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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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Summary

International Commercial Surrogacy (ICS) has emerged over the past decade as a new method of family formation, occurring across borders in response to demand from prospective parents and supported by technological advances in medical science and global interconnectedness. It raises human rights challenges to the core parties to ICS who are most vulnerable, namely the women who act as surrogate mothers and the children who are born as a result. No international consensus exists regarding the practice of ICS; this is reflected in the diverse legal positions taken by states regarding ICS and the divergence in state approaches to ICS in domestic legislation and policy. Furthermore, ICS is being practiced in the absence of any international regulation, involving a number of core parties with different motivations, rights and interests at stake in ICS arrangements. As a result, the rights and interests of different parties to ICS can clash.

Therefore, ICS raises profound ethical, moral and legal questions, which remain largely unresolved. However, in the face of this reality, children are continuing to be born through ICS, and as a result are at a heightened risk of their rights being infringed. A child is at the centre of all ICS arrangements, and like all other children, children born through ICS are entitled to exercise and enjoy their full range of rights under the United Nations Convention on the Rights of the Child (CRC). In practice though, children who are born through ICS are in some instances experiencing significant challenges to – and in some cases violations of – a number of their CRC rights. Therefore, ICS presents not only a twenty-first century human rights challenge, but a contemporary child rights challenge, in need of attention from a child rights perspective under public international human rights law.

This thesis is comprised of a collection of articles which have been written over a period of time during which ICS has been rapidly developing. The majority of the articles included as part of this thesis have been submitted for publication and published in a range of journals and edited volumes. They are brought together in this thesis to present a comprehensive exploration of the children's rights most at risk in ICS and the practical ways that the CRC can be brought to bear to ensure children's rights are protected, promoted and upheld in ICS.

The main research question this thesis is concerned with is:

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, and how should the rights of children involved be understood and approached from a public international human rights law, child rights perspective in relation to other ICS parties and rights-holders?

The subsequent research questions which are analysed are:

- *How does ICS present a challenge to children's rights?*
- *What rights of the child are most at risk in ICS?*
- *How can international human rights law norms and standards (especially those established by the CRC) be utilised to protect the rights of children in ICS situations?*
- *How should the various competing rights and interests of children and others in ICS situations be balanced using an approach consistent with, and drawing on, public international law human rights norms and standards?*

Limited scholarship exists on ICS from a child rights perspective under public international human rights law; this thesis seeks to help address this gap in scholarship. In addition, this thesis seeks to:

- explore and better understand the ways in which the child is vulnerable and how child rights are at risk in ICS;
- provide insight into how the public international human rights law framework – especially the CRC – provides a protective framework for children conceived and born through ICS, and how this can be harnessed to ensure children can exercise and enjoy their CRC rights, regardless of their conception and birth through ICS; and
- provide practical suggestions for how the child and their rights can be better protected in ICS.

Chapter 1 provides an overarching introduction to the thesis as a body of work. It sets out the research questions which the doctoral study explores; outlines the methodological approach and scope of the study; and explains the place of the thesis in the 'state of the art'. The Chapter introduces ICS as a phenomenon and explains how ICS is being practiced, as well as outlining the rationale for a focus on the rights of the child in the context of ICS through a public international human rights law lens. A clear overview of the structure and outline of the thesis is provided.

Chapter 2 discusses the emergence and development of the ICS market and predominantly focuses on introducing the parties whose rights and interests are at stake in ICS, the 'core parties' to ICS arrangements, namely the child, the surrogate and the commissioning parents. The main bioethical and moral challenges raised by ICS are briefly touched upon and provide important background context to the legal, child rights focus of the thesis. This Chapter

also foreshadows some of the issues triggered in ICS by the existence of competing rights and interests of the core parties to ICS arrangements.

Chapter 3 focuses on the rights of children conceived and born through ICS and the rights of surrogate mothers in ICS. Primary emphasis is placed on the rights of the child at stake, with a secondary focus on the rights of surrogate women in ICS. Central challenges to the child's rights in ICS are identified and discussed, in the context of and with reference to the relevant provisions of the CRC. This begins building a picture of the potential negative impacts of conception and birth through ICS on the rights of children. This Chapter also provides an overview of some of the key human rights issues pertaining to women in the ICS context, and discusses some of the human rights challenges common to both surrogate women and children in ICS, namely the risks of commodification and human trafficking. In doing so, this highlights the broader human rights picture at play, again emphasising the intersecting nature of many of the rights and interests at stake in ICS.

Chapter 4 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. This Chapter brings a unique focus from an international human rights law perspective to one of the central relationships in all ICS arrangements, between the child and their potential multiple 'mothers'. It discusses the construct of 'mother' as inherently related to 'child', and analyses the different 'mothers' involved in ICS: surrogate (the only person with a foetal-maternal link through the biological act of carrying to term and giving birth to the child); genetic (the only woman with a DNA link with the resulting child); and commissioning (where a woman is involved, the woman or women who want(s) to parent the child). This discussion illustrates that establishing the status of the various potential mothers in ICS is both socially and legally complex. In doing so, this Chapter draws attention to the contestable nature of the notion of 'mother' in ICS and traverses the corresponding implications for the rights of children. The potential interests of each of the 'mothers' in ICS *vis-à-vis* the child are examined, and attention is given to how such rights and interests might be balanced with the rights of the child.

Chapter 5 deepens the focus on the child's rights in ICS and develops the idea of the child as the locus of vulnerability in ICS arrangements. As part of this analysis, this Chapter presents an extended discussion of the ethics and economics of the commercialisation of the conception of children. Specific CRC rights which are at the most significant risk in ICS are highlighted: the child's right to nationality and to preserve identity, to grow up in a family environment, and to education, health and social security. This Chapter also highlights jurisprudential trends (through case law analysis) and non-judicial responses (especially national guidelines/government guidance as quasi-policy approaches to ICS) in three ICS 'demand' states (Australia, New Zealand and the United Kingdom). These are examined in relation to the child rights

framework, to assess the extent to which child rights are being promoted, protected and upheld through these responses to ICS. This Chapter illustrates that the clash of rights involved in ICS between the child and the other core parties is difficult to avoid, but that increased efforts and measures to place the child's rights and best interests at the heart of the practice of ICS is both necessary and possible.

Chapter 6 ensures that this study's treatment of the child's rights situation in ICS is holistic, by considering how decisions and actions taken during the preconception and prenatal phases of ICS can impact on the rights of children once they are born through ICS. Indeed, certain CRC rights may be negatively impacted once children are born through ICS, by actions and decisions taken prior to their conception and birth. This Chapter focuses exclusively on this issue. It identifies and examines these preconception and prenatal challenges to the child's rights in ICS and contends that due to the intentional, planned nature of ICS and the involvement of multiple possible parents, steps should be taken to protect the future child's rights both preconception and prenatally in all ICS arrangements. Analysis presented in this Chapter illustrates that no international consensus exists regarding pre-birth rights protection, as reflected in domestic jurisprudence, regional human rights jurisprudence, national constitutions and international human rights law. However, the CRC leaves open the option of its application to the pre-birth context; jurisprudence reflects that it is possible for some protection to be afforded before birth to a future child, without conferring rights pre-birth. A suggested approach to preconception and prenatal protection of the future child's rights in ICS is outlined, including three basic safeguards that can be practically implemented to ensure children can exercise and enjoy their CRC rights in the event that they are born through ICS. A range of actors have a role to play to support this, and their various roles are discussed. The Chapter makes clear that this is not about attributing rights pre-birth, but rather protecting potential rights preconception and prenatally in ICS, so the child is able to claim those rights post-birth.

Chapter 7 analyses one of the main children's rights challenges in ICS: securing the child's right to a nationality under Article 7 CRC. Children born through ICS are sometimes born stateless and stranded in their birth state. This Chapter provides an overview of the child's Article 7 right and discusses why and how child statelessness arises in ICS. As evidenced by case law, children born through ICS may face difficulties in acquiring nationality in three scenarios in the context of ICS, namely a) when a lack of recognition of the child's parentage prevents nationality acquisition; b) when nationality laws of the child's birth state and their commissioning parents' state of nationality conflict; and c) when a child is abandoned in his or her birth state by his or her commissioning parents. The intersecting nature of the child's right to a nationality with other CRC rights is emphasised in this Chapter, as well as drawing attention to state responses to the issue of child statelessness in ICS. It argues that the absence of international consensus concerning the practice of ICS does

not need to be a barrier to cooperation between States to prevent child statelessness in ICS. Drawing on existing public international human rights law standards and child rights principles, this Chapter proposes practical solutions to the problem of child statelessness in ICS, to prevent further children from being precluded from enjoying their right to a nationality. Specifically, Chapter 7 recommends that international guidance should be issued reflecting that a State which is the intended State of a child's residence in ICS will grant the child nationality if he or she would otherwise be stateless, as long as a genetic link between the child and at least one commissioning parent is proved; and that States will grant nationality to an otherwise stateless child born on their territory through ICS.

Chapter 8 examines the child's right to identity preservation as established by Article 8 CRC, in the context of ICS. Like the child's right to nationality, the right to identity preservation is one of the child's rights most at risk in ICS and is at the heart of the child rights challenges arising through ICS, given the wider impact identity has on the child's lifetime outcomes. Although nationality is an element of identity, it is just one of many elements in this respect. This Chapter therefore identifies other elements of child identity endangered in ICS (genetic and biological (including the health rights implications for the child); personal narrative; and cultural), as well as examining why identity preservation is so important in the ICS context. This discussion is grounded in Article 8 CRC, regional human rights jurisprudence, and draws on lessons from adoption, donor-conception and domestic surrogacy. The central argument advanced in Chapter Eight is that the child's Article 8 CRC right should 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. Chapter 8 makes the case that in instances where this right is not protected and upheld, it will have a lifetime impact on the child. This is illustrated with reference to case examples in which children conceived and born through ICS have had their Article 8 right endangered, and in some cases, violated. This Chapter makes clear that safeguarding the right to identity preservation must be treated as a matter of central importance for all children conceived and born through ICS.

Chapter 9 presents a case analysis of the landmark European Court of Human Rights judgments in *Mennesson v. France* and *Labassee v. France*. These cases are significant in the context of this study given they were the first judgments concerning ICS issued by a regional human rights court; furthermore, they warrant analysis as they indicate an approach to ICS emphasising the rights of the children involved. This Chapter examines the rights situation of the children concerned in the two cases, outlines the main arguments in the European Court of Human Rights and analyses the judgments of the Fifth Section of the Court. By taking a strong child-centred approach, the Court highlighted the vulnerability of children in ICS arrangements. Significantly,

the Court's judgments focus on the child's rights to nationality and identity; therefore, the discussion presented in the case analysis builds on the previous two chapters of this study, providing a further opportunity through which to view these rights of the child in the practical ICS context. This Chapter discusses the impact of these judgments in Europe and internationally, as Governments grapple with the complexities and impacts of ICS arrangements, particularly relating to the rights of children born through this new method of family formation. Although the Grand Chamber of the European Court of Human Rights has dealt with subsequent applications concerning ICS since passing the judgments this Chapter focuses on, the discussion presented in this Chapter provides insight into the reasoning of a judicial body grappling with ICS as a novel issue. However, to place the Court's jurisprudence concerning ICS in contemporary context, an Addendum to Chapter Nine is included, providing a brief analysis from a child rights perspective of the first ICS judgment of the Grand Chamber of the European Court of Human Rights, in the case of *Paradiso Campanelli v. Italy*.

Chapter 10 addresses the importance of rights balancing in ICS. As has been demonstrated throughout the preceding chapters of this study, due to the nature of ICS, this method of family formation often brings the rights and interests of the child into conflict with those of the other core parties to ICS arrangements. Chapter Ten brings these strands together, arguing that rights need to be balanced against each other in the ICS context, to establish the balance to be struck amongst competing rights and interests. This Chapter discusses the balancing of rights and interests of the child with those of other core parties to ICS: surrogate mothers, genetic donor parents and commissioning parents in ICS. It argues that rights balancing exercises will be necessary in relation to these core parties throughout the course of ICS arrangements, and that the child's rights and best interests should be accorded priority once born, given their particular stage in life and their vulnerability in comparison to the other core parties. In keeping with the preceding chapters in this study, while recognising the indivisible, interdependent and interrelated nature of children's rights, this Chapter draws attention to the child's rights most at risk in ICS, focusing on the need to respect the best interests of the child in all ICS situations. It proposes that along with this approach, the principle of human dignity must guide rights balancing in ICS, to strike an overall balance between the child's rights and best interests and the rights and interests of other core parties where necessary.

Chapter 11 serves as the overall conclusion to the thesis. It reiterates the complex and internationally unregulated nature of ICS and the fact that children are continuing to be born through ICS, and as a result, their rights are in some instances at risk. Chapter 11 traverses the ways in which the ICS landscape has changed over the course of the doctoral study, highlighting, for example, the supply-side states which have developed and closed down ICS markets through legislative reform or policy intervention, or which are in the process

of closing down ICS within their jurisdictions. It also draws attention to the various initiatives underway at the international level which have developed over recent years, seeking to bring public international human rights law standards and norms to bear in ICS, and to explore the potential for international agreement regarding ICS.

As well as placing the doctoral study in the current-day context, significantly, Chapter 11 distills the central findings of the thesis into a comprehensive framework of recommendations. These are drawn from and based on the preceding chapters of the thesis, presented in Chapter 11 as a 'Framework of recommendations for promoting and protecting the rights of children in International Commercial Surrogacy', proposed for use as a framework for a United Nations Committee on the Rights of the Child General Comment. The recommendations indicate practical steps to leverage existing international 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. Chapter 11 presents concluding remarks identifying future research opportunities from a child rights perspective in the ICS context, and discusses the prospects of reaching international consensus on ICS in the long-term. Finally, this concluding chapter of the doctoral study re-emphasises that as long as children continue being born through ICS, it is essential that CRC duty-bearers take decisions and actions that protect and promote the rights, best interests and inherent human dignity of all children who come into existence through ICS.

