (2007); Pande, *supra* note 59; and Jyotsna Agnihotri Gupta and Anнемiek Richters, *Embodied Subjects and Fragmented Objects: Women's Bodies, Assisted Reproduction Technologies and the Right to Self Determination*, 5 *Bioethical Inquiry* 240-241 (2008).

61 See generally for the most in-depth, up-to-date work in this vein Pande's body of work: *Commercial Surrogacy in India: Manufacturing a Perfect 'Mother-Worker'*, 34:4 *Signs: Journal of Women in Culture and Society* 969-992 (2010); *Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India*, 16:2 *Indian Journal of Gender Studies* 141-173 (2009); *'It may*

tain a strong foothold in the ICS market, the rapid growth in ICS is located in the developing world, in states such as India and Thailand. The supply-end of the ICS market is growing there through specialised medical clinics meeting the demand of prospective commissioning parents predominantly coming from the developed world, seeking cheaper surrogacy options.<sup>62</sup> These clinics recruit surrogates who are in most cases socio-economically marginalised, and are usually required to have already had at least one child and be within a specified age bracket.<sup>63</sup> Lee accurately observes therefore “the potential for exploiting poor women’s reproductive functions as a form of cheap labour for economic profit is greatly heightened.”<sup>64</sup>

That economically poor women are acting as surrogates in the developing world to meet the demand of developed world customers raises the question of whether these women are being exploited; indeed the fact that poor women are targeted to act as surrogate mothers seems to indicate that because of their poor financial situation or “economic desperation”<sup>65</sup> they will not only be more likely to take up work as a surrogate, but also be more likely to provide the child once born, to receive the monetary payment for the labour undertaken (and endured). Similar questions as to exploitation have been levelled in relation to the market for surrogacy services in the US, with a disproportionate representation of racial minorities acting in this capacity, seemingly reflecting the allure of the financial gain.<sup>66</sup> McEwen comments that “the barriers to exploiting poor women and women of color as gestational surrogates are few.”<sup>67</sup> Moreover, in the ICS context, the fact that women are being offered sums of money incomparable to anything they would otherwise earn, makes acting as a surrogate highly attractive; whether this is exploitation is therefore questionable, given the power imbalance which has been established in the ICS market. As Goodwin says,

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*be her eggs but it’s my blood’: Surrogates and Everyday Forms of Kinship in India*, 32:4 *Qualitative Sociology* 379-405 (2009). A recent e-book has been published: *The Indian Surrogate: A Look Into India’s Surrogacy Industry*, 2010, available at <http://theindiansurrogate.com/> (last visited July 1, 2011). A recent film on ICS is Rebecca Haimowitz and Vaishali Sinha, *Made in India*, 2010, <http://www.madeinindiamovie.com> (last visited June 1, 2011); see for a review of *Made in India* Rachel Lyons, *Film Review: Made in India*, 2011, 599 *BioNews*, available at [http://www.bionews.org.uk/page\\_89652.asp](http://www.bionews.org.uk/page_89652.asp) (last visited June 20, 2011).

62 E.g. the Hope Maternity Clinic in Gujarat, India, where Pande carried out her field work. See Pande, *supra* note 59, at 973ff.

63 *Id.* at 973.

64 Ruby Lee, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 *Hastings Women’s Law Journal* 281 (2009).

65 Pande, *supra* note 59, at 976.

66 Shanley, *supra* note 2, at 121.

67 Angie Goodwin McEwen, *So You’re Having Another Woman’s Baby: Economics and Exploitation in Gestational Surrogacy*, 32 *Vanderbilt Journal of Transnational Law* 304 (1999).

‘these women rent biological space to Americans and others urging them to export their reproductive process to other parts of the globe. These women are paid sums they otherwise would never see and are offered safe, clean housing and food. Most of them know – and even count on – never seeing the babies they will birth ever again.’<sup>68</sup>

The question of whether ICS is taking advantage of impoverished women has received some judicial attention in India. The Gujarat High Court highlighted the possibility of exploitation in the *Balaz* case, stating that “Exploitation of women through surrogacy was also a worrying factor”.<sup>69</sup> When the case progressed to the Supreme Court of India, the Court is reported to have expressed concern for the situation of poverty-stricken women in India and emphasised the pressing need to create guidelines in order to protect surrogate mothers – in doing so it directed the Indian Surrogacy Law Centre to draw up such guidelines.<sup>70</sup>

Some advocates of ICS argue that it is a positive development for poor women, as it contributes to bringing them out of poverty.<sup>71</sup> While this may be the case in theory – or indeed even one of the aims of those who run surrogacy clinics in developing states – it remains the case that many of the surrogates will experience social stigmatisation in countries such as India in reaction to their work as a surrogate.<sup>72</sup> There, surrogates commonly move away from their home town and family for the year, often living in a surrogacy hostel or clinic, hiding in fear of the stigma attached to such activity,<sup>73</sup> at the worst level, they will be seen as dirty workers, akin to prostitutes, who are also viewed negatively in Indian society.<sup>74</sup> Moreover, it is questionable whether the surrogates actually receive all of the money they are promised

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68 Michele Bratcher Goodwin (ed.), *Baby Markets: Money and the New Politics of Creating Families*, at x (2010).

69 *Balaz v Anand Municipality*, High Court of Ahmedabad (11 November 2009) (India), at para. [10].

70 No official report of the Supreme Court judgment in the *Balaz* case is available, but see Bar&Bench News Network, *The Curious Case of Nikolas and Leonard Balaz*, available at <http://barandbench.com/brief/2/401/the-curious-case-of-nikolas-and-leonard-balaz> (last visited June 1, 2011). At the time of writing, no reference to the existence of such guidelines can be found, which indicates they have not come to fruition.

71 E.g. Dr Nayna Patel, who has been dubbed India’s Mother of Surrogacy, see *India’s Mother to Surrogacy*, in *The Indian Surrogate: A Look Into India’s Surrogacy Industry*, *supra* note 61; in a television interview Dr Patel stated “How can you say that couple is exploiting the female when that female willingly wants to do it? You can call it exploitation when somebody is forcing, you cannot force surrogacy like any other organ transplant because it’s a whole procedure of one year – almost nine months.” 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). .

72 Pande, *supra* note 59, at 975.

73 *Id.* at 981.

74 Pande, *Not an “Angel”, Not a “Whore”: Surrogates as “Dirty” Workers in India*, 16:2 *Indian Journal of Gender Studies* 156-160 (2009); and Pande, *supra* note 59, at 979.

or contracted to receive. In some cases, this money is said to end up going to surrogates' husbands, the surrogates themselves gaining very little benefit from their labour.<sup>75</sup>

### 3.2 The potential for the exploitation of women's bodies and reproductive rights and autonomy

A further concern regarding women's rights is that ICS exploits women's bodies and their reproductive rights and autonomy. Chavkin talks of the "disaggregation of motherhood",<sup>76</sup> whilst Goodwin describes ICS as "women leasing their wombs"<sup>77</sup> – therefore acting merely as incubators. It is necessary to ask whether women are doing this of their own volition, with an awareness of their own bodily integrity, or if they are under external pressure to become surrogates in ICS arrangements. The allure of the money offered to surrogates has been touched on above. However in India, another factor might influence surrogates' decisions to be party to an ICS arrangement. In some cases it has been said that surrogates are effectively pushed into this work through a combination of guilt (for example to make up for not being able to marry off one's daughter) and a belief that it is the right thing to do, as it is characterised as an altruistic action for the benefit of other human beings who are less fortunate.<sup>78</sup> In such cases the surrogate is therefore left in a relatively weak position with little bargaining power; Drabiak comments that

'payment for commercial surrogacy is defined as a deeply emotional transaction. [...] However, unlike most other forms of employment, commercial surrogacy demands a consistent physical labor commitment, 24 hours a day for nine months, and – most importantly – results in the production of a human being.'<sup>79</sup>

Therefore reproductive autonomy may be precarious in ICS situations, and the surrogate's right to health, including sexual and reproductive health as a core component,<sup>80</sup> may be jeopardised. From a mental health perspective, undertaking the role of a surrogate may have immense psychological impact, especially given that the surrogate is expected to give up the child after birth.

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75 Pande, *Not an "Angel", Not a "Whore": Surrogates as "Dirty" Workers in India*, 16:2 Indian Journal of Gender Studies 157 (2009).

76 Chavkin, *supra* note 60, at 9.

77 Bratcher Goodwin, *supra* note 68, at x.

78 Pande, *supra* note 59, at 975-976.

79 K. Drabiak, C. Wegner, V. Fredland and P.R. Helft, *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, Journal of Law, 35:2 Medicine and Ethics 304 (Summer 2007).

80 Aart Hendriks, *The Close Connection Between Classical Rights and the Right to Health, With Special Reference to the Right to Sexual and Reproductive Health*, 18 Medicine and the Law 237 (1999).

As depicted in the opening scene of the trailer for *Google Baby*, this will not always be easy. There, a surrogate is seen giving birth. She is shown the baby, who is immediately removed to the commissioning parents. At this, the surrogate cries, and Dr Nayna Patel is heard asking “why are you crying?”<sup>81</sup> What this appears to illustrate is that Gupta and Richters’ assertion that some surrogates “feel as though their body belongs to someone else”<sup>82</sup> may bear out in practice. Moreover, under arrangements governed by contracts, “the natural mother is irrevocably committed before she knows the strength of her bond with her child.”<sup>83</sup>

Regarding physical aspects of the right to health and reproductive autonomy, ICS surrogates may not be made aware of the health risks they face by becoming a surrogate. As Gupta and Richters state, marginalisation may be perpetuated, and reproductive autonomy subordinated:

‘Although offered as a choice, the decision to [...] rent a uterus is seldom made on the basis of full information regarding health hazards, or in absolute freedom. It can be a considered decision, but the decision is generally made in a context of limited possibilities for self-expression or development, rising unemployment, lack of financial resources and in circumstances not always self-created.’<sup>84</sup>

Smith-Cavros also poses the question well:

‘In countries where hunger and safe living conditions are dire problems for many, such as India, do women turn to surrogacy [...] by choice and through the proper channels of informed consent, or out of desperation and lack of information and choices?’<sup>85</sup>

Therefore given the situations in which many ICS surrogates find themselves taking up their role, their right to health and reproductive autonomy may be jeopardised. The higher likelihood of multiple gestation births through ART often used in surrogacy, and the risks that go along with multiple births, may not be made clear to prospective surrogates in the developing world.<sup>86</sup> Therefore surrogates may be “facing increased chances of pregnancy associated health problems for themselves and their foetuses”,<sup>87</sup> without knowledge of this situation.

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81 HBO, *Google Baby Trailer*, available at <http://www.zippibrandfrank.com/> (last visited June 1, 2011).

82 Gupta et al., *supra* note 60, at 247.

83 Martha M. Ertman and Joan C. Williams (eds.), *Rethinking Commodification*, 64 (2005).

84 Gupta et al, *supra* note 60, at 247.

85 Eileen Smith-Cavros, *Fertility and Inequality Across Borders: Assisted Reproductive Technology and Globalization*, 4:7 *Sociology Compass* 470 (2010).

86 Chavkin, *supra* note 60, at 11.

87 *Id.*

#### 4 HUMAN RIGHTS ISSUES COMMON TO BOTH WOMEN AND CHILDREN IN INTERNATIONAL SURROGACY ARRANGEMENTS

The previous sections focussed on human rights issues raised by ICS pertaining to women and children as distinct groups. Additionally, there are some important human rights issues and challenges which cut across both groups. This highlights the fact that the rights of women who act as surrogates in ICS, and the rights of the children they give birth to, are to a certain extent intertwined; cognisance of this fact will assist in understanding the challenge of rights protection for both groups. This section discusses two of the most significant common issues.

##### 4.1 Commodification of women and children

ICS arguably commodifies both women and children. Radin provides a helpful definition of commodification as “the social process by which something comes to be apprehended as a commodity, as well as to the state of affairs once the process has taken place.”<sup>88</sup> Corea says when women act as surrogates their bodies form part of a “reproductive supermarket”,<sup>89</sup> thereby reduced to commodities filling a demand in the market. However, surely whether or not women who act as surrogates should be understood as commodified depends to some degree on whether they undertake their work as a surrogate of their own volition, or if they are unduly pressured into acting as a surrogate. As discussed previously, in some cases of ICS, it seems apparent that surrogates are not undertaking their role fully of their own choice, but under external pressure or against their will. Despite this distinction, the fact remains that regardless of whether or not ICS surrogates act out of their own choice as surrogates, they do function as a commodity within a global market, integral to the entire transaction. This is because without the surrogate mother, it would not be possible for commissioning parents to have the child they commission.

The children born from such arrangements may also be viewed as commodities to be bought in the marketplace of ICS. Mahabal asks “Are babies commodities to be planted and harvested?”<sup>90</sup> whilst Michael Freeman notes the effect of surrogacy has been to commodify children, as the child “can be seen as the product of an expensive business transaction. Technically, the commissioning parents may be buying gestational services but they feel they are

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88 Margaret Jane Radin, *Contested Commodities*, in Martha M. Ertman and Joan C. Williams (eds.), *Rethinking Commodification*, 64 (2005), at 81.

89 Gena Corea, *Surrogate Motherhood as a Public Policy Issue*, in *Reconstructing Babylon: Essays on Women and Technology*, 131 (P. Hynes (ed.), 1991).

90 Reported in Mark Magnier, *Room for Abuse in India Surrogacy*, April 30, 2011, The Seattle Times, available at [http://seattletimes.nwsources.com/html/health/2014914731\\_indiasurrogate01.html](http://seattletimes.nwsources.com/html/health/2014914731_indiasurrogate01.html) (last visited June 1, 2011).



buying a baby.”<sup>91</sup> Freeman rightly observes this wholly undermines any view of children as rights-bearing persons.<sup>92</sup> This may also have the spin-off effect of additionally undermining women’s rights by rendering their role in ICS less visible.

#### 4.2 The risk of human trafficking

Related to the concern that ICS commodifies women and children, is the heightened vulnerability of these groups to human trafficking caused by ICS; Corea describes surrogacy as “international traffic in women”.<sup>93</sup> The fear is that women, especially in the developing world, may be trafficked for use as surrogates, whose babies will be harvested and sold. Recently this was shown not to be beyond imagination when a human trafficking and baby ring was found holding 14 Vietnamese women captive, seven of whom were pregnant, some said to have been raped.<sup>94</sup> Indeed, this case starkly shows the possibility of both women and children to be trafficked to exploit the demand for ICS.

The possibility of alleged commissioning parents commissioning children who are then trafficked also exists as a possible danger in the current unregulated ICS market. Non-governmental organisations in India raised this concern in the case of *Baby Manji Yamada vs. Union of India & ANR*.<sup>95</sup> More recently, a French family was found smuggling surrogate baby twins, born to a surrogate mother in Ukraine, into France. The babies were said to have been smuggled so the commissioning parents could register them as French citizens. The smuggling was, in the eyes of the commissioning parents, a means to ensure their surrogate children French citizenship given that surrogacy is illegal

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91 M. Freeman, *supra* note 34, at 286.

92 *Id.* at 282. See for further discussion Hugh V. McLachlan and J. Kim Swales, *Show Me the Money: Making Markets in Forbidden Exchange: Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defence of Legally Enforceable Contracts*, 72 *Law and Contemporary Problems* 91 (2008).

93 Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs*, 245 (1985).

94 See for reports of the Baby 101 human trafficking ring: ABC News, *Women Freed from ‘inhuman’ Baby Ring*, February 25, 2011, available at <http://www.abc.net.au/news/stories/2011/02/25/3148396.htm> (last visited June 1, 2011); and K. Macnamara, *Future Uncertain for Unborn Children in Thailand Baby Scam*, February 27, 2011, *Jakarta Globe*, available at <http://www.thejakartaglobe.com/international/future-uncertain-for-unborn-children-in-thailand-baby-scam/425497> (last visited June 1, 2011).

95 Points, *supra* note 17, at 6.

in France.<sup>96</sup> These cases highlight the vulnerability of both children and women to be trafficked within the context of ICS, their human rights thus endangered due to the development of this global market.

This article has provided comprehensive coverage of the human rights challenges that ICS poses to the women who act as surrogates and the children who are born from such arrangements. Such a comprehensive identification and analysis of the human rights challenges arising out of ICS, collected together in one place, has not been undertaken to date. Arguably this forms a crucial foundation upon which recognition should now start to be given to ICS as a 21<sup>st</sup> century human rights challenge, requiring attention from the international community. In light of the human rights challenges and issues in this article, it can be said that for many of these issues, public international law tools and instruments – in particular human rights standards and norms – already exist, through which such challenges can and should be addressed. In order to protect the rights of those made vulnerable through ICS, the various parties involved in ICS arrangements, along with States Parties to relevant public international law treaties and other instruments, need to ensure that they act in ways which uphold and safeguard the rights of women and children in ICS, rather than jeopardise them. Indeed, this will often require the various competing rights and interests at play to be balanced against one another, in order to establish where rights protection is most needed in order to safeguard the groups made vulnerable in ICS. The crucial issue of rights balancing in ICS remains a rich and important area of research to which the author will focus on in the future.

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96 Associated Press, *Family Held After Trying to Smuggle Babies Out of Ukraine*, March 24, 2011, The Guardian, available at <http://www.guardian.co.uk/world/2011/mar/24/family-smuggle-surrogate-babies-ukraine> (last visited July 1, 2011). In France, the decision of the Cour de Cassation in the case of the Mennessons (Arrêt n° 370 du 6 Avril 2011 (10-19.053), Cour de Cassation – Première Chambre Civile (France) demonstrates that it is not possible for ICS children to gain French citizenship.