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

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## 1 FOCUSING ON CHILD RIGHTS IN INTERNATIONAL COMMERCIAL SURROGACY

International Commercial Surrogacy is one of the most complex ways to build a family with children. It is a site of social practice at which profound ethical, moral, philosophical and legal questions converge. As such, ICS has emerged as a 21<sup>st</sup> century human rights challenge. ICS continues around the world in the absence of international agreement concerning the practice from ethical, moral and legal perspectives. It is crucial to acknowledge that ICS as it is currently practised does not place children at the centre of these arrangements, and their rights are often left unprotected in practice.

This doctoral study is the first study to place a comprehensive focus on the children's rights most at risk in ICS, and to do so through a child rights approach under public international human rights law. By focusing on the rights of the child most at risk in ICS, and presenting recommendations for the implementation of the United Nations Convention on the Rights of the Child (CRC) so it can have a holistic, protective effect for children in ICS, this study makes a novel scientific contribution to both international child rights legal scholarship and to international child rights practice. It deepens the focus on children and their rights in ICS, and progresses approaches for the protection of children in ICS, grounded in the standards and norms established by the CRC and other relevant sources of public international human rights law.

Over the course of this study being undertaken<sup>1</sup> and the course of time through which the articles which make up this thesis have been written – and in most cases, published – the practice of ICS has both evolved and functioned in a state of flux. At times, this has posed a challenge for research, given the rapid rate of change occurring world-wide. However, this study has remained dynamic and responsive over the time it has been researched and written, and the findings and recommendations have had and can continue having practical, real-world application, to help improve the contemporary situation of children's rights in ICS internationally. Already, throughout the course of this study being undertaken, its research and findings have at various stages been presented to and taken into consideration by various decision-making

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1 Primarily undertaken between 01 January 2012 and 31 July 2016.

bodies developing national and international approaches to ICS.<sup>2</sup> The continuing relevance of this study is underscored by the author's involvement as a member of the Core Expert Group convened by International Social Service to develop and draft 'Principles for better protection of children's rights in the context of international surrogacy'.<sup>3</sup> Moreover, given the ongoing nature of work regarding international surrogacy amongst international fora and at the domestic level, this doctoral study is timely.

## 2 INTERNATIONAL COMMERCIAL SURROGACY: A COMPLEX METHOD OF FAMILY BUILDING IN A CHANGING LANDSCAPE

The ICS landscape has changed over the course of this study in many respects. This has especially been the case in the less-developed states where ICS supply has emerged over the past decade, which this study has largely been concerned with in relation to the child rights challenges arising. For example, the period during which this study has been undertaken has witnessed the rise of India as a global ICS giant where the ICS market has been allowed to grow rapidly, unregulated, and without any governing legislation.<sup>4</sup> Yet more recently, the Indian government has taken measures aimed at significantly limiting the practice and availability of ICS in India.<sup>5</sup> Also during the course of this study,

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2 E.g. the Parliament of Australia House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (2015); the Staatscommissie herijking ouderschap (Dutch Government Committee on the Reassessment of Parenthood); and the Hague Conference on Private International Law Parentage/Surrogacy project.

3 See: International Social Service, *Call for Action 2016: Urgent need for regulation of international surrogacy and artificial reproductive technologies*, January 2016, available at: <http://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy> (accessed 29 July 2016).

4 The Assisted Reproductive Technology Bill 2008 has been on the Indian parliamentary agenda for nine years but has not been adopted. The Bill has now been reframed as the Surrogacy (Regulation) Bill 2016, and seeks to establish a complete ban on commercial surrogacy in India, meaning foreign citizens will not be able to access ICS in India and Indian citizens will only be able to undertake altruistic surrogacy in India. See A. Tandon, "Rent-a-womb may well become illegal", *The Tribune*, 2 July 2016, available at: <http://www.tribuneindia.com/news/nation/rent-a-womb-may-well-become-illegal/260012.html> (accessed 29 July 2016). For a helpful overview of the ICS situation in India up until 2015, see N. Witzleb and A. Chawla, "Surrogacy in India: Strong Demand, Weak Laws", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights*, (2015), 167-192. For discussion of developments in India concerning ICS 2015-2016, see S. Kusum, "Public interest litigation PIL challenging commercial, overseas, same sex, single surrogacy in India – contemporary legal judicial developments" (2016), available at <http://www.familiesthrusurrogacy.com/wp-content/uploads/2016/05/Indian-Surrogacy-Bill-Background-latest-developments.pdf> (accessed 29 July 2016).

5 The most significant measure has been the directive issued in November 2015 by the Indian Ministry of Home Affairs stating that foreign nationals are not allowed to commission surrogacy in India. See <http://boi.gov.in/content/surrogacy> (accessed 29 July 2016) and

other international supply-side hubs proffering ICS markets have subsequently taken steps to close down the practice within national borders. Thailand is the prime example in this respect, where legislation was passed in 2015 outlawing and criminalising ICS in the country.<sup>6</sup>

Despite this somewhat boom-and-bust nature of the ICS market in some states, another development observed over the course of this doctoral study is the dynamic nature of the global ICS market to continue catering to commissioning parents' ongoing demand for ICS. This is largely based on the actors behind the ICS industry – such as surrogacy clinics, companies and brokers, and medical professionals – remaining agile and responsive to maximise this demand and meet it with ICS supply.<sup>7</sup> In an effort to sustain ICS practice, this responsiveness has been evident in the way these actors have taken advantage of loopholes and gaps in domestic laws and the vacuum persisting at the international level concerning ICS. For example, in response to the Indian government's initial steps to restrict ICS supply,<sup>8</sup> the ICS industry developed a workaround to ensure demand from unmarried and same-sex couples did not go unmet. This involved Indian women who were acting as surrogates crossing the border to Nepal,<sup>9</sup> where (at that time) although acting as a surro-

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Ministry of Health and Family Welfare, "Commissioning of surrogacy – instructions regarding", 4 November 2016, available at: <http://www.dhr.gov.in/latest%20Govt.%20instructions%20on%20ART%20Surrogacy%20Bill.pdf> (accessed 29 July 2016). For discussion, see A. Rabinowitz, "The trouble with renting a womb", *The Guardian*, 28 April 2016, available at: <https://www.theguardian.com/lifeandstyle/2016/apr/28/paying-for-baby-trouble-with-renting-womb-india> (accessed 29 July 2016). Also N.B. the Surrogacy (Regulation) Bill 2016, which would outlaw all commercial surrogacy in India; however, although this Bill was introduced in the Lok Sabha on 21 November 2016, this Bill has not yet been officially passed into law. Consistent with the Bill, the Indian Government is reported to have stated in an affidavit to the Indian Supreme Court in March 2017 that it does not support commercial surrogacy in India. See: "No commercial surrogacy, only for needy Indian couples, Government tells SC", *The Indian Express*, 06 March 2017, <http://indianexpress.com/article/india/india-news-india/govt-to-make-commercial-surrogacy-illegal-panel-to-decide-on-cases-of-infertile-couples/>

- 6 Protection of Children Born from Assisted Reproductive Technologies Act 2015. The law came into effect in July 2015.
- 7 This aspect of the practice of ICS is the subject of social and cultural anthropology doctoral research currently being undertaken by Elo Luik, University of Oxford. Luik's research explores how ICS is responding to attempts to regulate it, and the specific role of intermediaries facilitating ICS.
- 8 The Indian Ministry of Home Affairs did so by issuing a directive restricting ICS in India to foreign married (heterosexual) couples, and requiring foreign citizens seeking ICS in India to apply for medical visas, supported by a letter from their home government that the country recognises surrogacy and that any children born will be permitted entry to that country. See: Ministry of Home Affairs (India), File No.25022/74/2011-F-1. The text of this directive is available at: <http://blog.indiansurrogacylaw.com/india-clarifies-stand-surrogacy-visa-regulation/> (accessed 29 July 2016).
- 9 J. Drennan, "The Future of Wombs for Rent", *Foreign Policy*, 2 March 2015, available at: <http://foreignpolicy.com/2015/03/02/the-future-of-wombs-for-rent/> (accessed 29 July 2016).

gate was deemed an illegal activity for Nepali women, it remained legal for foreign women to act as surrogates within Nepal.<sup>10</sup> Although this meant same-sex couples could initially continue accessing ICS largely on the same basis they would have in India, concern arose regarding the situation of both the surrogates involved and the children born as a result. After some time, the Nepali Supreme Court ruled that ICS should not continue to be undertaken in Nepal; a Cabinet decision to completely ban the practice was adopted in September 2015.<sup>11</sup>

However, ICS supply continues springing up in new places, in response to measures to tighten or ban ICS in some of the less-developed supply-side states. For example, currently a new ICS market has been developing in Cambodia, largely as a result of some Thai and Indian ICS operations relocating there to take advantage of the unclear legal regime governing the practice of surrogacy in Cambodia.<sup>12</sup> Meanwhile, other states such as Georgia continue to quietly cater to the demand of commissioning parents for children through ICS in a largely under-the-radar manner. However, the spotlight is beginning to turn on these ICS supply states, and they will not be able to avoid scrutiny much longer.<sup>13</sup>

Therefore, although the ICS market remains fragile in some ways, in others it continues to thrive and recalibrate, demonstrating its adaptability to new circumstances. This is despite the increased attention from international media over the period this study has taken place, to expose situations of ICS 'gone

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10 As discussed in the UK High Court Family Division case *Re X (Foreign Surrogacy: Child's Name)* [2016] EWHC 1068 (Fam), at [20].

11 See Embassy of the United States, Kathmandu Nepal, "Surrogacy services are banned in Nepal", available at: <http://nepal.usembassy.gov/service/surrogacy-in-nepal.html> (accessed 29 July 2016). For discussion, see R. Abrams, "Nepal Bans Surrogacy, Leaving Couples With Few Low-Cost Options", *The New York Times*, 2 May 2016, available at: [http://www.nytimes.com/2016/05/03/world/asia/nepal-bans-surrogacy-leaving-couples-with-few-low-cost-options.html?\\_r=0](http://www.nytimes.com/2016/05/03/world/asia/nepal-bans-surrogacy-leaving-couples-with-few-low-cost-options.html?_r=0) (accessed 29 July 2016).

12 N. Bhowmick, "After Nepal, Indian surrogacy clinics move to Cambodia", *Al Jazeera*, 28 June 2016, available at: <http://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html> (accessed 29 July 2016). The development of the ICS market in Cambodia has not been without controversy. See B. Sengkong and W. Jackson, "As surrogacy industry expands, legal and ethical issues mulled", *The Phnom Penh Post*, 23 June 2016, available at: <http://www.phnompenhpost.com/national/surrogacy-industry-expands-legal-and-ethical-issues-mulled> (accessed 29 July 2016).

13 E.g. see *End of mission statement of the United Nations Special Rapporteur on the sale of children, child prostitution and child pornography, Maud de Boer-Buquicchio, on her visit to Georgia*, 18 April 2016, in which the Special Rapporteur highlighted comprehensive concerns about the practice of ICS in Georgia, in particular the protection gap surrounding children created through ICS in Georgia and that this places children at risk of being exploited, having their rights and best interests violated.

wrong'. The strongest example of this was the case of baby Gammy in 2014.<sup>14</sup> Gammy was born with Down Syndrome as a twin to his Thai surrogate mother and abandoned in Thailand by his Australian commissioning parents, who returned to Australia with Gammy's twin sister, Pipah. Furthermore, it later came to light that Gammy and Pipah's commissioning father was a convicted child sex offender. Regardless of the international outcry this case engendered, Australia reportedly continues to have the largest number of ICS users (commissioning parents) per capita.<sup>15</sup>

Increased public awareness of the practice of ICS has meant this is a social phenomenon which has gone from relative obscurity to dinner-table discussion in some countries, especially those which are involved in ICS from the supply and demand perspectives and which have been embroiled in ICS controversies as a result. ICS is also now the subject of much legal scholarship and research.<sup>16</sup> However, despite there now being increased attention from scholars towards the child's situation in ICS within this body of scholarship, scholarship focusing closely on the rights of the child from a public international human rights law perspective remains fairly limited.

Furthermore, over the course of this study, government decision-makers and courts in both ICS supply and demand states have been increasingly contending with the challenges and problems arising from the practice, and intervening to resolve ICS situations on a case-by-case basis. In the last three years, as well as steps taken by some supply-side states to tighten their approaches to ICS, some demand-side states have begun explicitly recognising ICS as a human rights challenge with implications for their citizens and residents and for the operation of their national laws and policies. Examples of this are the national inquiries undertaken in The Netherlands<sup>17</sup> and Austra-

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14 The judgment of the Family Court of Western Australia in this matter provides a comprehensive overview of the facts of this case. See: *Farnell & Anor and Chanbua* [2016] FCWA 17, at 8-40. For commentary, see: C. Achmad, "When baby comes last", *The Dominion Post*, 12 August 2014, A7; S. Howard, "Taming the international commercial surrogacy industry", *British Medical Journal*, 23 October 2014, 349.

15 M. Cooper et al (eds.), *Current Issues and Emerging Trends in Medical Tourism*, (2015) at 147.

16 E.g. P. Gerber and O'Byrne, K., *Surrogacy, Law and Human Rights* (2015); Koffeman, N., *Morally Sensitive Issues and Cross-Border Movement in the European Union: The cases of reproductive matters and recognition of same-sex relationships* (2015); Van Beers, B., 'Is Europe 'Giving in to Baby Markets?': Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets', *23:1 Medical Law Review* (2015), 103-134; Wells-Greco, M., *Status of Children Arising from Inter-country Surrogacy Arrangements* (2016).

17 Staatscommissie herijking ouderschap, established 2014. The Staatscommissie reported in December 2016. See *Rapport van de Staatscommissie Herijking ouderschap, Kind en ouders in de 21ste eeuw*, 7 December 2016.

lia<sup>18</sup> concerning ICS, which may lead to new legislative or policy approaches being developed.

At the international level too, ICS is receiving increased recognition as a global problem which must be addressed at the international level, if those it makes vulnerable are to be comprehensively protected. Since 2010, international discussion and work on international surrogacy (including ICS) has been undertaken through the Hague Conference on Private International Law.<sup>19</sup> This work has gradually increased over the past three years in particular, to the point where an international 'Experts' Group on Parentage/Surrogacy' has now been convened, and is discharging a mandate to "explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements."<sup>20</sup> Meanwhile, in the public international law arena, during the course of this study being undertaken the Committee on the Rights of the Child has taken its first steps towards recognising ICS as a child rights challenge and indicating it is on its agenda as a problem in children's rights. Over the past three years, the Committee has made its first comments on the practice of ICS and expressed concern regarding the rights and best interests of children conceived and born as a result of ICS arrangements.<sup>21</sup> These international efforts to contend with and address some of the challenges posed by ICS are now further complemented by the aforementioned international project being undertaken by International Social Service (ISS) and a global group of multidisciplinary experts, to develop principles to protect children in international surrogacy;<sup>22</sup> the author of this doctoral study is a member of the Core Expert Group leading the drafting of these principles with ISS.

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18 Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements, established 2015. The Inquiry reported in May 2016. See: *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements*, tabled 4 May 2016.

19 See: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 29 July 2016).

20 Conclusions and Recommendations of the Council on General Affairs and Policy of the Hague Conference of March 2015, at [5]. The reports of the Expert's Group are available at: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 29 July 2016).

21 In its Concluding observations on the second to fourth periodic reports of Israel, (2013), CRC/C/ISR/CO/2-4, at [33]-[34]; and Concluding observations on the consolidated third and fourth periodic reports of India, (2014), CRC/C/IND/CO/3-4, at [57](d) and [58](d).

22 See Section 1 of this Chapter and for updates on the recent work of the Group, see: <http://www.iss-ssi.org/index.php/en/news1/227-iss-surrogacy-drafting-principles> and <http://www.dsg.univr.it/documenti/Iniziativa/dall/dall983502.pdf>



## 3 A CHILD ALWAYS AT THE CENTRE, BUT OFTEN UNPROTECTED

Despite the changing landscape of the practice of ICS over the course of this study being undertaken, a feature which has remained constant is that ICS arrangements exist to create children, and in doing so, in some instances ICS endangers the rights and best interests of children conceived and born as a result. Indeed, this has been reflected in the caseload of domestic courts and in the regional sphere, the European Court of Human Rights, of matters concerning ICS arrangements and associated implications for children's rights and best interests. Blyth, in his study of the welfare of children conceived through new reproductive technologies, asks "Can bringing children into the world ever be regarded as contrary to their interests?"<sup>23</sup> Although this thesis has not considered this question, it has shown that as new children deliberately brought into existence deliberately through ICS, they can face particular challenges to their rights and best interests, heightening their vulnerability. As a result, and remembering that "in a contemporary context, [the concept of human] dignity underpins the human rights framework",<sup>24</sup> if safeguards to protect their rights and best interests are not established and implemented, ICS presents an affront to the human dignity of children born this way. Therefore, this study has made the case for children conceived and born through ICS as the most vulnerable party to ICS arrangements, and who must be better protected throughout this practice, to ensure their rights and best interests are upheld and given effect to.

The challenge of dealing with situations of ICS is made more complex by the lack of an international regulatory regime governing the practice, the lack of international agreement on how to approach the practice, and the variation amongst national legislation and policy concerning ICS. This can lead to conflict of laws situations when national laws of multiple states are applied to any one ICS arrangement, with no common legal approach between states and no international regime to specifically guide and regulate the practice of ICS. As Chief Justice Susan Denham observed in a landmark surrogacy ruling in the Irish Supreme Court in November 2014, "Any law on surrogacy affects the status and rights of persons, especially children: it creates complex relationships and has a deep social content."<sup>25</sup> Arguably it is because of this effect and the tensions involved in arriving at such laws, that we are left with the unsatisfactory position in many domestic jurisdictions that there is simply no law or policy clarifying the national position on the practice of ICS specifically.

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23 E. Blyth, "To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived Through New Reproductive Technologies", *International Journal of Children's Rights*, (2008), 16(4), at 506.

24 K. Galloway, "Theoretical Approaches to Human Dignity, Human Rights and Surrogacy", in P. Gerber and K. O'Byrne (eds.), *Surrogacy, Law and Human Rights*, (2015), at 25.

25 *M.R. and D.R. (suing by their father and next friend O.R.) & ors v An t-Ard-Chláraitheoir & ors* [2014] IESC 60 (7 November 2014), at [113].

Despite this, the challenges to the rights of children conceived and born through ICS persist and require attention.

#### 4 A FOCUS ON THE CHILD, THE MOST VULNERABLE PERSON IN INTERNATIONAL COMMERCIAL SURROGACY ARRANGEMENTS

Given that ICS is a practice which has emerged and is continuing as a modern method of family formation, this thesis has traversed the most pressing child rights challenges faced by children conceived and born through ICS, such as the risks to their rights to nationality and identity preservation. In doing so, it has proven the hypothesis that children are particularly vulnerable to having their rights endangered by being conceived and born through ICS, especially given the lack of international agreement on and regulation of ICS, and a lack of concerted efforts to uphold the standards and norms of the CRC in ICS arrangements. This study has shown that in general, the fact that the child is often the person in ICS whose rights are most at risk is due to:

- The child's lack of personal agency to advocate for his or her own rights and interests (especially in infancy and early years), and that by the time they can exercise this agency, actions and decisions will have been taken by the adults involved that might have undercut the child's ability to exercise and enjoy some of his or her CRC rights;
- The child's ambiguous legal status when born in many situations of ICS;
- The involvement of multiple parties with potential claims to parenthood in relation to the child and a lack of clear and certain legal parentage;
- The child's birth in a state different to the one that the commissioning parents intend to reside and raise the child in; and
- The overall uncertainty of the child's situation when born through ICS.

By exploring the situation of the child in ICS through a child rights perspective under public international human rights law, this study has placed necessary and comprehensive focus on the child, advanced understanding of the child's rights situation in ICS, and contributed to filling a gap in scholarship. This has been achieved whilst clearly acknowledging throughout the study the existence and importance of the rights and interests of other parties to ICS arrangements, and highlighting these where appropriate in relation to the child's situation. In particular, the human rights situation of surrogate mothers in ICS remains fraught; as SAMA observes, "The entry into surrogacy ushers the surrogates into a process full of challenges and difficulties."<sup>26</sup> Although placing central focus on the child, by remaining conscious of the wider human rights picture in ICS, this study is complementary to scholarship addressing the rights of other parties involved in ICS, such as surrogate mothers.

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26 SAMA, *Birthing a Market: A Study on Commercial Surrogacy*, (2012), at 60.

## 5 A MULTIFACETED CHILD RIGHTS CHALLENGE

This study has shown that the challenge to the rights of children conceived and born through ICS is multifaceted in nature. Chapters Two to Four illustrated that the child's rights and best interests are at risk in a number of ways in ICS and that these rights intersect with the situation, rights and interests of the other core parties to ICS, namely surrogate mothers, commissioning parents and genetic donor parents. Chapter Four demonstrated this complexity through a close examination of the child and their multiple 'mothers' in ICS, giving insight into the fragmented parentage<sup>27</sup> often present in ICS and the problems this can trigger for children born through ICS.

Chapters Five to Eight then built on this contextual underpinning of the study, by presenting a comprehensive picture of the child's rights most at risk when conceived and born through ICS. Chapter Five developed the idea of the child as the central locus of vulnerability in ICS, and assessed jurisprudential trends and non-judicial responses to the contemporary challenge of ICS in selected ICS demand states. Here, this study began exploring more deeply the idea that taking practical measures to protect the child and place their rights and best interests at the heart of ICS is achievable, and that the public international law human rights framework (in particular the CRC) provides a mechanism by which to do so. It also assessed the extent to which the CRC was considered in ICS cases from national courts, drawing on case law from a sample of demand-side jurisdictions.

Following on from this, by contending with the sensitive issue of the preconception and prenatal situation of the child, Chapter Six ensures that this study's treatment of the child's rights situation in ICS is holistic. The central argument put forward in Chapter 6 is that in order for children born through ICS to enjoy and exercise their rights as far as possible post-birth, attention must be given to protecting these rights of the future child during the preconception and prenatal phases of ICS, so the child can exercise and enjoy their rights in the event that he or she is born. A range of actors have a role to play to make this a reality, with their various roles traversed in Chapter Six. The Chapter makes clear that this is not about attributing rights pre-birth, but rather protecting potential rights preconception and pre-birth, so the child is able to claim those rights post-birth.

Chapters Seven and Eight illustrate that although the child's rights are interrelated, indivisible and interdependent in nature,<sup>28</sup> two of the child rights most significantly at risk in ICS are the rights of the child to nationality and

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27 H. Watt, *The Ethics of Pregnancy, Abortion and Childbirth: Exploring Moral Choices in Child-bearing* (2016), at X.

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

to preserve their identity, under Articles 7 and 8 CRC. Key practical solutions proposed in Chapter Seven to uphold the child's right to nationality and prevent statelessness are that a State which is the intended State of residence of a child born through ICS should grant nationality to the child if a genetic link with one commissioning parent is able to be proven and the child would otherwise be stateless; and that in instances of ICS where this does not occur and the child would otherwise be stateless, the child should acquire the nationality of their birth state. As Chapter Eight makes clear, the fundamental bearing that identity can have on a person means that the child's right to identity preservation is one of the most significant and pressing child rights challenges raised by ICS. The main argument advanced in Chapter Eight is that the child's Article 8 CRC right must be proactively and strongly safeguarded in ICS, in particular by commissioning parents, medical professionals, surrogacy clinics and states, in order for children to be able to preserve their genetic, biological, personal narrative and cultural elements of their identity. Through this study's treatment of the child's rights to nationality and identity preservation, the positive lifetime impact of protecting these rights for children is emphasised. Both Chapters provide detailed recommendations to achieve this in practice.

Although this thesis does not include a chapter focusing exclusively on legal parentage, the importance of establishing legal parentage for children born through ICS has been emphasised throughout the study; indeed, the case law analysed in Chapters Three, Four, Five and Nine demonstrates the importance of establishing a legal parent-child relationship for children in ICS. It is important for legal parentage to be established in a timely manner following the birth of the child in ICS; this can have a positive impact on the child's situation both in terms of certainty and stability regarding their care and protection and family environment. However, the process of decision-making to establish the child's legal parentage must consider the best interests of the child, as well as the rights and interests of the multiple potential 'parents' involved, including the surrogate's rights and interests. The ICS case law traversed throughout this study further emphasises the importance of establishing legal parentage for children in ICS, due to the positive impact that this can have on the child's rights to education, health and social security.

Chapter Nine presented a case analysis of the first landmark ICS judgments of the European Court of Human Rights.<sup>29</sup> This served to place the analysis and recommendations of Chapters Seven and Eight in context, given the ECtHR's focus on the child's nationality and identity rights. Furthermore, these cases were important to highlight as part of this thesis, as they prioritise the rights of the children involved and take an approach to balancing of rights

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29 *Mennesson v. France* (App. No.61592/11), judgment of June 26, 2014; *Labassee v. France* (App. No.65941/11), judgment of June 26, 2014.

which protects the children's best interests.<sup>30</sup> However, as noted in the Addendum to Chapter Nine, the approach since taken by the Grand Chamber of the European Court of Human Rights in its first ICS judgment raises questions concerning the Court's approach to children's rights and best interests in ICS cases, and it remains to be seen the extent to which the Court seeks to

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30 N.B. However, as outlined in the Addendum to Chapter Nine, since the time of writing Chapter Nine of this thesis, the Grand Chamber of the European Court of Human Rights has published its first judgment concerning international surrogacy. See: *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgment, 24 January 2017. In this judgment, the Grand Chamber (by a majority of 11:6) reversed the earlier findings of the Court (Second Section). The Grand Chamber held that the measures taken by the Italian authorities (removal of a child from the applicants who shared no genetic link with the child, who was born through a surrogacy arrangement in Russia) had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of children; therefore, these amounted to relevant and sufficient reasons. (see [196]-[199]) With regard to proportionality, the Grand Chamber held that the Italian Courts, by concluding the child would not suffer grave or irreparable harm as a result of his removal from the applicants' care (at [206]) (and also considering the absence of any genetic link between the child and the applicants, and the fact that they had breached Italian domestic adoption and ART laws through their actions), had struck a fair balance between the different interests at stake and within the State's margin of appreciation. (see [200]ff) The Grand Chamber observed that to let the child remain in the care of the applicants would have been tantamount to legalising a situation they had intentionally created in breach of domestic law. (at [215]) Interestingly therefore, through *Paradiso Campanelli v. Italy*, the Grand Chamber has re-emphasised the weight attached to the existence of a genetic link between a child born through international surrogacy and his or her commissioning parent(s) (as was emphasised in both the *Mennesson* and *Labassee* judgments), but it has given new weight to the actions taken by commissioning parents to obtain a child through international surrogacy in violation of the domestic law they circumvent through their actions. The judgment indicates that in such instances, even where an emotional and/or social connection has formed between the applicants and the child, if removal of the child will result in trauma which will not be irreparable, such a course of urgent action will be seen to be justified and proportionate in not only upholding national law and public interest, but also to protect the rights and freedoms of the child (such as their safety and welfare and protection against illicit practices, and the certainty of their legal relationship with their caregivers/parents). Of course, the exact factual matrix of the situation will be determinative to an extent; e.g. in *Paradiso*, the Grand Chamber noted the relatively short duration of the relationship between the child and the applicants as one of the factors taken into account when considering whether or not there was an existence of family life between the child and the applicants. (at [151]-[157]) The joint dissenting judgment of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev is worth noting, especially regarding its consideration of the child's best interests. The dissenting judges stated that in identifying the child's best interests in a particular case, two considerations are crucial, namely that it is in the child's best interests that his or her family ties are maintained, except in cases where the family has proved particularly unfit; and it is in the child's best interests to ensure his or her development in a safe and secure environment. (at [6]) The dissenting judges argued the majority attached too much weight to the need to put an end to an illegal situation and to discourage Italian citizens from circumventing domestic law in foreign jurisdictions, and stated that the Italian Courts had not adequately considered the impact of removal on the child's well-being, nor the impact the irreversible separation would have on the applicants. (at [12])

prioritise the rights of children in future ICS cases, taking into consideration their individual circumstances in contrast to the overall public interests at stake.

Chapter Ten illustrated the importance of rights balancing in ICS, given the conflicting rights and interests of the child with the other core parties to ICS. The importance of rights balancing in ICS has been engaged with throughout the thesis, for example, in Chapters Three, Four, Eight and Nine. Chapter Ten brought these strands together, arguing for rights balancing to take place throughout ICS arrangements on a case-by-case basis, guided overall by the concept of human dignity. This Chapter further argued that especially once a child is born through ICS, the child should be prioritised in actions and decisions in ICS affecting them, to ensure outcomes that are clearly focused on protecting the child's rights and which are consistent with the child's best interests.

Chapter Eleven forms the final chapter of this thesis, serving as an overall conclusion to the doctoral study, placing it in contemporary context and distilling the main findings of the study into a comprehensive framework of recommendations (see Section 6 of this Conclusion). If implemented, these recommendations would serve to protect the child's rights and best interests in ICS, while also guiding the balancing of core parties' rights and interests where these clash in ICS arrangements. The following schematic outlines how the chapters of the thesis connect to the study's research questions, and summarises the main contribution each chapter has made to addressing the research questions.

<i>Ch.</i>	<i>Title</i>	<i>Research question(s)</i>	<i>Main contribution to addressing research question(s)</i>
2	Contextualising a 21 <sup>st</sup> Century Challenge: Part One – Understanding International Commercial Surrogacy and the Parties whose Rights and Interests are at Stake in the Public International Law Context	- Main research question.	Analyses why ICS is a twenty-first century human rights challenge and the parties whose rights and interests are at risk in ICS.
3	Contextualising a 21 <sup>st</sup> Century Challenge: Part Two – Public International Law Human Rights Issues: Why Are the Rights and Interests of Women and Children at Stake in International Commercial Surrogacy	- Main research question; - Sub-question (a); - Sub-question (b); and - Sub-question (d).	Focuses on the rights of children conceived and born through ICS and surrogate mothers in ICS, identifying the main risks to their rights and how women and children in ICS experience some common human rights challenges in ICS.
4	Multiple 'Mothers', Many Requirements for Protection: Children's Rights and the Status of Mothers in the Context of International Commercial Surrogacy	- Main research question; - Sub-question (a); and - Sub-question (d).	Demonstrates the complexity of the mother-child relationship in ICS and presents analysis regarding the balancing of rights and interests of the child with those of his or her multiple 'mothers' in ICS.

<i>Ch.</i>	<i>Title</i>	<i>Research question(s)</i>	<i>Main contribution to addressing research question(s)</i>
5	International Commercial Surrogacy and Children's Rights: Babies, Borders, Responsibilities and Rights	<ul style="list-style-type: none"> <li>- Main research question;</li> <li>- Sub-question (a);</li> <li>- Sub-question (b); and</li> <li>- Sub-question (c).</li> </ul>	Argues the child is the locus of vulnerability in ICS, and analyses how and the extent to which international child rights standards and norms are being utilised in ICS decision-making, and the further scope that exists to do so, to protect and promote children's rights in practice.
6	Unconceived, Unborn, Uncertain: Is Pre-Birth Protection Necessary in International Commercial Surrogacy for Children to Exercise and Enjoy Their Rights Post-Birth?	<ul style="list-style-type: none"> <li>- Main research question; and</li> <li>- Sub-question (a);</li> <li>- Sub-question (b);</li> <li>- Sub-question (c); and</li> <li>- Sub-question (d).</li> </ul>	Argues decisions and actions taken in the preconception, prenatal and post-birth stages of ICS can impact on the rights of the child in ICS, and that in order to preserve the child's ability to exercise and enjoy his or her rights in the event he or she is born through ICS, decisions and actions taken preconception and prenatally should safeguard the child's rights and best interests, but that rights balancing exercises will be necessary.
7	Securing children's right to a nationality in a changing world: the context of International Commercial Surrogacy	<ul style="list-style-type: none"> <li>- Main research question; and</li> <li>- Sub-question (a);</li> <li>- Sub-question (b); and</li> <li>- Sub-question (c).</li> </ul>	Examines how children can become stateless through ICS and argues Art. 7 CRC right to a nationality is one of the children's rights most significantly at risk, but that the CRC and public international human rights law standards provide practical mechanisms which can be implemented to uphold the child's nationality right in ICS.
8	Answering the "Who am I?" Question: Protecting the Right of Children Born Through International Commercial Surrogacy to Preserve Their Identity Under Article 8 of the United Nations Convention on the Rights of the Child	<ul style="list-style-type: none"> <li>- Main research question; and</li> <li>- Sub-question (a);</li> <li>- Sub-question (b); and</li> <li>- Sub-question (c).</li> </ul>	Examines how children face challenges to preserving their identity in ICS and argues Art. 8 CRC right to identity preservation is one of the children's rights most significantly at risk in ICS, but that there are practical steps which can be taken by a range of CRC duty-bearers to uphold Art. 8 for children in ICS.
9	Case Analysis: Children's Rights to the Fore in the European Court of Human Rights' First International Surrogacy Judgments	<ul style="list-style-type: none"> <li>- Main research question; and</li> <li>- Sub-question (a);</li> <li>- Sub-question (c); and</li> <li>- Sub-question (d).</li> </ul>	Case analysis illustrating judicial decision-making considering the child's rights to nationality and identity in ICS, and the importance of the principle of the best interests of the child in decision-making and rights balancing in ICS situations.
10	Multiple Potential Parents But a Child Always at the Centre: Balancing the Rights and Interests of the Parties to International Commercial Surrogacy Arrangements	<ul style="list-style-type: none"> <li>- Main research question; and</li> <li>- Sub-question (c); and</li> <li>- Sub-question (d).</li> </ul>	Exploration of the rights balancing exercises necessary in ICS between the child and other core ICS parties, and between surrogate mothers and commissioning parents; proposes an approach to rights balancing in ICS consistent with the CRC and with broader public international human rights law concepts.

<i>Ch.</i>	<i>Title</i>	<i>Research question(s)</i>	<i>Main contribution to addressing research question(s)</i>
11	Conclusion	<ul style="list-style-type: none"> <li>- Main research question;</li> <li>- Sub-question (c); and</li> <li>- Sub-question (d).</li> </ul>	Demonstrates the role of public international human rights law in protecting and reinforcing the rights of children in ICS (and how the standards and norms of the CRC can be brought to bear in practice), by presenting recommendations proposed as a framework for a General Comment of the Committee on the Rights of the Child on protecting the rights of children in ICS, including how these can be balanced with competing rights and interests of other parties to ICS.

## 6 THE CONVENTION ON THE RIGHTS OF THE CHILD AS THE FRAMEWORK FOR PROMOTING AND PROTECTING THE CHILD'S RIGHTS IN ICS

### 6.1 The role of the CRC in protecting and reinforcing the rights of children in ICS

The main research question of this study sought to explore two things. Firstly, it asked "What is the role of international human rights law (especially the norms and standards established by the CRC) in protecting and reinforcing the rights of children in ICS?" This study has shown that the risks to the child's rights and best interests in ICS amount to a 21<sup>st</sup> century human rights challenge. Moreover, it has been demonstrated that the rights of the child most at risk in ICS require better protection than they are currently receiving, in order for children conceived and born this way to be able to enjoy and exercise their rights. By examining the international human rights standards and norms of particular relevance to the child's situation in ICS – and indeed, the rights which are most at risk in ICS – this study has demonstrated that the CRC provides a strong framework for promoting and protecting the child's rights in ICS. Providing this insight into the foundational importance of public international law human rights norms and standards in this context has highlighted that any approach to ICS at the national and international levels must begin with the rights of the child as the most vulnerable party in ICS. The standards and norms of the CRC and wider public international human rights law provide a platform upon which to develop responses to ICS which are child-centric, balancing the rights and best interests of the child with those of other core parties to ICS. Moreover, a dynamic interpretation of the CRC as a living instrument, in light of ICS as a contemporary development is warranted, to ensure children born through ICS can exercise and enjoy the rights to which they are entitled.



Taken together, these factors have demonstrated that public international human rights legal norms and standards – especially the CRC – have a very important role to play in protecting and reinforcing the rights of children in ICS. In the absence of international agreement concerning ICS nor an agreed international regulatory regime governing ICS practice; and in the face of a divergence of domestic law and policy and persisting child rights challenges arising through ICS, the norms and standards established by the CRC:

- serve to bring the focus of key actors in ICS (including States) onto the child as the person whose rights are most at risk in ICS;
- provide a near-universally agreed framework for human rights protection which can be implemented in practice to protect and reinforce the rights of children in ICS; and
- can guide decisions and actions in ICS, including to resolve contentious situations arising through ICS, thereby functioning as an arbiter and touchstone for child rights protection in ICS.

## 6.2 Understanding and approaching the rights of children in ICS from a public international human rights law, child rights perspective, and balancing competing rights in ICS

The second part of the main research question of this study asked “How should the rights of children involved be understood and approached from a public international human rights law, child rights perspective in relation to the other parties and rights-holders involved in ICS?” Taking a child rights perspective rooted in and informed by the CRC has served to maintain an underlying focus throughout the study on the inherent dignity of the child and their status as rights-holders, entitled to enjoy and exercise their full range of CRC rights, to outcomes consistent with their best interests, and to protection by duty-bearers. This study has shown that public international human rights law – and in particular the CRC – provides a tool which can help to ensure that the competing rights of the core parties to ICS can be navigated and balanced throughout the course of ICS arrangements, consistent with the concept of human dignity, whilst placing primary importance on the child’s rights and best interests. This study has demonstrated that the balance to be struck between competing rights and interests in ICS needs to be considered on a case-by-case basis taking into account the specific circumstances involved, and that the balance to be struck between the parties rights and interests will likely differ depending on at what stage of an ICS arrangement (preconception, prenatal, post-birth) the rights balancing exercise takes place.

Throughout the chapters of this thesis, findings and recommendations have been presented, focusing on how CRC standards and norms can be better harnessed to increase protection of the child’s rights and best interests in ICS. The findings and recommendations developed throughout the course of this

study and presented in the preceding chapters of this thesis provide guidance for promoting and protecting the rights of children in ICS. The findings and recommendations cover both general approaches for promoting and protecting child rights in ICS, as well as providing detailed guidance for implementing protection of the child's rights most at risk in ICS and balancing the child's rights with the rights and interests of other rights-holders in ICS. Where relevant, the findings and recommendations specify which of the core parties and wider actors involved in ICS should bear responsibility for implementation and protection measures.

Taken together, the 40 recommendations which can be distilled from this doctoral study are presented below in this Conclusion, in the form of a proposed framework for a Committee on the Rights of the Child General Comment on protecting and promoting the rights of children in ICS. The recommendations are grouped into four main categories:

- Overarching recommendations to promote and protect the rights of children in ICS;
- Safeguarding the rights of future children before conception and birth in ICS;
- Protecting the child's rights once born through ICS; and
- Balancing rights and interests in ICS.

It is noted that some of the recommendations proposed go beyond what may be politically palatable to States in the context of ICS. However, the recommendations are intended to indicate practical steps to leverage existing public international law child rights standards and norms which would and could have a protective effect on the rights of the child in ICS if implemented, as well as minimising harm to children and their rights in the continuing practice of ICS. Some of the recommendations can be implemented on an immediate time-scale, and others over a longer time horizon, dependent on increased international agreement concerning ICS. Following the framework of recommendations set out below, Section 6.3 of this Conclusion outlines the rationale for why a General Comment would help to protect and reinforce children's rights in ICS and why a General Comment is a sound and useful public international law intervention to make in this context.

Framework of recommendations for promoting and protecting the rights of children in International Commercial Surrogacy  
*(proposed for use as a framework for a General Comment of the United Nations Committee on the Rights of the Child)*

*A. Overarching recommendations to promote and protect the rights of children in International Commercial Surrogacy*

*Taking a child rights approach in ICS*

1. Given the child rights and human rights issues raised by ICS, a public international human rights law perspective, in particular a child rights approach, should guide and be a central feature of any approach addressing ICS at domestic, regional and international levels.
2. All efforts must be taken by the core parties and all actors involved in ICS to ensure that when ICS arrangements occur, they are child-centric, meaning that the child's rights, best interests and human dignity are promoted and protected.
3. The standards and norms established by the United Nations Convention on the Rights of the Child (CRC) must be comprehensively observed and implemented throughout the course of all ICS arrangements. In the absence of international agreement concerning ICS and/or international regulation of ICS, the CRC should guide all decisions relating to ICS, both at a general level and in relation to specific ICS arrangements.
4. The Committee on the Rights of the Child should require all CRC States Parties to report on the treatment of children in ICS in their jurisdiction as part of their periodic reporting obligation under the CRC.
5. In the long-term, States should develop domestic legal frameworks addressing ICS; work in cooperation to reach international agreement on ICS; and develop an international regulatory framework to govern any future practice of ICS. These should be grounded in international child rights standards and norms, to ensure the child's rights and best interests are paramount in ICS. This may necessitate the prohibition under law of some current aspects of the practice of ICS, for example, the use of anonymous gametes.

*Guarding against sale and trafficking of children in ICS*

6. Any new legislative or policy approaches concerning ICS at the domestic, regional and international levels should reflect and reinforce the international human rights norm that no child should be bought or sold.
7. All CRC States Parties and states involved in ICS in any way must remain alert to the potential of the trafficking and sale of children through ICS. As a first step, states should review their child trafficking and sale prevention and detection measures and systems, to ensure they safeguard children born through ICS from being trafficked and/or sold.

*The impact of domestic legislation on children in ICS*

8. Courts and governments should ensure that where changes to laws impacting on ICS are introduced, these changes are undertaken in a manner that does not negatively impact on the rights and best interests of children already born through ICS in the affected jurisdiction, or the rights and best interests of future children already conceived in that jurisdiction through ICS.
9. Governments should make public in a transparent and timely manner any changes to laws impacting on ICS arrangements, or changes to government positions regarding ICS (both in their own and other states), so that prospective commissioning parents can be advised as early as possible of any impact of these changes on future or existing children born through ICS. One possible method of making this information available is via regularly updated fact-sheets on government websites.
10. States involved in ICS should advise each other in a transparent and timely manner of any changes to the legal status of ICS in their territory. States receiving this information should communicate this publicly through channels that will reach prospective commissioning parents who are citizens or residents in their jurisdiction, to provide them with as much certainty and clarity as possible to make informed decisions about ICS.

*B. Safeguarding the rights of future children before conception and birth in ICS*

11. The CRC should be applied by all core parties and ICS actors before a child is conceived and before a child is born in ICS, to take an *in eventum* approach to preserve the future child's ability to enjoy and exercise their CRC rights once born. Taking such an approach in ICS is not attributing rights before birth, but rather can have a protective lifetime impact on the child in the event that they are born. It is consistent with the principles of human dignity and the best interests of the child.
12. CRC States Parties should implement key safeguards to encourage an *in eventum* approach to protecting the future child's rights in ICS at the pre-conception and pre-natal stages, namely:
  - 12.1 Educate medical professionals, legal advisors and prospective commissioning parents about the CRC rights most at risk for children in ICS as a result of preconception and prenatal actions and decisions, and how they can take decisions and act to uphold these rights for a future child; and
  - 12.2 Develop, establish, implement and monitor professional codes of practice/best practice guidance applying to processes used in ICS (including those in medical clinical settings) which raise preconception and prenatal risks to the future child's rights and best interests, particularly their rights under Articles 7 and 8 CRC.
13. In every ICS arrangement, from the time a pregnancy is confirmed, the intended state of birth (that is, the ICS supply-side state) should appoint an independent guardian for the future child.
  - 13.1 The guardian should have the mandate to represent the future child's rights and best interests, to ensure these are taken into account, advocated for

and are a central focus of the actions and decision-making processes of the adult parties to ICS during the prenatal phase; and

13.2 The guardian's mandate should remain in place until either:

- a) the child's legal parentage is established; or
- b) until after the child's legal parentage is established and a post-parentage monitoring period is concluded, and the child's rights and best interests are assessed as being protected to the satisfaction of the relevant authorities or court.

*C. Protecting the child's rights once born through ICS*

*Decision-making by commissioning parents*

14. When making decisions and taking actions in ICS that will affect the child (or the future child once he or she is born), commissioning parents should ensure that the child's actual or future best interests guide any decision that will affect him or her.

*The child's right to non-discrimination*

15. Children born through ICS must not be subjected to discrimination on the basis of their birth status (i.e. their conception and birth through ICS), or any other prohibited grounds of discrimination, such as disability, sex and the status of their parents.

15.1 Children born through ICS with a mental or physical disability are entitled to conditions ensuring dignity, and which promote self-reliance and facilitate the child's active participation in the community.

*The child's right to nationality*

16. Children born through ICS must be able to acquire a nationality from birth. Any grant of nationality to a child born through ICS must be made in a non-discriminatory manner and in accordance with the child's best interests.
17. The United Nations High Commissioner for Human Rights, in cooperation with the Committee on the Rights of the Child, should issue non-binding guidance to States to apply to children in ICS situations who would otherwise be stateless, reflecting the following clauses:
  - 17.1 A State which is the intended State of a child's residence will, either prior to the birth of that child through ICS or as soon as possible following birth, grant nationality to the child if he or she would otherwise be stateless, as long as a genetic link between the child and one of his or her 'commissioning parents' is proved.
  - 17.1.2 In order to ensure that the child is able to acquire nationality as soon as possible after birth through ICS, DNA testing will be made available immediately following the child's birth.

- 17.2 States will grant nationality to an otherwise stateless child born on their territory through ICS. The child should be assumed to be stateless if he or she:
- a) has no genetic link to either of their 'commissioning parents' on the basis of DNA testing; or
  - b) is abandoned pre- or post-birth by their 'commissioning parents' in the territory of the birth State, regardless of whether or not he or she has a genetic link to his or her 'commissioning parents'.

*Decision-making to determine legal parentage*

18. Decisions determining the legal parentage of a child born through ICS should be made in as timely a manner as possible, to provide the child with certain and secure legal and family status, and protect their rights to education, health and social security.
19. Decision-making concerning the child's legal parentage in ICS should:
  - a) treat the child's best interests and rights as paramount;
  - b) consider the rights and interests of the child's multiple potential 'mothers'; and
  - c) be consistent with the child's right to preserve the genetic, biological (birth) and social elements of their identity.

*The child's right to know and be cared for by their parents and to grow up in a family environment*

20. All children born through ICS should:
  - a) be able to know all those people who may be interpreted as their 'parents' in some respect (genetic; biological (surrogate); social);
  - b) be cared for by the people determined at law to be their legal parents;
  - c) grow up in a family environment, in an atmosphere of happiness, love and understanding, directed towards the full and harmonious development of their personality; and
  - d) be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person whose care they are in.

*The child's right to preserve their identity*

21. Children conceived and born through ICS must be able to enjoy and exercise their right to preserve their identity, including the genetic and biological elements of identity.
22. All states should outlaw the use of gametes and embryos from anonymous donors in ICS arrangements.
23. All states should outlaw the involvement of surrogates who act on an anonymous basis in ICS arrangements.
24. To uphold the child's Article 8 CRC right, commissioning parents should:
  - a) only enter into ICS arrangements involving identifiable gamete and embryo donors, and identifiable surrogates;

- b) only enter into ICS arrangements with medical professionals/surrogacy clinics with systems established and functioning to collect, store and protect information about all elements of the child's identity;
  - c) advocate before and after birth for the preservation of all elements of the child's identity, and wherever possible, take steps to do this themselves;
  - d) once the child is born, support him or her to develop, understand and thereby preserve his or her own identity, for example by sharing identity information with the child or supporting him or her to access identity information, in line with his or her evolving capacities; and
  - e) support the child and provide him or her with opportunities to know, understand and enjoy their ethnic, religious, cultural and linguistic background, including his or her background connected to his or her genetic parentage and biological heritage.
25. To uphold the child's Article 8 CRC right, medical professionals/surrogacy clinics should:
- a) only facilitate ICS arrangements involving the use of gametes and embryos from identifiable donors who agree to be contacted by the future child;
  - b) only facilitate ICS arrangements involving identifiable surrogates (acting non-anonymously) who agree to be contacted by the future child;
  - c) collect, store and facilitate the child's access to specific information<sup>1</sup> about his or her genetic parents and birth mother (surrogate);
  - d) create, store and facilitate the child's access to a formal record of the particulars and circumstances of the child's birth;<sup>2</sup> and
  - e) compile the information specified under 25(c) and (d) in an identity dossier for the child, and provide a copy to the child's commissioning parents as soon as practicable following the child's birth; and store a copy in perpetuity (or until such time that it is accessed by the child) at the surrogacy clinic/by the medical professional overseeing the ICS arrangement.
26. ICS supply-states should take the following steps to uphold the child's Article 7 and 8 CRC rights:
- a) legislate and implement policy placing a duty on medical professionals and surrogacy clinics to collect, store, protect and facilitate access to identity dossier for children born through ICS, and monitor and enforce the implementation of these requirements;

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1 In relation to the child's genetic parents (gamete/embryo donors), this includes: full name; date of birth; ethnicity and language spoken; current physical address, phone number and email address where available; significant health history (pertaining directly to the donor and regarding their family history); and the age and sex of any pre-existing genetic children. In relation to the child's birth mother (surrogate), this includes: full name; date of birth; ethnicity and language spoken; current physical address, phone number and email address where available; significant health history relating to the term of pregnancy and childbirth, insofar as it could impact the child's health; and any significant health history of pre-existing serious disease or medical condition.

2 Including, but not limited to: place of birth; date and time of birth; full names of every person present at the birth; details of the child's genetic make-up; details of the medical procedures undertaken to conceive the child (e.g. IVF; embryo implantation); and the particulars or a description of the child's health status at birth and in the days immediately following birth.

- b) in cases of children born via the use of anonymous gametes or embryos in ICS, or to an anonymous surrogate, require, at the minimum, that an identity dossier is compiled, stored and protected for the child's access, including all available non-identifying information available about the donor(s) and the surrogate, along with information about the particulars and circumstances of the child's birth;
  - c) require that a copy of each identity dossier pertaining to a child born through ICS is provided to the State itself, for storage in a national, centralised repository system designed for storing and protecting these dossier for future access by the children to which they pertain to;
  - d) actively publicise the existence of the system collecting, storing and facilitating access of children born through ICS to their identity dossier, and facilitate a process whereby donors and surrogates can update their contact details in this system;
  - e) ensure all children born through ICS are registered immediately after birth and issued with a birth certificate following birth, including accurate and complete information as far as possible concerning the child's parentage and particulars of birth, including the names of the child's birth mother and genetic parents; and
  - f) explore whether for children born through ICS with anonymous genetic parents, annotation of birth certificates to reflect this fact would have a protective effect for children, or whether it may have a discriminatory or stigmatising impact on them.
27. In the long-term, it is advisable that States explore the feasibility of cooperating to establish and facilitate an inter-state system to protect identity information in the context of ICS;<sup>3</sup> under such a system, at the same time as the supply-state stores a copy of an identity dossier of a child born in that state, the supply-state should transmit a copy of the identity dossier to a formally designated state-level agency in the demand-state (the home state of the child's commissioning parents). That demand-state agency should receive, store and protect the identity dossier and establish a system facilitating access by the children they pertain to.

*Care and protection of child victims in ICS*

28. In situations where none of the core adult parties to an ICS arrangement take responsibility for the care and protection of the child born through the arrangement, the supply-side state (child's state of birth) and the demand-state (home state of the commissioning parents) should work closely together to reach agreement on where and how the child will receive alternative care; in taking such a decision, both states must act in accordance with their CRC obligations

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3 Similar, e.g., to the system operating between Central Authorities of Contracting States to the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (concluded 29 May 1993, entry into force 1 May 1995) in relation to the transmission of reports between States of Origin and Receiving States under Arts. 15 and 16 of that Convention (pertaining to the identity and background of prospective adoptive parents and prospective adoptable children).



and establish alternative care that is consistent with the child's rights and best interests.

29. Supply and demand states should take all appropriate measures to promote the physical and psychological recovery and social reintegration of any child born through ICS who experiences any form of neglect, exploitation or abuse (for example, children who are trafficked, abused or abandoned through ICS), in an environment fostering the child's health, self-respect and dignity.

*Participation and protection of the child in ICS cases before judicial decision-making bodies*

30. A lawyer for the child should be appointed in all ICS cases coming before courts of law or judicial decision-making bodies,<sup>4</sup> including for children in early infancy;<sup>5</sup> the lawyer for the child should have a mandate to advocate for and represent the child's rights and best interests under the CRC and applicable domestic law. The lawyer for the child should ensure the child can express their views to judicial decision-makers on matters affecting them, in line with the child's evolving capacities.<sup>6</sup>
31. Judicial decision-makers should place the child at the centre of all ICS cases, by:
  - a) taking a holistic and lifetime-outcomes view of the child's situation, in particular paying attention to the care, safety and development of the child, and the enduring stability and sustainability of the relationships which are foundational to the child's on-going care, well-being and identity preservation;
  - b) applying the best interests of the child principle on a case-by-case basis and considering all relevant CRC rights in judicial reasoning; and

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4 Ideally, this lawyer for child should represent the child as an independent party to proceedings, rather than expounding the law on the rights and best interests of the child impartially as a lawyer for child appointed on an independent 'counsel to assist the Court' / *amicus curiae* basis. As a party to proceedings represented by a lawyer, the child would have arguments presented on their behalf. However, in ICS situations this may not be practically feasible given it may not be possible to reach agreement on who would pay the child's legal fees for representation as a party to proceedings (and States may be unwilling to fund the child's legal representation). Therefore, appointing a lawyer for child on an *amicus curiae* basis – but on the understanding that lawyer would advance legal arguments on the child's behalf as an un-represented party to proceedings – may be a more workable approach in practice and State funding may be more accessible on this basis.

5 N.B. The UN Committee on the Rights of the Child observes "By virtue of their relative immaturity, young children are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect their well-being, while taking account of their views and evolving capacities." UN Committee on the Rights of the Child, General Comment no. 7 on implementing child rights in early childhood (2005) at [13]. The Committee urges all States Parties to "make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests". General Comment no. 7 at [13](a).

6 This has also been emphasised by the UN Committee on the Rights of the Child in the context of implementing child rights in early childhood, urging States Parties to ensure that "children [are] heard in all cases [legal proceedings] where they are capable of expressing their opinions or preferences". UN Committee on the Rights of the Child, General Comment no. 7 on implementing child rights in early childhood (2005) at [13](a).

c) reflecting this focus on the child's rights and best interests in written judgments, including giving consideration to how written judgments may be important documents for the child in future to understand how their rights and best interests were treated.

*D. Balancing rights and interests in ICS*

32. Rights balancing is necessary throughout the course of ICS arrangements on a case-by-case basis to balance the competing rights of the core parties to ICS (child, surrogate, commissioning parents); the principles of human dignity and the best interests of the child must guide all rights balancing exercises in ICS.

*The child's best interests*

33. In assessing the child's best interests in ICS, priority should be accorded to the child or future child's rights to: preserve their identity; health; know and be cared for by their parents as far as possible; grow up in a family environment; be free from discrimination; and be free from any form of abuse or exploitation.
34. Assessing the best interests of the child in ICS must be aimed at ensuring the child's full and effective enjoyment of CRC rights and the holistic development of the child. All decision-making which will affect the child should assess continuity and stability of the child's present and future situation.
35. Once a child is born through an ICS arrangement, the child's rights and best interests should be treated as the paramount consideration by all private and public actors, and accorded the most weight in balancing competing rights and interests.

*Balancing the rights and interests of the surrogate with those of the child and commissioning parents*

36. In situations of competing rights in ICS occurring once the child is in utero but before the child is born, the surrogate's health, reproductive autonomy and human dignity must be accorded priority, however, the future child's rights and best interests should be protected wherever possible to safeguard their exercise and enjoyment once born.
37. Despite paragraph 36, in situations where the pregnant surrogate engages in actions or decisions unnecessarily endangering the foetus and therefore, the potential future child (that is, without a medical reason necessitating her action or decision), the balance of rights and interests will generally shift in favour of the commissioning parents and future child.
38. It is important to acknowledge the particular role that a surrogate undertakes in ICS arrangements, carrying the child to term and giving birth to the child, facts which cannot be displaced and which create a biological link to the child regardless of whether the surrogate shares a genetic link to the child or not. These facts should be taken into consideration in any rights balancing exercise in ICS.

*Balancing the rights and interests of genetic donor parents with those of the child*

39. The child's Article 8 and 24 CRC rights should be accorded priority and significant weight in the balancing of competing rights and interests between ICS genetic donor parents and children born through ICS, given the positive lifetime impact of these child rights being protected. Where genetic donor parents' privacy rights conflict with children's identity and health rights in ICS, the balance should weigh in favour of protecting the child's rights.

*Balancing the rights and interests of the commissioning parents with those of the child*

40. In balancing a conflict between the rights and interests of the child and their commissioning parents in ICS, the child's rights and best interests must be treated as the paramount consideration.

### 6.3 Arguments for the Committee on the Rights of the Child to issue a General Comment on the rights of children in International Commercial Surrogacy

As noted earlier in this Chapter, through its statements in some of its recent Concluding Observations, the Committee on the Rights of the Child has already indicated its concern regarding the promotion and protection of the rights of children born through ICS. By issuing a General Comment based on the framework of recommendations presented above, the Committee can send a strong message to CRC duty bearers that as long as ICS continues being practised, the rights and best interests of children conceived and born through ICS can and must be better protected and more assiduously upheld. A General Comment based on this framework is comprehensively rooted in the standards and norms established by the CRC, emphasising the interconnected and interdependent nature of the child's rights in practice in ICS. By explicitly requiring States Parties to report on the treatment of children in ICS in their jurisdiction via their CRC periodic reporting,<sup>31</sup> the Committee will impose a higher level of scrutiny on practices which are inconsistent with child rights.

Crucially, the General Comment can serve as a roadmap for States Parties to guide their implementation of the CRC for the promotion and protection

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31 N.B. The Special Rapporteur on the sale of children, child prostitution and child pornography made the following recommendation in her Study on Illegal Adoptions, appearing as Part III of *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography*, A/HRC/34/55, 22 December 2016, at [99]: "The Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women should request States parties to the Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography to provide information about concerns related to illegal adoptions and international commercial surrogacy arrangements, notably in preparation for the Committee's consideration of periodic reports."

of the rights of children in ICS, taking a holistic view of their rights and balancing them in relation to the other core parties to ICS. The framework of recommendations outlined above makes clear that there are steps which can be taken now, by States, the core parties to ICS and the wider actors involved in ICS, which can have a protective effect on children, without having to wait for international agreement on the practice of ICS. A General Comment built on the framework would likely prove helpful to the work underway at the international level concerning international surrogacy, both under the auspices of the International Social Service and the Hague Conference on Private International Law, and should, therefore, be viewed as complementary to these ongoing international efforts.

While focused squarely on protecting the child in ICS, the framework of recommendations reflects a broad perspective regarding the possible audience to whom they may be helpful. They are intended to be of use in guiding the decisions and actions of all the core parties to ICS (children, surrogates, commissioning parents, genetic donor parents), as well as to the wider actors involved in ICS (for example, medical practitioners, lawyers, surrogacy brokers), and to decision-makers in ICS (for example, State-based actors including social workers, government ministers and judges). Beyond their use as a practical tool to promote, protect and prioritise the child's rights in ICS on a case-by-case basis, the framework of recommendations should also assist policy-makers and legislators at the national and international levels, in future efforts to frame new laws and policies pertaining to ICS.

Of course, the framework of recommendations put forward as a result of this study will, even if incorporated in a Committee on the Rights of the Child General Comment, remain soft law; therefore, it will largely remain a choice for States Parties whether or not and to what extent they implement the recommendations. However, many states directly involved with ICS are currently grappling with the human rights, child rights and protection issues arising from the practice of ICS. For some such states, guidance of this kind from an authoritative body such as the Committee on the Rights of the Child will likely be welcomed given its effect of clarifying how the CRC's standards and norms can be implemented in practice. It may well prove helpful to those states as they seek to determine how they approach ICS at the legislative, policy and case-by-case levels, and how they work in cooperation with other states. By acting consistently with the framework of recommendations in ICS, states will help to foster a culture of understanding and commitment to the protection of the child's rights in ICS amongst the international community of states (States Parties as the principal CRC duty bearers), as well as amongst private actors involved in ICS, most importantly commissioning parents (given their particular role as non-State duty bearers under the CRC).

Indeed, it is important to recall in this respect that CRC States Parties have an obligation to "make the principles and provisions of the Convention widely

known, by appropriate and active means, to adults and children alike.”<sup>32</sup> Given the responsibility of all parents under Article 18(1) CRC to make the best interests of the child their basic concern, commissioning parents will certainly need to play an instrumental role in ensuring children conceived and born through ICS can realise their rights as outlined under the framework recommendations. However, the relationship between States Parties and commissioning parents is symbiotic in this respect. Commissioning parents will need to know about the recommendations and understand the role that they have to play as commissioning parents in protecting the child’s rights and best interests in ICS, in order to be able to actively implement the recommendations to ensure the child is prioritised in actions and decisions concerning them. States Parties can play a significant role in encouraging such action, by promoting the recommendations to commissioning parents.

## 7 ENVISAGING INTERNATIONAL COMMERCIAL SURROGACY ARRANGEMENTS THAT PROTECT THE CHILDREN AT THEIR CENTRE

Taking into account the examination of the child’s rights in ICS presented in this thesis and the protection framework rooted in the CRC which has been proposed, it is possible to discern a minimum ‘ideal state of affairs’ to strive for regarding the child’s rights in ICS, as long as the practice continues. If the recommendation framework proposed above is implemented, this would lead to a minimum ideal state of affairs whereby:

- It is recognised that some child rights risks in ICS begin before conception and birth and that these manifest once the child is born, but can be safeguarded against by taking an *in eventum* approach to protecting child rights in both the pre-conception and prenatal phases of ICS;
- Children born through ICS preserve their identities to the greatest extent possible, as a result of systematic safeguarding of identity information and the avoidance of the use and involvement of anonymous gametes and anonymous surrogates;
- Children born through ICS have a clear and secure child-parent relationship recognised by law at the earliest possible stage;
- Children born through ICS are registered immediately after birth and are able to acquire a nationality;
- All decisions and actions relating to children born through ICS are guided by the principle of the best interests of the child, leading to outcomes for the child consistent with, and giving effect to, their CRC rights;

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32 Art. 42 CRC.

- Children conceived and born through ICS are treated in a manner which is non-discriminatory, regardless of the circumstances of their conception and birth through ICS or any other prohibited grounds of discrimination;
- All states are actively engaged in considering the impact of their laws, policies and practices on the rights of children born through ICS, and whether specific proactive steps need to be taken in order for the child's rights under the CRC to be upheld and safeguarded in the context of ICS; and
- Any legislation, regulation and policy pertaining to ICS is informed by a human rights-based approach, reflecting international human rights standards and norms, with the child's rights and best interests being of foremost importance, balanced with the rights of others in ICS, guided by the concept of human dignity.

## 8 PROSPECTS FOR A LONG-TERM APPROACH TO PROTECTING THE CHILD'S RIGHTS IN INTERNATIONAL COMMERCIAL SURROGACY

In 2012, I stated that

'ICS arrangements tend to be complex given their international dimension and the matter they deal with: human life. Whilst there is a strong argument for international regulation, international agreement remains a distant possibility. This is due to the complexity of the issue, especially the minefield of ethical issues (related, but not limited to, aspects of ICS such as human dignity, commodification of human reproductive functions and bodily matter and commodification of children), and divergent State positions.'<sup>33</sup>

This remains an accurate assessment regarding the prospects for a long-term approach to protecting the child's rights in ICS. The drafting and conclusion of any international instrument governing the practice of ICS will, ideally, need to be informed by comprehensive (and no doubt difficult) discussion at the international level around the larger issues of the value society places on human life, children and human reproduction. Indeed, it is clear from this study and the many cases of ICS which have been analysed, that in part it is because of the lack of international consensus on these matters of public interest in relation to ICS that ICS has become such a problematic practice from a human rights perspective. As part of such discussions preceding any international consensus as to the approach to be taken regarding ICS, further contentious issues will likely require resolution, such as whether ICS constitutes

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33 I first presented this statement in 2012 at the World Social Work and Social Development Conference, 8-12 July 2012. It was later published as: C. Achmad, 'International Commercial Surrogacy: 21st Century Global Families in Transition', in S. Hessele (ed.), *Global Social Transformation and Social Action: The Role of Social Workers*, (2014), 137-146.

the sale of children (noting that the Committee on the Rights of the Child has now stated that ICS can lead to sale, but has not yet gone so far as to say it is sale);<sup>34</sup> whether it is in fact possible to 'buy' a child with whom one shares a genetic link; and whether or not the existence of a genetic link between commissioning parents and children in ICS is a decisive factor in international acceptance or rejection of the practice in the long-term.

Of these contentious issues, it is likely that reaching a definitive view on whether or not ICS is tantamount to the sale of children under international law – regardless of how it is practised – will be the most difficult. This study has not explored the legality or otherwise of ICS; rather, this study has acknowledged the reality of the existence of the practice of ICS and focused on protection and promotion of child rights through envisaging practical implementation of the CRC. However, it has become clear through research undertaken to inform this study that although not all instances of ICS amount to sale of children, in some instances ICS arrangements are being undertaken in ways that fall within the definition of 'sale of children' under public international law.<sup>35</sup> However, whether a specific ICS arrangement amounts to sale of children under public international law depends on the facts of the situation involved, in particular the payment structure of the ICS arrangement in relation to the transfer of the child. More work outside of the scope of this thesis is needed to identify more clearly when and how ICS amounts to the sale of children. This is an issue which the United Nations Special Rapporteur on the sale of children, child prostitution and child pornography should continue focusing on, under her mandate to consider matters relating to the sale of children to analyse the root causes of sale of children, addressing all the contributing factors, especially the demand factor, and to make associated recommendations.<sup>36</sup>

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34 Committee on the Rights of the Child, Concluding observations on the consolidated third and fourth periodic reports of India, (2014), CRC/C/IND/CO/3-4, at [57](d).

35 Art. 2(a), Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, United Nations Treaty Series, vol. 2171, 227.

36 Human Rights Council, Res. 7/13, Mandate of the Special Rapporteur on the sale of children, child, prostitution and child pornography (27 March 2008). N.B. the Special Rapporteur's *Study on surrogacy and sale of children*, A/HRC/37/60, p.3ff. Previously too, the Special Rapporteur has indicated her concern about the practice of ICS; see, e.g. the Rapporteur's *Study on Illegal Adoptions*, appearing as Part III of Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, A/HRC/34/55, 22 December 2016, pp.4-24. Importantly, the Special Rapporteur she has noted that "The international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children and may lead to illegal adoption. Indeed, several countries do not recognize such arrangements and, in order to establish a parent-child relationship, national laws often require parents to legally adopt the child born through international commercial surrogacy." (at [52] of the aforementioned 2016 Report).

Although international consensus on ICS will be difficult to achieve, the now on-going proactive work at the international level to address some of the challenges arising through ICS is a very positive development. The framework of recommendations proposed in this thesis from a child rights perspective could be used to help inform this work insofar as it relates to children in ICS, for example by the Hague Conference Experts' Group on Parentage/Surrogacy. The framework of recommendations could serve as a base document and useful guiding tool to ensure that a human rights approach, with a focus on the person at the centre of all ICS arrangements and most at risk – the child – is a primary consideration, as the Hague Conference Experts' Group continues to explore the feasibility of an international instrument to address ICS.

As work continues concerning possible long-term approaches to ICS, it is also important to bear in mind the observation made by Keyes and Chisholm that efforts to discourage surrogacy could have the effect of driving the practice underground.<sup>37</sup> International policy-makers and legislators must therefore remain conscious of the potential (unintended) consequences which may be triggered if ICS was in future subjected to a global ban, and ensure adequate consideration is directed towards how such consequences may be mitigated. Thought will also need to be given to how states share responsibility regarding ICS; even if a global ban is imposed, ICS will still continue to be practised to some extent. Therefore, states will need to consider how they will cooperate in such instances, especially regarding the protection of the rights of children born this way, who should not be penalised or discriminated against on the basis that they were conceived and born through an illegal practice, something which is beyond their control.

Moreover, international efforts to increase protection and safeguards for those most vulnerable in ICS – especially the child – should be founded on the impetus reflected in the statement by Biggs and Jones that “[u]ntil a dedicated international convention on surrogacy is devised to establish an appropriate framework for inter-jurisdictional cooperation, akin to the Adoption Convention, these vulnerabilities [of the child] will continue.”<sup>38</sup> Based on the findings of this doctoral study, it is also clear that a “differential emphasis [emphasising the rights of children as most vulnerable] seems justifiable

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37 M. Keyes and R. Chisholm, “Commercial Surrogacy – Some Troubling Family Law Issues”, (2013), available at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/flc-submission-professor-mary-keyes-griffith-university-16july2013.pdf> (accessed 29 July 2016), at 37.

38 H. Biggs and C. Jones, ‘Legally Vulnerable: What is Vulnerability and Who is Vulnerable?’, in M. Freeman, S. Hawkes and B. Bennett (eds.), *Law and Global Health: Current Legal Issues* (2014), Vol. 16, at 146. For further discussion regarding prospects for an international convention addressing ICS, see S. Mohapatra, “Adopting an International Convention on Surrogacy – A Lesson From Intercountry Adoption”, (2016) 13 *Loyola International Law Review* 25.



in a global surrogacy context where we need to consider whose vulnerabilities matter most in devising appropriate legal responses and regulation.”<sup>39</sup> This study has demonstrated that a framework exists under international human rights law that should not only be implemented in practice to ensure respect, protection and fulfilment of the child’s rights in ICS, but which should be utilised to inform any new approach to ICS at the domestic and international levels. By focusing on the particular rights of the child and the principles of the CRC most at risk in ICS, a human rights approach can be taken to frame future regulation, legislation and policy at the international and domestic levels in a manner that will prioritise the rights of the child but also benefit all core parties to ICS.

## 9 CONCLUDING REMARKS

Despite Dickensen’s assertion in early 2016 that “The global trade in babies born through commercial surrogacy is slowly being shut down”,<sup>40</sup> children are continuing to be conceived and born through ICS. Given that the technology is now available to make this possible and the fact that globalisation has made the world a much smaller place, and due to the ongoing demand for this method of family-building, ICS looks set to continue to some extent. This is despite the continuing evolution of new methods of family-building grounded in technological and scientific advances, such as the conception of children using DNA from three parents through mitochondrial transfer (now legal in some jurisdictions),<sup>41</sup> and extrauterine foetal incubation of human beings in artificial wombs.<sup>42</sup> Currently, ICS remains a much more accessible alternative method of family-building. Its continued use does not mean that we cannot do more to protect those most at risk in ICS: children. This study has demonstrated that these children are being created through and born into risk-laden

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39 *Ibid.*

40 D. Dickensen, “The End of Cross-Border Surrogacy?”, *Project Syndicate*, 25 February 2016, available at <https://www.project-syndicate.org/commentary/crackdown-on-international-surrogacy-trade-by-donna-dickenson-2016-02> (accessed 29 July 2016).

41 The United Kingdom was the first state in the world to legislate to make this practice legal, via The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015.

42 Children who are born through these methods should also be able to enjoy and exercise their full range of rights under the CRC; some of the child rights issues traversed in this thesis will also arise as child rights challenges in these other new contexts, e.g. the child’s right to preservation of identity when multiple parents are involved (mitochondrial transfer) and when there is no foetal-maternal link through pregnancy and childbirth (artificial wombs). For preliminary discussion of the potential impact of gestation in artificial wombs on children, see J.A. Robertson, ‘Other women’s wombs: uterus transplants and gestational surrogacy’, 3(1) *Journal of Law and the Biosciences* (2016), available at: <https://academic.oup.com/jlb/article/3/1/68/1751311/Other-women-s-wombs-uterus-transplants-and?searchresult=1> (accessed 29 July 2016).

circumstances. At best, many of their CRC rights are jeopardised by virtue of being born through ICS. At worst, they are breached as a result of the circumstances of their conception and birth, through actions and decisions being taken that do not align with what is in their best interests.<sup>43</sup>

This study is unique as it provides an examination of the practice of ICS from a child-centred perspective, using a child rights framework. In doing so, it has demonstrated the important role of public international law human rights standards and norms in addressing this 21<sup>st</sup> century human rights challenge. By translating the CRC's standards and norms into a framework of recommendations, this study presents a practical framework for protecting the child's rights in ICS, something which has not been done before with this focus. Indeed, many of the recommendations can be implemented in a relatively straightforward manner by a range of actors involved in ICS, without needing to wait for new international or domestic regulation of ICS to be established. These recommendations harness existing child rights and international human rights standards and norms to shine a light on the obligations that states, as well as private actors involved in ICS, bear in relation to the children conceived and born through this practice.

By taking up the framework of recommendations in a General Comment on the rights of children in ICS, the Committee on the Rights of the Child would provide guidance that is needed by a range of child rights duty-bearers internationally. Implementing the protection framework devised through this thesis in the face of the on-going regulatory lacunae concerning ICS holds the promise of the CRC's "protective shadow"<sup>44</sup> being cast over this group of children. Granted, some of the recommendations will be more straightforward to implement than others; for example, appointing a guardian for the child in all instances of ICS from the time a pregnancy is confirmed is a measure that states may well be reticent towards, given the administrative and financial resource required. However, the reality is that such a measure is likely to help to reduce conflicts arising in ICS arrangements, which is not only in the future child's interests, but also in the interests of the other core parties to ICS. With a particular focus on the child's rights relating to identity, nationality, parentage and the principles of non-discrimination and best interests under the CRC, and by implementing the framework of recommendations proposed, a minimum ideal state for the child's rights and best interests can be achieved, with children conceived and born through ICS at least having their rights and best interests more routinely considered and better protected.

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43 C. Achmad, "Protecting the Locus of Vulnerability: Preliminary Ideas for Guidance on Protecting the Rights of the Child in International Commercial Surrogacy", in T. Liefwaard and J. Sloth-Nielsen (eds.), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2017).

44 *Ellison v Karnchanit* [2012] Fam CA 602, at [84].

Although this study has delivered on its aims and been successful in answering the research questions established at the outset, there is still much more to be researched and learnt about the long-term impacts for children conceived and born through ICS and their families. To follow-up on the foundation set by this thesis, a major piece of work to be undertaken (by the author, preferably in collaboration with multidisciplinary researchers, and drawing on the experience of those working with children in ICS, such as social work professionals<sup>45</sup>) is to explore the lived experience of children born through ICS.<sup>46</sup> This would examine how children experience their CRC rights and the extent to which the actions and decisions taken preconception, pre-birth and post-birth in relation to their creation through ICS impacts on their enjoyment and exercise of their CRC rights. Such a research project could most usefully focus on issues relating to identity preservation, family environment, health, ethnic and cultural background and commodification. Ideally, the research would concurrently focus on the experiences of children born through altruistic surrogacy, to provide a comparative perspective. To take a child participatory approach so that the perspectives and voices of children conceived and born through ICS fully inform this future research project, it would preferably take an empirical research methodology, via a longitudinal study with a group of children born through ICS, benchmarked against the core rights at risk in ICS. This would enable the mapping of the impact on specific child rights in practice. Such research would have the aim of examining the children's lived experiences in line with their evolving capacities as they grow older, to build a picture and understanding of their enjoyment and exercise of rights. However, the sensitivities and ethical challenges involved in such a research project are acknowledged as likely being difficult to surmount, especially in relation to issues such as identity and commodification.

Other pieces of work identified through the course of this doctoral study as being ripe for further exploration from a child rights perspective are:

- Analysis and research regarding whether or not ICS definitively amounts to the sale of children;
- Research into the situation of children abandoned following birth through ICS in their state of birth. Little is known about this group of children, and it would be helpful to explore issues such as whether they are recognised as existing under national systems; more generally the situation of their

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45 The significant insight of social work professionals into the situation of the child in ICS is reflected in K.S. Rotabi et al, "International private law to regulate commercial global surrogacy practices: Just what are social work's practical policy recommendations?", *International Social Work*, 58 (2015) 4.

46 Such a study would be complementary to empirical research already undertaken to develop understanding of the situation of surrogate mothers in ICS (including their relationships with commissioning parents and the children they give birth to through ICS), e.g. A. Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India*, (2014); and A. Majumdar, *Kinship and Relatedness in Commercial Gestational Surrogacy in India*, (2014).

- care and protection following abandonment; and whether responsibility for such children should rest with the supply-side or demand-side state;
- Research into the impacts of ICS on the rights and best interests of the pre-existing children of women who act as surrogates, as well as the rights of genetic siblings of children born through ICS, and whether a global network of ICS siblings will exist as a result of the involvement of gamete donors in multiple ICS arrangements;
  - Research into the weight to be attached to the genetic link between children and their commissioning parent(s) in ICS, and the importance to be attributed to this factor in determining legal parentage for children born through ICS; and
  - Consideration of the likelihood of class actions being taken by ICS children in future against CRC States Parties in domestic jurisdictions and through the CRC complaints procedure,<sup>47</sup> on the basis of arguments such as ‘I should not have been allowed to have been born this way’ and ‘steps should have been taken to protect my identity preservation right so I can understand where I come from and who I am’; and the viability of such claims.

Even if one does not accept that ICS can ever be a child rights-consistent method of family building, this does not displace the fact that while the practice continues, legal obligations exist under the CRC to ensure protection of the rights and best interests of children who are conceived and born this way. Ultimately, ICS presents a global human rights challenge necessitating an internationally agreed approach. To this end, international cooperation mechanisms and initiatives focusing on possible multilateral approaches to ICS should be actively supported.<sup>48</sup> In the long-term, how we choose to approach ICS will reflect the value society places on human life, human reproduction, and children. This study has shown that until such a time that international agreement can be reached on ICS, in the face of its continued practice, it is imperative that we choose to place the child at the heart of ICS. By protecting the child’s rights and upholding their best interests, this will have the wider effect of protecting the rights of other vulnerable parties (such as surrogates), and reaching appropriate balances concerning the competing rights and interests of core ICS parties, maximising protection of the rights of the most vulnerable parties at stake. The framework of recommendations proposed through this study form a touchstone for ensuring the practice of ICS, where it continues to occur, does so consistently with the child’s rights and best interests. Protecting the child’s rights should lead to more positive family

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47 Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138 19 December 2011, entry into force 14 April 2014.

48 E.g. the work ongoing under the auspices of the Hague Conference, ISS, and the Special Rapporteur on sale of children, child prostitution and child pornography.

outcomes, with the potential for interconnected, cross-cultural children growing up in supportive families where the child has an understanding of their multifaceted parentage.

Children are at the centre of all ICS arrangements, but we must do more to accord priority to their rights and best interests. To do so will send a clear message to this group of children that they are valued, they are equal rights-holders, and that their human dignity must be respected and protected. To not do so will mean the possibility of a generation of children dispersed around the globe who are faced with a lifetime of rights-related challenges as they grow into adulthood. By actively harnessing the CRC's protection framework, many of the child rights challenges triggered through ICS can be guarded against, in the best interests of children who did not choose to be conceived and born this way.

