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

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5 International Commercial Surrogacy and Children's Rights

Babies, Borders, Responsibilities and Rights

Abstract

This Chapter argues that the child is the locus of vulnerability in ICS. It is complementary to the earlier chapters of this study as it also presents discussion of the ethics and economics of ICS in relation to children, as well as assessing jurisprudential trends and non-judicial responses to ICS in selected ICS demand states, in light of the child rights framework under public international human rights law. This analysis shows that more can be done at the government legislative and policy levels to protect the rights of children conceived and born through ICS. It also argues that the framework of standards and norms for protecting the child's rights and best interests established by the CRC should be further utilised in jurisprudential decision-making, too. This will help to ensure that the child's rights and best interests are placed at the heart of ICS practice. This Chapter therefore advances the idea of the CRC not only setting standards and obligations for states and other key actors in ICS, but also as a useful and necessary tool for use in the ICS context, to uphold the child's rights and best interests in ICS.

Main Findings

- The ethical and economic challenges raised through the practice of ICS trigger risks to the rights of children conceived and born through ICS; the child's rights and interests can also clash with those of his or her potential parents.
- Children should be understood as the central locus of vulnerability in ICS arrangements. Their rights to identity preservation, nationality, family environment, health, education and social security can be particularly at risk.
- In the absence of dedicated legislation concerning ICS, Australia, New Zealand and the United Kingdom are using quasi-policy responses to guide actions in relation to individual ICS cases; these reflect child rights standards and norms to differing degrees.
- At the time of writing, Courts across the three jurisdictions were new to dealing with ICS cases; analysis indicates that the Courts' have only limitedly harnessed the CRC and other mechanisms to uphold children's rights in ICS judicial decision-making and judgments.

Contextual notes

- This Chapter was written at a time when State responses to ICS were initially developing and ICS jurisprudence was beginning to develop, despite a lack of international consensus concerning ICS.
- The Chapter was initially presented at the New Zealand Law Society Continuing Legal Education International Adoption and Surrogacy Conference, the first Conference of its kind in New Zealand.
- At the time of writing, the examples provided from three English-speaking, common law jurisdictions grappling with ICS as emerging demand-States provided a useful snapshot of state practice and judicial decision-making, and the extent to which these reflected CRC standards and norms. Since the time of writing, ICS demand continues in these jurisdictions; quasi-policy guidance is still used, and judicial decision-making in ICS cases reflects a growing trend of judges considering children's rights and best interests. N.B. Starting in 2018, the UK Law Commission will embark on a three-year surrogacy law reform project.
- Since this Chapter was written, some of the most significant ICS supply-side states have closed down ICS (e.g. India and Thailand); others have developed and have closed down ICS (e.g. Nepal); and others have developed but are taking steps towards limiting ICS (e.g. Cambodia). No definitive statistical data on the global prevalence of ICS exists.
- Although an absence of international consensus regarding ICS persists, since the time this Chapter was written, a number of international bodies are now actively exploring avenues towards greater consensus, through private international law and public international law frameworks.

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1 Introduction

Over the past decade, international commercial surrogacy (ICS) has established itself as a new method by which to have a child. Families are being built in new ways leveraging off globalisation, technological advances in medical science and communications, and the lower costs of artificial reproductive technologies and surrogacy offered through burgeoning supply markets in the Global South. Across a multidisciplinary spectrum, much attention has been given to the phenomenon of ICS from the perspective of the "commissioning" or "intending" parents, and the woman who acts as a surrogate. However, the child is the person at the centre of ICS arrangements and is the person inherently lacking agency, consequently in a position of heightened vulnerabil-

ity. Yet relatively little consideration – including by way of legal analysis through the rubric of international human rights law – has to date focused squarely on the rights of the child.

This paper, intended as a working paper to be elaborated on and detailed further through a presentation at the NZLS CLE International Adoption and Surrogacy Conference, seeks to focus in on the situation of the child in ICS, with reference to international law human rights standards and norms. It encourages understanding the child as a core locus of vulnerability in ICS. This is done through an exploration of the framework of the rights of the child in ICS, as well as consideration of perspectives on the ethics and economics of ICS in relation to children. Jurisprudential trends and non-judicial responses to ICS in three ICS 'demand' states are examined (Australia, New Zealand and the United Kingdom), in light of the rights framework and the ethical and economic context. Overall, this paper explores the specific vulnerabilities of children born through ICS, highlighting avenues for increased protection through international human rights law.

2 Conception cross-border

Discussion of the rights of the child in ICS necessitates being placed in the overarching context of the growth of conception cross-border. The expansion of ICS over recent years can be viewed as part of a trend of increasing numbers of people traveling cross-border internationally, predominantly from the more developed to the lesser developed world, to access a range of medical treatment and health services, often motivated by wider availability of services and competitive pricing in comparison to that offered in a home-State (Ramirez de Arellano, 2007). Ramskold and Posner note that reproductive tourism has:

> 'alongside other forms of medical tourism, grown in scale and numbers as globalisation has gradually erased many economic and cultural borders. Transitional capital economies in Southeast Asia, technological advances and free trade pave the way for the interest of the comparably affluent, yet ever more infertile, Western couples. […] In the last decade, reproductive tourism has, alongside escalating demand, become a multimillion industry, stimulating national economies and providing jobs in both the service sector and healthcare.' (Ramskold and Posner, 2013: 397)

Human reproductive tourism, therefore, is placed in the wider context of the growth of medical tourism, yet ultimately leads to something quite different in comparison to a more standard medical procedure such as a hip replacement or dental surgery. Ultimately, it leads to a child. In the area of human reproduction, never has it been easier for gametes (egg or sperm cells) to be purchased and shipped internationally, and to access the "services" of a surrogate and medical clinicians to oversee a surrogacy arrangement. Usually, such an

arrangement will include an exchange of money – thus bringing the commercial element into international surrogacy.

India and Thailand have emerged as the two most popular destinations to access or undertake ICS, and in this respect they are "supply" states. Mexico is tipped as the next emerging international surrogacy supply state (Global IVF, 07 January 2014, online), and Georgia and Ukraine are both popular among European commissioning parents. The boom in the growth of international commercial surrogacy is most clearly demonstrated in India, where it is estimated that 25,000 children have now been born through surrogacy (Shetty, 2012: 1633). However, in both India and Thailand, the surrogacy market has been left to operate in a largely unregulated manner. In India, since the legalisation of commercial surrogacy in 2002, the surrogacy "industry" is increasingly seen as a component in the growth of the State's role internationally as a hub for medical tourism, which has expanded over recent years (Lal, 2010: Asia Sentinel, online). Henaghan observes that:

> 'In recent years, the Indian Government's efforts to promote India as a cost-effective, quality medical tourism destination, as well as the abundance of women willing to be surrogates for a lower price (compared to the United States) has meant that increasing numbers of couples have travelled from Western countries to India to commission their children.' (Henaghan, 2013: 3).

Arguably the key driver of the growth of the industry has been lower costs than in Western countries and the availability of surrogates as Henaghan notes. Mukherjee elaborates that:

> 'So far [as the] the Indian perspective is concerned […] Indian surrogates have been increasingly popular with fertile couples in industrialized nations due to the relatively low cost. At the same time, Indian clinics are becoming more competitive, not only in the matter of pricing, but also in the hiring and retention of Indian females as surrogates.' (Mukherjee, 2011: 1)

Estimates of the value of the Indian surrogacy industry differ, with the Confederation of Indian Industry reportedly claiming the surrogacy industry to be worth $2.3 billion USD annually (Shetty, 2012: 1633), whilst other groups endorse claims of a more modest figure of $450 million USD annually (Center for Social Research, 2013: 23). Malhotra and Malhotra state that over 200,000 clinics are estimated to be operating in India, offering IVF, artificial insemination and surrogacy (Malhotra and Malhotra, 2012: 31), whilst other commentators estimate India has approximately 3000 clinics specialising in surrogacy (Sama, 2012: 7). Although it is difficult to draw a conclusive view as to the size and value of the international surrogacy industry in India from the competing overall estimates, it is clear that international surrogacy is continuing its upward trend, yet continuing to operate in a laissez-faire manner, showing little concern for protecting and upholding the rights of the child. The Assisted

Reproductive Techniques Bill 2010 (India) – which would introduce a legislative and policy framework for commercial surrogacy in India – continues to languish in legislative limbo, as it has done so through the course of successive parliaments over recent years (Ghosh, 2013: Indian Express, online). In Thailand, currently no legislation exists which directly governs international commercial surrogacy, however draft legislation (the Assisted Reproductive Technologies Bill number 167/2553) which would clarify the legal situation in Thailand relating to surrogacy is pending (approved, not yet adopted by Cabinet).

The growth in cross-border conception is reflected in a corresponding growth in numbers of applications coming before domestic courts in global North countries for regularisation of parent-child relationships (such as applications for parentage and adoption orders). Three Commonwealth/common law jurisdictions provide an illustrative snapshot (further detailed in Table 1 below). However, note that the sample of case law used is limited, given that it is based on all decisions lodged on relevant legal databases between 2008 and up to and including 28 February 2014. This does not give a full, comprehensive picture in terms of the global number of cases involving international surrogacy in each of these jurisdictions, as there are other routes (for example, ad-hoc ministerial decision-making and situations that do not come before courts), as well as other legal decisions not lodged in these legal databases (certainly true in the New Zealand context, and likely to be true in Australia and the United Kingdom). The sample included in this paper though does have value as an indicative sample, and whilst the numbers of cases falling within this particular sample are not large by any measure, they are indicative of a growth in commissioning parents from these countries engaging in international surrogacy. Many of these cases have a commercial element. Taken as a group, this body of case law illustrates that family courts in all three jurisdictions are dealing with a novel area of law concerning the rights of the child, in the face of any internationally agreed regulation of international surrogacy, a lack of explicit (or any) national legislation on international surrogacy, or national legislation and policy which is often difficult to reconcile with the phenomenon of ICS.

Table 1: Decisions of Courts in Australia, New Zealand and the United Kingdom, 2008-2014, dealing with applications arising in relation to international surrogacy situations (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Jurisdiction	*Court*	*Total number of decisions dealing with applications related to international surrogacy situations 2008-2014*	*Reported case names and year of decision*	*Presiding Judge*	*Child's country of birth*
Australia	Family Court	11	*Collins v Tangtoi* [2010]	Loughnan J	Thailand
			O'Connor v Kasemsarn [2010]	Ainslie-Wallace J	Thailand
			Dennis v Pradchaphet [2011]	Stevenson J	Thailand
			Dudley v Chedi [2011]	Watts J	Thailand
			Johnson v Chompunut [2011]	Watts J	Thailand
			Hubert v Juntasa [2011]	Watts J	Thailand
			Findlay v Punyawong [2011]	Watts J	Thailand
			Edmore v Bala [2011]	Cronin J	India
			Gough v Kaur [2012]	Macmillan J	Thailand
			Ellison v Karnchanit [2012]	Ryan J	Thailand
			Mason & Mason and Anor [2013]	Ryan J	India
New Zealand	Family Court	7	*Re KJB and LRB [Adoption]* [2009]	Von Dadelszen J	Australia
			Re an application by KR and DGR to adopt a female child [2010]	Ryan J	Thailand
			Re an application by BWS & Anor to adopt a child [2011]	Walker J	USA
			Re Adoption by S and S [2011]	Walker J	USA
			Re DMW [2012]	DA Burns J	Thailand
			Adoption application by SCR [2012]	AP Walsh J	USA
			Re M S K [2013]	Strettell J	USA
United Kingdom	High Court Family Division	13	*Re W* [2013]	Theis J	USA
			Re P-M [2013]	Theis J	USA
			Re C (A Child) [2013]	Theis J	Russia
			Re C (A Child) [2013]	Theis J	USA
			J v G [2013]	Theis J	USA
			Re A & B (Parental Order Domicile)	Theis J	India
			D and L (Surrogacy) [2012]	Baker J	India
			Z and Anor v C [2011]	Theis J	India
			Re X and Y (Children) [2011]	Wall P	India
			IJ (A Child) [2011]	Hedley J	Ukraine
			L (A Minor) [2010]	Hedley J	USA
			Re K (Minors) (Foreign Surrogacy) [2010]	Hedley J	India
			X & Y (Foreign Surrogacy) [2008]	Hedley J	Ukraine

The total number of 31 cases across the three jurisdictions set out in Table 1 illustrates the growing body of jurisprudence across national courts pertaining

to international surrogacy and ICS. This is likely to continue to expand; for example, recent figures reported from the United Kingdom estimate that over 1000 babies born through international surrogacy may be brought into the UK annually (Blyth, Crawshaw, Van den Akker, 17 February 2014: Bionews, online).

3 The ethics and economics of commercialising conception

A strong argument exists for understanding this rapidly emerging growth in transnational reproductive services as the development of a new kind of "market", trading in human reproduction and fertility. Spar observes that:

> 'As technology made it easier for parents to choose all the components of assisted conception – the eggs, the sperm, the womb, the broker, and the governing jurisdiction – it was only a small and logical leap to international trade.' (Spar, 2006: 86)

However, what exactly is international commercial surrogacy a market in? A straightforward, black and white answer to this question would be that it is a market in surrogacy. Beyond this though, arguments can be made for this being understood as a market for the broader trade of human reproductive services, including the trade of human bodily products (gametes, embryos) for use for the conception of children to be carried to term by surrogates. Going a step further, the argument can be made that the growth of ICS has in fact brought with it the growth of a new market: in children, specifically produced to order in one place in the world, destined for another, the end "product" in a commercial transaction.

This paper does not seek to take up a specific position as to whether ICS amounts to the sale of children, but rather, it is intended that this paper at least raises these questions and issues for consideration.

These are highly controversial propositions to explore, given the difficult ethical terrain that they stray into, and the moral aspects they entail. But why this question matters in relation to children's rights in ICS is because although a market has for some time existed in the trade of gametes and embryos (with these human bodily products available for purchase in a number of states), under the international human rights framework, a market trading in children is prohibited by prescribed standards and norms. These are set down in international law and reflect that international consensus generally abhors such a practice as a fundamental principle. Moreover, as Ergas discusses, a strong argument exists for the prohibition on the sale and trafficking of children as a possible ius cogens norm (Ergas, 2013: 432-434), and it is questionable whether any future treaty governing international surrogacy would survive ius cogens scrutiny (Ergas, 2013: 434-435). Sandel notes that this relates to the value which we implicitly place on certain social practices or goods, through

deciding not to commodify them, or through explicitly excluding them from the realms of goods and services which can be bought and sold through the market: it follows that to reduce human beings to items which can be treated in such a way, fails to accord the appropriate value to them, as sentient beings to which dignity and respect inherently attach (Sandel, 2012: 9-10). Sandel is not alone in putting forth such an argument, which appears to accord with the approach taken by international human rights law, built on international agreement relating to the value accorded to children. The value the international community places on children, as reflected in international law, has nothing to do with money or commerce. In fact, it prohibits the commercialisation of children.

Regarding children as a specific subset of human beings, Sandel observes:

> 'We don't allow children to be bought and sold on the market. Even if buyers did not mistreat the children they purchased, a market in children would express and promote the wrong way of valuing them. Children are not properly regarded as consumer goods, but as being worthy of love and care.' (Sandel, 2012: 10).

Sandel takes his argument further to observe the growing trend of the market's reach into realms of life previously not governed by the market (Sandel, 2012: 28) and reasons that the value of certain things – such as human beings more generally, or concepts such as love – is degraded and corrupted through their marketisation (Sandel, 2012: 14-15).

Returning to the international legal framework then, this approach to how the international community "values" children is reflected in the consensus resulting in a number of relevant provisions at international law. The preamble to the United Nations Convention on the Rights of the Child (CRC, 1989) notes that particular care, including special safeguards, should be extended to children due to their specific stage in life. This flows through to the best interests of the child principle set out in art 3 of the CRC and the non-discrimination principle set out in art 2. This position is reflected in the International Covenant on Civil and Political Rights, which states the right of the child to "such measures of protection as are required by his status as a minor, on the part of his family, society and the State", without discrimination (ICCPR, 1966: art 24). Under the CRC, States Parties have obligations to provide a range of protective measures and specific safeguards in relation to children and their rights (for example, see arts 19, 20, 23). Similarly, the International Covenant on Economic, Social and Cultural Rights states that:

> 'Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.' (ICESCR, 1966: article 10(3).

Article 25(2) of the Universal Declaration of Human Rights establishes – reflective of the social mores of the time – that all children shall enjoy the same "special protection", regardless of whether they are born in or out of wedlock (UDHR, 1948).

Turning to the position at international law regarding the sale of children, which relates to the ethical and economic question of value, the Convention on the Rights of the Child and an associated Optional Protocol to the Convention (2000) are indicative of the status of international agreement, and provide a framework of standards and norms to define actions and behaviour among and between states and citizens. The Convention on the Rights of the Child makes clear the position at international law on the sale of children. Art 35 is broad in this respect, and the threshold of expected action on States Parties is high:

> 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form'.

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child pornography (2000) reflects the grave concern of the international community about international traffic in children for the purpose of sale, child prostitution and child pornography (Optional Protocol, 2000: Preamble). States Parties to the Optional Protocol are required to "prohibit the sale of children" in line with the Protocol (art 1). "Sale of children" is defined as being "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration" (art 2(a)).

Therefore, in considering the ethics and economics of conception in light of the clear standards and norms international law has established in relation to how children are to be valued (and thus protected), it is necessary to at least ask the question: does international commercial surrogacy amount to a market in the sale of children, commodifying them as a "product" to be traded, with the determination of their monetary "value" left open to the forces of the market? Or, should ICS be viewed as the provision of a specific package of services, that is, reproductive services provided by the woman who acts as a surrogate, and the services of associated medical clinicians and other actors in the industry? It is near impossible to get away from the reality that, if we are to identify the ultimate "product" in the commercial exchange which takes place in an ICS arrangement, it is a child. It is upon delivery of that child – once born, to the commissioning parent or parents – that the "transaction" is complete, and therefore it becomes difficult not to see this as falling into the definition set out by art 2(a) of "sale".

If we are to accept such a view, this raises confronting and difficult questions relating to the obligations of the State around the practice of ICS, and begs the question as to whether ICS is, in fact, inconsistent with international

human rights law. On the other hand, if we are to accept that ICS is a transaction which is predicated on and results in an exchange of reproductive services, the upshot of which is the birth of a child, this takes us away from the confronting and difficult question as to whether ICS is a commercial transaction for the sale of children. However, even if we accept this view, it is impossible to get away from the fact that in reality, no ICS arrangement can be said to be completed – certainly not in the eyes of the commissioning parents who are one party to such an arrangement – until the child who is born is in their care alone, once handed over to them (even if not literally) by the surrogate mother.

Looking at State practice to date in relation to ICS, it does not provide a conclusive view either way in relation to this vexed issue. There is very little international consensus in relation to international commercial surrogacy specifically, reflected in national legislative and policy approaches which variously outlaw the practice, tolerate it without an explicit regulatory or statutory framework, or explicitly legalise it (Trimmings and Beaumont, 2013: 443). On the face of it, this variation in state practice seems to show that some states do not view ICS as contradictory or in breach of their international human rights obligations. Yet the fact that other states expressly outlaw ICS through national law with extraterritorial effect (for example, New South Wales, Australia) can be seen to indicate that ICS is viewed in some states as inconsistent with international human rights law. In the case of some states, a reticence to engage with the issue has resulted in the legal position being somewhat unclear, arguably resulting in such states occupying a position of "permissibility" (Spar, 2006: 207) in relation to the practice of ICS. Indeed, the Permanent Bureau of the Hague Conference has questioned the feasibility of achieving international consensus on issues relating to international surrogacy, such as the question of unifying applicable conflicting private international law rules (Permanent Bureau, Hague Conference, 2012: para. 54).

Spar notes that in an abstract sense, the business model underlying the advent of international commercial surrogacy is a thoroughly reasonable one (Spar, 2006: 86). Indeed, if we are to take a purely market reasoning approach to ICS, that is, that if an exchange or trade of (any kind of) goods or services benefits both the buyer and seller, this leads to improving our collective or societal wellbeing. Goods are allocated efficiently, through the market, because the demand of the buyer is met by the supply of the seller. As Sandel notes, both sides are better off, their utility increasing. (Sandel, 2012: 29) However, Spar observes that:

> 'although eggs and sperm are now widely available in markets like the United States, it is tougher to find wombs. Because wombs come attached to women, who don't have any inherent incentive to endure the physical costs and emotional upheaval attached to pregnancy and labor. Purely in commercial terms, therefore, it makes sense to pay women for undergoing the rigors of pregnancy and thus to seek women for whom paid pregnancy is an economically attractive proposition.

> […] Some of these poor, young mothers will live in the developed world. But many more, demographically speaking will live in poorer nations of the developing world, where opportunities for poor, young women are even scarcer.' (Spar, 2006: 86-87)

Indeed, some commissioning parents will expressly want to ensure their surrogate is paid, and that to not pay such a person for what they are doing to enable them to have a child would be wrong. One commissioning mother from the United States who commissioned surrogacy in India has written that:

> 'Charges of 'renting a womb' and exploitation have long tarnished the practice of surrogacy. But in my mind, a woman going through the risks of labor for another family clearly deserves to be paid. To me, this was not exploitation. This was a win-win, allowing the surrogate to have a brighter future and the couple to have a child. If my money was going to benefit an Indian woman financially for a service she willingly provided, I preferred that it be a poor woman who really needed help because the money that a surrogate earns in India is, to be blunt, life-changing.' (Arieff, 2012: 37)

From these views, it can be observed that the commercial element of ICS leads to potential issues of global injustice (Spar, 2006: 87; 226-227; Sandel, 2012: 203) which are deserving of a dedicated discussion more comprehensive than is possible in this paper. Indeed, it is precisely to guard against the exploitation of economic inequalities that we explicitly ban a trade in human organs – such as kidneys and hearts – and arguably ICS presents simply a different human body part being transacted. Yet both Arieff and Spar appear to take up the position that ICS is a market in the trade of human reproductive services, not children themselves. Furthermore this supports the notion of ICS amounting to a "mutually advantageous trade" (Sandel, 2012: 29). However, Spar herself labels the international surrogacy and human reproductive market "The Baby Business", which granted, perhaps, is simply a more convenient and attention-grabbing label. Spar does further concede however, that taking an outsourced, market approach to the manufacturing of babies, in a similar way to the manufacturing of other "products" is a somewhat outlandish proposition, at least at the superficial level (Spar, 2006: 87), and that it is unclear what kind of market the "baby business" amounts to, but that it could constitute a "banned" or "imperfect" market (Spar, 2006: 204-206).

If we are to accept that ICS instead amounts only to a market in reproductive services only, it regardless still has the effect of commodifying children to an extent, given their centrality to ICS arrangements and the fact that such arrangements are only complete once a child is provided. Touched by commodification to any degree, the value we as a society place on children born through ICS may potentially be corrupted and degraded. In this connection, it is interesting to note that the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption has as one of its core purposes to guard against sale or traffic in children (Preamble; art

1(b)). However, it is also important to acknowledge the continuum on which international adoption and international surrogacy are both located. As Spar notes, adoption and fertility services are:

> 'two markets [which are] closely linked. Many people pursue fertility treatment because they are wary of adoption. Many others pursue adoption because they have grown weary of or dissatisfied with fertility treatment. Both sides of this market would prefer to believe that they are not substitutes for one another. But in reality, of course, they are. Everyone in the fertility market, everyone in the adoption market, and everyone who purchases eggs, sperm, wombs and PGD [Preimplantation Genetic Diagnosis] is looking for precisely the same thing: a child to call their own.' (Spar, 2006: 210)

4 Clash of rights: "parents", children and other parties

Whilst this paper argues for the child being placed at the centre of international commercial surrogacy arrangements, to ensure full realisation of their human rights, it is necessary to recognise the wider parties in ICS situations, not least the "commissioning parents". Understanding the full range of potential parties involved in ICS situations is critical to understanding the context in which children born through ICS come into the world, and to take a holistic approach to the child's rights (Achmad, 2012: 191-194). Due to the various possibilities for the genetic makeup of a child born through ICS, and the fact that a surrogate is involved, there are a number of parties who may claim to be a child's "parent".

Taking first the "mother" parent, this role in relation to the child may be claimed by a woman or women commissioning the child (therefore seen to be a "commissioning parent"); the woman who acts as the child's surrogate "mother"; and thirdly, the woman who provides her gametes (this could be the surrogate or the commissioning mother, or another third party, such as a woman who sells or donates her gametes for use). Turning to the "father" parent, this role may be claimed by the commissioning father or fathers, and potentially by a man who donates or sells gametes which are used in arrangement in instances where these are not provided by the commissioning father or fathers. This complex web of involvement in ICS arrangements amounts to there being potentially as many as four women who claim to be the "mother" in relation to a child born through ICS, and up to as many as three men who might claim to be a "father" to a child in an ICS arrangement. ICS proceeds on the expectation that the commissioning parent(s) is intended as the person(s) who will be the parent to the child – at least in a social sense. However, an argument can be made for each of these different people potentially involved in an ICS arrangement to be understood as a "parent" to a child who is born through the arrangement. The claim of the various potential parents can stem from a genetic or biological relationship to the child,

which cannot be displaced, as well as from an intention to parent the child, in the case of commissioning parents who sometimes have no genetic link to the child who is born.

The fact that ICS arrangements can lead to there being a multitude of adults involved who may claim to be a parent to any one child can lead to situations where the perceived rights of the different "parents" can clash with each other. A stark example of this is where a commissioning parent or parents and the surrogate mother have a clash of views in relation to matters such as what activities the surrogate avoids whilst pregnant, or what happens in an instance where tests indicate that a child is likely to be born with a birth abnormality or condition. In such instances, the commissioning parents seek to control more than just the surrogate's womb, but her whole body, and her rights being endangered or violated (for example, such as rights established under arts 11 and 16 of the Convention on the Elimination of all Forms of Discrimination Against Women, 1979).

Having alluded to the potential for clashes between the positions and rights of the various potential "parents" in ICS arrangements, where the concept of a clash of rights is most clear is when one considers the rights of the child in relation to the adults in its life who may have a parental claim in relation to him or her. What is in the interests of any one of the potential "parents" may not always be in the best interests of the child, nor uphold and protect their rights. However, the child is most likely to be the person in ICS arrangements with the most heightened level of vulnerability. Whilst the point can validly be made that commissioning parents can be vulnerable to being taken advantage of in ICS, and surrogate mothers – especially in the global South, where they are often economically and socially marginalised – are potentially very vulnerable to human rights violations (especially in situations where they are coerced into acting as a surrogate against their will (Center for Social Research, 2013: 39), not given appropriate support or properly informed about the arrangement, or not paid as they are told they will be (Center for Social Research, 2013: 23)), it is the child that is most universally open to the potential of human rights breaches in ICS. This is because of the inherent vulnerability that a child is characterised by, due to their lack of agency and inability, especially in their infancy and early years, to voice their wishes and to form views in relation to, and have control over what is in their own best interests. The child's evolving capacities as they advance in age means that the child's agency over their own interests and rights grows (Lansdown (for UNICEF), 2005: x-xi), however, in ICS situations the child may well be placed in a position of heightened vulnerability with no ability to have control over their own rights and interests (very early in their life).

To illustrate, a practical instance of this may arise in ICS situations in relation to the taking of DNA samples from a child for the purpose of determining legal parentage. It is likely to be unclear in ICS arrangements as to who is in a position in relation to the child to be able to authorise the taking of

a DNA sample, and this may then lead on to issues around evidential admissibility if the case goes before a court (Keyes and Chisholm, 2013: 115). This raises the issue of whether having a DNA sample is in the best interests of the child. This lack of agency is particularly problematic if a person claiming to be the child's parent does not act (either intentionally or by omission) in the child's best interests to protect the child's rights. Therefore, the question of who acts on behalf of and in the best interests of the rights of the child born through ICS is one that may not, on the surface of an ICS arrangement, be easily determined. At its worst, a situation could eventuate where no one is acting in the best interests of the child in an ICS arrangement – not necessarily out of malice – this could be purely through a lack of information or foresight. Given lack of international regulation and standards, there is no requirement for an independent third party to be assigned to the child to advocate for their rights and best interests to be upheld in ICS arrangements. This may result in a protection lacuna for the child, if their rights and best interests are not effectively upheld and realised. Moreover, when ICS cases come before courts, it will not always be automatic as a matter of procedure that the child is independently represented, which again may have implications for the rights of the child.

Above we have considered parents and children as part of this "clash of rights" in ICS, however, it is important to briefly note that other parties are very likely to be involved in ICS arrangements. This is significant due to the potential for these parties to influence the actions of or positions taken by the various potential "parents" in ICS arrangements. Other parties may include surrogacy or medical tourism brokers, government officials in the commissioning parents' home state and the state where the child is born, lawyers, medical doctors and other medical staff or fertility experts. Each of these parties may approach an individual ICS arrangement with their own vested interests and motivations, which may not always be in line with protecting the best interests of the child. It would be of great benefit to children born through ICS if professional and other third parties involved in ICS situations increase their focus on and commitment to taking a child-centred perspective in their practice, or at least to incorporate awareness of what this entails.

5 The rights of the child at stake

Having examined some possible ethical and economic perspectives on ICS and highlighted the various potential parties and their respective interests, this section hones in more closely on the broader international human rights law framework governing the rights of the child. The Convention on the Rights of the Child is the primary relevant framework in this respect. Provisions of the Convention which are of particular relevance to ICS situations are discussed below. Whilst this discussion is not intended to be exhaustive (for more, see

Achmad, 2012: vol. 7:8, 206-211), it is intended to assist in identification of some of the rights of the child which are left most at risk in ICS situations. It is these rights, along with the protection of the best interests of the child, which it is important, in the first instance, to be conscious of upholding, protecting and giving effect to in ICS.

5.1 The rights of the child to identity and nationality

As illustrated through earlier discussion of the various parties involved in ICS, and more specifically the range of persons who may claim to be a "parent" in relation to a child in these situations, the circumstances of birth of children born through ICS are likely to be complex. This raises potential challenges for the child's rights to identity and nationality. In fact, these are arguably the biggest child's rights issues arising out of ICS, given the long-term impact flowing from the realisation of both of these rights in the life of a child.

5.1.1 The child's right to the preservation of their identity

Firstly considering identity, without intentional steps being taken to protect information about the circumstances of their birth and information relating to their personal genetic lineage and cultural heritage, the identity of children born through ICS will likely be placed in a precarious position. As national judges have observed, in the absence of such steps being taken, this will very likely lead to repercussions for the child in later life, around their understanding of who they are as a person (for example, see *J v G* [2013] EWHC 1432 (Fam) at [27]). The Australian Family Court has described this as the concept of "lifetime identity" (*G v H* (1994) 181 CLR 387; applied in the international surrogacy case of *Ellison and Anor v Karnchanit* 2012 FamCA 602 at [91]). Van Bueren describes an individual's identity as being:

> 'at root an acknowledgement of a person's existence; it is that which makes a person visible to society. An identity transforms the biological entity into a legal being and confirms the existence of a specific legal personality capable of bearing rights and duties.' (Van Bueren, 1998: 117).

Art 8(1) of the CRC requires States Parties to the Convention to "undertake to respect the right of the child to preserve his or her identity". This article states that "identity" includes "nationality, name and family relations as recognised by law". The Committee on the Rights of the Child has not published a General Comment in relation to the child's right to preserve his or her identity. However, to think about the elements which are central to a person's identity, in addition to nationality, name and family relations, other significant aspects are culture, language, ethnic heritage, and genetic history. Writing as early as 1992, Stewart argued that at its broadest conceptualisation,

the child's identity could and should be said to include culture and language as important elements (Stewart, 1992). Van Bueren further advocates for race, sex and religion to be considered component elements forming a child's identity (Van Bueren, 1998: 117). Hodgkin and Newell, writing on behalf of UNICEF, have more recently sought to confirm the view that nationality and family are only some of the elements of identity (Hodgkin and Newell, 2007: 115) and therefore art 8 should not be read as putting forward a concept of the child's identity as limited to those elements explicitly mentioned in the Convention texts. Importantly, Hodgkin and Newell note that a further key element is "the child's personal history since birth – where he or she lived, who looked after him or her, why crucial decisions were taken" (Hodgkin and Newell, 2007: 155).

For children born through ICS, it is these aspects of their identity as related to their surrogate mother and their genetic parents – where they are different persons to the commissioning parents – which are vulnerable to not being preserved. Given the lack of international regulation of ICS, and the varying levels to which ICS is permitted or regulated in different jurisdictions, no system currently exists which is directed towards safeguarding the child's right to preserve their identity. Such a system has been important, for example, in the international system of protection which exists around intercountry adoption. Art 30 of The Hague Intercountry Adoption Convention requires steps to be taken by Contracting States to ensure information about the child's origin, particularly the identity of the child's parents and their medical history, is preserved. In the absence of a directive protection framework in the context of ICS, a strong argument can be made for those involved in ICS situations – especially commissioning parents – to be conscious of the need to protect all aspects of the child's identity, so that information about these are preserved for the child so that they can understand the full circumstances of their birth, and gain a full picture of their identity in the future at an age where they are ready or wish to do so. Sometimes, commissioning parents will be acutely conscious of this need, for example the commissioning parents in *Ellison* were observed to have given considerable thought to the children's future welfare and needs, including identity and culture (*Ellison*, 2012: at [122]). However, this is not always the case, and there is a need to build better awareness among persons involved in ICS of the need to preserve the child's identity and the many quite straightforward steps which can be taken in this respect.

Correspondingly, whether the State also has a corresponding duty to take steps to assist the child to preserve their identity in ICS situations is a relevant question. Note that art 8(2) of the CRC states that:

> '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 this regard, Hodgkin and Newell generally note that "appropriate assistance" could include (among other things):

> 'making available genetic profiling to establish parentage; […] ensuring that any changes to a child's identity, such as name, nationality, parental rights of custody etc., are officially recorded; enabling children to have access to the professional files maintained on them.' (Hodgkin and Newell, 2007: 117).

The role that the State may play – or is arguably under a duty to play – in preserving the child's identity in ICS situations is a complex one, requiring future consideration outside of the scope of this paper (and one which the author intends to explore comprehensively in the course of her current doctoral study).

Finally in relation to the child's rights connected to identity, it is necessary to acknowledge that in ICS situations, given the reality that gametes or embryos from anonymous donors are sometimes used, it will not always be possible for all aspects of the child's identity to be preserved, in instances where no system is in place to facilitate future contact between donors and children born. Consequently, in situations where anonymous genetic material is used, information relating to the child's genetic history, cultural heritage and "mother tongue" flowing from a genetic parent or parents may never be able to be established. Similarly, in instances where a surrogate mother acts anonymously and information about her is not recorded and provided to the commissioning parents, or safeguarded for the child to be able to directly access later in life of their own accord, information tied to the child's biological carrier (who will sometimes also be the child's genetic mother) will again be aspects of the child's identity which will fail to be preserved. The lack of preservation of this kind of identity related information could have implications for the child as they grow up and develop their capacity to understand the circumstances of their conception and birth. It is a natural part of development as a person to ask "who am I?", and without all aspects of identity information being made available, the child's right to preservation of identity in ICS situations may be difficult to fully realise, even beyond reach of the State. At a practical level, arguably the most powerful role to be played in protection of this kind of information is by private providers of fertility and surrogacy services, as a first line of enforcement, given they are most likely to be the party facilitating contact with all primary parties to an ICS arrangement. However, the status quo is that there are differing levels of attention and understanding towards these issues, and they are not usually made a central priority in ICS in places such as India and Thailand. To give effect to art 8 of the CRC in the ICS context, national regulatory and protection frameworks – or an international regulatory and protection framework – could helpfully establish such requirements and obligations for collection and retention of information identity by private actors. Under such frameworks, state actors could usefully play a role in storing and protecting such information. The corollary to this would be state actors facilitat-

ing access to this information, analogous to systems in place around the world aimed at safeguarding and facilitating access to information relating to donor conceived children (for example, in the New Zealand context see Part 3 of the Human Assisted Reproductive Technology Act 2004).

5.1.2 Nationality

Identity and nationality are closely linked, and in situations where a child's right to nationality is not upheld and given effect to, this will likely have an impact on their right to identity. Indeed, as observed above, art 8(1) of the CRC expresses nationality as an explicit key element of the child's right to preservation of his or her identity. The central importance of nationality to a human's dignity and worth is illustrated in instances of ICS where a child's nationality is not established, as has been the case in many ICS arrangements to date, triggering a myriad of challenges to the rights of the child (for example, see *Baby Manji Yamada v. Union of India & ANR*, *Jan Balaz v Anand Municipality*, and *Re an application by KR and DGR to adopt a female child*. As art 7(1) of the CRC makes clear, the child is entitled from birth to the right to acquire a nationality. This right is also recognised by art 24(3) of the ICCPR.

Despite the importance for the child of enjoying their right to nationality from birth, in practice, the issue of nationality is often one of the thorniest in ICS situations. It is often one of the first issues relating to a child's rights presenting as a challenging to give effect to in ICS arrangements. This is due to the practical nature of the concept of nationality, in that it triggers other protections, such as citizenship, the right to freedom of movement (art 13, UDHR) and the right to return and leave one's country of nationality (art 12, ICCPR), and the ability to hold a travel document issued by the corresponding state of nationality. One thing that can be said to be archetypal about ICS arrangements is that the commissioning parents intend for the child that is born through the arrangement to travel back to their home state with them following the child's birth. Nationality and a valid travel document which enables the child to travel across borders and enter the commissioning parents' home state are the keys to this (or in the absence of nationality, as has been seen in practice, the requirement for a valid temporary visa to allow the child to reside in the home State of the commissioning parents). However, in ICS situations, it may be difficult, due to the complex nature of the child's birth situation, and largely conflicting national laws related to legal parentage and nationality, to establish the child's nationality in any straightforward way, and therefore the child may not be able to travel with the commissioning parents as they had planned.

This practical issue, which is entwined with the child's right to nationality – and by extension – preservation of identity, has recently been playing out in relation to a number of children born in Thailand to surrogate mothers through surrogacy arrangements undertaken by Israeli commissioning parents.

Under Thai law, such a child is viewed as the child of the Thai surrogate mother, and therefore a holder of the Thai nationality. As a result, the surrogate mother is recognised as having full parental rights in relation to the child. (Goldman, 2014: The Times of Israel, online). In the face of this, the children born through these arrangements were not recognised as Israeli nationals and therefore refused Israeli passports, unable to return to Israel with their commissioning parents. This situation was resolved in early February 2014 through a diplomatic agreement between the Israeli and Thai governments, whereby an Israeli passport will be issued to the child if the surrogate mother signs a letter stating she is relinquishing the child, and this is delivered to the Israeli embassy in Thailand (Carr, 2014: Bionews, online).

Whilst an ad-hoc diplomatic solution was able to be reached in the Israel-Thailand situation described above, and in that situation, the children involved did acquire the nationality of their surrogate mother from birth, the upshot of a complete lack of nationality, where all relevant states refuse to recognise a child born through ICS as a national, is that the child's right to acquire nationality from birth and to hold nationality in an on-going manner is violated. As Harland notes:

> 'It is not just as a result of the lack of parental status of the intended parents, but the child not being entitled to the nationality of the surrogate. India and Ukraine are examples of this.' (Harland, 2013: 3).

Such a child is effectively rendered stateless until a point in time that they are recognised as holding the nationality of a particular state. These issues, including statelessness, have come into play in widely reported cases such as *Baby Manji Yamada v Union of India & ANR*, and *Jan Balaz v Union of India*. However, the CRC makes clear the obligations of the state in this respect. Art 7(1) of the CRC establishes that States Parties shall ensure the implementation of the child's right to nationality "in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless." In practice however, ICS is a relatively new issue confronting states (both ICS "demand" and "supply" states), which are still grappling to decide what approach they will take in response to issues such as nationality of children born through ICS. This can trigger unfortunate impacts on the child's ability to enjoy their rights, and in extreme situations the outcome for the child is statelessness.

5.2 The right of the child to grow up in a family environment

It would seem safe to say, that in the majority of ICS situations, commissioning parents are fully committed to providing a family environment for the child that they have gone to great lengths to have in their lives, and which they

plan to provide with an upbringing characterised by love and happiness. In such situations, it is arguable that a surrogacy arrangement is built much more on love than money. Indeed, the preamble to the CRC recognises that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment". Art 7(1) of the CRC develops this notion further, specifying that the child has "as far as possible, the right to know and be cared for by his or her parents". Other provisions of the Convention emphasise and reinforce the importance of the child's right to grow up in a family environment (for example, arts 5, 10, 19, 20). In the context of international surrogacy, Harland asserts that:

> 'It is in a child's best interest for the reality of child's (sic) family life to be legally recognised. Children's human rights are entwined, bound up with the human rights of their parents.' (Harland, 2013: 3)

Despite recognition that it is most likely that commissioning parents enter into ICS arrangements with positive intentions in relation to the eventual child, the possibility of persons entering into ICS arrangements with more untoward intentions cannot be completely ruled out and must be guarded against. The notorious Baby 101 surrogacy and human and child trafficking ring, exposed in 2011 (BBC, 2011: online) demonstrates human rights violations that can be effected under the guise of international surrogacy. Cases such as this can bring many of the child's rights – far beyond the right to grow up in a family environment – under threat, as well the rights of women. Such cases will, however, most likely be exceptional in the global context of ICS. To consider a less extreme situation that may endanger the child's right to grow up in a family environment – but a situation that cannot be ruled out in any ICS arrangement – is the situation which can arise when no potential "parent" to the child assumes responsibility for caring for the child deserves consideration. Such a situation can arise when the commissioning parents renege on the ICS arrangement, the surrogate mother does not wish to care for the child or is anonymous and cannot be traced, and the genetic parents, if they are separate to the commissioning parents and surrogate, also reject being responsible for the child or are anonymous and untraceable. Such circumstances will challenge the child's ability to enjoy their right to grow up in a family environment, triggering art 20 of the CRC. It will then likely fall to the State to ensure alternative care of the child (art 20(2)) and to provide him or her with special protection and assistance (art 20(1)). In ICS cases, which state should bear such responsibility is likely to present a conundrum, and is again an issue worthy of benefitting from future consideration and analysis.

5.3 The rights of the child to health, education and social security

Following on from the types of situations discussed above, whereby a child born through ICS may be left "parentless", it is important to briefly mention that the child's social and economic rights, such as those to health and health care services, education and social security may be threatened. Other commentators note that the child's entitlement to child support and inheritance may also be precarious (Gamble, 2013: Online). This is because the child's rights in relation to social and economic services often flow from or are tied to a person being recognised as the child's parent, or from their status as citizens of a particular state (Harland, 2013: 4). Therefore, without the recognition of legal parentage (and nationality and citizenship, where these are lacking), these rights of the child may be placed in jeopardy.

Difficulties may also arise for a child in this respect who is born through ICS even if, for example, the child's commissioning parents assume care for the child and the child is able to return with them to their home State without a legal parent-child relationship being established; the child may well remain in a protection vacuum regarding some of their economic and social rights. These issues have been well traversed, for example, in the long-running case of *Mennesson v France* (which has been taken to the European Court of Human Rights and is pending). The social and economic rights of the child are crucial for commissioning parents to consider prior to entering into ICS arrangements, in order to be informed as to what the practical implications of the child being born through ICS may lead to, and to make decisions which could help prevent the child potentially being disadvantaged in future. Similarly, states need to engage in further consideration as to how a child born through ICS is viewed under their domestic legislation and policy in relation to the realisation of their social and economic rights, fulfilling their obligations under international human rights law, as they will, sooner rather than later, likely be confronted with these issues as ICS grows.

6 International approaches to the rights of the child in international commercial surrogacy situations

So far, this paper has traversed some of the ethical issues related to ICS, as well as examining the potential clash of rights and interests between the parties to ICS. It has examined aspects of the ethical, economic and human rights framework relevant to ICS, particularly the rights of the child most at risk of violation in ICS arrangements. Set against the context of this ethical and legal framework, and in the absence of any international agreement on ICS, this section provides a high-level overview of some of the different approaches being taken in response to ICS internationally, with a specific focus on examination of how and to what extent they relate to the rights of the child. This

discussion limits its reference to a focus on the responses taken by three Commonwealth nations/common law jurisdictions which can all be characterised as "demand" States in the international market of ICS: New Zealand, Australia and the United Kingdom. However, the discussion could of course be extended in the future to a wider sample of states, to provide a more global assessment of international approaches in response to ICS relating to the rights of the child.

This section is divided into two subparts; the first looks at the rise of national guidelines or government guidance (in these national jurisdictions) as a quasi-policy response to ICS, and the second provides a high-level analysis of aspects of judicial decision-making about the rights of the child in ICS case law.

6.1 The rise of "national guidelines" or government guidance as a response to international surrogacy: aspects relating to the rights of the child

As a response to international surrogacy, demand States have, over recent years, begun to take what can be viewed as a quasi-policy approach through the issuing of national guidelines or government guidance. These are published on government domain internet pages. The general purpose of such guidance is twofold. One national purpose is to provide citizens or residents of the State with information about aspects of undertaking an ICS arrangement as they relate to national law and policy. This information is relevant before, during, and after an ICS arrangement is undertaken. The second purpose is to highlight the various risks and potential pitfalls inherent in ICS arrangements, information which is of most relevance prior to embarking on an ICS arrangement. It should be noted that although this section limits its analysis to guidance of this nature from Australia, New Zealand and the United Kingdom, these are not the only states to have issued such guidance. Ireland issued guidance in 2012 (Department of Justice and Equality, Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children Born as a Result of Surrogacy), and India provides an example of an ICS supply State that has gone some way towards providing guidance attempting to regulate aspects of the practice of ICS (Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India; Ministry of Home Affairs Government of India, Statement on Surrogacy, 2013). Australia, New Zealand and the United Kingdom have all taken slightly different approaches in issuing this guidance. Positively, each piece of guidance includes aspects relating to the rights of the child, however, they differ in the extent to which this is made a focus of or emphasised by the guidance. It is important to note that these pieces of guidance all relate to international surrogacy generally, thus including both international commercial surrogacy and altruistic international surrogacy.

6.1.1 New Zealand: International Surrogacy Information Sheets and Non-binding Ministerial guidelines

New Zealand was the first of these three States to publish this kind of information and advice, with the publication of the International Surrogacy Information Sheet (including Non-binding guidelines) in June 2011. This reflects a proactive approach in the absence of any explicit national legislation or policy regulating international surrogacy (of any kind). It can also be seen as a response to the fact that Child, Youth and Family, the service line of the Ministry of Social Development responsible for child welfare and protection and family support, had not heard of an international surrogacy case before 2010, but by August 2011 had received 63 enquiries from people in New Zealand exploring international surrogacy (Dastgheib, 2011: Dominion Post, online). The Information Sheet and Non-binding guidelines are jointly published by Child, Youth and Family, Internal Affairs, and Immigration New Zealand. A stated aim of the Information Sheet is to outline "some of the key issues for New Zealanders thinking about international surrogacy", and urges New Zealanders to seek independent legal advice prior to embarking on any international surrogacy process, along with advice to contact relevant government departments.

The New Zealand Information Sheet has a strong focus on the rights of the child, making clear that New Zealand law applies in international surrogacy situations concerning New Zealand citizens or resident commissioning parents. It highlights the need for a legal parent-child relationship and emphasises that without this, commissioning parents do not have any ability to make decisions about the child's needs including medical treatment and schooling (New Zealand Government, 2011: International Surrogacy Information Sheet: 1). The Information Sheet clearly states the requirements regarding New Zealand citizenship and nationality that govern the situation of children born through international surrogacy (p.3). The importance of establishing a family environment for the child is highlighted (p.2), and emphasis is placed on the need to take steps to preserve the child's identity. The key paragraph reads:

> 'According to the United Nations Convention on the Rights of the Child, every child has the right to family relationships and parental guidance, the preservation of identity and access to appropriate information. Therefore, although it may not be required in the jurisdiction where the surrogacy arrangement is made, when an egg or sperm donor is being used you will need to have as much information as possible about the identity of that person available. This information will become very important for the child in the future, should he/she wish to find out more about his or her genetic and/or ethnic identity. It could also be useful in addressing any future medical concerns.' (p. 2)

Furthermore, the Information Sheet states that "all decisions regarding international surrogacy should be made in order to uphold the best interests of

the child." (p.4) The inclusion of this kind of information on the rights of the child is very positive, as it will ideally have the effect of encouraging prospective commissioning parents to consider these kinds of issues and impacts on any future child they may have through international surrogacy, before embarking on any such arrangement, and bearing them in mind if they pursue ICS.

The New Zealand Information Sheet includes as an Annex a set of "Non-binding Ministerial guidelines" which:

> 'Ministers are likely to take into account if and when they are deciding to exercise statutory discretion to issue a visa or grant citizenship for a baby born as the result of a surrogacy arrangement overseas, who would otherwise not be able to enter New Zealand or be granted citizenship' (p. 5)

The Non-binding Guidelines are a set of 11 key factors, all of which can be seen to relate to the rights of the child in some way. However, of particular note are the following inclusions in the guidelines: the Minister may consider "The outcome that is in the best interests of the child" (therefore aligning with art 3 of the CRC); "The nature of the surrogacy arrangement, i.e. is it altruistic or commercial?" (this relates to art 35 of the CRC); "Whether there is a genetic link between at least one of the commissioning persons and the child" (relating to the right of the child to grow up in a family environment, and the art 7 CRC right of the child to know and be cared for by his or her parents); and "Steps taken by the commissioning persons to preserve the child's identity e.g. do the commissioning persons intend to retain information about the child's origins?" (alignment with the child's rights under art 8 of the CRC). Taken together, these factors reinforce the key rights of the child under the CRC which are particularly important in international surrogacy situations. They provide Non-binding guidelines which, if considered, will lead to discretionary ministerial decisions that will likely seek to protect and uphold the rights of the child. The Non-binding guidelines are an innovative approach to seeking to encourage ministerial discretionary decision-makers to consider the rights of a child when faced with complex factual scenarios and the role of making a decision affecting the lives of a number of people, including a potentially vulnerable child.

Finally in relation to New Zealand, in June 2013 the New Zealand government (the same government agencies which published the earlier Information Sheet, plus the Ministry of Foreign Affairs and Trade) published a new, additional information sheet, entitled Information Sheet: International Surrogacy in India. This was published in response to new surrogacy guidelines issued by India for foreign nationals traveling to India for surrogacy (New Zealand Government, Information Sheet: International Surrogacy in India, 2013: 1), and urges that "any individual considering pursuing international surrogacy should exercise extreme caution, seek independent legal advice, and keep up to date with any developments." (p.1) The Information Sheet reproduces

relevant parts of the Indian government direction, which introduces more stringent requirements and conditions applying to international surrogacy in India, requiring foreign nationals travelling to India for surrogacy to hold a medical visa, for which there is a narrower eligibility criteria, and specific conditions must be met before such a visa is granted (p.1). One of the conditions is the provision of a letter from the applicant's home State government, stating that the country recognises surrogacy, and that the child or children born through the surrogacy in India will be permitted entry to that country, "as a biological child/children of the couple commissioning surrogacy". The New Zealand Information Sheet: International Surrogacy in India is absolutely clear that the New Zealand government cannot produce such a letter, due to the fact that commercial surrogacy is prohibited under New Zealand law and New Zealand law does not recognise such a child as the biological child of the commissioning parents (even if one or both are genetically related to the child) (p.2). The Information Sheet states that a letter from the New Zealand government outlining surrogacy law in New Zealand can be requested from the Ministry of Foreign Affairs and Trade. Importantly, this Information Sheet notes that there is no guarantee that an exit visa will be granted for a child born in India through international surrogacy, and that this may leave the child in a highly vulnerable position (the implication being statelessness and violation of his or her associated rights).

6.1.2 Australia: "Fact Sheet 36a on International Surrogacy Arrangements"

The Australian government published its Fact Sheet 36a on International Surrogacy Arrangements in 2012, as a web page of the Department of Immigration and Border Protection. The Fact Sheet outlines Australian law relevant to international surrogacy situations, aiming to inform persons considering commissioning international surrogacy as to the risks involved, and requirements under Australian law. The Fact Sheet urges persons considering international surrogacy to seek independent legal advice prior to starting any process, as well as contacting the Australian immigration office responsible for the country that the surrogacy would take place in.

The Fact Sheet explicitly notes that as a States Party to the CRC and other relevant international conventions, Australia is "committed to protecting the fundamental rights of children" (including preventing the sale or trafficking of children), and that:

> 'Extreme caution is exercised by us in cases involving surrogacy arrangements that are entered into overseas, so as to ensure that Australia's citizenship provisions are not used to circumvent either adoption laws or other child welfare laws.'

The Fact Sheet goes on to highlight specific issues pertaining to the rights of the child, such as the right of the child to nationality and the requirements for a child to be recognised as an Australian citizen and to gain an Australian

passport. Related to this, the impact for a child of not having legal parents recognised in relation to it is mentioned. Such an explicit statement relating to the rights of the child and Australia's international human rights law obligations is to be welcomed. The Fact Sheet specifies the Australian states and territories with legislation making entering into an international commercial surrogacy arrangement a criminal offence, and further states that sponsorship of a child for a visa to enter Australia by a sponsor who has a conviction or an outstanding charge for an offence against a child is not possible (also applicable if the sponsor's spouse or de facto partner falls into such a category). Only limited exceptions will be made, and there must also be "no compelling reason to believe that the grant of the visa would not be in the best interests of the child".

The Australian Fact Sheet is predominantly focused on citizenship and visa issues and laws related to children born through international surrogacy. As such, its focus on the rights of the child is quite limited to nationality and family environment (relating to the child's art 7 rights in the main), as well as the best interests of the child principle (art 3). The Fact Sheet does not focus on issues relating to the preservation of the child's identity, other than the requirements it sets out around DNA testing to establish legal parentage of a child born through international surrogacy.

Connected to the Fact Sheet, in 2013 the Australian Government published a new web page on the Australia High Commission in India's website, relating to the (then) new Indian guidelines introducing the requirement for foreign nationals travelling to India for surrogacy to apply for a medical visa to enter India. Unlike the New Zealand Information Sheet relating to India, the Australian webpage does not reproduce excerpted parts of the Indian guidelines. However, it does include a link to a letter from the Australian Government (undated), which Australian commissioning parents can download and use to support their application for an Indian medical visa, if they are satisfied that they meet the Indian visa requirements. The letter provides information on the position at Australian law related to legal parentage, citizenship, passports and entry visas, as well as specifying the Australian states and territories where it is illegal for residents to enter into an international commercial surrogacy arrangement. The letter does not clearly state that a child born through international surrogacy will be permitted entry to Australia as the biological child of its commissioning parents. Rather, it explains that:

> 'Most states and territories in Australia have legislated to regulate surrogacy arrangements in Australia and have provided for transfer of the legal parentage of children where the surrogacy arrangement meets the requirements set out in legislation'

and that to enter Australia to live, a child born through international surrogacy will have to have Australian citizenship by descent or enter on a permanent visa. Therefore, the letter is surely not guaranteed to be viewed by the Indian

government as meeting the requirements and conditions specified for eligibility for the grant of a medical visa for international surrogacy.

6.1.3 United Kingdom: "Guidance: Surrogacy Overseas"

In early February 2014, the United Kingdom Foreign and Commonwealth Office published online its Guidance on surrogacy overseas. This official guidance is to inform prospective commissioning parents from the UK as to the issues they should be aware of and may encounter through international surrogacy (note that the UK Government Border Agency has also published its own internal guidance for use by entry clearance staff regarding the handling of international surrogacy visa applications made outside the UK). The UK's Guidance: Surrogacy Overseas is a response to the reality that:

> 'British Embassies and High Commissions are dealing with an increasing number of people who are choosing international surrogacy as an alternative route to parenthood, with more and more parents heading to the US, India, Ukraine and Georgia to enter into surrogacy arrangements.'

Indeed, last year the UK judiciary continued to urge the government to take active steps to inform and educate prospective commissioning parents about international surrogacy, with Mrs Justice Theis observing, obiter dicta, that:

> 'The message needs to go out loud and clear to encourage parental order applications to be made in respect of children born as a result of international surrogacy agreements, and for them to be made promptly.' (*J v G* [2013] EWHC 1432 (Fam), at [30])

The UK Guidance provides similar warnings as the Australian and New Zealand guidance, directed at prospective commissioning parents about the risks of international surrogacy, but is more comprehensive in terms of the contextual information it provides. The Guidance makes clear that a genetic link between one of the commissioning parents and any child born through international surrogacy will likely need to be proven for the granting of British nationality to the child. The Guidance cautions in relation to the child's genetic identity that:

> 'Several cases have come to light where there is no genetic link between the intended parents and the child born through a surrogacy arrangement. We recommend that you make sure that you work with a reputable clinic which can satisfy you at an early stage that the child is genetically linked to you.' (United Kingdom Foreign and Commonwealth Office, Guidance: Surrogacy Overseas, 2014: 2).

The Guidance predominantly focuses on legal parentage in relation to children born through international surrogacy, and the steps in relation to nationality, citizenship and visas for the child that commissioning parents will need to take in order to be recognised as a child's legal parent(s). Aligning with art 7 of the CRC, the Guidance specifically discusses how to register a child's birth with a British Embassy overseas in instances where a commissioning parent is able to directly pass on British nationality to a child. Notably, the Guidance itself is very light on content pertaining to any further protection of the rights of the child, with a much stronger emphasis on parental rights. The Guidance makes no mention of the UK's international obligations relating to the rights of the child, nor to the CRC itself or the principle of the best interests of the child. Furthermore, the Guidance includes no mention of any protection measures or requirements which would have the effect of safeguarding a child's right to the preservation of their identity.

However, the Guidance does include an annex entitled "List of documents required when applying for a passport without registration in surrogacy cases" (pp. 7-8), which includes, among other things, mandatory provision of evidence that the commissioning father is the biological father of the child (DNA evidence may be required); a "surrogacy agreement on official headed paper […] signed by all parties and dated"; a witnessed "Document signed by the surrogate mother which confirms that the surrogate mother gives up parental responsibility and custody of the child."; the child's birth certificate as issued by local authorities; "photographs of the commissioning parents and baby from birth to time of application; antenatal medical reports and scans from the surrogacy clinic/hospital covering the entire duration of the pregnancy"; "Letter from the Head Doctor at the surrogacy clinic setting out the details of the case"; marriage certificates of the surrogate if she has been married; and "Identity documents for the surrogate mother, e.g. passports, identity cards, driving licence". The requirement for such documentation may well have a positive impact on upholding and enforcing child's right to identity, if that information is properly safeguarded by the State and/or the commissioning parents, for the child's future access in later in life.

It is worth noting that the UK Guidance does address the issue of international commercial surrogacy slightly more explicitly than the Australian or New Zealand fact and information sheets, alluding to the fact that this may impact on commissioning parent's ability to bring a child born through ICS back to the UK and to be recognised as a legal parent to the child. The Guidance states that:

> 'Although you are entering into a surrogacy arrangement overseas, if you intend to settle in the UK you must comply with UK law. You should be aware that offering commercial brokering services to set up surrogacy arrangements in the UK is illegal. You are allowed to pay reasonable expenses to the surrogate mother. These expenses will be considered by a UK family court when seeking a UK parental order.

> You should bear this in mind when entering into a surrogacy agreement overseas.' (p. 1)

However, the Guidance makes no mention of guarding against the sale or trafficking of children, or the UK's international obligations in this respect.

Information on specific requirements pertaining to international surrogacy in India is incorporated into the body of the Guidance (p.6). A letter from the UK government (dated 01 May 2013) appears as an annex, enabling commissioning parents applying for a medical visa to India to use this in support of their application to the Indian government for entry to the country for the purpose of surrogacy. The letter notes that:

> 'the United Kingdom recognises surrogacy in India so long as it meets the conditions set out by the UK Human Fertilisation and Embryology Act 2008. The Act allows for a child to be treated in law as the child of a couple if the child is genetically related to at least one of the commissioning couple and no money other than reasonably incurred expenses has been paid in respect of the surrogacy arrangement.'

Therefore, the UK makes clear its line in the sand relating to commodification of children and human reproduction. The letter emphasises that due to the varying factual scenarios possible in international surrogacy:

> 'the way that a child born as the result of a surrogacy arrangement through an Indian surrogate mother may be brought into the United Kingdom will depend on individual circumstances.' (p. 11).

The letter concludes by specifying the three possible routes for a child born in India through international surrogacy to UK commissioning parent(s), and the different entry possibilities arising out of each. Although on the face of it, the letter it is unclear whether it reaches the threshold for the condition of supporting material for an Indian medical visa required by the Indian government, it is certainly more comprehensive than that provided by the Australian government to date, and it will arguably make the situation pertaining to the nationality of the child in the UK clearer to the Indian government.

7 Judicial decision-making on the rights of the child in selected reported ICS case law

The above analysis of the various approaches taken across three ICS demand state jurisdictions utilising quasi-policy measures demonstrates the efforts that some states are dedicating to create some level of clarity and certainty as to how they will deal with ICS cases involving their nationals or residents. On the whole these approaches, whilst placing differing levels of attention on

issues pertaining to the rights of the child in ICS, do not yet demonstrate a comprehensive focus on the rights of the child and measures for protection of the child in ICS situations. The New Zealand International Surrogacy Information Sheet (including Non-binding guidelines) currently appears to go the furthest towards taking a child-centred perspective to international surrogacy. In all three national jurisdictions (to a greater extent in some than others), a regulation gap exists in national law and policy with regard to ICS. It seems unlikely that this will be filled whilst an international agreement on international surrogacy is under consideration (see Permanent Bureau of the Hague Conference on Private International Law, Parentage/Surrogacy Project, http://www.hcch.net/index_en.php?act=text.display&tid=178). In the meantime, applications regarding international surrogacy – including ICS – continue to be heard before family courts in all three jurisdictions; as Table 1 illustrates, this trend shows no sign of abating. In the absence of both comprehensive international regulation and clear and harmonious state legislation and policy on ICS, the courts are playing a crucial role in exercising residual protection for the rights of the child in ICS situations.

The ethics and economics of ICS can be distracting and to some extent, irrelevant for courts to consider in reaching decisions related to applications arising out of international surrogacy situations. Whilst ethical and economic considerations provide helpful context for developing judicial reasoning, and indeed, in the area of commodification, useful guidance and frameworks to view ICS through, Henaghan astutely observes that:

> 'In these cases international Family Court Judges need to have the courage to put the overriding principle in family law, namely the welfare and best interests of the child, before the politics of the morality and legality of international surrogacy.' (Henaghan, 2013: 21).

However, the human rights framework is of crucial importance to judicial decision-making related to international surrogacy situations, given the protection standards and norms that it sets down and the international obligations it places on states in regard to the rights of the child. Therefore, in reaching decisions regarding ICS and international surrogacy situations, to what extent are the courts in Australia, New Zealand and the United Kingdom taking an approach that is focused primarily on the rights of the child as identified in this paper as being critical to realising the child's best interests in ICS? The tables below, and associated commentary, seek to provide a brief overview of this, and to highlight gaps where the international human rights framework can be better harnessed in future to ensure protection for the child. For further fact-specific discussion of some of the cases falling within this sample, see Harland, 2013, and Henaghan, 2013.

In terms of the particular child rights issues of central importance in ICS and international surrogacy situations, and therefore important for courts to consider when making a determination in relation to grant of parentage,

parenting or adoption orders, Table 2 below highlights that the courts in all three jurisdictions have been strongly concerned with consideration of the child's best interests and welfare. This demonstrates a high level of application of the best interests of the child as one of the five "principles" of the CRC. Connected to issues of welfare, decisions across the three jurisdictions are also strong on consideration of the child's right to grow up in a family environment. Finally, in relation to the preservation of the child's right to identity, the Australian and United Kingdom courts are particularly conscious of this issue in international surrogacy, as reflected in judgments to date, whilst the New Zealand courts have given less consideration to this issue. However, given the critical importance of this right for children in international surrogacy situations, it would be a positive step for courts to include this as a mandatory consideration when exercising decision-making powers in applications concerning international surrogacy.

Table 2: Frequency of reference to selected child rights issues in international surrogacy related judgements, per jurisdiction, 2008-2014 (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Child rights issues considered in judgment	*Of 31 total decisions, number of judgments referring to issue since 2014*		
	Australia (11 judgments)	*New Zealand (7 judgments)*	*United Kingdom (13 judgments)*
Best interests of the child/welfare	10	7	10
Family environment	11	7	11
Identity (including genetic and cultural heritage)	9	4	9

Table 3 below highlights that courts across the three jurisdictions give very limited explicit weight to the CRC, by way of specific inclusion of reference to the Convention or relevant provisions. Including explicit reference to the Convention would arguably assist in highlighting the importance of the rights of the child and the international legal framework that exists to support, facilitate and protect the rights of the child in international surrogacy situations. Explicit reference to the Convention can serve to assist in strengthening the legal reasoning of judgments in relation to the rights of the child, and aid in bringing a human rights lens to the situation of the child, to deal with the child's individual situation in a more holistic way, with consideration to their upbringing and the possible impacts later in life of their current situation and

circumstances of birth. However, judges may feel that explicit reference to the Convention is unnecessary if the relevant rights-related issues are covered through the use of other language (for example, the Australian judgments are relatively strong on the inclusion of the rights as captured in Table 2 above, yet only one judgment refers explicitly to the CRC), or there may be other reasons for this lack of inclusion, which are not immediately apparent, but which may be interesting to explore further with members of the judiciary.

Table 3: Instances of explicit reference to the UN Convention on the Rights of the Child in international surrogacy related judgments, 2008-2014 (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Of 31 total decisions, number of judgments where explicit reference to "UN Convention on the Rights of the Child" made, 2008-2014		
Australia (11 judgments)	*New Zealand (7 judgments)*	*United Kingdom (13 judgments)*
1	4	0

As discussed earlier in this paper, given the child's inability to put forward their own views in ICS applications coming before national courts and that they lack agency due to their infancy, and due to the potentially clashing rights of the child and other parties involved, it is very important for the child to be independently represented by a trained third party before decision-making bodies that will determine key aspects of the child's future. A lawyer for the child or counsel to assist the court can usefully fill this role. However, Table 4 below highlights that in Australia and the United Kingdom, such representation is the exception not the rule, which is concerning, given the limitations this places on the courts' ability to hear arguments around the best interests and rights of the child. Positively, the New Zealand Family Court appears to be more conscious of the important role to be played by such legal counsel, with over 50% of cases having involved such a representative in relation to the rights and best interests of the child. The divergence between the courts in the three jurisdictions in this respect provides a potential opportunity for the New Zealand Family Court to share best practice with its counterparts in Australia and the UK and to highlight the value of involving such counsel to ensure the child's rights and best interests are appropriately considered. Moreover, it would be interesting to examine whether this aligns with a broader trend in approaches in wider family court matters in each jurisdiction, in relation to the involvement of counsel presenting arguments focusing on the child's position.

Table 4: Instances of decisions relating to international surrogacy where the child's interests represented by lawyer for the child or counsel to assist the court, 2008-2014 (based on all decisions lodged on relevant legal databases up to and including 28 February 2014)

Of 31 total decisions relating to international surrogacy, number of judgments where child's interests represented by lawyer for child or counsel to assist the court, 2008-2014		
Australia (11 judgments)	*New Zealand (7 judgments)*	*United Kingdom (13 judgments)*
2	5	5

Arguably, the above discussion in relation to specific child rights related aspects of judicial decision making in international surrogacy cases to date in Australia, New Zealand and the UK paints a concerning picture. However, to say that this is the whole picture would be inaccurate. The body of jurisprudence across these three jurisdictions to date highlights courts grappling with the novel and complex issues of international surrogacy, with judges placed in the extremely difficult position of considering the situation of children who have been born through highly complicated circumstances, in a different state, yet are before the court and essentially needing to "take children as it finds them" in order to reach decisions (*Ellison*, 2012: at [87]). Yet this is not to say that the contextual background to the child's situation should not have a bearing on judicial decision-making in these kinds of cases. It is highly relevant, and where courts encourage inquires into such matters to be made, the child's rights may be further upheld and able to be enjoyed by the child. Furthermore, the courts in all three jurisdictions have begun to engage with the rights of the child set out by the CRC which are of particular importance in international surrogacy. There is definitely room for development here, with a greater level of consideration and incorporation of reasoning based on the CRC framework of rights and principles highly likely to benefit the children whose situations receive consideration by the courts. In this respect, any efforts by national courts dealing with international surrogacy cases to embrace and apply the "protective shadow" that the CRC casts over children (*Ellison*, 2012: at [84]), through approaches such as human rights reasoning based on the Convention, and the appointment of legal counsel for the child, is to be strongly encouraged and commended.

8 Conclusion: Placing the Child's Rights and Best Interests at the Heart of International Commercial Surrogacy

This paper has highlighted the impact of the growth of conception cross-border and explored the clash of rights that is often difficult to avoid. It has covered some of the ethical and economic considerations of ICS, and put forward the

proposition that the child is the most vulnerable person in ICS situations, with attention needing to be paid to how their rights under the international human rights legal framework are dealt with. The ethical discussion of ICS presented in this paper – explored in the light of the economic realities of ICS – emphasises that the quandary of ICS in relation to children is the value that is accorded to them and the protection that attaches as a result. The discussion demonstrates that simply because there is a commercial element to a transaction does not automatically mean that it is a bad thing – but that the possibility of tainting something not usually commercialised through the process of commodification needs to be guarded against, even in instances of mutually advantageous trades. The somewhat difficult fact of ICS arrangements only being complete when a child is provided to commissioning parents cannot be ignored.

The international human rights law framework pertaining to the child has been shown, therefore, to be a very relevant and helpful tool for focusing on the child and ensuring their protection in ICS. Particular rights – such as those to preservation of identity, nationality, a family environment, and various social and economic rights – are most at risk for children in ICS situations, and their overall best interests in connection to these deserve more comprehensive consideration by those involved in the practice at ICS. There is scope for the "practice of rights", as relevant to the context of ICS, to grow deeper roots and for those involved with ICS at all levels to be conscious that "Exercise, respect, enjoyment and enforcement are four principal dimensions of the practice of rights." (Donnelly, 2013: 8) Professional lines of defence – from consular staff, to social workers, to policy-makers, doctors and judges – can further harness this rights framework to better protect children.

Approaches amongst Australia, New Zealand and the United Kingdom as example "demand" states in relation to ICS show the utilisation of pragmatic, quasi-policy responses seeking to deal with international surrogacy, and to draw lines in the sand around what will be condoned in the absence, in many instances, of clear legislative and policy positions ameliorating residual uncertainty. These approaches have incorporated, to some extent, a child-centred perspective, but more can be done. In the area of judicial decision-making around international surrogacy over the past five years, approaches in all three sample jurisdictions provide a hopeful start towards considering and protecting the rights of the child; especially given the complex factual scenarios arising out of international surrogacy situations sometimes light on factual evidence, and the international regulation lacuna which persists. This body of case law does demonstrate, however, that practical steps, such as the appointment of counsel representing the child, can be more frequently taken and that more rigorous analysis of the child's situation and best interests in light of their CRC rights can be incorporated in future given the value of its protective shadow over children. Future international protection – whether through a Hague convention or other methods such as bilateral agreements between states, or the introduction of standards and agreements relating to the treatment of

parties to ICS, including the child – will contemplate the ethics and economics through the course of their development, and in coming to fruition will ideally place strong focus on the rights and best interests of the child.

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