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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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Citation

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

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Issue Date: 2018-06-26

Multiple 'Mothers', Many Requirements for Protection

Children's Rights and the Status of Mothers in the Context of International Commercial Surrogacy

Abstract

ICS always involves multiple potential parents, and this is a complicating factor for the child's enjoyment and exercise of their rights. This Chapter demonstrates this by focusing on one of the key relationships in ICS, between the child and their multiple 'mothers'. It contends that the notion of 'mother' is contested within the ICS context and cannot be understood straightforwardly because ICS involves more than one woman who may be genetically, legally, or socially understood as 'mother'. Examining this complex and tangled web of maternal relationships, this discussion traverses the various constructs of 'mother' in ICS and focusses on the central feature common to these mothers: to have, or to care for, a child. This Chapter discusses the child's rights in relation to those of his or her 'mothers', and the complexity of ICS mother-child relationships. The potential interests of each of the 'mothers' in ICS *vis-à-vis* the child are examined, and attention is given to how such rights and interests might be balanced with the rights of the child.

Main Findings

- Mother-child relationships are a central nexus in ICS arrangements.
- Mother-child relationships are complex in ICS because there are multiple women in any one ICS arrangement who may be understood to be the child's mother, linked to the genetic, biological and social aspects of 'mother'.
- As such, ICS challenges traditional notions of motherhood and this has implications for the rights of children born through ICS and the mother-child legal relationship.

Contextual notes

- This Chapter was written at a time when multidisciplinary scholars were beginning to come together to discuss the challenges raised by ICS. The main findings of this Chapter were initially presented to an international multidisciplinary workshop, *Deconstructing and Reconstructing "Mother": Regulating Motherhood in International and Comparative Perspective*, at Colum-

- bia University in 2012 and provided the sole contribution from a child rights, international human rights law perspective.
- Jurisprudence which has emerged since the time this Chapter was written – and which is discussed later in this doctoral thesis – highlights that the surrogate mother-child relationship is still a contested site within ICS arrangements, continuing to present challenges from a rights balancing perspective amongst the core parties to ICS.

This Chapter was originally published in Yasmine Ergas, Jane Jenson and Sonya Michel (eds.), *Reassembling Motherhood: Procreation and Care in a Globalised World*, Columbia University Press, 2017.

1 INTRODUCTION

International commercial surrogacy (ICS) is inherently complex; a method of having a child largely made possible through a combination of technological advances, market-forces, and changing attitudes towards family structure and human reproduction. ICS raises a raft of profound, intersecting issues relating, among others, to bioethics, commodification of human life, globalisation and migration. ICS largely operates in an unregulated manner across international borders. People from disparate corners of the world are drawn together in a relationship that has its roots in the supply and demand of commercial human reproduction.¹ In this respect, ICS is different from other international commercial transactions given that a child is the intended outcome. Work is currently under way at the international level to assess whether an international regulatory framework for international surrogacy is viable.² Yet global consensus remains elusive given the range of State views and approaches to

1 It should be noted that not all international surrogacy is international commercial surrogacy. Some international surrogacy arrangements are altruistic in nature, characterised by the notion of a 'gift relationship' (see Liezl van Zyl and Ruth Walker, "Beyond Altruistic and Commercial Contract Motherhood: The Professional Model," *Bioethics* 27, no. 7 (2013): 374.) However, this chapter takes international commercial surrogacy as its focus and therefore, altruistic arrangements fall out of scope.

2 Permanent Bureau of the Hague Conference, Project on The Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements: http://www.hcch.net/index_en.php?act=text.display&tid=178 (last accessed 01 February 2014). This Project was preceded by work led by Professor Paul Beaumont and Dr Katarina Trimmings, School of Law, University of Aberdeen: <http://www.abdn.ac.uk/law/research/international-surrogacy-arrangements-151.php> (last accessed 01 February 2014). An output of the work of the University of Aberdeen was the following text: Katarina Trimmings and Paul Beaumont (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, (Oxford: Hart Publishing, 2013). See for work by the author included as part of this collection, Achmad, C., 'New Zealand', at 295-310.

ICS, the lack of legislative and policy alignment, and in some instances, polarity of these positions.³

ICS functions with the express aim of producing a child. Such children are often much-wanted and longed-for by the people seeking them.⁴ However, sometimes only minimal thought is given to how the eventual child's rights will be upheld and protected in an ICS arrangement. This is despite a core principle of the United Nations Convention on the Rights of the Child (CRC) that: "In all actions concerning children...the best interests of the child shall be a primary consideration."⁵ This chapter proceeds from an international human rights law perspective: The centrality of the child to ICS, and the child's inherent vulnerability given his or her lack of personal autonomy and agency requires that his or her best interests be held paramount. But they must also be balanced with the rights of other persons involved. Therefore, to properly interpret the rights of the child in the ICS context, those of the multiple mothers involved require consideration.

Consequently, while this chapter takes the centrality of the child in ICS arrangements as its point of departure, it focuses on the complex and tangled web of 'mother' relationships that ICS entails,⁶ examining the various interpretations of 'mother' that ICS arrangements may foster and their attendant implications for the rights of the child. This chapter highlights the enduring need to adhere to human rights law in ICS situations. Doing so allows for a balancing of the human rights and interests of mothers and children, to achieve rights protection where the mother-child nexus is rendered fragile and uncertain by the ICS context.

3 E.g. some jurisdictions criminalise commercial surrogacy with extraterritorial effect (New South Wales, Australia is one example, see sections 8 and 11 of the New South Wales Surrogacy Act 2010), while others (such as India, Ukraine, Thailand) allow it to operate in a largely unregulated manner. For a discussion of the conflicts that discordant legal frameworks may produce, see Yasmine Ergas, "Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy." 27 *Emory International Law Review* (2013), 117-188.

4 Arguably, this will be the case in the majority of ICS cases. However, the possibility of persons commissioning children through ICS for purposes of child abuse, exploitation and/or trafficking cannot be ruled out. This has implications for the rights of the child given that they may be born into a situation whereby their rights under Articles 19, 34, 35, 36 and 37 of the United Nations Convention on the Rights of the Child (Nov. 20, 1989, 1577 U.N.T.S. 3) are breached. The preamble to the Convention recognises the inherent dignity of the child.

5 Article 3(1), Convention on the Rights of the Child.

6 N.B. this chapter focusses on mothers in ICS, not fathers. However, complications can certainly arise in relation to the roles of 'fathers' in ICS and it is possible to envisage ICS situations with multiple potential 'fathers'. E.g., such a situation may arise in ICS arrangements where two commissioning fathers are involved, or where a commissioning father does not provide his sperm for use in the arrangement and a sperm donor is involved, meaning there is a third-party genetic 'father'. This chapter does not delve into the question of whether men can be said to 'mother' in ICS arrangements. However, from an anthropological perspective this may well be a question ripe for consideration.

2 UNDERSTANDING INTERNATIONAL COMMERCIAL SURROGACY AS A DISTINGUISHABLE PHENOMENON

This chapter uses the term ‘International Commercial Surrogacy’ (ICS) in reference to surrogacy arrangements ‘commissioned’ by people⁷ paying money to have a child through surrogacy in a State other than their own.⁸ ICS is characterised by its cross-border and commercial nature.⁹ While the practice of surrogacy grew from the mid-1970s and through the 1980s (predominantly in the United States),¹⁰ ICS has emerged forcefully over the past decade. International surrogacy markets have developed and continue to grow, particularly in global South states such as Thailand and India,¹¹ with demand flowing predominantly from the global North.¹² The supply of ICS from global South states is dynamic in nature, gradually changing and adapting to demand and also in reaction to changing social attitudes and political pressures; notably, in early 2015 the Thai parliament passed a legislative ban on all commercial surrogacy services for non-Thai nationals (unless a person has been married to a Thai national for at least three years), with criminal penalties for commissioning parents and surrogate mothers who contravene the law.¹³ But the supply of ICS services is not limited to the global South. To the contrary, global North states, such as, within the U.S., the state of California, attract a signi-

7 ‘Commissioning parents’ may also be referred to as intending parents.

8 Commissioning parents who engage in international commercial surrogacy are motivated by various reasons. E.g. amongst other things, the inability to conceive a child themselves; desire to have a child with a genetic link to themselves; rejection of domestic or intercountry adoption or the failure to successfully adopt a child, for various reasons; inability to access surrogacy domestically; relative affordability of international surrogacy in certain States such as India and Thailand in comparison to States such as within the United States of America where commercial surrogacy is legal.

9 As distinct from compassionate or altruistic surrogacy, ICS involves a commercial element of some kind.

10 Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues – Expanded Edition*, (Cambridge: Harvard University Press, 1990), 5: 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).

11 For discussion of the concept of a market for international surrogacy, see Debora L. Spar, *The Baby Business: How Money, Science and Politics Drive the Commerce of Conception*, (Boston: Harvard Business School Press, 2006), Chapter 3 “Renting Wombs for Money and Love: The Emerging Market for Surrogacy,” 69-96.

12 However, commissioning parents from the global North do seek international surrogacy arrangements in countries such as Ukraine and the United States. E.g. see the cases *Re Application by BWS* [2011] NZLFR 621: commissioning parents residing in New Zealand commissioned twins in California; and *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam): commissioning parents in the UK commissioned a child in Ukraine.

13 BBC News, Thailand bans commercial surrogacy for foreigners, 20 February 2015, <http://www.bbc.com/news/world-asia-31546717> (last accessed 20 May 2015).

ficant part of the market.¹⁴ Northern states (such as California) can offer both legal certainty regarding legal parentage through the possibility of pre-birth orders, while global South states compete in part by providing ICS at lower cost and sometimes offering associated medical procedures – such as multiple embryo transfer to increase the likelihood of pregnancy, selective fetal reduction, mandatory caesarean deliveries – which are unavailable in global North states.¹⁵

Following the birth of a child through an ICS arrangement, the woman acting as the surrogate is expected to relinquish the child to the commissioning parents: the arrangement itself is premised on the fact that it is the commissioning parents (or commissioning mother(s) or father(s)) who intend to raise the child. Depending on the particular arrangement, the commissioning parents may or may not maintain contact with the surrogate. Moreover, she may act anonymously throughout all stages of the ICS arrangement.

In terms of the biological make-up of a child born through ICS, there are many possibilities. Within these possibilities, variants can exist, dependent on whether donors or surrogates act anonymously. The child may or may not be genetically related to one or both of the arrangements in which the surrogate has provided the ovum – thus establishing a genetic link between herself and the child – are termed “traditional surrogacy”¹⁶ or “complete surrogacy.”¹⁷ But in “gestational surrogacy” – which has increasingly become the norm – embryos formed either by the commissioning parents’ gametes or obtained from third parties are implanted in the surrogate, sometimes after being shipped across borders for use.

14 Whilst comprehensive data on the incidence of international commercial surrogacy in the U.S. is not available, survey data of all fertility treatment provided in the U.S. (approximately 6000 cycles) is delivered to persons domiciled in countries other than the U.S., amounting to 4 per cent. See: Ethics Committee of the American Society for Reproductive Medicine, “Cross-border reproductive care: a committee opinion.” *Fertility and Sterility* 100:3 (September 2013) 645-650 at 645. For an overview of commercial surrogacy laws in the various U.S. states, see Creative Family Connections 2015, *Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, <http://www.creativefamilyconnections.com/#!/surrogacy-law-by-state/f49jq> (last accessed 15 September 2015).

15 E.g. in some instances in ICS arrangements in global South states, procedures such as multiple embryo transfer and foetal reduction are offered.

16 Margaret Ryznar defines “traditional surrogacy” as a surrogacy 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,” *John Marshall Law Review* 43, no. 10 (2010): 1010. 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.

17 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*, (Boston: Beacon Press, 2001), 103.

Payments for ICS arrangements may flow in multiple directions. For example, fees may be paid to surrogacy clinics carrying out the associated medical procedures. Surrogacy brokers or third parties are often involved in arranging the surrogacy, usually commanding fees for doing so.¹⁸ The surrogate herself may be paid for her services – either directly or through the clinic or other third party.¹⁹ Contractual documents sometimes govern ICS arrangements, but not always.²⁰ The exact nature of each ICS arrangement differs in all these aspects, often making it difficult to map all the people, places and transactions involved.

3 THE CENTRAL FEATURE OF ‘MOTHER’: CHILD

International human rights law is largely about protection. It is relevant to ICS situations, given the inherent vulnerabilities of those involved in ICS arrangements, not least children. Crucially, international human rights law provides standards and norms setting out the rights and corresponding minimum protection measures to which all human beings and particular groups are entitled. To properly understand the rights of particular vulnerable groups, it is important to understand them holistically, in relation to the rights of those around them and in the context in which their rights may be at risk of being breached. This applies to understanding the situation and rights of the child in ICS arrangements. In particular, understanding the ‘mother’-child relationship is crucial, given it is a central nexus within all ICS arrangements.

But in ICS the rights (and obligations) of ‘motherhood’ may apply to several women.²¹ The defining and universal feature of ‘mother’ is ‘child’. It is always the existence of a child who is cared for or in some way related to a woman that leads to her being understood as a ‘mother’ – both legally and socially. The Oxford English Dictionary defines ‘mother’ as “a woman in relation to

18 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, 2011), 19.

19 Surrogates are open to the risk of exploitation here, and women who act as surrogates may already be vulnerable given their pre-existing position of economic marginalisation. Payment of surrogates may be arbitrary and not always guaranteed. For discussion of the risk to surrogate mothers in India in relation to payment, see Centre for Social Research, *Surrogate Motherhood – Ethical or Commercial* (2013) 47-48. See also Amrite Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*, (New York: Columbia University Press, 2014) 56; 71.

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

21 It is worth noting, however, that ‘mother’ is a term which is arguably applicable to men. For example see Darren Rosenblum, “Unsex Mothering: Toward a New Culture of Parenting.” *Harvard Journal of Law and Gender* vol 35 (2012): 57.

a child or children to whom she has given birth".²² Traditional understandings of whom and what constitutes a 'mother' at law align with this definition, with many domestic jurisdictions propounding the position that the person who can be understood to be a legal mother is the woman who gives birth to a child, in accordance with the maxim 'mater semper certa est' or 'the mother is always certain'.²³ Adoption and parentage laws have broadened the notion of a legal mother or parent in some specific circumstances.

ICS challenges these traditional notions of motherhood in new ways, beyond those entailed by adoption and assisted reproductive technology. In an ICS arrangement, as many as three different women can be identified as 'mother' in relation to any particular child.²⁴ These are: the woman who acts as a surrogate; the woman who provides her ovum; and the woman who (either alone or with a partner) 'commissions' the child. Who is considered the (or 'a') mother, impacts not only that particular woman's rights but also those of the other women implicated in any specific ICS arrangement; due to the commercial and cross-border elements present in ICS, these situations stretch the limits of the meaning of 'mother' and who can be understood as being a 'mother' into new terrain. The potential implications of three different women being variously understood as 'mother' in an ICS arrangement can furthermore have implications for and impacts on the rights of any child who is born.

4 MULTIPLE MOTHERS: THE MANY FACES OF 'MOTHER' IN INTERNATIONAL COMMERCIAL SURROGACY

4.1 Surrogate

As the woman who gives birth in ICS, the surrogate performs the role closest to the traditional notion of 'mother'. In many ICS 'demand' jurisdictions (that is, States in which commissioning mothers or parents originate from or reside

22 See Oxford Dictionary online, (Oxford: Oxford University Press, 2014), <http://oxforddictionaries.com/definition/mother> (last accessed 01 February 2014).

23 One such example is New Zealand's Status of Children Act 1969. Section 5 puts forward the presumption that it is the woman to whom a child is born who is the mother of the child. Section 17 governs motherhood in assisted reproduction situations, and posits that the woman who becomes pregnant is the mother even though the ovum is donated by another woman. Another example is found in the UK: section 33 of the Human Fertilisation and Embryology Act 2008 specifies that the mother of a child born through surrogacy is always the surrogate.

24 In fact, in situations where there are two commissioning 'mothers' (as will be the case where a same-sex couple commission a child through ICS), this may be expanded to four potential 'mothers' in relation to one child. For simplicity, in what is already a complex discussion, this situation is not considered in this chapter, which is confined to consideration of the possibility of three 'mothers' in ICS situations. In situations where there are no commissioning mothers (i.e. there are commissioning fathers), there will only be two potential mothers, and where the surrogate is also the genetic mother, only one mother will potentially exist.

in), under domestic legislation a woman who gives birth as a surrogate is held to be the legal mother of the child. This hinges on the very act of biologically carrying the child to term through supporting and nourishing the child's development with her own biological matter and giving birth to the child. However, in ICS situations, the surrogate's role in relation to the child is intended from the outset of an ICS arrangement to be time-limited to the gestation period and the birth. After the child's birth, she is expected to relinquish the child and any 'mother' role that she may have felt or held before the child's birth, given that it has ostensibly been agreed that the commissioning 'mother' will care for and raise the child as its 'mother' in an on-going, social sense. As numerous legal cases and anthropological studies have shown, however, in practice the surrogate may feel an enduring connection to the child at the emotional level, given her role carrying the child to term and giving birth to the child, acts which are immutable. This can give rise to many reactions – from private grief to legal challenges to the obligation to relinquish the child. While the surrogate may enter into an ICS arrangement with the intention of providing the child to the commissioning 'mother' following the child's birth, her intentions may change throughout the course of the ICS arrangement or once the child is born, and she may decide she wants to keep the child.

Where the law views the surrogate as the child's legal mother, this creates an obstacle in ICS in terms of the legal parent-child relationship. In such cases, the position of the surrogate as a legal 'mother' persists until the relationship between her and the child is severed at law, for example through the establishment of a legal parent-child relationship between the commissioning mother (or parents) and the child through adoption. This severance of the parent-child legal relationship is not always possible and is in no way guaranteed. Moreover, in many jurisdictions where a child is born through ICS, the surrogate is listed as 'mother' on the child's birth certificate. India constitutes an exception to this rule: current guidelines stipulate that birth certificates in the case of ICS children will be issued in the names of the genetic or commissioning parents, such that the surrogate does not have formal 'mother' status under Indian law. Thus in many ICS situations, the surrogate is physically, socially (in some respects, at the very early part of the child's life, from conception to birth) and legally viewed as the eventual child's mother. Yet she performs her 'mother' role having agreed to be left childless following birth and in the knowledge that the commissioning mother (or parents) is expecting to be provided with the child once he or she is born. As noted above, however, the intentions of a surrogate may change over the course of a pregnancy or once a child is born in an ICS arrangement (potentially leading to a dispute over the child with the commissioning 'mother'), the possibility of which can never be completely eliminated from such arrangements. Even in ICS arrangements governed by contracts in jurisdictions where such contracts are enforceable, situations may arise where the surrogate mother acts in a manner contravening

the agreement and it may be extremely difficult to enforce performance of the contract.

Surrogates have variously been described as 'outsourced' wombs, 'cheap or rentable womb[s]', 'human incubator[s]', 'gestational carrier[s]' and 'biological mother[s]'. Arguably, this wide range of terminology – which appears to studiously avoid references to a 'mother' role – highlights that the surrogate is open to marginalisation and exploitation in ICS arrangements, regardless of the reality that without her participation, the commissioning 'mother' would have difficulty in realising her wish to have a child. Pande observes the dual imperative under which surrogates in India are expected to carry out their role, counselled in fertility clinics and surrogacy hostels to simultaneously see themselves as 'workers' and not 'mothers' ('worker-producer'), and as 'mothers' and not 'workers' ('mother-reproducer'). Pande describes this training as "manufacturing the perfect motherworker". She notes that the surrogate "is expected to be a disciplined contract worker who gives up the baby at the termination of the contract, [and] is simultaneously urged to be a nurturing mother for the baby, and a selfless mother who will not negotiate the payment received." Furthermore, an integral aspect of the conflict inherent in the surrogate's 'mother' role in ICS arrangements is neatly summarised in Pande's statement that "When one's identity as a mother is regulated and terminated by a contract, being a good mother often conflicts with being a good worker".

4.2 Genetic

A woman contributing her genetic material in ICS arrangements is in a similar position to the surrogate, given that to a certain extent, her role is time-limited. Through the discrete act of providing ovum, her role in the ICS arrangement is complete. However, her role differs from that of the surrogate as through this act of donation, she establishes an enduring genetic connection with the child. Although gestation – the act which is unique to the surrogate mother in ICS – entails a series of biological processes which have an enduring impact on the child, it is the genetic mother alone who has a genetic connection to the child who is born. But does this mean that the woman who provides genetic material in ICS should be understood as a 'mother' in relation to any eventual child who is born? Clearly, there is a strong argument to be made that she can properly be distinguished as the 'genetic mother', separate from the surrogate or the commissioning mother. A genetic relationship with a child cannot be severed at law or otherwise altered. Indeed, unlike the relationship between the child and the commissioning and surrogate 'mothers', the genetic 'mother's' relationship with the child is able to be scientifically proven through DNA testing. Yet such a genetic mother may not be recognised under law as being a 'legal mother' in ICS or other surrogacy situations, given that this role

is generally reserved for the birth mother and in some exceptions, the commissioning mother.

In ICS, the involvement of the genetic 'mother' with the child may go no further, remaining purely based in genetics. Drawing an analogy from the experience of domestic surrogacy involving genetic surrogate mothers, the willingness of the commissioning parents to have the genetic 'mother' involved in the child's life is the likeliest factor immediately determining the extent of any social relationship with the child. In arrangements where the genetic 'mother' acts anonymously, this most likely will remain impossible.

In some instances of ICS, the genetic 'mother' may be blended with the surrogate 'mother' or the commissioning 'mother'. In practice this means that the surrogate can also be the genetic 'mother', therefore bringing a child who is genetically hers (through donation of her ovum) to term. In some ICS arrangements, the genetic 'mother' will be the commissioning 'mother', if she is able to contribute ovum. For example, this can occur in situations where the commissioning 'mother' cannot carry a child to term due to a hostile uterine environment but is fertile and can provide gametes, or where a commissioning 'mother' does not wish to or is unable to carry a child to term for other reasons but can provide gametes.

Lastly in relation to the genetic mother, it is important to note that often she will be referred to as the 'egg donor'. The effect of this is to remove any reference to this woman as being a mother in relation to the child, reducing her role to a purely transactional one, giving no recognition to the enduring nature of her connection to a child born through IC as a result of the provision of her genetic material.

4.3 Commissioning

Although it is the genetic and surrogate 'mothers' who physically enable a child to be born through ICS, most ICS arrangements begin with the desire of the commissioning 'mother' (or the commissioning parents or the commissioning father) to have a child. Nevertheless, it is this woman whose role as 'mother' is the most challenging construction within ICS. The commissioning 'mother' is the person (or one of the persons) who drives the whole ICS arrangement – it is her desire to have a child that brings into play the involvement of the two other potential ICS 'mothers', by virtue of the fact that she is unable to conceive or carry a child herself or chooses not to.

However, in many ICS arrangements she is not the 'mother' with a genetic connection to the child, and in all ICS arrangements she is not the woman who gives birth. Therefore, in ICS the woman who seeks to 'mother' the child in a social and on-going sense is the 'mother' with the most problematic link to the child and to the legal parental status of 'mother'. This is particularly so given traditional legal paradigms and emphasis placed on the biological

nexus between mother and child through the act of gestation and birth. The 'mother' role that the commissioning mother seeks to fulfil is wholly socially constructed, rather than established through a genetic or biological link (as is true in the case of the child's genetic 'mother' and surrogate 'mother' respectively). As previously noted, often the law does not recognise her as a mother at all. In jurisdictions where this is the case, to become the child's legal mother, the commissioning 'mother' has no other option than to apply to adopt the child or seek legal parentage of the child. This woman's status as 'mother' in ICS situations is, at its crudest, borne of a transaction. However, to reduce her 'mother' role to such a restricted reading ignores the most basic fact, that it is often due to her deep desire to have a child to care for and to mother, that the child has come into being. Her role as 'mother' to the child, if she goes on to care for the child, is that of a mother in the social sense. The question is when – and how – across the many jurisdictions that may come into play in ICS, this desire can be coupled with her legal recognition as a 'mother.' In ICS cases where the commissioning 'mother' is also the genetic 'mother', it is arguable that her status as 'mother' is bolstered, given her enduring link to the child in terms of DNA. However, in practice the features most importantly distinguishing the commissioning 'mother' from the other two potential 'mothers' is that without her there would be no child. Whilst all the 'mothers' involved in ICS are indispensable to the success of any individual arrangement in producing a child, it is the commissioning 'mother' who initiates the process and from the outset of the ICS arrangement, she is the only 'mother' intending to care for and raise the child as her own.

Despite the surrogate mother's contractual obligation to transfer the child to the commissioning 'mother' upon or shortly after birth, the commissioning 'mother' remains highly vulnerable: contracts governing ICS arrangements are often difficult to enforce and as previously noted, the intentions and decisions of the surrogate may change over the course of her pregnancy or following the birth of the child. Requiring specific performance of such contracts would be contrary to the child's rights as established under international human rights law, given that specific performance would explicitly render children the product of such contracts and in doing so, commodify them. Requiring specific performance of such contracts would also be contrary to the rights of the surrogate 'mother', given that she may well have a valid claim to a legal mother-child relationship regarding the child she has brought to term and given birth to. To require specific performance of such contracts would therefore ignore the reality of the surrogate 'mother's' role in ICS arrangements. Moreover, within limits, the commissioning mother's rights may also be impacted through a lack of clarity over her legal status as a 'mother' in relation to the child.

Therefore, although the commissioning 'mother' is the 'mother' (in contrast with the surrogate and the genetic 'mother') who likely intends to care for and raise the child as her own at all points throughout the course of an ICS

arrangement (unless, of course, she changes her mind), she is the 'mother' with the most difficulties in establishing a 'mother' relationship in ICS.

5 ABSENCE OF 'MOTHER' IN INTERNATIONAL COMMERCIAL SURROGACY

Despite the fact that multiple women may be able to stake a claim to being their 'mothers', children born of ICS arrangements may also be left 'motherless.' An absence of 'mother' can occur due to human and legal factors, as discussed below.

5.1 Human

The first situation where the absence of a mother to care for and raise the child is possible is when the commissioning 'mother' decides, either before or once the surrogate gives birth that she does not want to perform this role. Such a decision by the commissioning mother (or parents) not only undermines the entire ICS arrangement, but it leaves the child in a position of heightened vulnerability. This possible outcome can never be completely ruled out in ICS, given that at their root, such arrangements are based on a good faith understanding that all parties will follow through on the actions they commit to in respect of one another. In situations where the commissioning mother rejects the child, the surrogate 'mother' or the genetic 'mother' might be willing to be a 'mother' to the child on an on-going basis. But in situations where none of the three 'mothers' want to be a 'mother' to the child in an on-going manner, and if the partner of the commissioning mother (in instances where she has a partner who is legally recognizable as a parent) also reneges on the ICS arrangement, it may well fall to the State to assume a care and protection role in relation to the child, if the State is unsuccessful in attempts to enforce maternal obligations where commissioning 'mothers' have been deemed legal mothers. In such situations, the State will arguably be obliged to do so under the Convention on the Rights of the Child.

This further raises complex questions around which State should or is best positioned to take responsibility of the child when ICS arrangements go awry in this way. Arguably in situations where demand flows from commissioning parents in the global North to have a child through a surrogate in the global South, international development burden-sharing theory can be applied by analogy. On such a basis, the State the commissioning 'mother' (or parent(s)) originates from or resides in should provide care and protection to the child, rather than leaving the State where the child is born with this burden. However, the converse argument can be made in situations where the home State of the commissioning mother or parents does not sanction ICS but the country in which the surrogate and birth takes place does allow ICS. In such situations,

arguably it is the State that has opened itself to the risk of the burden of ICS children who end up motherless (or parentless) that should be the State to take responsibility for the child.

5.2 Legal

The second factor that may lead to a child born through ICS being 'motherless' or without parents who are committed to caring for and raising him or her is the law itself. Such a situation can be triggered when national legislation and policy either does not make provision for ICS or actively prohibits it. The inadequacies of national frameworks, the conflicts among them, and the absence of international regulation interact, undermining the certainty that children born through ICS will have a legally recognized 'mother' (or parent(s)). Where legally recognized parentage cannot be established, the child may also not have access to other entitlements, which can impact negatively on the child's rights.

In practice, such situations occur when neither commissioning 'mother' nor commissioning 'father' can demonstrate a connection to the child meeting particular state requirements for creating a legal parent-child relationship (or gaining entry to their home State to begin such a process). This can happen in instances where the state of origin of the commissioning mother – or parent generally – requires proof of a specific kind of connection (for example, genetic) in order to recognize parentage and, hence, citizenship.

Ireland provides an example of this. Under the Irish Guidelines a child will not be considered for a travel document or citizenship by the Irish government unless DNA evidence of a genetic link to the commissioning 'father' is provided, from a "suitably qualified independent third party." Such a requirement raises severe implications in ICS arrangements where donor sperm has been used and no genetic link between the commissioning father and the child exists, or in instances where there is no commissioning father, but only a commissioning mother or mothers. In such situations, the position of the child and protection of their rights will remain highly uncertain. Whether the child's status is regularised by State exercise of exception-based discretionary decision-making must surely be viewed as a remote possibility. State level guidance has been established in the United Kingdom, requiring a genetic link to at least one of the commissioning parents for entry of the child into the UK. Proof must be gained via DNA testing through an accredited company. This is a slightly less restrictive approach to that of Ireland, given the wider scope of the proof of a connection to the child from a commissioning mother or father.

In some other jurisdictions where such formal guidelines and requirements do not exist, courts appear to be taking into consideration evidence that proves some sort of link – usually genetic – between the commissioning 'mother' and/or 'father' before exercising discretionary powers to establish a legal parent-

child relationship. But where courts cannot establish such a link and governmental regulations prohibit establishing a legal relationship between the commissioning 'mother' and the child, the commissioning 'mother' is prevented from caring for the child in her home State. In such situations, the commissioning 'mother' still wants to mother the child. However, where neither surrogate nor genetic 'mother' want to 'mother' the child in lieu of the commissioning mother, and if the commissioning mother cannot stay in the State where the child is born, the child may be abandoned in the country of his or her birth, without a 'mother' (or other parent). Essentially, the child is left without a legally recognised parent, despite being brought into the world as a result of very specific and directed actions by a person who went to great lengths to have a child and others who have participated in enabling this to happen. Again, this undermines the child's rights to citizenship and nationality as well as to preserve their identity and to grow up in a family environment. Parentlessness under law often correlates with statelessness, leaving children at risk of being brought up in institutions that may afford few protections of their human rights.

6 THE CONTESTABLE NOTION OF 'MOTHER' IN INTERNATIONAL COMMERCIAL SURROGACY AND IMPLICATIONS FOR THE RIGHTS OF THE CHILD

The timeline of ICS arrangements leads to the three different women discussed in this chapter being involved in the arrangement at different points in time and for different lengths of time. The very fact that the genetic mother's gametes contribute to the genetic make-up of a child born through ICS means that her link with the child can neither be changed nor displaced; it is inherently un-severable. The link between her and the child is a significant one. However, unless the genetic mother also acts as the surrogate, in ICS she will rarely be recognised as the child's legal mother, at any point in the ICS timeline. This can have implications for the child's rights to identity and health, in particular if she acts anonymously and the child therefore does not know even so much as her name. Despite the position that the law may take, the genetic mother's link does not 'stop' at any point in time. It is arguably in both the child's and the genetic mother's best interests that there is at least social recognition of the mother role played by the genetic mother in relation to the child. India's *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* appear to acknowledge this to some extent, providing for information about donors (including their identity) to be released by ART clinics only "after appropriate identification, only to the offspring and only if asked by him/her after he/she reaches the age of 18 years, or as and when specified for legal purposes, and never to the parents (excepting [sic] when directed by a court of law)."

Contrary to the genetic mother, if acting purely as a surrogate in an ICS arrangement, the surrogate mother does not have any on-going relationship with the child unless that is agreed to with the commissioning parents, or if the child seeks out their surrogate mother later in life and the relevant information is made available. Again this will be extremely difficult if the surrogate acts anonymously. In most instances of ICS, it seems likely that the surrogate's role in the child's life will be time-limited to the period of pregnancy and birth, with the surrogate not playing any role in the sense of a social mother. This is unfortunate and should be guarded against, given that an on-going role in the child's life, or at the very least knowledge of the surrogate mother can aid in realisation of the child's rights to identity, nationality and health. The legal position of the surrogate may well be to the contrary, however, given the position that in many jurisdictions the surrogate mother is recognised as the legal mother the child, a position which often can only be displaced through legal extinguishment of the parent-child relationship of the surrogate and the child through the establishment of a new legal parent-child relationship via the granting of an adoption order.

In practice, it is possible in ICS situations for the commissioning mother to assume the social 'mother' role as soon as the surrogate relinquishes the child, despite her not having any guarantee that she will eventually be recognised as the child's legal mother. A gulf between fact and law may therefore persist for quite some time, until a legal relationship is established. If the parent-child relationship between surrogate mother and child is extinguished through law, any reinstatement of the surrogate's 'mother' role in relation to the child will be dependent on whether the commissioning mother or parents involve the surrogate in the child's life in any on-going capacity. Again, as discussed above in relation to the genetic mother, from a human rights perspective, arguably the surrogate should continue to be construed as a 'mother' to some extent in relation to the child, given the fact that she brought to term and gave birth to the child. These are factual acts which cannot easily be displaced, other than through a social re-construction of the circumstances of a child's gestation and birth. That the surrogate 'mother' unlikely has any ongoing relationship with a child born through ICS following their birth may well have implications for the surrogate as well as the child. The surrogate may be impacted from a mental or physical health perspective (or a combination of both) without any on-going role or recognition of the role she played in bringing the child into the world. From a child rights perspective, the child may be impacted negatively if the surrogate plays no on-going role or if there is no opportunity for the child to have any knowledge of their surrogate mother and her role, given that the child may wish to know her identity later in life, in particular to realise his or her own rights to identity and to health.

Of course, the converse argument can be put forward, that knowledge of the surrogate mother may cause a child born through ICS confusion and

bewilderment in relation to their identity. Steps should be able to be taken to ameliorate such an outcome, through providing the child with appropriate support in their understanding the circumstances of their birth. Equally, the surrogate may not wish to have on-going contact or involvement with the child, who she may purely view as the child of the commissioning mother (or parents).

As with the question of when – as well as whether – the genetic and surrogate mothers in ICS ‘stop’ being ‘mothers’ to the children they play an integral role in creating, it is necessary to consider when a commissioning ‘mother’ starts being a mother. This is despite the fact that she is the one woman of the three possible mothers in an ICS situation who at all points through an ICS arrangement (unless she changes her mind) wants to permanently and enduringly be the mother to the child who is born, and be recognised as such, both legally and socially. In practice, she is the woman whom it is most difficult to construe as mother to the child, given that in most ICS arrangements she is not genetically related to the child and the law will not automatically recognise her as the child’s mother. Therefore, the question of when a commissioning mother becomes a mother in ICS situations requires consideration from both a social and a legal perspective.

Unlike the genetic and surrogate ‘mothers’, the commissioning mother’s status in relation to the child is entirely socially constructed, until a point in time where she is able to establish a legal parental relationship with the child. Her relationship to the child is arguably based on four factors which may be present prior to the establishment of any legal status: her desire to have the child and intention to care for and raise the child as her own; the payment of money in relation to the ICS arrangement; that she may be party to either a written or oral agreement about the arrangement; and that she is likely to assume responsibility for caring for the child as his or her ‘mother’ once the surrogate mother relinquishes the child.

Arguably, the commissioning ‘mother’ becomes a mother to the child in a meaningful social sense from the point in time when she assumes care for the child, following his or her birth. It is from that point that the surrogate’s substantive involvement with the child is usually expected to end and the child and commissioning mother can begin to form an attachment in the form of a mother-child relationship. However, the surrogate ‘mother’ may want to maintain a connection to the child, and in some ICS arrangements there will be a period of substantive overlap regarding involvement and attachment of the child and his or her surrogate ‘mother’ and his or her commissioning ‘mother’. For example, this may occur if, at the request of a commissioning ‘mother’, a surrogate ‘mother’ agrees to breastfeed the child during his or her first few days or weeks of life. From the perspective of commissioning ‘mothers’, it is understandable however, that many view themselves as the child’s mother from the child’s conception onwards, given the child carried by the surrogate is intended for the commissioning ‘mother’ (or parents). This

view likely holds even if the commissioning mother is not genetically related to the child and lives in a different State to that where the surrogate is located. Surrogates themselves may or may not view the commissioning 'mother' as the mother of the child in ICS arrangements. Again, this is understandable given the complexities of the practical and emotional aspects of carrying a child for another person – a child who may or may not be genetically related to the surrogate herself. Therefore, identifying when a commissioning 'mother' becomes a mother from a social mothering perspective in ICS arrangements is a blurry exercise. In reality, in addition to what relevant laws and regulations prescribe, it will be largely dependent on the different personal attitudes and individual circumstances involved in specific ICS arrangements; navigation of who is 'mother' and when may prove complicated and fraught.

While some States such as Ukraine and California maintain a competitive edge in the ICS market through securing the recognition of the commissioning 'mother' as the legal mother of a child born through ICS, in some States supplying ICS, it can take a substantial period of time for a commissioning 'mother' (or commissioning parents) to attain legal 'mother' status in relation to a child born through an ICS arrangement – indeed, if she is able to at all. This will lead to great uncertainty in status for both the child and the commissioning mother. The child's rights to nationality, identity and to grow up in a family environment under the Convention on the Rights of the Child may again be undermined as a result. In some jurisdictions, gaining legal status as mother to a child commissioning through ICS may simply not be possible under the relevant domestic legislation, with discretionary measures such as adoption orders providing the only method by which a legal parent-child relationship can be established. Given this reality, the child may be in a vulnerable situation regarding his or her right to grow up in a family environment and potentially rendered stateless, impacting on their wider rights.

In States such as Australia, New Zealand and the United Kingdom, judges are grappling with the fact that while domestic legislation construes the birth mother of a child to be the child's legal mother and furthermore, prohibits commercial surrogacy domestically, albeit without extraterritorial effect, they are faced with applications from commissioning 'mothers' for parentage or adoption orders in respect to the children that have been born through the ICS arrangements they have entered into. But, as Justice Hedley of the UK High Court insightfully remarked, the "difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order." Chief Judge Pascoe of the Federal Circuit Court of Australia has described this as the "fait accompli upon return" in international surrogacy cases coming before Australian Family Law Courts. And while for many judges the "fait accompli" of the child's existence combines with the obligation to adopt their best interests as the primary consideration in any judicial proceeding leads them to grant

the orders that the commissioning parents have requested, at least in theory there is no guarantee that this will be the case. Unless ICS is recognized by law and acknowledged in birth certificates that the commissioning mother's state of origin is willing to accept, she will be compelled to overcome the hurdle of establishing her legal status in relation to the child to gain full recognition as the child's mother.

7 CONCLUSION

Establishing the status of the various potential 'mothers' involved in ICS is both socially and legally complex. Not only is this problematic for the various ICS 'mothers', but as demonstrated throughout, the ramifications for the realisation of the rights of the child born through ICS can be wide-ranging, generating long-term negative impacts. The common denominator in all ICS arrangements is what the arrangement is driven towards providing: a child. In the absence of international agreements capable of regulating the attribution of 'motherhood' and the rules of parentage generally, children born through ICS are, and will continue to be, in a position of heightened vulnerability. As Michael Freeman has said, "There can be no doubt that children are amongst the most vulnerable and powerless members of our society today." The risk is that the current uncertainty surrounding the attribution of motherhood exacerbates such vulnerability.

The speed with which the technological and medical advances making ICS possible have progressed has outstripped the development of the law to regulate and provide protection to parties made vulnerable in these arrangements. The need for national legislators and policy-makers to engage with developing responses to ICS focussing on ensuring human rights protection is necessary, and it is crucial that the international community remains engaged in continuing to consider options for possible international collaboration and regulation. A focus on the rights of the child in ICS in relation to the position of the child's potential 'mothers' is particularly important given the absence of any international regulatory framework governing the market or operation of ICS. The child has rights in relation to their 'mothers' and their 'mothers' have rights and interests in relation to the child. However, as this chapter has demonstrated, distinctions exist in ICS between notions of genetic, social and legal 'mothers', and these impact the rights of the child and the 'mothers' own situations. The child is the ultimate factor leading to a woman being understood as a mother, and while all the 'mothers' involved in ICS have human rights which may be open to breach through ICS and must be protected and upheld, the rights of children born through ICS require protecting alongside and balanced in relation to the situations of their multiple 'mothers'.